



---

LAW·COMMISSION  
TE·AKA·MATUA·O·TE·TURE

---

*Report 85*

**DELIVERING  
JUSTICE FOR ALL**

*A Vision for New Zealand Courts and Tribunals*

March 2004

Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body, established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

The present Commissioners are:

The Honourable Justice J Bruce Robertson – President  
Richard Clarke QC  
Frances Joychild  
Professor Ngatata Love QSO JP  
The Honourable Justice Patrick Keane (until October 2003)

The Executive Manager of the Law Commission is Bala Benjamin.

The office of the Law Commission is at 89 The Terrace, Wellington.  
Postal address: PO Box 2590, Wellington 6001, New Zealand  
Document Exchange Number: SP 23534  
Telephone: (04) 473-3453, Facsimile: (04) 471-0959  
Email: [com@lawcom.govt.nz](mailto:com@lawcom.govt.nz)  
Internet: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)

National Library of New Zealand Cataloguing-in-Publication data  
New Zealand. Law Commission.  
Delivering Justice for All – A Vision for New Zealand Courts and Tribunals.

Includes index.  
ISBN 1-877187-99-2  
1. Courts--New Zealand. I. Title.  
347.93--dc 22

Report/Law Commission, Wellington, 2004  
ISSN 0113-2334 ISBN 1-877187-99-2  
This report may be cited as: NZLC R85  
Also published as Parliamentary Paper E 3185

Presented to the House of Representatives pursuant to section 16 of the  
Law Commission Act 1985

This report is also available on the Internet at the Law Commission's website:  
<http://www.lawcom.govt.nz>

# Contents

|   |            |
|---|------------|
| About this Review.....  | 1          |
| <b>Delivering Justice for All: A Vision for the New Zealand Court System.....</b> | <b>3</b>   |
| <b>Part 1 Achieving Access .....</b>  | <b>9</b>   |
| 1.1 State Responsibility to Ensure Access to Courts .....                         | 10         |
| 1.2 Legal Information .....   | 11         |
| 1.3 Initial legal advice .....  | 20         |
| 1.4 Representation .....  | 25         |
| 1.5 Cost.....   | 36         |
| 1.6 Encompassing Diversity.....   | 51         |
| <b>Part 2 Outside the Court.....</b>  | <b>63</b>  |
| 2.1 The Place of Alternative Criminal Justice Processes .....                     | 64         |
| 2.2 Infringements and Minor Offences.....   | 70         |
| 2.3 Police Warnings and Formal Cautions .....                                     | 73         |
| 2.4 Restorative Justice.....  | 77         |
| 2.5 Problem-Solving Courts.....   | 83         |
| 2.6 State Mediation Services.....   | 86         |
| 2.7 Court-Mandated Mediation.....   | 93         |
| <b>Part 3 Court Structure.....</b>  | <b>103</b> |
| <b>Part 4 The Community Court .....</b>   | <b>117</b> |
| 4.1 Establishing a Community Court .....  | 118        |
| 4.2 Criminal Processes in the Community Court .....                               | 137        |
| 4.3 Civil Processes in the Community Court .....                                  | 147        |
| 4.4 Disputes Tribunal and Tenancy Tribunal.....                                   | 158        |
| 4.5 Community Justice Officers.....   | 163        |
| <b>Part 5 Primary Courts .....</b>  | <b>173</b> |
| 5.1 Primary Criminal Court and Criminal Processes.....                            | 174        |
| 5.2 Primary Civil Court and Civil Processes.....                                  | 191        |
| 5.3 Family Court and Youth Court .....  | 209        |
| 5.4 Environment Court .....   | 218        |
| 5.5 Employment Court .....  | 226        |
| 5.6 Māori Land Court and Māori Appellate Court.....                               | 233        |
| 5.7 Coroners' Court .....   | 251        |
| <b>Part 6 High Court, Court of Appeal and Supreme Court .....</b>                 | <b>257</b> |
| 6.1 The High Court .....  | 258        |
| 6.2 Court of Appeal .....   | 277        |
| 6.3 Supreme Court .....   | 281        |
| <b>Part 7 Tribunals.....</b>  | <b>283</b> |
| 7.1 A Coherent Framework for Tribunals.....                                       | 284        |
| 7.2 Appeal Rights .....   | 297        |
| <b>Part 8 Open Justice.....</b>   | <b>299</b> |
| 8.1 The Principle of Open Justice .....   | 300        |
| 8.2 Openness in the Family Court .....  | 303        |
| 8.3 Openness in the Youth Court .....   | 310        |
| 8.4 Openness in the Criminal Courts .....   | 312        |
| 8.5 Openness in the Civil Jurisdiction .....                                      | 320        |
| 8.6 Openness Issues in all Courts .....   | 323        |
| <b>Part 9 Economic Implications .....</b>   | <b>325</b> |
| <b>The Way Forward .....</b>  | <b>335</b> |
| Glossary of Terms .....   | 336        |
| Topic Index .....   | 340        |
| Appendix A – Terms of Reference.....  | 344        |
| Appendix B – District Court Judges' Proposals for the Criminal List.....          | 345        |
| Appendix C – NZLC General Discovery Recommendations (2002).....                   | 350        |
| Appendix D – Court System Performance and Cost Indicators .....                   | 353        |

1 March 2004

Dear Minister

I am pleased to present Report 85 of the Law Commission *Delivering Justice for All – A Vision for New Zealand Courts and Tribunals*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J Bruce Robertson', written over a faint circular stamp.

*J Bruce Robertson*  
President

To the Minister Responsible for the Law Commission  
Parliament Buildings  
WELLINGTON

---

# About this Review

---

The Law Commission was invited by the Government to undertake a review of the structure and operation of all state-based adjudicative bodies in New Zealand, including all courts and tribunals except the top tier of the appellate system (where another process was in train which resulted in the new Supreme Court. See Appendix A for Terms of Reference).

The commission was directed to “have particular regard to its statutory obligations to take account of te ao Māori (the Māori dimension) and the multi-cultural character of New Zealand society in this exercise”.

We saw our task as being to offer the best possible arrangements for the future, not to act as inspectors or auditors of what has happened in the past or is happening now.

As well as legal research looking at both domestic and international sources, the project has involved extensive consultation. The commission sought the views of past and potential litigants for whom the courts exist, and of those who work in or close to the system, to find out where they thought change would be of benefit. This included the heads of the various courts and tribunals, representatives of the Law Society and Bar Association, the Royal Federation of Justices of the Peace, government agencies, particularly the Ministry of Justice and the Department for Courts (now part of the Ministry of Justice), lawyers, community groups and individual citizens.

The commission also undertook a specific dialogue with Māori. One of our commissioners, Ngatata Love, attended nine hui early in the project and later four further hui were organised by Te Puni Kokiri. The commission greatly benefited from the major hui hosted by Ngati Tuwharetoa at Taupo in July 2003. The commission has been assisted by its Māori Advisory Committee whose members have national leadership stature and links to a variety of organisations.

Two discussion papers were published: *Striking the Balance: Your Opportunity to have your say on the New Zealand Court System* in April 2002, and *Seeking Solutions: Options for Change to the New Zealand Court System* in December 2002. More than 400 submissions were received. The breadth and depth of responses demonstrated the importance people place on the court system and how it is functioning.

The commission held meetings with representatives of community organisations and employed a market research organisation to hold focus groups with members of the general public, at least half of whom had had some experience of the New Zealand courts in the previous year or so. We visited prisoners both on remand and serving sentences. Fono were organised in Auckland, Manukau and Porirua by the Ministry of Pacific Island Affairs.

The commission held 15 workshops on key topics. For each topic, a background paper outlined options, current preferences, and arguments for and against. A range of people attended from public service agencies, community law centres, professional bodies and community organisations. Workshops lasted two to five hours with 15 to 20 participants at each.

The Law Commission is enormously grateful to everyone who has contributed to this exercise.

Bruce Robertson and Patrick Keane (until October 2003) were the commissioners responsible for progressing this review. Neville Trendle contributed significantly. The work was heavily dependent on Margaret Thompson as project manager, Vivienne Smith, Rachel Hayward, Susan Hall and Patricia Sarr. Most people connected with the commission from June 2001 to January 2004 have had a hand in this work. It has necessarily been a team effort.

### Three stage review

*Striking the Balance* – a general raising of issues relating to the structure and operation of the court system seeking widespread public and professional response as to the problems encountered and any suggested improvements. Published in May 2002.

*Seeking Solutions* – a detailed offering of alternatives for reform, following submissions and consultation meetings on *Striking the Balance*, and an assessment of national and international issues and trends in court reform. Further public and professional response was invited before this was published in December 2002.

*Delivering Justice For All – A Vision for New Zealand Courts and Tribunals* – includes recommendations for reform from the Law Commission to the Government in light of submissions, consultations and research.

---

# Delivering Justice for All: A Vision for the New Zealand Court System

---

New Zealanders must be confident that the court system delivers justice for all through fair and timely processes if courts are to fulfil their role as part of the fundamental infrastructure of our modern democratic society. The core lesson we have learned from the people who offered their views in the course of this review is that the court system has to do better in winning and retaining the confidence of New Zealanders from all our many communities.

To understand the need for enhanced public confidence we need to consider the role of courts in society. Courts uphold the rule of law. They act as a bulwark against the arbitrary abuse of power. Everyone, including the Head of State and the elected members of Parliament – who make the laws – is subject to the law through the courts. The counterbalancing of the executive, the legislature and the judiciary accords the courts a place in our constitutional arrangements as ‘the third arm of government’.

Courts are the ‘backstop’ available to resolve disputes between citizens, and between citizens and the state. Courts do not initiate action themselves. Courts decide cases. They resolve controversies. They can only respond to disputes which litigants place before them. The function of all judges – despite variations of hierarchy or process – is fundamentally the same: to deliver justice by determining the factual or legal issues relating to the particular cases in front of them. Their decisions have influence beyond the individuals and groups who come before them: they underpin the way the economy and society functions and citizens interact. In this way, courts make a vital contribution to a stable and civil society.

Saying that courts perform a backstop role in our society is not to suggest they can be passive in the way they carry out their role. Courts must be responsible for their own effectiveness. They should be constantly vigilant to ensure they operate for citizens and they must take it upon themselves to deliver justice through procedures that are relevant and responsive to the needs and expectations of the people who use the courts. In this way public confidence in the courts will be maintained.

The degree of confidence people have in the court system will influence their belief in the rule of law. If people cease to see courts as relevant, effective and accessible, they are less likely to believe that the rule of law means everyone is entitled to the benefit and protection of the law, including them and people like them. They are less likely to believe that courts will fairly and impartially resolve disputes between citizens and the state.

At another level, the rule of law provides certainty as to the law and confidence that it will be properly applied to all. This certainty and confidence assists social and economic development. Courts not only have to work well – but must be seen to do so – for our democracy to work well.

Part of the fabric that holds civil society together is the common adherence to social institutions. Those institutions, including the courts, need to build and sustain this adherence. The feedback we have received reminds us that the courts cannot take their mandate for granted.

## Guiding principles for an effective court system

The objective of our review has been to create an effective court system in which the public has confidence. In seeking to do this, we have identified criteria that contribute to this objective. These form the principles against which we have developed and tested our proposals.

The ***constitutional position of courts*** – the independence of the judiciary is essential so that courts can both supervise their own activities and the legality of other branches of government. This ensures that courts have the confidence and respect of all that justice is being delivered equally and fairly.

***Quality decision-making*** – judges should know the law and should be able to apply it correctly to particular cases. Courts’ decisions should be clear as to what is to be done and by whom. Decisions must be consistent and legally authoritative but responsive to the uniqueness of specific situations. This involves the qualification, training and experience of those who adjudicate, fair processes in the way cases are presented and ensuring judges have sufficient time to deliver quality decisions.

***Proportionality*** – the use of judicial talent and procedures should bear a sensible relationship to the nature of the dispute.

***Principled appeal rights*** – every person who has their rights or obligations determined by a court should have a general right of appeal on fact and law. In general, subsequent appeals should be by leave, and will often be restricted to questions of law.

***Accessibility*** – it is essential that everyone in the country is able to use courts and tribunals to assert or defend their rights. This raises issues of adequate information and advice, cost barriers, understandable processes and cultural responsiveness.

***Respect for all*** - when people come to court they should be treated with respect, which may mean that the court makes allowances for their particular needs, cultural or otherwise. As far as possible they should come away feeling that what happened in court has relevance for them. They should know what happened and why.

***Efficiency*** – the resources involved in supporting the court system must be managed so as to achieve timeliness and cost-effectiveness for both the parties and taxpayers.

---

We expect that the balance between these basic principles will fall differently in the various parts of the court system, but always within the parameters of preserving equality before the law and enhancing public confidence in the courts.

## Enhancing the court system

It is clear that cohesion or coherence have not featured in the creation of our existing arrangements for courts and tribunals. Reform of the law often proceeds without regard to the downstream effects on the overall structure of the courts. We do not consider that symmetry for the sake of uniformity is either necessary or desirable, but variance with no benefit is not useful either.

We can generally be proud of our court system and so we are not proposing wholesale change. The system has processes to determine all issues of legality in a principled, independent and objective way. That does not mean, however, that we need not strive to make it better. If significant sectors of society continue to feel that they have no place in the system then the courts will have increasing difficulty in responding to the society they were established to serve.

We do not advocate changing the fundamental principles on which the courts operate and which have guided our review. We reaffirm the basic premise of equality before the law. We do not seek to move the courts from their backstop position: most disputes of most citizens should continue to be sorted out away from the courts. But ordinary citizens must know that the courts are within reach should they need their intervention, and feel that the experience has protected or empowered them should they get there.

The most critical areas for reform relate to the unnecessarily difficult experiences people have when they go to court. We recommend a new Community Court as the place where most people will encounter the court system in the future. We propose new ways to resolve the high volume of work they bring to the system and call for this new court to be free to develop a working style (just as the Family and Youth Courts have done) that will re-establish “People’s Courts”<sup>i</sup> – meaningful and relevant institutions in the communities they serve.

The proposals for sorting issues in civil litigation will no longer see disputes of \$20,000 subjected to the same demanding procedures as disputes of \$200,000. The streamlined processes we propose will promote proportionality in the use of available resources and give value for money from the time spent in court.

The alignment of first instance courts as Primary Courts will simplify the system and make it more understandable and responsive to users. The arrangement will accommodate the level of specialisation in decision-making our society requires within one framework and without isolating particular courts. It will affirm the fundamental role of the High Court in supervising decision-making for legality. It will also create efficiencies by allowing for more flexibility in judicial allocation.

A coherent, rational and all-embracing appeal structure will ensure the consistent maintenance of legal integrity.

---

<sup>i</sup> A concept called for in Sir David Beattie’s report of the 1978 Royal Commission on the Courts.

A new structure for tribunals led by the judiciary will bring an integrated and unambiguously neutral framework to our system of administrative justice. Such a system will have an obvious entry point making it easier for the public.

The proposals for better provision of information and advice will enhance the transparency and accessibility of the system. They will enable the state to better match the contemporary reality of uneven representation and of increased self-representation with its responsibility to ensure people are equal before the law.

In essence, we need to find principled ways of doing the courts' work more effectively rather than simply increasing the number of judges and courts – the trend of recent decades.

## What people told us about the court system

The responses, which came from all sectors, were that courts too often exclude people rather than provide an environment in which they can comfortably and naturally seek redress or assistance. It is self-evident that those who are involved in the court system will almost inevitably be under a degree of strain or pressure, so it is never going to be a happy or desirable experience. That, however, is not a reason why people should find the involvement demeaning or so intimidating as to render them unable to participate in it fully. Such a reaction could have been anticipated from people at the social or economic margins of society. But the message of alienation and discomfort came from across the board – as much from big business and corporate entities as from ordinary New Zealanders.

The problems identified in submissions can be broadly summarised as:

- a lack of information or understanding about what the system is, how it can be used to initiate action, and what possibilities exist when someone is drawn into it against their will
- the high legal costs and filing fees, coupled with the economic consequences of the distraction from other productive activities which inevitably arises
- the time and delay involved and the exhaustion of being caught in the system
- people feeling as though they are not able to tell their story, to be understood or be responded to in a way which is meaningful to them.

In our consultations and in submissions, people frequently expressed the belief that delay and disadvantage could be swept away if we moved from an adversarial system to an inquisitorial system. We do not agree and consider that there is, in fact, a continuum both internationally and in New Zealand as to how disputes are determined in courts. In different places at different times and at different levels of courts, there is more or less emphasis on so-called adversarial or inquisitorial approaches, but neither is totally exclusive of the other. The mix needs to be constantly reviewed. We do propose that judges in the Community Court take a more active role – as the judges in the Family and Youth Courts do now – but find no justification for a wholesale shift in emphasis across the system.

A particular issue, which is not new, is the feedback that the eurocentric culture of the courts provides particular difficulties for Māori, and for people from minority cultures.

---

## Māori and the court system

Our court system was founded at a time when the dominant theory of the state was that nations are built on a homogenous national culture and our institutions were created accordingly. It was never a good reflection of reality in most countries and, in New Zealand, it failed to acknowledge the place of Māori as affirmed in the Treaty of Waitangi. As the position of Māori as tangata whenua has gained greater recognition, the assumption of cultural homogeneity has become increasingly out of kilter. In seeking to enhance public confidence we cannot ignore the relationship between the Government and Māori.

After generations of uncertainty as to what this relationship is – including times when there was a total neglect of the issue – there is now a commitment to honouring it. We were asked to consider the nature and operation of all courts and tribunals and this necessarily raises the sensitive issues of whether the system as a whole is responsive to the history and position of Māori and the consequences which flow from that. We cannot ignore the sustained challenges to the court system and its operation from many Māori, particularly with their over representation in the criminal courts.

Although Māori views are no more homogeneous than those of any other large group, there is a widespread belief that the current court system is externally imposed and heavily weighted toward the culture of only one Treaty partner. Many Māori feel that the very structure of the court system pays inadequate respect to Māori tradition and is insensitive to their needs. Too many Māori do not feel the justice system can be relied on to deliver justice to them. There were strong calls for constitutional change at many of the hui we attended, or at least for a major constitutional debate about the significance of the Treaty and all the ramifications of partnership.

Such a debate is beyond our task. We do, however, respectfully disagree with those who argue that nothing should be done to alter the existing courts until that debate has occurred. There are things that can and should be done now to create a system that is more responsive to, and effective for, all New Zealanders.

Many of the concerns of Māori were not dissimilar to those of other groups in our society: the system is mysterious and often unfriendly; basic information is hard to get; legal representation is expensive and often not satisfactory; and the mode of operation is almost exclusively monocultural and alienating to those whose cultures are not derived directly and relatively recently from the United Kingdom.

Feedback from Māori included a wish to incorporate key Māori cultural practices in the courts, such as the ability of whānau to speak in court and to support victims and defendants in culturally appropriate ways, and the capacity to put culturally relevant factors before the court. There was a strong desire to move the court experience away from a process focus towards making court appearances meaningful and resolution-based, including community involvement.

## Respecting diversity

The court system does not appear to have responded fully to what it means to serve a diverse society. There are basic values of minority cultures that come into direct conflict with some of the processes and rules of our courts. These include respect for elders, not individualising blame, the need for communal support, and the expectation of prayer to sanctify important proceedings. A constant theme from submitters from other cultures was that the current system tends to isolate the accused from family and context. This is distressing for many people.

We are confident that virtually all New Zealanders would agree that the enjoyment of full citizenship, including access to the courts, should not depend on one's ethnic descent, culture, gender, or physical ability. The process of adaptation must be reciprocal. As immigrants learn new languages and new cultural norms, so our institutions must have processes to accommodate the increasingly diverse nature of New Zealand's communities in ways that respect differences and treat people as equal citizens.

Fundamental and immutable principles must be preserved, but the need for that is too often an excuse for resisting any flexibility or change. Process must not be confused with substance – there is room for respecting values of other cultures while maintaining the crucial principles of equality before the law, adherence to the rule of law, fair and proper process, and independent adjudication.

## The challenge for courts

We recognise that change for the sake of change is unsettling and counterproductive, particularly when dealing with an institutional structure that goes to the heart of our constitutional and governmental process. For this reason our approach in this review has been to assess whether things could sensibly be done better. Our proposals focus on adaptations to help the court system work better for the dynamic and diverse society of twenty-first century New Zealand.

Those of us who are inside the system are inclined to confidently say that all people are equal before the law, that this is fundamental to our system, and we all believe in it. But for those who find the courts alien and alienating places, those who cannot understand the processes, have no idea where to start, or even if they can start; it is not hard to understand that they have difficulty believing they are equal before the law. The stark reality is that we have to question whether indeed they are. The feedback we received made it clear that this was our challenge.



**J Bruce Robertson**  
*President*

# Part 1

## Achieving Access

---

In this part we consider:

- the extent of the state's responsibility to ensure people have equitable access to legal information, advice and representation
- ways to improve the market for legal services and inform users of the cost of going to court
- ways to accommodate the needs of all members of our community in the court system.

# 1.1

## State Responsibility to Ensure Access to Courts

---

- 1 The court system is founded on the principle that all people must be equal before the law and all must have equivalent access to the law. The contribution this makes to the maintenance of a stable and civil society lends weight to the case that the state has a responsibility to ensure access. Access to the law, and to courts and tribunals where it is upheld, results from the satisfactory balance of a number of contributing factors. These include legal information and advice, representation, cost, and acknowledgement of diversity.
- 2 The right of access to the courts has been affirmed in New Zealand as being a fundamental right in a democracy, and it has also been said that in most instances legal representation is essential to render this right effective.<sup>1</sup> However, the assertion that the state has a responsibility to ensure access to the law is also qualified. It is not an absolute right. It must be balanced against government's duty to use public funds responsibly<sup>2</sup> and against the recognition that disputing parties bear some responsibility for resolving their differences themselves whenever possible.
- 3 This is reflected in the fact that Government does not provide legal aid to every New Zealander. Equally, court fees are set at a level that not only helps fund the court system, but carries an incentive for people to settle disputes outside the court. They are also designed to act as a deterrent to some 'vexatious' litigants – those who bring unfounded cases, perhaps to harass a defendant. In accordance with this, we do not suggest that the state has a responsibility to provide access to all in the sense that it should provide all of the means to enable every person to 'have their day in court'.
- 4 However, we do suggest that laws are designed to give guidance to the community, and that if the state has the power to make rules prescribing conduct and relationships and to deprive people of their liberty, it should also have an obligation to ensure people have access to information and a minimum level of advice about the rules and processes that are employed for the enforcement of rights or obligations. Equally, as the New Zealand taxpayer funds the courts and the legislature, it is appropriate that court users, as taxpayers, are given adequate information on how courts and the law work.
- 5 Submitters told us that, at present, information about the law, courts and their processes is not easy to come by. In fact, our court system is an impenetrable maze for most non-lawyers. Submitters described the court experience as disempowering, and many felt that their lack of understanding was a hindrance in accessing justice. If access to justice is to be effective, significant improvements need to be made with regard to the provision of help to navigate and understand the court system and the law it enforces.

---

1 *Re H & W Wallace Ltd (In Liquidation)* [1994] 1 NZLR 235 at 241.

2 *Tangiora v Wellington District Legal Services Committee* [2000] 1 NZLR 17 at 19.

## 1.2 Legal Information

- 6 Public confidence in the courts as an avenue for resolving disputes depends on people believing that they will be treated fairly in court proceedings. This confidence requires that all people can easily obtain initial assistance to understand how they can participate in legal or court proceedings.
- 7 Improving access to legal information and advice is becoming even more pressing in the face of the contemporary reality of increased self-representation and of uneven representation.<sup>3</sup> Uninformed court users have a significant impact on efficiency in the court system.
- 8 Before discussing the issues surrounding legal help, it is necessary to be clear about a few key words. The terms ‘legal advice’, ‘legal information’, and ‘legal representation’ may have different meanings when used by different people involved in the court process, be they litigants, defendants, judges, police, or the Legal Services Agency (LSA). In this report we have adopted the following definitions.
- **Legal information** is “general information about the law, legal services and legal processes”.<sup>4</sup> It might be neutral information about non-defined situations and problems, but may include more specific information particular to a field of law, group of people, or court procedure, and can be provided in a variety of ways. Legal information also includes information on how to access rights through the courts. It is often in printed or electronic form, but is also widely provided face to face or by phone.
  - **Legal advice** is “law related information provided to a person that explains how the law and legal processes apply to that person’s particular situation”.<sup>5</sup> Advice will usually be delivered person to person, and in most cases, face to face. For the purposes of this paper we consider information and advice as taking place outside the courtroom.
  - **Legal representation** is limited to the situation where a lawyer is appearing in a court or tribunal on someone’s behalf.
- 9 For most people approaching the court system, these distinctions are probably unimportant – what they want is help with their problem. The categories are, however, useful as a first step in analysing where the gaps are, and important in terms of identifying where responsibilities for their delivery should lie.

3 We discuss this further in Part 1.3, below.

4 New Zealand Law Commission *Women’s Access to Legal Information: NZLC MP4* (Wellington, 1996) 4.

5 New Zealand Law Commission *Women’s Access to Legal Advice and Representation: NZLC MP9* (Wellington, 1997) 3.

- 10 To participate meaningfully in our court system people need information and advice so that they know about:
  - their legal rights and responsibilities
  - what options are open to them and the potential outcomes from the choices they make
  - where they can find a lawyer
  - what other representation options are available to them or what they can do to help themselves resolve their legal problem
  - what happens in a courtroom and how the courts operate.
- 11 If they do become involved in a dispute, or if they are charged with an offence, they will need more specific advice tailored to their particular circumstances.
- 12 The recommendations we make in this part are closely linked to our discussion of criminal and civil processes. In Part 4.2 we note that better preparing defendants in criminal cases will have a significant impact on the number of court appearances required and could do much to improve efficiency in the criminal courts. In Part 4.3 we focus on the need for parties to civil disputes to have access to all the information to enable them to make informed choices and be able to focus on the issues in dispute as early as possible. These issues are inevitably influenced by the amount of basic information and advice citizens can access when first faced with a problem.
- 13 Significant improvements are needed to help people navigate and understand the court system and the law it maintains. Although the LSA, Ministry of Justice, Police, New Zealand Law Society (NZLS), Community Law Centres (CLCs) and other community organisations all play valuable roles in the provision of legal information and advice services, there is not yet formal recognition that coordination and integration of these services is a state responsibility. We are convinced that Government must explicitly accept responsibility for oversight in this area.
- 14 We note the Justice Sector Information Strategy project, which has membership from the central justice agencies, and which has begun preliminary work to streamline the current piecemeal approach. This will necessitate wide consultation and cooperation between the varied organisations now involved, but we emphasise that the state's core responsibility should be recognised.

## In this section we recommend:

- R1 A state agency should have lead responsibility for developing an integrated and coordinated legal information strategy that assists the entire community when dealing with the court system.
- R2 State agencies responsible for legislation that creates public rights and duties should be required to produce, distribute, review and update information that will assist lay people to understand those rights and duties. This should be an explicit requirement when new legislation in that category is passed.
- R3 Responsibilities of the lead agency or agencies in relation to legal information should include the following elements:
- advising Government in relation to an integrated legal information strategy, including specific initiatives that require new funding, (possibly by working with the Justice Sector Information Strategy project)
  - maintaining an accessible database of up to date legal information prepared from a lay user's perspective in online, written, aural or visual formats, along the lines of the online catalogue of law-related information currently being developed by the Legal Services Agency
  - maintaining an accessible database of where and how to obtain up to date legal information (such as from websites, Citizens Advice Bureaux, Community Law Centres, courthouses, libraries, 0800 numbers or professional organisations), prepared from a lay user's perspective along the lines of the online catalogue of law-related information currently being developed by the Legal Services Agency
  - taking an active role in ensuring this information is available nationwide in visible community outlets including courthouses, Citizens Advice Bureaux, libraries, Community Law Centres, and other community centres
  - taking an active role in promoting public awareness of the existence of the information and of information outlets in ways appropriate to different audiences (eg, posters, community radio, training information provider staff, and preparing training materials), building on initiatives the Legal Services Agency already has underway
  - liaising with other government agencies, the law profession, information providers and community groups to identify where and how deficits in the provision of information occur
  - taking an active role to assist other agencies and organisations with the provision of new information by identifying potential funding sources and providers, and advising on effective communication methods

- leading new initiatives to enhance the delivery of useful legal information, for example, by providing training information or by developing self-help kits for some types of case.
- R4 The Ministry of Justice should take the lead in providing information about court proceedings, in leaflet and electronic form, and within the courthouse.
- R5 The Ministry of Justice should pilot the use of an information service or helpdesk in courthouses, where trained staff can answer general questions about court proceedings, help people find their way, provide access to general legal information and suggest where people can obtain individual, initial legal advice.

## Information deficit

- 15 The information deficit that exists is not necessarily because information is not being produced, although that is certainly part of the story. Although many agencies provide information, and some of it is of very good quality, there is a fragmented approach to its provision and sometimes information provided is duplicated, either because agencies are unhappy with the quality of information already provided by others, or because they are not aware that the information already exists. The quality of the information that is available is uneven. Simple things such as missing dates on printed material mean that it can be impossible to know if material is current. In short, someone seeking basic legal information may find a range of pamphlets and not know which to trust, or may struggle to find any.
- 16 In the report *Women's Access to Legal Information*, the Law Commission asserted:
- At an overarching level, the Government has general responsibility to provide legal information to the public. In addition, Article 7 of the Universal Declaration of Human Rights provides that all shall be entitled, without discrimination, to the equal protection of the law. Arguably a pre-requisite to the equal protection of the law is access to information about the law and its processes.<sup>6</sup>
- 17 In the same report we noted that “[c]o-ordination is needed to avoid duplication and gaps in material and also to serve as a check on the quality of the information”.<sup>7</sup>
- 18 The Justice Sector Information Strategy project has not suggested that one agency should take a lead role in the provision of information. However, we consider, first, that for the purposes of coordination and accountability, one state agency needs to have a leadership function in this regard and, secondly, that all agencies responsible for legislation that creates public rights and duties should be required to produce, distribute, review and update information that will assist lay people to understand those rights and duties.

---

6 New Zealand Law Commission, above n 4, 34.

7 New Zealand Law Commission, above n 4, 26.

## Coordinating agency

- 19 We recommend that an agency should take the lead role in overseeing the delivery of legal information in New Zealand. We use ‘delivery’ in a broad sense to include some, but not necessarily all, responsibility for production, distribution and quality control. We recognise that giving legislative effect to this responsibility and the different duties it entails will be a complicated task. This challenge should not defeat the spirit behind our recommendation: that the state should bear responsibility for ensuring a wide breadth of reliable and accurate legal information is available to as many New Zealanders as possible.
- 20 The lead agency should liaise with other government agencies and organisations, information providers and grass roots groups to identify informational requirements. In particular, the agency should be directed to consider gaps in basic legal information. Its role should be to alert the relevant agencies to the gaps and develop an integrated approach to filling them. It should identify potential funding sources and providers, and advise on effective methods of communication.
- 21 The lead agency should oversee the quality and content of information being produced, perhaps by setting guidelines on how information should be presented, and take the lead role in promoting public awareness of the existence of the information and of information outlets. It should also monitor the information that is available on an ongoing basis.
- 22 Our intention is that heightened coordination should reduce duplication, promote accuracy and do more to ensure that all sectors of society are adequately and equitably catered for. Again, we note the work that has started in this area as part of the Justice Sector Information Strategy.
- 23 Distribution of information needs to be through a range of community locations across the country so that it is widely accessible. In addition, various means of delivery need to be used. Radio and telephone have the advantage of delivering information orally, avoiding problems associated with delivering information to people unable to read. Videos and television are similar in that they provide information in both visual and oral form. Television and internet technology may enable the user to interact with the provider of the information.
- 24 Written publications have the advantage that people can take them away and refer to them in the future. They have the disadvantage that people must be able to read and understand them. Written information should be provided in plain language, with the use of headings, large print, pictures, or diagrams. It should be provided in a variety of languages, and in Braille. There should always be a contact person/organisation listed for provision of further information. The most user-friendly form of information provision is face to face.

## LSA strategy for legal information

- 25 In January 2002 the LSA approved a new strategy for its role in provision of legal information. Under the strategy, the LSA is to produce information and education resources (itself and under contract) as well as facilitate access to resources produced by others. Some of the objectives of the strategy are:
- To provide for the general public in the most cost-effective manner information on:
- rights and responsibilities under the law
  - how to avoid legal problems
  - how to address legal problems, and
  - solutions to legal issues and problems through:
    - access to quality information on rights and responsibilities under specific laws (on priority topics of interest) via a range of media and methods
    - access to referral information on lawyers, including information on the role of a lawyer, how to choose a lawyer, and how legal aid works...<sup>8</sup>
- 26 The strategy involves developing links with other sectors, organisations, agencies and professions to identify new ways to deliver legal information and education for those who are most in need. The aim is to create an integrated system. The LSA's website will be expanded and key points of contact will be identified for those with the greatest unmet need.<sup>9</sup> This is an excellent start, but in our view it does not go far enough.
- 27 One option could be that the LSA takes on the role of the coordinating agency that we envisage. However, this would demand a significant expansion of the LSA's area of responsibility, and of the parameters of its current strategy. Alternatively, it may be better that a new agency be established with this coordinating role as its core function.
- 28 Inspiration might also be taken from structures overseas that promote access to legal information. For example, every Canadian province has a legal information organisation set up to provide essential information to the Canadian public. These organisations do not provide legal advice. Their role is simply to inform and educate Canadians about the law and legal system. They are coordinated by the Public Legal Education Association of Canada, a network of legal education societies. The organisations are partly government funded. They provide telephone information lines and lawyer referral services, visit schools to disseminate information, hold seminars and produce written publications.
- 29 In New South Wales the Legal Information Access Centre (LIAC) is a state-wide service providing free public access to information about the law through the State Library of NSW and other NSW libraries.

---

8 New Zealand Legal Services Agency, *Annual Report 2001/02*, 27.

9 Legal Services Agency, *Business Plan 2002/2005*.

## Education and self-help

- 30 The LSA defines legal education as:
- ... the (usually) interactive and structured delivery of information on law related matters, such as courses, seminars and classes for groups and occasionally individuals ... Law-related education may be delivered to groups with specific interests or to the general public on individual rights and responsibilities under a law or laws.<sup>10</sup>
- 31 Community Law Centres are committed to delivering legal education and to empowering people to help themselves, and the LSA has also started producing education kits. These law-related packages are useful for community educators in delivering quality and accurate legal information. The LSA also works collaboratively with other government and community agencies such as Age Concern and Consumer Affairs.
- 32 The proposed lead agency should also investigate the possibilities for producing self-help kits on how to prepare for different types of case with sample documents and forms, packages about the court system and procedure, services available, and tips on self-representation.

### Recommendations

- R1 A state agency should have lead responsibility for developing an integrated and coordinated legal information strategy that assists the entire community when dealing with the court system.
- R2 State agencies responsible for legislation that creates public rights and duties should be required to produce, distribute, review and update information that will assist lay people to understand those rights and duties. This should be an explicit requirement when new legislation in that category is passed.
- R3 Responsibilities of the lead agency or agencies in relation to legal information should include the following elements:
- advising Government in relation to an integrated legal information strategy, including specific initiatives that require new funding, (possibly by working with the Justice Sector Information Strategy project)
  - maintaining an accessible database of up to date legal information prepared from a lay user's perspective in online, written, aural or visual formats, along the lines of the online catalogue of law-related information currently being developed by the Legal Services Agency

<sup>10</sup> Email from Frances Blyth, Manager, Strategic Development, LSA, 19 May 2003.

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

## The role of the Ministry of Justice

- 33 The Ministry of Justice, which now encompasses the former Department for Courts, is the primary source of court-related information. The Ministry publishes some information booklets and maintains websites giving information about what to expect in court. Submitters, including community law centres, commented that court information booklets were overly generic and generally assumed greater understanding on the part of court users than was usually the case.
- 34 Our impression is that more can be done by the Ministry to inform those using the courts better and in a more user-friendly fashion, and that the standard of information it produces varies greatly depending on the court or type of process involved. At present the user-directed information provided by the Ministry compares unfavourably with similar bodies abroad.<sup>11</sup> The Department for Courts' Forecast Report for 2002/03 did not specify any objectives in respect of providing court-related information to the public.

<sup>11</sup> An exception is the new Youth Court website < <http://www.courts.govt.nz/youth> > . Overseas examples of comprehensive fact sheets available online include the websites of England's Court Service < <http://www.courtservice.gov.uk> > , the Canadian Department of Justice < <http://canada.justice.gc.ca/en/> > , the Courts Administration Authority of South Australia < <http://www.courts.sa.gov.au/content.html> > and the Australian Federal Family Court < <http://www.familycourt.gov.au> > .

- 35 As the agency that administers the court system, the Ministry of Justice should take the lead in providing information about court proceedings, and should be resourced accordingly. Adequately fulfilling this responsibility, and the aspiration of “[c]ontributing to a free, fair and equitable society by facilitating access to justice”,<sup>12</sup> may necessitate a change of priorities for the Ministry. We suggest that more emphasis be placed on providing information to court users.

### Courthouse helpdesks

- 36 Perhaps the single most common suggestion from submitters on any topic was that there should be a helpdesk inside the doors of court buildings where people can go for simple assistance and directions. Unfavourable comparisons were often made between the level of help available in courthouses and in other public places. Clear signposting and court staff who are trained to help court users and deal with different cultures and minority groups are essential.
- 37 We note that many overseas jurisdictions have developed self-help centres, especially for Family Court litigants.<sup>13</sup> They are often court-based or court-funded and staffed by ‘facilitators’ who can assist clients to represent themselves. They provide a range of services from help with filling in forms to referrals to other support agencies or professionals. Some have prepared easy to understand step-by-step do-it-yourself guides (with diagrams and flow charts) or videos of various court proceedings. Many have their brochures and self-help kits available on the internet. We recommend piloting an information helpdesk or service in court buildings.

## Recommendations

- R4 The Ministry of Justice should take the lead in providing information about court proceedings, in leaflet and electronic form, and within the courthouse.
- R5 The Ministry of Justice should pilot the use of an information service or helpdesk in courthouses, where trained staff can answer general questions about court proceedings, help people find their way, provide access to general legal information and suggest where people can obtain individual, initial legal advice.

<sup>12</sup> Department for Courts *Departmental Forecast Report (2002/03)*, 2.

<sup>13</sup> Examples are the Family Court Support Program in Dandenong, Victoria, Australia, the Unified Family Court of Ontario self-help centre, Hamilton, Canada, and the Maricopa County Self-Help Center in the Superior Court of Arizona, USA. See New Zealand Law Commission *Dispute Resolution in the Family Court: NZLC R82* (Wellington, 2003), Ch 16.

---

## 1.3 Initial legal advice

---

- 38 We use the term ‘initial legal advice’ to mean consultation with a legally qualified person who can identify the area of law involved, explain how that law and related court proceedings could apply to the particular situation, and discuss the options the person has. The objective is that the client leaves the consultation understanding their options and their next step. The choices beyond the initial interview will generally be applying for legal aid, seeking private legal representation or preparing to represent themselves.
- 39 The area of initial legal advice is where submissions told us the biggest gap in access to the law exists. As well as general legal information, people with a legal problem have told us they often need specific advice tailored to their situation and that they want to be able to ask questions, and receive answers, tailored to their level of understanding and particular issues.
- 40 The obvious place for people to go is to a lawyer, but submissions suggested that high legal fees mean this is not possible for a substantial proportion of the New Zealand population. Legal aid is available for both legal advice – where there is an intention to pursue court proceedings – and representation, but only on a limited basis. For most areas of law, the only sources of face to face initial legal advice at low cost are the existing networks of CLCs (described below) or lawyers’ clinics at CABs, which often operate on a voluntary basis.
- 41 Duty Solicitors, rostered to be at court on criminal list days, provide some initial advice, but their main function is to represent those charged with an offence who would otherwise be unrepresented. In terms of providing advice, the duty solicitor scheme has serious limitations because very little time can be given to each person appearing and there is no continuity from one duty solicitor to another when the offender has to make several appearances.
- 42 Our view is that the option open to ordinary citizens should not be between paying high rates to obtain simple preliminary legal or procedural advice, or receiving no help at all. We are also convinced that access to early individual advice would lead to cost savings for the court system itself by clarifying issues and enabling people to make informed decisions early, encouraging earlier settlement or use of mediation, and avoiding some disputes getting to court at all.
- 43 Early, sound legal advice for individuals is a critical aspect of our wider aim of making the courts operate more effectively and efficiently. In criminal cases, the economic saving to the system, the community and the individuals involved, in avoiding unnecessary repeat appearances, could be significant.

## In this section we recommend:

- R6 A state agency should have the lead responsibility to create and maintain a national network for the provision of initial legal advice.
- R7 The responsibilities of the agency should include:
- advising Government in relation to an integrated initial legal advice network, including specific initiatives that require new funding
  - ensuring there are options for people to obtain initial legal advice face to face or by some other method where questions can be asked and answers given, such as telephone or internet
  - ensuring state-funded legal advisers are qualified and experienced in the particular legal areas where they give advice, or properly supervised by senior lawyers with those attributes
  - establishing reasonable times and expectations for initial interviews with the objective of clarifying the available options and next step for the client
  - working with the legal profession to explore possibilities for offering ‘unbundled’ legal services.

## Community law centres

- 44 Community law centres are one of the most important sources of legal advice for people of average means. Their primary function, as defined in legislation, is the “provision of community legal services to communities with unmet legal needs, and in particular to people with insufficient means to pay for legal services”.<sup>14</sup> There are 24 established CLCs throughout New Zealand and one pilot CLC.<sup>15</sup>
- 45 The Legal Services Act 2000 states that community law centres will generally provide:
- legal advice and representation
  - legal information and law-related education
  - law reform and advocacy work on behalf of the community served.
- 46 The level to which each of these services is provided depends on the individual CLC. Some focus their activities on education and law reform, some are advice based, others are responsive to a specific community group (eg, Ngai Tahu Māori Law Centre, YouthLaw Tino Rangatiratanga Taitamariki and Mangere Community Law Centre). This flexibility has the advantage that individual centres can concentrate their resources on the most significant needs of their community, and can make the most of the experience of their staff.

<sup>14</sup> Legal Services Act 2000, s 85 (1).

<sup>15</sup> The number has more than doubled since the early nineties.

- 47 CLCs are all individually managed, usually as incorporated societies or charitable trusts. Funding can come from a variety of sources, but is principally from the LSA via interest earned on the New Zealand Law Society Special Fund.<sup>16</sup> We note that funding for CLCs is being considered by the LSA and Ministry of Justice.<sup>17</sup> They report to Government in 2005.
- 48 Despite the role played by CLCs in providing legal advice to the public, there are restrictions on how much they can do. They are inaccessible for some New Zealanders – nine of the 18 centres in the North Island are situated in the Auckland and Wellington areas and there are only seven in the South Island. Another problem is that the existence of CLCs and the range of services they provide may not be well known to many. A Manawatu survey of Māori found that only 16 percent of those surveyed knew about the Manawatu Community Law Centre and only three percent had used it.<sup>18</sup> The centres are also reliant on unsecured, short-term funding.
- 49 At present, the coverage and activities of the work done by CLCs can only provide a partial response to what we consider is needed.

## A national initial legal advice network

- 50 The Law Commission proposes that a state agency should take the lead responsibility in creating and maintaining a well publicised, national legal advice network on which people can rely to obtain initial advice about their legal situation, and for information about where they can go for further help. As with the coordination of provision of legal information, we make no recommendation as to which state agency should have this responsibility.
- 51 Where possible, the providers of this initial legal advice should have a visible ‘shop front’, as Community Law Centres do at present. Telephone and internet services, which would also enable people to ask individual questions, may be appropriate for some specialist areas of law, such as the service operated for young people by Youthlaw.<sup>19</sup>
- 52 The service could provide a port of call for the general public requiring basic legal information and for self-represented litigants or others requiring more specific help and advice in relation to particular proceedings. Ideally, they could be located close to, or even in, court buildings. In outlying areas, the service could be provided by outreach clinics, in coordination with other local services such as the CAB, the local lawyer or the Heartland Services initiative.<sup>20</sup>

---

16 In addition there is an annual levy of \$50 per practitioner in Auckland and \$40 in Wellington which contributes to CLC funding. Also, many firms volunteer the services of lawyers at their local CLC. Over 200 local solicitors and students volunteer at the Wellington CLC providing free advice and information in the evenings or some lunch hours. (Information obtained from Legal Services Agency website: < <http://www.lsa.govt.nz> >, last accessed 10 December 2003.)

17 See Office of the Minister of Justice *Future Funding for Community Law Centre* (Memorandum for Cabinet Social Equity Committee, 2001).

18 A Report on Legal Service Needs of Māori Living in the Manawatu-Rangitikei-Horowhenua Region, prepared for the Manawatu Community Law Centre, (Aronui Associates, Palmerston North, June 2002).

19 See < <http://www.youthlaw.co.nz/> >, last accessed 20 January 2004. Youthlaw operates an advice line on (09) 309 6967.

20 See < <http://www.heartlands.govt.nz> >, last accessed 21 January 2004.

- 53 The provision of initial legal advice calls for experience, knowledge, empathy and an ability to talk with all kinds of people. Ideally, the service should be staffed by people with experience in practising law. If it became necessary to introduce a fee for accessing the service, the fee should be minimal with the option of an easily administered waiver.
- 54 The time required for such an interview is, of course, variable but the greater the competence of the legal adviser, the less time required. We suggest that in most cases at least 15 minutes will need to be allocated for initial legal advice consultations.
- 55 As core services, each centre should provide:
- access to general legal and court information, in hard copy form, online and face to face on matters such as:
    - legal rights and duties
    - the function of courts and tribunals
    - court processes
    - legal concepts and procedures
    - representation and the availability of legal aid
    - the anticipated costs of litigation and time involved
  - assistance in the form of self-help kits and or helping people to complete forms and other documents
  - advice about other agencies, and assistance in coordinating representation through the legal aid or duty solicitor systems prior to the first court appearance
  - a minimum level of initial legal advice as well as further advice where the service is funded for particular legal advice areas or clients are eligible for legal aid.
- 56 With the exception of the last point, staff members would not necessarily need to be legally qualified to perform these roles.
- 57 In addition to these functions, the centres could provide other services tailored to the needs of their community, perhaps based on the ‘unmet needs’ basis employed under the Legal Services Act 2000.

## Telephone service

- 58 The LSA is considering options for expanding community legal services, including the option of a call centre for information and initial advice. We endorse this idea. The Law Commission has previously recommended an 0800 telephone number be made available to litigants in the Family Court for information, advice, and referrals to lawyers and community services.<sup>21</sup> This is especially important for people who cannot read so that they can obtain some person to person advice.

21 New Zealand Law Commission *Dispute Resolution in the Family Court: NZLC R82* (Wellington, 2003).

## Unbundling

- 59 'Unbundling' describes the process of providing only some legal services and support so that court users only pay for legal assistance at the points where they most need it. The idea is that there is a 'bundle' of legal tasks related to a proceeding, some of which can be dealt with by the litigant alone, and others which should only be undertaken by lawyers. This way, the litigant may perform some or even most of the work and can retain control of the proceeding. Unbundling can work in various ways: in some cases the lawyer might prepare the client to represent himself or herself.
- 60 The practice is a fairly recent development in the United States, is now being used in Canada and the UK,<sup>22</sup> and is being considered in Australia.<sup>23</sup> Unbundling can reduce client costs, expand the market for lawyers, and reduce the delays and inefficiencies of self-representation. But there can be difficulties associated with giving only limited advice, and for this reason safeguards have been written into legal professional rules in the US.<sup>24</sup>
- 61 We would encourage the state agency described in Recommendation 6 to work with the legal profession to explore the possibilities of offering unbundled services.

### Recommendations

- R6 A state agency should have the lead responsibility to create and maintain a national network for the provision of initial legal advice.
- R7 The responsibilities of the agency should include:
- advising Government in relation to an integrated initial legal advice network, including specific initiatives that require new funding
  - ensuring there are options for people to obtain initial legal advice face to face or by some other method where questions can be asked and answers given, such as telephone or internet
  - ensuring state-funded legal advisers are qualified and experienced in the particular legal areas where they give advice, or properly supervised by senior lawyers with those attributes
  - establishing reasonable times and expectations for initial interviews with the objective of clarifying the available options and next step for the client
  - working with the legal profession to explore possibilities for offering 'unbundled' legal services.

22 In a "Law Shop" in Bristol, UK, customers can walk in off the street and buy explanatory legal forms, have free access to leaflets and reference books or purchase advice in 10 minute units. (R Davies "The Answer is Unbundling" *Legal Action* (1997), 8).

23 Unbundling is being examined in New South Wales as part of the Australian Family Court project "Self-represented Litigants – A Challenge", led by Justice John Faulks.

24 See < <http://www.lawlink.nsw.gov.au/lpac.nsf/pages/unbundling> > for a comprehensive discussion of the concept of unbundling, how it can work in practice, the advantages and disadvantages to clients and to lawyers.

## 1.4 Representation

- 62 Everyone who is charged with an offence has the right to consult and instruct a lawyer, and the right to receive legal assistance without cost if the interests of justice so require, and the person does not have sufficient means to provide for that assistance.<sup>25</sup> A defendant also has a right to a fair and public hearing by an independent and impartial court.<sup>26</sup> In order to exercise this combination of rights people will generally need assistance and probably representation.<sup>27</sup> In civil cases, the principles of natural justice may also mean that litigants require representation.
- 63 However, access to representation is not a given in all situations. In several countries there are increasing numbers of unrepresented litigants, particularly in civil and family cases.<sup>28</sup> Empirical research in New Zealand is limited. We do not know for certain whether their numbers in courts are increasing, whether some who are unrepresented are in this situation by choice or whether they would have preferred or really needed representation (by a lawyer or otherwise). Nor do we know the profile of unrepresented litigants.
- 64 Some research is being done. The LSA has reviewed legal needs in the Auckland region. The review noted that representation is offered by some CLCs, but a lack of resources means the need for representation is not being met for low income and low skilled communities.<sup>29</sup> Community law centres in Christchurch and Taranaki are currently undertaking assessments of unmet legal need in their areas, with the assistance of the LSA.<sup>30</sup> The Manawatu CLC has assessed the legal service needs of Māori in their area in conjunction with Aronui Associates, funded by Te Puni Kokiri.<sup>31</sup>
- 65 The National Association of Citizens Advice Bureaux noted that their statistics showed an increase in the need for free or low cost and accessible legal advice. There is some evidence, too, that duty solicitors in the District Courts are

25 New Zealand Bill of Rights Act 1990, s 24(c) (d) and (f).

26 New Zealand Bill of Rights Act 1990, s 25(a).

27 See J L Huber “Legal Representation of Indigent Criminal Defendants in South Africa: Possibilities under the 1994 Constitution” (1995) 5 *Duke J Comp & Int’l L* 425.

28 In Ontario, unrepresented litigants in the province’s family courts rose almost 500 percent in four years: L Cohen “Unrepresentative Justice” (2001) *Canadian Lawyer* 40. For the UK see G Appleby “Justice without Lawyers: Litigants in Person in the English Civil Courts” (1997) *Holdsworth Law Rev* 109, 110. For USA see L Mather “Changing Patterns of Legal Representation in Divorce: From Lawyers to *Pro Se*” (2003) 30(1) *Journal of Law and Society*, 137–155. For Australia see D Farrar “Litigants in Person – the Story so Far” (2001) 15 *Australian Family Lawyer* 4.

29 Legal Services Agency *Executive Summary: Auckland Review*, 1 February 2002. The review shows that types of people with unmet legal needs include Māori and Pacific peoples, new immigrants and people with disabilities.

30 Some unmet needs are clear from the statistics of CLCs. The Whitiwhiti CLC found that it was responding to increasing numbers of inquiries from the Hutt Valley so offered an outreach service to Hutt Valley residents which has now become a separately funded Law Centre.

31 See Manawatu Community Law Centre, above n 18.

overworked responding to the needs of unrepresented defendants.<sup>32</sup> In their submission to *Striking the Balance*, the Family Court judges noted an increasing trend for parties appearing before the Family Court to be unrepresented. The NZLS stated “an increasing number of people appearing in court, especially in the civil jurisdiction, and the Family Courts, are unrepresented”.<sup>33</sup>

- 66 From this evidence, there is a clear need for initiatives to increase access to representation in courts, to expand legal advice for those who are unrepresented through necessity and to improve assistance to those who wish to self-represent. Initiatives should be accompanied by empirical research to find out more about the extent of the problem and the profile of the unrepresented litigants, but the need to undertake research should not delay steps being taken.
- 67 Lack of representation has a number of disadvantages. An unrepresented person is in a vulnerable position in court: possible conviction (in a criminal case) or employment or property may well be at stake. They may lack the skills and knowledge to represent themselves, and they may be too close to the situation to maintain objectivity, especially in cases arising from a personal relationship.
- 68 From the court’s point of view, lack of representation may prolong proceedings and require avoidable costs in terms of time and the resource of judges and staff, as well as increasing the costs for parties. Court staff may be asked for advice that they cannot give, and the need for judges to give extra assistance to the unrepresented person to ensure a fair hearing may lead to a perception of bias, endangering the judge’s impartial role. The person’s lesser understanding of the law and procedure may mean that judges and juries are not provided with all relevant information to enable a just decision to be delivered.
- 69 In criminal cases, the court itself suffers because a lack of preparation frequently leads to unnecessary adjournments and delay in preliminary hearings. Better representation, particularly in the summary criminal courts, will enable courts to function more equitably and efficiently.

## **In this section we recommend:**

- R8 The police should be under an obligation to inform people in their custody of the existence of the Police Detention Legal Assistance Scheme.
- R9 People charged with a criminal offence should receive a minimum standard of representation and advice about their rights and options, including:
- advice (by appointment) before the day the case is first called in court
  - representation for the first call of the case

32 A Opie “The ‘General Practitioner’ in the Courts: Changing Organisational Environments and the Operation of the Duty Solicitor Scheme” report produced for the Legal Services Board (November 2000), pp 48, 67.

33 Submission of the New Zealand Law Society.

- advice and continuity of representation for any further matters arising during the administrative phase of the case including disclosure, remand, plea, status hearing and (if relevant) jury trial election and bail
  - continuity of representation where a guilty plea is entered.
- R10 The duty solicitor scheme should be reformed, or a new scheme developed, to ensure these minimum standards are achieved for those who would otherwise be unrepresented.
- R11 Community Law Centre lawyers should be able to represent their clients, without demonstration of unmet legal needs, provided there is no double-dipping of state funding.
- R12 Legislation should establish a presumptive right, within limits controlled by the presiding judge, for unrepresented litigants in court to have assistance from:
- a supporter, such as a kaumātua or elder in the litigant’s community, who could address the court on behalf of the litigant at sentencing in summary criminal cases, or within limits to be decided by the judge in other proceedings
  - a ‘friend’, who may sit beside the litigant in court, take notes, make suggestions, give advice to the litigant, and propose questions and submissions which the litigant may ask or make.
- R13 Where lay advocates are permitted in specialist tribunals, the tribunal should be able to stipulate the level of knowledge or experience that is a prerequisite to a general right of audience.

## Current providers of legal representation

### Legal aid

- 70 At present most legal service delivery is by private practitioners, either funded by the clients or from legal aid administered by the LSA for people of low incomes who fulfil certain other criteria.<sup>34</sup> Eligibility for legal aid has not changed for a number of years, although the Ministry of Justice is undertaking a review of legal aid eligibility. Legal aid in the sense of allocation of the case to a private practitioner is not usually available for criminal cases unless imprisonment is a possible sentence.<sup>35</sup>

### Community law centres

- 71 Currently, the level of representation provided by CLCs depends in part on whether there is a perceived unmet need for representation in the community the CLC serves and in part on whether the CLC has an exemption from the

<sup>34</sup> Legal Services Act 2000, ss 8–11 and 87.

<sup>35</sup> Since 1998 the number of refusals of legal aid for criminal cases has been over 5000 per annum, refusals for civil cases 200–300, and for family cases refusals have gone from under 500 to nearly 1000, almost doubling since 1998/99. Information from LSA Performance Report January 2003 and LSA email February 2003.

appropriate District Law Society to offer representation services.<sup>36</sup> Community Law Centres only act for litigants who cannot afford to pay for representation. In reality very few represent their clients in court.

## Duty solicitor scheme

- 72 The duty solicitor scheme provides some initial assistance, advice and representation to unrepresented defendants in District Court criminal proceedings. Lawyers who act as duty solicitors can advise and represent defendants on matters such as plea, remand, the right to elect trial by jury (if relevant), legal aid eligibility, bail and sentencing. They can also help defendants arrange for private legal representation or apply for legal aid. The scheme is available to all defendants, regardless of means.
- 73 Some 800 lawyers participate and the scheme is administered by the LSA under the provisions of the Legal Services Act 2000. For a significant number of defendants the duty solicitor is the only form of legal advice and representation that is available.<sup>37</sup> Despite expansion of the scheme to increase both numbers and the time available – most recently in 2002 – most duty solicitors operate under considerable pressure and often have only a very brief consultation with the defendant before an initial court appearance.
- 74 The scheme is organised in different ways at different courts. In some courts the duty solicitors move from one court appearance to the next, representing a number of different clients. At one busy court, one duty solicitor has the function of speaking in court from information provided by other duty solicitors who meet with the defendants. This means defendants have not usually had the opportunity to meet the solicitor who represents them in court.

## Improving representation

### Police Detention Legal Assistance scheme (PDLA)

- 75 The availability of legal advice and assistance at an early stage in the process is just as important as advice and assistance received after criminal proceedings are commenced. At that early point an accused can be bewildered and may have no real appreciation of their rights. The Police Detention Legal Assistance Scheme<sup>38</sup> provides free access to a lawyer for any unrepresented person who is detained or interviewed by the police and who wishes to consult a lawyer after being advised of their right to do so.

36 Legal Services Agency *Annual Report 2000–01*. For example Whitireia, Mangere and Grey Lynn CLCs generally need the permission of the Law Society before they can represent people in court.

37 See earlier studies for the Legal Services Board (Opie, above, n 32) and G Maxwell, A Morris & J Robertson “The First Line of Defence: the Work of the Duty Solicitor” (Legal Services Board, Wellington, 1994).

38 Established under the Legal Services Act 2000, ss 50 and 51.

- 76 The police have correctly observed that there is no general duty on them to inform a person in custody of the existence of the PDLA scheme until the detainee indicates they would like to consult a lawyer but cannot afford one. Such an approach assumes the person being interviewed or detained has an understanding of available options that many do not have. It is a tenuous basis on which to require that person to take the initiative.
- 77 A clear message that emerged from submissions and from our consultation with the public and those working in the criminal justice sector is that the system tends to be very ‘hit and miss’. Those who are frequent offenders and well versed in the processes, know their rights and how to assert them. Those appearing for the first time tend to be at a serious disadvantage. If the system is to have integrity all people must be able to understand that if they lack the resources to employ a lawyer, they have an entitlement to legal advice and assistance at that point.
- 78 While this will have fiscal implications, we either have to resource the promise the law provides or, if we are unwilling to do so, stop pretending the protections exist. What goes on at that initial stage in a criminal investigation can have a profound effect on what happens afterwards. Whether a person makes a statement to the police, and how it is made – for example, whether it is oral or in writing or recorded on video – can greatly influence how the matter will proceed from then on.
- 79 As the Court of Appeal recently observed, in a case where advice of the existence of the PDLA scheme was not given,<sup>39</sup> a true decision whether or not to exercise a right requires knowledge not just of its existence, but of its practical availability. A majority of the court also tended to the view that giving advice as to the existence and availability of legal assistance such as the PDLA scheme went beyond facilitation of the right and could be seen as integral to a fair opportunity for the person to consider and decide whether or not to exercise the right. We agree.
- 80 To give effect to the right of access to legal advice,<sup>40</sup> the Law Commission recommends that the police officer concerned should be required to draw attention to the existence of the PDLA scheme at the time the person is advised of their rights. Requiring such an initiative on the part of the police officer is the only way to secure confidence that those who need and want legal advice, but may not be able to afford it, have access to a lawyer.

## Recommendation

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

39 *R v Kai Ji*, 29 September 2003, CA333/03.

40 As provided in the New Zealand Bill of Rights Act 1990, s 23(1)(b).

## Duty solicitor scheme

- 81 We recommend changes to the duty solicitor scheme to improve the quality and hence the value of preliminary court appearances. The duty solicitor scheme should effectively help defendants to better understand and participate in the court process, and should enable better preparation. We are convinced this will improve efficiency in the use of court time, particularly if the number of adjournments and appearances can be reduced. Also, there will be many cases where the provision of proper early advice and assistance mean they do not need to proceed to a stage where formal legal advice and assistance is required. Some additional funding into a duty solicitor scheme would be a minimal investment for a large return.
- 82 The duty solicitor scheme is particularly important in cases where the defendant is unlikely to face imprisonment, as legal aid is more often than not declined in these cases on the “interests of justice test”. This is a stark example of the manner in which the institutional response seems to be that offending of this sort is trivial, and that proper protection and assistance is not really required. There seems to be little regard to the consequence and effect that this has on the individuals and their families, and their confidence in the system.
- 83 At the initial contact, more time must be allocated to each defendant to ensure that all matters that could possibly be resolved on the first appearance are attended to.
- 84 Duty solicitors should also be available to follow up on preliminary matters and particularly to assist with submissions in mitigation of penalty. Currently the situation is often that one duty solicitor gives cursory advice prior to a plea, but a different duty solicitor is involved at the subsequent sentencing. That is not fair to the individual nor a sensible use of the scarce resource.
- 85 With our recommendations for pre-appearance preparation, the possibilities of more matters being dealt with at one hearing will increase, but where that does not occur there ought to be a sensible follow through by the first lawyer who was involved. To ensure there is effective initial advice available to defendants will mean significant changes to the way the scheme operates at present.
- 86 We advocate reconsideration of how to ensure people charged with less serious offences can be effectively informed and advised about their rights and options. This may involve building on the existing duty solicitor scheme or it may involve developing a new network of advisers available in court. Duty solicitors, public defenders, lawyers in CLCs and other salaried lawyers may all have some role, possibly with adoption of a bulk funding model. The long recognised problems with the current scheme must be faced and, if necessary, a new scheme devised with the primary objective of providing the minimum standard of advice and representation defendants are entitled to receive.<sup>41</sup>

---

41 The Legal Services Agency has informed us it has included a review of the duty solicitor scheme on its work plan. Communication from Legal Services Agency, 23 January 2004.

## Recommendations

- R9 People charged with a criminal offence should receive a minimum standard of representation and advice about their rights and options, including:
- advice (by appointment) before the day the case is first called in court
  - representation for the first call of the case
  - advice and continuity of representation for any further matters arising during the administrative phase of the case including disclosure, remand, plea, status hearing and (if relevant) jury trial election and bail
  - continuity of representation where a guilty plea is entered.
- R10 The duty solicitor scheme should be reformed, or a new scheme developed, to ensure these minimum standards are achieved for those who would otherwise be unrepresented.

### Public defenders

- 87 In *Seeking Solutions* we discussed the possibility of public defenders acting in criminal cases. The Minister of Justice has since announced that the LSA is to pilot an in-house public (salaried) lawyer service in Auckland and Manukau, for criminal cases, to commence in 2004. The aim of the pilot is to improve the quality of representation by contributing to a ‘mixed’ service delivery (of public and private practitioners),<sup>42</sup> although it will not increase access to legal aid for those not currently eligible. We commend this initiative.
- 88 The traditional idea that everyone can obtain representation from the private legal profession no longer applies. The modern reality is that many who need help are not getting it. New and different approaches must be introduced.

### Representation by community law centre staff

- 89 A revised duty lawyer scheme and the public defender option should improve the quality of representation in criminal cases, but will not assist unrepresented civil litigants. Community law centre lawyers provide one option to meet this need, especially if they have already been involved in providing advice and assistance to litigants. At present, however, CLC lawyers must obtain permission from their District Law Society before they can represent clients in court. In addition CLCs are only funded to represent people if there is a shown “unmet legal need” in the locality.
- 90 Reform in this area is underway. Changes proposed under the Lawyers and Conveyancers Bill, which is currently before Parliament, include abolishing

<sup>42</sup> See Legal Services Agency paper to the Minister of Justice “The Feasibility of Piloting Legal Aid Service Delivery Options” 28 February 2003.

District Law Societies, and clause 25(4) provides that a lawyer may “act, with the approval of the Legal Services Agency, in any community law centre”.

- 91 If this clause is adopted, an important issue for the LSA will be to ensure there is no ‘double-dipping’ in the sense that LSA funded CLC staff do not also claim legal aid for representing clients. However, provided that this can be managed, it would be in the interests of client choice, quality of representation and efficiency – since the same lawyer will be able to carry the whole process through – for CLCs to represent clients in any matter before the court if that is what the client wants. This would require a change to the concept that CLCs can only operate if unmet legal needs can be identified.

## Recommendation

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

## Lay representation and ‘McKenzie friends’

- 92 In general only legally qualified advocates have a right of audience in New Zealand courts.<sup>43</sup> However, judges do have discretion to permit lay people to support unrepresented litigants, and even to appear and speak for them if the judge thinks this is appropriate.<sup>44</sup> The Court of Appeal has said that this discretion should be exercised primarily in emergency situations or straightforward cases where the assistance of counsel is not needed by the court, or where it would be unduly burdensome to insist on counsel.<sup>45</sup> In addition, any person may attend as a friend of a litigant with leave of the court, take notes, quietly make suggestions and give advice to the litigant. This person has become known as a McKenzie friend.<sup>46</sup>
- 93 A number of submissions favoured allowing lay representation in minor matters or some tribunal cases. However, restricting lay representation to less serious cases does not mean the proceedings will always be free of issues of legal complexity. Where such issues arise, there is the potential for a lay representative to do more harm than good to the interests of the unrepresented litigant.

43 See *Mihaka v Police* [1981] 1 NZLR 54 referring to *Collier v Hicks* (1831) 2 B& Ad 663 and *McKenzie v McKenzie* [1970] 3 All 1034. See also Summary Proceedings Act 1957, s 37 and the High Court Rules and District Courts Rules 1992 (eg, DCR 38 governing authority to file documents).

44 *Mihaka v Police* [1981] 1 NZLR 54 at 55 referring to *Collier v Hicks*. See also *R v Edmonds* (1997) IS CPNZ 347. The District Courts Act 1947, s 57, provides that the court may permit any party to appear by an agent authorised in writing in special circumstances, but the agent is not entitled to receive a fee unless he or she is a barrister or solicitor.

45 *Re GJ Mannix Ltd* [1984] 1 NZLR 309 at 314. The rationale for the general rule was that the court (at least High Court and Court of Appeal) would be served by barristers who observe the rules, are subject to a disciplinary code, who understand the law, who can present arguments and who have an overriding duty to the court ([1984] 1 NZLR 309 at 311 and 316).

46 See *McKenzie v McKenzie* [1970] 3 All 1034.

- 94 Allowing lay representation in all court cases would create a new tier of advocates who would not be regulated or formally accountable. In the absence of professional standards, ethical obligations and disciplinary procedures, the unrepresented litigant could be exposed to risks of malpractice or unscrupulous conduct, and have no redress for complaints. Proceedings might become unnecessarily protracted or complicated by advocates who do not accept they have a duty to the court as well as to their client. The costs of representation would not necessarily be any lower for a litigant who might be no more able to afford lay representation than they would a lawyer.
- 95 Counter arguments to these claims exist. The increase in the choice of representatives could in itself ensure that the costs to the litigant are contained.<sup>47</sup> Lay advocates in summary criminal and minor civil cases would be likely to develop expertise and knowledge about those types of cases that would not necessarily be inferior to that of legal practitioners.<sup>48</sup> A regulatory regime could check malpractice and unethical conduct. There is no reason to assume that lay practitioners would be less ethical or less careful than lawyers.
- 96 The main benefit of expanding lay representation is that litigants and defendants of limited means who would otherwise be unrepresented, but who do not feel capable of speaking for themselves in a court setting, could have access to an alternative form of representation. Although full legal representation is preferable, where this is not viable, alternatives that could improve the position of those appearing must be investigated.
- 97 We do not favour a general right for a party to be represented by a lay advocate. Instead, we recommend that the leave of the court would be presumptively given for assistance by a McKenzie friend at any court hearing, and for a supporter advancing a plea in mitigation or otherwise speaking on behalf of the unrepresented defendant at sentencing in summary criminal cases.
- 98 Should the unrepresented party request that their support person speak for them in civil or in criminal proceedings other than sentencing, the litigant should first satisfy the court that leave should be given in the circumstances of the case. Otherwise, at a full hearing of the merits of the case a support person would have no right to examine or cross-examine witnesses or address the court. In effect, the proposal provides for legislative recognition of current practice in respect of McKenzie friends, and broadens the scope for a support person to assist an unrepresented party.

47 Academic commentators argue that prices should drop and consumers should benefit. See D L Rhode "Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice" (1996) 1 *J Inst Study Legal Ethics* 197 at 210 cited in M J Lock "Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-income Coloradans" (2001) 72 *U Colo L Rev* 459 at 468.

48 See Rhode, above n 47, at 206–207. See also DA Denckla "Nonlawyers and the Unauthorized Practice of Law: an Overview of the Legal and Ethical Parameters" (1999) 67 *Fordham L Rev* 2581 at 2594.

## Recommendation

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

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

### Lay advocates in specialist tribunals

- 99 Lay representation can occur as a matter of course in some courts and tribunals. For example, the Waitangi Tribunal, Employment Relations Authority and Employment Court, Motor Vehicle Dealers Licensing Board, and Disputes Tribunal and Tenancy Tribunal allow lay representation in certain circumstances. The Children, Young Persons and Their Families Act 1989 provides for lay advocates to be appointed by the court to appear in support of a child or young person to ensure the court is made aware of all cultural matters relevant to the case.<sup>49</sup>
- 100 While there are benefits from lay advocacy, there are also some concerns, especially in areas (such as employment and immigration) where lay advocates usually act on a contingency basis. There is a risk that costs for clients can be very high and that cases are pursued rather than settled. Lack of regulation or ethical standards means there is no redress for complaints.
- 101 The introduction of regulation of lay advocates does not appear to be practical, but there does need to be a level of protection for litigants who are represented by lay advocates. We recommend that where lay advocates are permitted in specialist tribunals, the tribunal should be able to stipulate the level of knowledge or experience that is a prerequisite to a general right of audience. This should not preclude the tribunal giving leave to an otherwise unrepresented party to be assisted by a person without credentials for a general right of audience, but who can speak for the party in the particular case.

<sup>49</sup> Children, Young Persons and Their Families Act 1989, s 326.

## Recommendation

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

### Law clinics

- 102 A further means of expanding the availability of advice and representation is for ‘law clinics’ to operate in conjunction with university law schools. These may be in-house (based in the law school) or outreach (run by the law school but based in the offices of another provider, such as a CLC<sup>50</sup>). Students at law clinics may give advice only or offer representation in the courts. Many US clinics have negotiated rights of audience for students subject to safeguards, provided they are supervised. The Springvale/Monash Legal Service in Victoria Australia, has a student appearance programme where students doing a “professional practice” course seek leave to appear in a limited type of case in the local magistrates court, under supervision.
- 103 Clinical legal services programmes are currently run in the Victoria University of Wellington Law Faculty whereby students are on ‘placements’ in the community (some at a CLC) for up to 360 hours. The ‘host’ organisation supervises the student’s work for the organisation and neither the host nor the student receive any payment.
- 104 We would encourage university law schools in New Zealand to investigate the feasibility of supporting a law clinic model (in-house or outreach), possibly using the Springvale/Monash Legal Service model. We would suggest that students involved should be at least in their fourth year of study and should undertake a clinical legal studies course. They could seek leave to appear in courts in some cases and represent clients, under supervision of an appropriately qualified lawyer, who should be present at least for the first few appearances.

50 Whitireia Community Law Centre has such an arrangement with the Victoria University of Wellington Law faculty.

---

## 1.5 Cost

---

- 105 A strong theme during this review has been the cost of going to court. A large number of submitters were concerned and angry about litigation costs and their effect on limiting access to justice through the courts. For those who do not qualify for legal aid, lawyers' fees are perceived as the most significant contributor to high costs. There was a widespread, cynical view that "you get the justice you pay for".
- 106 The point has been made that the costs involved in going to court are easier to identify than to control because they are dependent on and created by a number of sources – for example, the court, the client's solicitor, the opponent's solicitor. Furthermore, while they are quantifiable, it is difficult to say that in a particular case they were reasonable or excessive, since that determination relies on a number of factors such as complexity, the lawyer's specialist skills, the number of experts required.<sup>51</sup>
- 107 There is always going to be cost in going to court. The provision of legal services, like any other professional business, entails many necessary costs. Some level of cost is appropriate to discourage speculative or vexatious litigation, to discourage litigation from proceeding to higher, more costly levels and to encourage amicable settlement.
- 108 Costs can be reduced by ensuring both the law itself and court processes are as simple and accessible as possible. We consider that the most important way to reduce the cost of taking court proceedings or of defending a criminal charge is for court processes to be streamlined and simplified so that there are no unnecessary steps or obscure technicalities.
- 109 This section of the report discusses one aspect of reducing costs – how to make the market for legal services more effective. The Law Commission's recommendations elsewhere in this report, about greater use of simplified procedures and alternative, more economical forms of dispute resolution where possible, are aimed at ensuring court proceedings do not unnecessarily increase the expense for litigants.
- 110 Although empirical evidence about the scale of the problem is lacking – we do not know how many people are unable to access representation or the courts because of cost – submissions and consultation told us that the cost barrier is real for many. There is a strongly held perception that it costs too much to go to court. That perception alone needs to be tackled.

---

51 Australian Law Reform Commission *Managing Justice: A Review of the Federal Justice System* (Report 89, 1999), 255.

## In this section we recommend:

- R14 Accessibility and simplification in order to reduce costs to the public should be recognised as a priority in all law reform initiatives, including changes to court practice and new legislation.
- R15 A report on the direct and indirect compliance costs to the public of new legislation should be required by Government as a matter of course.

### Costs disclosure by lawyers

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

- At the first meeting or contact the client should be given:
  - the name of the lawyer responsible for the conduct of the matter
  - details of the methods of costing, billing intervals and billing arrangements (which should include itemised billing)
  - information setting out the disclosure obligations of the lawyer
  - a statement specifying the external and internal avenues available for complaints about lawyers' conduct or fees.
- Before the lawyer's services are retained by a client, or as soon as reasonably practicable afterwards, either:
  - a written estimate should be given for the work, which should not be exceeded without the consent of the client (the estimate should include, so far as practicable, all likely costs involved including disbursements and court filing fees)
  - if it is not practicable to give an estimate, the solicitor should either explain why and give a forecast within a possible range of estimates or give the best possible information about the cost of the next stage or stages of the matter<sup>52</sup>
  - alternatively, the client should be able to state their budget, which should not be exceeded without their consent
  - the lawyer should be required to explain the possible outcomes of the matter and their likely effect on cost (including the amount the client would likely recover in the event of success, the likely extent of the client's liability to pay the opponent's costs in the event of failure).

52 "Best possible information" should include the definition set out in paragraph 4c of the Law Society of England and Wales' Costs Code.

- As the matter progresses:
  - The lawyer should keep the client up to date about costs, including court fees incurred or likely to be incurred, lawyers fees, disbursements and liability for the other party's costs.<sup>53</sup> This means delivering interim bills and notifying the client in writing about any changes in circumstances that will affect costs. The extent to which this would be appropriate will depend on the level of the claim – the amount of time preparing bills should not be disproportionate nor increase cost for the client.

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

### Complaints mechanisms

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

### General costs information

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

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

### Legal aid funding

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

### Court fees

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

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

<sup>53</sup> This should include any interim orders made by a judge for costs following interlocutory applications under the High Court Rules, r 48E.

## Compliance costs

- 111 Reducing compliance costs for lay people should be a high priority in all law reform, including both changes to court practice and new legislation. There is already a Cabinet requirement that the business compliance costs of new legislation are checked and we suggest a similar report on the direct and indirect compliance costs to the general public should also be required as a matter of course.

### Recommendations

- R14 Accessibility and simplification in order to reduce costs to the public should be recognised as a priority in all law reform initiatives, including changes to court practice and new legislation.
- R15 A report on the direct and indirect compliance costs to the public of new legislation should be required by Government as a matter of course.

## The legal services market

- 112 An open, competitive market assumes that regulation of price and quality is carried out by ordinary consumers who are the best judge of the value of goods and services.<sup>54</sup> The ordinary consumer is expected to be armed with the knowledge to enable them to make appropriate choices. Knowledge comes in part from clear comparative information about cost.
- 113 This model does not work effectively in the legal services market for a number of reasons.<sup>55</sup> Consumers are not in a good position to judge prices and quality since information is poor and general knowledge and understanding of legal work, its complexity and the extent to which cost can be incurred, is very low.
- 114 This was highlighted in submissions to *Striking the Balance* which suggested not only that cost was in some cases prohibitive to starting a claim, but also that it was very difficult for people to predict accurately the costs related to being involved with the court system. As a result potential consumers of legal services are not able to make informed decisions about how much it is reasonable to spend on legal advice.
- 115 The lack of information also perpetuates the perception that legal advice costs too much and that lawyers overcharge. Submissions included complaints that clients were kept in the dark about the growing costs of their dispute or legal matter and were surprised with a huge bill once the matter came to a conclusion.

54 W Bishop “Regulating the Market for Legal Services in England: Enforced Separation of Function and Restrictions on Forms of Enterprise” (1989) 52 *MLR* 326.

55 The view that the legal services market does not work efficiently and effectively is supported by representatives of Treasury (meeting with Treasury, 16 April 2003).

- 116 The market is also prevented from working as a ‘typical’ market because its suppliers – the legal profession – are regulated. Entry restrictions, in the form of qualification requirements, mean that there is a limit on how many people can become lawyers and those that do have significant hurdles to overcome to enter the market. Once qualified, lawyers are governed by professional and ethical rules restricting their practices and their ability to compete openly with each other.
- 117 Because of the type of work that lawyers do, some of these restrictions are essential. Lawyers are in a position of significant power over their clients since usually they alone are in possession of the relevant knowledge and experience. Ethical and professional rules are therefore essential in seeking to ensure that this position is not abused. Also, some control over who can practice law is defensible since it is a complex subject that has a very significant impact on the lives of those who come into contact with it and the courts.

### Greater state intervention

- 118 One way of reducing the cost of legal services is for the state to exert a more direct influence over the amount lawyers charge. We do not advocate direct price regulation as an option. Price regulation is usually introduced where there is a monopoly or where the unregulated market does not secure specifically defined social goals (eg, where sudden supply failures allow those owning scarce goods to earn windfall profit).<sup>56</sup> It has the effect of inhibiting competition and there is the danger of substituting one market imperfection for another.
- 119 The state already indirectly regulates and influences price by setting the rates at which Crown Solicitors, legal aid lawyers, youth advocates and counsel for the child in the Family Court are paid. Government agencies and other Crown entities are substantial purchasers of private legal services and, if coordinated, could influence the general market rates.
- 120 The High Court and District Court cost recovery rules set a standard of what the Rules Committee considers a “reasonable charge” for the preparation and conduct of a case which can also provide some benchmark for lawyers’ fees.<sup>57</sup>

### Improving the way the market works

- 121 Instead of price regulation we suggest a better response is to seek to remove some of the existing barriers to the efficient operation of the market.
- 122 By making more information available to the public generally and to prospective users of legal services in particular, consumers would be in a better position to know the costs involved in taking a case to court. They could also be better informed about the steps required in going to court and the procedure involved.

---

<sup>56</sup> E Gellhorn and R Pierce, *Regulated Industries* (2nd edn, 1987), 10.

<sup>57</sup> Although submitters commenting on cost recovery almost universally felt that cost recovery bears little relationship to actual fees charged. See High Court Rules, Sch 2 and District Court Rules 1992, Sch 2.

- 123 Even if cost does not reduce, consumer understanding and satisfaction should improve. The New South Wales Law Society reported that compulsory cost disclosure has led to a reduction in complaints about overcharging from 304 in 1995/96, to four in 1997/98.<sup>58</sup>

### Costs disclosure by lawyers

- 124 Currently, lawyers are not required to provide detailed information about how much their services will cost. Rule 3.01 of the New Zealand Law Society’s Rules of Professional Conduct only requires that a “practitioner shall charge a client no more than a fee which is fair and reasonable for the work done, having regard to the interests of both client and practitioner”.
- 125 The NZLS Conveyancing Guidelines recommend that the lawyer/conveyancer should offer to give a quote or estimate of likely costs, but this recommendation does not explicitly apply to any other area of legal work. The guidelines incorporate “Principles of Charging” which are to be read with Rule 3.01 and “encourage” lawyers to give clients estimates, but they are not prescriptive.
- 126 The NZLS recommends that clients ask in advance about the lawyer’s hourly rate, request a written estimate or quote, inform their lawyer of their budget and ask to be advised before that amount is exceeded. However, this places the onus on the client to ask all the relevant questions and assumes that he or she will know what further inquiries to make, and will have the confidence to negotiate. Given the complicated nature of legal services to many outsiders, this is unlikely to be the case.
- 127 These practice standards do not compare favourably with those in similar countries.

### England and Wales

- 128 The Law Society of England and Wales requires solicitors to “make sure that clients are given the information they need to understand what is happening generally and in particular on: (i) the cost of legal services both at the outset and as a matter progresses; and (ii) responsibility for clients’ matters”.<sup>59</sup>
- 129 Solicitors must give the “best costs information possible” at a level appropriate to the particular client. This includes either agreeing a fixed fee, giving a realistic estimate, or a forecast within a possible range of costs, or explaining to the client why that is not possible and giving instead the best information possible about the cost of the next stage of the matter. The solicitor should also explain that a client can set an upper limit which must not be exceeded without the client’s consent. Solicitors are also required to discuss with the client whether the likely outcome will justify the expense or risk involved. As the matter progresses, solicitors are required to keep clients properly informed about costs and changes in the degree of risk involved.

<sup>58</sup> See Australian Law Reform Commission, above n 51, 267.

<sup>59</sup> Solicitors’ Costs Information and Client Care Code 1999, 1(b).

130 The Woolf report noted that if in the past it had proved difficult to predict accurately what might occur in a given set of proceedings, case management reforms have had the effect of making that justification no longer valid.<sup>60</sup>

## Australia

131 Most Australian states have rules of professional conduct or legislation requiring a degree of disclosure about costs.<sup>61</sup> For example, the Victorian Legal Practice Act 1996 provides that costs information must be given, in a “concise written statement”, before a lawyer is retained by a client, or as soon as practicable. The lawyer must in the first instance give an estimate, and if that is not reasonably practical, give a range of estimates and an explanation of the major variables, the range of costs that may be recovered in the event of success or that might be recoverable from the client in the event of failure.<sup>62</sup>

132 Many lawyers in New Zealand do provide good information to clients, and the Law Commission is convinced that all lawyers could, at little extra cost and inconvenience, give more information to potential clients. In most cases lawyers are in a position to give an estimate for work. Legal practice in New Zealand does not differ sufficiently from Australia and the United Kingdom for this not to be the case.

133 In making the following recommendation we have drawn on Australian reform recommendations,<sup>63</sup> the England and Wales code described above, and the needs identified in submissions.

## Recommendation

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

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

60 Rt Hon Lord Woolf MR *Access to Justice* (Final Report and Draft Rules, July 1996), 84.

61 See Australian Law Reform Commission, above n 51, 264.

62 Legal Practice Act 1996 (Vic), s 86.

63 Australian Access to Justice Advisory Committee *Access to Justice: An Action Plan* (1994), Action 4.2, p 143.



- Before the lawyer’s services are retained by a client, or as soon as reasonably practicable afterwards, either:
  - a written estimate should be given for the work, which should not be exceeded without the consent of the client (the estimate should include, so far as practicable, all likely costs involved including disbursements and court filing fees)
  - if it is not practicable to give an estimate, the solicitor should either explain why and give a forecast within a possible range of estimates or give the best possible information about the cost of the next stage or stages of the matter<sup>64</sup>
  - alternatively, the client should be able to state their budget, which should not be exceeded without their consent
  - the lawyer should be required to explain the possible outcomes of the matter and their likely effect on cost (including the amount the client would likely recover in the event of success, the likely extent of the client’s liability to pay the opponent’s costs in the event of failure).
- As the matter progresses:
  - The lawyer should keep the client up to date about costs, including court fees incurred or likely to be incurred, lawyers fees, disbursements and liability for the other party’s costs.<sup>65</sup> This means delivering interim bills and notifying the client in writing about any changes in circumstances that will affect costs. The extent to which this would be appropriate will depend on the level of the claim – the amount of time preparing bills should not be disproportionate nor increase cost for the client.

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

134 A recent release by the Auckland District Law Society of electronic legal forms includes a Terms of Engagement form for practitioners. The form establishes at the outset the terms on which the firm will undertake work for the client and enables the firm to record information about the client’s instructions, fee estimates, credit limits and billing policy.<sup>66</sup> This is a commendable move in the right direction.

64 “Best possible information” should include the definition set out in paragraph 4c of the Law Society of England and Wales’ Costs Code.

65 This should include any interim orders made by a judge for costs following interlocutory applications under the High Court Rules, r 48E.

## Solicitors' duty to inform legally aided clients

135 With civil legal aid, clients can be liable to pay a contribution to legal costs either by instalments, or by a charge being placed on their property. It is therefore in the client's interests to be aware how much the lawyer is billing, what the anticipated total cost will be and to discuss ways of keeping cost to a minimum. Lawyers are already required to disclose to their client the estimate of costs contained in their application for legal aid and later, their invoice for the work undertaken. They must advise their client of the right to challenge the fees claimed. What they can charge for particular stages of legal work is tightly prescribed in many areas and all other areas have limits set. The duties set out in the preceding recommendation should be adjusted as necessary to also apply to lawyers undertaking work for legally aided clients.<sup>67</sup>

## Complaints mechanism

136 Part 7 of the Lawyers and Conveyancers Bill provides for the introduction of independent standards committees to deal with complaints about lawyers and conveyancers. Rule 15 of the UK Solicitors' Practice Rules 1990 requires that solicitors firms should operate an internal complaints handling procedure. Although many law firms do this already, there is no such requirement at this time in New Zealand. We consider that this should be a statutory requirement.

### Recommendation

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

## Cost recovery rules as a benchmark

137 The High Court and District Court cost recovery rules (the costs awarded by the court, usually to the winning party, after the case has been disposed of) set a standard for what the Rules Committee considers a "reasonable charge" for the preparation and conduct of a case. The rules could, if publicised more widely, be useful in influencing lawyers' fees, by providing some guidance on what is considered "reasonable". They include guidelines on time considered reasonable for undertaking set tasks. In New Zealand information about these rules, or even the fact that they exist, is poor and in reality, lawyers' fees bear little relationship to the rules.<sup>68</sup>

138 In contrast, lawyers taking cases to the Family Court in Australia must give the client a copy of a costs brochure published by the Family Court which sets out the costs scale, the procedures for costs disputes and information about the

66 Auckland District Law Society *Law News* (Issue 37, 3 October 2003), 5.

67 Currently the obligation is limited to supplying a copy of the Legal Services Agency invoice to the client.

68 The rules can be found in the High Court Rules, Sch 2 and the District Courts Rules 1992, Sch 2.

availability of independent legal advice on costs matters. If lawyers charge more than the court scale, they must explain to the client why and a costs agreement must be reached.<sup>69</sup> The Queensland Law Society Act also requires, if a fee scale exists in legislation for any type of work completed for a client, that a copy of that scale must be provided to the client.<sup>70</sup>

- 139 In Germany, the court recovery scale (the BRAGO scale) is specifically designed as a benchmark. Lawyers normally charge the BRAGO rate although, with the agreement of their clients, they can charge lower or higher than the scale. This means that it is reasonably clear to the opposing parties what their liability might be if they lose the case. A similar approach is used in Northern Ireland.
- 140 We do not recommend that lawyers be required to charge a set scale of rates – this is inflexible and does not recognise the wide variety of work undertaken by lawyers. There is a danger that infrequent amendment of fixed scales will either fail to keep up with market prices, or will place a floor under market prices and keep fees unrealistically high.
- 141 There are some limits to the value of wider dissemination of information about cost recovery rules for potential litigants. They are designed for use by lawyers who know more or less how much work a particular matter might demand, and for judges in making costs orders, and are not written in a way that will easily inform a non-lawyer. Indeed, since the High Court Rules foresee that cost recovery will represent two-thirds of the daily rate considered reasonable in relation to the work<sup>71</sup>, the rules may in fact be misleading as a guide on fee levels.
- 142 However, on the basis that the more informed users of legal services are about the costs involved, the better able they will be to make informed decisions, these scales should be more readily accessible.
- 143 Similarly, Crown Law, the Legal Services Agency, and the Youth and Family Courts could make the fee scales for Crown Solicitors, legal aid lawyers, youth advocates and counsel for the child, more readily accessible. Wider understanding of the fees charged for other aspects of legal work can only better enable court users to negotiate fees with lawyers.

## Recommendation

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

69 See < [http://www.familycourt.gov.au/forms/html/legal\\_costs.html](http://www.familycourt.gov.au/forms/html/legal_costs.html) > .

70 Queensland Law Society Act 1952 (Qld), s 48.

71 High Court Rules, r 47.

## Advertising and comparative price information

- 144 The Rules of Professional Conduct allow advertising so long as it is “consistent with the maintenance of proper professional standards”.<sup>72</sup> Lawyers rarely undertake price advertising, with the only real exception being for standard conveyancing fees. This contributes to the lack of available information for potential clients.
- 145 The rules governing the profession do not allow comparative advertising. The rationale for restrictions on advertising has traditionally been that it would bring the profession into disrepute, was contrary to its collegial responsibilities<sup>73</sup> and could open clients up to low quality work.<sup>74</sup>
- 146 However, the limited advertising undertaken by lawyers and the restriction on comparative advertising reinforces the disparity of information between suppliers of legal services and users – who are unable to predict what is a “reasonable” fee for helping with their legal problem. It may also have the effect of preventing some people with valid claims seeking legal services because of an assumption that the services will prove more costly than in fact they are.<sup>75</sup>
- 147 The trend in Australia and England and Wales in recent years has been to remove restrictions on advertising by the legal profession.
- 148 Such a move is unlikely to lead immediately to a significant increase in the amount of advertising undertaken by lawyers. Accordingly, we consider that the New Zealand Law Society, or an independent body, should assume responsibility for providing independent comparative costs information for consumers on legal fees. This could set out the range of hourly rates or fixed fees for diverse legal services, with geographical variations.
- 149 The cooperation and dedication of the legal profession would be essential to ensure that any such information would be accurate and of genuine use to the consumer. The removal of the ban on comparative advertising may be an essential precursor to such work being undertaken.

### Recommendation

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

72 New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors*, r 4.01.

73 A Bollard & P Scott “Competition and the Legal Profession” (1996) NZLJ 275 at 276.

74 Australian Access to Justice Advisory Committee *Access to Justice: An Action Plan* (1994), 136.

75 Law Reform Commission of Victoria *Access to the Law: Restrictions on Legal Practice* (Discussion Paper 23, 1991), para 117.

## How lawyers charge

- 150 Lawyers are at liberty to reach agreement with clients about the way they will charge. Some lawyers charge on a fixed fee basis, particularly for conveyancing since it is reasonably easy to predict the amount of work involved. However, most lawyers charge for most work on the basis of hourly billing, which is simple to apply and is a convenient way of setting targets for law firms.
- 151 Hourly billing can drive costs up, especially in firms where lawyers' performance is measured by targets of billed hours. This can make 'bill-padding' a temptation and rewards inefficiency. Also, hourly billing does nothing to inform a client's understanding of how much the lawyer's services will in fact cost.
- 152 It has been suggested that commercial clients are using their bargaining power to encourage a movement towards quotes, tenders and costs agreements with lawyers.<sup>76</sup> In some cases the beginnings of a trend away from hourly billing is lawyer-led, with at least one New Zealand firm having abandoned hourly billing in a bid to reduce frustration by both lawyers and clients.<sup>77</sup>
- 153 We note this trend, and favour greater use of conditional fee arrangements, costs agreements and event-based charging which can give clients a more accurate indication of the likely costs and may also have the effect of encouraging settlement since it can act as a 'reality check' for the client.

## Legal aid – tackling 'the gap'

- 154 In *Seeking Solutions* we highlighted the problem faced by users of legal services who fall in 'the gap' between those who can afford to employ a lawyer and those on very low incomes who can obtain legal aid to fund all or part of their claim. Legal aid eligibility criteria have not changed significantly for a number of years.<sup>78</sup> There is some evidence, for example in the increase in the number of unrepresented litigants entering the courts, that the proportion of court users able to obtain aid is ever-diminishing.
- 155 In the absence of government changing the thresholds, there is a need to find alternatives to legal aid. We discussed some alternatives, for example, an extended duty solicitor scheme, and the unbundling of legal services in the previous section. Other possibilities are considered below.

## Staged grants of legal aid

- 156 The Legal Services Agency is planning to review legal aid remuneration options in 2004 and alternatives to staged grants may form part of that review.<sup>79</sup>

76 C MacLennan "Trend is away from hourly billing to alternative methods of fee charging" (2003) 2 *Law News* 4.

77 See, C MacLennan, above n 76, 4.

78 The threshold of \$2000 per annum of disposable income was set in 1969 and has not been updated since. The living allowances permitted in calculating disposable income were last reviewed in 1987. The Ministry of Justice is currently reviewing legal aid eligibility including financial criteria.

79 Email from Frances Blyth, Manager, Strategic Development, Legal Services Agency, Monday 19 May 2003.

The grant of legal aid is currently black and white: a person either qualifies for it, or they do not. It is unrealistic to assume that someone falling just outside the range is able to afford to fund a case through the courts. A staggered approach to eligibility, with contributory rates being paid by the LSA would go a long way to improve access to justice. The Law Commission considers this should be a core focus of the LSA review.

## Conditional and contingency fees

- 157 The Lawyers and Conveyancers Bill is likely to introduce a provision allowing conditional fee arrangements to be made between lawyer and client in certain circumstances. Greater use of conditional and contingency fee arrangements should enable greater access to justice for those not qualifying for legal aid, but could be of limited application since it is likely that lawyers will only take on cases for a monetary or property-based claim with a reasonable likelihood of success.

## Contingency legal aid (or assistance) funds (CLAFs)

- 158 Contingency legal aid funds are designed to aid individuals who do not qualify for legal aid by removing the need to find the funds for litigation ‘up front’.<sup>80</sup> Some work in a similar way to contingency fees in that they fund the entirety of an individual’s litigation and in the event of success in the litigation, the CLAF recovers any party and party costs and a ‘fund fee’ (usually a percentage of the award) from the assisted litigant.
- 159 Others operate as loans. If the litigant is successful, the loan and interest must be repaid, or the applicant may contribute according to his or her ability to pay. Repayment may not be dependent on success in the litigation.
- 160 Contingency legal aid funds were set up in Western Australia, South Australia and Queensland in the 1990s, each with a seeding fund provided by professional legal and state bodies.<sup>81</sup> They are run by trustees or management committees. CLAFs have also been established in Hong Kong.<sup>82</sup>
- 161 An example is the South Australian Litigation Assistance Fund, which was set up in 1992, is still in existence and is maintained by the Law Society of South Australia.<sup>83</sup> Applicants are subject to a means test and the merits of their case are considered before a loan is made. The fund claims 15 percent of any monies awarded by the court or upon settlement and a reimbursement of the legal costs and disbursements already paid. The Law Society also runs a Disbursements Only Fund (DOF).
- 162 The funds offer limited aid to litigants since they are only available for civil matters, and usually only for claims for money or property. Some are restricted to lending for disbursements. The greatest potential barrier though is

80 Australian Access to Justice Advisory Committee *Access to Justice: An Action Plan* (1994), 259.

81 See Australian Access to Justice Advisory Committee, above n 80, 260.

82 See Australian Access to Justice Advisory Committee, above n 80, 262.

83 See < <http://www.lssa.asn.au/community/laf.htm> > .

sustainability. CLAFs are dependent on maintaining a level of funding, either through the money repaid from successful litigation, or from loan repayments.

- 163 The fiscal sustainability of such a scheme may well be more difficult in New Zealand where ACC precludes personal injury litigation.
- 164 Contingency legal aid funds, legal aid lending schemes and legal insurance were discounted as options in a discussion paper produced as part of the Ministry of Justice review of legal aid eligibility. The Law Commission considers, in view of the limitations of the current legal aid scheme, there would be value in considering these options further. Further research would need to identify what the measurement of ‘success’ for such a scheme would be, and would need to identify how many people the schemes would actually help.

## Recommendation

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

## Court fees

- 165 In 2000, the Department for Courts undertook a major review of court fees which led to a drop in Dispute Tribunal fees, a significant increase in filing fees for most civil proceedings in the District, High and Appeal courts<sup>84</sup> and increased scope to waive fees.<sup>85</sup> “Public law” proceedings (about 40 % of applications to commence civil proceedings) are excluded from the High Court fee increase. Most litigants now have to find a more significant amount of money upfront if they want to file a claim than they did previously.
- 166 The second stage of the review of civil court fees is in progress. One option being considered is to broaden the class of cases qualifying for the lower fee level in the High Court to include cases that generally cost the courts relatively little to process, or carry particular public benefits.
- 167 The Court of Appeal has said:
- ... court fees are the price the Government charges for access to the courts and fees that are high in relation to the means of litigants inhibit access to the system of justice they administer ... If access to the courts is impeded because court fees are set at a level that pose significant impediments to access both the constitutional principle and the fundamental right [of access to justice] are breached.<sup>86</sup>

84 The standard fee for booking a case for hearing rose from \$145 to \$450 in the District Court and from \$650 to \$2,200 in the High Court.

85 Department for Courts *Equitable Fees in Civil Courts: Discussion Paper* (October, 2000).

86 *Wiseline Corp Ltd v Spaceways Holdings Ltd* (2002) 16 PRNZ 347 at [18] and [19].

87 “Civil court fees – further review needed” (2002) 586 *LawTalk* 1.

168 Consistent with this view, we support observations made by the Regulations Review Committee that the new fees may give rise to concerns regarding access to the courts<sup>87</sup> and that they should be kept under continuous review. The committee concluded that there was insufficient evidence as yet to determine whether there was in fact any effect on access but that the potential is significant.

## Recommendation

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

## Waiver of court fees

169 A person can apply to have their court fees waived if:

- they are unable to pay the fee because they have not been granted legal aid AND are dependent for the payment of their living expenses on a specified benefit; or on New Zealand superannuation or a veteran's pension; or would otherwise suffer undue financial hardship if they paid the fee; or
- the proceeding concerns a matter of genuine public interest and would be unlikely to be commenced or continued unless the fee is waived.<sup>88</sup>

170 The fee increases have been justified in part by the availability of the waiver in these circumstances. As there is little reported material on the threshold that needs to be reached before an application for waiver will be granted, evidence is lacking on the extent to which the waiver does protect the fundamental right of access to court. As framed, the waiver is likely only to aid a limited number of applicants. An additional problem is the potential cost to an applicant if they require counsel to prepare the waiver application.

171 The Minister for Courts reported that in the 10 months following the introduction of the new fees and revised waiver provisions there were 288 waiver applications filed in all courts. Of these 190 had been granted and 17 were awaiting a decision.<sup>89</sup>

## Recommendation

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

88 District Court Fees Regulations 2001, reg 4A, High Court Fees Regulations 2001, reg 5 and Court of Appeal Fees Regulations 2001, reg 6.

89 Paper "Review of Civil Court Fees: Impact of Changes Made in October 2001" delivered to the Cabinet Committee on Government Expenditure and Administration (EXG(02)49, 11 October 2002), p 11.

## 1.6 Encompassing Diversity

- 172 Access to justice should not depend on how close one’s ethnic descent, culture, gender or physical ability is to the dominant group in society. In *Seeking Solutions*, we identified several groups of New Zealanders who face challenges over and above those experienced by other New Zealanders in accessing justice through the courts, or whose particular needs may give them a different perspective on the courts’ operation. The court system needs to be responsive to these groups of people.
- 173 While recognising that our list was not exhaustive, the groups we heard most from, and have focused on, are Māori, people of ethnic minorities, people with disabilities and victims of crime.<sup>90</sup> Our objective was to look at practical assistance or ways to adapt existing processes to enable these groups to participate more easily in the court system.
- 174 Many of the issues raised by disadvantaged groups are the same as those experienced by all New Zealanders. The most important recommendations to encourage courts to be more responsive to diversity are reflected in the main thrust of this report – those to improve access to information and advice, provide simpler processes and identify or resolve issues early. The ethos of the proposed Community Court is that it should establish respectful and ongoing relationships with local people, which includes responding to the needs of these particular groups.
- 175 The recommendations made in this section are additional to the major proposals made elsewhere in the report, and do not provide a full picture if read in isolation. However, many submitters also recognised that “on top of an improved level of service and information, there should be additional specific services for especially disadvantaged or high need groups”.<sup>91</sup>

### In this section we recommend:

- R24 The Ministry of Justice should investigate:
- the designation of staff as liaison officers or facilitators to assist groups with particular access issues arising from their ethnicity, disability or any other special concerns, and to advise the court about ways to improve services for these people
  - staff training to assist people with special needs for assistance with court processes.

90 Women are not discussed separately here. Their position has been considered in previous Law Commission papers: see New Zealand Law Commission *Women’s Access to Legal Information: NZLC MP4* (Wellington, 1996) and New Zealand Law Commission *Women’s Access to Legal Advice and Representation: NZLC MP9* (Wellington, 1997).

91 Submission received from New Zealand Law Society.

- R25 The Ministry of Justice should develop a national policy for the hiring of interpreters, including setting minimum qualifications, standards, and other requirements.
- R26 In accordance with the New Zealand Disability Strategy, the Ministry of Justice should review court facilities from the perspective of all types of impairment and experience of disability, to determine specific measures that will improve access to justice for people with disabilities.
- R27 The treatment of victims should be enhanced by implementation of two measures, previously recommended by the Law Commission:
- there should be discretion for all witnesses to be screened while giving evidence, or to give evidence on video, where need is established, regardless of the nature of the crime
  - victims should have access to separate rooms at all courts.
- R28 When implementing recommendations that will improve access and support for people coming to court, the Ministry of Justice should include consideration of the diverse needs of minority groups, including their particular concerns about:
- access to useful information
  - provision for support people in court proceedings
  - alternatives to mainstream criminal justice processes.

## Groups with particular issues and interests

### Māori

- 176 The partnership between Māori and the Crown symbolised by the Treaty of Waitangi requires that Māori have meaningful input into the workings of the justice system. In consultation, a high degree of frustration was expressed about the cultural inflexibility of the current system:
- Progressive governments have had access to numerous reports and advice from Māori for nearly 20 years. These have all included the fundamental changes necessary to improve outcomes for Māori. This advice has quite literally been ignored ... If outcomes for Māori are to change, the government must fully implement Te Tiriti o Waitangi and activate the changes advocated for by Māori.<sup>92</sup>
- 177 In addition, criminal justice statistics in relation to Māori are worrying. Māori, as a group, are three times more likely than non-Māori to be prosecuted for a criminal offence, four times more likely to be convicted and one and a half times more likely to be imprisoned. Māori make up 51 percent of the prison population,

92 Submission received from Dunedin Community Law Centre.

despite only making up 18 per cent of the population, and while women prison inmates number only five per cent of the total prison population, 80 per cent of them are Māori.<sup>93</sup>

- 178 Through consultation with Māori, we heard a strong and universal view that the mainstream courts are failing Māori because the processes, language, and culture are mysterious and intimidating. In the civil sphere, this means Māori rarely use the courts to enforce their rights, and in the criminal sphere they often pass through the system without any real sense of having participated or having had their case effectively dealt with.
- 179 Many Māori feel that outcomes for Māori would improve if the courts were more reflective of Māori culture and values. Māori issues are further considered in this report in our discussion of the proposed Community Court and the Māori Land Court.

### Ethnic minorities

- 180 There are 200 different ethnic groups living in New Zealand.<sup>94</sup> Many of the issues faced by Māori when interacting with the courts are echoed in the experiences of members of minority ethnic groups.
- 181 Different cultural values relating to conflict resolution, gender roles and family dynamics may render New Zealand's English-based court system incomprehensible to people of ethnic minorities. Recent immigrants are likely to be unfamiliar with New Zealand laws and may face language barriers in understanding and making themselves understood. Members of ethnic minorities may also face negative attitudes based on their ethnicity.
- 182 The courts have a vital part to play in ensuring that equal justice is provided to all, without discrimination. This requires that the court system treat people of ethnic minorities fairly and with respect, and in a way that enables them to participate fully in court processes.

### People with disabilities

- 183 Twenty percent of New Zealanders have some form of long-term disability.<sup>95</sup> People with disabilities face barriers to participation in many areas of life, and submissions suggest that these barriers also exist in accessing courts.
- 184 Issues include the physical inaccessibility of some court facilities, inaccessible information materials, difficulties understanding what is happening in court due to physical or intellectual disabilities, and attitudinal barriers. The court system, as a guarantor of justice, must take responsibility for reducing rather than exacerbating these barriers.

93 New Zealand Law Commission *Seeking Solutions: Options for change to the New Zealand Court System*: NZLC PP52 (Wellington, 2002), 24

94 Statistics New Zealand *Census* (2001). See < <http://www.stats.govt.nz/census.htm> > .

95 Statistics New Zealand *Disability Survey* (2001).

## Victims of crime

- 185 An important role for the criminal courts is to provide a just resolution for those who are affected by criminal acts or omissions. Submissions received revealed that many victims of crime do not feel that the courts deliver a just result from their perspective.
- 186 Victims complain of the trauma of giving evidence in court, the worry of encountering accused people in the courthouse, insufficient facilities at court, long periods of waiting and inadequate reparation. Many also state a general feeling of being left out of the process: having their views ignored and not being provided with enough information and support. This may in part be explained by the longstanding approach to crime – that it is a matter to be resolved between the offender and the state, with the victim not a direct party in the proceedings.
- 187 Victims entering the courts are particularly vulnerable. It is important that their experience of court processes does not add to their anxiety. If the courts respond to victims in a way that takes account of their needs, they are more likely to recover well from their experience of crime.<sup>96</sup>
- 188 The New Zealand Council of Victim Support Groups advocated substantial change to the way the court system responds to victims. It called for legal representation for victims and processes in which the judge plays a more direct role. It claimed recidivism rates show that:
- ... the system as a whole is not working; that a dramatic and fundamental change is needed. The Law Commission should not be apprehensive in suggesting workable change for the sole reason that a fundamental shift in focus or policy is needed.<sup>97</sup>

## Views of submitters

- 189 A strong theme raised by submitters was that there are disadvantaged court users from all parts of the community, and that many of the issues we identified for these particular groups, and the options we suggested for addressing them, would apply equally to the large majority of New Zealanders. Submitters frequently stated that court processes appear complex, confusing and alienating to the majority of New Zealanders, regardless of their background. Examples of comments made in submissions are:
- The report rightly identifies critical issues in the court system for members of ethnic minorities ... It is important to note that most of the changes recommended could and should not be available only to those who are members of ethnic minorities. Many of [the] solutions potentially respond to all those who are disadvantaged in the legal system by their unfamiliarity with it, the costs involved, the limited information available to assist users, the complexity and technicality of procedures and their fears about both the processes and potential outcomes.

---

96 Submission received from New Zealand Council of Victim Support Groups.

97 New Zealand Council of Victim Support Groups, above n 96.

Many proposals would be equally appropriate for non-Māori – for example if I was in the dock or on the witness stand I would greatly appreciate having a relative or friend standing beside me even if they were just holding my hand.

## Socio-economic factors

- 190 Another theme was the need to recognise the impact of socio-economic factors on the ability of any individual or group to access justice through the courts.
- 191 In research for the 1998 study *Meeting Legal Service Needs*<sup>98</sup>, Dr Gabrielle Maxwell found that “by far the most important factor in identifying those with unmet needs [was] socio-economic and many of the differences noted for Māori were not significant when socio-economic disadvantage was taken into account”. This factor was also found to outweigh all other factors including ethnicity and sex.<sup>99</sup>

## Diversity and similarity

- 192 When assessing ways to better meet the needs of minority groups within the court system, it is important to take into account both the diversity and the similarities between and within these groups.
- 193 Similarities can be identified between several high need groups. Illiteracy can be as much of a disability as blindness in accessing court-related information, and issues for the deaf community can be similar to those encountered by speakers of languages other than English. The Office for Disability Issues noted:
- It is our experience that other languages and cultures provide the most useful analogy for describing the needs of the Deaf community.
- 194 In a similar vein, Te Ture Manaaki o Rehua Māori Legal Services noted:
- If the justice system fails to address the particular needs of Māori (and Pacific Islanders), it must follow that it is not likely to be addressing the needs of non-English speaking ethnic minorities (including foreign students).
- 195 On the other hand, it cannot be taken for granted that people facing similar barriers at court will have the same needs. Taking the example of disabled New Zealanders, there is a great diversity of disabilities and diversity even within particular categories of disability. The Office for Disability Issues states:
- People with disabilities fit in into distinct groups with different needs and issues. There are hearing impaired people who identify with the hearing community, and use hearing aids or other devices to access spoken communication. There are also hearing impaired people and Deaf people who are members of the linguistic and cultural Deaf community for whom [New Zealand Sign Language] is their first, preferred or only language.<sup>100</sup>

98 G M Maxwell, C Smith, P Shepherd and A Morris *Meeting Legal Service Needs: A Report Prepared for the Legal Services Board* (Institute of Criminology in association with AC Neilsen, through Victoria Link, 1998).

99 Submission received from G Maxwell.

100 Submission received from Office for Disability Issues.

- 196 Similarly, with 200 ethnic groups represented in New Zealand, there is an enormous diversity in cultural backgrounds of those who may come before the courts. Some of the issues for people of Samoan background will be very different from those with a Chinese heritage. People also differ on other grounds, including gender, age and education. Even within a particular ethnicity, it could not be assumed that the problems experienced in accessing the courts would be the same for men as they are for women.
- 197 Many court users will face multiple challenges in accessing the court system. The New Zealand Council of Victim Support Groups highlighted the fact that victims in a lower socio-economic bracket are less likely to be well informed, and that some victims are unable to speak English.<sup>101</sup> The majority of disabled New Zealanders have more than one disability.<sup>102</sup> For many there will be compound barriers to effective participation in the courts.
- 198 There was a strong view from Māori and members of ethnic minorities that the cultural diversity of New Zealand communities should be reflected in judicial and legal services. Some signalled a need not only for ethnically diverse staff, but also for a gender mix within this diversity. The Shakti Asian Women's Centre commented, for example, that a female Chinese court user might be more comfortable seeking assistance from a Chinese woman than from a Chinese man.

## Proposals

- 199 The reality is that the court staff can never cater fully for the wide range of needs that may be presented to them, but it can have systems and practices that encourage flexibility and enable individual solutions to be found. The Office for Disability Issues emphasised that the initiatives in relation to people with disabilities should work together:

These solutions work as a package, each reinforcing one another, and it is critical that one activity or initiative is not adopted at the expense of another.

## Liaison

- 200 In *Seeking Solutions* we suggested that one way of improving the relationship between high need groups and the court system might be to employ 'cultural facilitators' for ethnic minorities and 'accessibility coordinators' for disabled people at the courts.
- 201 These staff members could monitor the availability and accessibility of information for ethnic and disabled court users, offer advice and help both court users and staff members on cultural and disability-related matters, and assist with staff training. They could also work to foster greater links with relevant community-based support services and other groups.

---

101 Submission received from New Zealand Council of Victim Support Groups.

102 Statistics New Zealand *Disability Survey* (2001).

202 It would be beneficial if these members of staff were themselves representative of the minority groups with whom they were working. This option fits well with the wishes of Māori and Pacific New Zealanders to have a person to speak to rather than having to rely solely on written information. It is also prefigured in the current Pacific liaison scheme in the Manukau Youth Court. The Office for Disability Issues agrees that the employment of accessibility coordinators at court is a useful addition to awareness training for staff:

... it is impossible for every judge and staff member to be an expert in disability issues and be able to make the courts accessible on their own. Therefore the suggestion to employ an accessibility co-ordinator is a very good way of facilitating access.

203 Some court staff already fulfil specific liaison roles. Victims have access to court victim advisers at all courts and these advisers have recently been trained to deliver a programme to assist children who appear as witnesses. Forensic nurses to assist defendants with mental health issues are present and some courts have restorative justice coordinators.

204 All courts deal with requests for special assistance as a matter of course, but it is difficult for all staff to be equipped to deal with the very wide range of requests that might arise. It makes sense for some staff to take on specific liaison roles, so that they can advise both the public and other staff.

## Diversity training

205 There was a strong call for cultural awareness programmes for court staff, as well as for training in disability awareness and in meeting the needs of victims. Improving judges' understanding of tikanga Māori was raised repeatedly in consultation with Māori. This was understood to be broader than just learning a few words of Māori language, but to include an understanding of commonly relevant aspects of Māori culture:

... there is clearly a need for all court staff, not least the judiciary, to have greater cultural awareness and understanding and to treat all people with whom they have come in contact with courtesy and respect.<sup>103</sup>

206 Training by itself does not offer a quick solution. While acknowledging the importance of training to combat unhelpful attitudes, the Office for Disability Issues noted that:

... it is now well recognised that attitudinal/behavioural and system barriers need to be addressed simultaneously ... disability awareness training will not be effective unless it is supported by clear systems changes, service provision requirements, and by measurable goals in relation to the training.

103 Submission received from Te Ture Manaaki o Rehua Māori Legal Services.

207 Diversity training does encourage people to examine their attitudes, and think about the reasons why such differences exist, rather than dismissing them out of hand. An example raised in consultation with Māori was the way that Māori culture encourages background support with “kia ora” or other words, whereas in the courtroom silence is required. Accommodating differences of this nature need not be difficult, yet could make a significant difference to the comfort levels of court users.

208 It is unrealistic to expect judges or staff to have a wide level of understanding of cultural differences or of the full range of disabling conditions, but the key is that they are equipped to recognise when they need extra input and that there is a source of help available. Noting that draft guidelines are currently being developed for the use of sign language interpreters in court, the Office of Disability Issues stated that:

... all judges and court staff need to be aware of disability issues enough to refer to the guidelines when using an interpreter or whenever a Deaf person is participating in court processes.

## Recommendation

R24 The Ministry of Justice should investigate:

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

## Speakers of other languages

209 Everyone who is charged with an offence has the right to have the free assistance of an interpreter if they cannot understand the language used in court.<sup>104</sup> However, submitters signalled several problems with the current use of interpreters within the justice system.

210 It was claimed that interpreters are often called in at very short notice, as if as an afterthought, rather than as an essential service required to uphold the rights of speakers of foreign languages or deaf people. The need for interpreters is not always identified early enough in the process, despite the fact that they are often required not only at the actual court appearance but also during the preparation leading up to this appearance, for example, during interaction with police and counsel.<sup>105</sup>

104 New Zealand Bill of Rights Act 1990, s 24(g).

105 Submission received from Shakti Asian Women’s Centre.

- 211 There are also issues around the selection of interpreters. It is important that interpreters used within the legal system are appropriately qualified and are trained in the ethics of interpreting. It is also important that judges and court staff are aware of the code of ethics that interpreters follow, so that they understand the relevant professional boundaries.<sup>106</sup> The Office of Disability Issues noted that there is a serious workforce shortage of sign language interpreters in New Zealand.
- 212 The recent establishment of a pilot telephone interpreting service to enable the Police, ACC, the Department of Internal Affairs, Housing New Zealand, Work and Income New Zealand and the Immigration Service to access interpreters for 30 languages when communicating with people of non-English speaking background should have substantial potential for courts.

### Recommendation

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

### People with disabilities

- 213 The particularly high and complex needs of the wide variety of disabled people in New Zealand require more detailed attention than is possible in the context of this report. However, work is already underway under the auspices of the New Zealand Disability Strategy adopted by Government in 2001.
- 214 The strategy is intended to eliminate barriers that prevent disabled New Zealanders from participating in and contributing to society. All government departments are required to develop annual Disability Strategy implementation work plans with goals and actions, and the Minister for Disability Issues is required to report annually to Parliament on progress.<sup>107</sup> The strategy also provides a framework to ensure government departments and agencies consider disabled people before making decisions. Monitoring and reporting on the New Zealand Disability Strategy implementation is coordinated and supported by the Office for Disability Issues.

### Recommendation

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

<sup>106</sup> Submission received from Office of Disability Issues.

<sup>107</sup> New Zealand Health and Disability Act 2000.

## Victims of crime: endorsement of previous recommendations

### Increased privacy when giving evidence

215 Concerns about privacy for victims when they are giving evidence was another issue raised by submitters. Currently, adult victims (with the exception of people with an intellectual disability who are complainants in sexual cases) can only be screened while giving evidence, or give evidence on video, in rare circumstances. In line with a recommendation made by the Law Commission in a previous report, we consider that there should be discretion for all witnesses to give evidence in these ways where need is established, regardless of the nature of the crime.<sup>108</sup>

### Separate rooms for victims

216 Submitters expressed strong support for ensuring that victims have access to a separate room at court so that they need not encounter offenders. The Victims' Taskforce recommended in 1993 that separate rooms be provided for distressed victims, and this features in the Department for Courts (now part of the Ministry of Justice) Service Charter. Some smaller courts still do not have this service and the proximity of victim and offender can be very upsetting.

## Recommendations

- R27 The treatment of victims should be enhanced by implementation of two measures, previously recommended by the Law Commission:
- there should be discretion for all witnesses to be screened while giving evidence, or to give evidence on video, where need is established, regardless of the nature of the crime
  - victims should have access to separate rooms at all courts.

## Augmenting other recommendations

217 The following recommendations need to be read in conjunction with related recommendations made elsewhere in this report.

### Increased access to information

218 Improved information is a primary need for all court users. This is even more so for minority groups, who face added disadvantage.

219 It is particularly important for speakers of other languages that legal information is produced in plain language, and that the most important information is translated into key community languages. New arrivals to New Zealand also have a need for very basic information regarding legal processes, as they may

<sup>108</sup> New Zealand Law Commission *The Evidence of Children and Other Vulnerable Witnesses: NZLC PP26* (Wellington, October 1996), 31–37.

come from countries with very different legal systems. This information may need to be given in a different form, depending on the group to which it is directed. Te Ture Manaaki o Rehua Māori Legal Services noted that written resources are of limited value for people of predominantly oral cultures.

- 220 Better information means such things as a visible person in the court foyer who can greet people who have language needs or disabilities and assist them to take the first steps to deal with their particular issue.
- 221 Information for disabled New Zealanders requires great flexibility in delivery. Vision-impaired, hearing-impaired and intellectually disabled New Zealanders all face serious barriers in accessing necessary information. The Office for Disability Issues noted, as an example of the complex needs of disabled people, that:
- [it is a] myth that all Deaf people can communicate through English text. The reality for many Deaf people is that lack of hearing prevents or reduces their exposure to English and therefore the development of English language skills. Deaf literacy levels are low.<sup>109</sup>
- 222 Good access to information is also identified as vital to victims of crime, to help them understand what is happening in the case against the accused, and to counteract their possible sense of being left out of the court process. Victims' right to information has recently been given extra weight under the Victims' Rights Act 2002.
- 223 Improved information for all groups must also include readily accessible information about where to go to get extra help.

#### Allowing support people at court

- 224 Another issue that was raised many times was to allow supporters to be near people involved in court appearances, both accused and witnesses, or self-represented parties. This is particularly important where the person finds the court environment very difficult to understand or when standing alone is alien to the culture. Māori and Pacific Islanders in particular wanted the wider family to be able to be more involved in court processes.
- 225 Allowing parents or relatives to stand close to the person they have come to support, is one way to concretely, but also symbolically, acknowledge differing cultural perspectives on collective and individual identity. The Law Commission has previously recommended allowing the presence of support people when victims are giving evidence.<sup>110</sup>

<sup>109</sup> Submission received from Office for Disability Issues.

<sup>110</sup> See New Zealand Law Commission, above n 108, 41–45.

- 226 There is some tension between needing to preserve the orderly conduct of court processes and wanting to be inclusive and flexible. There are also security concerns. Change would need to be considered and introduced carefully. Our proposal for a Community Court, discussed in Part 4, suggests that there should be ongoing consultation and liaison with the community so that individual courts can develop practices that are more responsive without detracting from legal process. Also relevant is our proposal, for a presumption that self-represented litigants can be assisted by lay people in some situations.
- 227 This issue is one aspect of the need to treat people involved in court cases with more respect and dignity. Until there is better control of the volumes and pressures in the proposed Community Court, it will be difficult to achieve these kinds of changes.

### Alternatives to mainstream criminal justice processes

- 228 Calls for greater use of restorative justice processes came up frequently in submissions relating to Māori, ethnic minorities and victims within the court system.
- 229 A strongly felt view in consultation with Māori was that diversion is not applied to Māori as often as it might be. There was also concern that practices are inconsistent across the country. To address shortcomings in the diversion scheme, it was felt that police and courts should place more importance upon creating and nurturing partnerships with iwi and urban Māori organisations.<sup>111</sup>
- 230 These alternative processes were seen as having the potential to be more effective than adversarial approaches in enabling victims to come to terms with the effects of crime, encouraging offenders to take responsibility for their offending, and providing the opportunity to acknowledge community structures, involve family members and incorporate cultural values and needs.

## Recommendation

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

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

111 Submission received from YouthLaw Tino Rangatiratanga Taitamariki.

# Part 2

## Outside the Court

---

In this part we consider:

- the use of alternative criminal justice processes, including infringements and minor offences, police warnings and formal cautions, restorative justice and problem-solving courts
- a state mediation service, and whether the courts should be able to order parties to attempt mediation.

## 2.1

# The Place of Alternative Criminal Justice Processes

---

- 1 Justice can be achieved without the direct control of the court system. Various options are available, from processes that take place completely outside the court to those that only require limited judicial involvement.
- 2 We begin with the criminal jurisdiction and consider both existing and emerging alternatives. The alternative criminal justice processes currently operating in New Zealand display some problems, including inconsistency of process and possible outcomes, lack of transparency and accountability and a lack of clarity and coordination between community organisations and the state. It is our view that alternative criminal justice processes need a robust overarching legislative framework to establish principles and parameters.
- 3 Both infringements and police adult pre-trial diversion deal with less serious offending without imposing a conviction and occur largely outside the court. We consider that legislative reform is needed to make both these processes more transparent and proportionate, and the procedures more efficient.
- 4 Restorative justice, as it is currently developing in New Zealand, primarily occurs when cases are adjourned prior to conviction and sentencing. Such adjournments have long been a standard option for courts but with expansion of restorative justice processes and the possible development of more community-based options from the proposed Community Court, it is necessary to have a stronger legislative framework. We also discuss some international perspectives in relation to therapeutic and restorative jurisprudence, and their possible impact in New Zealand.
- 5 Our recommendations relating to alternative criminal justice processes contribute to work already underway in several justice agencies. In relation to infringement offence notice schemes and minor offences, the Ministries of Justice and Transport, the Land Transport Safety Authority and the Law Commission have begun a set of related projects. As regards diversion, the Police have begun a review of current policy and practice. The Ministry of Justice has work underway to ensure the restorative justice related provisions in the 2002 Sentencing, Parole and Victims' Rights Acts are implemented effectively.

## In the following sections we recommend:

### Guiding principles for alternative criminal justice processes

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

### Infringements and minor offences

- R30 One statutory framework should be developed to regulate the establishment of infringement offence schemes and procedures.
- R31 Penalties for infringement offences should be reviewed to ensure there is proportionality between the behaviour being regulated and the penalty imposed.
- R32 The minor offence regime should be examined to determine whether some minor offences should be reclassified as infringement offences, or removed from the statute books altogether.

### Police diversion

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

### Restorative justice

- R34 Policies, including funding policies should be developed for the operation of restorative justice programmes under the Sentencing Act 2002 and Victims' Rights Act 2002 that ensure high standards of accountability, consistency, equity and transparency.
- R35 Regulations should be developed to provide for best process standards in the provision of restorative justice programmes and the monitoring and enforcement of offenders' plans prior to sentencing.

## The limitations of alternative justice processes

- 6 It is important to recognise the limits of alternative justice processes. To be effective they require willing participants and acknowledgment of responsibility on the part of the offender. Without these, only a court can resolve disputed charges, function as the guardian of basic human rights and impose enforceable sanctions.
- 7 Alternative processes also have the potential to undermine core fundamental principles if they result in uncertainty as to processes and accountability mechanisms, lead to unwarranted variations in outcomes, mask incompetent or

unethical practices, or impact on the rights of defendants and victims to protection under the law. The rights of defendants and victims should be recognised and protected equally and effectively whether they take place inside or outside the court.

- 8 Net-widening is also a risk with alternative processes, and may occur in two ways. More offenders may be ‘caught’ by alternative processes than would ever be brought to court if a charge had to be proved, and the response for the offender may be harsher or unrealistic as compared with a court-imposed sentence. These risks can arise with police diversion and community-based restorative justice and are already apparent with the infringement offence notice regimes of central and local government agencies.

## Enduring features of the criminal justice system

- 9 In 1997 the Law Commission asserted the fundamental goals of the criminal justice system as:
- the protection of the peace and common good of society from the blameworthy acts of members of society who threaten or impair it
  - the protection of all people and their property from injury by the blameworthy acts of others
  - the bringing of offenders to justice.<sup>112</sup>
- 10 We add a further goal, in keeping with developments since:
- the protection of individual victims and the upholding of their rights.
- 11 In achieving these goals, the rules and processes of the formal criminal justice system are intended to safeguard important public interests. Safeguards are essential because the power of the state is vast and the implications for civil liberties are profound.
- 12 Legislation gives the public the certainty of knowing what behaviours constitute criminal offending in the eyes of society and the potential sanctions. The court functions as an independent arbiter with the authority to make decisions and impose sanctions. The defined processes of the courts and their openness to public scrutiny ensure that decisions are made in a fair, consistent and transparent manner, and that those who make decisions are accountable for them.

## Evolution of criminal justice processes

- 13 Criminal procedure is not, however, unchanging. Like the law, it has evolved to reflect the values, and meet the needs, of a changing society. In earlier centuries, crime was seen in Western society in an interpersonal or community context – with the courts acting as an alternative and last resort. The criminal justice system gradually evolved to give the state full control of the process, with offences seen as being committed against the state – representing the interests of the victim

---

112 New Zealand Law Commission *Criminal Prosecution: NZLC PP28* (Wellington, 1997), 9.

- rather than against the actual victim. Justice came to be based on formalised procedures and increasingly “the test of justice was the process used”.<sup>113</sup>
- 14 Formal court processes are sometimes out of proportion to the actual circumstances of offending. The infringement offence notice regime, for example, is a process developed to deal with types of offending considered not to require the full extent of due process.
- 15 More recently, the pendulum has swung to give victims more recognition and status. There is lively debate as to whether it would be more effective to deal with some offending behaviour in ways other than through the formal criminal justice system, or in different ways within the system. Critics point to negative indicators such as high recidivism rates; sharp increases in the number of violent crimes over the last 10 years; disproportionate numbers of Māori appearing before the court and acquiring criminal convictions; and the inadequate imposition and enforcement of reparation to victims.
- 16 Others have commented that those directly involved in an offence, both victims and offenders, may neither understand nor engage with the court’s processes. The preoccupation with establishing guilt means court proceedings tend to focus on an historical event rather than on how to solve the problems the offence has created. Some victims feel ignored or even humiliated, while offenders may not feel any responsibility or remorse for their offending.
- 17 The emphasis within the mainstream criminal justice system on individual rights and responsibility is also at odds with the more communal approach to criminal justice by Māori and many non-Western ethnic groups. This leads to a perceived lack of fairness in procedures and outcomes. In upholding the fundamental principle of equality before the law, the system can be unnecessarily inflexible in response to the diverse circumstances of the individuals before it.
- 18 The concerns that led to the Children Young Persons and their Families Act 1989 are felt by some to apply to the traditional criminal justice system as a whole. State control of the criminal justice process takes the response to crime away from the community it has affected:
- ... there is little room for a community input into individual sentencing, no chance for an offender’s family to express censure or support, no opportunity for a reconciliation between the wrongdoer and the aggrieved, no search for a community solution to a social problem. The right and responsibility of a community to care for its own is again taken away and shifted to the comparatively anonymous institution of Western law.<sup>114</sup>
- 19 Just as change has occurred in the past, if the criminal justice processes that currently operate are not meeting public expectations, adjustments are possible.

113 H J Zehr *Changing Lenses: A New Focus for Crime and Justice* (A Christian Peace Shelf Selection, 1990), 115, 121.

114 V E Jantzi *Restorative Justice in New Zealand: Current Practise, Future Possibilities* (August 2001), quoting Judge FWM McElrea in *Puao-Te-Ata-Tu (Daybreak)*: Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare (September 1998), 74.

## Guiding principles for alternative criminal justice processes

- 20 It is fundamental that there be clear guidance on the level of offending that can be dealt with outside direct judicial control, with seriousness of offending being the logical starting point. The greater the severity of the offence, the greater the necessity and degree of involvement of the court. In cases where the likely consequences of offending behaviour are less severe, imperatives such as proportionality, flexibility and swiftness of response come to the fore. Proportionality is already a recognised principle in relation to infringements, where there is no conviction but very limited ability to challenge the infringement.
- 21 Nevertheless processes must also ensure fairness. Offenders must be aware that they have the right to elect a court appearance and the right to obtain legal advice. They must be aware that alternatives will only be used with their consent and they must be advised of the consequences of accepting an alternative justice model in response to their offending. It is also important that there are mechanisms to allow an offender to return to the mainstream courts during the process, and that there are complaints procedures in relation to processes outside the court.
- 22 The Law Commission supports the further development of alternative criminal justice processes but it is essential that these operate in a consistent way, have transparent processes and robust accountability mechanisms.
- 23 The principles that have guided the Law Commission's proposals for reform in the area of alternative justice models are:
- operation of the criminal justice system is the responsibility of the state
  - only the court can impose sentences and only state agencies can enforce these sanctions
  - alternative processes are a useful addition to, but not a replacement for, the existing criminal justice system
  - the seriousness of responses to offending behaviour should increase as the seriousness of offending behaviour escalates
  - alternative processes should deal with offending behaviour in a way that is proportionate to the harm done, while still taking into account the overall history of offending behaviour
  - the safety and interests of victims must be protected
  - in any system that seeks to remove cases from the mainstream process, it is essential to preserve the defendant's right to choose to have the allegations against him or her brought before a court<sup>115</sup>

---

115 See Committee on Alternatives to Prosecution *Keeping Offenders Out of Court: Further Alternatives to Prosecution* (Great Britain, 1983), 72.

- alternative justice models must, in order to be fair, operate in a consistent way, have transparent processes, and strong accountability mechanisms
  - the maintenance of consistency and accountability requires the state to maintain oversight of alternative justice models.
- 24 One of the objectives of establishing a new Community Court is to encourage closer connections with the local community and the development of more effective options for dealing with less serious offending and reducing re-offending rates. Coupled with greater recognition of restorative justice principles, we may see considerable expansion of alternative criminal justice options in the Community Court before formal sentencing occurs. Guidelines would encourage the development of more effective initiatives because the community, judges and officials would be clear about the boundaries of their roles.
- 25 We propose that clear guidelines be developed to regulate the development and use of alternative criminal justice processes. These guidelines should encourage processes that produce better social outcomes but also protect the fundamental rights and interests of victims and defendants and recognise the different roles and responsibilities of the community and the state. While these issues are clear in mainstream criminal process there is a risk that, without explicit guidance, they will become blurred in processes developed outside the court. The serious function and implications of criminal justice processes mean they should be beyond community or political whim.

### Recommendation

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

## 2.2

# Infringements and Minor Offences

- 26 Infringement offences and minor offences are separate statutory schemes intended to deal with minor offending in a way that requires no, or limited court involvement. In the case of infringements, it is only where an infringement fee is not paid to the enforcement agency within the prescribed time that the notice is referred to the court for collection or enforcement.
- 27 A very large number of minor offences are dealt with under these schemes. The police alone issue nearly 1.3 million infringement notices each year. It is important that with such a high volume the process is both fair and efficient. In this section, aspects of the schemes are discussed and recommendations are made with respect to some of the issues identified.

### Minor offences

- 28 Minor offences are summary offences punishable by a fine of up to \$500 (or \$2000 under the Transport Act 1962 or the Land Transport Act 1998). Under s 20A of the Summary Proceedings Act 1957, a “notice of prosecution” is usually issued rather than a summons. The only penalty imposed for a minor offence is a fine, and a conviction usually results.
- 29 Most minor offences arise under traffic laws, but the courts are also called upon to deal with a wide variety of other minor offences. While court costs are imposed, offenders are not usually required to appear personally. The level of fine is flexible. The amount can be adjusted within the maximum to reflect the gravity of the offence and the means of the offender. Arrangements can be made with the registrar for fines to be paid in instalments.

### Infringement offences

- 30 Infringement offences were first introduced in New Zealand in 1956 for some minor traffic and parking offences. In 1971 speeding infringements came into force. Infringement offence notices are now issued for a wide variety of offences including traffic matters, parking offences, resource management offences, underage drinking, under-weighting foodstuffs, dog control and bio-security offences.
- 31 Under the infringement offence regime the amount of a fine is predetermined without any regard to the means of the offender. A notice or ticket (sometimes described as an instant fine) is issued on the spot or through the post by the enforcement authority. Fees can range from \$12 for most minor parking offences, to \$10,000 for heavy vehicle overloading offences.

- 32 Infringement offences are concerned with less serious breaches and do not result in a formal prosecution or criminal sanction. The advantages of infringement offence schemes are that sanctions for the most minor misconduct are disposed of quickly, with no court costs or personal appearance and no criminal record.
- 33 Nevertheless, they are a blunt form of penalty. As an on-the-spot fine, no consideration is given to the circumstances surrounding the commission of the offence, or the financial and other circumstances of the offender when imposing the penalty. There is no discretion for the enforcement authority to vary an infringement fee in cases of hardship or for other reasons although, in certain circumstances, fees can be waived.<sup>116</sup>
- 34 While fixed penalties have the advantage of achieving consistency of penalty, they can be criticised for the inequitable way that they operate between offenders. Previous offending is not taken into account and more affluent offenders will always find it easier to pay fines than those who have less means.

### Key issues

- 35 The use of infringement offence notice schemes has grown considerably in recent years. For example, the Local Government Act 2002 widened the infringement offence regime for territorial local authorities, enabling all breaches of bylaws to be subject to an infringement offence regime. And while the value of court-imposed fines has remained largely constant for more than a decade, the value of infringements filed in court for collection has tripled over the same period to exceed \$250m in the 2002/03 year.
- 36 The growth in the use of infringement offences raises a number of issues, including:
- a proliferation of schemes, usually established by regulations, designed to achieve a range of enforcement or other purposes
  - apart from the Legislation Advisory Committee's guidelines, there is no principled framework to guide the establishment of infringement offence schemes;<sup>117</sup> this has resulted in wide variations.
  - differences in timeframes and variations with respect to infringement fees for similar breaches lead to unjustified disparity between schemes
  - the imposition of monetary penalties without regard to the means of the offender and the offender's ability to pay is not consistent with sentencing principles and has led to sentencing difficulties if an offender appears before the court for other offences

<sup>116</sup> The police informed us that fees are waived in an estimated 5–10 percent of infringement offence notices.

<sup>117</sup> The Legislation Advisory Committee issued guidelines on infringement offences in 2000. See Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001). The guidelines are set out in *Seeking Solutions: New Zealand Law Commission Seeking Solutions: Options for Change to the New Zealand Court System: NZLC PP52* (Wellington, 2002), 112.

- each year, large amounts of outstanding fees are remitted by registrars or judges, or remitted with alternative sentences imposed by judges
- in the last two years, payment of more than \$250m in infringement fees was overdue.

37 In a 2001 report the Law Commission expressed the view that consolidating the infringement system into a single regime was desirable to promote consistency and uniformity.<sup>118</sup> We remain of that view.

38 The two systems for dealing with minor breaches have not been developed together, with the result that there is no obvious rationale as to why some breaches are treated as minor offences and others as infringement offences. In *Simplification of Criminal Procedure Legislation* the Law Commission noted the possibility that minor offences could be subsumed into the infringement notice procedure.<sup>119</sup> Rationalisation along these lines is desirable.

39 Aspects of infringement offence schemes are currently the subject of work by the Ministry of Justice and the Land Transport Safety Authority. Our recommendations should either be considered in the course of those projects, or if not, may be included in terms of reference to the Law Commission for further work in this area.

## Recommendations

- R30 One statutory framework should be developed to regulate the establishment of infringement offence schemes and procedures.
- R31 Penalties for infringement offences should be reviewed to ensure there is proportionality between the behaviour being regulated and the penalty imposed.
- R32 The minor offence regime should be examined to determine whether some minor offences should be reclassified as infringement offences, or removed from statutes or regulations altogether.

<sup>118</sup> New Zealand Law Commission *Simplification of Criminal Procedure Legislation: An Advisory Report to the Ministry of Justice: NZLC SP 7* (Wellington, 2001), 3–4.

<sup>119</sup> See New Zealand Law Commission, above n 118, 4.

## 2.3

# Police Warnings and Formal Cautions

- 40 Before a criminal case goes to court, the current options of police warnings or diversion arise. The informal resolution of minor offending by the police through the exercise of discretion not to prosecute has always been an integral part of the criminal justice process. We suggest reforms to strengthen and enhance these processes in accordance with the guidelines for alternative criminal justice processes discussed earlier.

### Warnings

- 41 Police issue warnings when they consider that an offence is not serious enough to warrant prosecution. Warnings are widely used, do not incur penalties and do not appear as a conviction. They provide for the resolution of a minor breach of the law by way of admonishing the offender without a formal record being kept. Warnings are a recognised exercise of police discretion, made without the need for substantive guidelines.

### Police diversion

- 42 Diversion is intended for first offenders who have committed an offence that the police consider too serious for a warning but not serious enough to warrant the full intervention of the criminal law.
- 43 An eligible offender initially appears in court, but resolution of the charge takes place outside the courtroom through an informal agreement between the offender and the police, who have previously consulted the victim(s). If the offender accepts an offer of diversion made by the police and completes agreed tasks, aimed at making amends to the victim and the community (such as a donation to charity or payment of reparation) no evidence is offered and the case is dismissed, or the charge is withdrawn with the court's permission.
- 44 The result is that a criminal conviction is avoided although the police retain a record of the diversion. When the case is called before the court, the court is not able to override the police discretion to remove the case from the court's jurisdiction.

### Key issues

- 45 In *Seeking Solutions* we noted some of the criticisms that have been made of current police warning and diversion practices. While criticisms of the police adult diversion scheme could be met through changes in policy and practice, a more fundamental issue does not seem as easy to remedy. Because the police decide both whether to prosecute and how to punish, the boundary between the proper roles of the police and the courts can be compromised. The constitutional split between

law enforcement and prosecution versus adjudication and punishment is eroded due to both functions being controlled by a single agency.

- 46 Furthermore, the current diversion policy is characterised by the anomalous situation of offenders appearing in court in response to charges laid but the charge being discontinued if the police offer and the offender agrees to diversion. Court processes are invoked by the laying of a charge yet in reality there is no judicial oversight of the police decision, even though the offender appears in court. In the vast majority of cases, that court appearance serves no substantive purpose while using scarce resources.
- 47 The police are presently undertaking a review of adult diversion policy. In their submission they acknowledged a need to provide officers with more guidance in respect of warnings to promote consistent decision-making. The police also acknowledged the value of the Solicitor-General's 1992 Prosecution Guidelines, providing guidance on the prosecution process, and the usefulness of the guidelines in operation in England relating to the cautioning of offenders – now supplemented by the provisions of the Criminal Justice Act 2003 (UK).
- 48 The present framework for dealing with cases that do not warrant the full intervention of the law is inadequate. The only options available result in either an informal, unrecorded warning, or a charge being laid. There is a need for an intermediate formal step to provide a first offender arrested for a less serious offence with the opportunity to resolve the matter without appearing in court. Such a step would also provide a more robust process for the exercise of the discretion not to prosecute. Whenever a police officer deals with a person whom there is good cause to suspect of having committed an offence there should be three considerations:
- whether the offence is a sufficiently minor breach of the law that it can be dealt with by way of informal warning
  - if a charge is the appropriate response and the evidence is sufficient to provide a realistic prospect of conviction, whether, in the public interest, a formal caution ought to be given
  - if the case is one where the evidence is sufficient to provide a realistic prospect of conviction and the public interest factors tending against prosecution are clearly outweighed by those in favour, a prosecution may be considered.
- 49 The sound and consistent exercise of police discretion not to prosecute less serious offending is a critical factor in resolving cases that need not come before the court. Such decisions have obvious implications for offenders and it is vital that officers making them are assisted by clear and principled guidelines. Existing policy and practice needs to be reviewed and the opportunity taken to rationalise the exercise of police discretion along the following lines:
- the Solicitor-General's Prosecution Guidelines relating to the decision to prosecute, particularly with respect to the identification of public interest

factors, should be updated and formally adopted by the Commissioner of Police

- police guidelines relating to informally warning offenders for less serious offending that does not warrant a charge should be reviewed by the Commissioner of Police to provide better guidance and promote consistency
- a formal caution procedure should be adopted by the police in place of the present diversion scheme.

50 The formal caution procedure should include the following elements:

- An initial determination of the offender's eligibility for a formal caution should be made by the officer in charge of the case (usually the arresting officer) in consultation with the officer's supervisors. That would take into account first, whether the offender qualified to be considered for a caution (eg, because it was a first offence), and secondly, whether the circumstances of the offence warranted a caution.
- If eligibility for a formal caution is provisionally determined, the offender should be released on police bail for the decision to be made by the prosecutor and for any conditions associated with the caution (such as the payment of reparation or the making of a donation) to be identified. For example:
  - the offender should be released on police bail for up to seven days on the condition that he or she will return to the police station at an appointed time
  - as well as the bail bond, the offender should be provided with a document specifying the offence he or she is alleged to have committed and advising that the police will be considering his or her eligibility for a formal caution. The document should also contain advice about the consequences of a formal caution.
- If the decision is made to issue a formal caution, the offender should be advised and details of any conditions should be discussed when he or she reports on bail. For example:
  - the offender should be advised that bail will be continued for up to a further seven days to allow time to obtain legal or other advice, in which case a time and date to further report to the police will be fixed
  - the offender should be able to elect to accept the caution and any associated conditions there and then.
- If the offender accepts the terms of the formal caution:
  - a 'caution notice' (which should include a brief summary of the circumstances of the offence) should be completed and signed
  - if there are no conditions attached to the caution, the matter should be at an end

- if there are conditions attached to the caution, police bail should be continued for a further period to allow for the conditions to be met and for the offender to provide evidence to the police diversion coordinator that they have been fulfilled
  - once the offender has provided confirmation that any conditions associated with the caution have been met, the matter should be at an end. A record of the caution should be kept for two years and may be referred to in court in the event of any reoffending during that period.
- 51 The offender may be charged with the relevant offence (or the decision be made to take the matter no further) if:
- either the provisional determination or the prosecutor’s decision is that the offence is too serious to be dealt with by a formal caution
  - the offender does not accept the caution or its conditions, or wants the matter dealt with by the court
  - the offender fails to report on bail
  - the offender does not produce evidence that a condition associated with the caution has been met within the time agreed.
- 52 If a decision has been made to charge an offender, the option of a formal caution could still be available – even though the matter is before the court – if the prosecution considered it appropriate. In such cases an adjournment would be requested and once the formal cautioning process was completed, the court would be asked to withdraw the charge.
- 53 So far as implementation is concerned, some amendments to existing legislation would be required to give effect to the formal caution process (eg, Bail Act 2000 provisions relating to police bail and s 316(5) of the Crimes Act 1961 relating to the duty to bring an arrested person before a court). In addition, policies governing the operation of the process (such as the eligibility criteria) would need to be developed. As such criteria would concern decisions relating to the commencement of criminal proceedings, they should be promulgated by the Solicitor-General in the same way as the Solicitor-General’s 1992 Prosecution Guidelines providing guidance on the prosecution process.
- 54 This framework captures the essential requirement that alternative criminal justice processes can only be used with the agreement of an accused. To cater for instances where the accused feels the process has been unfair, or disputes the merits, he or she must always be able to have the issue determined by the court in a formal process. Consent of an alleged offender is essential for the process to have effect.

## Recommendation

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

## 2.4 Restorative Justice

- 55 Restorative justice has been described as “a generic term for all those approaches to wrongdoing that seek to move beyond condemnation and punishment to address both the causes and the consequences – personal, relational and societal – of offending in ways that promote accountability, healing and justice”.<sup>120</sup>
- 56 Restorative justice seeks to redefine crime in terms of the harm caused to another person or persons, rather than as breaking the law. The victim and offender become full participants in the process, with the state and legal professionals acting as facilitators to find ways to put right the wrong.
- 57 Commentators note that the increased use of restorative justice processes can lead to reduced imprisonment<sup>121</sup> and that, even if this is not the case, the process is worthwhile to participants by helping them reach some sense of resolution over what has occurred.<sup>122</sup>

### Existing restorative justice programmes

- 58 Restorative justice principles have been recognised in the New Zealand youth justice system since 1989, with the passage of the Children, Young Persons and their Families Act 1989, and courts have used restorative justice processes on an informal basis since the mid 1990s. The passage of the Sentencing, Parole and Victims’ Rights Acts in 2002 have given restorative justice processes explicit statutory recognition in the formal criminal justice system. The passage of these three Acts is a significant development for the use of restorative justice processes in New Zealand.
- 59 There are currently several different forms of programmes in New Zealand that can be described as operating within a restorative justice framework and not all are within the criminal justice system. Some schools, for example, use processes based on restorative justice principles.
- 60 Restorative justice initiatives linked to the court system include ‘family group conferences’ for young offenders, community-managed programmes with facilitated panel or victim-offender conferences that often divert less serious offenders away from conviction,<sup>123</sup> and court-referred restorative justice conferences for more serious offences.<sup>124</sup> The latter initiative is running in four

120 New Zealand Restorative Justice Network *Restorative Justice Values and Processes* (June 2003).

121 In New Zealand the Children, Young Persons and their Families Act 1989 greatly reduced reliance upon custodial sentences for young people.

122 J Eaton and Judge FWM McElrea *Sentencing – The New Dimensions* (paper presented at New Zealand Law Society seminar, March 2003).

123 Either with some government funding from the Crime Prevention Unit based in the Ministry of Justice, or reliant on private funding.

124 These have operated in four District Courts – Auckland, Waitakere, Hamilton and Dunedin – since 2001.

District Courts and is currently being evaluated as to outcomes for both victims and the recidivism rates of offenders, with the evaluation due at the end of 2004.<sup>125</sup> Restorative justice processes are also used to reintegrate offenders to their communities after the completion of sentences, including imprisonment. Several providers already operate programmes in prisons.

61 There is considerable variety in the way community-based programmes operate, reflecting local differences of objectives, ethnicity, relationships between iwi, community groups, judges and police and, not least, the particular drive and enthusiasm of the largely volunteer workforce. In contrast, the District Court scheme operates in the same way in all four courts assisted by the staff appointment of a Restorative Justice Coordinator and a formal training and accreditation process for restorative justice facilitators.

62 Māori service providers manage five of the 16 community restorative justice programmes funded by the Crime Prevention Unit within the Ministry of Justice. While there are commonalities between indigenous justice programmes in New Zealand and restorative justice as a whole, there are also important differences:

[Indigenous justice] systems typically share a number of features with restorative justice, but ... they often place a heavier emphasis on the restoration of the balance of relationships within the community disturbed by the offending than on the needs of the individual victim. The locus of responsibility for restoring the balance is often seen as lying with the family group or clan as a whole. Reintegration is usually central to indigenous processes. Response to the needs of victims is often part of the focus, but not a defining part of the process ... in this type the principal desired outcome is the reintegration of the offender into the community and restoration of the mana or balance within community relations. In other words, it seeks first the healing of the community and secondarily, or as a result, victim healing and offender rehabilitation.<sup>126</sup>

63 Experience so far suggests the restorative justice model can have considerable alignment with indigenous justice processes. Marae-based programmes such as at the Hoani Waititi Marae in Waitakere aim to change behaviour of young Māori offenders by setting up and monitoring individual programmes within a framework of whānau and hapū support. Victims may be unwilling to participate in what is essentially a Māori process but are invited and kept informed. The Rotorua Community Trust, initiated to provide restorative justice programmes for offenders using a community panel meeting to which the victim is invited, now has a contract with police to deal with all diversion cases. This is not based on a marae but the processes can be culturally-based.

## Key issues

64 The restorative justice movement is growing rapidly internationally and New Zealand has been a pioneer of various restorative justice models and processes. However, community enthusiasm is somewhat ahead of implementation of

125 The timeframe allows for offenders to be followed up for at least a year from the completion of each restorative justice plan.

126 VE Jantzi *Restorative Justice in New Zealand: Current Practise, Future Possibilities* (August 2001).

restorative justice policies. While the Sentencing and Victims' Rights Acts provide statutory recognition of restorative justice principles, national systems for funding providers, setting values and process standards for providers, and monitoring and enforcing programmes are not yet established, although work is underway.

- 65 The absence of national systems means a lack of consistency, transparency and accountability, which can create serious risks for both victims and offenders involved, and for the public credibility and acceptance of these alternative processes. The provisions of the Sentencing Act 2002 apply in all courts right now, not just in the four pilot courts or where a community provider has become established.
- 66 Concern has been expressed to us about the potential for lack of fulfilment of restorative justice undertakings. The legislation enables sentencing judges to take into account offers from offenders to make amends for their actions, but there seems to be no process to ensure these offers are fulfilled – unless the proceedings are adjourned while an offender carries out his or her offer,<sup>127</sup> or while restorative justice outcome plans are completed.<sup>128</sup> There are no national systems in place to establish responsibility for monitoring and enforcing these undertakings unless they are put into sentences. This is a major issue for the overall credibility of restorative justice.
- 67 Traditionally, there is a distinction between adjournments, which give offenders time to take personal responsibility and make amends prior to sentencing, and the administration of community-based sentences imposed by the judge, which is the responsibility of probation staff. It might be thought that if cases are considered suitable for adjournment and offenders are essentially given a chance to prove themselves, there is less need for supervision. Overseas, however, the importance of simple and regular reporting mechanisms for changing behaviour is stressed. This is partly as a means of encouragement and also to ensure prompt reaction to any failure by the offender to behave as agreed. The lack of such systems is recognised as a major problem in ensuring effective outcomes from family group conferences in the youth justice area.
- 68 In our assessment, when an offender is carrying out a community-based activity, whether before or after sentencing, routine reporting and enforcing mechanisms are required to ensure their activity is monitored and that those who do not carry out their plans are quickly brought back before the court. Supervising adult offenders on adjournments should not be left completely to informal community arrangements any more than it should be after sentencing.
- 69 In some of the problem-solving courts overseas, monitoring and recall is the responsibility of appropriately trained court staff. In New Zealand, probation officers have the training and competencies to deal appropriately with offenders either before or after sentencing. However, they have no statutory monitoring responsibilities prior to sentencing and are not involved unless the response to an offer to make amends or other restorative outcome is included in the sentence.

127 Sentencing Act 2002, s 10 (4).

128 Sentencing Act 2002, s 25.

- 70 Submissions also expressed concern about an intrinsic unfairness if restorative justice programmes are not available on a consistent basis to offenders and victims in all courts. Community groups indicated that they find it difficult to understand the basis for current government funding of community initiatives. The current demand for funding and support for restorative justice programmes probably outstrips available government funding.
- 71 The restorative justice movement already involves a wide range of community people and officials at both local and central government level. In order to apply limited resources effectively and equitably nationwide, transparent funding policies and requirements for best practice standards are a priority.
- 72 Very little substantive research has been done anywhere in relation to restorative justice and adult offenders. However, preliminary information is available from the pilot, and substantial research has been completed on what is effective with family group conferences.<sup>129</sup> In addition there are now many people in New Zealand with a wealth of experience in restorative justice, as well as published information based on this first-hand experience.<sup>130</sup>
- 73 The research report on the court-referred adult restorative justice pilot, to be published later this year, will be ground-breaking. Preliminary findings indicate that most victims found the restorative justice conference a positive experience, and 90 percent were pleased they had taken part. Most offenders decided to participate in order to make amends and believed the process and outcome would assist them to not re-offend.<sup>131</sup> The final report will provide data on whether these views change over time, whether offenders do re-offend, and how these findings differ from the view of victims and offenders who have not had a restorative justice intervention.

## Possible solutions

- 74 The Law Commission is of the view that government must urgently take the lead role to ensure there are clear accountabilities, transparent funding, consistent processes and fairness for parties before the court in relation to restorative justice. It is essential to have a workable and appropriate system for the monitoring and enforcement of restorative plans carried out under adjournments as well as after sentencing.
- 75 In establishing policy and best practice on these issues, we suggest that resources should be channelled to the kinds of cases and programmes where the most benefit to victims is possible, and which are likely to change serious offending behaviour in the long term. It will be important to limit the risk of net-widening and to ensure that interventions are proportionate to the offence.

129 Guidelines on best practice and practitioner effectiveness are summarised in G Maxwell *Achieving Effective Outcomes in Youth Justice: Implications of New Research for Principles, Policies and Practice* (paper presented at the 6th Annual Conference on Restorative Justice, Vancouver, British Columbia, Canada, 31 May–4 June 2003).

130 For example: government restorative justice website which includes a training manual for providers as used in the pilot, booklets, and newsletters – < <http://www.justice.govt.nz/crrj/> > . See also J Eaton and Judge FWM McElrea *Sentencing – The New Dimensions* (paper presented at New Zealand Law Society seminar, March 2003).

131 Crime and Justice Centre, Victoria University of Wellington Research Update No 1 (Wellington, December 2003).

76 The Ministry of Justice is currently developing a policy framework to facilitate the continuing development of restorative justice processes in New Zealand. It is intended to include guidelines for practitioners and restorative justice providers on the use of restorative justice processes in the courts, clarification of agencies' roles and responsibilities (including funding responsibilities), and guidance for Government and government agencies when considering funding proposals for new initiatives.

77 In 2003 the Ministry developed principles of best practice to identify when and how restorative justice processes should be used in the criminal courts, which have been approved by Government.<sup>132</sup> These acknowledge the community-based nature of restorative justice processes and are flexible enough to allow for diversity of practice at a local level. We understand that 2004 will see a focus on implementing the principles.

78 The challenge is to achieve these objectives in ways that provide leadership while also encouraging the community wellspring for restorative justice that has been so evident in New Zealand. The Restorative Justice Network of New Zealand has also undertaken work on these issues, reflecting contributions from providers in New Zealand and international thinking. It notes that it is not helpful to restrict "best practice" to a single prescribed process or set of procedures to be followed in every setting but rather to:

- specify the values and virtues that inspire the restorative justice vision
- describe how these ideals find expression in concrete standards of practice
- identify the skills practitioners need in order to initiate and guide interactions that express restorative justice values
- affirm that restorative justice values and principles should shape the nature of relationships between restorative justice providers and all other parties with a stake in the field, including government agencies which contract restorative justice services from community providers.<sup>133</sup>

79 The development of guiding principles would be in accordance with international trends. In 2002, the UN Economic and Social Council adopted a resolution encouraging countries to use the United Nation's *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.<sup>134</sup> The principles identify the need for countries to develop guidelines and standards and provide draft principles as a starting point. One of these states that:

Guidelines and standards should be established, with legislative authority when necessary, which govern the use of restorative justice programmes. Such guidelines and standards should address:

132 Ministry of Justice *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court* (October 2003).

133 Massey University Albany *New Zealand Restorative Justice Values and Processes* (November 2003) adopted by New Zealand Restorative Justice Network.

134 See < <http://www.restorativejustice.org/rj3/UNdocuments/UNDecBasicPrinciplesofRJ.html> >, last accessed 23 January 2004.

- the conditions for the referral of cases to the restorative justice programme
- the handling of cases following a restorative process
- the qualifications, training and assessment of facilitators
- the administration of restorative justice programmes
- standards of competence and ethical rules governing operation of restorative justice programmes.

80 It would seem sensible for any guidelines developed, consistent with the UN resolution, to stem from legislation that affirms fundamental principles. We endorse the use of regulations to provide a clear and rigorous basis for the operation of restorative justice programmes under the Sentencing and Victims' Rights Acts, and consider these could be formulated in consultation with the restorative justice community.<sup>135</sup> Key issues for restorative justice shown up by submissions and our investigations include the need to:

- identify the most important priorities for state funding of restorative justice initiatives, and direct funding accordingly
- ensure consistent availability of restorative justice providers for identified categories of case
- clarify best practice processes and values for providers of restorative justice programmes to the courts
- clarify the state's responsibilities in relation to monitoring and enforcement of restorative justice outcomes
- clarify the role of existing enforcement agencies such as police and corrections in monitoring and enforcement of pre-sentence restorative justice outcomes
- publicise government policies in relation to implementation of restorative justice so that community groups and local bodies can make informed decisions about their involvement.

## Recommendations

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

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

<sup>135</sup> The Domestic Violence (Programme) Regulations 1996 provides an example of existing legislation that sets criteria for referrals from court to state-funded programmes, developed by a working party with community involvement.

## 2.5 Problem-Solving Courts

- 81 In the evolution of options outside the formal criminal justice system much can be learned from the wide range of initiatives overseas. It has been suggested that four current influences are leading to the development of new criminal justice processes. These are:
- a worldwide movement towards the recognition of victims' rights
  - a trend towards the democratisation of process and empowerment of the community
  - a trend towards holistic approaches to offending, allowing cultural values and needs to be expressed
  - a move from procedural justice towards substantive justice.<sup>136</sup>
- 82 Therapeutic jurisprudence is a law reform approach that examines the effect of law and legal procedures on therapeutic outcomes. It can also be seen as part of a broader approach known as the “comprehensive law movement”, which offers an alternative to reliance on adversarial litigation.<sup>137</sup> In Canada, the phrase ‘participatory justice’ is used to incorporate both restorative justice and consensus-based justice processes in the civil courts. The restorative justice movement has been more prominent in New Zealand.
- 83 The concept of therapeutic jurisprudence originates from recognition that, for offenders with particular problems such as mental illness or drug dependency, punitive approaches are often ineffective and sometimes counterproductive in addressing criminal behaviour and reducing re-offending.<sup>138</sup>
- 84 Therapeutic jurisprudence represents a direction for courts that involves:
- ... [using the courts'] authority to forge new responses to chronic social, human and legal problems ... that have proven resistant to conventional solutions, [and seeking] to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behaviour of litigants and ensuring the well-being of communities.<sup>139</sup>
- 85 In the United States, the approach has led to adoption of the idea of specialist courts in many states, in particular domestic violence, drug and mental health courts but also a range of others. Offenders with identified special needs are diverted from general court processes into alternative treatment programmes

136 Judge FWM McElrea *Restorative Corrections* (paper presented at Conference of International Corrections and Prisons Association, October 2002).

137 W J Brookbanks “Therapeutic jurisprudence: implications for judging” (2003) *NZLJ* 463 at 472.

138 Some critics of therapeutic jurisprudence claim that it is inappropriate for the court to monitor health treatment plans and that this concept has largely arisen because of failure on the part of health rehabilitation services.

139 G Berman & J Feinblatt *Problem-Solving Courts: A Brief Primer* (New York Center for Court Innovation, 2001); see < [http://www.courtinnovation.org/pdf/prob\\_solv\\_courts.pdf](http://www.courtinnovation.org/pdf/prob_solv_courts.pdf) >. (Originally published in (2001) 23(2) *Law and Policy* 125.)

that address major underlying problems behind the offending behaviour. Approaches vary, but generally involve an interagency response and close judicial supervision of each offender prior to sentencing. Successful completion of the treatment plan is then taken into account at sentencing.

- 86 More recently the original concepts have been adapted in the United States and the United Kingdom for use in community justice courts dealing with all less serious offenders, rather than being restricted to specialist courts. Rather than therapeutic justice, the term ‘problem-solving’ is favoured. These courts have usually tried to make it easy to work closely with specialist agencies by providing them with space and support services at the court, rather than the court being directly involved in making therapeutic decisions.
- 87 They tailor community-based sentences to bring about changed behaviour on the basis of full information about the personal circumstances of the offender, such as employment, income and debt, housing, dependants, family support, and education as well as any major health problems such as drug dependency or mental health issues. In putting together a sentence plan, the court may work with agencies on issues that are peripheral to the offence but important in assisting offenders to change their behaviours, for example, to clear outstanding debts, sort out housing problems or educational opportunities. Offenders are required to report progress with the agreed plan regularly and failure to do so can result in prompt, stronger measures.
- 88 Sentencing plans developed on this basis are not unlike the plans developed by family group conferences in our youth justice jurisdiction, and now coming from restorative justice conferences.<sup>140</sup>
- 89 In New Zealand, elements of therapeutic jurisprudence, restorative justice and problem-solving concepts are found in both the civil and criminal jurisdictions including:
- Family Court referrals under the Mental Health (Compulsory Assessment and Treatment) Act 1992
  - Family Court referrals under the Domestic Violence Act 1985 to non-violence programmes and counselling
  - Youth Court family group conferences under the Children, Young Persons and their Families Act 1989
  - the Youth Drug Court pilot scheme (operating in the Christchurch Youth Court since 2002), which refers young offenders with drug and alcohol dependency to a treatment programme under judicial supervision
  - restorative justice programmes under the Sentencing Act 2002 and Victims Rights Act 2002.

<sup>140</sup> As noted, in New Zealand pre-sentence plans are not necessarily followed up with close reporting requirements of the offender, effective monitoring of plans and prompt return to court if necessary.

- 90 One benefit of using a problem-solving approach in criminal justice is that offenders who complete treatment programmes are less likely to re-offend than if they were sent to prison. They are held accountable and face swift consequences for failing to comply with court orders; the cost of providing treatment is less than the cost of imprisonment; and these courts promote an effective coordination of services.<sup>141</sup>
- 91 An important aspect of problem-solving courts is explicit recognition and use of the emotional issues inevitably involved in a criminal case, in processes that seek commitment from offenders, support of family and the agreement of victims to plans that involve attending treatment programmes or making restitution.
- It [therapeutic jurisprudence] suggests, in broad terms, an approach to law that is more familistic, less contractual and more capable of giving expression to ethical values of compassion, empathy and hope.<sup>142</sup>
- 92 However, it is important that the gains offered by the adoption of a problem-solving approach in the courts do not compromise other fundamental principles of justice, as there are recognised risks in this approach. Incorporation of problem-solving concepts into the court environment calls for caution because:
- there are risks to perceptions of judicial impartiality and equal treatment before the law when judges take a more interventionist role in sentencing
  - treatment services are the function of executive government and involving the judiciary may inappropriately blur the lines with the other branches of government<sup>143</sup>
  - the cost of establishing these courts, coupled with increased judicial workload may affect the efficiency and responsiveness of the rest of the court system
  - it requires skills and knowledge that some judges may not have.
- 93 Reservations of this kind have led to our recommendation for a principled framework that should apply to all alternative justice processes. With clarity on the guiding principles, we will be in a position to learn from the experience of problem-solving community justice courts overseas, which appears positive:
- The benefits of these new approaches is that they offer the means of exploring, in a range of legal settings, new solutions to tired and embattled legal problems.<sup>144</sup>
- 94 Some of the options are discussed further in relation to the summary criminal jurisdiction of the proposed Community Court, in Part 4.2.

141 R Van Duizend *The American Court System: Long Traditions, New Directions* <<http://usinfo.state.gov/journals/itdhr/0503/ijde/vanduizend.htm>>, last accessed 23 January 2004.

142 See W J Brookbanks, above n 137.

143 See W J Brookbanks, above n 137. For further discussion see also Judge AG Christean *Therapeutic Jurisprudence: Embracing a Tainted Ideal* (Sutherland Institute, January 2002).

144 See WJ Brookbanks, above n 137.

## 2.6

# State Mediation Services

---

- 95 A primary objective in any review of the civil jurisdiction must be to identify factors that would encourage early, satisfactory and inexpensive resolution of civil disputes. In this context we discussed mediation in *Seeking Solutions*, and we questioned whether it should play a more integrated role in our civil court processes.
- 96 Key to our approach is the view that parties have some responsibility to seek to resolve their differences before they come to court. If parties are encouraged to do this, the issues are more likely to be identified early and more satisfactory resolutions reached even where cases do still come to court. Where mediation is successful, there is little debate that an outcome which disputing parties reach themselves is preferable to one that is imposed.
- 97 Greater use of mediation also offers benefits to civil justice systems where cases are costing more and more money to resolve and administer through the court system. The more disputes resolved outside normal court processes, the more the pressure on court resources is relieved.
- 98 Mediation is emerging as a common element of the court systems of countries with which New Zealand often compares itself. New ways of resolving conflicts have developed alongside the formal adversarial model, giving parties more freedom to design their own solutions.
- 99 In the last decade, various alternative dispute resolution (ADR) processes, and mediation in particular, have become far more widely used in New Zealand in a wide range of disputes, and the number of people trained in some way as mediators has greatly expanded. State-managed mediation now operates in several specialist jurisdictions, including the Tenancy, Employment Relations and Weathertight Homes Resolution services, and under the Human Rights Act 1993. Both the Environment and Māori Land Courts promote the use of state-funded mediation and various new initiatives are proposed for the Family Court to make greater use of mediation.
- 100 There has been considerable ongoing discussion about whether, and how, the use of mediation could be expanded in relation to civil court processes. The Law Commission's work has highlighted some serious concerns about the way the mediation market is developing in New Zealand. Costs seem to be spiralling to levels that are beyond the reach of many people.
- 101 We have two proposals to enhance the use of mediation in civil disputes. One builds on existing state-managed mediation services to ensure that mediation is available as an alternative to the court system for cases of low value. The second is to introduce a presumption that the parties in cases filed in the mainstream civil courts will have tried mediation before cases are set down for hearing.

## In this section we recommend:

- R36 One organisation should take responsibility for coordinating all state-managed mediation services to ensure they remain accessible and meet high standards.
- R37 Mediation should be available through the coordinated service for a small fee, to parties with general civil disputes under \$50,000.

## The role of mediation

- 102 Mediation is a process led by a neutral third party who works with the disputing parties to help them explore, and if appropriate, reach a mutually acceptable resolution of some or all of the issues in dispute. Mediation offers many benefits for the parties to the dispute, the public generally and the court system:
- it requires an early settlement appraisal on the part of lawyers and clients, and ensures direct client participation in seeking consensual solutions via negotiation<sup>145</sup>
  - it has a high settlement rate and while many cases that settle at mediation might have settled before trial, it can significantly speed up this process<sup>146</sup>
  - it enables the parties to come to solutions that would not be possible through a court hearing; disputing parties keep greater control of how the solution is reached, have the opportunity to discuss peripheral problems, and to achieve an agreement that might better continue their relationship
  - studies into mediation schemes in the UK, Australia and the United States have reported high levels of satisfaction with the process among litigants and lawyers.<sup>147</sup>
- 103 In contrast, litigants, lawyers and the commercial community consider the court system costly, subject to delay and inefficient.<sup>148</sup> Some degree of delay in cases can be useful to ensure that all avenues for settlement have been explored and the parties are ready for trial. However, although around 90 percent of cases filed settle, many do not do so until the trial date is fast approaching as that provides an incentive for serious negotiation.

145 Dr J MacFarlane *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program* (paper prepared for the Law Commission of Canada, 2001), 3.

146 Prof H Genn *Central London County Court Mediation Scheme: Evaluation Report* (Lord Chancellor's Department, 1998), 44; S Clarke and E Gordon, "Public Sponsorship of Private Settling: Court-ordered Civil Case Mediation", (1997) *The Justice System Journal* (Vol 19, No 3).

147 See Prof H Genn, above n 146, 119; S Bordow and J Gibson *Report No 12: Evaluation of the Family Court Mediation Service* (Family Court or Australian Research and Evaluation Unit Research 1994) and Dr J MacFarlane *Court Based Mediation of Civil Cases: an Evaluation of the Ontario Court (General Division) ADR Centre* (November 1995).

148 While the number of cases filed has fallen, the average time between filing and disposal in the District Court has increased. In 1997, 76 percent of cases were disposed of within 52 weeks; that figure fell to 63 percent in 2000, and 67.5 percent in 2002.

- 104 The adversarial nature of civil litigation compounds the problem by engendering an initial climate where parties think only in terms of winners and losers. Many litigants navigate all the pre-trial steps before settlement, needlessly and at high cost. The court suffers by having to allocate precious court time on the basis of constantly changing caseloads, and consequently delays occur.
- 105 Research, consultation and submissions have indicated that there is general consensus that mediation is a positive way of resolving disputes. Individual submitters and community law centres highlighted the benefits that mediation can offer those who may suffer in a traditional court setting due to their financial means, experience, knowledge or position of power compared to their opponent.
- 106 The Buddle Findlay report<sup>149</sup> also reinforced what has been termed “an increasing appetite for early reporting, strategic settlement and early dispute resolution ... in relationships between commercial lawyers and their institutional clients ...”<sup>150</sup> Wider use of mediation in New Zealand<sup>151</sup> and abroad<sup>152</sup> signals a trend towards greater reliance on more consensual forms of dispute resolution. A recent Canadian report discusses the values that support this shift and encourages wider consideration of the promises and challenges of participatory justice for both the criminal and civil jurisdictions.<sup>153</sup>

### Existing mediation services

- 107 A growing number of potential litigants are willing to use forms of alternative dispute resolution, such as mediation, to resolve their differences outside the courtroom. Parties can employ private mediators at any point during a dispute, including while they are awaiting trial. Many mediators are trained and accredited members of the Arbitrators and Mediators Institute of New Zealand (AMINZ) and/or Leading Edge Alternative Dispute Resolvers (LEADR).<sup>154</sup>
- 108 As stated above, forms of mediation also take place as a part of court and adjudicatory proceedings in the Family Court, Environment Court, Māori Land Court and the Disputes and Tenancy Tribunals. The state employs or contracts mediators under the Residential Tenancies Act 1986, Human Rights Act 1993, Employment Relations Act 2000 and Weathertight Homes Resolution Service Act 2002.<sup>155</sup>

---

149 Buddle Findlay Lawyers *Quest for Efficient Justice: What does the New Zealand Business Community Expect of our Judicial System?* (September 2002).

150 See Dr J MacFarlane, above n 145, 5.

151 In recent months, mediation has been turned to to resolve leaky homes disputes and pay disputes with international rugby players.

152 Mediation now forms an integrated part of the court systems of Australia, Canada and the United States.

153 Law Commission of Canada *Transforming Relationships through Participatory Justice* (2003).

154 Formerly Lawyers Engaged in Alternative Dispute Resolution.

155 Family Proceedings Act 1980, s 13, Resource Management Act 1991, s 268 and < <http://www.weathertightness.govt.nz> > (last accessed 13 June 2003). See also the Human Rights Act 1993.

- 109 One aim of pre-trial conferences in the District and High Court is for judges and case managers to actively encourage parties to mediate – one school of thought is that making settlement exploration a more active part of case management is sufficient to enable cases to settle earlier. Under High Court Rule 442(5), parties can be ordered to mediate, but only with their agreement. There appears to be increasing use of judge-led settlement conferences in the District and High Courts.

### The mediation market

- 110 It has been strongly submitted by some that this existing mediation market in New Zealand negates the need for court involvement. Some mediation practitioners have argued that knowledge of mediation processes among litigants is good, that supply meets demand, and that there is no market failure that warrants intervention.
- 111 That there is an active market of mediators in existence is not disputed. However, the Law Commission is concerned about the way this market is developing. The assertion that costs seem to be spiralling may be because the market is being led by the commercial sector within which its use is booming – some mediators specialising in commercial disputes charge \$3,000 per day and for clients disputing many thousands of dollars this may well be a reasonable outlay. However, these charges are out of reach for many other people, especially as there is no assured outcome.
- 112 The current level of costs could turn mediation into a process only available to wealthy disputants. That is an unsatisfactory state of affairs for a process that is universally considered beneficial for all those involved. As one submitter put it:
- The effect of these developments has been that precisely the same cost barriers which inhibit or deny access to the courts (principally, lawyers' fees) are now being erected in relation to mediation.<sup>156</sup>

### Low take-up of mediation

- 113 Despite the existence of these services, we do not consider mediation is as accessible nor as widely used as it might be, at a national level and across the spectrum of cases and litigants.
- 114 There is no clear research indicating the levels of take-up of mediation in New Zealand. One study reported a perception among judges that there is an increasing reliance on forms of ADR in some types of disputes in the High Court, such as those involving insurance companies. However, that perception is less apparent among District Court judges.<sup>157</sup>

<sup>156</sup> Submission received from Jane R Chart, University of Canterbury.

<sup>157</sup> Preliminary findings of Ministry of Justice Alternative Dispute Resolution Research Programme. The final report is due in 2004.

- 115 Some mediation practitioners told us that take-up is low at the District Court end of the market – particularly among individual litigants – and that outside the larger firms and main centres lawyers are less likely to have any experience of mediation. It has also been submitted that the level of take-up of mediation at the suggestion of the courts depends on the judge’s enthusiasm for mediation. Indeed, some lawyers have said that they would be keen for judges to be more forceful in their encouragement.
- 116 Research into a UK court-linked voluntary mediation scheme indicated that still a very small proportion of cases take up the opportunity to mediate.<sup>158</sup> A US study also found that neither lawyers nor judges promoted ADR extensively when it was provided on a voluntary basis.<sup>159</sup>
- 117 Take-up may be low because litigants are unaware that an effective alternative to litigation exists. Lawyers reported that clients often feel strongly entrenched in their position and initially resist the suggestion of mediation. Some lawyers, on the other hand, may be unwilling to encourage their clients to enter the mediation process without fully knowing what to expect themselves, or for fear of it being seen as a sign of weakness in negotiation. The high cost of some mediation services may also have an impact on levels of take-up.
- 118 We have concluded that the existing civil mediation market is largely restricted to the commercial community. In our view, the existence of this narrow market does not negate the need for stronger measures to promote the use of mediation.

## Proposal for state mediation service

- 119 The current state of the mediation market suggests the need for some form of intervention to ensure accessibility and maintain consistently high standards. This could surely be achieved with the current mix of state-managed and private mediation providers. It seems timely for the significant expertise and knowledge captured in the state mediation models to be better coordinated and to have more impact on the market.
- 120 Our proposal is for an umbrella organisation to manage the existing state mediation services, and for these services to be available for general civil disputes below \$50,000, the level of claim we propose would exist in the Community Court. Our consultation has led to concerns that access to private mediation is out of reach for many because the cost would be out of all proportion to the value of the claim – placing it in the same camp as litigation. A state mediation service should be available in these cases for a small fee.

---

158 Prof H Genn, above n 146, 5. In the first two-year period of the scheme, only 160 mediations resulted from 4500 invitations.

159 J S Kakalik, et al *Just Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (RAND Institute for Civil Justice, 1996).

- 121 Combining existing state mediation services into one centralised body would enable advantages to be taken of economies of scale, enable the cross-fertilisation of ideas, and allow consistent standards of selection, training and quality assurance. Some mediators would be able to expand their experience into a broader category of cases and continue developing their mediation skills, but we also envisage that specialist categories of mediation would continue to exist as is appropriate.
- 122 A combined state mediation service could better represent the cultural diversity of New Zealand. Disputing parties from different cultures and backgrounds are likely to have very different views on what they expect from mediation, how they expect it to proceed, and who their mediator should be. The private mediation market alone is unlikely to meet all these needs, especially given the limited geographical spread of mediators.
- 123 The Law Commission has no doubt that mediation has much to offer people who have general civil disputes of low value. A low cost service would offer satisfactory, speedy and cheap resolution of disputes, many of which may be of a ‘community’ or neighbourhood nature, and would assist to keep disputes out of the court system. Such a broadly available service could also educate users on the benefits of mediation, and lead to the development of skills that may help litigants resolve their own disputes in the future.
- 124 Although our proposal imposes ongoing costs, state funding for mediation is already available in many ‘primary’ jurisdictions and this would simply extend it to a limited category of general civil disputes – those under \$50,000. We consider that access to justice, and the direction of the private mediation market, require the state’s intervention in this way. Rationalisation of the state’s role in funding mediation services would reinforce the state’s commitment to mediation as an alternative way of resolving disputes.

## Mediation and the Community Court

- 125 We propose that the state mediation service should be available to those with general civil disputes falling within the \$50,000 upper limit jurisdiction of the Community Court, for a small charge.
- 126 We do not suggest that people should have to file a claim in court in order to access the service, nor that the Community Court would be able to order parties to attempt mediation.

## Concerns about quality

- 127 In making this recommendation, we acknowledge the concerns of some submitters about the quality of mediation provided by some state-employed mediators.

- 128 Critical to a new state mediation service would be:
- the need to clearly articulate the role and ethical responsibilities of the mediators
  - a coherent policy on the aims and philosophy of the service
  - an effective appointment process
  - only people who are sufficiently trained being engaged as mediators
  - the need for a clear quality review procedure to be instituted from the outset, with performance standards for mediators.
- 129 Constant re-evaluation of training methods, procedures and strict appointment criteria should be of central concern to any state mediation service, and we emphasise the need for quality control in this area.
- 130 Practitioners identify different forms of mediation (eg, facilitative, narrative, interest-based, evaluative) as suiting different types of disputes or parties. We do not consider it necessary to define or restrict the form of mediation used in a state-managed system. Indeed, different models and techniques are still developing and a strength of mediation lies in its ability to remain flexible and to adapt method to match each set of circumstances.

## Recommendations

- R36 One organisation should take responsibility for coordinating all state-managed mediation services to ensure they remain accessible and meet high standards.
- R37 Mediation should be available through the coordinated service for a small fee, to parties with general civil disputes under \$50,000.

## 2.7

# Court-Mandated Mediation

- 131 During this review, we have given a great deal of consideration to whether courts should have the power to order parties to attempt to mediate a solution to their dispute.
- 132 Commentators have raised concerns that court-mandated mediation:
- is a barrier to access to court-administered justice
  - places a further hurdle in the court process that can waste time and increase cost<sup>160</sup>
  - is an unwarranted interference with the parties' autonomy to choose how they wish to progress their case
  - may be inappropriate where there is a significant power imbalance, or threat of violence, between the parties to the dispute
  - attacks one of the core purposes of the civil justice system – to resolve disputes by principled decision-making based on the rule of law, which maintains a body of law that people and commerce can rely on and which benefits other potential litigants<sup>161</sup>
  - undermines the very features that make mediation popular and successful
  - will result in an unjustified restraint on the evolutionary development of mediation.<sup>162</sup>
- 133 There is some validity to these concerns. However we consider that careful design and management of a court-mandated mediation rule will minimise the hazards. In particular, we consider it is possible to create a system in which party autonomy can be accommodated. We have concluded that the benefits offered in terms of the speedier resolution of disputes, greater choice and satisfaction for many litigants, and savings to the court system warrant the introduction of a court-mandated mediation rule.

### In this section we recommend:

- R38 There should be a presumption that cases filed on the standard case management track in the proposed Primary Civil Court and the High Court will go to mediation before the 13<sup>th</sup> week after filing.
- R39 The judge should have discretion to excuse parties from mediation, or to allow the parties to delay mediation.

160 See, for example, D Spencer “Mandatory Mediation and Neutral Evaluation: a Reality in New South Wales” (2000) *ADRJ* 237 at 249.

161 A Barker “Ideas on the Purpose of Civil Procedure” [2002] *NZLR* 437.

162 Submission received from New Zealand Law Society.

- R40 A multi-disciplinary working group of mediation practitioners, lawyers, policy-makers and trainers should oversee the implementation of court-mandated mediation and advise on:
- the qualification level required for mediators to be placed on the court list
  - a code of ethics and review or complaints procedure
  - rules for privilege and confidentiality, mediator immunity and good faith of the parties in the mediation.
- R41 Parties should be free to choose their own mediator or to use one contracted by the Ministry of Justice.
- R42 Parties using a mediator contracted by the Ministry of Justice should pay an additional fee set at a level that protects access to justice, in accordance with established principles for setting civil court fees. The fee should be a percentage of the relevant setting down fee.
- R43 Waivers available for court fees should also apply to mediation fees.
- R44 Judges should be able to order the parties to an appeal to attend mediation prior to the hearing.

### Access to justice, cost and imbalances of power

- 134 The suggestion that court-mandated mediation by definition denies access to justice is not sustainable – the parties are always able to have their case decided by a judge if they are unable to agree at the mediation. Compulsion to mediate does not mean compulsion to agree.
- 135 If the cost of court-mandated mediation were to become prohibitive or to significantly increase the cost of taking a case to court, access to justice concerns might be valid.
- 136 The model we envisage means that the judge will always retain the discretion to excuse a dispute from mediation – for example, if cost would create a hardship for either of the parties – or to order one party to carry the burden of the cost if there is a significant financial imbalance between the parties. Below, we also propose that legal aid should be available – subject to eligibility criteria being met – for both counsel and mediator fees, as well as the opportunity of a waiver for any court mediation fee.
- 137 The judge would also be able to excuse a dispute from mediation if there was an imbalance of power between the parties that might mean one party could be exposed to coercion or duress during the mediation.

### Party autonomy

- 138 Some argue that there is a contradiction in requiring people who want a legal resolution of their dispute to participate in a process that is outcome driven and

far from pure in the application of legal principle. It must be remembered that most people do not willingly go into litigation. They become involved because they see no alternative and a presumption that mediation will occur ensures that the potential for a quicker and less costly alternative is explored.

139 In its submission, LEADR said:

Mediation is part of a continuum of dispute resolution processes and any service should be able to provide or access any process which is relevant to the dispute and to the parties ... mediation should be seen as augmenting the existing processes within the judicial system ... rather than replacing what is currently available.<sup>163</sup>

140 We endorse this view and suggest that facilitating access to mediation through the court system offers more benefits than maintenance of the status quo. While we recognise that there may be valid reasons that a party is not ready for mediation or why it would be pointless in a particular case, in these instances, autonomy can still be exercised since parties will be able to obtain exemption. Expanding the form of dispute resolution available through the court system merely broadens the range of choices for litigants.

### The rule of law

141 The Law Commission sees no reason why the body of law will be diminished by the introduction of court-mandated mediation. At present only a tiny percentage of cases filed in New Zealand actually go to a full hearing in any event. Experience abroad is not that court-mandated mediation significantly reduces the number of cases that go to court, but rather that it helps others to settle earlier, thus enabling court resources to be managed more efficiently.

### Impact on mediation

142 Mediators have expressed concern that bringing mediation within an institutionalised framework has the potential to introduce incentives that run counter to its defining features and core goals. Central to this concern is the potential influence that introducing measurements of success, such as the imperative to achieve set disposal rate targets, could have.

143 We are sympathetic to concerns about the ‘institutionalisation’ of mediation and acknowledge that the success of any court mediation scheme should not be measured by ‘disposal rate’ alone, although we were intrigued to find that some leading mediators place great store on their ‘success’ percentages. Measuring success solely by the number of settlements achieved has the potential to encourage mediators to exert undue pressure on the parties to settle. While the ultimate aim of any mediation is clearly to reach a settlement, it also offers far broader benefits. Those benefits – for example, the restoration of the relationship between the parties – must not be lost because of a focus on efficiency gains alone.

<sup>163</sup> Submission received from LEADR.

- 144 Linked to this is the suggestion that mediators conducting court mediations need to be trained to recognise when to terminate an unproductive mediation.<sup>164</sup> This would be essential to ensure parties do not incur unnecessary costs.

## Presumption of mediation within case management

- 145 Our recommendation is that there should be a presumption that cases filed on the standard case management track in the proposed Primary Civil Court and the High Court should, in most cases, be required to attempt mediation before the 13<sup>th</sup> week after filing which, according to our recommendations regarding case management, would be the time that a second case management conference would normally take place in both courts.<sup>165</sup>
- 146 We propose that the Ministry of Justice should contract mediators, or a mediation service provider, to undertake the mediations, but consider that parties should be free to employ a private mediator if they so wish. Parties using mediators contracted by the Ministry of Justice should be required to pay an additional court fee, which should be set at a level that protects access to justice.

## Cases for which the presumption should not operate

- 147 A balance needs to be struck between ensuring that amenable cases are mediated, and ensuring that those where mediation is not appropriate gain exemption without a significant front-loading of costs. Parties who feel their case is not appropriate for mediation will, at the first case conference, be able to make submissions to that effect to the judge who should retain the discretion to excuse them from mediation. The threshold for this should not be high and parties who have already attempted a form of mediation facilitated by a neutral third party would normally be excused.
- 148 The judge should also have the discretion to allow the parties to delay mediation, for example, until after discovery has taken place. However, research indicates that cost savings are usually maximised the earlier that court-ordered mediation takes place. Since discovery adds greatly to cost for the parties, this discretion should be exercised carefully.
- 149 The Law Commission favours this approach over a model where judicial officers are required to decide, in every case before them, whether to make an order for mediation. It mirrors the practice of the Employment Relations Act 2000.<sup>166</sup>

---

164 Submission received from Jane R Chart, University of Canterbury.

165 We discuss civil case management in the proposed Primary Civil Court and the High Court in detail in Part 5.2 of this report.

166 See, Employment Relations Act, s 188(2): “Where any matter comes before the Court for decision, the Court—(a) must, whether through a Judge or through an officer of the Court, first consider whether an attempt has been made to resolve the matter by the use of mediation; and (b) must direct that mediation or further mediation, as the case may require, be used before the Court hears the matter, unless the Court considers that the use of mediation or further mediation—(i) will not contribute constructively to resolving the matter; or (ii) will not, in all the circumstances, be in the public interest; or (iii) will undermine the urgent or interim nature of the proceedings; and (c) must, in the course of hearing and determining any matter, consider from time to time, as the Court thinks fit, whether to direct the parties to use mediation.”

150 One effect of our proposal is that mediation would become part of the general culture of civil litigation. Judges would not be required to analyse the suitability of every case to mediation, but all parties would be required to give proper consideration to it. Where counsel consider mediation would be inappropriate, they will have time to prepare appropriate submissions rather than having to argue against an order, sometimes without warning, at a case conference. The number and types of case being the subject of mediation orders would also be less reliant on the enthusiasm of the case management judge, as might be the case under a different model.

151 We do not intend that the presumption should introduce an unnecessary and disproportionate step into the process in some cases. Compelled mediation has the potential to hinder some parties, whether by disproportionately or unnecessarily increasing cost, or because of power imbalances which may lead parties to settle against their best interests. One submitter said:

Awareness of both the limitations and the potential of mediation should be reflected in any moves to integrate mediation into the court system or to establish a separate mediation service.<sup>167</sup>

152 In deciding whether to exempt a case from mediation, judges might have regard to a number of criteria, rather than the resistance of the parties being determinative. These could include:

- whether the parties really want a legal ruling
- how intent either of the parties is on having their ‘day in court’
- whether the cost of mediation would be proportionate to the value of the claim
- whether the cost of mediation might create disadvantage
- the nature and number of parties, and the degree of power imbalance
- whether mediation has already been attempted.

## Recommendations

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

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

<sup>167</sup> Submission received from Jane R Chart, University of Canterbury.

## Implementation

- 153 Mediation takes place in private and what occurs is confidential. Its success is, to a significant extent, dependent on the skills and impartiality of one person. This raises a number of issues. A pivotal concern is that parties should not be compelled to enter mediation until:
- it can be ensured its cost will not act as a barrier to access to justice
  - there are sufficient trained mediators to undertake the task, who are guided by a code of ethics that serve to protect the parties and ensure mediator impartiality
  - a review or complaints procedure is in operation.
- 154 If the courts can require parties to attend mediation, the state must bear the responsibility for ensuring that the mediators providing a contracted service are competent.<sup>168</sup> Mediation is not an established profession, although there are ongoing steps to improve training standards and introduce minimum standards of behaviour. AMINZ and LEADR place restrictions in terms of qualification, experience and character on their membership.<sup>169</sup> Important lessons have also been learnt in the establishment of the mediation service under the Employment Relations Service. These are discussed further in Part 5.8.
- 155 We consider a review and complaints procedure, code of ethics and practice against which behaviour could be measured, as well as rules governing conflicts of interest are a prerequisite to the introduction of court-ordered mediation. Mediators contracted by the state should be required to work according to these rules.
- 156 We comment on three of these issues (privilege and confidentiality, immunity and good faith) below, but consider what we say advisory. Devising the finer points of how our proposal should be implemented demands the attention of those with experience in the mediation field. There is a wealth of knowledge and expertise in the market that can be drawn upon, and mediators have expressed enthusiasm about being involved in further developments. We consider that a multi-disciplinary working group of mediation practitioners, lawyers and policy advisers should be charged with the pivotal task of advising government further.

### Recommendation

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

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

168 In the Law Commission's *Dispute Resolution in the Family Court* report (above n 21) we emphasised the need for jurisdiction specific mediation skills and for further training to be a prerequisite for that jurisdiction.

169 See < <http://www.aminz.org.nz/about.html> > and < <http://www.leadr.com.au/about.html> > .

## Privilege and confidentiality

157 Our preliminary view is that mediation should be subject to privilege. Things said during mediation should remain confidential and should be inadmissible in any proceedings before a court. This recognises the need for openness and candour in mediation to give the greatest chance of settlement. It is in line with practice abroad.<sup>170</sup>

## Mediator immunity

158 Whether mediators should be immune from civil suit for anything done or said in a mediation needs to be considered.<sup>171</sup> Since they would be undertaking a state-directed service to act neutrally and impartially to assist people resolve their disputes, there is an argument that they should be immune from civil liability in the same way as judges are. Disputes Tribunal referees and Environment Court commissioners, carrying out mediations, are protected from legal proceedings,<sup>172</sup> as are mediators in some other jurisdictions.<sup>173</sup>

## Good faith of parties

159 It is important that parties attempt mediation in good faith. We have considered methods of reporting to the court upon the “bad faith” of one of the parties but apart from the “Calderbank letter”<sup>174</sup>, which currently exists, the negative consequences of the possible approaches appear to outweigh any benefit. It could compromise the mediator’s need to hold the trust and confidence of the parties and be seen to be impartial if he or she were able to report to the court that there had been bad faith.

160 With a “Calderbank letter”, either party has the ability to put the terms of a final offer to settle to the other party on the basis that the offer is “without prejudice except as to costs”. This can be produced to the court that has determined the issue when it is considering costs claims. This facility to make a “Calderbank” offer may go some way to ensuring that parties make a serious attempt at mediation.<sup>175</sup>

170 See, for example, Supreme Court Act 1970 (NSW), ss 110P, 110Q; Mediation Act 1997 (ACT) ss 9, 10; UNCITRAL Draft Model Legislative Provisions on International Commercial Conciliation, art 13.

171 D Clapshaw and S Freeman-Greene “A Mediation Act – Do we need one?” paper presented at the AMINZ Conference (Auckland, 21/22 February 2003), 6.

172 Disputes Tribunals Act 1988, s 58; Resource Management Act 1991, s 261.

173 Mediation Act 1997 (ACT), s 12 gives mediators the same protection and immunity as a Supreme Court Judge. Supreme Court Act (NSW) 1970, s 110R exonerates mediators from liability for things done in good faith.

174 *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333 (CA).

175 A Rules Committee Consultation Paper Proposed Amendments to the High Court Rules, District Courts Rules and Court of Appeal (Civil) Rules (issued 19 September 2003) proposes reinforcing the Calderbank offers provisions in the High Court Rules by introducing a presumption in favour of awarding costs to a party whose offer was not better in the final judgment.

## Choice of mediator and funding

- 161 A viable funding option is needed to ensure that the concept of court-ordered mediation is fair for all court users. The difficult and contentious issue of funding has been the downfall of proposed schemes in the past. It raises complex, and sometimes conflicting issues, in relation to the state's responsibility, accessibility, economic incentives and the health of the provider market.
- 162 On one hand:
- the introduction of a new, compulsory step into the civil process arguably imposes responsibility on the state to bear some, if not all, of the cost
  - the cost should not result in restricted access to justice
  - imposing a relatively high cost on parties who are ordered to mediate may be perceived as financially penalising those parties that the court deems more likely to settle
  - while there are probably overall cost savings to the court system from use of mediation, only some individuals will realise cost savings, and these may be hard to identify.
- 163 On the other hand:
- the parties need to have some financial investment in the mediation in order to ensure they take it seriously
  - free mediation may reduce the incentive for people to resolve their disputes by themselves; it could also have significant 'floodgate' implications
  - there is a body of experienced private mediators who are well versed in general civil mediation, and many who have done some training; there is little reason why well qualified mediators should provide their services without reasonable compensation.
- 164 The Law Commission considers that a model where funding is shared by the state and the parties is the most likely to protect access to justice, provide sensible incentives, and promote a market where the users are well informed and providers meet high standards. Neither total state funding nor a completely free market offers all these advantages.
- 165 We do not favour the model of judges, or registry staff, conducting mediations as happens in some jurisdictions. Judges are not qualified mediators, nor are they necessarily suitably skilled. Using registry staff as mediators raises similar concerns, and may be a model that would be particularly susceptible to the pressure of inappropriate ratings of 'success'.
- 166 Instead, we suggest the Ministry of Justice should contract individual mediators, or a mediation service provider, to undertake mediations for cases filed at the court. Parties should have the choice of engaging a private mediator of their choosing and at their own cost, or of using a Ministry-contracted mediator, for whose services they would pay an additional court fee.

167 To assist individual choice, each court should provide information and maintain a list of local mediation providers as well as of the available contracted providers. If the parties cannot agree on a mediator, a registrar would appoint a Ministry-contracted mediator, subject to rights of review by a judge.

#### The level of fee for mediation

168 It is difficult to assess what level of fee is reasonable, fair and proportionate for court users to pay in relation to mandatory mediation. Since our proposal brings mediation within the court's case management procedures, we propose that the fee should be set according to principles already established in relation to civil court fees.<sup>176</sup> These recognise that:

- there is both private and public benefit to be gained from early settlement; both the state and the individual have an interest in disputes being resolved as quickly as possible and at minimum cost
- this fact needs to be reflected in the ratio of contribution between taxpayer and user
- part-funding by the state protects access to justice.

169 Our view is that the party's contribution could reasonably and fairly be a percentage of the setting down fee (at present \$450 in the District Court; \$2,200 in the High Court). Proportionality would demand that the fee for mediation in the proposed Primary Civil Court should be lower than in the High Court. Whatever fee is imposed, it should be at a level that protects access to justice in the mainstream civil courts and the waiver available for court fees should also be available for the mediation fee.<sup>177</sup> Legal aid should be available, subject to the eligibility criteria, for both counsel and mediator fees.

170 Any arrangement would need to be able to be adjusted in response to changed circumstances, such as changes to legal aid eligibility, reduction of providers or increase in workload. If there is a robust mediation market, the Ministry of Justice should be able to negotiate fees that would not be excessive and the cost to users should be less than some fees in the private mediation market – just as legal aid rates are generally lower than private fees.

<sup>176</sup> As set out in Department for Courts *Review of the Civil Court Fees: Stage Two Consultation Document* (May 2003).

<sup>177</sup> See District Court Fees Regulations 2001, reg 4A, High Court Fees Regulations 2001, reg 5 and Court of Appeal Fees Regulations 2001, reg 6.

## Recommendations

- R41 Parties should be free to choose their own mediator or to use one contracted by the Ministry of Justice.
- R42 Parties using a mediator contracted by the Ministry of Justice should pay an additional fee set at a level that protects access to justice, in accordance with established principles for setting civil court fees. The fee should be a percentage of the relevant setting down fee.
- R43 Waivers available for court fees should also apply to mediation fees.

## Appellate mediation

- 171 Appellate mediation differs from pre-trial mediation. A major aim of pre-trial mediation is to get the parties face to face, whereas in the appellate context they have had ample opportunity to negotiate. There is therefore less to be gained from appellate mediation and correspondingly less reason for compulsion. Also, mediation should not offer another avenue to a vexatious opponent, who seeks to drag out the appeal process.
- 172 On the other hand, experience abroad suggests that appellate mediation can offer real additional benefits. Appeals involve different risks that may make an out of court settlement more attractive to the parties concerned: they raise the possibility of adverse precedent for both parties, and the chance of having the first instance judgment overturned.<sup>178</sup> Further, mediation after a judgment can help the parties re-establish their relationship – business or personal – can recognise a need for relief not taken account of in the court judgment, and can enable the parties to negotiate structured payments over time that might make the judgment easier to implement. It may offer benefits even to cases that have been mediated before.
- 173 Although settlement rates for appellate mediation are lower than for pre-trial cases (40–50 %), it can also lead to significant savings for the court and parties.<sup>179</sup> We propose that on appeal, judges should be able to order cases to go to mediation but without a presumption in favour of it.

## Recommendation

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

<sup>178</sup> See, G Sharp “Appellate Mediation: Cutting a Deal After the Deal has Already Been Cut” *New Zealand Lawyer* (22 February 2001), 9; M Irvine “Better Late than Never: Settlement at the Federal Court of Appeals” (1999) *Journal of Appellate Practice and Process* 341.

<sup>179</sup> See, Taskforce on Appellate Mediation *Mandatory Mediation in the First Appellate District of the Court of Appeal Report and Recommendations* (USA, September 2001), 9; G Sharp, above n 178.

# Part 3

## Court Structure

---

In this part we consider:

- the principles against which we measure the court system
- a new Primary Court structure
- strengthening the supervisory role of the High Court
- a principled appellate framework.

- 1 In this review we have used fundamental criteria as yardsticks to measure the court structure and any modifications to it. These are:
  - the constitutional position of courts
  - quality decision-making
  - proportionality
  - principled appeal rights
  - accessibility
  - respect for all
  - efficiency.
- 2 The Law Commission heard many concerns from submitters that – while not explicitly linked to the structure of the court system – are inevitably influenced by where the courts sit, how they are accessed and how the work is shared. Submissions called attention to:
  - the complexity of the present structure, which creates unnecessary barriers for lay people in understanding and respecting the court system
  - the absence of clear principles for the establishment of new specialist jurisdictions or courts
  - inconsistency in the provision of appeal rights
  - lack of a proper appreciation of the constitutional importance of an appellate system in upholding the law and maintaining consistency and confidence
  - an insufficient understanding of the supervisory function of the High Court
  - problems arising from the volume and range of work in the District Court
  - problems arising from the over-burdened situation in the Court of Appeal
  - the absence of clear and consistent jurisdictional boundaries between the general courts
  - a lack of flexibility in capturing the scarce available judicial resource and ensuring it is best utilised to meet particular demands.
- 3 In addition, the present court structure contributes to strains and stresses experienced by some judges, particularly in the high volume courts. It does not encourage collegiality between benches, and can make it difficult to share legal, policy, procedural or even administrative developments.
- 4 Structural changes will not necessarily resolve all these issues (and tensions are part and parcel of any system), but the current system is not as healthy as it could and should be. We have concluded that some aspects of the current structure seriously impede possible improvements in the delivery of justice.
- 5 We are satisfied that with increased coherence, focus and coordination, existing resources can be harnessed to deliver justice more consistently throughout the country.
- 6 A coherent and principled framework for the court system is an absolute necessity as a starting point.

## In this part we recommend:

### Primary Courts

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

- Community Court<sup>180</sup>
- Primary Civil Court
- Primary Criminal Court
- Family Court
- Youth Court
- Environment Court
- Employment Court
- Māori Land Court
- Coroners' Court.

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

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

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

### Appeals

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

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

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

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

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

<sup>180</sup> Described in Part 4 of this report.

## The nine Primary Courts

- 7 There is a commonality among what we have chosen to call the Primary Courts. Their principal function is to conduct the first formal court hearing of a case and make an independent and objective decision based on an assessment of the facts and law. They are the primary arenas in which the evidence is tested, and where cross-examination takes place as a matter of course. They are the courts where most people encounter the formal court system and which deal with most of the work. Whatever other processes may have taken place to try to resolve the dispute prior to that adjudication (such as mediation or investigation) this is the first judicial determination that authoritatively declares an outcome to a legal situation.
- 8 While the High Court also has substantial first instance jurisdiction, it can be distinguished from these Primary Courts by its core responsibility for maintaining consistency in the application of legal principle, and in supervising the operation of the Primary Courts.
- 9 We are conscious that our proposal involves removing the current concept of omnibus District Courts. A cluster of jurisdictions operating under that name has existed for two decades, although the concept of an all encompassing first court goes back far in our history.
- 10 We consider that the geographical element, which is the focus in that framework, is no longer the appropriate pivot. Of much greater importance are the various types of work which need to be dealt with. As our concept of a Community Court demonstrates, we are totally committed to a level of jurisdiction which is immersed in, and responsive to, individual communities. Maintaining catch-all District Courts which have such disparate areas of work appears to us to be out of step with the needs of contemporary society.
- 11 Since the early 1980s, the Youth Court and the Family Court have developed a nationwide presence. In our view that has been beneficial. The trend should continue by departing from the catch-all District Court model and recognising what has become the current reality of separate but complementary courts.
- 12 Legislation would be required to implement such a new court framework. For clarity, we suggest each forum should be termed a ‘court’. We find the present distinction between ‘divisions’ and ‘courts’ unhelpful for parts of a system that sit at analogous levels, and in the court structure we describe, it would be artificial.<sup>181</sup>

---

181 In this regard, we note our recommendation in Part 4.4 that the Disputes Tribunal and Tenancy Tribunal should become divisions of the Community Court.

- 13 Each of these courts employs its own processes, has a different role, and in some cases, embodies its own philosophy. We seek to maintain those areas of specialisation, while ensuring clarity and cohesion in the court structure and broadening the opportunities for flexibility.
- 14 Our recommendations have broad repercussions for some of the existing courts. They have an impact on the current share and transfer of work between jurisdictions, and on the routes of appeal from some of the courts. We consider the implications for each court in the following sections of this part of our report.

## Recommendation

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

- Community Court<sup>182</sup>
- Primary Civil Court
- Primary Criminal Court
- Family Court
- Youth Court
- Environment Court
- Employment Court
- Māori Land Court
- Coroners' Court.

## Specialisation

- 15 In our existing structure there are a number of courts and divisions, each with unique histories. The District Court has distinct civil and criminal jurisdictions, and two specialist courts – the Family Court and the Youth Court – within it.
- 16 Some of these courts and divisions sit separately, to a greater or lesser extent from the general courts. The Environment Court, although a stand-alone court, has, as its members, judges who are at once District Court judges and Environment judges. The judges of the Employment Court and the Māori Land Court sit as separate judges of their distinct jurisdictions.

<sup>182</sup> Described in Part 4 of this report.

17 In *Seeking Solutions* we set out factors for determining whether cases should be allocated to a specialist or a generalist court. They include:

- the nature of the work:
  - mainly legal decisions favour a generalist judge
  - mainly factual or discretionary decisions favour a specialist judge (and discretionary decisions more so than factual decisions)
  - controversial subject matter or questions of public importance, might favour a generalist judge to strengthen the perception of objectivity
  - highly technical or rapidly changing subject matter favour a specialist court
- how the work should be done and the matter decided:
  - specialist judges may be preferable if the matter has unique procedural requirements or needs to be decided quickly or if consistency is particularly important
- the volume of work:
  - if there are not enough cases to achieve a critical mass, specialisation will not be worthwhile; but if there are high volumes of cases raising nearly identical issues, this factor will support specialisation.

18 Specialisation is a facet of modern life and specialist courts have been established to meet specific requirements. Too often though, the emphasis is on the differences rather than the commonality that exists within all first instance courts. Some of the essential criteria for a robust court system identified earlier, such as accessibility, flexibility, proportionality and efficiency, could be more effectively recognised within a more unified framework.

19 We also see substantial benefit for the judiciary if there is a degree of cross-fertilisation between specialist jurisdictions. Within the existing District Court, individual judges now have warrants in a number of areas. In addition, two District Court judges hear certain Environment Court matters, an Employment Court judge holds a warrant for the District Court, an Environment judge is warranted to hear District Court Criminal Jury Trials, and Māori Land Court judges can sit as alternate Environment judges (although this has not occurred). The argument for this flexibility being extended to some of the other primary jurisdictions is compelling.

## Judges of the Primary Courts

- 20 We recommend that all the judges of all these courts (apart from coroners) should be sworn as tenured Primary Court judges. Future appointments should meet the current requirements for appointment as to experience, qualifications and personal qualities. There will need to be a coordinated and consultative appointments process. The rights of existing judicial officers will require protection but should not impede effective reform.
- 21 Primary Court judges would be warranted by the Attorney-General to sit in a particular court or courts. Warrants should be granted solely on the basis of additional competencies and interests.
- 22 Most judges would hold more than one warrant, as is the case now. Warrants might be granted or changed according to personal circumstances or workload demands. This flexibility has advantages in terms of professional development for judges as well as for management of the work volume. But there would be no wholesale transfer between the jurisdictions nor would Primary Court judges be deployed in a casual way between the various jurisdictions. Warranting would allow them to be strongly involved in particular areas.
- 23 Coroners are the exception as they are not required to have the same level of legal qualification as the judicial officers in the other eight Primary Courts, although many do. The Coroners' Court should form part of the Primary Court structure, but its judicial officers should instead be coroners, endowed with the powers, privileges, authorities, and immunities of a Primary Court judge exercising jurisdiction under the Summary Proceedings Act 1957. This is in line with the formulation in s 35(1) of the Coroners Act 1988<sup>183</sup> and consistent with what is proposed in the reform of that Act anticipated in 2004.

### Recommendation

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

<sup>183</sup> We discuss the coroners' jurisdiction in Part 5.7, below.

## Primary Courts Consultative Council and Coordinating Judge

- 24 There should be an office of a coordinating Chief Primary Court Judge who, together with a Primary Courts Consultative Council, made up of the Chief or Principal Primary Court judges, would have responsibility for the coordination of all the work of the Primary Courts; and for ensuring the best use of the judicial talent, experience and expertise available, and the most effective and efficient deployment of resources.
- 25 The existing and new Primary Courts would each have a Chief or Principal Judge as most do now (the Coroners' Court would have a Chief Coroner), who would have the day to day responsibility for leadership and advocacy of their jurisdiction, judicial rostering, the oversight of law reform, dealing with emerging problems and their specialist processes. Their role would be to look after the interests of their jurisdiction and to deal with the problems peculiar to it. We envisage these people continuing to be sitting judges so they would need adequate resources to do both aspects of their task well.<sup>184</sup>
- 26 Together they would form a Primary Courts Consultative Council which would be chaired by the coordinating Chief Primary Court Judge. This position would require appropriate support from officials and an adequately resourced office. We do not envisage the Chief Primary Court Judge having hands-on involvement in the individual courts, but instead would be responsible for the sensible use of facilities and resources between the various jurisdictions, provide coordination as needed and protect the overall integrity of the system.
- 27 We are proposing a structure that recognises the unique features of these various jurisdictions, provides leadership within them, sees each of them as an entity with a particular role to play within our community and which works in a sensible and rational way alongside other courts for the benefit of all who need to use the system.
- 28 The volumes of work in the Community Court will make it the largest user of the courthouse – precisely as it should be. Similarly the Family Court will be a large user with the other Primary Courts having lesser involvements.
- 29 All of this supports the nurturing and developing of particular processes and approaches which are the essential reasons why these individual courts exist as separate entities. They demonstrate the simple reality that different problems require different approaches. Our suggestion reflects the reality that we are a small country with a challenging geography and a relatively small population. We need to ensure that resources are well used and that the courts do not remain an impenetrable web for those who need their assistance.

---

184 The Judicial Matters Bill proposes that the term of office of the Principal Youth and Family Court Judges should be eight years.

## Recommendations

- R47 Each court should be headed by a Chief or Principal Judge, or Coroner, with responsibility for leadership and advocacy of the jurisdiction, judicial rostering, and oversight of law reform, emerging problems and court procedures.
- R48 A Chief Primary Court Judge, together with the judicial heads of each Primary Court, should have responsibility for overseeing the Primary Courts and coordinating their respective interests through a Primary Courts Consultative Council.

## Appeals

- 30 The ability to appeal a decision or request a review of the way the decision was reached is fundamental to our system of justice. However, it is a legitimate matter of public policy whether access to an appellate court should be as of right or by leave of the court.<sup>185</sup>
- 31 Historically the court system was substantially centralised. Over time, jurisdictions have been split off to cope more effectively with specialist issues.<sup>186</sup> There is now a variety of ways in which these separate specialist courts intersect with the general court system in terms of appeals and judicial review.
- 32 The High Court stands at the heart of our constitutional arrangements, and has a key supervisory role in relation to the Primary Courts. In our court system, the High Court has responsibility for supervision and the maintenance of legality and standards, by way of appeal and review. In our view, to ensure this role can be properly and consistently discharged, the Primary Courts should be arranged around the High Court. This is not about symmetry or status but the fundamental constitutional role of the courts. The duty to maintain legality is brought together in the High Court.
- 33 The role of the Court of Appeal will be that of a strong intermediate appellate court. The importance of its role has not been diminished by the establishment of the Supreme Court – for most cases the Court of Appeal will continue in practice to be the final appellate court. It needs sufficient time to give adequate consideration to the complex and significant cases that come before it.
- 34 In general, appeals from the Primary Courts should go to the High Court, which should also exercise judicial review of them. This should include the Employment Court, which currently looks to the Court of Appeal for both appeal and review.

185 B Opeskin *Appellate Courts and the Management of Appeals in Australia* (Australian Institute of Judicial Administration, 2001) para 51.

186 The Māori Land Court is an exception since it has always been a separate court. Its predecessor, the Native Land Court, was established as a specialist court in 1865. The motivation for its creation, stemming from colonial attitudes of that time, is questionable as is much of its early history. For further discussion, see Part 5.6.

- 35 The exception to this general principle, in relation to appeals only, is the Māori Land Court. For reasons of process, subject matter and history, appeals from the Māori Land Court should continue to lie in the first instance to the Māori Appellate Court.<sup>187</sup> However, in Part 5.6 we recommend that the further general right of appeal from the Māori Appellate Court to the Court of Appeal should instead be to the High Court, so all Primary Courts would be within its general supervisory jurisdiction.
- 36 We consider that this first appeal from a Primary Court should be a general appeal, on both fact and law, and should be as of right. A general right of appeal to the High Court from a lower court does not entail an automatic complete rehearing of the case from scratch. It is a right of appeal by way of rehearing, but on the record of the oral evidence given in the lower court. There is discretionary power to rehear the whole or any part of the evidence or to receive further evidence.<sup>188</sup>
- 37 In such appeals, the appellate court makes an allowance for advantages that the court or tribunal appealed from may have had in seeing and hearing the witnesses. In practice an appellate court, which has not seen and heard the witnesses, is slower to overturn a discretionary decision of a court that has had that advantage; stress is laid on the need to show that the decision under appeal was wrong.<sup>189</sup> As has been the case in the past, we would anticipate that the appeal court would show due deference to the experience and expertise of specialist courts on questions of fact and policy. In addition we would have the added advantage of specialist panels of judges in the High Court.<sup>190</sup>
- 38 This would be a change of position for the Employment Court and the Environment Court, which presently have a right of appeal on matters of law only. The argument is made that those courts have other preliminary processes, which ensure that the facts have been well tested before the primary hearing.
- 39 However, the primary hearing is the first formal hearing and adjudication. Despite the earlier processes, what takes place in these specialist courts are de novo or initial hearings. New matters do come to light, and it may be the first opportunity the parties have had to test the other side's evidence in full. It is also where the first binding judicial balancing of rights and responsibilities takes place. In our view, parties are entitled to a general appeal, even though the opportunity may not be frequently exercised.<sup>191</sup>

---

187 For further discussion see Part 5.6.

188 An example of this type of appeal was the former District Courts Act 1947, s 76, governing civil appeals from District Courts to the High Court.

189 *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 at 440.

190 For further discussion see Part 6.1.

191 For further discussion see Parts 5.4 and 5.5.

- 40 Any further appeal from the High Court would be on a matter of law only, and would require leave.
- 41 A constant argument against a general appeal to the High Court is that it would add a further step to these jurisdictions. When analysed, the majority of the Law Commission considers that this argument is not convincing. First, although there is potential for another step, leave must be obtained. Secondly, and more importantly, the potential for that step is already there with the unfettered right of appeal from judicial review.<sup>192</sup>
- 42 Frances Joychild, Law Commissioner, would qualify this approach in relation to the Employment and Environment Courts. She considers that their purpose-built dispute resolution mechanisms, tailored to the specialist nature of the jurisdictions, and consistent with the aims of the legislation, mean they should have fewer levels of appeal. Her view is that the leave provisions for the Court of Appeal and Supreme Court will not sufficiently filter appeals, as the issues will often be of public importance and therefore reach the Supreme Court. She suggests it should be made easier to leapfrog the Court of Appeal and go to the Supreme Court in these jurisdictions, possibly by a presumption that applications for leave to appeal from the High Court to the Supreme Court in these jurisdictions would be granted, except where the parties do not meet the requirements of s 13 of the Supreme Court Act 2003.
- 43 The Law Commission considers it is timely to restate the fundamental principles which should apply to the structure of the court system, and has proposed a structure which reinforces these principles and enables them to be upheld robustly. With all specialist jurisdictions these principles should be the starting point. The existence of specialist courts does not detract from the essential requirement that any state initiated and supported adjudication must be subject to the High Court's jurisdiction to "review for legality the exercise of all authority whether by the executive or by the inferior courts".<sup>193</sup>

#### Leave to appeal

- 44 At present, where leave to appeal is required, the question of who hears the application for leave varies: in some cases it is the court that made the original ruling, in others it is the court that is going to hear the appeal (the receiving court).
- 45 In the latter case, while the receiving court has to spend time deciding whether a case should go to appeal, before hearing it, it then has a measure of control over which cases proceed to appeal, and how many. This promotes a consistent approach, and helps ensure that only matters deserving further attention proceed to appeal. We recommend that the court that is going to hear the appeal is best placed to decide applications for leave to appeal.

192 *McGuire v Hastings* (2000) 1 NZLR 679.

193 Rt Hon Dame Sian Elias, Chief Justice of New Zealand, F W Guest Memorial Lecture (delivered at Otago Law School, Dunedin, 23 July 2003), p 17.

## Recommendations

- R49 The first appeal from a Primary Court should be a general appeal to the High Court, on both fact and law, as of right, with the exception of the first appeal from the Māori Land Court, which is to the Māori Appellate Court.
- R50 Further appeal from the High Court should be on a matter of law only and should require leave of the Court of Appeal.
- R51 Applications for leave to appeal should be heard by the receiving court.
- R52 The High Court should have primary responsibility for maintaining consistency in the application of legal principle, supervising the operation of other courts and the exercise of administrative power – functions which derive from its role as an appellate court, and the court responsible for judicial review.
- R53 The Court of Appeal should be a strong, intermediate appellate court with sufficient time to give adequate consideration to the complex and significant cases that come before it.

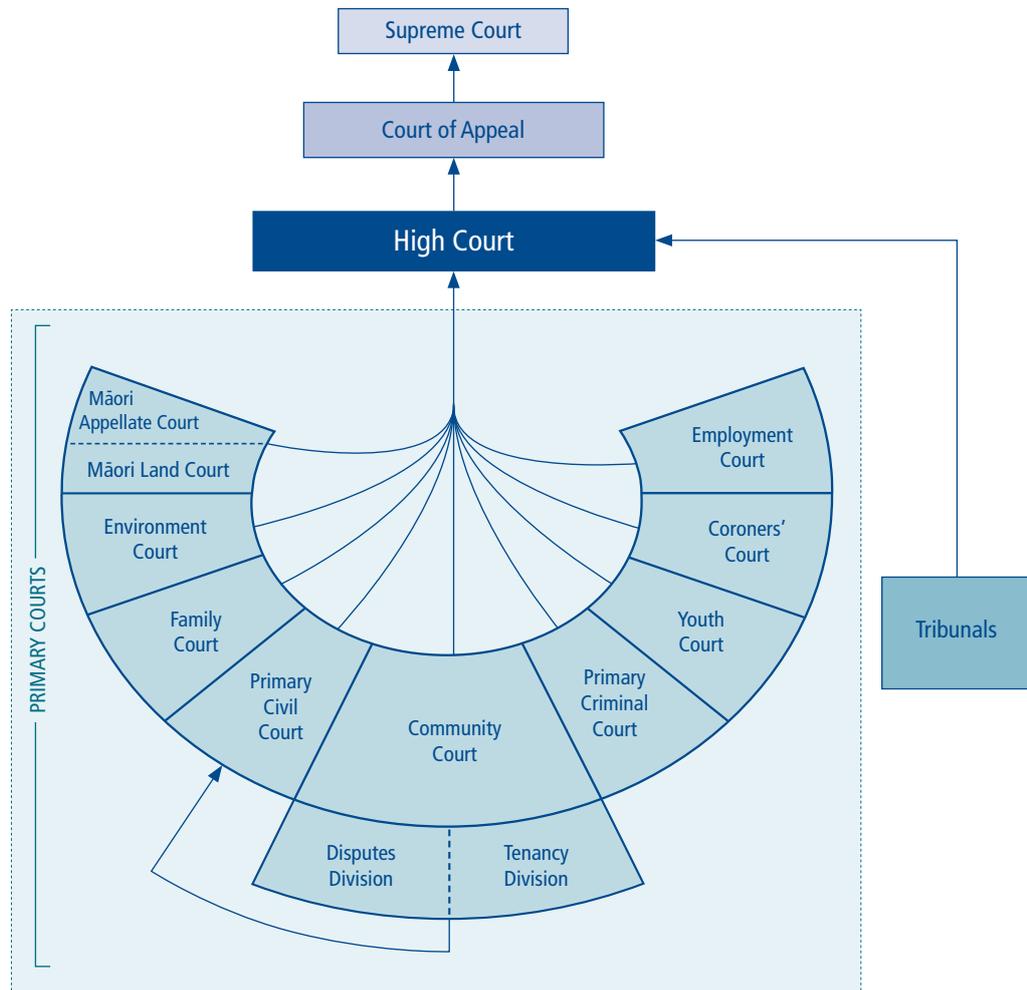
## Access

- 46 A simple but basic premise, which has in the past been taken for granted and often neglected, is that people need a place to start, a place where they can get assistance and direction, and where they may also have their adjudication carried out. For the court system to be available in reality, there need to be places where people can go, within a reasonable distance, where they can find help on a basis that is not alien or unnecessarily intimidating to them. The local courthouse or office should be the place where any citizen can seek guidance or entry into any part of a necessarily diverse system.<sup>194</sup>
- 47 Our general approach is that there should be a courthouse in as many communities as possible, and this should be the portal through which New Zealanders can reach all the Primary Courts. Court users should be able to access information about how to file claims, how processes work and who to contact in relation to any Primary Court through their local courthouse.
- 48 Some concerns have been raised about the potential for administrative complexity in our proposals. Because of volumes, some of the Primary Courts will make greater use of courthouses than others.<sup>195</sup> However, with modern technology there is no reason why frontline staff cannot be available to hear the court-related requests and inquiries of citizens and, if there is no suitably qualified staff person at that place, to make contact with someone else who is able to respond.

<sup>194</sup> We note that information and access to the Employment Court is widely available through Department for Labour outlets. We do not suggest that this should change, but that access should also be facilitated through our proposed Community Court houses.

<sup>195</sup> At present the Employment and Environment Courts are based in three centres in New Zealand. By contrast the District Court – the court that most New Zealanders come into contact with – sits in 64 locations.

## Proposed Court Structure



## Summary of application of principles

- 49 In summary, we see the benefits of a simpler and more coherent structure as:
- ensuring clarity and coherence in the court structure by strengthening the fundamental and distinct functions of primary, supervisory and appellate level courts
  - enhancing accessibility by enabling New Zealanders to access all primary level courts through their local courthouse
  - acknowledging the benefits of judicial leadership and direction for each jurisdiction
  - reinforcing the need for specialisation in some areas of the court system
  - allowing for flexibility in the use of resources by multi-warranting Primary Court judges to facilitate the efficient management of cases

- restoring the principle that every person having their rights determined by a court should have a general right of appeal on fact and law
- confirming the importance of the supervisory role of the High Court, which includes ensuring that specialist court decisions can be supervised for legality
- reaffirming the role of the Court of Appeal as the strong, intermediate appellate court
- ensuring resources are utilised in a way that is cost-effective for both the parties and the taxpayers by maximising use of judicial talent and resources at Primary Court level.



---

# Part 4

## The Community Court

---

# 4

In this part we consider:

- the case for a new Community Court
- the court's criminal jurisdiction and processes
- the court's civil jurisdiction and processes
- the role and position of the Disputes Tribunal and Tenancy Tribunal
- a new judicial officer, to be known as a Community Justice Officer.

## 4.1

# Establishing a Community Court

- 1 By far the majority of people who have dealings with courts in New Zealand have their cases heard in the District Court.<sup>196</sup> The way people are treated here, their sense of satisfaction and of justice having been done, and their understanding of the process they have been through has a huge impact on society's view of the court system and the extent to which it delivers justice.
- 2 There is widespread agreement among court users and legal professionals that there are considerable shortcomings in the way the court deals with the greatest part of its workload, which we will refer to as the court's "high volume work" and which comprises the less serious civil and criminal cases. It would be accurate to describe this part of the District Court as "the undervalued workhorse of the court system".<sup>197</sup>
- 3 This view was one of the clearest messages to the Law Commission. As we set out in *Seeking Solutions*, people consider taking lower value civil cases to court to be costly and disproportionate. They describe the criminal list court – the court where all criminal cases begin, and which deals with the greatest volume of people – as alienating and disempowering. Māori have forcefully repeated these criticisms at the hui attended by the Law Commission.
- 4 The unavoidable impression at present is that these sort of high volume cases are seen as less important than other cases and receive lower quality legal attention. The Law Commission considers the reverse should be true. High volume cases have just as great a need for judges with sufficient practical legal experience to deliver appropriate decisions. The increasing level of unrepresented or inadequately represented parties, noted in Part 1.4, demands judicial officers with robust knowledge of the law and the confidence and experience to be flexible within the law.
- 5 We are firmly of the view that these concerns must be addressed by the creation of a new court. The District Court judges have submitted that the problems experienced at the high volume end of the District Court could be tackled by changes in process, increased funding and the introduction of legally qualified Community Magistrates to undertake some of the work.
- 6 The Law Commission agrees that process changes are essential and will go a long way to achieving the desired improvements. Our proposals include detailed suggestions for change to high volume criminal and civil processes. However, we also consider the necessary focus will not be brought to bear on the high

196 For example, summary criminal cases (the least serious offences) took up 51.1 percent of District Court judges' sitting time between July 2002 and June 2003. Email from Business Information Section, Ministry of Justice, 19 November 2003.

197 J Willis "The Magistracy: The undervalued workhorse of the Court System" (2001) 18(1) *Law in Context* 129.

volume cases if they retain their ‘Cinderella’ status at the bottom of the District Court’s jurisdiction. Process change alone is not sufficient to bring about a change in the way the District Court operates, which we are convinced is needed to address all of our concerns. A fresh start is a prerequisite to making a fundamental change in culture and philosophy.

- 7 When the Royal Commission on the Courts recommended the Magistrates’ Court become the District Court in 1980, it was adamant that there was a need for it to remain the “People’s Court”. In reality, the “People’s Court” notion has eroded with the expansion of the District Court’s jurisdiction. With our recommendation for a Community Court we reissue the call for a People’s Court.

## In this section we recommend:

### Establishing the Community Court

- R54 A Community Court should be established at the same level as the other Primary Courts to deal with the high volume, less serious, criminal and civil cases currently heard in the District Court.
- R55 The court should have original jurisdiction over all cases heard summarily with a possible maximum penalty of 10 years’ imprisonment, and should hear the preliminary hearings of indictable offences. The court should hear civil disputes up to a value of \$50,000.
- R56 The Community Court should be a specialist court with its own principles, style and processes.
- R57 Principles should be developed, in consultation with community representatives, to guide the ongoing operation of the Community Court, and be included in the founding legislation.
- R58 The principles should reflect the need for each Community Court to be accessible and responsive to its community, to deal effectively with criminal behaviour, to provide early clarification of issues and understandable processes for those with cases in the Community Court and to be a portal for general information and advice for all court jurisdictions.

### The court and its community

- R59 A national advisory group with community representatives should be established to advise on the development and implementation of the Community Court concept.
- R60 The Ministry of Justice should seek advice from Māori leadership as to how appropriate Māori representation should be achieved at a strategic level.
- R61 Each Community Court should have a Community Court Consultation Group, with a membership that represents the community where it is situated.

- R62 Each Community Court should employ one or more Community Liaison Officers with responsibility for maintaining a two-way dialogue with the community and court users.
- R63 Each Community Court Consultation Group must include representatives of local iwi and hapū.
- R64 Judges and staff should work with the Community Court Consultation Group in an ongoing relationship, to enhance the effectiveness of the court's processes and practice for persons who attend the court who are Māori; or from ethnic and cultural minority and disability groups.
- R65 One of the Community Liaison Officer's core functions should be to establish formal and enduring relationships with local marae, runanga and urban entities.

## The case for reform

- 8 The shortcomings at the high volume end of the District Court arise from operational, process and structural causes.

### Operational issues

- 9 The way people are dealt with in courts and court buildings are among the most frequently made criticisms from submitters to *Striking the Balance* and *Seeking Solutions*. They suggest that from the moment they are contacted by the court, to arriving at the courthouse and appearing before a judge, there are serious deficiencies in the way they are treated.
- 10 People have criticised the lack of information they are given before a court hearing, the responses of court staff, and the degree of attention they are given during the hearing. There is a feeling that the courts are operating for those who work in them, rather than those they serve.
- 11 The cost of going to court and finding representation has also been criticised. People feel that the cost is disproportionate for low value civil cases, and that as a result they are often forced to represent themselves. The problems surrounding the lack of information and help given are compounded for the unrepresented.
- 12 Although these criticisms are undoubtedly also a reflection of the process and workload issues experienced by the court and of the resource that is available, improvements can be made.
- 13 In response to these specific problems one of our core goals for the new court is that it must improve the experience of all those who enter. Our vision of a Community Court is a place citizens can approach with confidence that they will be treated decently, whatever their reason for coming to court.

## Process issues

- 14 At present the same basic processes and rules apply to all civil cases heard in the District Court – a case will be treated in more or less the same way whether it is for \$20,000 or \$200,000. This can be disproportionate. Also, the complex nature of the processes are not easy for unrepresented people to understand.
- 15 In the criminal jurisdiction, the criminal list court is the point at which all summary and indictable proceedings enter the system. It is the first place where defendants have the opportunity to respond to charges laid against them and the process is intended to be efficient by gathering judges, lawyers, court staff, duty solicitors, corrections and other agencies together in one place.
- 16 However, the sheer volume of cases coming before the court compounds the fact that court processes sometimes appear alienating, confusing and frustrating. Usually people must give up an entire day, sometimes longer, and they are not always equipped or assisted to participate effectively in the process.
- 17 High volume work needs streamlined processes that will deal with cases fairly, quickly and proportionately, and improve public understanding and therefore confidence in the court system.

## Structural issues

- 18 In the 25 years since the District Court’s establishment was called for by the 1978 Royal Commission on the Courts, its caseload has grown far beyond anything then envisaged.
- 19 In part, this can be attributed to changes in New Zealand society – since 1978 the population has expanded and crime rates have increased. The Department for Courts (now part of the Ministry of Justice) has forecast that the number of criminal cases is likely to increase by six percent nationally over the next five years. As the District Court judges said in their submission, “the courts cannot expect to be immune from the changes that have occurred outside their doors”.
- 20 Also, the jurisdiction of the court has been expanded. The monetary limit on the civil jurisdiction of the court has been increased incrementally from \$3,000 in 1978 to \$200,000 today. In Part 5.2, we recommend it should be increased further to \$500,000.
- 21 The court’s criminal workload increased in 1991 when the “middle band” procedure was introduced under which specified indictable offences can be tried in either the District Court or the High Court. In reality, this has resulted in almost all but the most serious criminal work being done in the District Court. In Part 5.1, we recommend that the middle band of offences should be abolished, with most criminal jury trials being heard as a matter of course in the proposed Primary Criminal Court.

- 22 The expansion at the top end of the court's jurisdiction means that the high volume work at the lower end of the court – sometimes seen as the most mundane – has suffered. Yet it is at that point that most New Zealanders come into contact with the court system. To those people the issues involved in their dispute are anything but mundane.
- 23 This reality has two appreciable effects on the court.

#### Workload and scheduling

- 24 The wide jurisdiction of the District Court creates difficulties in scheduling all cases with due priority. The criminal list court must always take priority. The volume pressures in the list court can result in delays for criminal trials and for the court's civil work.
- 25 The result is that matters are not always dealt with as satisfactorily as the parties concerned would like. A major reason for this is that judges have insufficient time to deal with cases as effectively as possible. The pressures on them mean that they are not able to dedicate as much time to each person appearing before them as justice and fairness dictate.
- 26 This, in turn, has an impact on efficiency – not enough time for each matter often means cases are stood down a number of times before they are dealt with properly. This contributes to the burgeoning workload.
- 27 Courts are by necessity reactive and have little influence over the factors that lead to criminality or result in people bringing their disputes to court. They have little control over the volume of cases that come before them. The Law Commission is convinced however that changes can be made to processes and to what goes on outside the courtroom to ensure that more time is created and that defendants are sufficiently prepared. The aim is that each court appearance should be meaningful and effective, and that accordingly savings are made.

#### Matching judicial skills to the work (H5)

- 28 The District Court judges' submission stated:
- List courts impose their own particular demands. They call for a reasonable level of personal efficiency and organisational ability as well as decisiveness ... It [sitting in the court] calls for different techniques and approaches than are required when sitting in other areas of the District Court jurisdiction.
- 29 At present the workload and breadth of jurisdiction mean it is not always easy to best match judicial skills to cases. The Law Commission's view is that a new court would facilitate specialisation.
- 30 The Law Commission agrees that trial work can demand different skills from work in the list court and that the work at the high volume end of the current District Court's jurisdiction demands a different focus from other cases heard in the District Court. It needs people with particular skills and empathy. But it also

has just as great a need for judges with sufficient practical legal experience to deliver appropriate decisions.

- 31 Key to the Law Commission’s call for a specialist Community Court is to allow it to develop its own judicial style. This parallels the call by the 1978 Royal Commission for a Family Court to be a distinct division of the District Court with its own “judicial philosophy”.<sup>198</sup> While the underlying law will remain the same, the court should have the flexibility to develop a working style that is more attuned to the communities it is serving.

## Summary

- 32 Many of the problems we have identified are to an extent intangible, but very real for those affected. They include dissatisfaction for court users and stress for all those involved in a court hearing. While these problems are hard to quantify, they have a serious impact on the image of justice and on confidence in our court system.
- 33 These failures also result in a great deal of waste for individuals and for the state. For example, on each occasion that a judge adjourns a case because an accused has not been able to obtain any advice, time and money is wasted. Similarly, each time cases settle at the door of the court leaving resources committed but unused, money and time is used up unnecessarily.
- 34 Ensuring that every court appearance is meaningful and productive should have a significant effect in limiting this waste and will mean that the dollars allocated to this part of the court system are used efficiently.
- 35 Improvements in the quality of experience for court users together with increased efficiency of process are critical. We consider an arena with this particular focus, together with the introduction of streamlined processes, and appropriately qualified judges, can achieve much.

## Overseas parallels

- 36 In comparable overseas jurisdictions the work of our District Court is generally divided between trial courts and lower courts. In most Australian states<sup>199</sup> District or County Courts are responsible for cases at the upper level of our District Court’s jurisdiction, and Magistrates or Local Courts for cases at the lower level of jurisdiction.
- 37 In England and Wales, the Crown and County Courts deal with work similar to the top end of our District Court. The lower end is handled by Magistrates’ Courts, which have jurisdiction over both criminal and civil cases, and dispose of over 95 percent of all criminal cases.

198 Royal Commission on the Courts *Report of the Royal Commission on the Courts* (Wellington, 1978), 146.

199 The exceptions are Tasmania, and the Australian Capital and Northern Territories.

38 A recent English Government policy document suggests replacing Magistrates' Courts with local community courts.<sup>200</sup> The document states that:

... courts and judicial appointments are seen as unrepresentative and out of touch with the communities they serve – both in social terms and with people's daily experiences.

39 While we are similarly convinced that this sort of work should be dealt with by a distinct court that is clearly different in process and style from the proposed Primary Criminal and Civil Courts, we do not envisage the Community Court as a lower court. Instead it would be a specialist jurisdiction, at Primary Court level, dealing with issues that are of just as much importance as those resolved in the other Primary Courts. The work which needs to be done is different but no less important.

## A platform for ongoing change

40 Not only will the creation of a new Community Court tackle these problems, it has potential as a platform for more fundamental and ongoing change.

41 There is a growing view that the forum dealing with high volume criminal and civil cases should play a broader role in the delivery of justice. In the first place courts are adjudicative and responsible for administering justice and determining rights. This assertion is undisputed. However, courts are also the community's gateway to the justice system. Some community level courts in Australia, the United Kingdom and the United States see themselves as having a legitimate role in building a more direct relationship with their community, by understanding the tensions and influences that contribute to criminality in their locality and being at the forefront of new strategies for the delivery of justice.

42 There is an almost constant flow of new ideas, developments and initiatives for how best to deal with criminal offending and to aid the resolution of civil disputes. The Community Court could provide a forum where many of our proposals for the provision of information and advice can be immediately implemented, where concepts of problem-solving and restorative justice might be further developed, and where improvements in technology can be trialled.

## New processes

43 In New York, for example, the Red Hook Community Justice Centre lists its aims as threefold: to confront not just the crime but the criminal and his or her environment; deal effectively with the petty crimes that can lead to more serious offending; and to have all the services relevant to the defendant in one place.<sup>201</sup> Critical to this approach is the development of links and working relationships

---

200 National Policy Forum Consultation Document *Justice, Security and Community* (January 2003).

201 See < <http://society.guardian.co.uk/crimeandpunishment/story/0,8150,975068,00.html> >, last accessed 8 August 2003.

with the community and other agencies working in the community. This court houses staff from 14 other agencies, including drug and mental health assessment providers and a variety of public and private programme providers, so they are on hand to work with those coming before the court.

- 44 The centre employs a resource coordinator who organises the flow of information to the court for every case, including recommendations for specific placements with programme providers. This information is at hand for the judge before the defendant appears.<sup>202</sup> Resource coordinators carry out a new role for court staff and are a feature of all of the New York problem-solving and community courts.<sup>203</sup> Unlike probation officers in New Zealand whose responsibility only commences after conviction, they are involved in providing this information to the judge before defendants make their first appearance.
- 45 In a similar way, a range of service providers now assist magistrates in Victoria, including Aboriginal liaison officers, disability coordinators, a bail advocacy programme and community correctional services, among others.<sup>204</sup>
- 46 On a recent visit to the New York Midtown Community Court, Lord Falconer, the British Secretary of State for Constitutional Affairs said the public should expect the courts to understand the community and its problems and that the community court system in New York has taken the lead in steps to connect courts to the community.<sup>205</sup> The United Kingdom has signalled an intention to pursue a similar approach with the aim that “community justice centres ... will eventually form a central part of the Government’s drive to engage local communities in the criminal justice system”.<sup>206</sup>
- 47 Our Community Court could provide an umbrella under which various agencies providing services for victims, offenders, witnesses and disputing parties are coordinated. With a more combined effort, the court and those services could play a core role in the community they serve; by reaching out and working with those members of the community most affected by crime, and doing more to reduce the underlying tensions that can lead to and escalate instances of criminal behaviour.

## New technology

- 48 Increased use of video links and telephone conferences mean that, in most jurisdictions, the physical presence of the parties and their lawyers at court is unnecessary for all pre-trial hearings. The submission from District Court judges pointed out that prisoners are still transported great distances to take part in a hearing that might last a few minutes, which would sometimes be unnecessary

202 Information from visit to Red Hook Community Justice Centre, New York, September 2003.

203 A Phelan “Solving human problems or deciding cases? Judicial innovation in New York and its relevance to Australia: Part I” (2003) 13 *JJA* 98 at 120.

204 I Gray, “The People’s Court – Into the Future” (Twelfth AIJA Oration in Judicial Administration, 22 June 2002), 2.

205 “Chief of British Courts Takes a Cue From New York” *New York Times* (16 December 2003).

206 Home Office Press Release *Support Package for the Development of Community Justice Centres Agreed* (2 Apr 2003). See also Home Office Press Release *Liverpool to Pioneer One-Stop Crime Busting Centre* (11 September 2003).

---

if there were video links to prisons. New Zealand has been somewhat slower to experiment and adopt these technologies at all levels of the court system than other countries, yet they offer huge potential for saving cost and time for all involved, given the small size and isolation of some communities.

- 49 The use of electronic technology for internal administration and to manage the flow of information between lawyers, their clients, other professionals and the judiciary is already silently revolutionising the operation of most courts. The Department for Courts completed a modernisation programme for internal electronic management of court cases and fines collection in 2003. Many countries are now working towards fully integrated national electronic systems, which would provide judges, lawyers and court staff with the ability to share the document filing and case management database.
- 50 In *Seeking Solutions* we asked questions about the direction of further investment in information technology to enhance the court system. In light of the community's high and expanding use of the internet, improving access to law-related information by developing availability on websites may be more worthwhile than, for example, electronic filing capability, if choices have to be made. However, the choices will not be easy nor obvious. Enabling cases to be dealt with efficiently by having all the relevant information to hand electronically, will benefit court users as well as professionals. We suggest that systematic and strategic planning is needed to ensure that the vision of the Community Court is supported by technical developments that benefit users of the court.

## Features of the Community Court

### Jurisdiction

- 51 We propose that the Community Court should have original jurisdiction over all cases heard summarily with a possible maximum penalty of 10 years' imprisonment and should conduct the preliminary hearings of indictable offences.<sup>207</sup> All criminal cases would commence in the Community Court. Judges would have the same sentencing authority as District Court judges exercising summary jurisdiction have at present. There would be no jury trials in the Community Court.
- 52 There may be some exceptional cases where – although the maximum penalty is 10 years or less and the defendant has elected a summary trial – the particular circumstances of the offence or offender and the interests of justice call for the case to be heard by a Primary Criminal Court judge. That possibility should be available on application by prosecution or defence, although we anticipate it would seldom be exercised.
- 53 The upper limit on general civil claims in the Community Court should be \$50,000. The court would not have jurisdiction to grant injunctive relief.

---

<sup>207</sup> Where a person is charged with two or more offences, one of which is outside the jurisdiction of the Community Court, then all charges will be heard in the higher jurisdiction.

The figure of \$50,000 is intended to capture most cases that ordinary citizens or small businesses need to pursue in the normal run of activities, and is not based on any formula other than common sense.

- 54 We propose that parties with cases involving more than that should be able to transfer them to the Community Court by mutual agreement, if they want the matter to be dealt with according to the streamlined Community Court processes. The ceiling figure should be adjusted to reflect inflation over time.
- 55 This work represents a significant part of the District Court's workload. In 2002/03 the summary criminal jurisdiction of the court took up 51.1 percent of District Court judges' sitting time.<sup>208</sup> When the civil jurisdiction is added, we are envisaging a court dealing with about 60 percent of the work currently heard in the general civil and criminal jurisdictions of the District Court.

## Recommendations

- R54 A Community Court should be established at the same level as the other Primary Courts to deal with the high volume, less serious, criminal and civil cases currently heard in the District Court.
- R55 The court should have original jurisdiction over all cases heard summarily with a possible maximum penalty of 10 years' imprisonment, and should hear the preliminary hearings of indictable offences. The court should hear civil disputes up to a value of \$50,000.

## Court fees

- 56 In keeping with its workload of low value civil claims, court fees for the Community Court should be kept to a minimum. The court is designed to have processes proportionate to the claim and to enable more people to have their disputes resolved before the courts. Court fees should reflect this aim.

## Judges

- 57 A number of Primary Court judges will need to have a Community Court warrant. The basic qualifications for appointment would be the same as the current requirements for District Court judges but it is anticipated that judges with a wide range of life or community experience and background, in addition to their legal qualifications, would be appointed in the future. In this respect, the part-time provisions in the Judicial Matters Bill may prove to be of particular value in the Community Court.<sup>209</sup>

208 Email from Business Information Section, Ministry of Justice, 19 November 2003.

209 A position in the Community Court may be attractive to appropriately qualified senior counsel and judges nearing retirement who wish to put their experience to use in this specialised area. Likewise, it may be an arena where judges with family responsibilities would be able to make a valuable contribution.

## Statutory Principles

- 58 The Children, Young Persons and their Family Act 1989 introduced principles, in statutory form, that should be applied to youth justice and to the exercise of the powers and jurisdiction granted by the Act.<sup>210</sup> Those principles go beyond the strict application of the law and its processes, and establish a particular philosophy for how youth justice matters should be dealt with both outside and within the Youth Court.
- 59 For example, s 208(c) of the Act establishes the principle that any measures for dealing with offending by children or young persons should be designed (i) to strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and (ii) to foster the ability of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with offending by their children and young persons.
- 60 We envisage a Community Court similarly guided by its own philosophy, and propose the development of principles to guide those exercising judicial authority within the Community Court and those managing its services. The principles should enable the Community Court to be responsive and accessible to its local community in relevant ways and could include:
- providing a forum that is flexible in the ways it deals with the needs of different individuals and different cultures
  - ensuring each offence is treated seriously by enabling the court to dedicate more time to each defendant
  - acknowledging each defendant, victim or litigant as an individual with his or her own set of circumstances
  - involving whānau/families or other support groups in its processes
  - ensuring the real issues in each case are identified and dealt with as early as possible
  - advising disputing parties of alternative forms of dispute resolution
  - involving the community in developing effective processes at the courthouse
  - providing information and service that is friendly, helpful and understandable
  - providing registry services appropriate to the local cultural and social makeup, and that are responsive to change
  - facilitating access to general legal information and advice resources.

---

<sup>210</sup> Children, Young Persons and their Family Act 1989, s 208.

## Recommendations

- R56 The Community Court should be a specialist court with its own principles, style and processes.
- R57 Principles should be developed, in consultation with community representatives, to guide the ongoing operation of the Community Court, and be included in the founding legislation.
- R58 The principles should reflect the need for each Community Court to be accessible and responsive to its community, to deal effectively with criminal behaviour, to provide early clarification of issues and understandable processes for those with cases in the Community Court and to be a portal for general information and advice for all court jurisdictions.

## The court and its community

- 61 Each Community Court needs to be responsive to its particular blend of population. The judiciary and court staff need to forge links and relationships with members of the community, which has an interest in ensuring the court deals with its particular mix of local crime and civil disputes effectively and speedily, achieving problem-solving outcomes rather than adding delay and complexity.
- 62 We envisage that some Community Court practices would vary depending on their location and the makeup of the community they serve. This does not mean there would be any variation in legal principle or the law that is applied. Courts exist to apply the law and everyone must be treated equally in them. The Law Commission's proposal should not be interpreted as suggesting any departure from this principle. However, the potential for flexibility in the style and provision of court services is a core characteristic of a Community Court, and community representatives should have opportunities to influence these aspects.

### National advisory group

- 63 We envisage that a strategic level national advisory group would work with the Ministry of Justice to ensure the new Community Court is responsive and accessible to the community. Such a group would have input into development of the vision for the court and its implementation, including the overarching principles suggested in paragraph 60.
- 64 The creation of the Community Court will significantly impact on Māori interaction with the court system and must adequately reflect Māori perspectives in order to be effective. Māori should have input into the establishment and

maintenance of the new court which, on current trends, will inevitably affect a high proportion of the Māori population.<sup>211</sup>

- 65 The court needs to be clear about Māori customary concepts if further steps are taken to accommodate them within procedural rules. Māori hold the expertise and knowledge in traditional Māori concepts, and the voices of Māori leaders working with the legal community and experts in tikanga Māori should be heard.
- 66 We suggest there should be strong Māori representation on the national advisory group or a separate Māori advisory group. The Ministry of Justice should seek advice from Māori leadership as to how Māori should be involved at the strategic level, before the direction and framework for the court have been determined.
- 67 It will also be essential to have clear protocols to ensure no interference with the principle of separation of powers, which is a fundamental part of our constitutional structure.
- 68 It is inevitable (and to be encouraged) that this advisory body (and the local consultative groups we recommend below) will have innovative ideas for new and better ways of doing things. Their function will be to encourage and influence government to resource such possibilities when all their implications and consequences have been assessed. However, they would not have an independent ability to initiate processes or procedures with cost implications without specific budgetary provision being made. The separate functions of each branch of government necessarily requires that just as judges cannot initiate processes with financial implications without executive approval, advisers cannot initiate beyond any budgetary provisions that they may have been granted. Similarly, the adjudication of individual cases must remain the sole province of judges who are appointed for that task.

## Recommendations

- R59 A national advisory group with community representatives should be established to advise on the development and implementation of the Community Court concept.
- R60 The Ministry of Justice should seek advice from Māori leadership as to how appropriate Māori representation should be achieved at a strategic level.

211 In *Seeking Solutions* the Law Commission identified that “Eighteen percent of New Zealand’s population identify themselves as being of Māori descent and Statistics New Zealand predicts this will significantly increase in the next decade. Current criminal justice statistics are worrying. Māori are three times more likely than non-Māori to be prosecuted for a criminal offence, four times more likely to be convicted and one and a half times more likely to be imprisoned. Māori make up 51 percent of the prison population and while women prison inmates number only five percent of the total prison population, 80 percent are Māori. Māori are also more likely than non-Māori to be victims of violent crime.”

## Community Court Consultation Groups

- 69 Matters of procedure can have the effect of confusing or disempowering court users without any intention of doing so. Minor changes in court procedure or administration could increase people's ability to participate well in court proceedings. Court professionals and community representatives need to have a way of working together constructively, so the professionals understand the barriers that arise for ordinary people and community representatives understand how the court works, what it does and what it does not do.
- 70 There was strong support for this type of community engagement at the hui hosted by Ngāti Tuwharetoa in July 2003.
- 71 The Law Commission proposes that each Community Court has a Community Court Consultation Group, with membership that reflects the community it serves, including the tangata whenua. This group should be advisory in nature (with the same protocols to ensure separation of powers as discussed above) and should meet regularly with members of the Community Court judiciary and staff.

### Recommendation

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

## Community liaison officers

- 72 While it is important for the community to be involved in the development of the Community Court, both at a national and local level, the court itself has a responsibility to ensure, as far as is practicable, that the concerns of the people who go there each day are met. Appointment of a community liaison officer (or officers, depending on the size of the court), who is part of each Community Court structure, would facilitate consultation at a local level. The officers should have responsibility for fostering relationships with local groups and maintaining dialogue between the court and its community.
- 73 The only full-time, court-funded Community Liaison Officer in the system at present is the Youth Court Pacific Community Liaison Officer in the Manukau District Court. This position is supported by a Youth Court Pacific Community Resources Panel with some six members nominated by the Pacific Island community and also includes other stakeholders, including for example Police Youth Aid and CYFS. This position is working well and demonstrates the potential for our proposed officers.
- 74 Making the Community Court work in a sensible and responsive manner is not an optional extra. It is at the heart of a system which delivers justice rather than

merely administers the law. There is currently a gulf between these two attributes which needs dedicated attention. It cannot periodically receive the attention of well intentioned individuals. It must be a pivotal part of the mission and operation of the Community Court.

## Recommendation

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

### Liaison with Māori

- 75 At present there are no comprehensive national guidelines or strategies to assist court staff in establishing and maintaining networks within the Māori community. Each court is left to create its own networks, and unfortunately this is often not happening.
- 76 We found that some individual courts have initiatives for Māori in place, largely developed informally. While different communities require different solutions, the limited initiatives that exist were generally too fragile to be sustainable long term. They were either developed by an individual court staff member with personal networks, individual judicial leadership or as in a couple of courts, by approaches from the Māori community to the court.
- 77 Waitakere Court illustrates the advantages of establishing strong links. Members of the judiciary initiated learning of te reo Māori and tikanga from the local marae some years ago, and in this way were able to foster a court culture that encouraged learning about cultural diversity. It also meant that community links were created and maintained, and a good working relationship now exists between the Māori community and the court. A marae diversion scheme operates in Waitakere and offenders can be referred to Hoani Waititi Marae for programmes and assistance. A liaison person from the marae sits in the court during the criminal list and has office space allocated in the court building. This has resulted in improvements in the way Māori involved with the court have been treated, whether as offenders or victims.
- 78 However, some courts have formal relationships with Māori but tend to activate them only when a crisis occurs or a powhiri is required. This results in a feeling of exploitation by the Māori community groups concerned. At one court we visited, a local kaumātua receives some court funding to assist Māori appearing in court and to liaise with court staff but, although his contribution is invaluable and greatly appreciated, he has no access to private space for meetings or even a desk for his work materials. Liaison must be properly supported and maintained to be effective and to provide a platform for dialogue on equal terms with the Māori community.

- 79 We are concerned that some community networks which previously existed have now broken down. Groups like Maatua Whangai, Māori Women’s Welfare League, Māori Wardens and iwi groups have at times offered valuable liaison services to link courts with their communities. From a Māori perspective, there seem to be unnecessary barriers to establishing liaison with the court or providing services for Māori appearing in court. It is unclear to Māori why these barriers exist, but they contribute to the ‘us and them’ culture of the courtroom that Māori experience.
- 80 Most court staff we met agreed that the need for a good relationship with local Māori should be better recognised and put on a more formal basis. Specific policies and performance standards to guide court managers and staff will be needed in the Community Court to establish strong, ongoing links with local Māori communities.

#### Māori representation

- 81 Māori must be represented at a national level in developing the community court concept.
- 82 Each Community Court Consultation Group must also include representatives of local iwi and hapū, Māori organisations and/or Māori working within the legal profession. This would create a forum where court-related issues of concern to the court or the Māori community could be raised and considered.
- 83 The group would be able to provide insight into local Māori cultural concepts and establish networks that enable judges and staff to enhance the effectiveness of the court’s processes and practice for Māori. It would also allow iwi to keep the court informed about developments within iwi and hapū structures that could be of relevance in sentencing.
- 84 The Community Court Consultation Group would assist with implementation of policy initiatives filtered down from Māori representatives working with the national advisory group.
- 85 A core function of Community Liaison Officers would be establishing formal and enduring relationships with local marae, rūnanga and urban entities. In several courts, liaison with Māori is currently undertaken by volunteers or by community group representatives accorded a particular status in that court. The informal nature of these arrangements can be less than satisfactory, and fails to accord sufficient importance to the creation and maintenance of the relationships.

## Recommendations

- R63 Each Community Court Consultation Group must include representatives of local iwi and hapū.
- R64 Judges and staff should work with the Community Court Consultation Group in an ongoing relationship, to enhance the effectiveness of the court's processes and practice for persons who attend the court who are Māori; or from ethnic and cultural minority and disability groups.
- R65 One of the Community Liaison Officer's core functions should be to establish formal and enduring relationships with local marae, rūnanga and urban entities.

### Operational changes to incorporate Māori culture

- 86 Consultation with Māori indicated a widespread feeling of alienation and disempowerment when dealing with high volume courts. As a starting point, in the following paragraphs we suggest some basic ideas to improve this situation, but it is an area where ongoing Māori input is required, and where the new consultative bodies will have a critical role.
- 87 Many of the concerns were echoed by other community groups. For example, lack of access to information is a widespread concern, as is inadequate access to legal representation. These problems are considered elsewhere in this report, and where solutions have been offered we have been mindful of the needs of Māori.
- 88 However, there still remain specific Māori concerns about the high volume courts relating to the invisibility of Māori culture within the courts and the inability of court procedure to have due regard for matters important to Māori. These concerns require more than mere cosmetic changes and the Community Court must have the flexibility to accommodate Māori cultural perspectives.

### Inside the court

- 89 Courts, as they currently exist, are often perceived by Māori as totally non-Māori. While attempts have been made over recent years to incorporate 'aspects of Māori culture' this has often been little more than the incorporation of Māori motifs into interior design, or the translation of signage into Māori. The inclusion of Māori language in brochures and courtroom signage, although important, is not enough to satisfy obligations to Māori. When presented concurrently with wider changes, however, this assists in making the court system less monocultural.

- 90 Changes could be made to accommodate the needs of the people appearing before the court. For example, the court could allow whānau and the person charged to have contact before and after the court appearance, and for members of whānau to sit closer to the defendant during the appearance. Contact before and after a court appearance allows whānau to engage in cultural practices like karakia and kōrero.
- 91 Security concerns may arise with the suggestion that supporters could sit in close proximity to a defendant, as courtrooms can undoubtedly be dangerous places. However, the demands of flexibility and security should be balanced. Issues of safety do not arise in all cases and can be dealt with when they do by court staff and the judge's inherent power to control his or her courtroom. Where such concerns do exist, there is valid justification for courts not to allow such contact. However, a case by case approach should be adopted, rather than the 'one size fits all' practice that is currently taken.
- 92 Likewise allowing time and space for whānau to receive legal advice and to interact with court staff is important. At the moment whānau want, and are often expected, to support people appearing in court but are not supported in any formal way when doing so. This results in a feeling of isolation, both for the person appearing, and the whānau.
- 93 Court staff with knowledge in Māori concepts and language will be able to actively assist Māori coming into contact with the courts; and will conversely be able to assist the courts with cultural issues when they come into contact with Māori. Court staff should be encouraged to have or develop knowledge in te reo Māori, tikanga Māori and to establish links to mana whenua and/or urban authorities.
- 94 Duty solicitors should also be encouraged or required to take account of tikanga and te reo, and should have a responsibility to make whānau aware of the provisions that allow cultural factors to be taken into account by the court. This will necessarily mean that duty solicitors need more time to liaise with clients. It could also mean that a 'Māori dimension' is added to duty solicitor training.
- 95 These measures illustrate some ways to include aspects of tikanga Māori in the Community Court, and which generally requires a far more holistic and whānau-oriented approach than currently exists.

#### Section 27 of the Sentencing Act 2000

- 96 Section 27 of the Sentencing Act 2000 permits offenders to request that someone address the court on their personal, family, whānau, community, and cultural background. This provision is currently underutilised. Its importance and potential should be captured.

97 More time may have to be allocated per appearance if this kōrero is to be effective. Timing is an essential element of the court process. In the past the requirement that justice be timely has tilted the balance in favour of procedural haste, rather than being able to slow things down and work through them on a substantive level. It has done so at the expense of its own integrity; and Māori, in particular have expressed the view that these procedural issues now consume the court rather than issues of dispute resolution and justice. There is concern that this impacts negatively on judicial willingness to view section 27 applications favourably.

#### Presence of kaumātua

98 We sought specific feedback on whether kaumātua could or should play a greater role in decision-making in the courts. While this idea has been supported in respect of the Māori Land Court, reservations were expressed about extending this concept into the Community Court especially in its criminal work.

99 Undoubtedly advice from kaumātua on Māori cultural concepts and tikanga in general is supported. However the idea of involvement of kaumātua with members of the judiciary in specific cases has been met with caution. This would be a complex relationship to manage, and many Māori view it as having the potential to undermine the cultural integrity of Māori leaders if, for example, their views were able to be overruled. Some are reluctant to see this happen without a constitutional review that would clarify the relationship between tikanga Māori and the law applied in the courts.

100 The need for assistance with tikanga stems from the fact that at present the judiciary does not currently include adequate numbers of Māori. Many judges genuinely understand and give due weight to cultural matters but, with the small proportion of Māori on the bench, it is difficult for these concepts to be given full play without looking externally for advice.

101 Our proposal for a primary court structure with cross-warranting provides the potential for some Māori Land Court judges to sit in the Community Court and to share their experience and knowledge with judges in other jurisdictions.

---

## 4.2 Criminal Processes in the Community Court

---

- 102 The overwhelming majority of criminal matters will be dealt with in the Community Court, and the most critical process in managing this volume efficiently and effectively is the criminal list where all criminal cases are commenced. The criminal list is the point where the court system is under the most strain, and correspondingly, where the greatest need for a new approach is needed. Our proposal is to make the criminal list process more effective by better coordination of the various functions necessarily involved and carried out by judges, lawyers, court staff, duty solicitors, probation and other agencies.
- 103 In *Seeking Solutions* we identified some of the perceived problems with the current system. Those who had been involved were critical of the lack of information and advice received from the moment of arrest, the lack of helpfulness of the court staff when they went to court, the difficulties experienced accessing legal help, the endless hours of waiting around, the number of times they had to come back, the crowded and intimidating nature of the court, and that discussion between the lawyers and the judge could not easily be heard or was in a shorthand code that they could not understand. Māori in particular considered that the process did not meet their needs or reflect their way of doing things.
- 104 We heard that speed and compliance with the law often seem to be at the expense of sufficient care and attention being given to the people involved in criminal proceedings. Submissions and consultation identified this as one of the greatest failures in our court system and why some people have lost confidence in the courts. It was also the area most highlighted at hui as falling below expectations.
- 105 From arrest onwards more must be done to protect rights and inform those who are involved. As much as possible should be done to minimise the inconvenience and stress for victims, witnesses and other parties to criminal proceedings. While this will require more meaningful time to be spent on each case, delay will be reduced if the total number of appearances in each case is minimised. To achieve this, each appearance must usefully advance the case so that the time of victims, witnesses, defendants and judges is not wasted. The criminal justice system needs to find the correct balance between protecting the rights of the defendant – those set out in the New Zealand Bill of Rights Act 1990 – and ensuring that its limited resources are used efficiently.

- 106 Reform of the criminal list process is already underway with a pilot in the Wellington District Court launched on 30 January 2004. This pilot should be given a high priority and be implemented with the specific aims and improvements in mind that we discuss in this section. We also propose other measures to streamline management of preliminary criminal processes in the Community Court.
- 107 The promotion and use of alternative processes, such as restorative justice are discussed in Part 2.4. Criminal jury trial processes are discussed in Part 5.1.

### **In this section we recommend:**

- R66 Current work to reform and streamline the criminal list process should be given high priority.
- R67 The responsibility for scheduling cases set down for hearing in the criminal list court should lie solely with the court registry.
- R68 The police should vary the dates on which defendants released on bail or summons following arrest are required to make their first appearance in court in order to maintain an even volume of court appearances, when this is possible.
- R69 The requirement for police to swear informations laid in court should be abolished, and informations should be able to be transferred electronically to courts by police.
- R70 A court officer should be responsible for the court record, which should be read and signed by the judge at the end of each appearance.

### **The criminal list**

- 108 In *Seeking Solutions* we proposed that the criminal list be seen as a three-phase process and we distinguished between the induction, administrative and judicial phases. A pilot instigated by our proposals was launched in the Wellington District Court on 30 January 2004.
- 109 The induction phase involves:
- directing people to the court registry or appropriate courtroom and ensuring they have enough information about what they need to do
  - court officers identifying persons in need of advice or representation and directing them to a duty solicitor
  - groups such as Maatua Whangai, or Friends of the Court providing assistance and support
  - duty solicitors being available with sufficient time to identify those matters that need to be resolved at the initial stage and to provide appropriate advice and representation.

- 110 The administrative phase involves:
- the availability of sufficient people and resources to take care of legal advice and legal aid, probation and collections issues
  - registrars using their existing powers to resolve all administrative matters without appearance before a judge, including receiving pleas, granting adjournments, remands in custody for up to eight days, granting bail or name suppression where it is not opposed by the police and issuing summonses or warrants.
- 111 The induction and administrative phases are concerned with preparation of the defendant and the case so that all procedural issues have been dealt with before the case is heard by a judge in the list court. The judge should deal only with those matters that require the exercise of judicial discretion. The judicial phase involves matters:
- that are contested and require a judicial decision (such as police opposition to bail or name suppression)
  - where decisions must be made under the court’s summary jurisdiction.
- 112 District Court judges have been developing their own proposals for reforming the criminal list. Their recommendations are set out in Appendix B to this report. Some of their proposals are more detailed than we have considered in this project, but, in total, they are a valuable resource for further action.
- 113 Work to improve what happens in the list court should be ongoing. List court reforms need to achieve some fundamental improvements including:
- Defendants should have access to better initial information and assistance from the moment they are arrested. At the very least, helpful and comprehensive information should accompany the court summons or be available at the police station.<sup>212</sup> Defendants should know where they can turn for more detailed face to face advice and how to access legal representation. They should be able to phone the courthouse and be directed to the services they need, such as the duty solicitor, the Legal Services Agency, or drugs counselling.
  - In most cases, defendants should not appear in court until they are prepared for the first appearance. Where possible, they should have had access to all the services and information they need before the day of their appearance. Far too often cases are adjourned because of a lack of preparation and this has a major impact on the workload of the court, and on all those involved in the case.

<sup>212</sup> We note in particular here our recommendation in Part 1.4 that the police should be required to notify the defendant about the Police Detention Legal Assistance Scheme.

- People should not have to wait around all day for their appearance, nor spend the whole day there without appearance at all. Consideration should be given to scheduling the day in time ‘blocks’ so that a case will be allotted a defined period of not more than a two-hour slot when it will be called.<sup>213</sup>
- Procedures should be more understandable to enable effective participation. This means simplifying processes, using plain language and ensuring the defendant can hear and comprehend what is going on.
- A courthouse should not put unnecessary barriers in the way of effective participation. Staff should take an approach of helping where they can, signage should be clear and there should be a conspicuous helpdesk staffed by someone who is able to answer questions, assess if people have special needs, and direct them to the correct place.
- The courthouse should, where possible, facilitate access to all the attendant services that may be required. Ideally all the relevant agencies should be able to operate from the courthouse. This would maximise the efficiency gains from the process.
- Each appearance should deal effectively with the fact of the offending. The judge should have sufficient time, and as few distractions as possible to allow for adequate focus on the defendant. This goes directly to the concepts that are at the heart of the Community Court: better process, effective sorting of issues outside the courtroom, and allowing the available judicial resource to be better directed at delivering justice.

114 Some of these ideas are dealt with in other parts of this report, particularly in Part 1.

## Recommendation

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

<sup>213</sup> It has been suggested that appearances should take place on the basis of the order in which defendants ‘check in’ at the desk. We would rather see the introduction of blocks in the schedule – some steer and direction, and structure, needs to be retained.

*The Law Commission received this letter in December 2003, giving an account of the work of a District Court judge sitting in the list court.*

Re: District Court Lists

I write to describe, against the background of the Law Commission's present work on District Court procedures, workloads and the like, my experience in the last couple of days. I stress that what I am about to describe is not at all atypical – rather, it is a depressingly common situation encountered in the District Court.

On Monday I sat in the [location] District Court. There were some 80 in the list, together with 10 sentencings. There were, from memory, a couple of opposed bail hearings, and at 1.10 pm I also did a swearing in of a local JP.

One of the sentencings, a dangerous driving causing death, took a significant time. The defendant, after a sustained period of dangerous driving on the state highway, had collided head-on with a car being driven by two European tourists, a husband and a wife. The wife was killed and the husband was seriously injured. As a result of his injuries, he had to arrange for his wife to be cremated in New Zealand, and their two daughters were unable to be present.

On Wednesday I sat in the [location] District Court. There were a similar number in the list, together with a similar number of sentencings. I began the day by doing a jury trial sentencing at 9.00 am, where I sentenced a young man of age 19 for the intruder rape and indecent assault of a school-aged girl from a remote rural area. The defendant had no previous convictions, considerable family support, and the offending was as a direct result of the consumption of a combination of alcohol and a variety of drugs. He had no memory of the offending, but the effect on the victim and her family was, and will continue, to be enormous.

During the balance of the day, there were a number of contested bail hearings arising from the termination of an electronic interception operation targeting methamphetamine, and to get through the volume of work I sat until well into the lunch hour and began the afternoon sitting early. As it was, I did not finish the day's sitting until about 6.00 pm, and the need to produce the various warrants using the new and somewhat problematic computer system meant that I finally signed the last warrant at about 6.45 pm.

I am presently taking the morning adjournment during a sitting at [location]. When today's sitting began, I was informed there were 45 in the list, a number of opposed bails, a scheduled two-hour disability hearing where the police were seeking an order that the defendant be detained in a hospital, and the defence were seeking an order that he be released forthwith, together with a ½-day depositions hearing. The latter related to a number of indictable charges of sexual violation by rape, sexual violation by unlawful sexual connection, aggravated assault (with a meat cleaver) and male assaults female. These matters had first been called in court in May 2003, and a pre-depositions hearing had occurred in July. Thereafter there was a remand

to 14 October 2003 for the deposition hearing, but on that day the matter “could not be reached” as a result on an earlier hearing running over time. It was remanded further to today’s date. Defence counsel informs me that the day after that earlier remand, he had written to the court requesting priority. The court had replied that there were “a few matters in the list” but otherwise there would be time to complete the hearing. That advice was given in mid-October, and by this morning, the “few matters in the list” had ballooned out to 45 plus the two-hour disability hearing. Not without some misgivings, but in the end with the reluctant agreement of both counsel for the defence and for the Crown, the ½-day depositions hearing has been further remanded to a date in mid-February 2004.

From those of us on the “institutional” side of the justice system’s fence, there is perhaps a perverse sense of pride in the fact that during these sitting days we got through a lot of work, disposed of a lot of cases, and generally kept things moving along at a cracking pace. But that was only achieved at the cost of dealing with most defendants at what can only have been, for them, a bewildering speed, in circumstances that can have left them with little sense of having been involved in the proceedings. On many occasions during each day, I would have preferred to slow down, and invest some real time and effort in individual cases – young men appearing perhaps for the first or second time, their lives beset by problems of unemployment, low educational achievement, misuse of alcohol and drugs, all leading them into, at least initially, low-level nuisance-type offending, which nevertheless has a significant impact on the communities in which they live. A lot of these kinds of cases are crying out for some approach other than the swift, heavy-handed, almost brutal, application of summary disposal in a list court. Yet time and again the fact that there were 40 or 50 or 60 other people waiting to be dealt with meant that time was the last thing I could spend on them.

None of these issues will be news to any District Court judge who regularly sits in the summary jurisdiction. When faced with a list the size of the kind I have been describing, the immediate need simply to get through the day and get the work done overwhelms everything else. At the end of it all I am left with the clear feeling that from the perspective of the public, the communities in [locations], and the victims and the defendants, the justice system was dysfunctional.

I close by repeating that my experience this week is not particularly remarkable. Most District Court judges face similar pressures on a regular basis, week after week.

Yours sincerely

*[name]*

*District Court Judge*

## Managing the flow of cases

115 To an extent, court volumes reflect police charging practices in that the police decide what offences should be prosecuted, and on what days defendants should first appear. The District Court judges have submitted:

The ability of the District Court to manage and prioritise its work as a whole is reduced by the way that cases start their life in the District Court. How many new cases are put into a criminal list court on any given day is determined, not by the courts themselves, but by outside prosecuting agents.

116 It is fundamental to the optimum management of the criminal list court that the court itself should determine its caseload. While there will no doubt be an ongoing need for consultation with the Police Prosecution Service, we accept the principle that the court should control the volume of cases and their scheduling. The District Court judges consider this can only be achieved by computer-based scheduling.

117 At the initial stage of the proceedings, however, where an arrested defendant's first appearance is usually before a registrar, there is less ability to manage the flow of cases consistently. However, the police have some leeway in choosing a date for the first appearance.

118 Where the defendant is released from custody on a summons following arrest, s 19A of the Summary Proceedings Act allows for considerable flexibility in fixing the date for the defendant's first appearance in court, so long as the information is laid within seven days. Where the defendant is released from custody on police bail, the discretion is restricted to an appearance date within seven days after arrest.<sup>214</sup> To alleviate the problem of uneven caseloads at this stage, close liaison between the police and the court registry is required if the dates on which defendants must make their first appearance in court are explicitly aligned with the court's capacity to hear them.

### Recommendations

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

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

<sup>214</sup> Bail Act 2000, s 21(3)(c).

## Laying an “information” in court

- 119 An information is the document filed in court that commences most criminal proceedings. It contains the charge against a defendant, and each charge is the subject of a separate information. It is common for a police officer to bring a bundle of informations to the court registry and swear under oath in front of a registrar that the officer believes their contents are correct, as required by section 15 of the Summary Proceedings Act 1957. Swearing an information is often referred to as ‘laying an information’.
- 120 However, the theoretical protection afforded by an officer swearing an information in court is illusory as the actual police officer who takes the oath is unlikely to have investigated all, or indeed any of the offences, and may have no personal knowledge of the correctness or otherwise of the allegations. The process would be more efficient if the requirement for police to substantiate informations with an oath when they are laid was abolished, and police could simply transfer the informations electronically to the court.

### Recommendation

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

## Record keeping

- 121 The requirement that judges physically keep the court record has an adverse effect on the atmosphere and the efficiency of the court. It can distract the judge from the person appearing, contribute disproportionately to the time taken in a case, and may result in the court record being inaccurate because of the judge’s competing responsibilities. In many jurisdictions overseas, a court officer is responsible for maintaining the court record, often assisted by electronic record keeping systems, which is then signed by the judge.
- 122 We see no reason why the court record should not be maintained by a court officer, which is then read and signed by the judge. This would enhance the atmosphere of the court, freeing up judges to concentrate on the adjudication required.

### Recommendation

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

## Identifying issues before trial

- 123 The phenomenon of cases ‘falling over’ at the door of the court is common where defendants are late in confirming pleas or prosecutors withdraw or amend charges. This has a real cost. Defendants are remanded in custody or on bail for longer, witnesses and victims may suffer stress, and unnecessary time and money is wasted. Gaps are left in the court’s schedule, which result in courtrooms standing empty or cases being overbooked.
- 124 It is essential that, without compromising the defendant’s fundamental rights, both the prosecution and defence have enough information about each other’s case as early as possible to enable them to make informed decisions. After a not guilty plea has been entered, cases should be managed through the criminal process.
- 125 On one hand, there needs to be a process that provides for accurate charging and plea timing, an appropriate degree of case direction, fewer adjournments and shorter, scheduled, more focused, trials. The processes must be constructed, however, so as not to alter the proper balance of the trial, in terms of the burden on the Crown to prove its case beyond reasonable doubt.
- 126 The challenge is to identify the contested issues in a case at the earliest possible stage, so that cases can be set down for trial and court time limited to the issues in dispute. This requires early, more frank disclosure, and the disposal of issues of procedure prior to the trial. These issues are relevant for both summary and indictable cases.

## Status hearings

- 127 In the summary jurisdiction – which will fall within the Community Court – one element of case management is the status hearing.
- 128 Status hearings have been in operation in many courts since 1995. If a defendant pleads not guilty to an offence to be tried summarily, it will usually be set down for a status hearing before a District Court judge.
- 129 Although practice varies, status hearings:
- confirm the charges and the defendant’s plea
  - explore whether the charge can be resolved without the need to proceed to a full hearing
  - identify the issues in dispute and any matters in agreement
  - provide a sentence indication if requested
  - assess how long a hearing may take and when it will be held.
- 130 If a defendant pleads guilty at the status hearing, the sentencing process commences. If he or she pleads not guilty, and all preliminary issues have been resolved, the case is set down for a defended hearing.

131 Issues that have been associated with status hearing processes include:

- the lack of standardised practice<sup>215</sup>
- the propriety of a judge actively inquiring into a case prior to the hearing and their potential influence on the defendant
- concerns that status hearings may provide an incentive for defendants to delay making guilty pleas in the hope that the status hearing will result in a lesser penalty
- the impact of the process on defendants who are not represented by counsel at status hearings
- the circumstances in which sentence indications are made.

132 Status hearings have been the subject of extensive empirical research by the Ministry of Justice and the Law Commission. A research report will be published in the first half of 2004, along with a discussion paper issued by the Law Commission.



<sup>215</sup> There is no legislation or practice note governing status hearings nationally. A number of courts have their own practice notes setting out how status hearings should be conducted.

## 4.3 Civil Processes in the Community Court

- 133 The District Court Rules 1992 are unduly complicated for simple debt recovery and for the lower value civil cases that will be heard in the Community Court.
- 134 Despite the amount involved, claims below \$50,000 are subject to the same processes as claims up to \$200,000. A significant amount of preparation goes on before a trial and sometimes too many appearances are required at the courthouse. For many claims under \$50,000, the cost of pursuing litigation is disproportionate to the value of the claim. This is highly problematic for the parties, and means that more time and money may be spent on the cases than is appropriate or economic.
- 135 We have designed simplified processes for civil cases under \$50,000 that minimise transaction costs and are understandable so that those who choose, or are forced, to represent themselves can do so. The processes should be speedy, affordable and proportionate to the dispute, yet maintain the principles of natural justice and the law.
- 136 Debt claims are all subject to the general civil processes under the High Court Rules and District Courts Rules 1992 and are commenced by ordinary proceedings or by summary judgment proceedings. Both processes can be complex and usually require legal understanding or representation.
- 137 An area of great concern to submitters was the difficulty experienced by creditors trying to enforce court orders once they have obtained them. The question of enforcement is outside the Law Commission's terms of reference for this project. We have focused on concerns about the complexity and expense of processes presently available for debt recovery and propose one process that complements our proposed streamlined civil claim process.

### **In this section we recommend:**

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

#### Claims under \$50,000

- R72 Civil processes in the Community Court should be simplified to ensure that they facilitate access to justice and are proportional to the amount in dispute.
- R73 A simplified, two-stage process should be implemented for civil claims under \$50,000 with the following features:

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

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

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

#### Claims to recover civil debt

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

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

## Proposed process for claims under \$50,000

### Information

138 Issues surrounding access to information are particularly relevant for Community Court processes since this will be the court where people are most likely to have their first contact with the court system.

139 The Court Service in England and Wales provides information sheets and booklets catering in particular to unrepresented litigants and providing step-by-step guides. Similar information should be available in New Zealand at key places where people go to seek legal help and information, as well as at court registries.

## Recommendation

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

### Two-stage civil process

- 140 Focusing on the issues and getting to the essentials of each case are the objectives of the Community Court. Civil claims under \$50,000 should be able to be dealt with by two hearings in front of a judge – a ‘case assessment conference’ followed by a full hearing if the case is not settled. At both hearings, the judge should play an active role in assisting the parties to identify the issues in contention and to explore possibilities of settlement.
- 141 We propose that parties in cases with claims above \$50,000 who mutually agree that their case can be dealt with according to the processes of the Community Court, can have their case transferred to the Community Court.

### Commencing proceedings

- 142 The ability to deal with cases effectively depends on the relevant information being available early and set out clearly. Filing a pre-printed ‘claim form’, with specific questions designed to draw out precise information, facts and issues relating to the dispute, should start proceedings. The form would require parties to identify:
- a list of up to five of the most important documents – a copy of each document would be filed and served with the claim form<sup>216</sup>
  - a list of up to five possible witnesses.
- 143 Responsibility for serving notice on the defendant should remain with the claimant. For some claimants this may be a daunting prospect, and the court should provide information about local service agencies who can serve the documents on the claimant’s behalf if they do not want to do so themselves.
- 144 It would be impractical for the court to have to take responsibility for serving every claim filed; nearly 20,000 civil cases are commenced each year. From the perspective of the efficient use of the court’s administrative resources, it is not sensible for them to carry this burden. The potential private benefit for claimants means it is not unreasonable for them to bear this cost.

<sup>216</sup> For civil claims on the fast track under the UK Civil Procedure Rules (Part 28), parties must file the “documents on which they rely; and which adversely affect their own case; adversely affect another party’s case; or support another party’s case; and the documents required to be disclosed by a relevant practice direction”.

- 145 To improve the usefulness of information provided to a defendant, the claimant should also be required to include an information pack and a pre-printed ‘defence form’ with the notice that is served. This is a requirement under the English Civil Procedure Rules<sup>217</sup>, and should be incorporated in rules devised for the Community Court. The information pack should be provided by the court when the claimant files their claim, or able to be downloaded from the web.
- 146 The defence form would have to be filed and served within 21 days from the date of receipt of the information pack, otherwise default judgment could be awarded.<sup>218</sup> On the filing of a defence, a time and date would be set for an initial hearing, which would be within 30 days. Adjournments should only be granted by leave of a judge.
- 147 The pre-printed defence form should require the defendant to admit or deny allegations, and to identify:
- the main issues
  - a list of up to five of the most important documents – a copy of each document would be filed and served with the defence form
  - a list of up to five possible witnesses.
- 148 The pre-printed forms should be signed by the parties as a statement of truth. Statements of truth are a concept under the English Civil Procedure Rules 1998. Rule 32.14 states that making a false statement in either the particulars of the claim, or the defence, may mean that person is liable for contempt of court. The aim of the statement of truth is to stop defendants filing a defence just to stall proceedings. This would also eliminate the need to pursue summary judgment proceedings on the grounds that any defence has to be supported on oath.
- 149 Carrying out these preliminary steps may be difficult for some claimants who will prefer to seek legal assistance. However, the simplified processes should also lower the cost of legal services. Information sheets attached to the forms should also alert the parties to alternative forms of dispute resolution, such as mediation, and should inform the parties of what they will need to bring to court if their case should progress to a hearing.

### Case assessment conference

- 150 An initial ‘case assessment conference’ should take place within 30 days of the filing of the defence, with up to one hour set aside. Attendance of parties would be required and they would be expected to bring relevant documents.

---

<sup>217</sup> Civil Procedure Rules 1998, r 7.8.

<sup>218</sup> Information on obtaining judgment by default and pre-printed forms requesting judgment should be set out in information packs for the claimant.

- 151 The judge should take an active facilitative role, helping the parties identify the main factual and legal issues and exploring possibilities for settlement. Any settlement reached should be binding. This conference should be without prejudice if the matter proceeds to a hearing.
- 152 If the parties cannot settle, the conference judge should make any directions necessary for the trial. A pre-printed ‘directions summary’ form, completed at the end of the conference, should include:
- the facts and issues agreed at the conference
  - any orders to be completed before the next hearing, for example, discovery of certain documents and filing and service of witness statements
  - an estimated duration, time and date of the trial, which should take place within 90 days.
- 153 The directions summary would remove the need for evidence about the agreed facts and identify issues about which evidence needs to be introduced at the trial.
- 154 Any interlocutorys would be directed by the judge in the directions summary, further applications would not be permitted except by leave of the court. Calderbank opportunities<sup>219</sup> should be explained and encouraged by the judge at the case assessment conference.

#### The trial

- 155 The trial should take place within 90 days before a different judge and the dispute would be decided according to law. The judge should be free to be more actively involved, especially where unrepresented or under-represented parties are involved. The judge will often need to ask questions and assist in ensuring that all the relevant evidence is available. To do so they should be able to seek and receive any evidence they see fit.
- 156 The judge would make a decision based on the evidence at the hearing and, if reserved, written judgment should be available within 30 days.

### Recommendations

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

<sup>219</sup> This means a party’s ability to put a letter containing the terms of a final offer to settle to the other party with the note that the offer was “without prejudice except as to costs”. See *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333 (CA).

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

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

## Discovery

157 Parties to proceedings in the Community Court should not have a right to general discovery. Further discovery, beyond the documents supplied on filing, should be limited to those documents listed by the judge in the case assessment conference, and the parties should be required to supply those documents within 21 days of the conference.

158 If discovery beyond that were essential, the case should be transferred to the Primary Civil Court.

## Recommendation

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

## Transfer mechanism

159 At any stage after the initial case assessment conference, cases should be able to be transferred to the Primary Civil Court, either on application to a judge warranted to sit in that court, or by order of a Community Court judge, for example, because of complexity. This would be a relatively rare occurrence as the majority of cases under \$50,000 are fairly straightforward in the sense that they involve a single plaintiff in dispute with a single defendant.<sup>220</sup>

<sup>220</sup> See, Department for Courts *District Court Civil Claims Under \$50,000* (Wellington, 2002) Table 4.1, which revealed that 77 percent of defended cases under \$50,000 involved a single defendant.

## Recommendation

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

## Existing processes to recover civil debt

- 160 Debt claims are excluded from the Disputes Tribunal jurisdiction and are all subject to the general civil processes under the High Court Rules and District Courts Rules 1992. All debt claims are commenced by ordinary proceedings or by summary judgment proceedings.<sup>221</sup> Both processes can be complex and usually require legal understanding or representation.
- 161 The Ministry of Justice is considering options for a review of the overall role of the state in civil debt enforcement. The Minister of Housing has also announced a legislative amendment to help landlords obtain address information about debtors after obtaining an order from the Tenancy Tribunal.<sup>222</sup> This is a critical issue for creditors seeking to recover debt. The question of how best to enforce a court order, may involve further consideration of the processes available to recover debts.
- 162 In *Seeking Solutions* we identified the two alternative procedures that can be used to recover debt at present: the default judgment procedure, or summary judgment.

## Default judgment procedure

- 163 Default judgment can be obtained after proceedings are commenced in the ordinary manner – by filing a statement of claim<sup>223</sup> and notice of proceeding.<sup>224</sup> The statement of claim sets out the facts that the claimant claims entitles him or her to relief, together with the amount of the claim. The notice of proceeding is in a prescribed form, and is intended to provide information to the defendant as to how to respond.<sup>225</sup>
- 164 Both documents must be served personally on the defendant, by the claimant.<sup>226</sup> The defendant then has 30 days to file a statement of defence.<sup>227</sup> If the defendant fails to do so, the claimant may immediately ‘seal’ judgment,<sup>228</sup> by filing a judgment in court which the registrar signs and stamps.

221 The 1992 District Courts Rules replaced the 1948 District Courts Rules, and were drawn to reflect as closely as possible the High Court Rules.

222 Press release from the Minister of Housing, 23 August 2003.

223 District Courts Rules 1992, r 112.

224 Rule 126.

225 Rules 126 and 127.

226 Rules 131 and 132.

227 Rules 128 and 135.

228 Rule 463.

- 165 This can only be done in respect of liquidated claims, that is, claims for a specific sum that is due and payable by the defendant that is “ascertained or capable of being ascertained as a matter of arithmetic”. For unliquidated sums, a hearing for the assessment of damages, at which evidence may be introduced, must be held.<sup>229</sup>
- 166 If a defence is filed, the matter then proceeds as an ordinary proceeding. The only ‘shortcut’ to a quick judgment is to seek leave to make a summary judgment application.

### Summary judgment procedure

- 167 A summary judgment application can be made when the proceeding is commenced. The claimant must file and serve on the defendant:<sup>230</sup>
- a statement of claim
  - an affidavit verifying the statement of claim, and swearing to the belief that the defendant has no defence
  - a notice of proceeding (in a special form)
  - an application for summary judgment.
- 168 It is possible to make a summary judgment application at a later stage of the proceeding, but leave of the court is required. *Brooker’s District Courts Procedure* notes:<sup>231</sup>
- ...the Court will have to be persuaded that there is a good reason to permit the application to be brought late. This will generally mean showing that the application could not have been brought earlier and that it has at least a reasonable prospect of success.
- 169 The timing requirement puts the claimant in a difficult position when he believes that the defendant has no real defence. If he makes a summary judgment application on filing, extra cost will be incurred in preparing the documentation and appearing in court. However, if the claimant commences proceedings in the ordinary way and, if the defendant files what the claimant considers a meritless defence, the claimant may be faced with making two further applications (for leave to issue summary judgment, and the summary judgment application itself), and the court could still decline leave.
- 170 An application for summary judgment is given an immediate hearing date, and the claimant must serve the documents at least 21 days prior to the hearing.<sup>232</sup> If a defendant wishes to defend the matter they must file and serve a notice of opposition (setting out the particular grounds as to why judgment should not be entered) and an affidavit (containing the evidence that the defendant relies

---

229 Rule 468.

230 Rule 154.

231 Hon JW Hansen (ed) *Brooker’s District Courts Procedure* (Brookers, Wellington, 1992) para DR154.04B.

232 District Courts Rules 1992, r 157. There is scope for “enlarging” the hearing date, or abridging the time for service.

upon) three working days prior to the hearing.<sup>233</sup> The claimant may then file a further affidavit in reply by 1pm on the last working day before the hearing.<sup>234</sup>

- 171 At the hearing, judgment will be entered only if the judge or master is satisfied that the defendant has “no bona fide defence, no reasonable ground of defence, no fairly arguable defence”.<sup>235</sup> If the matter is defended, the judge will hear argument from both sides (often taking hours, or even days) before making a decision.

## Characteristics of existing procedures

- 172 The advantage of seeking default judgment is that if a statement of defence has not been filed at the end of 30 days, judgment can immediately be sealed.
- 173 Anecdotal evidence confirms that the majority of claimants use ordinary proceedings for debt claims, to obtain judgment by default. The disadvantage of this is that a defendant can file a statement of defence and various interlocutory steps to delay the entry of judgment. The case may then proceed to a full defended hearing, or an application for leave to apply for summary judgment must be made. Only a relatively small number of cases go to a full defended hearing.
- 174 The advantage of proceeding by way of summary judgment is that as soon as the application is filed, a date of hearing will be granted. However, an application for summary judgment entails extra cost and time spent preparing the necessary documents. Many applications for summary judgment in debt are unnecessary since the defendant is unlikely to have a defence.
- 175 A problem with both procedures is the utility of the information served upon the defendant. At present a notice of proceeding – a document in a prescribed form – must be served on the debtor with the statement of claim. The document however appears to be unhelpful to most lay people, for example, it states that the defendant must file a statement of defence, but nowhere does it say what a statement of defence actually is, nor what form to use.

233 District Courts Rules 1992, r 159. It is not uncommon for the defendant to file these documents late, or not at all, and then appear at the hearing. In such cases the judge or master will often adjourn the hearing and give further time to file the documents, if he or she believes that the defendant has a reasonable excuse for the delay, and may be able to make out an arguable defence.

234 District Courts Rules 1992, r 161. If the defendant prepares a detailed affidavit in opposition, this deadline is difficult to comply with; further, if the defendant receives the affidavit in reply the day before the hearing, he or she has little time to prepare. In practice, once the defendant’s documents in opposition are filed, the application is adjourned to another date for a defended hearing. At the same time the claimant is given a certain amount of time to file his or her affidavit in reply; typically seven to 14 days. Although not expressly provided for in the rules, it is not uncommon for the defendant to be permitted to then file a further affidavit; this was permitted by Hansen J in *Nelson Lifecare Centre Ltd v Sampson* (1995) 8 PRNZ 376.

235 District Courts Rules 1992, r 152 and *Pemberton v Chappell* [1987] 1 NZLR 1,3 (CA).

## Proposed process to recover debt

- 176 The Law Commission considers the summary judgment procedure is too costly and cumbersome for claims to recover debt under \$50,000. Accordingly, we do not consider there is any need for summary judgment to be available in the Community Court.
- 177 We acknowledge that despite the costs involved, the summary judgment procedure is a useful tool for both claimants, and for defendants seeking to defend against frivolous claims. However, the simplified procedure we propose for civil claims under \$50,000 will enable speedy resolution and serve the same purpose as the summary judgment procedure.
- 178 District Courts Rule 209 provides for the striking out of pleadings that disclose no reasonable cause of action or defence; are likely to cause prejudice, embarrassment, or delay in the proceeding; or are an abuse of the process of the court. This provides protection against vexatious claims.
- 179 The summary judgment procedure would be retained in the Primary Civil Court and High Court. Claimants in cases under \$50,000 wishing to take advantage of the summary judgment procedure would be free to commence their cases there instead. Also, debt claims would be subject to the same transfer mechanisms as those set out in paragraph 159 above.
- 180 We propose that debt claims in the Community Court begin in the way described for civil claims earlier. Where no defence is filed within 21 days, default judgment would be able to be entered for any claim for a “specified amount of money”.<sup>236</sup> This includes claims for sums that are not definite but can be readily quantified and proved.
- 181 As is the case under the District Courts Rules 1992, for unliquidated demands that cannot be readily quantified there should be a hearing for the assessment of damages, at which evidence may be introduced.<sup>237</sup> The hearing should be held within 21 days of the final date for filing the statement of defence.
- 182 If a defence is filed, claims under \$7,500 (and under \$12,000 with the consent of the parties) should be transferable to the Disputes Tribunal process.<sup>238</sup> Claims that remain in the Community Court would follow the simplified two-stage process described earlier for civil claims and a time and date for a case assessment conference would be scheduled immediately.<sup>239</sup>

236 This is the wording employed in the Civil Procedure Rules 1998, r 12.4. At present in New Zealand, default judgment may only be awarded for “liquidated demands”, a term undefined in our rules.

237 District Courts Rules 1992, r 468.

238 Dispute Tribunals Act 1988, s 37.

239 In summary, an early case assessment conference should take place in which the judge would play a proactive role. If the dispute did not settle, a directions summary would be completed by the judge, and a hearing date set. Discovery would be limited.

## Recommendations

- R76 The summary judgment procedure should not be available for claims under \$50,000 heard in the Community Court.
- R77 Default judgment should be able to be entered within 21 days of service on the defendant on any claim for a specified amount of money.

### Electronic filing

- 183 In *Seeking Solutions* we described the online system for debt claims in practice in the United Kingdom. The scheme is an excellent example of how electronic filing can further simplify matters for claimants and defendants. Our recommended process seeks, in the absence of electronic filing in New Zealand, to meet requirements of proportionality and efficiency, while protecting the interests of both the claimant and the defendant.
- 184 Introducing electronic filing in the courts over the next few years is essential, but our recommended process would provide a transitional arrangement.

## 4.4

# Disputes Tribunal and Tenancy Tribunal

---

- 185 The Disputes and Tenancy Tribunals resolve an enormous volume of civil claims according to their own distinct processes. Many of these would be uneconomic to pursue using the general civil courts. The strength of the jurisdictions is their speed, simplicity and low cost.
- 186 On balance, we found that these tribunals operate satisfactorily and efficiently for most of the parties that appear before them. We do not make recommendations to change their jurisdiction or processes, other than to propose that proceedings in the Disputes Tribunal should be open unless a specific order prohibiting access or publication is made. This is discussed in Part 8.5. We discuss the qualifications and status of Disputes Tribunal Referees and Tenancy Adjudicators in Part 4.5.
- 187 Although called tribunals, these jurisdictions in effect deal with the lowest category of civil cases that make up the continuum in the general civil jurisdiction. They are currently situated in District Courts and are supported by courts staff.

### In this section we recommend:

- R78 The Disputes Tribunal and Tenancy Tribunal should operate as the Disputes and Tenancy Divisions of the Community Court.
- R79 All proceedings in the Disputes Tribunal should be recorded so that a transcript is available if a complaint is made or an appeal is sought.

### Disputes Tribunal

- 188 The Disputes Tribunal offers a means of dispute resolution designed to be quick, informal and inexpensive. It can hear certain types of dispute where the amount is less than \$7,500 or, by consent, \$12,000<sup>240</sup> and is presided over by referees, who are not required to have any specialised legal training or knowledge. Parties cannot be legally represented.
- 189 Disputes Tribunal referees first attempt to facilitate an agreement between the parties and only determine the dispute if agreement cannot be reached. Determinations are made on the substantial merits and justice of the case, and although regard is to be had to the law, they are not bound by strict legal rights or obligations, or legal forms or technicalities.<sup>241</sup> Appeals to the District Court

---

<sup>240</sup> Disputes Tribunals Act 1988, s 13.

<sup>241</sup> Section 18(6).

are only available on the grounds that the referee conducted proceedings in a manner which was unfair and which prejudicially affected the proceedings.<sup>242</sup>

190 In 2002/03 the Disputes Tribunal disposed of 19,710 claims.<sup>243</sup>

## Tenancy Tribunal

191 The Tenancy Tribunal has jurisdiction to determine all disputes arising between landlords and tenants in relation to any residential tenancy, up to the value of \$12,000.<sup>244</sup>

192 Tenancy Adjudicators are required to be legally qualified, or “in the opinion of the Minister of Justice [and the Minister of Housing], otherwise capable by reason of special knowledge or experience of performing and exercising the duties, functions, and powers of a Tenancy Adjudicator”.<sup>245</sup> Cases are decided according to general principles of the law and parties can be legally represented. Parties can appeal to the District Court in respect of awards over \$1,000.

193 In 2002/03 the Tenancy Tribunal disposed of 19,874 claims.<sup>246</sup>

194 A mediation service is available for parties before they go to the tribunal through the Tenancy Services agency, for a small fee of \$20. Approximately 34 percent of Tenancy Tribunal applications were settled by Tenancy Services mediation in 2001/02.<sup>247</sup>

## Disputes and Tenancy Tribunal issues

195 On balance, our impression is that the two tribunals, and their attendant services, operate as efficient and cost-effective mechanisms for resolving disputes. Most submitters commenting on the tribunals felt they were successful in achieving their aims, and liked their tailored processes. Lawyers were less impressed with their operation.

196 An area of concern that we do not consider here was the difficulty that many creditors encountered when trying to enforce a Disputes or Tenancy Tribunal order and recover their debt. As noted in Part 4.3, the Ministry of Justice and Ministry of Housing are considering how best to meet these concerns.

197 Although there are few applications for re-hearings or appeals, some submitters complained about the fairness of the Disputes Tribunal process and the capacity of the referees to identify and resolve legal issues adequately. There were 56 referees sitting in Disputes Tribunals in 2002, of whom approximately one

242 Section 50(1).

243 Department for Courts Annual Report for the year ending 30 June 2003, p 50.

244 Residential Tenancies Act 1986.

245 Residential Tenancies Act 1986, s 67.

246 See above n 243, 53.

247 Information obtained from the Ministry of Housing.

quarter were legally qualified.<sup>248</sup> Referees deal with a wide range of disputes at differing levels of legal complexity. Some submitters considered that the lack of legally qualified referees was a weakness in the system.

- 198 This problem is compounded by the lack of a general appeal right – and therefore error correction – from decisions of the tribunal. We raised two possibilities in *Seeking Solutions*. First that Disputes Tribunal referees should be required to have more qualifications or, secondly, that there should be a general right of appeal from the tribunal.
- 199 We do not favour the latter. It is a characteristic of the Disputes Tribunal process that costs and delay are kept to a minimum, and parties have consistently put a high value on finality of process. An appeal right would reduce this attribute. Also, normal appeal rights are inconsistent with decisions based on the merits and justice. A wider appeal right than at present could only be by way of rehearing. Parties with more time or resources to wear down the other side could abuse the appeal process.
- 200 However, we do consider that all proceedings in the Disputes Tribunal should be recorded so that a transcript is available if a complaint is made or an appeal is sought. This would have other benefits. In similar jurisdictions overseas, recording informal proceedings has been found to have a salutary effect on behaviour in ensuring that ‘informal’ does not translate into ‘anything goes’.<sup>249</sup>
- 201 We consider that Disputes Tribunal referees should normally be required to be legally qualified. This would protect the interests of the parties more effectively and reduce the likelihood of aberrant decisions being made that are contrary to established law. The fact that, in the Disputes Tribunal, people do not have access to legal representation is a reason to put measures in place that will help protect their interests and reduce inconsistencies.
- 202 However, we accept that while a legal qualification may objectively enhance the integrity of the jurisdiction, there may be individuals who, because of their particular experience and qualities are capable of fulfilling this role without a legal qualification. This issue is discussed further in Part 4.5.

## Structure

- 203 The function of both these tribunals sits squarely at the lower end of the general civil jurisdiction.<sup>250</sup> The Disputes Tribunal and Tenancy Tribunal should now operate as divisions of the Community Court. This would enable any changes in these jurisdictions, such as quantum level or fees, to be considered in alignment with the development of the Community Court and as part of the continuum of the civil jurisdiction.

---

248 Information obtained from Grant Aislabie, Principle Disputes Tribunal Referee, 8 July 2002.

249 The Australian VCAT system tape-records hearings, which has reduced complaints and appeals.

250 Section 2(b) of the Inferior Courts Procedure Act 1909 provides that the Disputes Tribunal is an “inferior court”.

204 The tribunals should become, respectively, the Disputes Division and the Tenancy Division of the Community Court. This eliminates the possibility of any confusion of terms with the tribunals included in our proposed tribunal framework in Part 7.

## Recommendations

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

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

## Jurisdiction

205 Some submitters argued that the jurisdiction of the Disputes Tribunal should be extended on the basis that some types of low value disputes have no valid route for determination. One example is a dispute over a demand from a body corporate to a unit title holder under the Unit Titles Act 1972 for, say, a \$2,000 maintenance fee. Since the demand would be for money “arising under an enactment” it is excluded from the Disputes Tribunal under section 11(7) of the 1988 Act, and must instead be taken to the High Court.<sup>251</sup>

206 The rationale for the exclusion of these types of claims may, in part, be to prevent people from taking ‘political’ actions in the tribunal, for example, challenging rate demands or fees for planning consents. Another view is that the exclusion was to prevent the tribunal being used as a debt-collecting agency for statutory bodies.<sup>252</sup>

207 A second issue is whether low value relationship property claims should be heard in the Disputes Division. At present all such claims must be heard in the Family Court.<sup>253</sup> Proposed fee increases may make the cost of such applications prohibitive for some claims,<sup>254</sup> although there are also a number of compelling reasons to retain all cases involving the breakdown of a relationship in the Family Court.

208 The Law Commission is concerned that expanding the jurisdiction of the Disputes Division could swamp it. We are not in favour of undisputed debt claims being dealt with there, given that we propose a simplified debt claim process in the Community Court. We are not convinced, however, that where a true dispute is involved other claims should be excluded, simply because they

251 Unit Titles Act 1972, s 2.

252 P Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, 2003) 28.

253 Property (Relationships) Act 1976, s 22(1).

254 Working Party on Civil Court Fees *Review Of Civil Court Fees Stage Two – Consultation Document* (May 2003) 55–56.

arise under statute or otherwise. This appears to be an unnecessary and unhelpful restriction. As statutory frameworks are put in place or revised, we suggest that the potential role of the Disputes Division in hearing low value claims should be seriously considered.

### Open proceedings

209 At present Disputes Tribunal hearings are held “in camera” and are unrecorded. In Part 8 we recognise the principle of open justice and recommend that the hearings should be open unless a specific order prohibiting access or publication is made.



---

## 4.5

# Community Justice Officers

---

- 210 The use of lay judicial officers in the court system, and the potential for lay participation to enhance public confidence in the legal system, is a very longstanding issue which at times becomes very contentious.
- 211 Our preliminary view was based on the principle that it is desirable for all judicial officers sitting in court to be legally qualified. In jurisdictions where parties are often not legally represented, or the quality of representation is uneven, we consider it more, not less, important for judicial officers to be well qualified and have a level of skill and experience appropriate for their judicial function. The types of case that have been dealt with by lay judicial officers are regrettably called trivial, minor or insignificant. For those on the receiving end of the adjudication they are none of those things. Confidence that just outcomes will be delivered is vital for public acceptance of the court system, as well as being in the interest of the parties.
- 212 This view departs somewhat from that expressed in previous reviews of the court system. The 1978 report of the Royal Commission on the Courts endorsed lay involvement of Justices of the Peace as a means of allowing for greater community participation.<sup>255</sup> The topic of lay participation in the legal system was again touched on in 1989 by the Law Commission in its *Structure of the Courts* report,<sup>256</sup> but no specific proposals were made in light of recent and pending legislative reviews.
- 213 The fair, accurate and efficient resolution of less serious civil and criminal cases contributes more to enhancing confidence in the court system than does the appointment of lay people as judicial officers. However, we acknowledge that there may be individuals who, because of their particular knowledge or experience, are able to determine cases in this way without a standard legal qualification.
- 214 The proposal that judicial officers in the four jurisdictions where lay judicial officers can be appointed at present – Justices of the Peace, Community Magistrates, Disputes Tribunal and Tenancy Tribunal – should be legally qualified was discussed in workshops and at subsequent meetings with representatives of these judicial officers. The Royal Federation vigorously opposed any lessening of the judicial work of Justices of the Peace.
- 215 In light of the feedback received and with further development of the community court model, we propose the establishment of a new category of judicial officer, Community Justice Officers, to perform the judicial functions currently carried out by the four categories of judicial officer noted above. They would be

---

255 See Royal Commission on the Courts, above n 198, 337–341.

256 New Zealand Law Commission *Structure of the Courts: NZLC R7* (Wellington, 1989) 15, 169–170.

warranted to exercise duties in one or more of three distinct jurisdictions – the Disputes and Tenancy Divisions, and Community Magistrate functions – which would continue to exist.

## **In this section we recommend:**

- R80 A single judicial officer, known as a Community Justice Officer should exercise the current jurisdictions of the Community Magistrate, Justice of the Peace (in the exercise of their judicial functions), Disputes Tribunal Referee and Tenancy Adjudicator.
- R81 Each Community Justice Officer should be warranted to sit in one or more of these jurisdictions, depending on their skills and experience.
- R82 The summary criminal jurisdiction of Community Justice Officers should be the same as that currently exercised by Community Magistrates.
- R83 The qualification for Community Justice Officers should be either:
- experience in practice as a barrister or solicitor or overseas equivalent, or
  - capability, by reason of special knowledge or experience, of performing and exercising the duties, functions, and powers of one or more of the Community Justice Officer jurisdictions.
- R84 Community Justice Officers should be appointed for a fixed term of five years, with the option of reappointment, but not beyond the age limit that applies to permanent judicial officers.
- R85 A common rate should be paid to Community Justice Officers, set at a level that fairly reflects the importance of their judicial role and the significant volumes of civil and criminal cases they handle.
- R86 Community Justice Officers should be able to be appointed to sit on a part-time basis.

## **Existing situation**

- 216 At the time the Royal Commission on the Courts reported in 1978, Justices of the Peace were the principal judicial officers who were not necessarily (or usually) legally qualified. There are now four different types of judicial officer who handle a large volume of minor civil and criminal matters and who are not necessarily legally qualified:
- Justices of the Peace (appointed under the Justices of the Peace Act 1927) hear minor summary criminal cases (mainly minor offence notices and infringement offences) as well as conducting preliminary hearings and hearings under the Bail Act 2000. They are required to be “fit and proper” persons for carrying out the functions of a Justice of the Peace and hold their commissions for life. They are unpaid.

- Community Magistrates (appointed under the District Courts Act 1947, since 1999), exercise a summary criminal jurisdiction that includes and extends the role exercised by Justices of the Peace. A person is qualified for appointment as a Community Magistrate if that person is “capable, by reason of that person’s personal qualities, experience and skills, of performing the functions of a Community Magistrate”. The appointment is permanent, though Community Magistrates are not full time judicial officers. They are paid a very small daily rate.
- Disputes Tribunal Referees (appointed under the Disputes Tribunals Act 1988) hear certain types of tort or contract disputes with a monetary limit of \$7,500, or \$12,000 with the consent of both parties. To qualify for appointment as a referee, a person must be “capable, by reason of that person’s personal attributes, knowledge, and experience, of performing the functions of a referee”. Referees hold office for three years and may be reappointed. They are paid a daily rate according to their qualifications.
- Tenancy Adjudicators (appointed under the Residential Tenancies Act 1986) hear disputes relating to tenancies or tenancy agreements having a maximum value of \$12,000. A Tenancy Adjudicator is qualified either as a barrister or solicitor or “otherwise capable by reason of special knowledge or experience of performing and exercising the duties, functions, and powers of a tenancy adjudicator”. They hold office for three years and may be reappointed. They are paid a daily rate according to their qualifications.

- 217 Community Magistrates are the most recent class of lay judicial officers to be established and only operate in some courts in Waikato and the Bay of Plenty. This began under a pilot scheme that has now operated for nearly five years.<sup>257</sup> Community Magistrates have generally been able to handle work done by judges in other courts effectively and efficiently. Initially Community Magistrates, like Justices of the Peace, sat in pairs but they now sit singly.
- 218 These four categories of judicial officer deal with a substantial amount of business that either comes before the court or would otherwise have come before a court had it not been for the jurisdiction they exercise. For example, in their submission to *Seeking Solutions*, the Royal Federation of Justices of the Peace advised that for the 12 months ending October 2002, Justices of the Peace and Community Magistrates dealt with some 3,380 minor traffic offences, 1,139 defended traffic cases and 16,650 remand applications. They also presided over 10,600 preliminary hearings. The time involved was more than 12,000 hours of court sitting time.
- 219 It would appear that about half the sitting time of Justices of the Peace is devoted to preliminary hearings, about 43 percent to summary criminal matters and seven percent to bail hearings. The pattern of sitting hours for Community Magistrates is different. While the same proportion is spent hearing bail matters

<sup>257</sup> The pilot was formally evaluated by the Department for Courts in 2000. See B Hong, R Hungerford, P Spier Evaluation of the Community Magistrates Pilot: Final Report (Department for Courts, 2000).

(7%), two-thirds of their sitting hours are devoted to summary matters and 27 percent to preliminary hearings.

- 220 With respect to civil proceedings, Disputes Tribunals and Tenancy Tribunals deal with approximately 45,000 cases a year. Information received from the Ministry of Justice reveals a downward trend in the total number of cases filed (from around 50,000 in the 1999 fiscal year to 43,500 in the 2002 fiscal year) with around 80 percent of cases disposed of within 90 days. The number of sitting days totals around 6,000 annually for the Disputes Tribunal and 2,500 for the Tenancy Tribunal with each tribunal hearing roughly half of the cases filed.

## Proposal for Community Justice Officers

- 221 A common characteristic of the jurisdictions exercised by Justices of the Peace, Community Magistrates, Disputes Tribunal Referees and Tenancy Adjudicators is their accessibility. They operate at a community level and provide for prompt and inexpensive resolution of less serious civil disputes or summary criminal matters.<sup>258</sup>
- 222 The availability of a judicial officer to hear bail applications outside normal court hours or where a judge is otherwise unavailable is also important for the proper administration of justice. Over the last three years, bail hearings have been conducted by Justices of the Peace or Community Magistrates in some 40 District Courts when a judge was not available.
- 223 The local resolution of disputes in an environment that is convenient to the parties is important. Ease of access to venues where less serious civil and criminal matters are resolved is also a central characteristic of the proposed Community Court. Grouping these jurisdictions and enhancing their links to the Community Court will facilitate simplicity and coherence. Accordingly, the opportunity should be taken to:
- have one category of judicial officer to undertake the less serious cases in the civil and criminal jurisdictions of the Community Court, called a Community Justice Officer
  - permit (and encourage) Community Justice Officers to sit in more than one of the jurisdictions through a warranting system
  - have common qualifications, tenure and remuneration arrangements for Community Justice Officers
  - treat the two tribunals as divisions of the Community Court (the Disputes Division and the Tenancy Division).
- 224 Different skills, knowledge and capabilities are required for each jurisdiction and cross-warranting may not be common, at least initially. Only Community Justice Officers with relevant experience and skills should be warranted to sit in more than one of the jurisdictions.

---

<sup>258</sup> Disputes Tribunals and minor summary matters are dealt with in District Courts; Tenancy Tribunals sit in 21 different venues and in other places as determined by the Principal Tenancy Adjudicator.

225 However, greater availability of multi-warranted judicial officers could facilitate accessibility and also provide a broader range of work, and challenge, to Community Justice Officers. It may encourage applicants who might otherwise not have been attracted to a single jurisdiction.

## Recommendations

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

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

## Combining the jurisdictions of Justices of the Peace and Community Magistrates

226 Justices of the Peace and Community Magistrates have a similar summary criminal jurisdiction. Both groups made submissions in response to *Seeking Solutions* and both felt their jurisdiction could be extended.<sup>259</sup>

227 We accept that there is a continuing need for judicial officers other than judges to hear less serious criminal matters. Reasons include:

- the number of cases heard and disposed of each year amounts to a significant contribution to the total business of the courts
- the cases are dealt with locally, inexpensively and reasonably promptly
- the workload is often neither predictable nor even; the availability of a judicial officer outside normal court hours is also desirable
- it arguably allows for an enhanced use of judicial resources, in that judges are freed up to deal with more complex matters, provided that cases raising difficult issues can be transferred to a hearing before a judge.

228 The opportunity should now be taken to rationalise the current situation by combining the judicial function of Justices of the Peace and the jurisdiction of Community Magistrates. There seems no justification for two types of judicial officer to exercise what is essentially a single jurisdiction in summary criminal matters. The jurisdiction should be exercised by appropriately qualified Community Justice Officers.

229 The jurisdiction of Community Magistrates includes and expands the judicial role of Justices of the Peace. We consider the summary criminal jurisdiction of Community Justice Officers should that be held by Community Magistrates at present.

<sup>259</sup> A similar proposal advanced by the Royal Federation of Justices of the Peace to establish a Petty Sessions Court presided over by a specially trained Justice of the Peace was not favoured by the Royal Commission on the Courts in 1978.

## Recommendation

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

### Qualifications

- 230 The qualifications required of the four kinds of judicial officers, vary considerably, and there seems no reason why these historical anomalies should continue.
- 231 Community Magistrates are required to be capable of performing their duties by reason of their “personal qualities, experience and skills”, whereas Tenancy Adjudicators, if not the holders of a practising certificate as a barrister or solicitor (or equivalent), are required to have “special knowledge or experience” in the area they operate. A similar qualification was initially required of Disputes Tribunal Referees, but changed with the enactment of the current legislation. All Justices of the Peace are appointed in a political process and the small number who do judicial work undergo specific training. As there is no remuneration, disproportionate numbers are at or over the retiring age for professional judges.<sup>260</sup>
- 232 The starting point is to ensure that the quality of decision-making in each of the three jurisdictions can consistently be at a high level. The fair, accurate and efficient resolution of the less serious civil and criminal cases is in both the public interest and the interest of the parties. In the jurisdictions concerned:
- rights of appeal are either very limited or somewhat illusory as they are rarely worth pursuing
  - many, if not most, parties are unrepresented calling for a high level of resolution or adjudicative skills
  - it is important that findings of fact are reached within the proper legal context and rigorously made
  - in cases where bail is applied for, the liberty of the subject is at stake, so both the substantive and the technical provisions of the Bail Act 2000 must be properly taken into account; where bail is opposed by the prosecutor, reasons for the decision must be given
  - it is fundamentally important that the requirements of due process and adherence to the principles of natural justice are observed at any hearing
  - it is important for the maintenance of public trust and confidence in the institutions themselves, and for the credibility of the system, that those carrying out the judicial function have a level of qualification, knowledge, skill and experience appropriate for the task.

<sup>260</sup> In 2002 over 70 percent of Justices of the Peace were over 60 years of age, 70 percent were male and 87 percent European or Pakeha.

- 233 While this list explains why judicial officers should be legally qualified, we also recognise that some people are able to determine cases in these jurisdictions without the standard legal qualifications. We heard submissions about some current judicial officers, without legal qualifications, who are very competent and skilled. Personal qualities and experience of life are essential in addition to legal knowledge.
- 234 We consider that parties to these proceedings in court are entitled to expect they will be heard by Community Justice Officers with both appropriate personal qualities and legal knowledge, and this should be our objective. Our proposal for qualification draws on the current requirements for appointment of Tenancy Adjudicators, which assumes legal experience but allows for other qualifications in exceptional circumstances.
- 235 The skills required for each of the jurisdictions are similar, and to facilitate cross-warranting, the same qualifications should be necessary for each.

### Recommendation

R83 The qualification for Community Justice Officers should be either:

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

### Tenure

- 236 The tenure of each of the current judicial officers also varies considerably. Community Magistrates and Justices of the Peace have permanent tenure, whereas Disputes Tribunal Referees and Tenancy Adjudicators hold office for three years, but may be reappointed.
- 237 Generally, people appointed to judicial positions in our courts are appointed permanently. This is part of our constitutional arrangements to protect them from political pressure. Experience in New Zealand and elsewhere with temporary and fixed-term appointments, however, suggests that the principle of permanent appointment should not be regarded as sacrosanct. In the lower courts or in jurisdictions that have no judicial review function, the principle does not appear to be under threat.
- 238 Accordingly, there does not seem to be any reason not to appoint Community Justice Officers for a fixed term of five years, with the option of reappointment until they reach the age limit that applies to permanent judicial office holders.

## Recommendation

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

## Remuneration

- 239 At present there is no consistency to the remuneration of the judicial officers referred to, with Community Magistrates being paid much less than Disputes Tribunal Referees and Tenancy Adjudicators. Justices of the Peace, despite the value and importance of their contribution, are not paid for their time in court at all.
- 240 In 1978, the Royal Commission on the Courts recommended that Justices of the Peace receive an “adequate daily allowance” for performing their judicial functions. Successive governments did not accept this, but the case is even stronger today. The reliance on unpaid lay judicial officers has limited the pool of people available to perform that duty.
- 241 It is no longer reasonable or acceptable to expect unpaid lay people to act in a judicial capacity for the proper administration of justice, nor is there any basis for different rates of remuneration for judicial officers working in the different jurisdictions.<sup>261</sup> The substantial economic advantage in getting judicial work free from Justices of the Peace is unconscionable and unsustainable. The balance now falls in favour of requiring traditional legal qualifications or equivalent special knowledge or skills as the prerequisite for all doing this work.
- 242 A single rate should be paid. It should be set at a level that fairly reflects the importance of the judicial role and the significant volumes of civil and criminal cases they handle.

## Recommendation

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

261 A differentiating feature might arise if a Community Magistrate were to sit very briefly to hear a bail application, or to deal with an uncontested committal. That type of exceptional event should not, however, be an obstacle to consistency in remuneration.

## Part-time Community Justice Officers

243 Community Magistrates, Justices of the Peace, Disputes Tribunal Referees and Tenancy Adjudicators are currently able to work on a part-time basis and many do so. A number of Tenancy Adjudicators, for example, also maintain legal practices. There seems to be no reason in principle why Community Justice Officers should not be appointed on a part-time basis. The issues of conflict of interest are currently dealt with, though differently, in each of the statutes under which they are appointed:

- Disputes Tribunal Referees may hold any other office, or engage in employment that “will not impair the proper discharge” of their functions
- Tenancy Adjudicators may not hold any office or employment in the Public Service, or any other office or employment that “is inconsistent with the office of Tenancy Adjudicator”
- Community Magistrates may hold office, or engage in employment that “will not impair the proper discharge” of their functions; additionally, however, there are a number of prescribed offices and occupations they cannot hold and they may not practise law.

244 It should be possible to devise a common statutory formula with respect to conflict of interest. There would seem to be no impediment in principle to a Community Justice Officer holding a legal practising certificate, as long as any possible conflict is specifically dealt with, for example, by restricting appearances in the Community Court.

### Recommendation

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



# Part 5

## Primary Courts

---

In this part we consider:

- the effect of our proposed court structure on each Primary Court
- criminal processes in the Primary Criminal Court and the High Court
- civil processes in the Primary Civil Court and the High Court
- issues arising in relation to the:
  - Family and Youth Courts
  - Environment Court
  - Employment Court
  - Māori Land Court
  - Coroners' Court.

## 5.1

# Primary Criminal Court and Criminal Processes

---

- 1 Under our proposals, the Primary Criminal Court and the High Court would both conduct criminal jury trials, but most would be heard in the Primary Criminal Court.
- 2 The criminal jurisdiction provides the greater part of the workload of the courts in terms of volume of cases dealt with. All District and High Court judges deal with criminal cases. Seventy District Court judges are warranted to conduct jury trials, as are 11 acting District Court judges. To avoid repetition, in this section we discuss the criminal processes for jury trials, which are applicable to both the proposed Primary Criminal Court and the High Court.
- 3 In the last decade, the number of criminal cases dealt with in the courts annually has fluctuated between a high of 141,000 and a low of 129,000, with the average being 133,000. The number of cases where the maximum penalty has not been imprisonment or has not been more than three months' imprisonment, has ranged from 85,000 to 69,000 with the annual average about 76,000.<sup>262</sup> These cases would comprise the workload of the Community Court. Cases with a maximum penalty of seven years' imprisonment or more have numbered around 30,000 annually. These cases would be predominantly heard in the Primary Criminal Court, with a small number heard in the High Court.

### **In this section we recommend:**

#### Primary Criminal Court

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

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

- R88 The middle band of criminal offences should be abolished.
- R89 The High Court should retain exclusive criminal jurisdiction for a defined group of offences. All other cases not in the jurisdiction of the Community Court should be heard in the Primary Criminal Court.
- R90 The defined list of offences heard in the High Court should be based on the seriousness and complexity of offending. Legislation should be introduced after consultation with the judiciary, the police and the legal profession.

---

<sup>262</sup> Information received in meeting with Ministry of Justice, 15 January 2004.

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

#### Criminal jury trials

- R92 The threshold for an accused's right to elect a jury trial should be limited to offences regarded as 'serious' by today's standards.
- R93 New Zealand should adopt the standard in the Canadian Charter of Rights and Freedoms 1982, and provide a right to trial by jury for cases with a maximum penalty of five years' or more imprisonment.
- R94 The prosecution as well as the accused should be able to apply for trial by a judge without a jury for offences with a maximum penalty of less than 14 years' imprisonment, where the case is likely to exceed four weeks or 20 sitting days.

#### Reforms in progress

- R95 There should be urgent implementation of the legislative reforms relating to criminal jury trials, currently planned to be introduced to Parliament in 2004, which aim to:
- enable juries to be more representative and competent
  - allow majority verdicts of 11 jurors
  - minimise the use of preliminary hearings at which witnesses give oral evidence
  - standardise prosecution disclosure and provide for some defence disclosure.

### Boundary between the Primary Criminal Court and the High Court

- 4 Before 1980, the general work of the courts in New Zealand was divided between the Supreme Court and the Magistrates' Court depending on the severity of penalty in criminal matters and the amount of money at stake in civil matters.
- 5 In 1980, these courts were reconfigured as the High Court and District Courts, in response to the recommendations of the 1978 Royal Commission on the Courts. The District Court was given an expanded criminal and civil jurisdiction. The High Court retained the most significant litigation: civil cases with a high monetary value, the most serious criminal trials, cases involving important points of law, judicial review and appeals.
- 6 In its 1989 review of the court system, the Law Commission recommended that the District Court and the High Court should have a wider area of concurrence in the civil jurisdiction.<sup>263</sup> It proposed that there should be no monetary limit to the cases that the District Court could hear, but that some categories of case should be reserved for the High Court, most notably judicial review.

<sup>263</sup> New Zealand Law Commission *The Structure of the Courts: NZLC R7* (Wellington, 1989).

- 7 That proposal was not fully implemented. Instead, the District Court’s civil jurisdiction was increased to \$200,000 with the concurrent jurisdiction of the two courts being \$50,000 to \$200,000.
- 8 In 1989 the Law Commission also recommended complete concurrence of criminal jurisdiction between the High Court and District Court. It anticipated that cases of public importance, such as murder trials, would usually be heard in the High Court, but proposed that the High Court concentrate on appellate and supervisory work.
- 9 Again, these proposals were not fully implemented. The District Court’s criminal jurisdiction was fixed by offence category. The High Court retained exclusive jurisdiction over the most serious crimes, and the two courts were given concurrent jurisdiction over a range of indictable criminal offences, commonly known as “middle band offences”.

## Middle band offences

- 10 Middle band offences are set out in Part II of Schedule 1A to the District Courts Act 1947. Cases involving these offences are initially committed to the High Court for trial, but may be transferred to the District Court, after taking into account the gravity of the offence, the complexity of the issues, the need for prompt disposal of trials, and the interests of justice generally.<sup>264</sup>
- 11 In terms of workload, the District Court presently deals with most criminal work, conducting 86 percent of all jury trials in the June 2002/03 year.<sup>265</sup> We have heard little criticism of the ability of the District Court judiciary to do this work. While delay is undoubtedly a cause for concern, much of it results from what happens in the preliminary stages before trial – an area where improvements are suggested elsewhere in this report.
- 12 The middle band procedure has emerged as a clear area of concern. The almost universal view is that the procedure is applied unevenly across the country, with wide variations between regions in the proportion of cases referred back to the District Court.
- 13 Also, moving middle band files from the District Court, after depositions, to the High Court and then back to the District Court is administratively inefficient, and creates workload issues in the District Court. As control of the transfer mechanism lies solely with the High Court, planning for workflows at the District Court can be difficult.
- 14 The fact that the bulk of middle band work is eventually done in the District Court lends weight to the suggestion that this should be recognised by a clean grant of jurisdiction. This view was endorsed by the submissions of the New Zealand Law Society and the District Court judges.

---

264 Summary Proceedings Act 1957, s 168AA(3).

265 Email from Ministry of Justice, received 17 December 2003.

## Proposal for a National Trial Court

- 15 In their submission, the District Court judges suggested that a National Trial Court should deal with all criminal work.<sup>266</sup> They recommended maximising concurrence between the District Court and the High Court, and adopting a unified structure. Examples of this approach exist in the Crown Court in England and in South Australia.
- 16 Their submission was that all jury trials should be grouped together and managed within a single administrative structure. With very limited exceptions, any indictable trial could be heard by either a High Court or District Court judge. The submission envisaged that indictable matters would fall into two groups. Category 1 would include offences like murder, manslaughter and treason, and could only be dealt with by a High Court judge, or on the basis of a specific order of release, by a District Court jury warranted judge. All other offences would fall into category 2 and would be dealt with by all warranted District and High Court judges.
- 17 The District Court judges considered this proposal would bring greater efficiency in dealing with jury trials, since it would be easier to coordinate the work of the two courts, and deploy their resources more efficiently. They submitted that it would be a relatively simple matter to balance the workloads of the two courts under this arrangement, and to ensure that the High Court continued to have sufficient trial work. A new criminal trial management unit, supervised by a Chief Trial Judge from the High Court would undertake the allocation of cases.

## Submission of the High Court judges

- 18 The concept of one national criminal trial court did not have the support of the High Court judges. Their submission was that a National Trial Court would inhibit the High Court's ability to manage its general jurisdiction effectively.
- 19 The judges argued that the efficiencies claimed from a National Trial Court could equally come from improved administration within the courts. To this end, the High Court is developing a total roster and schedule that will permit a national approach to the allocation of judicial resources.
- 20 Their submission proposed that offences for which High Court trial only is available should be defined specifically, rather than on the present default basis. If Class A drug dealing charges are retained as High Court only matters, they urged that there be a discretion to transfer less serious cases to the District Court.
- 21 All other cases would be committed to the District Court, and the High Court would retain discretion to transfer certain cases for trial, on the application of Crown or defence counsel. Guidelines for transfer could be identified in legislation or by way of Practice Note.<sup>267</sup>

<sup>266</sup> Submission received from the District Court judges.

<sup>267</sup> The High Court suggested reference could be made to the position adopted in England and Wales – see Practice Direction (Crown Court: Allocation of Business) (No 3) [2000] 1 WLR 399.

## Discussion

- 22 Each of these proposals recognises the expertise in the District Court in criminal cases, and the need to ensure that the High Court has sufficient criminal work to enable the judges to maintain expertise in the area. This is critical to ensure quality decision-making in the High Court both at first instance and appeal. There are no significant differences between the proposals in terms of constitutionality or accessibility.
- 23 In our view, the arguments in favour of a change of the magnitude of the National Trial Court are not sufficiently compelling, and its principal advantages – said to be efficiency and flexibility – can be achieved, with less disruption, by other means. The model may be better suited to the current District Court where some judges tend to do predominantly criminal work, as opposed to the High Court, where the judges all hear cases in the civil and public law jurisdiction as well. The High Court’s contention that a National Trial Court would cut across its ability to manage its jurisdiction effectively has merit.
- 24 Other changes can be made to minimise time wasted in the courts. The need for timely hearings and decision-making is of critical importance in the criminal jurisdiction, where people’s liberty is at stake. However, the biggest impediments to timely hearings at present are volumes of cases, lack of resources, and unavailability of counsel of choice. Our recommendations for the establishment of the Community Court, new processes for dealing with the criminal list and to better prepare litigants who cannot access representation should have a positive impact in these areas.
- 25 The District Court judges also argued that a National Trial Court model offers greater flexibility to respond to changes in patterns of criminal offending. We accept that a flexible system is desirable, but do not think that the National Trial Court model is the best way to achieve this.
- 26 We are not attracted to the High Court judges’ suggestion that less serious cases in its exclusive jurisdiction could be transferred back to the Primary Court. This would create the same double handling that has caused concern in the context of middle banding and has the potential to raise the same concerns about the District Court losing the ability to manage its own caseload.

## Proposal for a Primary Criminal Court

- 27 The Law Commission proposes that there should be a Primary Criminal Court, led by a Principal Judge with responsibility for leadership, oversight, judicial resourcing, scheduling and policy development in that jurisdiction. It would have original jurisdiction in all criminal cases except those specifically within the jurisdiction of the Community or High Courts. The work would include both jury trials and judge-alone hearings.

## Recommendation

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

## Abolition of the middle band

- 28 We propose that the great bulk of more serious criminal work should be heard in the Primary Criminal Court, with a power to transfer cases to the High Court where that is necessary in the interests of justice, in the particular circumstances of the case. The middle band of offences would be abolished. Enabling the Primary Criminal Court to assess and control its criminal caseload would have major advantages in planning and management.
- 29 The High Court should have an exclusive criminal jurisdiction for the most serious criminal offences, which would obviously include those where the maximum penalty is life imprisonment. However, there is an urgent need for a reassessment and review of the other offences that should be in this category. We are aware of work in 2001 that identified and proposed removing some of the most serious anomalies in the current regime. This would certainly be useful but it has not yet been implemented and, in our assessment, more needs to be done. Even the 2001 proposals would leave some offences with a maximum penalty of as little as three years' imprisonment in the exclusive jurisdiction of the High Court.
- 30 There are sound reasons for retaining an originating jurisdiction in the High Court. Society views some criminal matters as so serious that they should be tried there. In addition, the High Court has an appellate role with regard to criminal matters heard in the Primary Criminal and Community Courts and it is important that its judges remain conversant with current practice and procedure.
- 31 Determining what the High Court's originating jurisdiction should include is not easy because inevitably arbitrary lines have to be drawn. A current example of the problem is that dealing in Class A drugs has a maximum penalty of life imprisonment. This is not an issue where the charge involves commercial supply or transference of a substantial quantity of a drug. But the current definition also catches a teenager handing another teenager one LSD or methamphetamine pill. It is neither necessary nor proportionate for such a case to be dealt with in the High Court.
- 32 Some argued that middle banding provides the best response to such problems. However, it is a blunt instrument which involves wholesale transfers of cases and has serious implications for planning workloads in the District Court.

- 33 In our criminal law there are offences where the relative seriousness is reflected by different penalties, depending on the value of what is at stake in the alleged crime. Such a formula could be used in respect of drug supply offences so that in some circumstances the involvement of the High Court will be warranted and not in others. We acknowledge that such an approach may be considered arbitrary, but the current regime is also arbitrary and, in addition, does not provide a sensible or rational means of determining the truly serious or complex cases that require the attention of the High Court.
- 34 Accordingly we recommend that there be a defined group of offences for which the High Court alone has original jurisdiction. Secondly, that this group of offences be determined after further consultation with the judiciary, the police and the legal profession to agree a formula which reflects the complexity and seriousness of offending characteristic of these offences.
- 35 All other cases – that are not in the jurisdiction of the Community Court – would be heard in the Primary Criminal Court. There is no suggestion that the present District Court is not appropriately skilled to attend to this work as a matter of course. Abolishing the middle band procedure will result in more clarity in case allocation protocols and be more understandable for court users.

## Recommendations

- R88 The middle band of criminal offences should be abolished.
- R89 The High Court should retain exclusive criminal jurisdiction for a defined group of offences. All other cases not in the jurisdiction of the Community Court should be heard in the Primary Criminal Court.
- R90 The defined list of offences heard in the High Court should be based on the seriousness and complexity of offending. Legislation should be introduced after consultation with the judiciary, the police and the legal profession.

## Transfer of cases

- 36 There should be a mechanism whereby individual cases can be transferred from the Primary Criminal Court to the High Court in the interests of justice, because of the particular circumstances of the offence or the offender. The High Court judges submitted possible criteria for transfer but, in our view their mechanism carries the same disadvantages as the present middle banding mechanism. The criteria for transfer should be limited to truly exceptional circumstances so as to promote certainty and clarity for the parties and maximise efficient management schedules in both courts.
- 37 Our proposal will be more efficient administratively since there will be no transfer of cases from the High Court to the Primary Criminal Court. Transfer will arise only in truly exceptional cases instead of the current arrangement

where the bulk of criminal cases are in fact middle banded. Under our new system, both the Primary Criminal Court and the High Court will be in control of their own workloads and in a better position to manage their available resources.

- 38 The vesting of original jurisdiction for the most serious criminal cases in the High Court will ensure that the High Court maintains a critical mass of criminal trial work to enable judges to preserve competence in their appellate role.

## Recommendation

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

## Criminal jury trials

- 39 Trial by jury is a critical part of our criminal justice system. In *Juries in Criminal Trials*<sup>268</sup> the Law Commission identified a number of ways in which the jury system could be enhanced. In *Seeking Solutions* we referred to the pressures on the courts, particularly the District Court, of the criminal jury caseload and the problems caused by delay. We also noted some of the overseas attempts to streamline the process.
- 40 A number of initiatives are already underway to deal with the problem of delay and we discuss these below. So far as the jury system itself is concerned, we make a number of specific recommendations including a new threshold for jury trials and for trial by a judge without a jury in certain cases.
- 41 Juries play a valuable role in the operation of the criminal justice system. They help to ensure:
- lay participation in the hearing of criminal offences
  - contemporary community values are reflected in decisions of the court
  - a range of perspectives, experiences and knowledge are brought to bear in decision-making
  - the public is educated about court processes.
- 42 In *Juries in Criminal Trials*, the Law Commission endorsed an accused person's fundamental right to trial by jury in serious cases. The report concluded that the jury system remains "an essential and desirable feature of [the] criminal justice system", and that research had confirmed juries reach fair and impartial decisions.

268 New Zealand Law Commission *Juries in Criminal Trials*: NZLC R69 (Wellington, 2001).

- 43 However, the Law Commission also discussed some of the issues that arise in jury trials. We highlighted the reluctance among some in the community to undertake jury service, the difficulties encountered in convening truly competent and representative juries, and the interference jury service causes in the lives of jurors. Many of these issues were also raised by submitters, who were concerned about:
- the costs involved in conducting jury trials
  - the extent to which jury trials contribute to delay
  - the burden jury service places on jurors in terms of time and loss of earnings
  - the reluctance of some citizens to be jurors
  - the reality that juries may not fully reflect the community due to the ability of people to apply for exemption.
- 44 For most cases, it is inevitable that a jury trial will be more costly and incur greater delays than a judge-alone trial. The public interest benefits of jury trials require that additional court time be spent on selecting and briefing jurors, directing them on the law, presenting evidence comprehensibly and on jury deliberation.
- 45 However, measures can be taken to ensure juries are more representative and competent, to ensure that jury service is held in high esteem, and that jury trials are only used in the most appropriate cases.

## Eligibility for jury trials

- 46 It is in the public interest that the community participates in the hearing of serious cases to ensure a range of perspectives is incorporated into the decision-making process. However, the right to trial by jury is not absolute. A jury trial is the largest direct investment the community makes in our system of justice and so should only be reserved for serious cases.
- 47 The right to elect trial by jury has always been available for offences Parliament classifies as ‘indictable’. Since 1900, a person charged with a summary offence punishable by a term of more than three months’ imprisonment has also had that right.<sup>269</sup> When the right became enshrined in section 24(e) of the New Zealand Bill of Rights Act 1990, it was worded in terms of a maximum punishment for an offence of more than three months’ imprisonment.
- 48 Under this very low threshold the right to a jury trial is effectively triggered by the penalty for the offence, rather than by a deliberate decision by Parliament that the offence itself warrants such a right. In this regard New Zealand law has

<sup>269</sup> Indictable Offences Summary Jurisdiction Amendment Act 1900, s 6. The current enactment – Summary Proceedings Act 1957, s 66 – is subject to two exceptions relating to common assault and assault on a police, prison or traffic officer.

developed differently from the United Kingdom and Australia, where the right applies to prescribed ‘indictable’ or ‘either way’ offences. In Canada the constitutional right to a jury trial is linked to offences carrying a specific penalty, but there the threshold is maximum imprisonment of five years or more.<sup>270</sup>

- 49 In New Zealand the gradual yet substantial increase in the number of offences for which trial by jury may be elected has contributed to an increase in the number of jury trials and to relatively minor offences (such as simple possession of a Class A controlled drug) now being determined by a jury. We question whether this is a proportionate response and an appropriate investment of resources. Notwithstanding the specific provision in the Bill of Rights Act, the threshold for jury trials needs reconsideration to bring it into line with what would be broadly regarded as ‘serious’ offences in today’s terms.
- 50 If New Zealand were to adopt the Canadian approach to the constitutional right to trial by jury, offences with a maximum penalty of more than three months but not more than five years would no longer be eligible for jury trial. New Zealand has already drawn heavily on Canada’s jurisprudence in Bill of Rights matters, which many regard as standard-setting. Adoption of the standard in the Canadian Charter of Rights and Freedoms 1982 could better reflect the principle of proportionality and current views of the seriousness of offences.
- 51 In New Zealand, annual volumes of cases in this category range from 17,000 to more than 28,000 with substantial increases in the second half of the last decade.<sup>271</sup> The potential number of cases where the right to trial by jury would not be available under the Canadian approach would be about 30,000. At present, a substantial proportion of these cases are prosecutions for common assault under the Crimes Act, possession of an offensive weapon, and male assaults female where the maximum penalty is one or two years’ imprisonment.
- 52 Although the number of cases in which right to trial by jury was available would nearly halve, we cannot predict how much the actual number of trials would reduce. The change would have a substantial impact but, as jury trials are more often elected in the serious categories of cases in this range, it could be significantly less than half the current volume.
- 53 Parliament would always be able to determine that a right to jury trial should exist for a particular class of offending, even if it carried a lesser maximum imprisonment than five years. The converse has existed in New Zealand over a lengthy period of time. Although assault under the Summary Offences Act has a maximum penalty of six months’ imprisonment, there has never been a right to trial by jury in those cases. Such individual situations can be accommodated.
- 54 The critical factor, we contend, is proportionality within the justice system. Community views, as expressed through Parliament, would be important in making a decision to raise the threshold of eligibility for jury trials.

<sup>270</sup> Canadian Charter of Rights and Freedoms 1982, s 11(f).

<sup>271</sup> The average for the first five years was 26,000, but for the second about 27,500 annually. Information received in meeting with Ministry of Justice, 15 January 2004.

## Recommendation

- R92 The threshold for an accused's right to elect a jury trial should be limited to offences regarded as 'serious' by today's standards.
- R93 New Zealand should adopt the standard in the Canadian Charter of Rights and Freedoms 1982, and provide a right to trial by jury for cases with a maximum penalty of more than five years' imprisonment.

## Lengthy and complex cases

- 55 In *Juries in Criminal Trials*, the Law Commission recommended introducing the option of judge-alone trials, on application by the prosecution, in cases likely to exceed 30 court sitting days. In that report we discussed the demands made of a jury in complex trials, such as complicated fraud cases, and the imposition on jurors hearing evidence in very long trials. The recommendation related only to cases likely to exceed 30 days. No separate recommendation was made with respect to 'complex' trials as often the ingredients of length and complexity affected the same cases.
- 56 At present the accused has the additional right after committal for trial to then elect for the case to be heard by a judge without a jury.<sup>272</sup> This choice was regarded as particularly appropriate for complex cases or long trials involving 'white collar' crime.<sup>273</sup>
- 57 Lengthy jury trials raise two particular difficulties. The first relates to the practicality of securing a representative panel of available jurors for trials that could extend to months. The second is the reasonableness of expecting members of the public to effectively give up their normal lives for extended periods in fulfilment of their public duty as jurors. In respect of the most serious of cases, such as those carrying life or imprisonment for 14 years or more, the public interest in a jury deciding guilt or innocence is of such importance as to outweigh the difficulties involved.
- 58 However, in less serious cases – usually long-running fraud trials – the public interest is less acute, and the imposition of a lengthy commitment on members of the jury needs to be considered in the context of the individual case. From comments made to the Law Commission and further reflection, we have concluded that point is reached when a trial is likely to exceed one month or 20 sitting days.
- 59 The possibility of trial by a judge without a jury, either at the election of the accused, or by special order of the court, was first raised by the Court of Appeal in *R v Jeffs* (28 April 1978), a fraud case which occupied the court for three months. More recently, the topic has been the subject of lengthy consideration

272 Crimes Act 1961, s 361B.

273 Royal Commission on the Courts, above n 198, paras 394–400.

in the United Kingdom, resulting in provisions in the Criminal Justice Act 2003 permitting the prosecution to apply to the Crown Court for a serious or complex trial to be conducted without a jury where:

... the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the members of the jury hearing the trial that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury.<sup>274</sup>

- 60 The possible length of the trial should not be the only consideration when the Crown makes an application for trial without a jury. The judge should have regard to the steps that might reasonably be taken to reduce the length or the complexity of the case and also the strong public interest in guilt or innocence being decided by a jury in serious cases. An accused should have a right of appeal against an order for a judge-alone trial made following a successful Crown application.
- 61 We understand that Government has made a policy decision along similar lines to this recommendation and it is anticipated that legislation will be introduced to Parliament in 2004.

## Recommendation

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

## Reforms in progress

- 62 Government has accepted several recommendations made by the Law Commission in previous reports relating to criminal jury trials, and policy work is well advanced to allow these to be implemented. Officials of the Ministry of Justice have informed us that significant reforms, regarding much of what we discuss in the following paragraphs, will be included in the Criminal Procedure Bill, which is expected to be introduced into Parliament in 2004.
- 63 During consultation for this review many submitters raised many of these issues again and it is clear they are still of serious concern to the general public. Below, we discuss four issues in this category that we consider do need urgent consideration by Parliament.

<sup>274</sup> Criminal Justice Act 2003 (UK), s 43(S).

## Representative and competent juries

- 64 This issue was considered by the Law Commission at some length in *Juries in Criminal Trials*. In that report, we recommended:
- extending jury district boundaries to include people living farther from the court
  - implementing measures to assist people serving as jurors such as improving the provision of information and assistance and increasing the daily rate of payment
  - imposing statutory penalties on people who fail to answer jury summonses
  - ensuring that information is presented clearly and simply for jurors to enhance their competency levels
  - limiting the time jurors must serve on cases by introducing the option of judge-alone trials in lengthy and complex cases.

## Majority verdicts

- 65 In *Juries in Criminal Trials*, the Law Commission recommended introducing majority verdicts of 11, if one of the 12 jurors dissents, for both convictions and acquittals in all criminal jury trials. The recommendation was aimed at reducing the number of hung juries that may occur due to the presence of a juror who is unreasonable or unwilling to consider the views of others.
- 66 We note that this reform is due to be included in the Criminal Procedure Bill, which is expected to be introduced into Parliament in 2004.<sup>275</sup>

## Preliminary hearings

- 67 Preliminary or committal hearings are a mechanism to ensure that there is a case to answer before a matter proceeds to trial. Evidence in support of the prosecution case is presented either orally, by calling witnesses, or in the form of written statements signed by the witnesses, or a combination of both. Reforming this process has been under consideration for many years.<sup>276</sup>
- 68 In the overwhelming majority of cases the accused acknowledges the existence of a sufficient case to justify trial on the basis of prepared sworn statements, without a witness being called. The Law Commission suggested that this should be the normal approach so that preliminary or committal hearings with witnesses giving oral evidence would only occur where a judge was satisfied this was required in the interests of justice. This approach already exists in regard to the evidence of complainants in sexual offending cases.

---

<sup>275</sup> Minister of Justice, Hon Phil Goff, media statement, 23 January 2004, noted in *27 TCL* 2, 10.

<sup>276</sup> The Law Commission made a number of recommendations in *Criminal Procedure Part One: Disclosure and Committal: NZLC R14* (1990) and *Criminal Prosecution: NZLC R66* (2000) paras 176–192.

69 We confirm the urgent need for reform of preliminary hearings and note that Government has made a policy decision to include such provisions in the proposed Criminal Procedure Bill.

## Disclosure

70 In Part 4.2, we highlighted the positive impact there can be from doing as much as possible to identify the issues and agreed facts in a criminal case. We noted the importance of the prosecution and defence having enough information about each other's case as early as possible to enable them to make informed decisions and make the trial process sensible and appropriate. We also noted that any attempts to do this must be consistent with the defendant's rights, as protected by the New Zealand Bill of Rights Act 1990.

71 This is an area for statutory reform that the Law Commission has referred to on a number of occasions, the most recent being in *Criminal Prosecution*.<sup>277</sup> Along with reform of preliminary or committal hearings, legislation should provide for initial and ongoing disclosure in both summary and indictable proceedings in accordance with set timetables. An effective disclosure scheme is central to addressing the issue of delay in the trial jurisdiction.

72 One of the purposes of disclosure is to compensate defendants for not being able to hear the prosecution's witnesses at the committal hearing, by ensuring early disclosure of the prosecution's case. Standardising prosecution disclosure practice and providing for some defence disclosure, would also have more broad-based trial management benefits and could result in parties:

- preparing more fully and adequately for hearings
- identifying earlier the real issues in dispute
- making early and informed pleas.

73 We confirm the urgent need for standardising prosecution disclosure practice and providing for some defence disclosure. As above, Government has made a policy decision to include such provisions in the proposed Criminal Procedure Bill.

### Recommendation

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

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

<sup>277</sup> New Zealand Law Commission *Criminal Prosecution*, above n 276.

## Judicial case management

- 74 In Part 4.2 we referred to the practice of status hearings and to the research report and discussion paper to be published shortly. Status hearings, as such, do not take place in the trial jurisdiction, although initiatives to enhance the judicial management of criminal cases are ongoing.
- 75 In *Seeking Solutions* we made reference to reform overseas directed at better case management. In Victoria, Australia, legislation has been in force since 1999 to increase the capacity for judicial management of criminal jury trials and to make other changes for the purpose of improving the efficiency of trials.<sup>278</sup>
- 76 The Victorian Act provides for pre-trial directions hearings (and in some instances case conferences<sup>279</sup>) to be held to reduce the number of pending cases and the length and complexity of criminal trials. Emphasis is on the early identification of guilty pleas, on providing trial date and length certainty, and on settling issues of representation, law, fact or procedure prior to the trial.
- 77 Central to these hearings is the requirement in statute for both sides to identify the contentious issues in the case prior to the trial.<sup>280</sup> The prosecutor must provide the court and the defence with a summary of its opening address to the jury and a notice of pre-trial admissions at least 28 days prior to trial. The summary of the prosecution opening must outline the manner in which the prosecution will put the case against the accused, and the acts, facts, matters and circumstances being relied upon to support a finding of guilt.
- 78 The defence must then respond to the prosecution and the court within 14 days of trial, setting out the matters with which it takes issue and the basis for doing so. The procedure limits the case to the relevant issues and focuses the defence at an early stage on the merits of the case. Where these statutory requirements are not met, the court may impose costs orders on either party or their counsel.
- 79 Indications are that the practice has been successful in Victoria in decreasing the time taken to resolve cases and in reducing the backlog of cases awaiting trial. It was reported in 2000 that the number of cases resolved at arraignment had increased from 15 to 60 percent, with 40 percent of those being resolved at the prior case conference. It was also reported that the number of guilty pleas at trial had reduced from 36 to 20 percent.<sup>281</sup> This in turn has reduced the length of time spent in custody or on bail for defendants, and reduced stress and uncertainty for victims and witnesses.
- 80 In the United Kingdom, the rules relating to disclosure by both the prosecution and the defence contained in the Criminal Procedure and Investigations Act

278 Crimes (Criminal Trials) Act (Vic) 1999, s 1.

279 Section 36, amending the Magistrates' Court Act 1989, Sch 5, cl 24(3).

280 Unless there has been a post-committal conference and a magistrate has prepared a written record of it in accordance with Schedule 5 to the Magistrates' Court Act 1989, or the court otherwise directs. See: Crimes (Criminal Trials) Act (Vic) 1999, s 6(1).

281 Report of the County Court of Victoria *County Court Criminal Case and List Management System under the Crimes (Criminal Trials) Act 1999* (Melbourne, 2000) 1.

1996, its code of practice and Attorney-General's guidelines, were recently supplemented by Part 5 of the Criminal Justice Act 2003. While the requirements for prosecution disclosure are moderately strengthened by the new provisions, the burden on the accused has been substantially increased. The British Government in its white paper *Justice for All* (July 2002) issued in response to Lord Justice Auld's *Review of the Criminal Courts*,<sup>282</sup> adopted these changes in principle as part of a strategy to streamline the trial process.

- 81 The role of judges in the case management of criminal trials has evolved over the last decade to become central to reducing delay in the process. The imposition of a higher burden of disclosure on the accused by the United Kingdom legislation goes further than the Law Commission has previously contemplated. Whether such a step can be justified under the New Zealand Bill of Rights Act 1990, or whether reform along the lines of that undertaken in Victoria is appropriate, are matters on which we will be better placed to comment in the context of our status hearings report.

#### Who should prosecute?

- 82 A clear division between the investigation and the prosecution of an offence helps promote transparency and accountability. It ensures that the prosecution decision is not prompted by bias or improper motives, and that the weight of the prosecution's case is evaluated by an independent party.
- 83 Currently, the police investigate and prosecute virtually all summary offences. In 1999, the Police Prosecutions Service (PPS) was set up to create an identifiable division between the police's investigative and prosecuting powers. Members of the PPS are responsible for reviewing and, if necessary amending, the initial police charging decision, and for conducting most summary prosecutions and indictable prosecutions up to committal.
- 84 Once a case is committed for trial, the prosecution transfers from the police to the Crown Solicitor. Crown Solicitors are responsible for making the decision to prosecute and for presenting the indictment to the court. Charges may be added or dropped at this stage so long as, if a charge is added, there is sufficient evidence in support of it.
- 85 In exceptional cases, at the request of the PPS, Crown Solicitors may prosecute complex summary cases and serious indictable cases prior to committal. In *Criminal Prosecution* the Law Commission identified the benefits likely to be achieved by having Crown Solicitors review all prosecution files once a plea is entered, or an election is made for a jury trial.<sup>283</sup> We endorse that recommendation.<sup>284</sup>

282 Lord Justice Auld *Review of the Criminal Courts of England and Wales* (London, 2001).

283 New Zealand Law Commission *Criminal Prosecution*, above n 276.

284 New Zealand Law Commission *Criminal Prosecution*, above n 276, Recommendation A16 which states: "Crown Solicitors should have oversight of all indictable prosecutions once a plea is entered or the defendant has elected trial by jury. Crown Solicitors should review prosecution files to confirm that the original charges are appropriate, and to give guidance to police on evidential issues. Responsibility for conducting the preliminary hearing itself would remain with the police, except in cases where they elect to instruct the Crown Solicitor (as is the present practice in relation to particularly serious or complex cases)."

86 The arrangements for prosecution in New Zealand – through the PPS conducting most summary cases and Crown Solicitors, who are private practitioners holding a warrant, prosecuting jury trials – are unique. The issue of a stand-alone public prosecutions office has been raised and appears worthy of detailed consideration. In the context of this report we have not assessed the appropriateness or effectiveness of such a proposal.



---

## 5.2

# Primary Civil Court and Civil Processes

---

- 87 Under our proposals, the courts hearing civil cases over a value of \$50,000 would be the Primary Civil Court and the High Court. Although the jurisdictional limit in the Primary Court would be higher than that in the current District Court, parties would have considerable choice as to where they file.
- 88 At present, slightly different rules on civil procedure apply in the High and District Courts despite a longstanding intention to combine the rules for cases above a certain value and develop separate procedures for claims of lesser value – as we propose for the Community Court.
- 89 We suggest some changes to the current High Court Rules to enhance their effectiveness and propose that the same case management rules should apply in both the High Court and Primary Civil Court. We also suggest that the court rules should be rewritten to make them more accessible, as has been discussed for some time. This would be a major task.
- 90 We also advocate greater use of mediation in the civil courts, as discussed in Part 2.6. We consider those proposals should be built into any further review of civil procedure and case management.
- 91 The civil process and case management issues discussed in this section apply to both the proposed Primary Civil Court and the High Court, and are not repeated in Part 6.1 where we discuss the role of the High Court.

### **In this section we recommend:**

#### Primary Civil Court

- R96 A Primary Civil Court should sit as a separate court, forming part of the Primary Court structure, headed by a Principal Judge. The work of the court should be undertaken by Primary Court judges warranted to hear civil cases.
- R97 The upper limit of the Primary Civil Court’s jurisdiction should be \$500,000.
- R98 The Primary Civil Court and High Court should share jurisdiction concurrently for cases up to \$500,000.
- R99 The provisions for transfer of cases between the Primary Civil Court and the High Court should remain unchanged.

## Case management in the Primary Civil Court and High Court

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

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

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

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

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

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

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

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

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

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

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

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

R110 We restate the recommendations made in our 2002 report on *General Discovery*<sup>285</sup> and seek their early implementation.

---

<sup>285</sup> Those recommendations are attached as Appendix C to this report.

---

## Structure

92 In its 1989 report, the Law Commission advanced the view that greater concurrence between the District Court and High Court would:

... make justice more widely accessible in the community; provide for a more principled allocation of business between High Court Judges and District Court judges (for monetary and penalty limits are not themselves a good guide); it would enable the better matching of work to the work of the courts to the qualities and abilities of different groups of judges; and it would allow a better balance of work between those groups and within them ...<sup>286</sup>

93 These arguments are still pertinent. There are countervailing concerns today, which were perhaps not so relevant in 1989, but which have an influence on the civil work of the courts. However, questions of accessibility – both geographical and financial – become increasingly relevant as the cost of living rises. A growing number of ‘ordinary’ New Zealanders are involved in disputes involving more than \$200,000 and this number will continue to grow. It is important that they are able to gain access to the court system. These factors weigh in favour of greater concurrence.

94 The countervailing factors referred to include the perception that the District Court’s heavy criminal workload adversely affects the way the court deals with civil cases. District Court managers have confirmed that criminal work takes priority and that administrative focus on civil cases sometimes takes a back seat. The priority given to criminal work may also cause the quality and experience of the judges hearing civil cases to suffer. Worryingly, some submitters have suggested that lawyers sometimes advise their clients to file their case in the High Court because of concerns about the ability of the District Court to deliver satisfactorily.

95 The Law Commission acknowledges that there are concerns about the quality of civil justice in the present District Court. In the absence of other procedural and structural changes, these concerns create unease about increasing the civil jurisdiction of the proposed Primary Civil Court. Our view is that there are a number of District Court judges who are appropriately skilled to exercise its civil jurisdiction. The disquiet arises because the present volume pressures in the court have made it difficult to ensure that the civil work is performed in sufficient time by these skilled judges. A consequence is that judges appointed for their experience in civil work struggle to maintain and develop their skills.

96 That there is low respect for the court’s ability to deliver justice is a major area of concern. However, rather than accept these negative perceptions, we have sought to make recommendations that will enable it to perform to expectations and fortify its reputation. Our approach has been to look at the body of civil work as a whole, and consider how and where it might best be dealt with.

---

286 New Zealand Law Commission *The Structure of the Courts: NZLCR7* (Wellington, 1989), para 192.

97 The warranting of Primary Civil Court judges and the appointment of a Principal Civil Court Judge to oversee the jurisdiction are essential elements of our approach. Our recommendation that Masters of the High Court should be able to be warranted as Primary Civil Court judges is also an important reform to enhance the base of quality and able civil adjudicators in the court.<sup>287</sup> Without strengthening the new court, the negative perceptions and the inefficiencies and unnecessarily high costs incurred by both court users and the taxpayer are unlikely to change. In our view they are merely a reflection of under-resourcing and volume pressures.

## Concurrence

98 With our recommended changes in place, the Primary Civil Court would be more accessible and able to hear a broader range of cases. The present District Court currently sits in 64 locations nationwide. In contrast High Court judges are located in three main centres and travel on circuit to 14 other courts.

99 As the Law Commission argued in its 1989 paper, practicality and flexibility call for a greater degree of concurrence. Any proposals must be flexible enough to cope with future developments and recognise litigant choice in which forum they file.<sup>288</sup> This would now include the possibility for parties to mutually agree to file in the Community Court if they wish to adopt the streamlined processes available there, even if the claim was above the proposed ceiling of \$50,000.

100 In Part 6 we recommend the expansion of the High Court's appellate jurisdiction, to include appeals from jury trials in the Primary Criminal Court and appeals from the Employment Court. The additional resource implications in the High Court from this change lend support to the proposal to expand the Primary Civil Court. From the point of view of the overall administration of justice, particularly in terms of efficiency, maximising the use of the Primary Civil Court as the primary court of general civil jurisdiction is the sensible option.

101 Unlike the view held by the Law Commission in 1989, we do not recommend complete concurrence between the courts. The High Court should retain its position as the court that hears the most serious criminal and civil cases. To maintain its expertise, the court needs to retain a sufficient amount of civil work. Although the value of claims may be a blunt instrument for determining what are the most serious civil cases, there is no more efficient alternative.

102 There should be a Primary Civil Court, led by a Principal Primary Civil Court Judge with responsibility for leadership, oversight, judicial resourcing, scheduling and policy development in that jurisdiction. As with the other Primary Courts, it would essentially be the task of the Principal Judge to look after the interests of his or her jurisdiction. The work should be undertaken only by Primary Court judges warranted to hear civil cases.

---

<sup>287</sup> For further discussion, see Part 6.1.

<sup>288</sup> New Zealand Law Commission, above n 286, para 14.

## Jurisdiction

- 103 We consider that the upper limit of the Primary Civil Court’s jurisdiction should be \$500,000. This figure is intended to be a sensible level that would shift more claims to the Primary Court. The effect of the provision is to reinforce the Primary Civil Court as the court hearing most civil claims, reserving the High Court for more serious or complex cases. This figure should be kept under review.
- 104 The Primary Civil Court and High Court should share jurisdiction concurrently for cases up to \$500,000 with the intention that parties will be able to choose the court in which they wish to file. If introduced, the new regime will take time to bed down and we consider it important that parties retain as much autonomy as possible about where their cases are heard. The existing concerns about the District Court’s ability to undertake the work support this cautious approach.

### Recommendations

- R96 A Primary Civil Court should sit as a separate court, forming part of the Primary Court structure, headed by a Principal Judge. The work of the court should be undertaken by Primary Court judges warranted to hear civil cases.
- R97 The upper limit of the Primary Civil Court’s jurisdiction should be \$500,000.
- R98 The Primary Civil Court and High Court should share jurisdiction concurrently for cases up to \$500,000.

## Transfer mechanism

- 105 At present, the District Court and High Court share jurisdiction for cases under \$200,000. The existing mechanism for transferring cases from the District Court to the High Court draws a distinction between matters valued between \$50,000 and \$200,000 and those less than \$50,000. Section 43 of the District Courts Act 1947 enables cases between \$50,000 and \$200,000 to be transferred on the application of the defendant, whereas cases under \$50,000 also require the leave of the judge on the basis of whether “some important question of law or fact is likely to arise or a question of title to any hereditament [property that can be inherited] is likely to arise otherwise than incidentally”.<sup>289</sup>
- 106 We have considered whether extending the area of concurrence between the two courts means that this provision should be amended, so that leave would be required to transfer a case up to a value of, say, \$200,000 instead of \$50,000. For the reasons already discussed, however, we consider the transfer mechanisms should continue to facilitate the autonomy of the parties, and do not favour such

<sup>289</sup> District Courts Act 1947, s 43(2).

a change. We suggest the provision for the transfer of cases between the Primary Civil Court and the High Court should remain unchanged.<sup>290</sup>

## Recommendation

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

## Process

- 107 As noted earlier, the processes for the general civil jurisdiction discussed here apply to both the proposed Primary Civil Court and High Court. In *Seeking Solutions* we described initiatives and reforms that have been introduced in New Zealand and other countries to try to reduce delay and cost in civil proceedings.
- 108 Civil litigation is undoubtedly a costly way of resolving disputes and delay can add significantly to this cost. The cost of going to court was one of the major concerns many submitters raised. Further, the adjudicative process can be damaging to business and personal relationships.
- 109 Yet, on the whole our civil justice system works well. The delays and backlogs experienced are not as serious as in other countries. Population size and the ACC regime mean that we do not have to contend with the same volume of cases. Also, some degree of delay can be productive to ensure avenues for out of court settlement have been explored and to make sure parties are prepared for trial. Nevertheless, any delay that impacts on access to justice by disproportionately raising cost is cause for concern.
- 110 In looking for improvements to court processes, the Law Commission has sought to identify factors that are central to the early, satisfactory, inexpensive resolution of disputes, and the appropriate methods of progressing cases without unduly adding to the cost faced by parties.
- 111 Key to this is an acknowledgment that parties have a responsibility to try to resolve their differences before coming to court, that more satisfactory resolutions are likely to be reached that way, and that where cases do come to court the issues need to be clearly identified as early as possible. This theme is also considered in Part 2.7 of this report.

<sup>290</sup> District Courts Act 1947, ss 43 and 46. Relevant considerations under s 43 include the amount of the claim, its nature and complexity, and the type of issue raised by the pleadings, and whether the issue is of public or other importance.

- 112 The introduction of case management in the 1990s has led to significant reductions in the time between filing and disposal of cases.<sup>291</sup> However, a constant theme in submissions has been that simplification of the court rules and processes could demystify the court system and make it more accessible to those not familiar with the law. Review of the case management systems in place has also suggested that some changes might improve efficiency and help parties to focus on the issues earlier, leading to earlier settlement and earlier, shorter trials.
- 113 Many of the concerns expressed to us are being worked on by the Rules Committee and the respective District Court and High Court judicial committees. In addition, the Ministry of Justice modernisation programme entails improving registry processes to support case management practice.

### The Rules of Court and the role of the Rules Committee

- 114 In *Seeking Solutions* we recorded the substantial concerns expressed about the volume and complexity of both the High Court Rules and District Courts Rules 1992. Although there was a major revamp of the High Court Rules in the mid 1980s, there has been an extraordinary array of amendments, additions and variations since that time and by any standard they must be seen as complicated and elaborate.
- 115 In places the rules for each court duplicate each other exactly, but there are also differences, which can lead to inconsistency, argument and confusion. Some of the language of the rules is also unnecessarily complex. The degree of complexity has a significant impact, particularly on self-represented litigants. It does nothing to make the law accessible and understandable by all.
- 116 The Rules Committee has recognised the need for a root and branch reconsideration of the present rules, but the costs of such an exercise have been a deterrent. In our judgment the consequences for litigation in New Zealand would undoubtedly see such an investment pay dividends in a short time.
- 117 We have been impressed by endeavours elsewhere to make court rules readily accessible. In the United Kingdom (a jurisdiction of almost 60 million) the new Civil Procedure Rules are much more user friendly than the current regime in New Zealand. In a much smaller jurisdiction, the new Civil Procedure Rules for Vanuatu provide a good example of material which is readable and comprehensible by all. Simplicity and accessibility can be achieved.

291 See for example, Department for Courts *High Court Civil Caseflow Pilot: An Evaluation of its Impact in Auckland and Napier* (Wellington, 1996); Department for Courts *An Evaluation of the Christchurch High Court Pilot of Caseflow Management for Civil Cases* (Wellington, 2000); National Caseflow Management Committee *Report: Caseflow Management in the Year 2001* (Wellington, 2001), 5. In the submission of the High Court Judges, it was said: “Department for Courts figures suggest case management has reduced the number of interlocutory applications in the High Court by 5.5 percent between 2000/01, and 19.4 percent between 2001/02.”

- 118 The changes we are proposing to the civil jurisdiction of the High Court, and the establishment of a specialist Primary Civil Court, would provide an opportune time to tackle the seriously overdue reform of our court rules as a whole.<sup>292</sup> Such a redrafting will involve significant issues of policy, which, in our view, raises issues about the proper body to undertake the task.
- 119 At present the rules are administered by the Rules Committee, a statutory body. Its rule-making power, contained in s 51 of the Judicature Act 1908, provides the committee with a mandate relating to “the practice and procedure of the Court in all civil proceedings”.
- 120 The committee, whose membership is defined in s 51(b), is made up of people who are legally qualified (the only possible exception being the Chief Executive of the Ministry of Justice). The power in this area is therefore given to judges and lawyers, which is thoroughly appropriate when dealing with practice and procedure in court. However, the rules can impinge on a much wider area and have a substantial effect on the nature of litigation and general issues of accessibility to justice.
- 121 An example of the current operation is the response of the Rules Committee to a recent Law Commission report on *General Discovery*.<sup>293</sup> Without presuming that our recommendations were necessarily the best way forward, our consultation left no doubt that a wide sector of the public believes that the current operation of the discovery regime creates problems of time, expense and exhaustion in civil litigation. The Rules Committee agreed in principle to adopt our recommendations, and the Parliamentary Counsel Office drafted appropriate amendments. However, the committee has retreated from the proposal after sustained opposition from practitioners.
- 122 The question must be asked whether the proper approach is to see issues such as discovery purely as matters “of practice and procedure”,<sup>294</sup> or whether more fundamental issues about the nature and cost of litigation are involved, which should be evaluated and assessed in more conventional law-making processes.
- 123 These wider issues – which impinge on the community and involve setting process standards with far-reaching consequences – need to be addressed by a body that includes all parties with a legitimate interest and which consults widely. Setting the standards should not be confined to those who are part of the existing legal regime.
- 124 A redraft of the rules will demand major resources if it is to be completed in a realistic timeframe, as shown by similar projects overseas.

292 The Rules Committee is due to review court processes and rules for small debt claims and civil cases under \$50,000 in early 2004, which would relate to our proposals for new civil processes in the Community Court. We note in Part 4 with regard to the Community Court that the reform needs to reflect practice and procedures that can be accessed and utilised by all New Zealanders.

293 New Zealand Law Commission *General Discovery*: NZLC R78 (Wellington, 2002).

294 For an interpretation of the s 51 use of “practice and procedure”, see *Kenton v Rabaul Stevedores Ltd* [1990] 2 PRNZ 156.

## Recommendation

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

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

## Case management

125 In our court system, the parties have traditionally controlled the pace of litigation, and the court's role has been passive, waiting for one or other party to seek its intervention. To an extent, case management has changed this model, as it requires that the court take greater control of the progress of cases. The court supervises or manages the time and events involved in the movement of a case through the court system from beginning to end.<sup>295</sup>

126 Since its formal introduction in New Zealand, in 1994, case management has involved an incremental adoption of various procedures.<sup>296</sup> In the Law Commission's view, case management is an essential part of an effective and efficient civil justice system in the twenty-first century. But while the present case management system has much to commend it, there are still opportunities to improve it, and there is a need to restate its objectives.

127 A case management system should have the straightforward aims of ensuring that:

- cases are dealt with consistently, but there should be flexibility for cases that do not fit the usual mould
- the issues are identified as early as possible
- opportunities for settlement are thoroughly explored
- a hearing date is allocated as early as possible.

## Commitment to case management and cooperation

128 Speed and backlog are determined in large part by the local legal culture.<sup>297</sup> Even an ideal system of caseload management will not succeed in reducing delay unless the judicial officers, practitioners and administrators are committed to supporting the system.

<sup>295</sup> Hansen J "Case Management in New Zealand Courts" (1998) 9 *Otago LR* 319 at 320.

<sup>296</sup> See *Civil Case Management in the District Court* and *Civil Case Management in the High Court* Practice Notes. The High Court Practice Note expressly excluded the Commercial List at Auckland. (Aspects of the High Court Practice Note have been incorporated into the High Court Rules, by the High Court Amendment Rules 2003.)

<sup>297</sup> T Church *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978); Sallmann and Wright *Going to Court, A Discussion Paper on Civil Justice in Victoria* (2000), 69.

- 129 In New Zealand, case management has been described as being “dependent on total cooperation and commitment from the profession, the judiciary and court staff. Without that level of cooperation and commitment, the ability of case management to reduce delay and cost is limited.”<sup>298</sup> In submissions, practitioners emphasised the need for court staff to be well trained and familiar with legal processes, in order for case management to run smoothly.
- 130 Since the initial series of workshops run in 1996, opportunities for training and development in caseload management have been limited.<sup>299</sup> As a result the implementation and relative success of caseload management systems are somewhat uneven across the country.

## Recommendation

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

### Consistency in case management systems

- 131 In *Seeking Solutions* we set out the different case management systems operating in our court registries.
- 132 Christchurch High Court operates on an individual list basis, under which each case is allocated to an individual judge from the outset. Other High Court registries and the District Court operate under a master calendar system, whereby cases proceed through a series of preliminary steps managed by judicial or registrar run conferences. Each conference or other event is allocated to an available judicial officer. In Auckland longer and more complex cases are assigned to a judge at an early stage, but otherwise a master calendar operates.
- 133 Both types of system have been successful in reducing the amount of time from filing to conclusion<sup>300</sup> and there are proponents who are strongly in favour of each. In its report in May 2001, the National Caseload Management Committee noted:
- Experimenting with different approaches will lead to the development of knowledge about the value of each and the circumstances in which each works best. This continues to be an area of development and debate.<sup>301</sup>

298 Hansen J “Payment for Litigation”, (paper presented at the NZLS Conference, Christchurch, 7 October 2001).

299 National Caseload Management Committee, above n 291.

300 National Caseload Management Committee, above n 291.

301 National Caseload Management Committee, above n 291, 12.

134 The Law Commission considers that this is an area in which continued evaluation is required. It may be that one system works well for one area of New Zealand, but is not suited to another. If both systems are delivering efficient and effective results, and there are no procedural inconsistencies between regions, there is no reason to enforce a change. However, given the size of the New Zealand civil jurisdiction, it is important to guard against differences that are confusing for the profession and obstructive for clients.

#### Consistency in case management rules

135 The most critical issue relating to consistency is alignment of the rules in the proposed Primary Civil Court and the High Court. At present, case management rules differ between the District Court and the High Court in both their substance and the way they are presented.

136 The High Court Amendment Rules 2003 incorporate case management procedures (which were previously contained in a Practice Note) into the High Court Rules. Case management in the District Court is governed by Practice Note, although work towards possible amendments to the District Courts Rules 1992 is on the Rules Committee work programme.

137 We can see no reason why the case management rules for cases above \$50,000 should not be the same.<sup>302</sup> A greater degree of concurrency between the two courts lends weight to this argument – litigants should be able to expect to be treated the same way in each court.

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

### Recommendation

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

139 This recommendation will have a number of implications. We have identified three of these in particular, which we set out below.

#### *Week seven conference*

140 Under the new rules, cases filed in the High Court are allocated to either the ‘swift’ or ‘standard’ track.

<sup>302</sup> A simplified process is proposed for claims under \$50,000 in Part 4.3 of this report.

- 141 In standard track cases, an initial conference, which usually takes 10 to 15 minutes, is to be held in week seven. This conference addresses, among other things, whether further particulars are required, the scope of discovery and the timetable for future events.
- 142 At present in the District Court the first conference does not take place until week 13, after discovery and inspection have been completed. Submitters expressed concern that this case management regime does not encourage the parties to focus on identifying the issues early enough. Adoption of the High Court case management rules would mean that an early conference would also be held in the Primary Civil Court.

### *Identifying the issues*

- 143 More can be done to ensure that the parties to a dispute focus as early as possible on the true issues in dispute, particularly where mediation has not been attempted, or is unsuccessful. The new High Court Rule 429 and Schedule 5 require the parties to file memoranda before case management conferences in the High Court, setting out the issues to be addressed in the conferences.
- 144 The memoranda are to include:
- a statement of the legal and factual issues
  - details of a proposed timetable leading to the hearing of the proceedings
  - a description of any matters on which directions are sought.
- 145 We endorse this amendment, and note that our recommendation to align the case management rules would mean that this would also be a requirement before the week seven conference in Primary Civil Court cases. In this regard, in addition to the issues to be addressed during conferences, set out in the new Schedule 5, we consider that they should also be used to explore possibilities for settling the dispute.

## **Recommendation**

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

### *Definite early fixture date*

- 146 The allocation of an early fixture date has long been recognised as an essential element to the success of a case management system.<sup>303</sup> For case management to work, early fixture dates must not only be allocated, they must be met. This requires commitment and adequate resourcing.

<sup>303</sup> J S Kakalik, et al *Just Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (RAND Institute for Civil Justice, 1996). The Rand Corporation study found that of the range of early judicial case management strategies, fixing an early trial date had the most significant effect and did not affect litigant costs.

- 147 The High Court Amendment Rules 2003 require cases in the High Court to be allocated a hearing date at the second case management conference. Aligning the rules would mean that this would also be the case in the Primary Civil Court.

#### Further reform of case management rules

##### *Second case management conference*

- 148 The High Court Amendment Rules 2003 provide that a second conference – to take place in the 13<sup>th</sup> week – will only be held if required. The rules provide for further conferences to take place if they are considered necessary. The power of the court to order the parties to attend a judicial settlement conference remains.<sup>304</sup>
- 149 The Law Commission considers this is the sensible approach if a presumption in favour of mediation is to operate. Below, we reinforce the view that a degree of flexibility needs to be maintained, and that standard steps should not be rigidly enforced where they may not be required. Case management needs to be seen as a means to an end. It creates frustration and unnecessary cost when adherence becomes an end in itself.
- 150 However, our view is that if mediation is not attempted, a second conference should take place as a matter of course. That conference provides an important opportunity for the issues in dispute, as well as settlement, to be explored.

### Recommendation

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

#### *Attendance of parties*

- 151 The new rules do not specify whether parties should attend case management conferences. However, judges can direct parties, as well as their legal representatives, to attend. In our view, these conferences are important events in the progress of a dispute. If the parties have not been to mediation, the second case conference may be the last formal opportunity for face to face negotiations and settlement discussions. In those circumstances, parties should be expected to attend the second conference.

### Recommendation

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

<sup>304</sup> High Court Rules, r 442.

### *Maintaining flexibility*

- 152 Some practitioners consider there are too many case conferences, and that case management, while a good idea, can be too rigid in form – lawyers are required to complete a checklist of activities, whether or not they are suited to the particular case.<sup>305</sup>
- 153 One view is that over-conferencing comes about in part from a lack of cooperation and commitment, and in part from a lack of adequate case management training, especially for judges. The bulk of straightforward litigation can be disposed of by one, or at most two, conferences combined with an early fixture date. This requires judges and counsel to get to grips with the issues at an early stage and highlights the need for cooperation. One aim of the new High Court Rules is to reduce the number of conferences.
- 154 There needs to be a balance between the discipline of case management and party autonomy in certain cases. Indeed, we heard from a number of practitioners and judges that, in practice, the present system does operate in a flexible manner – that judges do dispense with the standard format and allow parties to set their own agenda, as long as the case continues to progress. The Law Commission endorses this approach. Case management should not become a strait-jacket for parties who take a sensible and proactive approach to litigation.
- 155 If both parties agree, there should be an opportunity at the first conference for them to set a process and agenda tailored to the needs of their case. This includes the form of interlocutory processes (including the nature and extent of discovery) and timetabling through to the trial date.
- 156 Those practitioners and judges who found the present system flexible did not consider any change to the current regime was required to achieve this aim. However, the experience of others we heard from suggests that the system does not always work in a flexible fashion, and that some specific provision is needed.
- 157 The litigation rests with the parties and if they mutually agree that a different, or even a novel, approach is the best way to achieve a proper and just end to their dispute without calling on court processes, the system should not railroad them on a predetermined track they do not require. To be fair to the parties, if new timeframes are agreed, these should then become the recorded case management track for that case.

### **Recommendation**

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

305 Submission received from the New Zealand Law Society.

### *Enforcement of timetables*

- 158 The aims of case management can be subverted by parties not keeping to timetables if not enough is done to enforce them. Two conflicting principles arise. There may be a tension between the general demands of case management – needed to resolve litigation efficiently and make the best use of judicial and court resources – and the provision of individual justice in a particular case.
- 159 The compromises the courts have made to date are weighted in favour of individual justice. Courts have traditionally taken a benevolent approach to non-compliance with timetables.
- 160 It is important that the courts remain in touch with litigation and set realistic timetables with the cooperation of the parties. But they must also take a firm approach to enforcement, making costs awards in order to indicate the court's adherence to case management objectives where the opposing party complains or is disadvantaged by non-compliance.<sup>306</sup>
- 161 Consequences must follow for non-consensual departures from case management timetables. Flexibility must be maintained, but the integrity of the system is dependent on the courts making appropriate orders under High Court rule 258 and District Courts rule 299, where necessary if one party is disadvantaged by non-compliance.

## Other civil process issues in the Primary Civil and High Courts

### Wasted costs orders

- 162 In 2001, the Rules Committee investigated the possibility of including a 'wasted costs' provision in the High Court Rules, to expressly enable the court to make orders against barristers or solicitors where it considered their conduct had resulted in wasted costs being incurred by any party in a case.<sup>307</sup>
- 163 In the light of the Privy Council decision in *Harley v McDonald* [2002] 1 NZLR 1, affirming the circumstances in which the High Court has an inherent jurisdiction to make costs orders against barristers, there should be a rule defining the instances when wasted costs orders can be made. The effect of this would be to introduce an explicit rule about wasted costs, which may have a 'signalling' effect and would clarify the situation.
- 164 In 2001, the Rules Committee determined that a rule was not necessary at least in part because the issue was due to be considered as part of the Lawyers and Conveyancers' Bill. As the Bill does not have a clause to this effect, the matter should be reconsidered and acted on.

<sup>306</sup> A Beck "Case Management Sanctions" [1999] NZLJ 60.

<sup>307</sup> See draft rule in Rules Committee *Preliminary Consultation Paper: The Rule for Wasted Costs* (Wellington, 2001).

## Recommendation

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

### Offers to settle

- 165 At present, in order to encourage settlement, a defendant can pay a sum of money into court and give the claimant an opportunity to accept it. If the claimant refuses and at the hearing fails to recover more than the defendant paid in, the court may award costs against the claimant for the legal expenses incurred since the time of the payment into court.
- 166 A party can also make a written settlement offer which is expressed to be “without prejudice save as to costs”, relating to any issue in the case. The court has a similar discretion to make a costs award in these circumstances.<sup>308</sup>
- 167 In the United Kingdom, the rules go further, setting out more explicit consequences, and covering offers made before cases begin.<sup>309</sup> If a claimant fails to do better than a payment into court, or fails to obtain a judgment which is better than a defendant’s offer, the court will make a costs order in regard to any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without the court’s leave, unless it considers it unjust to do so.
- 168 Claimants can also make formal written offers to settle a case that carry penalties if they are refused. The court may award extra interest (up to 10% above the normal base rate)<sup>310</sup> and may grant costs to the claimant on an indemnity basis, unless the court considers it unjust to do so.<sup>311</sup> These offers may be made before proceedings begin.<sup>312</sup>
- 169 The new rules have been welcomed by all interested groups as a means of resolving claims more quickly – those which settle without court proceedings and those where proceedings are issued.<sup>313</sup>

308 High Court Rules, r 48G. While the District Court does not have an express rule in this regard, the same principle applies under *Calderbank v Calderbank* [1975] 3 All ER 333.

309 The relevant rules appear in Part 36 of the United Kingdom Civil Procedure Rules.

310 Civil Procedure Rules (UK) r 36.21.

311 Relevant considerations include the terms of the offer, the stage of the proceeding at which it was made, the information available to the parties at the time of the offer and the conduct of the parties in providing information to enable the offer to be evaluated.

312 Civil Procedure Rules (UK) r 36.10.

313 Lord Chancellor’s Department *Civil Justice Reform Evaluation* (London, 2002), para 3.27.

## Recommendations

- R108 The rules relating to offers should be extended to include offers before cases are commenced.
- R109 The consequences of failing to accept an offer where the other party (the offeror) does better than the terms of the offer should be set out explicitly in the rules, including the possibility of full indemnity costs, but leaving the court discretion to avoid any injustice that might result.

### Discovery

- 170 Discovery is the process by which each party to a civil case can obtain access to documents in the possession or control of the other party. At present, discovery has the potential to increase costs significantly since the rule is that each party has the right to compel every other party to produce a list of all documents “relating to any matter in question in the proceeding” which are or have been in the possession, custody or power of the party providing the list.<sup>314</sup>
- 171 Many now regard this test as outdated in an age where documents no longer have to be handwritten, and where cases can involve many hundreds if not thousands of documents.
- 172 In 2002, the Law Commission made recommendations for reform of the law relating to general discovery.<sup>315</sup> It recommended that general discovery should continue to be available as of right in New Zealand, but that the extent of the obligation should be narrowed by adopting a ‘direct relevance’ test. This would mean limiting the obligation to discover to matters directly in issue, and by withholding the entitlement to general discovery until the case is at a point where the issues are clear.
- 173 The Law Commission also recommended making it easier in appropriate cases to obtain an order limiting the extent of the discovery obligation or prescribing the manner in which it is to be performed.
- 174 In jurisdictions with a more active regime for case management than New Zealand there has been a move away from an entitlement to general discovery as of right. The Law Commission’s recommendations were based on the view that it was better for reform to concentrate on the narrow issues of what is to be discovered and how.

314 The rule is set out in *Companie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

315 New Zealand Law Commission, above n 293.

175 Following its own consultation, the Rules Committee determined not to introduce the Law Commission’s recommendations.<sup>316</sup> In light of our recent work, we restate the recommendations made in our 2002 report.<sup>317</sup> Retention of the present regime has significant implications for the cost of civil litigation and accordingly for access to justice. The wider community finds the approach oppressive, expensive and generally unhelpful.

## Recommendation

R110 We restate the recommendations made in our 2002 report on *General Discovery*<sup>318</sup> and seek their early implementation.

### Pre-action protocols

176 Pre-action protocols are used in the United Kingdom to outline the steps parties should take to obtain and provide information about a prospective legal claim. The aim is to encourage the exchange of early and full information, to enable parties to avoid litigation by settling where possible, and, where litigation cannot be avoided, to support the efficient management of proceedings.

177 Although there is evidence that the protocols have worked well in the United Kingdom to promote a culture of openness and cooperation and to encourage settlement,<sup>319</sup> there are also indications that they have to a degree increased costs by causing a ‘front loading’ of expenses.<sup>320</sup>

178 The Law Commission considers the early exchange of information should happen in New Zealand as a matter of good practice, but we do not recommend the introduction of pre-action protocols in New Zealand until there is clear evidence that the additional costs involved are not an impediment in themselves.

316 See also paragraph 5.121 above.

317 See New Zealand Law Commission, above n 293, Appendix C which sets out the recommended new rules.

318 Those recommendations are repeated in Appendix C to this report.

319 Lord Chancellor’s Department, above n 313.

320 Lightman J “The Civil Justice System and Legal Profession – The Challenges Ahead” (The 6th Edward Bramley Memorial Lecture, University of Sheffield, 4 April 2003).

## 5.3 Family Court and Youth Court

- 179 The Family Court and Youth Court operate as divisions of the District Court. Each is headed by a Principal Judge, and each has a distinct culture and distinct processes designed to deal with the people and issues that come before them.
- 180 There are 39 judges<sup>321</sup> with a Family Court warrant and 52 designated Youth Court judges.<sup>322</sup> The family jurisdiction is second to the criminal jurisdiction in terms of volume of cases.
- 181 In *Dispute Resolution in the Family Court*<sup>323</sup> the Law Commission made a number of recommendations aimed at improving the way cases are dealt with in the Family Court. Those recommendations were intended in part to respond to consumer perceptions of delay and inefficiency in the court. In this report we are concerned with the place of the Family and Youth Courts in the overall court structure, and with ways to ensure family cases are handled efficiently.
- 182 Submissions did not raise many issues specific to the Youth Court. Concerns about the availability of information and advice for young offenders were emphasised by some. The issue of whether the courts should be opened up to the public, which was the source of a great deal of comment in submissions, is dealt with in Part 8.

### In this section we recommend:

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

### Family Court

- 183 The Family Court was established in 1980 as a result of the recommendations of the Royal Commission on the Courts. The intention was that all matters relating to a family should be dealt with in one court.
- 184 The Royal Commission recommended that the Family Court be established as a division of the District Court, rather than at High Court level, primarily to ensure better access to court services around the country.<sup>324</sup> Initially, the High Court retained jurisdiction in respect of Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949 matters.<sup>325</sup> Relationship property matters

321 In addition there are five acting warranted Family Court judges.

322 In addition there are three judges designated as acting Youth Court judges.

323 New Zealand Law Commission *Family Court Dispute Resolution: NZLC R82* (Wellington, 2003).

324 Royal Commission on the Courts, above n 198, para 485.

325 Family Protection Act and Law Reform (Testamentary Promises) Act matters can now be heard in the Family Court by virtue of Family Courts Act 1980, s 11.

could be filed in either court, and the Family Court could remove complex matrimonial property cases to the High Court.

- 185 Today, the Family Court offers services in 44 places around the country.<sup>326</sup> By comparison, High Court judges are based in three main centres and travel on circuit to 14 other courts. The accessibility of the Family Court is one of its key strengths and helps to minimise some of the associated costs for court users.
- 186 Family Court judges are specially warranted District Court judges, appointed for their experience and suitability for this jurisdiction. Most also sit in the general jurisdiction of the District Court.

## Youth Court

- 187 The Children, Young Persons and Their Families Act 1989 established a new model for youth justice in New Zealand. As part of this model, the Youth Court was established as a division of the District Court.
- 188 The criminal offending of young people (aged 14 to 16)<sup>327</sup> is dealt with in the Youth Court. The Youth Court is separate from the adult criminal justice system and is strongly focused on the rehabilitation of young offenders.
- 189 The Youth Court comprises the Principal Youth Court Judge, and whatever number of other District Court judges the Chief District Court Judge designates, after consulting with the Principal Judge. The judges must be suitable by virtue of their training, experience and personality, and understanding of the importance and significance of different cultural perspectives and values.

## Location of the courts in the court structure

- 190 The position of the Family Court and Youth Court is anomalous when compared with the independent status of the Environment and Employment Courts, which are separate courts in their own right.
- 191 An issue in the past has been the perception that the pressures of the District Court's criminal jurisdiction can outweigh Family Court priorities. Some submitters argued for a separate Family Court as it might place the court in a better position to define its priorities and lobby for resources to achieve these.
- 192 As a point of principle, we consider that every court in the justice system needs to be accorded adequate departmental support and that they all require an adequate infrastructure to ensure they can operate effectively. This should be the case whether they are classed a court or a division.
- 193 Another suggestion was that all family and youth matters should be heard in one unified court. Proponents of this view emphasise the frequent link between

---

<sup>326</sup> There are 16 main courts, providing services to a further 28 outlying courts on a circuit basis.

<sup>327</sup> Except for murder and manslaughter.

youth offending and broader family issues such as relationship breakdown and custody.<sup>328</sup> Young offenders very often have care and protection issues and having two separate social workers involved and two separate jurisdictions to deal with can result in confusion and duplication. Accordingly, it has been argued that it would be better to deal with youth offending in the same court where other family issues are being addressed.

- 194 This was the approach in New Zealand before the Children, Young Persons and Their Families Act 1989, when the Children’s Court dealt with both care and protection and youth justice matters. It has been noted that the laws in relation to young people who offended were firmly rooted in the welfare tradition, and that there was no distinction in practice between those who offended and those who needed care and protection.<sup>329</sup>
- 195 The trend in New Zealand since that time has been to address youth offending from a more justice-based orientation. The prevailing school of thought is that the two courts essentially deal with two different concerns, and that those concerns need to be tackled in different ways.<sup>330</sup> A considered decision was made in the 1989 Act to separate care and protection proceedings from youth justice matters. In particular, there was a concern that young people sometimes received harsher outcomes (including deprivation of liberty) under a welfare system than under a justice system where there are safeguards in relation to proof of offending and proportionality of treatment.
- 196 Our view is that New Zealand benefits from having two specialist courts which focus directly on the specific issues coming before them. The courts themselves benefit from having the freedom, and specialised focus, to embody different philosophies and employ their own solutions, such as counselling, mediation and restorative justice, in ways that deal specifically with the particular nature of their jurisdiction. We would be concerned that this dedication and philosophy might be lost if the two courts were collapsed into one. Coordination and cooperation between the two courts can be achieved by the Primary Courts Consultative Committee, suggested in Part 3.
- 197 There is an additional concern about security. It is not advisable to create a situation where a waiting room accommodates a parent and child involved in a care and protection matter alongside a 16-year-old, potentially threatening offender. The Youth Court has secure rooms where young people can be held in custody, and there is a significant police presence. This is inappropriate for a Family Court.

328 Hon A Nicholson *Justice for Families and Young Offenders – A Unified Court System as a 21st Century Reform* (John Barry Memorial Lecture, 14 October 2003); C J Ross “The Failure of Fragmentation: The Promise of a System of Unified Family Courts” (1998) 32 *Family Law Quarterly* 3.

329 *Trapski’s Family Law* Vol 1, YI.10.02.

330 See, for example, M Doolan *From Welfare to justice (Towards new social work practice with young offenders: An overseas study tour report)* (Department of Social Welfare, Wellington, 1988).

## Recommendation

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

### Family Court workload

- 198 Over the years the jurisdiction and workload of the Family Court has been expanded to include a relatively high volume of domestic violence work, mental health work, and matters under the Protection of Personal and Property Rights Act 1988, Family Protection Act 1955 and Law Reform (Testamentary Promises) Act 1949, Property (Relationships) Act 1976, Child Support Act 1991 and Hague Convention child abduction cases. Its workload in the past 20 years has increased enormously.
- 199 This expansion in jurisdiction and workload reflects the recognition of the specialist knowledge of the judges and professionals who work in the court, but the increase has come at a price. In 2001/02, only 32.1 percent of applications made under the Domestic Violence Act 1995 were allocated a hearing date within 42 days after the filing date, as is required in legislation.<sup>331</sup> This is of serious concern; the types of issue dealt with under that particular Act demand that applications are dealt with quickly. The Department for Courts' (now the Ministry of Justice) *Annual Report* of 2001/02 attributes this delay in large part to unavailability of judge time.
- 200 The Family Law Section of the New Zealand Law Society has also expressed concern that the Family Court is not dealing with simple relationship property matters quickly enough. The recently amended Property (Relationships) Act 1976 is expected to further compound the situation (although some allowance for this has been made by appointing additional Family Court judges).
- 201 The Family Court has 36 full-time judges and six acting warranted judges (often retired Family Court judges). In our consultations, we heard support for the proposal that Family Court judges should only do Family Court work to address current workload issues. At present Family Court judges spend approximately 20 percent of their time doing District Court work.
- 202 In principle, the Law Commission considers it preferable – for reasons of flexibility, job satisfaction and cross-fertilisation of ideas – for judges to be warranted in more than one jurisdiction. We understand that some Family Court judges prefer to do some other work as it provides a change from the core family law work.

<sup>331</sup> Department for Courts *Annual Report* (2001/02), 63. Figure relates to applications made subject to ss 22, 36, 46, 55, 59, 65, 69, 76 of the Act.

- 203 We do not recommend that Family Court judges should as a rule only do Family Court work. Encouraging cross-warranting across the Primary Courts should maximise opportunities for flexibility in allocating resources. We believe it is better to address volume concerns in this way, rather than limit the judicial ‘diet’.
- 204 However, we acknowledge a pressing need to address the workload of this court. The Department for Courts stated that it was “looking at what can be done to address the factors behind the reasons for delay”<sup>332</sup> and we consider some of these options below.
- 205 A commitment to better resourcing of the Family Court is needed. The importance of the work done in that court cannot be undervalued. Steps taken to address similar problems in the Environment Court have paid dividends. This does not simply mean constantly increasing the number of available judges. In part it means ‘doing things smarter’ – making the most of the available resources by using them more effectively and efficiently.

### Expanding the registrar’s role

- 206 Family Court judges and Ministry of Justice officials have expressed concern that Family Court registrars do not currently perform the full range of tasks for which they have jurisdiction. Ensuring their role is maximised is an important way to manage the workload, and another way of directing the judicial resource to the most appropriate tasks. The Ministry of Justice is reviewing the current role of Family Court registrars to make sure they are exercising their powers to an adequate extent.
- 207 The Family Court bench has suggested appointing a ‘judicial registrar’ to perform a range of functions (some of which are currently within the powers of Family Court registrars and some of which are new tasks).<sup>333</sup> The Family Court of Australia has a judicial registrar. This registrar acts in a quasi-judicial capacity and can make interim orders.
- 208 As a first priority, existing registrars should be performing all the tasks that they currently have jurisdiction to do. That is the case across all jurisdictions. However, we advise caution about the extent to which the registrar’s role should be expanded. It is important in principle not to confuse tasks that can usefully be performed administratively and those that need to be undertaken by a properly qualified judicial officer. Some of the tasks proposed by the Family Court bench involve a degree of discretion that, in our view, should be performed only by a judge. Examples are:
- ordering that adoption records be produced or open to inspection (Adoption Act 1955, s 23)

<sup>332</sup> Department for Courts *Annual Report* (2001/02), 63.

<sup>333</sup> Submission received from the Family Court judges.

- issuing an interim adoption order where the application is unopposed
- making a declaration as to the sex of any adult or child under ss 28 and 29 of the Births, Deaths and Marriage Registration Act 1995
- making an interim maintenance order under the Family Proceedings Act 1981.

## Altering the jurisdiction of the Family Court

- 209 It has been suggested that the Family Court’s workload could be better managed by reallocating some of its jurisdiction to other parts of the court system. One suggestion is for the High Court to take on more property cases, or to establish a land division in the Primary Court structure to deal with land matters.
- 210 The Family Court has originating jurisdiction for matters arising under the Property (Relationships) Act 1976,<sup>334</sup> but the statute enables cases to be transferred to the High Court on the initiative of a Family Court judge, for example, for reasons of complexity.<sup>335</sup> The Family Court also has concurrent jurisdiction with the High Court in family protection and testamentary promises cases. Parties can choose to file in either court and cases can be transferred between courts at the instigation, or application of a Family Court judge or a High Court judge.<sup>336</sup>
- 211 Few litigants use the opportunity to commence cases in the High Court. Most High Court family property work is on appeal from a Family Court decision.
- 212 Much Family Court work is protective in nature and requires judges who have specialist skills in dealing with children and a sound knowledge of family dynamics. Some submitters questioned whether these specialist skills are necessary in relationship property and testamentary promises cases.

## Specialisation

- 213 The majority of family property cases will benefit from a specialist family law approach. The Property (Relationships) Act 1976 requires the court to deal with a range of discretionary matters that need a good understanding of family structures and dynamics. Family Court judges are best placed to do this work. The Family Court also offers a range of ancillary services that can be useful to parties involved in a relationship property claim; many couples with relationship property disputes also have other family law disputes in the Family Court.
- 214 However, we also heard submissions about the need for speedy and simple decisions about relationship property of low value, without the complexity of filing in the Family Court. Prior to the Property (Relationships) Act 1976, couples could choose to go to the Disputes Tribunal with disputes about shared

334 Property (Relationships) Act 1976, s 22(1).

335 Section 22(3).

336 Family Protection Act 1955, ss 3A, 3(3), and (4); Law Reform (Testamentary Promises) Act 1949, s 5.

property and this suited some people. If this is a mutual choice, and there are no children involved, there is a good argument for allowing people to opt out of the specialist Family Court process.

## Cost

- 215 Cost may become a more significant factor in whether family property cases should be able to be filed in other courts or tribunals. At present there are no filing fees for family property cases in the Family Court.<sup>337</sup> In the past this has reflected a policy decision that there is a public good involved in resolving family disputes.
- 216 A Department for Courts and Law Society working party has indicated that some cases in the court might attract fees in the future.<sup>338</sup> In particular, one option raised by the working party is to introduce a filing fee of between \$235 and \$590 for relationship property cases.<sup>339</sup> This is comparable to fees in the District Court, whereas High Court fees are significantly higher.<sup>340</sup> In the absence of a guarantee that their case would be heard more quickly, or that the quality of decision-making would be demonstrably better, many litigants may still prefer to use the Family Court.
- 217 However, if fees are introduced in the Family Court, there is a stronger case for litigants to have the choice of taking simple property disputes, such as those concerning low value household appliances, to the Community Court or the Disputes Tribunal.
- 218 We acknowledge that parties can apply, in cases of hardship, to have their court fees waived, but proportionality and autonomy weigh in favour of people being able to choose where to file their case, if no children or more complex relationship or property issues are involved.<sup>341</sup>

## Proposal for a mental health tribunal

- 219 Members of the Family Law Section of the New Zealand Law Society suggested that mental health matters could be assigned to a tribunal presided over by people trained in the mental health area, with the Family Court retaining an appellate function.

337 The two exceptions are for the dissolution of marriage and applications for adoption, where litigants pay modest filing fees.

338 See, Department for Courts *Review of Civil Court Fees: Consultation Document* (May 2003). The document invites comment on the introduction of fees for applications made under the Adoption Act 1955, Children Young Persons and Their Families Act 1989, Domestic Violence Act 1995, Family Proceedings Act 1980 (Dissolution of marriage), Guardianship Act 1968, Mental Health (Compulsory Assessment and Treatment) Act 1992, Protection of Personal and Property Rights Act 1988 and Property (Relationships) Act 1976.

339 Department for Courts *Review of Civil Court Fees: Consultation Document* (May 2003), 55–56.

340 Filing fees in the High Court are \$900; setting down costs \$1900 and the hearing fee for each subsequent day is \$1100. Filing a case in the District Court costs \$120. Litigants have to pay \$450 to apply for a hearing, and a further \$450 for each ½ day after the first ½ day hearing.

341 See also Part 4.4 of this report.

220 Applications under the Mental Health (Compulsory Assessment and Treatment) Act 1992 form an increasing part of the Family Court workload.<sup>342</sup> In the Wellington region, mental health work is conducted two mornings a week occupying one judge for a whole day each week. The Auckland courts have a similarly high level of this work.

221 While we sympathise with concerns about increasing workload, the mental health legislation authorises a number of highly intrusive interventions into the life of a person subject to a compulsory treatment order. Adequate protection needs to be afforded. In our view, the Family Court is fulfilling this function and there is no justification to move this work to another body.

## Appeals from the Family Court

222 We have previously set out the principles which should apply to appeals from Primary Courts, namely:

- there should be a general right of appeal from the Primary Courts to the High Court, then any further appeal should be with leave
- there should be a presumption that appeals from the Primary Courts will be heard by more than one judge (with the exception of Primary Court jury trials which will go to three)
- due deference should be paid to the specialist nature of the court appealed from.

223 At present, appeals from the Family Court go to the High Court. They are usually heard by a single generalist judge, although they can be heard by a full bench of two judges.

224 The judges of the Family Court and family law practitioners expressed concern in submissions that elements of specialisation are lost on appeal. Not all appeals from the Family Court require specialist expertise. Many raise general principles of law, rather than specific specialist issues. However, there will be instances where some specialist knowledge or experience may be of benefit to the bench hearing the appeal. The question is how we can best meet this need?

225 In *Seeking Solutions*, we discussed the option of establishing a specialist appellate division of the Family Court to hear appeals from the Family Court. A specialist appellate body of this nature can bring specialist expertise to bear, and provide informed leadership for trial judges in policy, practice, and on issues of law. In Australia, the Appeal Division of the Family Court operates as an intermediate appellate court with a specialist jurisdiction. A full court of three or more judges hears appeals from the Family Court of Australia and the Family Court of Western Australia, a majority of whom must be members of the Appeal Division.

---

<sup>342</sup> Data obtained from 80 percent of the Family Court's workload indicates that there were 3,762 mental health applications in the year 2000. Source: Department for Courts (now Ministry of Justice).

- 
- 226 While we agree that there is a need to increase the availability of specialist expertise for appeals from the Family Court, we do not consider that establishing a specialist appellate court is the best way to achieve this. The more appellate courts there are, the more likelihood there is of differences of approach, and of inconsistencies arising in the development of the law. There is also a danger of a smaller, specialist appellate court losing objectivity and breadth of perspective, and becoming inward looking.
- 227 Drawing on the pool of trial judges to make up the appellate division also raises concerns about judges sitting in judgment on their colleagues. In the case of a specialist appellate court, and in a jurisdiction of New Zealand's size, such concerns are exacerbated by the smaller size of the bench.
- 228 In our view, appeals from the Family Court should go to the High Court, in line with the general principles set out for all primary court appeals. However, we consider that provision should be made in the High Court to improve the availability of specialist expertise, if it is required on appeal. In Part 6.1 we recommend the use of panels of High Court judges to achieve this. In the context of the Family Court this would mean a panel of self-selected judges with experience and expertise in the area of family law.

## 5.4 Environment Court

---

- 229 The Environment Court is a specialist court having jurisdiction over environmental and resource management matters. The court comprises seven Environment judges, including the Principal Environment Judge, plus three alternates, 15 Environment commissioners and three deputy commissioners. The deputy commissioners and some of the commissioners work part-time.
- 230 As well as fulfilling a primary function as a ‘court’, the Environment Court has a pivotal role in the resource management process. The Resource Management Act 1991 (RMA) confers primary powers on local authorities and the court. In general, policies are locally generated and are interpreted by the court. The work of the court is predominantly plan references and resource consent appeals.<sup>343</sup> Although only a small proportion of local authority decisions are appealed to the court,<sup>344</sup> the workload is demanding and there has been a significant level of complaint about delay in getting hearing dates.
- 231 Because the court’s workload is largely generated by decisions of local authorities the court considers itself to be essentially an appellate court.<sup>345</sup> Nevertheless, a hearing before the court is a ‘de novo’ hearing (a full hearing of the entire matter), and the court considers afresh all matters of fact and law, unless the parties mutually agree to some limiting. It is the first point in the RMA process where these issues are tackled in an adversarial court setting with cross-examination taking place as a matter of course.
- 232 We recommend retaining the status of the Environment Court as a specialist primary court but have reconsidered the court’s current appellate arrangements.

### In this section we recommend:

- R112 The Environment Court should sit as a separate court as part of the Primary Court structure, headed by a Principal Judge. Work in the court should continue to be done by warranted judges.

---

343 As at December 2003, 51 percent of the cases on the court’s files were plan references, 36 percent were resource consents and 13 percent were other matters including designations, declaratory judgments and road stopping and other non-RMA matters, arising from legislation such as the Local Government Act 1974, the Public Works Act 1981, and the Historic Places Act 1993. Source: Email received from Environment Court 26 January 2004. Around 80 percent of references and 70 percent of resource consent appeals are settled prior to hearing. Since the RMA came into effect, references represent roughly 33 percent of the cases dealt with by the court. The Ministry for the Environment concludes that there is likely to be a sizeable reduction (but not a disappearance) of plan-based work for the court in the next few years. Ministry for the Environment *Reducing the Delays, Enhancing New Zealand’s Environment Court*, (March 2003), 4, 8, 12.

344 According to the Ministry for the Environment, approximately one percent of resource consent applications are appealed to the Environment Court.

345 Over 90 percent of cases before the Environment Court are appeals from another body (eg, district or regional councils, Historic Places Trust).

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

## Structure

233 We consider that the Environment Court should remain a specialist institution within our court system. It has a unique role under the RMA. Adjudicating the matters that come before it requires a balancing of various policy matters and issues of wide social importance, and involves many discretionary decisions.

234 In addition, unique procedures have been established by the court and in legislation to suit the type and extent of the caseload. For example, the court can use mixed benches of Environment judges and commissioners to bring a range of experience to bear on the matters being determined.

## Position in the court hierarchy

235 The Law Commission received submissions that the Environment Court should be elevated in status, due to the public importance and complexity of a significant proportion of the work that comes before it. There is a precedent for this – the New South Wales Land and Environment Court sits at State Supreme Court level (comparable with the position of our High Court). However, other Australian environmental courts sit at a lower level.<sup>346</sup>

236 Other submissions did not favour elevating the status of the court. Participants in the Law Commission’s workshop on the Environment Court raised concerns about the impact that it might have in terms of increasing costs and formality. Such a change in status could have a negative impact on access to justice.

237 The Law Commission accepts the importance, complexity and high value of much of the work of the court. But we do not consider that this constitutes a conclusive case for elevating the court. The importance of the work of the Environment Court has been recognised by the maintenance of a specialist forum (formerly a tribunal) that can apply specialist processes to the cases within its jurisdiction. We are concerned that the further elevation of the work of the court could create problems relating to:

- the accessibility of the court to key user groups
- the goal of ensuring a unified, logical and consistent court structure, including a consistent and principled framework for the specialist courts
- an appellate structure which involves the streamlining of the work of the Court of Appeal and the expansion of the appellate work of the High Court.

<sup>346</sup> For example, the Environment, Resources and Development Court of South Australia, the Queensland Planning and Environment Court, the Victorian Civil and Administrative Tribunal (VCAT) Planning and Environment List and the Tasmanian Resource Management and Planning Appeal Tribunal.

- 238 Our proposed model would ensure the court maintains its autonomy and specialist practices suited to its caseload. But it offers the added flexibility of cross-warranting of other appropriate Primary Court judges.

## Recommendation

R112 The Environment Court should sit as a separate court as part of the Primary Court structure, headed by a Principal Judge. Work in the court should continue to be done by warranted judges.

## Appeal Rights

- 239 At present, any party in a case before the Environment Court can appeal to the High Court against a decision or recommendation on a point of law. There is no general right of appeal on the merits or facts.
- 240 There is a further right of appeal to the Court of Appeal with leave of the High Court, or special leave of the Court of Appeal, if the question of law is important. Important questions of law can also go directly to the Court of Appeal. The Supreme Court Act 2003, which came into force on 1 January 2004, provides for a further appeal by leave if the Supreme Court is satisfied that it is necessary in the interests of justice.<sup>347</sup>
- 241 In our view, as a matter of principle and as a fundamental safeguard, there should be a general right of appeal from decisions of the Environment Court to the High Court. This should include an appeal on matters of fact as well as law.
- 242 By the time disputes get to the Environment Court, many parties will have already been through a number of formal processes, some involving experts. It is often argued that this system means the case is stripped to only the central issues, so in that sense the Environment Court is not a *de novo* court. A general appeal on the facts is seen by some as adding an unnecessary layer to the court process. In Part 3 we recorded the concerns of one member of the Law Commission on this issue.
- 243 We acknowledge that the role of the Environment Court is largely one of review of decisions of other bodies such as local authorities. Many matters will have been the subject of prior determinations. We note that resource consent matters that reach the court are statutorily described as “appeals”, but nothing decided previously is definitive or conclusive. Prior determinations of local authorities and other bodies are quasi-judicial in nature. Cross-examination is not a feature of local authority hearings.<sup>348</sup> The Environment Court is the first formal

<sup>347</sup> It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if it involves a matter of general or public importance, or a substantial miscarriage of justice may have occurred or may occur, or the appeal involves a matter of general commercial significance: Supreme Court Act 2003, s 13.

<sup>348</sup> Resource Management Act 1991, s 39(2)(d).

adjudication: the first opportunity for a full de novo hearing, for cross-examination, and for a court to make findings of fact that are binding in the cases before it.

- 244 In addition, some matters may not be raised during the preliminary processes at all, and are heard for the first time in the Environment Court. Indeed in workshops we heard anecdotal evidence of parties reserving significant items of evidence for the Environment Court hearing, in order to obtain a tactical advantage.
- 245 The processes below the Environment Court create a very desirable and effective sifting mechanism with a high disposal rate. But our concern is for those cases that are not resolved by these preliminary processes, and proceed to a hearing in the Environment Court. Those cases are entitled to due process, including a right of appeal on fact and law. Curtailing proper rights in the interests of efficiency does not deliver justice.

### Specialist content

- 246 It is also argued that the High Court is not properly qualified to hear appeals on a point of fact, as these often involve evaluative questions, environmental value judgments, and questions of planning and resource management policy. Some say such matters are best determined by an expert court or tribunal, and the role of the High Court should be restricted to matters of law, such as ensuring the correct interpretation of statutes, and that all and only relevant matters have been considered.
- 247 There is no question that the Environment Court has valuable expertise and knowledge, and day to day experience of the reality of environment law and policy. However the same argument could be made in respect of matters heard in the Family Court, where there is a general appeal right on fact and law to the High Court. The answer is not to limit appeals on fact in either jurisdiction.
- 248 The desire to avoid the High Court embarking on an investigation of the appropriateness of policies endorsed or laid down by the Environment Court is understandable. However, the principle of deference by the High Court to the expertise of specialist courts is well established, and where value judgments and policy issues are concerned, the High Court can be expected to continue to defer to the specialist knowledge of the Environment Court. But as well as issues of policy, matters going before the Environment Court often involve complex issues of fact, supported by detailed evidence, and specialist judges, while invaluable, are not infallible. There should always be one opportunity for parties to challenge an error of fact.
- 249 Our recommendation about extending appeals from the Environment Court to matters of fact as well as law proceeds on the assumption that the appeal would be heard by a bench that includes a judge with knowledge of environment law. Even if appeals from the Environment Court were to remain limited to matters

of law only, there would be a case for some specialisation in the High Court. In Part 6.1 we discuss the benefits of encouraging the development of panels of judges in the High Court with interest and experience in certain areas of law. One of those areas is environment law.

- 250 In the course of consultation, concern was expressed that cost and delay in RMA proceedings are already too high. It was said that broadening the grounds of appeal to include fact as well as law risks increasing that, and would be contrary to the initiatives of the last five years to rationalise the RMA.
- 251 Clearly cost and delay are real issues in the context of the RMA. However, again the principled response is not to truncate appeal rights. It may be that efficiency gains must be sought in the RMA process, but this should not be at the expense of a fair court process. We endorse efforts to resolve issues before they get to a court hearing, but once there, litigants are entitled to have their issue treated in a principled way.
- 252 While there is potential for two further levels of appeal to the Court of Appeal and the Supreme Court, those appeals are only available with leave and, in the case of the Supreme Court, on specific and limited grounds.

## Recommendation

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

## The court's workload

- 253 A comprehensive study of the Environment Court and comparable institutions in other jurisdictions has reported a broad degree of satisfaction with the manner in which the RMA process is working and with the performance of the court as part of that process, although the study notes that problems remain. The major problems are considered to be the ability of local authorities to cope consistently with their key role in the process and overall delay in the system.<sup>349</sup> Time lags and delays in hearings have been a matter of recent critical public concern.
- 254 The Environment Court is one of the most costly and time consuming components of the resource management process.<sup>350</sup> The court has a heavy workload and waiting times for the disposal of cases are far from optimal.<sup>351</sup>

349 M Grant *Environmental Court Project: Final Report* (Cambridge, 1999), para 4.13.17.

350 Ministry for the Environment, above n 343, ix.

351 The backlog peaked in 2001 at over 3,000 outstanding cases. At 30 April 2003, the backlog stood at 1,941. Department for Courts *Report to the Courts Executive Council* (June 2003), 2. In September 2002, there were approximately 2,500 cases on the court's books, with an average waiting time of 23 months from filing to disposal. The Auckland situation has received particularly harsh criticism. The report concludes that an optimal disposal timeframe would be between three and nine months. In contrast, the average waiting time for a hearing in the NSW Land and Environment Court (1993–2001) was 3.5 months. Ministry for the Environment, above n 343, 19, Appendix.

- 255 The high costs<sup>352</sup> and long delays experienced in the Environment Court are a major problem for participants,<sup>353</sup> for the resource management process and for the court itself. They create barriers to justice and – as well as direct personal costs and lost opportunity costs for litigants – there are flow-on costs to the economy and society in resources being unduly tied up in litigation.<sup>354</sup> These problems contribute to a negative public perception of the RMA process<sup>355</sup> and the role of the court.
- 256 The heavy workload may be limiting the court from realising its full potential to exercise a more complete jurisdiction over environmental matters.<sup>365</sup> This impacts on the workload of other courts, which are obliged to retain jurisdiction in some areas that perhaps belong more logically in the Environment Court but for which there is currently no capacity.

### Dealing with the workload

- 257 A number of initiatives aimed at addressing the court's workload are underway. In 2003 the Ministry for the Environment released a comprehensive report looking at the delays. The report identified five broad areas which may provide time savings in court disposal times: reviewing the substance of appeals, expanding the role of Environment Commissioners, improving case management, administrative improvements and streamlining Environment Court hearings.<sup>357</sup>
- 258 Additional funding allocations, announced in June 2001 and May 2002, have permitted the appointment of an additional judge, commissioner and support staff, and enabled enhancements to the court's database, judicial support roles and case management.<sup>358</sup> More recently, the Minister for the Environment has announced a further \$4.5 million over the next three years for initiatives to increase the capacity of the Environment Court. The new funding is expected to raise the number of sitting days to 850 per year.<sup>359</sup>

352 An appeal can cost a business anywhere from \$30,000 to \$100,000 or more (depending on complexity): Explanatory Note to the Resource Management Amendment Bill (No 2), p 27.

353 See examples of potential costs incurred. Ministry for the Environment, above n 343, 18.

354 Delays are said to be affecting levels of international investment in New Zealand. Ministry for the Environment, above n 343, 1.

355 Ministry for the Environment, above n 343, iii. It was submitted that delays in RMA prosecutions result in the RMA and Councils being regarded as ineffective while during the period of delay unlawful behaviour is perpetuated or repeated and damage is done to the environment. Submission received from Environment Southland.

356 A submission from the previous Principal Environment Judge identifies three specialty areas that might logically belong in the Environment Court, subject to the court having available capacity. These are appeals under the Hazardous Substances and New Organisms Act 1996; landlocked land and tree/structure issues under the Property Law Act 1952, ss 129B, 129C; and allowing appeals against council decisions not to notify resource consent applications.

357 Ministry for the Environment, above n 343, ix.

358 Funding of \$2.1 million over three years was announced in June 2001 and a further \$1.2 million per year over four years in May 2002. See the Annual Report of the Registrar of the Environment Court (30 June 2002), 12.

359 Department for Courts *Report to the Courts Executive Council* (June 2003), 2, 4. There were 649 sitting days in 2001/02.

- 259 Within the court, a hands-on approach to case management has been adopted, in part to try to deal with workload issues. Alternative forms of dispute resolution, particularly mediation and judicial settlement conferences have become integral to case management. A registry change project for the court is also being run by the Ministry of Justice to implement key initiatives.
- 260 Finally, while the legislative amendments in the Resource Management Amendment Act 2003 do not directly affect the court's workload, some changes were made which relate to the operation of the court, and may have an indirect effect on delay.

### Future management of the workload

- 261 A clear and direct commitment needs to be made to bring the workload of the Environment Court within acceptable parameters, within a specified timeframe. The essential problem is that the backlog of cases generated by the resource management process affects the court's ability to do justice to its caseload.
- 262 The trend of the past has been reversed and disposals now exceed new cases.<sup>360</sup> Participants in the Law Commission's Environment Court workshop expressed confidence that tangible improvements are noticeable.
- 263 Indications are that this is an area where constant review and a commitment to provide resources have paid dividends. Analysis and review need to be ongoing to ensure the court does not continue to be a delaying factor in the RMA process.
- 264 Suggested reforms to the court have included prioritising the flow of cases, limiting the parties who can take cases before the court or redirecting certain types of case to compulsory ADR or to the mainstream courts. However, in keeping with the overall approach of our review, we consider the first focus of reform should be to ensure that the processes prior to cases reaching court are effective and efficient in identifying and dealing with issues with a minimum of delay. In addition, if cases are inevitably going to require a court hearing, they should be able to be fast-tracked. We do not support the suggestion that certain categories of case should be stopped from going to court, rather the right to a swift court hearing should be acknowledged.

---

<sup>360</sup> Department for Courts, above n 359, 3.

## Specialist assistance

- 265 Under the Resource Management Act, the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga is a matter of national importance.<sup>361</sup> Further, all decision-makers under the RMA must take into account the principles of the Treaty of Waitangi.<sup>362</sup>
- 266 Section 249 of the RMA allows District Court or Māori Land Court judges to be appointed as alternate Environment judges. Although several District Court judges have been appointed as alternate Environment judges, no Māori Land Court judges have been appointed under this procedure. The RMA also acknowledges that knowledge and experience in matters relating to the Treaty of Waitangi and kaupapa Māori are relevant to the appointment of Environment commissioners.<sup>363</sup>
- 267 In a series of decisions, Māori cultural issues have been recognised, although the Environment Court or the High Court which decided the cases did not always have members with particular expertise in these issues.<sup>364</sup> In *McGuire v Hastings District Council* [2002] 2 NZLR 577, Lord Cooke in the Privy Council alluded to the question of justice for Māori and their confidence in the system. His comments lend support to greater use of the RMA provisions allowing for members with expertise in issues affecting Māori to sit on the bench of the Environment Court.
- 268 We see no reason in principle why the RMA provision allowing the appointment of Māori Land Court judges as alternate Environment judges has not been used. Justice will clearly be better ‘seen to be done’ if cases involving substantial Māori issues are heard before an Environment Court that includes a Māori Land Court judge or a suitably experienced Environment commissioner.

<sup>361</sup> Section 6.

<sup>362</sup> Section 8.

<sup>363</sup> Section 253.

<sup>364</sup> K Palmer “Current resource management issues – a bi-annual review” (2002) 4(16) *Resource Management Bulletin* 181.

---

## 5.5 Employment Court

---

- 269 New Zealand’s industrial and employment law jurisdiction has been headed by a specialist court since 1894. The present Employment Court was established under the Employment Contracts Act 1991 and retained under the Employment Relations Act 2000. At various times its historical predecessors were the Labour Court, the Industrial Court and the Arbitration Court. The Employment Court currently has four judges, including the Chief Employment Court Judge.
- 270 The Employment Court sits above a structure which aims to make litigation in employment issues a last resort. In most instances, employment disputes will first have been through the mediation service administered by the Employment Relations Service (ERS) of the Department of Labour. Where mediation is not successful, cases go to the Employment Relations Authority (ERA). The Act describes the ERA as:
- ... an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.<sup>365</sup>
- 271 Appeals from the Employment Court go to the Court of Appeal, on a matter of law only. There is now potential for a further right of appeal with leave to the Supreme Court. (Previously appeals in employment cases could not go to the Privy Council). It is possible to appeal directly to the Supreme Court from the Employment Court, with leave, in exceptional circumstances.<sup>366</sup>
- 272 The Court of Appeal also hears applications for judicial review of Employment Court decisions, though such applications are few.<sup>367</sup>
- 273 Significant changes were made to the employment law regime in 2000. In the course of our review, we have considered a number of issues arising as a result.

### In this section we recommend:

- R114 The Employment Court should remain a specialist court.
- R115 The Employment Court should sit as a separate court as part of the Primary Court structure, headed by a Chief Judge. Work in the court should continue to be done by warranted judges.

---

365 Employment Relations Act 2000, s 157.

366 Employment Relations Act 2000, ss 214 and 214A. Decisions on the construction of employment agreements may not be appealed.

367 Employment Relations Act 2000, s 213. In May 2003, the Chief Judge of the Employment Court noted that only two such applications had been made and decided in the last 16 years: *New Zealand Airline Pilots’ Association IUOW v Labour Court and Air New Zealand* [1988] NZILR 1677, and *New Zealand Rail Ltd v Employment Court & Anor* [1995] 1 ERNZ 603.

- R116 There should be a right of general appeal from the Employment Court to the High Court, on matters of fact and law. There should be a further appeal to the Court of Appeal with leave, on matters of law only, and to the Supreme Court as at present.
- R117 Applications for judicial review of decisions of the Employment Court should be heard in the High Court, rather than the Court of Appeal.

## The case for a specialist court

- 274 There have long been calls from some sectors for the disestablishment of a specialist Employment Court. It has been said that the specialist role of the court has changed over the years: initially, the court's jurisdiction covered only union members and it had a more restricted remit. Today it deals with all employment-based disputes. The argument is that the work of the court is now, in essence, nothing more than the strict interpretation of contracts. As such, it is argued, it should fall under the jurisdiction of our general civil courts.<sup>368</sup>
- 275 Submissions to the Law Commission argued that the effect of the mediation service and the ERA has been to diminish the court's workload.<sup>369</sup> A declining workload may have implications for the continuing role of the Employment Court, should the workload fall below the amount necessary to maintain the role of the court.
- 276 We do not agree that the court should be disestablished. While it is true that the workload of the Employment Court has declined in recent years, there is still sufficient work to support a separate court, and good reasons to justify a specialist jurisdiction. The factors for determining whether a specialist court should exist – for example, the nature of the work, how it should be done and the matter decided – indicate that a specialist court is still required in the employment area.
- 277 We do not accept that employment relationships are simply a variation of any other commercial relationship. The regime set up under the Act recognises that employment relationships are of broad social importance, that different considerations may apply to them and to any related agreements than apply to ordinary commercial relationships and agreements, and that special processes and protective mechanisms may be required.
- 278 Importantly, a key objective of the Employment Relations Act 2000 is to “build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment relationship”.<sup>370</sup> The specialist Employment Court is a key part of the framework designed to achieve that objective. Submissions show that the court has the confidence of employment lawyers and of the parties appearing before it.

<sup>368</sup> See, for example, Press Release of Business New Zealand, posted on < <http://www.scoop.co.nz> > Friday, 23 May 2003, 4.49pm NZT.

<sup>369</sup> The editor of *The Capital Letter* (19 November 2002) notes that as the tail of work under the Employment Contracts Act 1991 disappears, the court is at risk of becoming underemployed, on the basis of data collected by the Department of Labour on the first two years of the Employment Relations Act 2000.

<sup>370</sup> Employment Relations Act 2000, s 3.

## Recommendation

R114 The Employment Court should remain a specialist court.

### Employment Relations Authority

- 279 The ERA is specifically defined as an investigative body required to establish facts and make determinations according to the substantial merits of the case. How that is done is defined in broad terms. The ERA is not required to allow cross-examination, but it can do so at its discretion.<sup>371</sup>
- 280 The Chief of the ERA has described speed, informality, practical and summary decision-making and summary decision-recording as the key specifications, with the emphasis being on investigation. Such specifications involve a departure from the traditional adversarial method of judicial decision-making.
- 281 The approach to the operation of the ERA has been summarised as:
- The new Act's approach aims to achieve two things. First, in the authority meeting, the parties do not need to present exhaustive evidence and legal arguments, as if looking ahead to a possible Employment Court hearing (which was a problem in the tribunal). The authority member will try to get parties to focus on the key issues and the information needed to deal with those issues.
- Secondly, parties who feel they have not received a fair hearing at the authority – where the procedures adopted may prevent a full canvassing of every aspect – retain the right to their 'day in court'. For the many cases which will be resolved at authority level, however, the Act's intention is to spare the parties the time and cost of extensive preparation and argument.<sup>372</sup>
- 282 Submissions received indicated widely differing views about the ERA. Some praised it as an efficient and effective way of resolving disputes. Some lawyers considered it an unnecessary burden, and that the ability to bypass the operation of the ERA, under section 178 of the Act, should be more generously interpreted. Others took the view that it was easier just to let clients go through the formalities of an ERA hearing and then deal with the substantial merits of the dispute before the Employment Court.
- 283 Under the Employment Contracts Act 1991, there was a limited right of appeal from the Employment Tribunal, where most employment litigation began, to the Employment Court. The Employment Court primarily played the role of an appeal court, although it held the first hearing for certain common law actions.
- 284 This situation changed following the passage of the Employment Relations Act 2000. There is now a right of challenge from the ERA to the Employment Court.

371 Employment Relations Act 2000 s 157(2A)

372 CCH New Zealand Limited *The Employment Relations Authority in Action*, p 3 at < <http://www.cch.co.nz/employ/articles> >, last accessed 15 December 2003.

The Employment Court judges advised that in practice most challenges are heard ‘de novo’ – a full hearing of the entire matter where evidence can be introduced, which is considered and tested for the first time. As the judges note, the Employment Court in this respect is once again a court of first instance. A dissatisfied party before the ERA has an absolute right to start again in the Employment Court. Such a hearing cannot sensibly be compared to an appeal.

## The Employment Court as a Primary Court

- 285 Given that the New Zealand court system requires a specialist court to deal with matters relating to employment law, the issue is where that court should sit in the structure. At present, the Employment Court sits near the level of the High Court. The Law Commission considers it should, instead, be a Primary Court.
- 286 The existence of the ERA does not alter our view. As the preceding discussion makes clear, the role of the ERA does not transform the role of the Employment Court into an appellate one. It remains a court which makes primary adjudications.
- 287 We consider that the Employment Court has an important part to play in the court system. However this specialist jurisdiction should be more aligned to and involved with the other courts of primary jurisdiction. Accessibility, flexibility, proportionality and efficiency are better served in a more unified framework and there are clear advantages to be gained from greater cross-fertilisation between specialist jurisdictions. One Employment Court judge is also a District Court judge, and in our view, increased duality of roles will benefit all the specialist courts.
- 288 Some people maintain that the Employment Court will lose status by this change. We consider clarity and accessibility for court users weigh more heavily against this concern. As with all the Primary Courts, information about the court’s processes, and access to its registry should be able to be sought through local courthouses.
- 289 The Employment Court should retain a Chief Employment Court Judge as the head of its bench.

### Recommendation

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

## Appeals from the Employment Court

- 290 At present appeals from the Employment Court lie to the Court of Appeal on questions of law only.<sup>373</sup> However, since the Employment Court hears most cases de novo, as a matter of principle there should be a general right of appeal from its decisions.
- 291 The current lack of any general right of appeal from the Employment Court also means that there is no recourse for the matters that the court hears at first instance, such as common law actions. It has been noted that:
- The role of predecessors of the Employment Court up until the 1970s was economic arbitration over wages and conditions. That role was replaced by a role that in its essentials is very little different from that of any other court.<sup>374</sup>
- 292 Some maintain that the ERA presents an adequate opportunity for the testing of facts and that the Employment Court is sufficient as a general appeal mechanism. We do not accept this position. Whether a party can cross-examine or not before the ERA is up to the discretion of the authority members. We support the aim of the Employment Relations Act to preclude the need for litigation where possible – indeed we seek to build on that model in the general civil jurisdiction. However, where the more consensual approach does not satisfactorily resolve a dispute, the court system must be available as the backstop where rights are definitively adjudicated. The Chief Judge has noted:
- The objective of the Act [is] to reduce the need for judicial intervention, while recognising that there will be some cases that require judicial intervention and that difficult issues of law will need to be determined by the courts.<sup>375</sup>
- 293 Where recourse to the courts is required, as a matter of principle, parties must be able to challenge a decision in the event of any error on the part of the judge. Although most disputes are filtered out in mediation and the ERA, the small proportion of cases that do go on to the Employment Court involve primary determinations of fact and law. Therefore, there is a need for the potential for correction of errors of both fact and law.
- 294 The importance we attach to the High Court’s role in our court system leads us to conclude that the Employment Court should be under its supervision for general legality. The present requirement for the Court of Appeal to have regard to the special jurisdiction and powers of the court would equally apply if the appeal were to the High Court.<sup>376</sup> Accordingly, we recommend that appeals from the Employment Court should lie to the High Court, rather than to the Court of Appeal.

---

373 An average of 30 appeals a year have been lodged in the Court of Appeal from the Employment Court since 1999 – email from Higher Courts Group, Ministry of Justice, 3 October 2003.

374 G Anderson “Specialist Employment Law and Specialist Institutions” (paper presented to NZIRR seminar, Wellington, 23 April 1993).

375 TG Goddard, Chief Judge, Employment Court “The Changed Role of the Employment Court under the Employment Relations Act 2000” (September 2000) *Employment Law Bulletin* 116.

376 Employment Relations Act 2000, s 206.

- 295 It has been strongly submitted to us that access to justice will be seriously impeded if a further tier is added to the process, and in Part 3 we recorded the concerns of one member of the Law Commission on this issue. The submission from the Employment Court judges noted that our proposal would mean that six steps might have to be completed to resolve an employment dispute.<sup>377</sup>
- 296 The concern is that this will play into the hands of better resourced employers, and cause significant problems for individual employees seeking to have their rights vindicated.
- 297 Similar arguments have been raised in other specialist contexts. But the total appeal ladder is only available with leave, and cases will not be allowed to inevitably proceed up the appellate chain if there is no substance to the appeal. An overwhelming proportion of cases are dealt with either in mediation or before the ERA. The fact that there is a small fraction requiring full and proper litigation is not a reason to deny people their fundamental rights.

### Recommendation

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

### Judicial review

- 298 Applications for judicial review of decisions of the Employment Court are extremely rare. Presently they lie to the Court of Appeal. This is an exception to the general principle that the High Court is the court responsible for judicial review.
- 299 Although there are historical explanations for the Court of Appeal being vested with this jurisdiction, they are no longer compelling in principle or practice. Judicial review applications should be heard in the High Court, which is properly equipped to deal with them, rather than in the Court of Appeal.

### Recommendation

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

<sup>377</sup> Disputes could proceed through mediation, the Authority, the Employment Court, the High Court, the Court of Appeal and the Supreme Court.

## Quality and qualifications

### Mediation

- 300 Under Part 10 of the Employment Relations Act 2000, the Chief Executive is required to employ or engage persons to provide mediation services to support all employment relationships. Generally this will be the first step in resolving any employment dispute and a pre-condition to an issue being considered by the Employment Relations Authority.
- 301 There have been concerns voiced about the quality of the mediation service offered by the Employment Relations Service. The implementation of the mediation service was a new challenge for the ERS. It chose to engage people from the community whom it determined possessed an ‘innate’ ability to be a good mediator. Mediators were not necessarily experienced in human relations or industrial relations or law.<sup>378</sup> Initial training of the mediators was carried out by an outside agency, and continued on an internal basis.
- 302 The service has suffered from some complaints that the mediators were not sufficiently trained or experienced in the types of issue they had to deal with.
- 303 As a result of these complaints, further training was introduced and the service has implemented a more rigorous selection process. The Chief Mediator has told us that the number of complaints has reduced since these changes. In these circumstances, we do not make any recommendations about the mediation service. In line with our comments about the state mediation service we envisage in Part 2.6, we reiterate the need for the ongoing re-evaluation of training methods, procedures and appointment criteria for such a service.

### Qualifications of ERA members

- 304 Concerns were expressed in submissions about the qualifications and experience of some members of the authority. The Employment Relations Act 2000 does not set out any criteria for the appointment of members, only that they should be appointed by the Governor-General on the recommendation of the Minister.<sup>379</sup>
- 305 If this aspect of the total package for dispute resolution in the employment sector is to fulfil its potential, we consider that adjudicative skills should be given more prominence. The qualification requirements for Community Justice Officers, discussed in Part 4.5, appear to us to be the proper starting point. The recommended qualifications for Community Justice Officers are that they either have experience in practice as a barrister or solicitor or overseas equivalent, or have capability, by reason of special knowledge or experience, to perform and exercise the relevant duties, functions, and powers. Similar criteria could be applied to the selection of members of the ERA.

---

378 Meeting with Stephen Hooper, Chief Mediator, Employment Relations Service, 4 March 2003.

379 Employment Relations Act 2000, s 167.

---

## 5.6

# Māori Land Court and Māori Appellate Court

---

- 306 The Māori Land Court has traditionally been a land title court. The court has eight judges, including the Chief Judge and a Deputy Chief Judge. There are seven Māori Land Court districts with registries in Whangarei, Hamilton, Rotorua, Gisborne, Wanganui, Hastings and Christchurch. The court processes between 5,000 and 6,000 applications annually.<sup>380</sup>
- 307 The Māori Appellate Court comprises three Māori Land Court judges sitting together and hears general appeals from the Māori Land Court. There are 20 to 30 appeals annually, most of which relate to procedural errors.
- 308 Both courts have specialist knowledge and expertise in matters concerning Māori land and have developed a sound understanding of issues relating to tikanga and customary practices. The procedures of both the Māori Land Court and the Māori Appellate Court are flexible, and allow a high degree of judicial discretion. Judges are directed to avoid formality, to apply the rules of marae kawa, and to encourage the appropriate use of te reo Māori.
- 309 Further proposals to alter and expand this jurisdiction considerably are being actively considered by Government. The Māori Fisheries Bill, currently before Parliament, extends the jurisdiction of the court to include dispute resolution over fisheries settlement assets. The Government has also recently proposed that the Māori Land Court should be the forum to decide customary rights in relation to foreshore and seabed issues.<sup>381</sup> The Māori Land Court is viewed as the appropriate and logical court to deal with issues relating to Māori communally-owned assets, including the commercial and non-commercial structures to manage these assets.
- 310 Reform of laws governing Māori and their assets has been ongoing since New Zealand's birth as a colony. The role of the Māori Land Court has also been constantly evolving, never more so than over the last decade. There is now a further opportunity to adapt the Māori Land Court to better assist Māori to resolve their disputes.
- 311 Our proposals confirm the position of the Māori Land Court as a specialist primary court, with an expanded jurisdiction in relation to communal assets, and with the assistance of pū-wananga (experts in tikanga Māori and whakapapa), and the continuation of the Māori Appellate Court.

---

380 These figures are based on last three years; information provided by Ministry of Justice.

381 Office of the Deputy Prime Minister *Foreshore and Seabed: A Framework* (18 December 2003).

312 Historically few appeals have been heard in appellate courts above the Māori Appellate Court and there are markedly divergent views about what appeal rights exist. The Supreme Court Act 2003 provides a general right of appeal from the Māori Appellate Court to the Court of Appeal, with judicial review remaining with the High Court. The Law Commission finds this situation anomalous, but commissioners have differing views as to the appropriate appeal rights.

## **In this section we recommend:**

### **Jurisdiction and structure**

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

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

R120 Māori Land Court judges should be able to appoint pū-wananga (experts in tikanga Māori and whakapapa) and others with relevant skills to assist, as full members of the court, in particular cases.

### **Appeal rights**

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

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

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

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

## History

- 313 Māori land has been the subject of a parallel land title system presided over by the Native Land Court, later the Māori Land Court. The court has its origins in the Native Land Act 1862, and became fully functional under the Native Land Act 1865. The 1865 Act created the Native Land Court as a court of record presided over by superior court judges and assessors.<sup>382</sup>
- 314 The Waitangi Tribunal has noted in many reports that both this court and the then Native Appellate Court had a catastrophic effect on Māori. We are told that only 5.6 percent of New Zealand's total land mass is held by Māori as Māori freehold land and that the pain of this loss is still felt acutely by the Māori community. The Māori Land Court still suffers some stigma from the actions of its predecessor, the Native Land Court.
- 315 Throughout the twentieth century, many statutes regulating the relationship between Māori and their land have come and gone, and there have been many changes to the jurisdiction of the courts. The adverse effects of some government policy on Māori and their land have been recognised but most reforms have been piecemeal and often too late to preserve Māori land in Māori hands.
- 316 Major change finally came with the Te Ture Whenua Māori Act 1993 (the Māori Land Act). The bulk of the jurisdiction of the Māori Land Court and the Māori Appellate Court comes from this statute, which deals with the retention and development of Māori land in Māori ownership and with the commercial and social entities managing Māori land and other assets. In contrast to the previous Māori Affairs Acts governing Māori land, the preamble to the 1993 Act recognises the Treaty of Waitangi:
- Whereas the Treaty of Waitangi established the special relationship between the Māori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Māori people and, for that reason, to promote the retention of that land in the hands of its owners, their whānau, and their hapū [and to protect wahi tapu]: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whānau, and their hapū: And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Māori people to achieve the implementation of these principles ...
- 317 Increasingly, as the Treaty settlement process moves forward, the court is called upon to exercise jurisdiction with respect to customary mandate and representation issues. Recent amendments to Te Ture Whenua Māori Act 1993 involving this type of jurisdiction have seen the mode of operation of the court change from one of adjudication to mediation and facilitation. This approach focuses on providing a forum through which the community itself can be more actively involved in dispute resolution affecting it.

<sup>382</sup> Assessors were Māori.

318 The Office of the Auditor-General is currently undertaking a review of the operation of the Māori Land Court and Māori Trust Office focusing on the effectiveness of selected operations of the court and trust office in assisting the administration and management of Māori-owned land. This review will include an investigation of the effectiveness of the services of the court from the perspective of the owners of Māori land. This work, to be completed early in 2004, should provide insights into the effectiveness of the current operations of the court, along with suggestions for improvements in service delivery to Māori.

## Current Issues

319 In *Seeking Solutions* the Law Commission asked whether members of the Māori community should be more involved in court decisions in some jurisdictions. The options proposed were:

- that the jurisdiction of the court be widened to include settling disputes over any communally-owned Māori asset, including for example, those disputes arising out of the administration of and management of Treaty of Waitangi settlements
- that each court registry has a pool of up to 10 pū-wananga<sup>383</sup> appointed, from which up to two pū-wananga could sit with a judge on cases coming before the court
- that Māori Land Court judges have the ability to sit together with Environment Court judges on Environment Court cases involving significant Māori interests
- that the Māori Land Court have a parallel jurisdiction with the Family Court on issues arising under the Guardianship Act 1968 and the Property (Relationships) Act 1976.

## Consultation

320 While much of the work of the Māori Land Court will remain the administration and development of Māori land, it is equally obvious that the facilitation and mediation of other types of dispute between Māori groups is taking on increasing prominence as Treaty grievance settlements occur and as the fisheries and forestry assets become available to Māori.

321 A number of focus group hui with Māori were undertaken before publishing *Seeking Solutions*, focusing on the whole project as it relates to Māori. The Māori Land Court was one of five topics discussed at a major hui, open to all Māori and hosted by Ngati Tuwharetoa, held at Taupo in July 2003.

---

383 The Chief Judge of the Māori Land Court has suggested, on the advice of experts, that pū-wananga is the more accurate term, rather than pukenga, which we used in earlier reports.

322 We have also received advice from members of the Law Commission’s Māori Advisory Committee and consulted widely with stakeholders with particular interests in the Māori Land Court, including Te Puni Kōkiri, the Chief Judge of the Māori Land Court, the Chief Registrar of the Māori Land Court and Te Ohu Kai Moana (the Treaty of Waitangi Fisheries Commission). Their input and consideration of complex issues has been invaluable, notwithstanding that their views, in some instances, differ from those now recommended by the Law Commission.

### Communal assets

323 Historically, land was the primary Māori asset and it was subject to different laws than non-Māori assets. Over time this has created situations that put Māori in a unique position in relation to the utilisation of their assets. In contrast to owners of non-Māori land, owners of Māori land face greater barriers to economic development because, in part, of the different way Māori land is treated under the law.<sup>384</sup> One of the primary differences in relation to the treatment of Māori assets is that they are generally held for the benefit of the communal group: whānau, hapū, iwi or some other type of grouping of Māori based on other criteria.

324 Treaty settlement assets are subject to similar criteria, with entitlement to the benefits normally being based on whakapapa. While the general courts are frequently called upon to enforce individual rights, in the Māori Land Court individual rights are enforced as part of the wider enforcement of communal rights that exist between related rights holders. One example of this is the “preferred class of alienee” whereby an individual who wants to alienate their share of the land in question must first offer that land to a specified group, usually other shareholders of the land (generally related by blood). Another is where the court is called upon to decide whether an individual can be granted exclusive occupation of a house built on communal land – this often involves balancing the respective rights of the individual and other rights holders.

325 In *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase*,<sup>385</sup> the Law Commission made a series of recommendations dealing with the creation, administration and review of those legal entities created to hold and administer Treaty of Waitangi settlement assets. The Law Commission proposed that the constitution of every settlement entity should provide four key elements, one of which was the provision of some method of solving disputes. We suggested two options:

- the use of the internal processes of the settlement group, including, perhaps, the creation of a “domestic tribunal” to hear and determine the dispute; and/or

384 For example, see New Zealand Institute of Economic Research *Māori Economic Development/Te Ōhanga Whanaketanga Māori* (Wellington, 2003).

385 New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post Settlement Phase: NZLC SP13* (Wellington, 2002).

- the creation of a procedure involving the Māori Land Court sitting with pū-wananga, initially in a mediation and facilitation role, and ultimately, if necessary, in an adjudication role. The commission proposed that the use of pū-wananga in this context would provide greater expertise in tikanga issues, greater community participation in the process and assist the retention of successful ongoing relationships between disputing groups usually bonded by blood or other close ties.

326 The Māori Fisheries Bill 2003 provides a legislative basis for the decisions taken by Te Ohu Kai Moana in the settlement of Māori fisheries claims arising under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Te Ohu Kai Moana approved of the dispute resolution procedure utilising the Māori Land Court proposed by the Law Commission and sections to that effect were included in the Bill. These allow the Māori Land Court to hear certain disputes arising out of the fisheries settlement.

## Proposal to extend jurisdiction

327 As the number of Treaty settlements increases, and the fisheries allocation goes ahead, it is evident that disputes over the administration and management of these assets will also occur, as they do now in relation to Māori land. Often, while of paramount importance to development, the types of disputes encountered are not easily resolved. In *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase*, the Law Commission noted that:

These disputes are not easily resolved under the general law by a judge inexperienced in the tikanga of a particular iwi ... where the group itself cannot solve disputes, there may be a role for the Māori Land Court in some capacity.<sup>386</sup>

328 Given the different treatment of Māori communal assets under the law, there seem to be principled and practical reasons (in addition to any argument that could be mounted based upon indigenous rights and the Treaty of Waitangi) for Parliament to provide a suitable judicial framework for Māori to deal with disputes arising out of the administration of their assets. Consequently as a minimum, the Māori Land Court should have some oversight of communal Māori assets, to ensure that there is an appropriate forum in which Māori can settle their disputes, should they choose to use the court system.

329 The level of support for expanding the role of the Māori Land Court appears strong among key Māori organisations and opinion leaders. There is a marked preference by Māori to internally manage their own dispute resolution processes, but where matters are unable to be mutually agreed the Māori Land Court appears to be an acceptable forum. There seems general agreement on the need for the court to be able to deal with issues arising out of the administration by traditional Māori communities of their communally-held assets. This would mean that the court could have oversight, among other things of:

<sup>386</sup> New Zealand Law Commission, above n 385, 5

- disputes arising out of, and the administration of Māori land (as currently exists)
- disputes arising out of the post-settlement phase of Treaty settlements
- disputes arising out of the ownership of other Māori assets (eg, other communally-owned taonga)
- disputes arising out of the fisheries settlement
- customary rights in foreshore and seabed.

330 There was not much enthusiasm for the Māori Land Court jurisdiction to be extended to quite different matters such as custody or criminal disputes. Our proposal for a Primary Court structure with cross-warranting provides the potential for some Māori Land Court judges to sit in the Community Court and for their expertise in and knowledge of tikanga to be used in other jurisdictions.

## Recommendation

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

## Structure

331 The Māori Land Court is a first instance ‘primary’ court. It has a unique role to play in a number of areas where its experience, expertise and process make it particularly appropriate for primary judicial adjudication.

332 The Chief Māori Land Court Judge should lead a separate specialist jurisdiction within the Primary Court structure. Like the other principal judges, the Chief Māori Land Court Judge should head the bench, play the key role in advocating for, and allocating resources and be responsible for leadership and training. He or she should be a member of the Primary Courts Consultative Committee, which would coordinate all Primary Court work and direct the courts’ collective activities.

333 Judges of the Māori Land Court would all be tenured Primary Court judges, specifically warranted to sit in the Māori Land Court. Cross-warranting would provide the potential for them to be warranted to sit in other Primary Court jurisdictions as and when appropriate and as resourcing may permit.

## Recommendation

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

## Judicial resource

334 The current workload of the judges of the Māori Land Court needs to be assessed to see if there are enough judges given the proposed significant extensions to the court's jurisdiction. This assessment will be influenced by whether the judges of the Māori Land Court continue to chair Waitangi Tribunal hearings, which is currently part of their workload.

## Pū-wananga (pukenga)

335 The use of experts in tikanga, whakapapa and te reo Māori sitting with judges of the court has significant precedent. As early as the 1862 and 1865 Native Lands Acts, provision was made for Māori of chiefly status to sit with Native Land Court judges. In the present context there are a number of legislative provisions allowing the co-option of experts in tikanga Māori to assist the bench.<sup>387</sup> The extension of these processes to the new areas of jurisdiction would be a natural progression that may allow for more robust and successful outcomes for disputing groups, who will have ongoing relationships due to their communal asset ownership.

336 The successful future of the court is dependent upon community satisfaction with the character, methods and processes of the court. Therefore, involvement of the community in the processes of the court, through these experts, is likely to be positive.

337 It is suggested that pools of up to 10 pū-wananga could be assigned to each Māori Land Court registry, available to be assigned to cases within the jurisdiction conferred upon the court. In fisheries allocation cases, for example, the court might include at least two pū-wananga and perhaps more, depending on the significance and difficulty of the particular case. Legislative amendments could be made to ensure that the decision quorum includes a judge, as is the situation when certain advisers sit with the High Court bench where decisions are made by the majority, including the judge.<sup>388</sup> Alternatively, ss 44–49 of the Te Ture Whenua Māori Act 1993 may provide an avenue to remedy any difficulties in this respect.

338 The new mediation provisions included in Te Ture Whenua Māori Act 1993<sup>389</sup> mean that the court is moving away from a solely adjudicative role towards a mediation and facilitation role. The use of pū-wananga sitting with a Māori Land Court judge can only assist that process.

339 Since expertise in tikanga lies primarily with those who practice it on marae and in communities on a daily basis, pū-wananga knowledgeable in tikanga Māori and whakapapa in a particular case are likely to be related to those parties in

387 See Te Ture Whenua Māori Act 1993, ss 28, 31–33.

388 See Land Valuation Proceedings Act 1948, s 3, Commerce Act 1986, s 77(10), Human Rights Act 1993, s 126.

389 Sections 30A–30J.

dispute in the court. From a strict legal perspective such a relationship could disqualify pū-wananga from sitting, so amendments would be needed to confirm that decisions should not be set aside on that ground alone.

340 In a submission to the Law Commission, the Chief Judge described how the Māori Land Court could operate:

Some issues can and should be mediated by a Judge and Pū-wananga working together with the parties outside the courtroom in the ordinary way of mediation. In other cases, the parties may have tried alternative forms of dispute resolution without success. In ordinary litigation these matters would be referred to court to be dealt with through some form of adversarial process.

It may not necessarily follow, however, that the usual lawyer dominated orthodox court process ought to be employed in dealing with intra-Māori tikanga disputes when they do come to court. A hearing may for example, at least in the first instance, operate more as an inter-iwi hui at which lawyers are tolerated but not encouraged. Parties may be encouraged to engage in discussion over the issues in the normal Māori whaiwhai kōrero manner. A formal record may well be kept of such discussions, but it may not be formal evidence adduced in the orthodox way. A panel of Pū-wananga may, in appropriate cases, using these traditional techniques, be able to guide the parties to agreement in accordance with tikanga.

This approach is not new. When the Native Land Court was established as a pilot scheme in 1862, the bench comprised Pū-wananga chaired by a Pākeha Magistrate. The processes utilized were hui based. It is clear that in this area involving as it does the application of fundamental concepts of tikanga Māori, the usual western approaches to dispute resolution are unlikely to be as successful as techniques which utilise Māori processes, Māori knowledge and are conducted in a Māori spirit. These ideas will present real challenges in terms of making orthodox principles of procedural fairness work in a completely different cultural context.

Other cases, raising more familiar legal issues of internal iwi or hapū decision making for example may well be best dealt with in the usual manner of judicial proceedings. It will be important for the court to adapt its procedures to the needs of the parties and the particular dispute.

## Recommendation

R120 Māori Land Court judges should be able to appoint pū-wananga (experts in tikanga Māori and whakapapa) and others with relevant skills to assist, as full members of the court, in particular cases.

## Referrals of tikanga to the Māori Appellate Court

- 341 Tikanga Māori is defined in section 3 of Te Ture Whenua Māori Act 1993 as “Māori customary values and practices”. It has been described as the body of rules and values developed by Māori to govern themselves – the Māori way of doing things.<sup>390</sup>
- 342 Where issues of tikanga arise, the court is required to deal with an issue which is different from most other matters which come before the court. Tikanga, by its very nature, is difficult to define and not universal. The Māori Land Court and the Māori Appellate Court are markedly more appropriate than any other forum in our court structure to make determinations about tikanga. It ignores the very substance of what requires determination to suggest that decisions can simply be made after hearing competing experts give evidence. The adjudicator needs an understanding of the context, beyond fact and precedent. It involves sets of beliefs and values which are subjected to careful and sensitive assessment.
- 343 While the judges of the Māori Appellate Court do not describe themselves as expert in tikanga, that court has, among its membership, greater experience and knowledge than any other. Added to this it can seek advice from those with expertise and so is the appropriate forum for determinations in this area both at first instance and on appeal.

### Tikanga in the general courts

- 344 The courts have developed a number of requirements for the recognition of customary law. Such case law as there is in New Zealand indicates that Māori customary law is regarded as analogous to foreign law and must be proved.<sup>391</sup> The law regarding evidence and proof of Māori customary law has been summarised as follows:<sup>392</sup>

In the ordinary Courts matters of Māori customary law, like foreign law, must be proved by appropriately qualified experts, except where, by “frequent proof” the matter has become “notorious” to the Court (in which case judicial notice may be taken of the customary rule).

### Section 61 Te Ture Whenua Māori Act 1993

- 345 Section 61 of Te Ture Whenua Māori Act 1993 provides another means of establishing tikanga. This section gives the High Court discretion to state a case to the Māori Appellate Court on matters of custom. The opinion of the Māori Appellate Court, once given, is binding on the High Court. The Court of Appeal has described the legislative purpose of this section as giving the High Court access to the expertise of the Māori Appellate Court in respect of matters of fundamental Māori importance, land and tikanga.<sup>393</sup>

390 New Zealand Law Commission *Māori Custom and Values in New Zealand Law: NZLC SP 9* (Wellington, 2001), 1.

391 For a summary of methods of proof of foreign law specifically *The Laws of New Zealand* (Wellington, 1992) Conflict of Laws, para 272.

392 R Boast et al *Māori Land Law* (Wellington, 1999) 22, cited in New Zealand Law Commission, above n 390, para 204.

393 *Hauraki Māori Trust Board v Treaty of Waitangi Fisheries Commission* [1995] 2 NZLR 702.

- 346 In 2001, the Law Commission reported that this procedure was under utilised, commenting that in the interests of efficiency and justice, the Māori Land Court has an important role to play as the appropriate fact-finding body in matters of Māori customary law.<sup>394</sup> We remain of that view.
- 347 In a recent decision, the High Court acknowledged that judges of the Māori Appellate Court enjoy a uniquely qualified knowledge of Māori values and custom not normally held by a judge of the High Court. The court was satisfied, however, that a judge sitting in the High Court of New Zealand in 2003 or 2004 would be capable of determining the questions of tikanga that arose in the case with the benefit of evidence from experts.<sup>395</sup>
- 348 In our view, the Māori Appellate Court has unique resources and expertise which make it a more appropriate body than the High Court for establishing matters of tikanga. In the interests of consistency, efficiency and justice, *all* courts should use its expertise in this regard. We recommend that where any question of tikanga arises for determination in the High Court, the High Court should be obliged to state a case and refer that question to the Māori Appellate Court for its opinion.
- 349 The section 61 procedure should also be required for Primary Court cases where issues of tikanga require determination. Appeals in relation to an opinion of the Māori Appellate Court on tikanga should only go to the Supreme Court and only if leave to appeal is granted.
- 350 We were concerned there could be undue delay in cases in other courts if referrals on tikanga to the Māori Appellate Court were mandatory. Information provided from the Ministry of Justice indicates that on the historical data, delay in obtaining a fixture date is unlikely to be a significant issue,<sup>396</sup> and the benefits of this process would outweigh some slight time lag.
- 351 Some would say that there will be difficulties in drawing boundaries between what is tikanga and what is not. That is true, as issues of fact and tikanga can be intrinsically tied together. However legal principle requires appellate courts to show appropriate deference to the specialist expertise of primary courts, and we would expect this to occur with reference to the recognised proficiency of the Māori Appellate Court. Drawing jurisdictional boundaries has always been part of the task of courts.

394 New Zealand Law Commission, above n 390, ff 344.

395 *Proprietors of Parininihi ki Waitotara Block v Ngaruahine Iwi Authority & Ors* (HC, New Plymouth, CP18/99, 7 April 2003, Harrison J), at 7. The judge noted that at the conclusion of the trial process the judge may wish to obtain the benefit of the Māori Appellate Court's opinion, and would then be in a position to define precisely the parameters of the assistance required.

396 The Māori Appellate Court sits four times a year, usually for two weeks at a time. There is no significant backlog in obtaining a fixture date at present. Section 61 referrals could either be slotted into the next Māori Appellate Court session, or a special sitting of the court convened.

- 352 Views differ as to whether decisions on matters of tikanga should be appealed to the Supreme Court. One view is that they should not because the Supreme Court does not have the required qualifications among enough of its members to determine such issues and it is unlikely to have them in the foreseeable future.

### Recommendation

- R121 The Māori Appellate Court should be the forum for deciding any disputed issue of tikanga in all court litigation.
- R122 Appeals from an opinion of the Māori Appellate Court on tikanga should be capable of challenge only in the Supreme Court, and if leave to appeal is granted. This recommendation is not supported by Law Commissioners Ngatata Love and Frances Joychild, who consider decisions of the Māori Appellate Court on matters of tikanga should be final.

## Appeals from the Māori Appellate Court

- 353 There is provision for a maximum of eight judges in the Māori Land Court including the Chief Judge. There is a right of appeal from the Māori Land Court to the Māori Appellate Court, which is made up of three judges of the Māori Land Court. The Chief Judge of the Māori Land Court presides (unless that is the judge against whom the appeal arises, in which case the senior judge sitting presides).
- 354 The judges of the Māori Land Court estimate that of the 5,000 to 6,000 applications received by the Māori Land Court each year, only 20 to 30 appeals result, most relating to procedural errors. The court also has a broad discretion to solve problems at its own instigation, subject to procedural safeguards. There is a unique regime under which the Chief Judge can correct mistakes and omissions.<sup>397</sup>
- 355 Judges of the Māori Appellate Court have discretionary power to refer a point of law to the High Court for decision. The High Court can judicially review the Māori Appellate Court as well as the Māori Land Court.
- 356 A substantial proportion of appellants and respondents are unrepresented. A small number of appeals involve significant questions of law, tikanga or principle in which legal counsel will be involved.

## Principles of appeals from Primary Courts

- 357 Throughout this report we have taken the view that in principle there should be a right of general appeal from any Primary Court to the High Court, unless there

<sup>397</sup> Te Ture Whenua Māori Act 1993, ss 44–49.

are compelling reasons against this. This accords with the High Court's central supervisory role in the court structure. The fundamental thesis is that following all primary adjudications, there ought to be a right of general appeal, and that this should normally be to the High Court, which also has judicial review jurisdiction.

- 358 Concern can arise that judges of the Māori Land Court, when sitting in the Māori Appellate Court, are sitting in judgment on their own Māori Land Court colleagues. This results in the possibility that the independence, or just as importantly, the perceived independence, of their decisions may be compromised. Submissions received from the Māori Land Court bench strongly assert that this is not a problem, and that it is in fact necessary to maintain the current appellate structure from the Māori Land Court to the Māori Appellate Court because of the internal expertise in dealing with the complex nature of tikanga and Māori asset administration. We agree that no other court currently has the ability to deal with tikanga in a satisfactory and sensitive way.
- 359 Some appeals from the Māori Land Court involve simple error correction. A significant number of the remaining appeals involve issues of tikanga Māori. If the jurisdiction of the Māori Land Court is extended to include communally-owned assets other than land, the tikanga-based content of its work will increase in volume and significance.
- 360 Further, the processes used at present in the Māori Land Court and Māori Appellate Court differ markedly from those in the High Court. There is a high degree of flexibility in the manner of hearing and decision-making in the Māori Land and Appellate Courts. Parties often do not have legal representation. The judge is directed to avoid unnecessary formality, to apply the rules of marae kawa, and to encourage the use of te reo Māori where appropriate. The court can receive evidence that may not be admissible under strict rules of evidence, and can instigate its own inquiries. In terms of process, appeals from the Māori Land Court are more appropriately routed in the first instance to the Māori Appellate Court.
- 361 Despite our initial concerns, having assessed the competing issues, we are satisfied that appeals from the Māori Land Court should continue to be subject to an initial appeal to the Māori Appellate Court. There are good reasons relating to subject matter and process that outweigh the other risks and justify some departure from the general principle that appeals from the Primary Courts go directly to the High Court.

## Recommendation

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

## Appeals from the Māori Appellate Court

- 362 The recent Supreme Court Act 2003 made it possible to appeal from the Māori Appellate Court to the Court of Appeal, with provision to apply for leave for direct appeal to the Supreme Court in special circumstances.
- 363 Prior to the passage of the Supreme Court Act 2003, the case law dealing with any right of appeal from the Māori Appellate Court was unclear. One view is that there was no appeal right at all and the Māori Appellate Court was the final court of appeal. There was however a general right to petition the Sovereign for the exercise of the Royal Prerogative. This right was available to litigants before any court in the country.
- 364 The contrasting view is that whatever the jurisprudential source of the right, the case law specifically confirms a right of appeal to the Privy Council from the Māori Appellate Court. This is a longstanding and unique right.
- 365 Irrespective of what might have existed prior to the Supreme Court Act, the situation is now unambiguous. The Act provides for a general right of appeal from the Māori Appellate Court to the Court of Appeal. In exceptional circumstances, and with leave of the Supreme Court, a party may apply to appeal directly to the Supreme Court. The Māori Appellate Court has always been able to be judicially reviewed in the High Court and this remains following the Supreme Court Act.

## Submissions

- 366 Some submissions suggested that there should be no right of appeal beyond the Māori Appellate Court. The Māori Land Court and Māori Appellate Court are dealing in specialist areas of law, and developing their own field of jurisprudence relating to intra-Māori issues. Great value is placed on maintaining the courts' distinctiveness, and this is largely a reflection of their unique ability to deal with Māori asset-related issues.
- 367 The argument is that an avenue of general appeal to the High Court, Court of Appeal or Supreme Court will remove cases from the expertise of the Māori Land Court bench. This concern was raised by the Law Commission's Māori Advisory Committee, and by some Māori during consultation.<sup>398</sup> Most accept the High Court's power of judicial review, although some also questioned that level of supervision for legality, and wanted total internal autonomy.
- 368 Some argue that the appeal position created by the Supreme Court Act 2003 should be maintained, on the basis that very recent consideration has been given to this matter by Parliament, and that the Act is reflective of Parliament's balancing of competing issues.

<sup>398</sup> Representatives of this argument were divided about whether this would or should remove the High Court's power of judicial review.

- 369 Conversely, others consider that the Supreme Court Act 2003 diminished the right to appeal straight from the Māori Land Court to the highest court in the structure, previously the Privy Council. They assert this right was based on the Treaty relationship, and developed through case law, and they argue that it should be restored. That would mean appeals from the Māori Appellate Court would go directly to the Supreme Court.
- 370 Still others argue that if there is to be any appeal beyond the Māori Appellate Court, this should be treated cautiously, and defined narrowly. They would require cases to be dealt with in a way that protects the distinctive nature of the subject matter while upholding general judicial principles. The factual subject matter would be best dealt with by people with proper understanding and expertise in tikanga Māori, and Māori legal and social issues. In their view, to have appeals on matters of fact and tikanga go beyond the Māori Appellate Court would expose them to judicial scrutiny by judges less experienced in the subject matter. However, they accept the High Court, Court of Appeal and Supreme Court can be of assistance in deciding appeals on issues of law.
- 371 Two views have emerged from consultation on the issue of appeals from the Māori Appellate Court. They are both included here so that due weight can be given to each perspective. Members of the Law Commission diverge on where appeals should be routed after the Māori Appellate Court, and what the basis of those appeals should be. Neither view supports the situation as exists currently under the Supreme Court Act.

### View one: appeal to the High Court except for tikanga

- 372 View one is that the High Court should maintain its constitutional supervisory role within the court system and, therefore, cases from the Māori Appellate Court should be subject to judicial review and general appeal on fact and law in the High Court. Matters of tikanga, however, should be appealed directly to the Supreme Court.

#### Reasoning

- The judicial system requires a variety of specialist courts in many areas, but eventually all of them must come within a unified and principle-maintaining structure and be subject to supervision for legality. One of the most important premises of this review is that there should be a principled, coherent and understandable pathway for appeals and judicial review, allowing the High Court and Court of Appeal to focus on their core functions within the court system. This will maintain the integrity of the whole system.
- The recent provisions in the Supreme Court Act were developed in the context of the existing supervisory arrangements from specialist courts. We are seeking to create a more coherent and principled framework, in which the potential for cases from the Māori Land Court and Appellate Court to be judicially reviewed in the High Court at the same time as a general appeal proceeds in the Court of Appeal would be problematic.

- In those cases where an appeal is properly required, parties should not be denied their fundamental right to have a decision tested and scrutinised by way of a general appeal in the High Court, the court with inherent jurisdiction and the crucial responsibility of maintaining legality throughout the system.
- Although this model introduces one more appellate step from the Māori Land Court, this needs to be kept in perspective. Subsequent appeals would be by leave only, and a matter could only proceed if it truly involved a significant issue of public importance. Indeed there is already the potential for this number of appellate steps in relation to judicial review.
- Bypassing the High Court avoids the risk of creating too many potential steps of appeal, but has the significant effect of distorting and sidelining the supervision and review aspects of the High Court. Where only judicial review is available in the High Court, there are often ingenious attempts to fit appellate issues into the judicial review jurisdiction to achieve substantive justice at that level. Access is another issue: appeals in High Court centres would be more accessible than the few places where the Court of Appeal sits.
- The argument for reduced interplay between the Māori Land and Appellate Courts and the general courts system, is unsustainable in this view. The Māori Land Court, either with its present jurisdiction or with our suggested increased jurisdiction, is part of the adjudicative system of New Zealand. Its decisions have potential to affect much more than a purely Māori constituency. The recent decision of the Court of Appeal that the Māori Land Court's present jurisdiction includes determining customary rights to the foreshore and seabed is compelling evidence of that reality. Recent government proposals in response involve an ongoing role for the Māori Land Court.
- As the scope of issues dealt with in the Māori Land Court expands to include communally-owned assets which affect not only Māori, the limitations of the small and isolated nature of the Māori Appellate Court (three members from the court whose decision is being appealed) could become more apparent. In contrast, the High Court provides independent and specialist supervisory oversight, and a further general right of appeal there would offset any perceived risk.
- View one acknowledges the specialised nature of decision-making where issues of tikanga arise – which we are advised mainly relate to intra-Māori disputes – by proposing that such issues should be determined finally by the Māori Appellate Court, subject only to the right from all courts to seek leave to appeal to the Supreme Court.

## View Two – appeal on law only to Supreme Court

- 373 View two is that there should be an appeal on a question of law only, from the Māori Appellate Court to the Supreme Court, with leave of the Supreme Court. Appeals on tikanga to the Māori Appellate Court should be final.

## Reasoning

- A general appeal right to three layers of general courts is neither appropriate nor necessary. The Māori Appellate Court's primary work is in intra-Māori communal asset disputes and disputes as to Māori representation issues. Resolution of these disputes requires both subject-specific knowledge of tikanga Māori, as well as a solid understanding of the Māori community itself. As in other disputes before the courts, principles of access to justice require that Māori have confidence in the delivery of justice in this forum.
- We have heard repeatedly that there is widespread and serious alienation of Māori from the general court system. After a long history of Māori antipathy to the Māori Land Court and Māori Appellate Court, which were the historic means by which their land was alienated, Māori are moving to reclaim these courts as their own and to have faith and trust in them as a legal vehicle able to process intra-Māori disputes. Māori feel they are 'their courts'. The courts are in a critical stage of evolution. The proposed increase in jurisdiction to include all Treaty settlement assets means they are destined to have a significant role in the economic and social development of Māori.
- Overwhelmingly, appellate court judges have no experience of, nor training in the legal, cultural and social matters which are critical to a determination of disputes heard in these courts. Should that expertise become available in the future, then a stronger case for view one could be made, but it cannot be made now. View two maintains that a general right of appeal has the serious potential to repress rather than support the development of Māori jurisprudence relating to matters Māori, and to create a new wave of mistrust of the court system.
- The Māori Appellate Court has always been subject to judicial review and that should be retained. It is important that litigants in this forum, like all others, have the right and ability to challenge the fairness of the processes used by the court in deciding their disputes. View two would advocate giving the Supreme Court the power to remove a proceeding for judicial review into its jurisdiction in the very infrequent situation when it would be hearing an appeal from the Māori Appellate Court relating to the same matter.
- Rejoining the two streams at the Supreme Court level is a more appropriate embodiment of the principles of the Treaty of Waitangi and also appropriate because of the references to the Treaty contained in the Supreme Court Act. This would retain the position the court held prior to the Supreme Court Act 2003, according to some interpretations of the law, with the Supreme Court replacing the Privy Council.
- This view considers the suggestion that general appeals should go to the High Court, except for issues of tikanga, would be difficult and unwieldy. It would often be impossible to separate tikanga from law.

- Should serious legal questions arise in the Māori Appellate Court that affect non-Māori New Zealanders, these will inevitably be of a constitutional nature, and befitting the expertise of the highest court in the land to determine by way of appeal on a question of law or judicial review.

## Recommendation

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

---

## 5.7 Coroners' Court

---

- 374 A Coroners' Court is a special judicial proceeding that takes place within the court system. Coroners have all the powers, privileges, authorities, and immunities of a District Court judge exercising jurisdiction under the Summary Proceedings Act 1957.<sup>399</sup> Coroners inquire into certain deaths to establish their manner and cause. The Department for Courts notes that 3,824 coroner's findings were registered in 2001/02.<sup>400</sup>
- 375 The Law Commission reported on the role and function of coroners in 2000.<sup>401</sup> Following that report, the Ministry of Justice has been undertaking preliminary work towards reform of the coronial jurisdiction to enhance public confidence in the integrity and independence of the system. We understand Government plans to introduce a Coroners Bill to Parliament to give effect to some of the recommendations in the 2000 report.
- 376 We focus on only two issues here: where the coronial jurisdiction fits in the Primary Court structure and whether there should be any rights of appeal.

### In this section we recommend:

- R125 The coronial jurisdiction should be exercised through a Coroners' Court, forming part of the Primary Court structure and headed by a Chief Coroner.
- R126 There should be a general right of appeal to the High Court from a coroner's findings.

### Structure

- 377 The Law Commission's 2000 report did not specifically deal with where the coronial jurisdiction fits into the court system. In *Seeking Solutions* we raised the possibility that coroners' court work could be brought within the scope of a new court of general jurisdiction.
- 378 The coronial jurisdiction is unique in the court system. It is longstanding and plays a fundamental role in the investigation of deaths. It is exercised in inquests (the investigation into a death) and inquest hearings (which take the form of a public hearing).<sup>402</sup> Its general purpose is to identify the cause of preventable deaths and "to identify practices that have cost human lives and then to modify or eliminate them".<sup>403</sup>

---

399 Coroners Act 1988, s 35.

400 Department for Courts *Annual Report* (year ending 30 June 2002), 65.

401 See New Zealand Law Commission *Coroners: NZLC R62* (Wellington, 2000).

402 The 2000 report notes the confused use of the term "inquest" in the Act and recommends the Act be amended.

403 New Zealand Law Commission, above n 401, para 1.

- 379 More specifically, inquests seek to establish, so far as is possible:
- that a person has died
  - the person’s identity
  - when and where the person died
  - the causes of the death
  - the circumstances of the death.<sup>404</sup>
- 380 Findings under the last two can have broad implications, for example, where a person is found to have died due to omissions or mistakes made by a medical practitioner. The hearing itself has been described as “a judicial hearing conducted under special rules in the knowledge that there are often no parties in the adversarial sense and that the inquiry is inquisitorial in nature”.<sup>405</sup> Nevertheless, any person with a sufficient interest in the subject or outcome of the inquest may, personally or by counsel, attend an inquest and cross-examine witnesses.<sup>406</sup>
- 381 Coroners have broad powers and responsibilities including the power to decide whether or not to hold an inquest.<sup>407</sup> They are, however, required to hold inquests into deaths arising from certain circumstances, and are required to complete and sign a certificate of findings for all inquests held.<sup>408</sup>
- 382 Coroners have the powers, privileges, authorities, and immunities of a District Court judge exercising jurisdiction under the Summary Proceedings Act 1957. They can issue summonses for the attendance of witnesses, issue warrants to enforce summonses, maintain order, administer oaths to witnesses, punish for contempt, adjourn proceedings from time to time and place to place.<sup>409</sup>
- 383 In the course of an inquest a coroner can hear evidence from any person he or she thinks it appropriate to examine.<sup>410</sup> Any evidence is admissible, whether or not it would be admissible in a court of law, so long as the coroner is satisfied its admission is necessary or desirable for the purpose of establishing any matter specified in section 15(1)(a).<sup>411</sup>
- 384 At present, coroners in New Zealand do not have the broad search and seizure powers held by some of their Australian and Canadian counterparts. Some Australian coroners have powers of entry, inspection and possession of documents<sup>412</sup> and coroners in the Australian Capital Territory can issue warrants

---

404 Coroners Act 1988, s 15(a). Subsection (b) provides: “Making any recommendations or comments on the avoidance of circumstances similar to those in which the death occurred, or on the manner in which any persons should act in such circumstances, that, in the opinion of the coroner, may if drawn to public attention reduce the chances of the occurrence of other deaths in such circumstances.”

405 *Re Sutherland (Deceased)* [1994] 2 NZLR 242 at 246.

406 Coroners Act 1988, s 26(4).

407 Section 20.

408 Sections 17 and 31.

409 Section 35(2).

410 Section 26.

411 Section 26(5) and (6).

412 Tasmania, Western Australia, Northern Territory, Victoria.

authorising a police officer to do a number of things, including seizing documents.<sup>413</sup> We understand that the anticipated reforms will broaden coroners' powers in this area.

385 We endorse the view asserted in a recent United Kingdom report:

... the coroner service is essentially a judicial, investigative and public safeguarding or regulatory service, which should in all its functions work to judicial standards. It is more likely to develop such standards reliably and consistently if it has a structure similar to and linked with those of mainstream judicial services, which are organised into national jurisdictions and are led by the higher judiciary.<sup>414</sup>

386 Our view is that, in line with our recommendations for each specialist jurisdiction, the Chief Coroner should head a separate specialist coroners' jurisdiction within the Primary Court structure. In this way, the new coronial system, which will be composed of fewer, mainly full-time, coroners will have a closer affinity and relationship with the rest of the court system.

387 Like the other Principal Judges, the Chief Coroner would head the bench, play the key role in advocating for, and allocating, resources and be responsible for leadership and training.

## Recommendation

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

## Appeals

388 At present, coroners' proceedings are only subject to judicial review in the High Court. This does not equate to a standard right of appeal, as it offers little recourse to a party who simply argues that the coroner got it wrong in fact or law.

389 We understand that the proposed legislation may extend the opportunities for objections and appeal in some circumstances. One example may be the proposal that there should be concurrent jurisdiction between the High Court and the Solicitor-General for ordering new inquests. At present, the Solicitor-General can order a new inquest in the light of new facts and the High Court can order a new inquest for "any sufficient reason".<sup>415</sup>

390 A complaints process may also be considered, in that the jurisdiction of the Judicial Conduct Commissioner, described in the Judicial Matters Bill, could be extended to include coroners.

413 Concern has been voiced in those jurisdictions that the overlap between coroners' investigative power and the criminal investigative sphere is unacceptable: Hallenstein "The twentieth century coroner: a review of the Coroner's Act 1985" (1986) *Law Institute Jnl* 1060.

414 Secretary of State for the Home Department *Death Certification and Investigation in England, Wales and Northern Ireland The Report of a Fundamental Review* (Cm 5831, London, June 2003), 182.

415 Coroners Act 1988, ss 38–40(3).

## Practice abroad

- 391 In South Australia, the Attorney-General or a person with “sufficient interest” may appeal to the Supreme Court against an inquest finding. An application to appeal must be made within one month of the findings of the Coroners’ Court. The Supreme Court may rehear witnesses or receive fresh evidence.<sup>416</sup>
- 392 The Supreme Courts of six other states<sup>417</sup> have powers to void the findings of an inquest, and order a new one where it is necessary or desirable because of fraud, consideration of evidence, failure to consider evidence, irregularity of proceedings or insufficiency of inquiry; there is a mistake in the record of the findings; it is desirable because of new facts or evidence; or the findings are against the evidence or the weight of the evidence.
- 393 The power of the High Court in the UK is less broad.<sup>418</sup> However a recent report has proposed that there should be an appeal route against coronial decisions to the Chief Coroner, or a High Court judge authorised to hold inquests.<sup>419</sup>

## General right of appeal

- 394 We consider the principle that everyone should have a general right of appeal from first instance decisions to be fundamental in our court structure. The lack of such a right from a coroner’s findings, therefore, needs consideration.
- 395 While the Coroners’ Court does not conduct trials and hear evidence in quite the same way as other Primary Courts, its decisions can have broad implications. Coroners make findings of fact, and as noted above, their findings regarding the causes and circumstances of a death can have significant implications on the work of certain professional groups, for instance, medical practitioners.
- 396 Although coroners’ powers in New Zealand are not at present analogous to those in some jurisdictions, and are reviewable by the High Court, it is our view that there is a need for general error correction in the jurisdiction. If the Coroners’ Court becomes one of the Primary Courts, appeals would be heard in the High Court, along with judicial review.
- 397 We anticipate that the volume of appeals would be very low – the right would be exercised rarely. But it is for those rare instances of error that the protection is needed.

---

416 Coroners Act 2003 (SA).

417 Western Australia, Australian Capital Territory, Victoria, Tasmania, Northern Territory, New South Wales.

418 Coroners Act 1988 (UK), s 13.

419 Secretary of State for the Home Department *Death Certification and Investigation in England, Wales and Northern Ireland The Report of a Fundamental Review* (Cm 5831, London, June 2003), 232.

398 At present a right of appeal lies against the decision of a coroner who is not a District Court judge either to prohibit the publication of evidence given at an inquest, or to allow publication of details about self-inflicted deaths,<sup>420</sup> to a District Court judge. If our proposals are adopted, these provisions would need to be amended so that such appeals would also be heard in the High Court.

## Recommendation

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

<sup>420</sup> Coroners Act 1988, ss 25(2)(b) and 29.



---

# Part 6

## High Court, Court of Appeal and Supreme Court

---

In this part we consider:

- the jurisdiction of the High Court
- the case for increased specialisation in the High Court
- the future of the Commercial List
- the role of Masters
- appeals
- the roles of the Court of Appeal and new Supreme Court.

# 6.1

## The High Court

- 1 The High Court has significant original jurisdiction as the court in which the most serious criminal and civil cases are heard. It has the primary responsibility for maintaining consistency in the application of legal principle, and in supervising the operation of other courts, and the exercise of administrative power. It carries out these responsibilities as an appellate court, and as the court exercising judicial review. In the FW Guest Memorial lecture in 2003, the Chief Justice described the High Court's inherent jurisdiction as follows:

The High Court exercises inherent as well as statutory jurisdiction. The statutory jurisdiction is sometimes shared with other courts. The inherent jurisdiction is not. It includes the jurisdiction to review for legality the exercise of all authority whether by the executive or by the inferior courts. Judicial review by the High Court has been systemised by statute, but it follows from the full authority exercised by that court to say what the law is. That function is essential to government under law.

- 2 The court's inherent jurisdiction enables it to deal flexibly with issues not covered by established procedure, and to protect the administration of justice.
- 3 The volume pressures in parts of the court system that are described in this and our previous reports are not as acute in the High Court. However it is not isolated from the other courts. Any changes made to other parts of the system inevitably affect the operation of the High Court, and some adjustments are necessary.
- 4 In addition, there is room for increasing specialisation within the civil work of the High Court, both at first instance and on appeal, without threatening the integrity of the court, or undermining the importance of its broad general jurisdiction.

### In this section we recommend:

**Criminal jurisdiction** (These recommendations are made and discussed in Part 5.1)

- R88 The middle band of criminal offences should be abolished.
- R89 The High Court should retain exclusive criminal jurisdiction for a defined group of offences. All other cases not in the jurisdiction of the Community Court should be heard in the Primary Criminal Court.
- R90 The defined list of offences heard in the High Court should be based on the seriousness and complexity of offending and legislation should be introduced after consultation with the judiciary, the police and the legal profession.
- R91 There should be a means of transferring individual cases from the Primary Criminal Court to the High Court in exceptional circumstances, based on extraordinary matters at issue in the particular case.

## Civil jurisdiction

- R127 The High Court should retain exclusive or predominant jurisdiction in the following areas: civil cases over \$500,000, judicial review, arbitration, trusts and administration, admiralty, intellectual property, insolvency and probate.
- R128 Panels of judges should be established in the High Court to allow a degree of specialisation at both first instance and on appeal, without detracting from the generalist nature of the High Court as a whole.
- R129 The Commercial List should be discontinued and commercial cases managed within the general civil system. Complex cases should be assigned to a judge and managed on an individual listing basis.
- R130 A small group of appropriately skilled, tenured Primary Court judges should be warranted to exercise the Office of Master of the High Court, as well as being warranted to hear cases in the Primary Civil Court.

## Supervisory jurisdiction: appeal and review (Recommendations 49 and 52 are made and discussed in Part 3.)

- R49 The first appeal from a Primary Court should be a general appeal to the High Court, on both fact and law, as of right, with the exception of the first appeal from the Māori Land Court, which is to the Māori Appellate Court.
- R52 The High Court should have primary responsibility for maintaining consistency in the application of legal principle, supervising the operation of other courts and the exercise of administrative power – functions which derive from its role as an appellate court, and the court responsible for judicial review.
- R131 Appeals from Primary Criminal Court jury trials should go to a bench of three High Court judges in the High Court, with the potential for further appeal to the Court of Appeal with leave.
- R132 Appeals from the Community Court should go to one High Court judge.
- R133 Subject to specific exceptions, there should be a presumption that two High Court judges will hear all other appeals, including appeals from the tribunal structure.

## Criminal Jurisdiction

- 5 The Law Commission's recommendations for changes to the criminal jurisdiction of the High Court and proposed Primary Criminal Court are discussed in detail in Part 5.1.
- 6 There, we recommend that the middle band of offences should be abolished and that the High Court should retain an exclusive criminal jurisdiction for the most serious offences. We suggest that while homicide and treason are obvious examples of offences that should be heard in the court, there is a need for a

reassessment and review of the others that should be in this category. The High Court's criminal jurisdiction should be a defined jurisdiction, established after consultation with the judiciary, the police and the legal profession. Our proposal is that all other criminal cases, apart from those within the jurisdiction of the Community Court, should be allocated to the Primary Criminal Court.

- 7 There should be a means of transferring individual cases into the High Court where the interests of justice require it, in the particular circumstances of the case.

## Civil Jurisdiction

### General civil jurisdiction

- 8 There is considerable overlap between the civil jurisdiction of the present District Court and that of the High Court. The District Court has jurisdiction for claims up to \$200,000<sup>421</sup> and the High Court has exclusive civil jurisdiction in claims over \$200,000. Some other classes of civil case are heard exclusively or predominantly in the High Court, including intellectual property, admiralty, company matters and insolvency.
- 9 In determining where civil cases should be heard, the principles of constitutionality, proportionality, accessibility, quality of decision-making, and efficiency are of pivotal importance.
- 10 The Law Commission is recommending increasing the civil jurisdiction at the Primary Court level to claims up to \$500,000, but using only civil warranted judges to conduct the civil work of that court. The High Court would have concurrent jurisdiction for cases between \$50,000 and \$500,000, and cases over \$500,000 should be in the exclusive jurisdiction of the High Court, unless the parties consent to the Primary Civil Court having jurisdiction.
- 11 Parties should be entitled to apply for a case to be transferred to the High Court, or from the High Court to the Primary Civil Court or Community Court, according to the importance and complexity of the issues in the case.<sup>422</sup> The High Court should retain its present overriding discretion to order the transfer of any case into the High Court on the application of any party,<sup>423</sup> or transfer a case to the Primary Civil Court of its own motion.

---

421 Unless the parties agree to extend the jurisdiction – District Courts Act 1947, s 37.

422 At present the defendant has the right to have proceedings transferred to the High Court if more than \$50,000 is involved. If less than \$50,000 is at stake, the defendant may give notice but the court must be satisfied that an important question of fact or law is likely to arise, or the question of title to some heriditament – District Courts Act 1947, s 43(1) and (2). The High Court may itself order a matter to be transferred to the District Court, if the matter is one within the jurisdiction of the District Court, unless an important question of fact or law is likely to arise – District Courts Act 1947, s 46.

423 District Courts Act 1947, s 43(6). Relevant considerations include the amount of the claim, its nature and complexity, and the type of issue raised by the pleadings, and whether the issue is of public or other importance.

## Exclusive civil jurisdiction

- 12 At present the High Court has exclusive or predominant jurisdiction in a number of areas, including probate, company insolvency, bankruptcy, arbitration, trusts and administration, admiralty and intellectual property.
- 13 We propose that some areas of civil work continue to be heard exclusively or predominantly in the High Court. These include judicial review, arbitration, trusts and administration. Such cases can be complex, or of constitutional significance.
- 14 In *Seeking Solutions*, we raised the possibility of some areas of exclusive jurisdiction being moved to or shared with the District Court (or, as we propose, the Primary Civil Court), in particular, probate and aspects of bankruptcy and insolvency.
- 15 The submissions we received in relation to probate indicated that the exclusive jurisdiction of the High Court is not reducing access in these areas. The New Zealand Law Society submitted that fees were not an impediment in relation to probate as they were with some other High Court applications. “Common form” probate applications largely involve High Court registry staff, so there is little to be gained by moving them.
- 16 The New Zealand Law Society also argued that probate applications “in solemn form” deserve the consideration of a High Court judge, as they relate to a change in status. This argument in itself is not necessarily persuasive – for example, the Family Court has powers to make orders relating to changes in status. However, it appears that work in the probate jurisdiction of the High Court is currently performed efficiently and well at registry level, and that shifting the jurisdiction would be disruptive, rather than productive. We do not recommend any change in the probate jurisdiction at this time.
- 17 It was clear from our consultation however that there are issues about access to information about probate, which could be relieved in part by better information and assistance being available in Primary Court courthouses.
- 18 As for insolvency, much of the work is done efficiently and effectively in the masters’ jurisdiction. We make no recommendations for change at the present time. However, questions were raised during our consultation about whether all of the work actually required the attention of a judicial officer, or whether more might be done at registry level, and whether the jurisdiction being in the High Court limits access in those centres where the High Court goes on circuit.
- 19 The Ministry of Economic Development has undertaken a major review of insolvency, which will lead to reform in a number of areas, such as the need for court involvement in simple creditor petitions. We anticipate that issues of access will have to be reconsidered when the recommendations of that review are being implemented.

## Recommendation

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

## Specialisation

- 20 Consideration of the structure of the High Court inevitably involves a discussion about judicial specialisation. The competing factors for and against specialisation have been outlined in relation to the Primary Courts.
- 21 The High Court is a court of general jurisdiction. All judges of the court hear cases across the range of criminal, civil and judicial review. One of the issues frequently raised in the course of this review was whether there should be more specialisation in the way the High Court hears cases, and if so, what form this should take.
- 22 The Buddle Findlay survey of corporates<sup>424</sup> asked whether more specialisation was required in the court system. It found that, of those surveyed, people in the commercial community felt generally that High Court judges were of high calibre, and could come up to speed relatively quickly with the issues involved in a case. An exception to this was in the area of intellectual property, which was described by some as a complex area requiring specialist knowledge and procedure.
- 23 The example of intellectual property captures the tensions in the debate about specialisation at this level of the court structure. In 1997, Sir Ian Barker QC noted that there were not enough cases to justify allocating one or two judges to deal solely with intellectual property work.<sup>425</sup> However he also made the point that we cannot expect close familiarity with intellectual property litigation from all judges, who are otherwise required to be “jacks or jills of all trades”.<sup>426</sup>
- 24 The question of specialisation also arises in relation to appeals to the High Court from specialist courts like the Family or Environment Courts. At present there are some legislative mechanisms that introduce an element of specialisation into the High Court on appeal. For example, where the High Court hears appeals that come to it under the Commerce Act 1986, it must for most purposes include at least one lay member, appointed for their knowledge or experience in industry, commerce, economics, law, or accountancy. But the usual rule is that generalist judges hear appeals, even if the court of first instance was a specialist court like the Family Court.

424 Buddle Findlay Lawyers *Quest for Efficient Justice: What does the New Zealand Business Community Expect of Our Judicial System?* (September 2002)

425 Sir Ian Barker QC, “Is Australia and New Zealand’s IP litigation product internationally competitive?” (1997) NZIPJ 259

426 Barker, above n 425.

- 25 Matters on appeal may not require the same degree of specialisation as was required in the original hearing – appeals often concern more general principles of law. However, in the course of our review we received submissions supporting increased specialisation in decision-making on appeals from specialist courts to the High Court. Proponents argued that it was unusual to find many areas of law which involved sufficient expertise at first instance to justify a specialist court, yet apparently required no specialist element on appeal.
- 26 In our view, there is not enough recognition of the need for some specialisation on appeal from cases which were heard by specialist bodies. However, there are real issues as to how much specialisation is healthy or practical in a bench the size of the High Court. The question is one of balance: where should the balance between general and special jurisdictions lie, and how is it best achieved?
- 27 The High Court judges believe that the present balance is right, and that the court should continue to be a court of general jurisdiction, not subdivided according to specialisation.<sup>427</sup> They consider that case volumes in New Zealand do not require streaming, and that streaming for specialisation is difficult to achieve administratively.
- 28 Many others took a different view, suggesting that more can be done to encourage the use of specialist expertise within the judiciary.<sup>428</sup> While there was general support for the level of decision-making in the High Court, there was a view that capturing the use of specialist expertise within the court would enhance the system, increase efficiency, and make better use of judicial resources.
- 29 Given the size of the New Zealand jurisdiction and the number of judges in the High Court, we do not believe that the system can have specialist judges to the exclusion of work in the broad general jurisdiction. All High Court judges must be capable of and available for civil, criminal and judicial review work. Otherwise the High Court risks losing flexibility, and becoming fragmented, and the substantial benefits of a generalist principled approach are lost.
- 30 However, we do consider that there is room for more specialisation within the High Court, without threatening the flexibility or integrity of the court, and in a way that will enhance judicial decision-making.

### Specialisation overseas

- 31 Many overseas jurisdictions have a greater degree of specialisation at the equivalent of our High Court level, some for historical reasons, but others as a result of more recent initiatives.

---

427 Submission received from the High Court Judges.

428 For example, submission received from the New Zealand Law Society, paras 127–133.

## New South Wales

- 32 In New South Wales, the Supreme Court is divided into two trial divisions, Common Law and Equity, which are administered separately by the Chief Judge of each division. Judges are appointed to the divisions in large measure because of their background and experience as practitioners. This allocation reflects the historical separation of jurisdiction between equity and common law, which has not been a feature in New Zealand.
- 33 Cases to be heard by judges are placed into particular lists within each division.<sup>429</sup> A judge is appointed to manage each list.<sup>430</sup>

## United Kingdom

- 34 In the United Kingdom, the work of the High Court is handled in three divisions:
- Chancery Division: equity, trusts, tax, bankruptcy
  - Queen's Bench Division: contract, tort, commercial matters
  - Family Division: divorce, children, probate.
- 35 The Divisional Court of the High Court sits in the Family and Chancery Divisions, and hears appeals from the Magistrates' Courts and County Courts. The Administrative Court in the Queen's Bench Division deals with a variety of judicial review matters. Lord Woolf has noted that the judiciary is tending to become more specialised, mirroring what happens at the Bar.<sup>431</sup>

## Victoria

- 36 In Victoria, a new system was introduced in 2000, reflecting the growth in specialisation in the court, the profession and the broader community. The Trial Division of the Supreme Court is now divided into three divisions: Commercial Law and Equity; Common Law, and the Criminal Division. There are specialist lists within each division.<sup>432</sup> The (approximately) 20 judges of the Trial Division are allocated to the three divisions, and each has a Principal Judge, who manages the work of the division as well as his or her own judicial duties.

## Ireland

- 37 In Ireland, the High Court uses a system of 'lists', which involves nominating particular High Court judges to hear specific types of cases. The maximum

---

429 The Common Law Division has the following lists: Administrative Law, Defamation, Differential Case Management, Professional Negligence, Possession, criminal and bails. The Equity Division has a number of lists including Admiralty, Adoptions, Commercial, Corporations, Probate, Protective jurisdictions, and Technology and Construction.

430 Three of the 12 Equity Division judges are dedicated to the Admiralty List, Technology List and Technology and Construction List. The remaining judges in the Equity Division do all kinds of cases, although two particular judges tend to do most of the Corporations List work. Letter from Chief Justice of the Supreme Court, New South Wales to the President of the Law Commission, 3 July 2003.

431 Letter to the President of the Law Commission from Lord Woolf, August 2003.

432 Supreme Court of Victoria Practice Note 4 of 1999.

number of ordinary judges of the Irish High Court is 26. The President of the High Court allocates the work with the assistance of the Chief Registrar. Almost all judges do most types of work. The list system is seen as a way to respond to the need for specialisation without losing flexibility or sacrificing the benefits of a generalist court system.

- 38 At present, the Irish High Court has the following lists: personal injuries (Dublin and provincial), Bail, Bankruptcy, Chancery (1) and (2), Examiner’s List, Family Law, Garda/Police Compensation, Probate, Asylum and Admiralty. The President of the High Court has also nominated three particular judges for a Competition List, three for a Judicial Review List and three for a Planning List.<sup>433</sup>

#### Federal Court of Australia

- 39 Another example of capturing the strengths of particular judges can be found in the Melbourne and Sydney registries of the Federal Court of Australia. The Federal Court runs an individual docket system, under which cases are randomly allocated among judges. However, within the court there are specialist areas in which the court uses “panels” – self-selected groups of judges. Cases in the specialist areas of admiralty, corporations, workplace relations, intellectual property, Part IV Trade Practices Act (competition law) and taxation are randomly allocated among the panel judges.
- 40 Any judge can ask to be placed on a particular panel or panels, and it is the policy of the current Chief Justice to agree. The judge need not be a specialist to begin with, but he or she accepts a responsibility to become familiar with the area in question and is expected to take an active part in regular judicial education programmes in that specialty organised within the court.
- 41 The panel system is not universally accepted, but a recent committee examination of the system concluded it should remain, and the judges have accepted this as court policy. The Chief Justice describes the advantages of the panel system as follows:
- it widens the specialist base of the court: the allocation of specialist cases within a panel substantially increases the chance of individual judges hearing a reasonable number of such cases, where if they were distributed randomly among the Melbourne and Sydney judges (of whom there are almost 30) the level of experience in specialist areas would drop
  - the system promotes expertise
  - it gives judges an opportunity to do work they like, and others the opportunity to avoid work they do not like.

<sup>433</sup> Letter to the President of the Law Commission from Justice Budd, President Irish Law Reform Commission, September 2003.

42 The system has reduced pressure for separate specialist courts or divisions, and in the Chief Justice’s view has assisted the court as an appellate court, as they can more readily put together appellate panels with a good combination of general and specialist experience.

43 The Chief Justice describes one final advantage as being the attention the court can give to a case in a specialist area when it arrives at the registry requiring immediate attention:

No doubt we can all work out the right result if we have time, but where a decision in a technical area has to be made on the spot as happens in the area of corporations law and admiralty – to take just two examples – it is best to have a judge who can give the case the immediate, almost instinctive, attention that it requires.<sup>434</sup>

44 The Australian Law Reform Commission considered the panel system in its 1999 review of the Federal Court of Australia.<sup>435</sup> The commission noted that there were differing views within the court and the profession on the role and composition of judge panels. Essentially the debate was whether judges should be generalists or specialists.

45 The commission noted that while expertise in an area should be encouraged, there is a danger that a panel which is too small and specialised may create a ‘club’ culture, promote a matching mythology of expertise among the profession, encourage monopolies and constrain jurisprudence. It commented on the desirable balance between expertise and accessibility, between the desire for specialist judges, and a restricted club of specialists, and concluded:

The Federal Court is well aware of and appropriately sensitive to the competing needs in the formation of panels. The commission is not disposed to make any recommendations on these matters.

## Specialist panels in New Zealand

46 We consider that the model of the Federal Court of Australia has potential for the High Court in New Zealand.

47 One of the great strengths of our High Court is that it is a court of general jurisdiction. All High Court judges should do a mix of work within the general jurisdiction. However, as well as that solid general core of work, there are areas within the High Court’s jurisdiction which would benefit from more specialist focus, but do not warrant the creation of a specialist court. In those areas, specialist panels offer a flexible and sustainable option.

48 Panels of judges should be established with familiarity in and commitment to certain areas of law. Cases arising in those areas would then be assigned to a judge from an appropriate panel, or a bench including such a judge. We are of

434 Letter to the President of the Law Commission from the Chief Justice, Federal Court of Australia, August 2003.

435 Australian Law Reform Commission *Managing Justice: a Review of the Federal Civil Justice System* (Report 89, 1999), 453–454.

the view that, as in the Federal Court, the panels should be self-selecting – judges would opt for membership of a panel if interested.

- 49 The system must remain flexible, and a degree of pragmatism will be required. The panel system need not result in any detriment to the administration of judicial resources – judges can develop more than one specialty, and all will remain available for hearing other cases. The system should also be transparent, to avoid the risk of any suggestion of ‘panel packing’ (the deliberate allocation of one or more judges to a judicial panel in order to achieve a particular outcome):

The establishment of specialised panels (in bankruptcy or company law, for example) is not, per se, panel packing. Judges’ specialist experience and understanding of the particular field can cut down hearing time and costs for litigants. They can also produce a better quality decision through the right questions being asked, thus reducing the likelihood of a further appeal. But any specialised panel has to be constituted according to sound criteria that cannot be changed arbitrarily and must sit for a fixed amount of time so that packing cannot occur.<sup>436</sup>

- 50 Statistical information about the types of civil case filed in the High Court has not been easily accessible. However, the introduction of the CMS computer system into the High Court will provide useful information as to the range and number of panels required in the High Court. Establishing panels in taxation, intellectual property, competition, and admiralty would seem an appropriate start.
- 51 There should also be panels to reflect the specialist Primary Courts, to bring an element of specialisation to the hearing of appeals from those courts where necessary. This would include the Employment Court, Māori Land Court, Family Court and Environment Court.

## Recommendation

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

## Commercial litigation

- 52 Commercial litigation in the High Court and District Court is heard within the general civil jurisdiction of each court. The current exception is the Commercial List in the Auckland High Court where there is an alternative pre-trial procedure for certain types of commercial cases,<sup>437</sup> and where a designated Commercial List judge presides. The emphasis is on the speedy determination of pre-trial issues.

<sup>436</sup> Petra Butler, “The Assignment of Cases to Judges” (2003) 1 *NZJPIL* 83, 84.

<sup>437</sup> Proceedings eligible for the Commercial List are set out in the Judicature Act 1908, s 24B. Parties can also refer a dispute over the construction, status or application of a contract or document to a Commercial List judge for determination – Judicature Act 1908, s 24C(4).

Once pre-trial matters have been concluded, the case is heard by any High Court judge (not necessarily a Commercial List judge).

- 53 The Commercial List was established as a pilot scheme in Auckland, by a working party in 1987. It achieved immediate success in the management of litigation, and introduced a number of innovations to the litigation process which have since become commonplace in all litigation.<sup>438</sup> A feature of the List has been a high pre-trial settlement rate.
- 54 However, a number of questions have been raised about the Commercial List in its current form and there have been calls for reform.<sup>439</sup> The Annual Report of the Commercial List for the year ending 31 December 2000 reported signs that the Commercial List was losing its purpose, as many of the techniques used in it were integrated into general case management.
- 55 Commentators have described a number of apparent disadvantages with the List<sup>440</sup> but the most significant criticism is that it is limited to pre-trial issues. Once the case is ready for hearing, it is transferred back into the general list for allocation to any judge for hearing.<sup>441</sup> The judge to whom the case is allocated will not necessarily be a Commercial List judge. While sometimes cases are allocated to judges with the appropriate background or experience, concern has been expressed at the randomness of allocation of cases and the lack of confidence that this engenders in the process.<sup>442</sup>
- 56 There have been calls from some commercial litigators for greater specialisation of adjudication at the hearing stage. It is argued that allowing judges to specialise in adjudicating commercial cases means they could apply their particular skills where they can most make an effective contribution to the law. It may also attract commercial specialists who would not otherwise consider judicial appointment.<sup>443</sup>
- 57 On the other hand, while some commercial cases may require real specialist knowledge and expertise, many falling within the definition of commercial cases for the purposes of the commercial list in fact do not require specialist adjudication and may be handled efficiently and effectively by judges within the general jurisdiction of the High Court.
- 58 In the year ending 31 December 2000, 36 cases were commenced via the Commercial List. About 40 percent were categorised as “the ordinary transactions

---

438 A Beck “Litigation Section” (2002) *NZLJ* 441.

439 In the year to 31 March 1988 there were 143 cases filed, in the year to 31 March 1995 it was 51, in the twelve months to 31 December 2001 only 34. See Beck, above n 438. Between 1999 and 2000 the workload of the Commercial List decreased by 30%. See *Annual Report of the Commercial List* for the year ending 31 December 2000 and *Report of the Judiciary*, Appendix 2.

440 Beck, above n 438.

441 See, for example, Galbraith “Facilitating and Regulating Commerce: the Court Process” (2002) 33 *VUWLR* 841 at 846ng.

442 See Galbraith, above n 441 at 845, fn 11. Galbraith notes, “on occasions, Executive Judges appear to have exercised influence to ensure that particularly difficult cases ended up in safe hands. Commerce has reason to be grateful for that, but the system should be explicit and open to the parties”.

443 Submission received from the New Zealand Law Society.

of persons engaged in commerce or trade or of shippers”, and just over 20 percent concerned intellectual property disputes. The remaining cases involved disputes about arbitration, companies, securities and liquidation.<sup>444</sup>

## Discontinuing the Commercial List

- 59 We do not consider that a dedicated specialist commercial court<sup>445</sup> or formal division of the High Court are currently warranted in New Zealand, bearing in mind the need for judicial resources to be managed as flexibly as possible, the need to retain a viable commercial caseload within the High Court and the Primary Civil Court, and the relatively low numbers of cases presently being entered on the Commercial List.
- 60 We recommend the use of panels of judges in areas that would benefit from greater specialist judicial decision-making. We have suggested the establishment of intellectual property, taxation, and competition panels, from which judges could be drawn to hear cases requiring that expertise.
- 61 As for case management, the current Commercial List has been a useful and successful trailblazer within the High Court. However many of the advantages of the present list have been overtaken to a large extent by the development of case management generally.
- 62 In our view, the Commercial List in its present form has served its purpose, and should not be maintained.
- 63 We note that the supervision of all pre-trial matters by one judge is a particular advantage in commercial litigation. Case management of any complex litigation should be on an individual listing basis, rather than a master listing system. Such assignment avoids duplication of effort and an inefficient use of scarce resources.

### Recommendation

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

## Masters

- 64 The Office of Master was established in 1986. The 1978 Royal Commission on the Courts recommended that masters should be available at all levels of jurisdiction, but the office was eventually introduced into the High Court only.

<sup>444</sup> *Annual Report of the Commercial List* for the year ending 31 December 2000.

<sup>445</sup> For example, the Commercial Court in London.

Masters were appointed to assist with the growing workload of the High Court and to ensure the prompt handling of the planned summary judgment procedure. Masters are appointed for a five-year term and may be reappointed.

- 65 The masters' jurisdiction has been extended a number of times by amendment to the Judicature Act. The increasing emphasis on case management and the introduction of a summary judgment jurisdiction to the District Court has meant that the nature of masters' work has changed over the years. Their current workload is substantially dealing with insolvency and company liquidation, summary judgments, interlocutory applications, and case management.
- 66 The responses to our first two reports were generally supportive of the contribution of masters, noting the experience and expertise they bring to their specialist jurisdiction. High Court judges (past and present) offered enthusiastic support for their work. There are, however, some concerns. Masters do not have tenure, which poses a potential threat to the independence of the office, and places masters themselves in an unsatisfactory position. Although this issue may be resolved by the passage of the Judicial Matters Bill, previous attempts to pass legislation to ensure tenure for masters have been unsuccessful.
- 67 We heard from a former master that there has been a decrease in the amount of 'real legal work' which masters get, particularly with the extension of the summary judgment jurisdiction to the District Court, leaving little opportunity for masters to preside over defended hearings. Other masters however expressed the view that the job was no less satisfying as a result of this change and that there is still variety. There was a general view that hearing cases totally would add to the attractiveness of the role.
- 68 The present review provides an opportunity to reconsider the Office of Master, to see whether improvements can be made, and whether the role can be enhanced in ways that would improve the way in which civil work is carried out in our courts. In particular, we see potential for specialised judicial officers doing both the work of the present masters and also playing a valuable role in the extended jurisdiction of the Primary Civil Court.

### Proposal for dual warranting

- 69 The Law Commission proposes that a small group of appropriately skilled, tenured Primary Court judges be warranted to exercise the office of a Master of the High Court, as well as being warranted to hear civil cases in the Primary Civil Court. It is anticipated that this group would number 8 to 10 people, all of whom would have the particular expertise, experience and aptitude to deal with all of this work.
- 70 The masters' jurisdiction would remain in the High Court. Existing masters could have tenure as Primary Court judges and would be provided with the opportunity to hear civil cases in the Primary Civil Court if they were to make the transition to this new approach.

- 71 The idea is not new. In 1995, a similar proposal was raised by the then Solicitor-General, to deal with concerns about lack of tenure for masters, and the small specialist nature of the office.<sup>446</sup> In South Australia, in 1991, the Supreme Court Act was amended to provide that a master is, while holding that office, a District Court judge.<sup>447</sup> In practice there was initially little connection between Supreme Court masters and District Court judges, until 2002, when the current Chief Judge of the District Court arranged with the Chief Justice for one of the masters to spend such time as he has available sitting as a judge in the District Court to help in both civil and criminal work.<sup>448</sup>
- 72 Current masters and their colleagues on the High Court bench do not support the proposal. They noted that masters provide a desirable degree of flexibility and carry out part of the civil jurisdiction of a High Court judge, and consider that the proposal poses risks to the role of master without any demonstrated commensurate improvements to the work of the District Court.
- 73 There is a general recognition that problems exist in the present District Court structure in dealing with civil cases, including resource issues, and difficulties arising from the priority given to other parts of the work in the District Court. Under our recommendation for Primary Courts these problems will be lessened. Once civil cases for less than \$50,000 are dealt with in the Community Court, we estimate that the number of cases in the Primary Civil Court up to either \$200,000 or \$500,000 (as proposed) would be the workload of between five and six judges.
- 74 We have consistently taken the view that a grouping as small as that is undesirable and we remain of the view that the skills, experience, knowledge and commitment required to be a master in the High Court are substantially the same as those required to undertake the civil work between \$50,000 and \$500,000. With these two areas, there is considerable potential for variety, challenge and development.
- 75 The desire of the High Court to leave things as they are, with the masters' work and more serious civil work of the District Court being dealt with separately, is understandable from the perspective of that bench. However this review demands a wider focus. If these two areas of work become the responsibility of one group of judicial officers, it will provide a skilled pool of people with the requisite skills and experience to deal with two important areas of law, between which there is considerable synergy.
- 76 We agree that nothing should be done to interfere with the hands-on involvement of masters with High Court files. The history of the office has shown how very successful this has been, but we are satisfied that a composite group could continue to provide that benefit in the High Court while at the same time responding to clear needs in the wider area of civil cases.

446 Letter from the Solicitor-General to the Chief Justice, Rt Hon Sir Thomas Eichelbaum, 6 October 1995.

447 Supreme Court Act 1935, s 7(4).

448 His availability for roster in 2003 came to about 5 months. Letter from Chief Judge Worthington, South Australia, to Patrick Keane.

- 77 An alternative approach raised during consultation would be to have no Primary Court dealing with civil cases (other than those dealt with in the Community Court and its divisions) and all other civil cases heard in the High Court. The masters' jurisdiction could still be amended to enable them to hear some cases which come within the \$50,000 to \$200,000 or \$500,000 bracket. The advantage of that as seen by the existing masters is that they would not be straddling two different jurisdictions (which they perceive to be a major practical problem), their expertise would be captured, and their work varied. It was suggested that there would need to be about nine masters to deal with this work.
- 78 This proposal raises issues of increased cost and of geographical access, as cases in this civil bracket would only be heard in the 17 High Court centres rather than the 64 current District Court centres. On balance, we do not consider it to be the best way of promoting efficient and effective civil justice.

## Recommendation

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

## Supervisory jurisdiction: appeal and review

- 79 The ability to appeal a decision made by a court, or request a review of the way the decision was reached, is fundamental to our system of justice. Appeals serve three main purposes:
- correcting errors made by lower courts or tribunals (primarily the role of intermediate appellate courts)
  - clarifying and developing the law and establishing precedents for use in future cases (primarily the role of final appellate courts)
  - ensuring consistency in decision-making.
- 80 In our view, there should generally be at least two opportunities to appeal primary judicial decisions in most substantive matters; one appeal as of right, and a further opportunity if leave is granted by the court to which the appeal is proposed.
- 81 Appeals should generally proceed from one level of the court system to the next. We have recommended that all courts of originating jurisdiction, apart from the High Court, should be clustered as Primary Courts. There should be a general right of appeal to the High Court from all Primary Courts, except the Māori Land Court where the first appeal is to the Māori Appellate Court. This recommendation would result in changes for the Employment Court (discussed

in Part 5.5) and the Environment Court (discussed in Part 5.4). Our discussion and recommendations as to appeals from the Māori Appellate Court appears in Part 5.6.

## Type of appeal

- 82 As noted in Part 3 a general right of appeal to the High Court from a Primary Court would be a right of appeal on fact as well as law, and would be by way of rehearing, on the record of the oral evidence given in the court below. There would be a discretionary power to rehear the whole or any part of the evidence or to receive further evidence. It would necessarily also involve proper deference to the particular specialisation and experience of the relevant Primary Court.
- 83 Any further appeals would be by leave and may often be restricted to questions of law.

## Leave to appeal

- 84 Where appeals require leave, the issue of who hears the application for leave varies. In some cases, the court that made the original ruling hears the application for leave.<sup>449</sup> In other cases, the court to which a full appeal would be brought hears the application.<sup>450</sup> In the latter case, the appellate court has to spend time deciding whether a case will go to appeal, before hearing it. Whether this reduces delays in the appellate process depends on the balance achieved by the courts between the time spent deciding leave applications and the time saved by reducing the overall number of appeals.<sup>451</sup>
- 85 However, it allows the court hearing the appeal to control appeal volumes and content. In our view, the court hearing the appeal is generally best placed to make the decision as to leave, rather than applications for leave being heard by the court that made the original ruling. We recommend this in Part 3.

## Appeals from District Court jury trials

- 86 At present appeals from all jury trials in both the High Court and the District Court are heard in the Court of Appeal. Appeals from jury trials in the District Court leapfrog the High Court, even if an appeal in relation to the same offence tried by a single judge in the District Court would go to a single judge in the High Court.
- 87 In 1978, when recommending this appellate path, the Royal Commission on the Courts noted that this created an anomaly, but it was preferable that the

449 For example Residential Tenancy Act 1986, ss 117–119. In a case under the Residential Tenancy Act, the first appeal is by right to the District Court, there is a further right of appeal on a point of law to the High Court, then a further appeal to the Court of Appeal with leave of the High Court, or, if that leave is refused, with special leave of the Court of Appeal.

450 For example in the Family Court, there is an appeal by right to the High Court, then a further appeal to the Court of Appeal with leave of the Court of Appeal – Family Proceedings Act 1980, s 174(5).

451 B Opeskin, *Appellate Courts and the Management of Appeals in Australia* (Australian Institute of Judicial Administration, 2001) para 60.

permanent appellate court be entrusted with overall supervision of directions to juries and the reviewing of longer sentences.<sup>452</sup>

- 88 In 1989, the Law Commission recommended that appeals from criminal jury trials in the District Court should lie to the High Court. This recommendation was not implemented. Instead, the Criminal Appeals Division of the Court of Appeal was established in 1991.
- 89 More than a decade later, it is apparent that the Court of Appeal is heavily overloaded. Many of the appeals from District Court jury trials involve issues of fact, rather than law, which is not an optimal use of the judicial skill and expertise of the Court of Appeal.
- 90 Much of the appellate work from District Court jury trials is done in the Criminal Appeals Division, which usually consists of only one permanent Court of Appeal judge, and two High Court judges. Under the Criminal Appeals Division system, the role of supervising jury directions now falls to a wider group of judges than the Royal Commission originally envisaged, and the argument related to consistency of supervision has lost its force.
- 91 If appeals from District Court (or as we propose Primary Criminal Court) jury trials were to go to a bench of three judges in the High Court, instead of going directly to the Court of Appeal, the Court of Appeal would continue to exercise overall supervision and control through second appeals. The proportionality and accessibility of the appellate pathways would be improved, and the Court of Appeal would have more time to do other work for which it is uniquely suited.
- 92 This will involve an increase in the workload of the High Court. However, we do not consider it would mean a significant increase in the number of judges required. Effectively most of these appeals are already heard by a bench including two High Court judges, sitting in the Criminal Appeals Division of the Court of Appeal. If this recommendation is adopted, the High Court would no longer be required to provide Divisional Judges to the Court of Appeal. (Presently more than two judge equivalents are deployed there each year.) This resource would then be available to the High Court.

## Recommendation

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

452 Royal Commission on the Courts, above n 198, para 360.

## Number of judges on appeal

- 93 At present, appeals from the District Court to the High Court are usually heard in the High Court by a single judge. A full bench of two judges may be convened where the matter is of particular importance, but these cases are the exception. A court of three judges of the High Court is required in certain matters, for example for the hearing of electoral petitions, or on appeals from the New Zealand Law Practitioners Disciplinary Tribunal.
- 94 In *Seeking Solutions* we discussed the suggestion that the number of judges hearing an appeal should increase as the matter proceeds up the appellate chain. Arguments which support increasing the number of judges who hear appeals from first instance decisions include:
- the importance and significance of some appeal business
  - the enhanced status, qualifications and jurisdiction of District Court judges – it is no longer appropriate that one High Court judge sits on appeal, particularly where the matter is of equal complexity or value as one which might be heard originally in the High Court
  - the viewpoint of litigants, who may perceive it as unfair that one judge can simply overturn another.
- 95 On the other hand, there are real issues of scarcity of judicial resources at appellate level, and the need to retain proportionality and maintain efficiency, which suggest that an automatic presumption of three judges hearing an appeal cannot be sustained. In the United Kingdom, the *Bowman Review of the Court of Appeal (Civil Division)* recommended in 1997 that the Civil Division should be able to sit with one, two or three judges. It noted that valuable resources should not be devoted to cases which have no real need of them, and that a move towards allowing judicial discretion to determine the constitution of the court according to the individual nature of the case sits well with the general principle of introducing greater case management, which runs through the whole of the civil justice reforms.<sup>453</sup>
- 96 Taking into account the need for proportionality, and the best use of judicial resource, we recommend that appeals from the Community Court should go to one High Court judge. Apart from appeals from Primary Criminal Court jury trials, and certain other statutory exceptions where three judges are currently required, there should be a presumption that two High Court judges will hear all other appeals, including appeals from the tribunal structure we recommend in Part 7.

<sup>453</sup> This recommendation is now reflected in s 54 of the Supreme Court Act 1981. The Master of the Rolls may determine the appropriate number of judges for a particular proceeding, or a description of proceedings.

## Recommendation

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

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

## Judicial Review

97 The High Court is the court with responsibility for judicial review of most other courts, with the notable exception of the Employment Court. Applications for judicial review of decisions of the Employment Court are heard in the Court of Appeal. Although such applications are very rare, they constitute an exception to the general principle that the High Court is the court responsible for judicial review. In Part 5.5 we recommend that they should be heard in the High Court.

---

## 6.2 Court of Appeal

---

- 98 The Court of Appeal has traditionally been New Zealand’s principal appellate court. Until 1958, it was made up of judges of the former Supreme Court, but in that year it was constituted with permanent members.
- 99 The jurisdiction of the Court of Appeal currently includes hearing appeals from: judgments and orders of the High Court; criminal matters on indictment (criminal jury trials) in the District Court; certain decisions of the Employment Court, including appeals on a question of law; and appellate decisions of the High Court on appeal from the District Court, where parties have been given leave to appeal.<sup>454</sup>
- 100 The establishment of the Supreme Court was not intended to supplant the role of the Court of Appeal. A strong, intermediate appellate court at this level is essential for the health of the court system. In practical terms the Court of Appeal will continue to be New Zealand’s principal appellate court, and for most litigated cases it will in effect be the final appellate court.
- 101 For some years, concerns have been mounting that the Court of Appeal’s workload is affecting its ability to fulfil this role. In our view, the Court of Appeal cannot continue to operate with its present volume of work. The establishment of the Supreme Court will not ease these work pressures. In order to ensure that the Court of Appeal functions effectively and efficiently, changes are needed to some current appeal pathways. For this reason, in the previous section we recommended that appeals from Primary Criminal Court jury trials should go to three High Court judges in the High Court.

### In this section we recommend:

- R134 The Court of Appeal should no longer hear:
- appeals from jury trials in the proposed Primary Criminal Court
  - appeals from the Employment Court or applications for judicial review of Employment Court decisions
  - appeals from the Māori Appellate Court.
- R135 The Court of Appeal should always include one High Court judge on secondment. The secondment should be for a sufficient period to make it meaningful and useful for both courts, perhaps three or four months at a time.

---

<sup>454</sup> Judicature Act 1908, s 66; Crimes Act 1961, s 383(1); Employment Relations Act 2000, s 214; Judicature Act 1908, s 64.

## Composition of the Court of Appeal

- 102 Before the Supreme Court Act 2003 came into effect on 1 January 2004, the Court of Appeal had seven permanent appellate judges, plus the Chief Justice, by virtue of her office as head of the judiciary. The Court of Appeal now comprises the President and no fewer than five or more than six other permanent judges.<sup>455</sup> The Court of Appeal usually sits as a bench of three judges.<sup>456</sup> The Criminal Appeals Division and the Civil Appeals Division of the court were constituted in 1991. From time to time (except where the work of the High Court renders it impracticable), after consulting with the President of the Court of Appeal, the Chief Justice may nominate judges of the High Court to be members of the Court of Appeal for the purposes of hearing civil or criminal appeals in the divisions.
- 103 The main purpose of the Criminal Appeals Division was to relieve the Court of Appeal of a substantial amount of criminal appellate work, freeing it up for its role of judicial standard-setting in New Zealand.<sup>457</sup> The divisions were developed mainly to deal with routine appeals leaving those involving particularly difficult or important questions to be heard by permanent members of the Court of Appeal. The arrangement had the added advantage of allowing direct contribution by trial judges in the appellate process.
- 104 Appointments to the divisions are made either for a specified hearing, or for periods up to three months. In 2001 it was noted that in order to manage its workload, the total judicial resource employed for the Court of Appeal was equivalent to slightly fewer than 10 judges (seven permanent judges, some of the time of the Chief Justice, and the equivalent of 2.5 High Court judges).<sup>458</sup> Divisional courts normally have one permanent Court of Appeal judge and two nominated High Court judges.

## Workload

- 105 Prior to the creation of the Supreme Court, the Court of Appeal had been described as being stretched to the limit. Viewing it as a final appellate court for practical purposes, it decided more than five times the number of cases decided by most comparable overseas courts.<sup>459</sup> In 2001 the Court of Appeal determined 593 appeals.<sup>460</sup>
- 106 The workload of the Court of Appeal will not alter substantially because of the introduction of the Supreme Court. It may not need to sit as often as a bench of five, but it will continue to have roles in both error correction and in the

---

455 Judicature Act 1908, s 57(2) as amended by Supreme Court Act 2003, s 44.

456 The Judicature Act 1908 sets out exceptions: any two judges may act as the court for the purpose of delivering judgment (s 58(2)), a single judge of the Court of Appeal may make incidental orders and directions (s 61A) and the Court of Appeal must, in certain cases, sit as a full court of five judges (s 58D and s 58E).

457 E Geddis "The Criminal Appeal Division: the first three years" (1995) NZLJ 118.

458 Office of the Attorney-General *Report of the Advisory Group: Replacing the Privy Council: A New Supreme Court* (2002), para 171.

459 Tipping J *Notes for Privy Council Panel Discussion* (New Zealand Law Society Conference, October 2001).

460 Office of the Attorney-General, above n 458, para 75.

development of the law, and will remain the final arbiter in the overwhelming bulk of appeals, especially those which do not raise major issues of public importance warranting a further appeal to the Supreme Court. It must have sufficient time to carry out these responsibilities.

- 107 The Court of Appeal hears a large number of appeals in criminal cases which are primarily error correction. It is not the best, or most proportionate, use of the skills of the judges of the Court of Appeal to deploy them in this way. In Part 6.1 we recommend that appeals from criminal jury trials in the District Court should lie to the High Court, with a further opportunity to appeal to the Court of Appeal with leave. The Court of Appeal should continue to hear first appeals from those criminal trials that are heard in the High Court.
- 108 In Part 5.5 we recommended that appeals from the Employment Court should go to the High Court, with a further opportunity to appeal to the Court of Appeal with leave.
- 109 Shifting these appeals to the High Court will improve the proportionality and accessibility of the appellate pathways, and is consistent with the supervisory role of the High Court. It would also ease the Court of Appeal's current workload to give it adequate opportunity for proper consideration of the complex and significant cases to which it is uniquely suited.
- 110 Similarly, as recommended in Part 5.6, there should be a right of general appeal from the Māori Appellate Court (except on tikanga) to the High Court, and not to the Court of Appeal as in the Supreme Court Act 2003.

## Recommendation

R134 The Court of Appeal should no longer hear:

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

## Number of judges

- 111 We estimate that the Court of Appeal will require eight judge equivalents. The Court of Appeal will most often sit as a court of three. However the court should still sit with a bench of five judges to hear the most important cases.

- 112 A total of eight judges would allow two benches of three to sit simultaneously, with a contingency for illness or leave. Two benches will be necessary much of the time, even with a reduced workload in the court, to allow proper time for reflection, determination and judgment writing. The current arrangement with divisional courts would no longer continue.
- 113 Currently there is provision for seven permanent members of the Court of Appeal (including the President).<sup>461</sup> Cases will be heard by permanent judges of the court. However, to ensure continuing contact with current trial court practice, we recommend that the Court of Appeal should have one High Court judge always on secondment. We suggest that High Court judge should spend one-third of the year in the Court of Appeal, so that the secondment would be meaningful, consistent and advantageous on both sides.

### Recommendation

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

<sup>461</sup> The Chief Justice will no longer be available as a part of the judicial resource in the court of Appeal.

---

## 6.3 Supreme Court

---

- 114 The Supreme Court was established under the Supreme Court Act 2003, which came into force on 1 January 2004. The Act establishes a new court of final appeal comprising New Zealand judges. The Act ends appeals to the Judicial Committee of the Privy Council.
- 115 The Supreme Court will perform the roles that superior appellate courts traditionally perform, of error correction, and clarification and development of the law. In its report, the Advisory Group on the establishment of the Supreme Court estimated that the Supreme Court will hear between 40 and 50 cases a year.<sup>462</sup>
- 116 Appeals to the Supreme Court can be heard only with leave of the Supreme Court itself. The court will only grant leave to appeal where it is satisfied that it is in the interests of justice for the Supreme Court to hear and determine the appeal. That ground will be made out only if the appeal involves a matter of general or public importance, or a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard, or the appeal involves a matter of general commercial significance.<sup>463</sup>
- 117 In exceptional cases, the Supreme Court may grant parties leave to appeal to enable them to leapfrog the intermediate appellate process in the Court of Appeal.
- 118 The Supreme Court comprises the Chief Justice and not fewer than four, and no more than five other judges.<sup>464</sup> The court will normally sit as a bench of five.
- 119 The Supreme Court will begin hearing substantive cases on 1 July 2004.

---

462 Office of the Attorney-General, above n 458, para 5.1.

463 Supreme Court Act 2003, s 13.

464 Supreme Court Act 2003, s 17.



---

# Part 7

## Tribunals

---

In this part we consider:

- establishing a judicially-led, independent and unified tribunal framework
- the principles which should underpin the creation of new tribunals
- appeals from tribunals.

## 7.1

# A Coherent Framework for Tribunals

---

- 1 During the past 50 years a large number of tribunals have been created, with a wide variety of powers. Many of these tribunals were set up in response to specific needs, and lack any coherent framework or settled pattern. Reaction to a new statutory scheme, or the emergence of a particular kind of dispute, has often been the establishment of a new tribunal.
- 2 The present diversity of tribunals is much greater than it needs to be. The piecemeal way in which tribunals have developed has led to an unnecessary ‘jungle’ of different jurisdictions, often with no clear entry point for the ordinary citizen, and wide variations in process for no principled reason.
- 3 While some tribunals are well known, sit regularly and have experienced membership, others are little known, meet infrequently, and have occasional members who are not always well supported and have little opportunity to gain experience in their tribunal role. This can raise concerns about standing, authority and competence.
- 4 A number of tribunals are housed and resourced by departments who are directly affected by their decisions. While historically this may be understandable, it throws their independence and neutrality into question. Tribunals, like courts, must both be independent, and be seen to be independent. The perception is as important as the reality.
- 5 These issues arise wherever tribunal justice exists. In many parts of Australia, and now in England and Wales, the remedy has been to integrate all but the largest and most prominent tribunals within a single tribunal framework, led by members of the judiciary. That is what the Law Commission recommends should happen in New Zealand.

### **In this part we recommend:**

#### **Unified tribunal framework**

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

R137 The following bodies should be excluded from the new structure: the Waitangi Tribunal, the Securities Commission, the Commerce Commission, the Takeovers Panel, the Abortion Supervisory Committee, the Privacy Commissioner, the

---

Employment Relations Authority, the Mental Health Review Tribunal, the New Zealand Parole Board, the Disputes Tribunal and the Tenancy Tribunal.

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

### Judicial leadership

- R139 The unified tribunal structure should have a President, who is a Primary Civil Court judge, together with two legally qualified deputies.
- R140 Legislation should vest the President with the role of recommending to Government how particular tribunals can be merged, grouped or rationalised within the tribunal structure.
- R141 The structure should build up a core of experienced tribunal members, who should sit in more than one of the constituent tribunals. The other members of tribunals should be people with particular skills and expertise in the specific areas.

### A neutral administrative base

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

### Appeals

- R143 Appeals from tribunals within the unified framework should be to an appellate panel, made up of the President or Deputy President, a member of the tribunal in question, and a member from another tribunal.
- R144 Appeals should be on matters of fact and/or law, depending on the primary statute which creates the particular tribunal.
- R145 Any further appeal should be by leave to a full bench of the High Court, on a matter of law only.

### What is a tribunal?

- 6 The word “tribunal” is not used consistently. In New Zealand there are a number of bodies which are commonly regarded as tribunals, but are called commissions, authorities, committees or boards. It is hard to find a comprehensive definition of a “tribunal”. Many tribunals have in substance the same functions as courts – the finding of facts and the application of legal rules to those facts. The definition of a tribunal sometimes seems to come down to the features which make them different from courts.

- 7 One approach is to say that the term tribunal is used to describe a statutory body with most or all of the following characteristics:<sup>465</sup>
- it is independent of the administration and decides cases impartially as between the parties before it
  - it reaches a binding decision in relation to the cases heard
  - its decisions will usually be made by a panel or bench of members rather than by a single adjudicator. Members often do not serve full-time and are not professional judges and in many cases not lawyers either
  - it will adopt a procedure similar to, but rather more flexible and simpler than, a court of law
  - it will have been established specifically to deal with a particular type of case or a number of closely related types of case, on a permanent basis (as opposed to being set up for a one-off inquiry). By contrast courts of law generally have jurisdictions covering a much wider range of subject matter.
- 8 These characteristics also demonstrate the perceived advantages of tribunals over courts of law: they should be relatively cheap, more accessible, relatively free from procedural technicality, speedier, and should possess more expert knowledge of the subject matter under dispute.<sup>466</sup>
- 9 In fact few tribunals have all these features. Bodies which have most or all of them are commonly regarded as tribunals. But beyond these shared characteristics, many tribunals have little in common with one another. There have been attempts over the years in New Zealand to rationalise the diversity of tribunals, and to try to create some sort of coherence.<sup>467</sup>

## Tribunal reform

- 10 In 1989, the Legislation Advisory Committee (LAC) recommended that New Zealand tribunals should be ordered in larger clusters, beginning with three major tribunals encompassing 20 distinct jurisdictions.<sup>468</sup> One would be concerned with welfare, another resources and a third revenue. The LAC saw licensing and indecent publications as two other areas worthy of major tribunals.
- 11 The LAC proposed an incremental approach to amalgamation. It did not consider it feasible to establish a single overarching tribunal to encompass most bodies, despite acknowledging the advantages that a more complete integration might bring.

465 Jones Garner's *Administrative Law*, (7th edn, London, 1989), 276–277.

466 Jones, above n 465, 277; Wade *Administrative Law*, (8th edn, Oxford, 2000), 885.

467 For example, the First Report of the Public and Administrative Law Reform Committee of New Zealand, *Appeals from Administrative Tribunals* (Wellington, 1968) which proposed a larger original or supervisory role for the general courts, including a dedicated administrative division of the Supreme Court; Legislation Advisory Committee *Administrative Tribunals* (Report No 3, Wellington 1989).

468 Legislation Advisory Committee, above n 467.

- 12 In the years since that report, the Environment Court has assumed some of the jurisdictions that the LAC recommended for a resources tribunal. The two other major tribunals that it recommended have never been created. Other new tribunals have emerged, and though some have also been disbanded, the scale and diversity has not reduced. In 1989 the LAC identified 74, and referred also to 40 licensing bodies. In *Striking the Balance* the Law Commission identified 99 tribunals, with a further four proposed.
- 13 There has been one encouraging blow for coherence. The Health Practitioners Competence Assurance Act 2003 was passed in September 2003. The introduction of the Act is staggered, but over time it will replace 11 occupational regulation statutes governing 13 health and disability sector professions, establish a single Health Practitioners Disciplinary Tribunal, and create consistent processes for complaints against health practitioners.
- 14 In many parts of Australia and in the United Kingdom, there has been a trend towards unified tribunals. In 1995 the Australian Administrative Review Council endorsed conditionally the merits review process offered by the Administrative Appeal Tribunal (AAT) in its first 25 years of life.<sup>469</sup> The Council recommended that the AAT be enlarged to encompass two other significant Commonwealth tribunals.
- 15 The Australian Government accepted this recommendation, and introduced enabling legislation. However this was rejected in the Senate, because of concern that the new enlarged tribunal might have less status and independence, and fewer resources, than the tribunals it was to replace.
- 16 The Victorian Civil and Administrative Appeal Tribunal (VCAT), which began life in July 1998, is an integrated state tribunal on the AAT model, and has evolved into a forum which is now well known and accepted in Victoria. Western Australia intends to follow suit, following the release of a report in May 2002.<sup>470</sup> Legislation has been introduced to establish a State Administrative Tribunal (SAT). The SAT will replace the functions of nearly 50 industry and public sector boards and tribunals.
- 17 In 2000, the United Kingdom government commissioned an independent review of the tribunals system, led by Sir Andrew Leggatt. The resulting report contained a number of recommendations aimed at improving the services that tribunal users receive, including better access, clearer procedures, encouraging better decision-making by departments and promoting the use of information technology.<sup>471</sup> The report proposed achieving this by establishing a single service for all tribunals, encompassing 70 different jurisdictions. This would make

469 Australian Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report 39, Canberra, 1995).

470 Western Australian Civil and Administrative Review Tribunal *Taskforce Report on the Establishment of the State Administrative Tribunal* (2002).

471 Sir Andrew Leggatt *Report of the Review of Tribunals: Tribunals for Users – One System, One Service*, (London, 2001).

tribunals manifestly independent of their sponsoring departments, and would allow for significant economies of scale. In March 2003, the Lord Chancellor published a summary of responses to the report, indicating the Government's intention to bring most tribunals into a single service.

- 18 The benefits of clustering tribunals are no longer seriously debated. Fewer and larger tribunals are thought likely to:
- be more prominent, better known and more obviously accessible; more independent and authoritative
  - accord tribunal members a more secure career, allow them to be deployed in a range of compatible jurisdictions, and enable them to be better resourced and trained
  - allow processes to be aligned to eliminate needless differences and to ensure that they are simple, usable and fair
  - enable the alignment of rights of review and appeal
  - secure greater efficiencies, and economies of scale.
- 19 The Law Commission considers that for all aspects of tribunal justice to be coherent and accessible, the approach should be to create fewer and stronger tribunals, by amalgamating or grouping existing tribunals according to their functions. In contrast to the LAC approach, we consider that these clusters can and should be integrated within a single entity. The VCAT model is both desirable and achievable in New Zealand. Most New Zealand tribunals should be integrated within a unified tribunals framework.
- 20 With time, the risks identified by the LAC as inherent in unifying tribunals – achieving formal but no real unity, or forcing tribunals into one inhospitable mould – no longer seem so acute. These risks were inherent in the LAC's own proposal that three tribunals assume 20 separate jurisdictions. Whenever distinct jurisdictions are drawn together within a larger entity, there will be tension between coherence and specificity. How acute that will prove to be will not depend upon the size of the unifying structure. More important will be its philosophy, and how the different jurisdictions are organised.

## Proposal for a new tribunal structure

- 21 The Law Commission considers that a unified tribunal framework should be established by legislation, and that all the individual tribunals which are to be included within it should be brought immediately under the umbrella of this structure, complete with their existing memberships and processes.
- 22 This is not to suggest that all tribunals should become the same. Clearly, there will still be significant differences between many tribunals, as their functions and the processes and membership they require may be very different. Where there is a principled reason for diversity it should and can be maintained within the

unified tribunal framework. But the unified structure will help to reduce needless difference, and allows tribunals to benefit from each other's experience.

- 23 The process of clustering individual bodies within the structure, and standardising processes and rationalising membership, will be incremental. Even tribunals which continue to operate very much as they do at present can still derive advantages from being within the framework, in terms of accessibility, administration, support, and potential for cross-membership.
- 24 Merging tribunals will be a large task, but New Zealand has the advantage of a number of models readily available, in particular the constituting statutes for VCAT and the proposed Western Australian SAT. VCAT's constitutive statute, the Victorian Civil and Administrative Tribunal Act 1998, established the tribunal, defined and ordered its membership, prescribed how it was to be administered, stated its jurisdiction and functions, set out its general procedure, conferred a right of appeal, established a rules committee, and integrated all its individual jurisdictions within the whole.

## Recommendation

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

### Tribunals to be included

- 25 Getting up to date and comprehensive information about tribunals has been difficult. In *Striking the Balance*, we described over 100 tribunals. It was difficult to confirm that some still existed, or how often and where others sat. New tribunals have been created since the publication of that report, and still others may have ceased to meet.
- 26 We have not attempted to update the list of tribunals described in *Striking the Balance*. The first task in creating a unified tribunals framework would be to confirm a comprehensive list of tribunals that exercise a power of adjudication (including those that also have related administrative responsibilities and powers).
- 27 The nucleus of the unified framework should be those tribunals that resolve issues between citizens and the state. Some, like the Taxation Review Authority, are very like courts: they conduct hearings at which the contending parties appear, call and challenge evidence and make submissions. Others, like the Refugee Status Appeal Authority, are less formal and decide by inquiry. But all find facts, resolve issues of law, and make reasoned, binding decisions.

- 28 There are other tribunals which have a mix of functions, duties and powers, some adjudicative, some administrative. Included among these are the many tribunals which are occupational and professional bodies that licence, supervise and discipline.
- 29 The question is whether those adjudicative and administrative functions ought to remain integrated in one entity, or whether they should be separated. Such issues would be considered by the President of the unified framework, and might form the basis for recommendations in the long term. In the short term, we recommend that such tribunals become part of the unified tribunal framework and retain their present mix of functions.
- 30 There are two tribunals we specifically note should be included within the framework: the first, the Motor Vehicle Disputes Tribunals (MVDT), where our recommendation differs from that of the LAC in 1989, and secondly, the Weathertight Homes Resolution Service, which is a new body created since *Striking the Balance*.
- 31 Motor Vehicle Disputes Tribunals are established by the Minister responsible for the administration of the Act, by notice in the *Gazette*. They usually sit in the metropolitan centres, and are chaired by an adjudicator, who is a barrister or solicitor with five years' experience, with an assessor appointed by the adjudicator from a panel maintained by the Minister.<sup>472</sup> The MVDT only has jurisdiction if one party is a motor vehicle trader (as defined in the Act) and the total amount of the claim does not exceed \$50,000, (unless the parties agree to the tribunal determining a larger claim).<sup>473</sup>
- 32 In 1989, the LAC concluded that the MVDTs, like the Small Claims and Tenancy Tribunals, should best be seen as part of the District Court. In particular, the LAC noted that the jurisdiction of the MVDTs overlapped that of the general courts, and raised issues about liability for breach of contract and damages with which the courts commonly deal.
- 33 In our view the overlap of jurisdiction with the general courts is not a sufficiently compelling reason to keep the MVDTs outside a unified framework. Nor are there issues of very high volumes of cases – as there are in the case of the Tenancy Tribunal – to justify leaving the MVDTs free-standing. We consider that the MVDTs should be included in the new structure.
- 34 The Weathertight Homes Resolution Service was established by the Weathertight Homes Resolution Services Act 2002, to provide owners of houses that are leaky buildings with access to speedy, flexible and cost-effective procedures for the assessment and resolution of claims relating to those buildings.<sup>474</sup> In both effect and practice, the service is a tribunal, and is suitable for inclusion in the unified tribunals framework.

---

472 Motor Vehicle Sales Act 2003, s 82.

473 Motor Vehicle Sales Act 2003, s 90.

474 Weathertight Homes Resolution Services Act 2002, s 3.

---

## Lists and divisions

- 35 The various tribunals within the framework might be ordered in divisions and lists, as in a number of the Australian models. In the VCAT model, for example, the former boards and tribunals that form VCAT are assigned to one of three divisions – Civil, Administrative and Human Rights. A County Court judge heads each division.<sup>475</sup>
- 36 In the New Zealand framework, the President should have discretion to cluster tribunals into lists or divisions.

## Tribunals to be excluded

- 37 There are some tribunals that fall outside the Law Commission’s terms of reference because they are strictly private – they have been constituted and funded by industries to respond to complaints from the public. These include the Banking Ombudsman, the Insurance and Savings Ombudsman, the Electricity Complaints Commissioner, and the New Zealand Press Council.
- 38 In *Seeking Solutions* we noted a number of bodies that we have excluded from this review, as we consider that if they are to be reviewed, their unique roles require separate consideration. Those are the Waitangi Tribunal, the Commerce Commission, the Securities Commission and the Takeovers Panel.
- 39 The Waitangi Tribunal is charged with inquiring into and making recommendations on claims brought by Māori relating to acts or omissions of the Crown, which are inconsistent with the principles of the Treaty of Waitangi. It is a permanent commission of inquiry, and should remain free-standing.
- 40 While the Commerce Commission, the Takeovers Panel and the Securities Commission exercise powers of decision, there is a high policy content to their work, which is very significant in national life. These bodies should continue to be stand-alone.
- 41 Of the remaining tribunals, we also recommend that the following bodies remain outside the new framework: the Abortion Advisory Committee, the Employment Relations Authority, the Mental Health Tribunal, the New Zealand Parole Board, the Disputes Tribunal and the Tenancy Tribunal, and the Privacy Commissioner.
- 42 In our earlier reports we described the Privacy Commissioner as a tribunal. The view of the Office of the Privacy Commissioner is that that description is not apt or correct – while the Privacy Act system contains a tribunal (the Human Rights Review Tribunal), the relevant functions of the commissioner are investigative

---

<sup>475</sup> The divisions contain a number of lists, which specialise in particular types of cases. For example, the Administrative Division includes a General List, a Land Valuation List, an Occupational and Business Regulation List, a Planning and Environment List and a Taxation List. Deputy presidents head the various lists.

and conciliatory, and do not fit easily into the definition of a tribunal. The view of the Privacy Commissioner was that the office would not fit easily into a composite tribunal. Definitions aside, we agree with the conclusion, and do not recommend that the Privacy Commissioner be included in the tribunals framework.

- 43 The Abortion Supervisory Committee oversees and reviews, appoints and recommends, but its duties and powers are not truly adjudicative. It does not decide disputes by a formal contested process. For these reasons, it does not easily fit our approach to the tribunals to be included in a unified framework, and we recommend that it remain free-standing.
- 44 The Employment Relations Authority is at the mid-point of a process that begins with mediation and may end with court proceedings. Its role in this regard might be impaired if it were assimilated in a tribunal framework gathering many other jurisdictions. It needs to be closely linked to the Employment Court, rather than coming within the new framework.
- 45 Another tribunal that stands by itself is the Mental Health Review Tribunal. Its jurisdiction concerns persons compulsorily detained in mental hospitals, and is aligned with the jurisdiction of the Family Court. It is better left aligned with, but independent of, that court. Australian examples where a different approach exists are unlikely to be helpful, as the general statutory schemes are not directly comparable.
- 46 The New Zealand Parole Board is integral to the criminal justice process. It is chaired by judges and exercises a power of decision as to sentenced prisoners, which is aligned with that of the sentencing courts. The Law Commission considers it should maintain its connection with the Ministry of Justice and the Department of Corrections.
- 47 The Land Valuation Tribunal, the Catch History Review Committee and the Soil Conservation and River Controls Tribunals have work which is close to, and may appropriately in the long term be assimilated into, the Environment Court. We recommend that in the short term, these tribunals become part of the unified framework, but recognise there is a real likelihood that over time they will be assimilated into or connected to the Environment Court.
- 48 There are two bodies that are in reality high volume low level civil courts: the Disputes and Tenancy Tribunals. Although called tribunals, these jurisdictions are in effect the lower category of civil cases that make up the continuum in the general civil jurisdiction. At present, they are situated in District Courts and are supported by courts staff.<sup>476</sup>
- 49 In Victoria, comparable activities have been subsumed within VCAT. However we do not recommend that the Disputes and Tenancy Tribunals be incorporated

---

476 The Disputes Tribunal is noted as an “inferior court” in the Inferior Courts Procedure Act 1909, s 2.

into a new tribunal framework in New Zealand. As discussed in Part 4 of this report, these bodies operate as efficient and cost-effective mechanisms for resolving disputes. They hear large numbers of cases, and are closely connected with the courts. There is ready access to both bodies through the multitude of courthouses around New Zealand.

- 50 We have recommended that the Disputes Tribunal and the Tenancy Tribunal should operate as the Disputes Division and Tenancy Division of the Community Court. Avoiding using the word “tribunal” in connection with them will lessen confusion. Disputes Tribunals referees and Tenancy adjudicators should become Community Justice Officers and may well have other roles within the general courts system.

## Recommendation

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

## Principles for establishing new tribunals

- 51 There is a growing tendency for groups or sectors of the community to agitate for a new tribunal to be created whenever a problem emerges, often because it is perceived that the existing court system does not respond in a suitable, proportionate or cost-effective way to the demands which need to be dealt with.
- 52 One of the main reasons for the current diversity of tribunals is that they have generally been established indiscriminately, sometimes in response to a particular issue or pressure point, without an eye to coherence or a principled structure. As the history of our tribunals demonstrates, there is a risk of fragmentation and inconsistency in this approach.
- 53 In our view, whenever there is a call for a new tribunal, a principled analysis should be undertaken, rather than an approach based on an expedient reaction to the immediate issue. The following questions could usefully be asked by policy makers at the outset:
- Can this matter be dealt with through the ordinary mechanisms of the general courts? Are there compelling reasons related to subject matter or process which require a tribunal?
  - If it is thought that a tribunal is required, can an existing tribunal deal with this matter, rather than creating a new one? We suggest that in the future,

this is a decision in which the President of the unified tribunal framework should play an important advisory role.

- 54 If a new tribunal is found to be needed, it should be included within the unified framework, unless there are very good reasons to exclude it and have it free-standing.

## Recommendation

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

## Uniform processes

- 55 One of the most compelling arguments for creating a unified tribunal is the opportunity it affords to make processes uniform and more accessible. However no one code of procedure will fit all tribunals. There are a variety of possible responses.
- 56 In November 2003, the United Kingdom Council on Tribunals produced a *Guide to Drafting Tribunals Rules*. This is not intended as a uniform code of procedural rules to be adopted by tribunals without modification – rather it is a selection of different samples of rules, inviting a “pick and mix” approach.<sup>477</sup> The guide is intended to be useful for people drafting rules for new tribunals, or updating the rules of old ones.
- 57 The constitution of VCAT goes a step further. As well as defining jurisdictions and functions, it also sets out both its general procedure, and the variations called for by particular forms of proceeding.<sup>478</sup> It establishes a rules committee with the ability to make rules and issue practice notes.<sup>479</sup>
- 58 The Law Commission believes that uniform and accessible processes ought to be prominent hallmarks of any unified tribunal framework. We commend the model used in Victoria, where the essential elements are prescribed generally, but the necessary particular processes of individual jurisdictions are respected and promoted. A rules committee with wide discretion and powers would be essential. There is an issue as to whether tribunal hearings should generally be open or closed. This is discussed in Part 8.5 of this report.

477 The guide succeeds the *Model Rules of Procedure for Tribunals* published in 1991. It can be found at < <http://www.council-on-tribunals.gov.uk/files/GuideDraft.pdf> >, last accessed 15 December 2003 .

478 The Act defines the parties, and governs how a tribunal is to be constituted, what its preliminary procedure is to be, the compulsory conference, mediation and settlement option, the role of experts, the conduct of the hearing, costs, orders and general powers, service of documents and other generally recurring issues: Victorian Civil and Administrative Tribunal Act 1998, Part 4, s 58.

479 Victorian Civil and Administrative Tribunal Act 1998, Part 6.

## Judicial leadership

- 59 The new tribunal framework should be led by a President who is a judge, together with two legally qualified deputies. The Law Commission considers judicial leadership indispensable to ensuring the new tribunal framework is clearly independent and neutral, that its processes are fair, and that its members exercise their powers of decision-making competently and confidently. We envisage the tribunal structure being at the same level as a Primary Court, and it would therefore be appropriate for the President to be a Primary Civil Court judge.
- 60 Among the reasons for the creation of VCAT were the need for strong judicial leadership, for a neutral and independent body worthy of public confidence, and to ensure that judges heard the most controversial cases involving the executive. The same needs exist in New Zealand.
- 61 The Law Commission recommends that the President should have the specific role of advising Government on changes required to individual tribunals, their processes and memberships. The President will be instrumental in achieving a coherent tribunal structure through the systematic consideration of such issues as:
- Is there room for rationalisation or merger?
  - Does a particular area of work still warrant the existence of a dedicated tribunal, or could it be done by a court, or combined with the jurisdiction of another tribunal?
  - Could members of one tribunal usefully also serve on another?

This review and advisory role would be ongoing, but particular opportunities for change would present themselves as tribunals require new members.

- 62 The aim should be to establish a core of members within the structure who sit on more than one tribunal, and who are supplemented on particular tribunals by people with expertise in the area under consideration. This will help to encourage experience, expertise and consistency across tribunals.

### Recommendations

- R139 The unified tribunal structure should have a President, who is a Primary Civil Court judge, together with two legally qualified deputies.
- R140 Legislation should vest the President with the role of recommending to Government how particular tribunals can be merged, grouped or rationalised within the tribunal structure.
- R141 The structure should build up a core of experienced tribunal members, who should sit in more than one of the constituent tribunals. The other members of tribunals should be people with particular skills and expertise in the specific areas.

## A neutral administrative base

- 63 There are serious risks associated with statutory tribunals being housed, resourced and administered by state agencies affected by their decisions. An example of a potentially tainting link between a tribunal and an interested department or agency is that between the Department of Labour and the Removal Review, Residence Appeal and Refugee Status Appeals Authorities. These tribunals hear appeals against decisions of the Immigration Service, a division of the department, relating to deportation, the refusal to grant a residence visa or permit, and the refusal of refugee status. The department administers all three.
- 64 Those tribunals in all probability function independently. Their members are unlikely ever to consider themselves captured by their host agency. But do they enjoy the full confidence of those whose appeals they hear? There is a risk they may be seen as just another tier of departmental officers, working to a fixed policy, merely vindicating the decision under appeal.
- 65 This is just one example. There are a significant number of other tribunals where the same questions of independence and confidence recur. It is essential to remove the potential for such perceptions.
- 66 In contrast, many tribunals are supported administratively by the Special Jurisdictions Division of the Ministry of Justice (formerly the Tribunals Division of the Department for Courts). The Law Commission considers that this is the only host agency within the government that can be seen as unambiguously neutral. It comes closest to the Department for Constitutional Affairs,<sup>480</sup> which is to oversee and support the unified tribunal service recommended in the Leggatt report in the United Kingdom.
- 67 A May 1999 review of the Tribunals Division of the Department for Courts concluded that an organisation with the functions of the Tribunals Division was essential within New Zealand's overall justice system, and was well equipped to become the administrative base for statutory tribunals generally.<sup>481</sup>
- 68 The Department for Courts became part of the Ministry of Justice on 1 October 2003. We consider that a dedicated facility within the Ministry of Justice is the appropriate organisation to act as a neutral administrative base for tribunals.

### Recommendation

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

480 Previously the Lord Chancellor's Department.

481 M Smith *Review of the Tribunals Division* (Department for Courts, 21 May 1999).

---

## 7.2 Appeal Rights

---

- 69 Existing tribunals have their own sets of appeal rights. Some have no right of appeal at all. Some rights are confined to errors of law, while others involve a complete rehearing. In some the appeal is to a court, in others to a tribunal.
- 70 In many of the Australian jurisdictions, while rights differ from one tribunal to another, where appeals exist they are generally confined to points of law. The same position is to apply in England, where it is proposed that there will be a right of appeal on a point of law, with leave.
- 71 In New Zealand, adopting a standard rule that appeals will be on matters of law only would not impact greatly on the status quo for the many bodies which have no existing appeal rights, or appeals which are already limited to law only. However for other tribunals, it would be a dramatic change.
- 72 It can be argued that appeals on matters of law only are consistent with the aim that tribunals should provide speedy justice. This view maintains that energy and resources should be put into ensuring a thorough and rigorous first hearing, and appeals should be restricted to legal issues. We have some reservations about this approach. Tribunals are not all of one kind. While in some, the absence of a right of appeal may be of little concern, in others it will be more significant. For example, tribunals engaged in disciplinary work often hear matters of highly contested evidence, and their decisions can have a profound impact on a person's career, reputation and livelihood.
- 73 In New South Wales, the Administrative Decisions Tribunal has an Appellate Panel within its structure, which hears appeals from decisions made by divisions of the tribunal. For internal appeals, the panel is made up of three members, the President or Deputy President, a judicial member of the tribunal, and a non-judicial community member drawn from the division from which the appeal originates.
- 74 Whether there is a right to appeal depends on the primary statute giving jurisdiction to the division. The Administrative Decisions Tribunal Act 1997 gives parties a right to appeal in relation to a question of law. An appeal on fact (the 'merits' of the decision) can only be heard if the Appellate Panel specifically agrees to hear it. The panel rarely, if ever, agrees to an appeal on the merits unless there is a significant error of law in the way the division dealt with the case.<sup>482</sup>
- 75 We recommend that the unified tribunals structure includes an appellate panel from the outset, to deal with first appeals from decisions of tribunals within the

---

482 See < [http://www.lawlink.nsw.gov.au/adt.nsf/pages/adt\\_11](http://www.lawlink.nsw.gov.au/adt.nsf/pages/adt_11) >, last accessed 29 October 2003.

framework, on matters of fact and/or law, according to the primary statute establishing the particular tribunal. A further appeal to the High Court (sitting as a full bench of two judges) would also exist, with leave, on a matter of law only.

- 76 The appellate panel should be made up of three members, the President or Deputy President, a member of the tribunal in question (but obviously not one who sat on the matter concerned), and a further tribunal member from another tribunal.
- 77 The President could recommend whether a particular body should continue to have a general appeal on fact to the appellate panel, or whether appeal rights from that tribunal should be restricted to questions of law only.

## Recommendations

- R143 Appeals from tribunals within the unified framework should be to an appellate panel, made up of the President or Deputy President, a member of the tribunal in question, and a member from another tribunal.
- R144 Appeals should be on matters of fact and/or law, depending on the primary statute which creates the particular tribunal.
- R145 Any further appeal should be by leave to a full bench of the High Court, on a matter of law only.

---

# Part 8

## Open Justice

---

In this part we consider:

- the principle of open justice
- its application in the Youth Court, Family Court, criminal proceedings, the Disputes Tribunal and in relation to the courts generally.

## 8.1

# The Principle of Open Justice

- 1 The principle of open justice is a long-standing buttress of legitimate court systems, and is fundamental to New Zealand's system of justice. It underpins the public's right to attend court hearings, the media's right to report proceedings, and access to court documents. Throughout history criminal proceedings have usually taken place in public and involved degrees of public participation.
- 2 Open processes are central to maintaining public confidence in the administration of justice and ensuring the accountability of judges. Openness also enhances the accuracy of the process and serves an educative function. It contributes to democratic process as the actions of Executive Government or of officials are subject to public scrutiny in the context of court proceedings.
- 3 The open justice principle is reflected in international instruments to which New Zealand is a party, such as the International Convention on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights. Article 14(1) of the ICCPR says:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- 4 In New Zealand, the principle of open justice is affirmed in the New Zealand Bill of Rights Act 1990 where, in criminal cases, the right to a public and fair hearing is contained in section 25. In civil cases, there is an established presumption of openness. Section 14 of the Bill of Rights Act also affirms the right to freedom of expression, which includes the right to seek, receive and impart information of any kind. This can be interpreted as supporting the right of the media to report court proceedings, and the right of the public to access court records.
- 5 While openness in courts is a fundamental principle, there are situations where other important principles compete. The main justifications for limiting the openness of a court include:
  - protection of the vulnerable, including children and victims
  - the administration of justice (such as the need to ensure a fair trial)
  - commercial secrecy
  - overriding privacy interests.
- 6 We have concluded that most exceptions to the openness principle in New Zealand are justified. We recommend changes where we believe the balance between openness and other competing interests needs to be adjusted, including some significant changes in respect of family proceedings and in the criminal jurisdiction.

---

## In this part we recommend:

### Family Court

- R146 Family proceedings that are currently closed to the general public should remain closed.
- R147 The court should have discretion to permit the attendance at family proceedings of support persons requested by a party.
- R148 Accredited news media representatives should be permitted to attend family proceedings.
- R149 There should be no restrictions on the reporting of family proceedings (other than those involving children or domestic violence) unless the court orders otherwise.
- R150 In cases involving children or domestic violence, the media reporting of proceedings should be permitted, but details that would identify those involved in the proceedings must not be published unless the leave of the court is obtained.
- R151 If leave of the court is sought, the court should not require a draft of the news report to be submitted for approval as a condition of leave to publish identifying details being granted.

### Youth Court

- R152 Proceedings in the Youth Court should remain closed to the general public.
- R153 Accredited news media should be allowed to report on Youth Court proceedings and judgments so long as all identifying information is removed.
- R154 The Youth Court should not require a draft of the news report to be submitted for approval prior to publication.

### Name suppression in criminal cases

- R155 Publication of identifying details of a person charged with an offence before they appear in court should be prohibited unless the person consents.
- R156 After a person is charged, there should be a general presumption that publication of their name or identifying particulars should be prohibited until the substance of the case is gone into by the court. Exceptions should be made in certain circumstances.
- R157 Where a request for name suppression of a victim in criminal proceedings is made, that request should be granted unless it would not be in the interests of justice to do so.

## Civil cases

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

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

## Note taking in court

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



---

## 8.2

# Openness in the Family Court

---

- 7 The most extensive restrictions on openness are in the Family and Youth Courts. There has been significant criticism of the restrictions, particularly in the Family Court.
- 8 Proceedings in the Family Court are generally heard in private, with no reporting of the case except in law reports and family law publications unless the court allows it. The criticisms of the restrictions on public access and media reporting in the Family Court are most frequently voiced by interest groups and some politicians who argue that unfair processes and bias go unchecked because of a lack of public transparency. These are serious issues. The Law Commission has considered them carefully, but has concluded that in the main there is a satisfactory balance in the Family Court.
- 9 The closed nature of Family Court proceedings is required by most of the statutes that provide the Family Court with jurisdiction. While the exact wording of the provisions varies, only a limited number of people are usually permitted to attend, with the judge having a discretion to allow others.<sup>483</sup> Access to court records in the family jurisdiction is also governed by specific rules.<sup>484</sup>
- 10 It is Parliament that has decided there should be restrictions on openness in many aspects of family disputes, not the Family Court judges. The contention that the court has decided to close its doors to public scrutiny is incorrect. In addition, if cases are appealed to the High Court or Court of Appeal, the restrictions remain the same.<sup>485</sup> For this reason, in this section we use the term ‘family proceedings’ to mean any proceeding before a court that involves family issues. ‘Family proceedings’ are not confined to those taking place in the Family Court.
- 11 Two general points should be kept in mind. First, disputes heard in the Family Court almost invariably involve children. Secondly, Family Court proceedings are more intimate and emotionally charged than most others in the court system. This combination means that the matters heard in the Family Court are often very contentious.

---

483 The following provisions provide that matters under the Acts must be conducted in private: Domestic Violence Act 1995, s 83, Family Proceedings Act 1980, s 159(2), Guardianship Act 1968, s 27, Adoption Act 1955, s 22, Children Young Persons and their Families Act 1989, s 166, Child Support Act 1991, s 123, Protection of Personal and Property Rights Act 1988, s 79, Mental Health (Compulsory Assessment and Treatment) Act 1992, s 24. Proceedings under the following acts are generally open to the public and the media: Law Reform (Testamentary Promises) Act 1949, Family Protection Act 1955, Status of Children Act 1969. Under s 35 of the Property (Relationships) Act 1976, proceedings relating to the division of relationship property are open, although they are to be heard in private if either party so requests.

484 Family Court Rules 2002, r 427.

485 See *Television New Zealand Ltd v W* (2000) FRNZ 42 at 47.

## Australian model

- 12 Those who argue for greater openness in the Family Court in New Zealand point to the Family Court in the Australian federal jurisdiction as a model to be considered. Since 1983 proceedings before the Family Court of Australia have been open to the public and the media, but there are restrictions on the publication of details that might identify the parties.
- 13 There is, however, little indication that public access to the Family Court in Australia has contributed in any meaningful way to the greater openness of its proceedings. It appears that very few members of the public ever attend the Family Court. Those who do usually have either an association with one of the parties in a case, or are observing the court's procedures prior to their own case being called. In addition, there has been only limited reporting of cases in the media. The statutory restrictions on the publishing of any report of proceedings<sup>486</sup> appear to have limited the newsworthiness of cases to the point where there is no regular attendance of the media in the court.<sup>487</sup> Indeed, despite the Family Court of Australia being open to the public with limited reporting since 1983, allegations of bias have continued (and may in fact have escalated).<sup>488</sup> One review of the legislation concluded that the underlying policy of s 121 of the Family Law Act 1975 had failed.<sup>489</sup>
- 14 There are also differences in the types of case heard in the Family Court of Australia since our Family Court has a wider jurisdiction. Adoption, paternity, child protection, domestic violence and some property matters are dealt with in state and territory courts in Australia, where the proceedings are often closed.
- 15 The Law Commission has concluded that adopting the Australian model would not properly or adequately address the issues regarding the openness of family proceedings in New Zealand. They need to be considered in the context of local conditions.

## Protection of children

- 16 Society places a high value on protecting children. This is the starting point for determining that family disputes should not be litigated in public. These cases usually involve deeply personal matters where high feelings and thus suspicion and hostility are common. Not surprisingly, controversy and tension about the balance to be struck around openness in family courts occurs worldwide.

---

486 See Family Law Act 1975 (Cth), s 121.

487 Family Court Public Affairs Committee *Report to His Honour Principal Family Court Judge Mahony* (1995), 26.

488 M Kaye and J Tolmie commented in 1998 that although fathers' rights groups had been in existence for a number of years in Australia, the movement only gathered momentum and popular support during recent years. This was evidenced in the significant media attention the movement received, its political support and the number of groups and branches that had sprung into existence in Australia at that time. See M Kaye & J Tolmie "Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law" (1998) 12 *Australian Journal of Family Law* 19–20.

489 See IWP McCall *Publicity in Family Law Cases: Proposals for Amendments to Family Law Act Section 121* (Report to the Attorney-General, 1997), 63.

- 17 Internationally, the balance has regularly shifted. In England, for instance:  
 The view, almost universally accepted in 1926, that the public had a legitimate interest in the trial of matters affecting the status of the marriage and the family, has come to be gradually (albeit with little or no public discussion) supplanted by the view that family matters are essentially private and that this privacy is to be respected by the legal system.<sup>490</sup>
- 18 It is of note that the open nature of the Australian court does not appear to have allayed the concerns of disaffected litigants, nor to have educated the public any further about the issues that face modern families and the court.<sup>491</sup>
- 19 In New Zealand there has been provision for hearing domestic cases out of the public eye for nearly a century. The Divorce and Matrimonial Causes Act 1908 allowed the court to decide whether proceedings should be heard behind closed doors and parties could also apply for a closed hearing, “in the interests of public morals”. The court could also prohibit publication. This basic approach was carried through several reforms of the legislation until 1968 when the Domestic Proceedings Act restricted access to and the reporting of proceedings. These restrictions have been largely repeated in the current legislation.
- 20 Such departures from the principle of openness must have convincing justifications. The Law Commission considers the protection of children’s interests is a valid ground. There is widespread recognition that the vulnerability of children often requires special protection. International conventions specify that this special protection may mean compromising the principle of court openness.
- 21 Article 14 of the International Covenant on Civil and Political Rights 1966 contains the principle of open justice in court proceedings. The second part of the article describes its limitations:  
 ...The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case, or in a suit at law, shall be made public **except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.** [Emphasis added.]
- 22 Article 16 of the United Nations Convention on the Rights of the Child 1989 says:  
 No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.  
 The child has the right to the protection of the law against such interference or attacks.

490 S Cretney, *Law, Law Reform and the Family* (1998) 113.

491 As Margaret Harrison, of the Australian Family Court, comments, the court usually tries to encourage the media to report on issues for educational purposes, but usually finds the media are not interested unless famous people are involved (who they cannot identify anyway due to a statutory prohibition on reporting with identifiers under Family Law Act 1975, s 121). Source: Email from Margaret Harrison 21 July 2003.

23 Protecting children from the “wounding experience of litigation”<sup>492</sup> and public exposure through the media is a compelling reason to limit the openness of family proceedings. The views of the English Law Commission on this subject are instructive:

What is more serious is that the parties and, more especially their innocent children whose identity is frequently revealed as a result of the details which can be published, suffer the disturbing experience of having the most intimate details of the family life exposed. While it may be said that the parties have only themselves to blame, no such argument can apply to the children whose privacy the law takes pains to protect in other cases.<sup>493</sup>

24 The next question is whether proceedings in the Family Court, or other courts, should be closed when matters affect children, and open at other times. This may sound attractive, but the reality is that most proceedings involve children in some way, and their interests are inextricably linked to the proceedings. Separating cases that involve children from those that do not in order to allow public access to the latter would often be impractical, and would require considerable administrative effort.

25 If administrative difficulty were the only reason for restricting openness in the Family Court, the issue would need revisiting. There are, however, other arguments for restricting access and reporting in this court.

## Nature of proceedings

26 One argument is the very particular nature of Family Court processes. It was the vision of the Royal Commission on the Courts in 1978 that a specialist court should be created which would encourage parties to resolve their own differences wherever possible. Implicit in this was the need to create a forum in which stress and trauma for parties coming to court would be reduced. It was envisaged that a private and confidential court would lessen stress, as would the informal nature of the court.

27 A further justification for restricting openness relates to accuracy and the administration of justice. It is argued that it is vital that parties can come to court secure in the knowledge that their private affairs will not be in the public domain. Such privacy permits parties to speak fully and frankly about often highly personal (and potentially embarrassing) matters, and this level of disclosure is necessary for the court to function effectively.

28 In addition, the special procedures used in family and youth-related cases include counselling. This is specifically designed to be sensitive to the parties’ needs, and to encourage them to “speak candidly”, and “act almost as a social agency”.<sup>494</sup>

---

492 Royal Commission on the Courts, above n 198, para 484.

493 The Law Commission, *Report on the Powers of Appeal Courts to Sit in Private and the Restrictions Upon Publicity in Domestic Proceedings* (London, 1966) para 17.

494 C Baylis “Justice Done and Justice seen to be Done – the Public Administration of Justice” (1991) 21 *VUWLR* 177 at 192.

- 29 Finally, Article 12 of the Universal Declaration of Human Rights proclaims a person’s right to be protected against arbitrary interference with their privacy, family or reputation. Open court processes can sit uneasily with this right. While in the past courts had less regard for the privacy of parties, this has changed in recent years, so that “the regulation of family matters is now regarded primarily as a private area rather than one of public concern, while in the Youth Court the concern is that a young offender should not be stigmatised as a criminal at an early age”.<sup>495</sup>
- 30 While continuing criticism risks undermining public confidence, we do not consider that allowing greater public access to the court is the answer. The Australian experience provides evidence that complaints of bias and prejudice do not reduce as a result. The Law Commission considers that the avenues of appeal and review provide a stronger check against bias and unfair process than does the public’s attendance in court.
- 31 Our view is that the general approach that has been taken to public access in the Family Court represents a sensible balance. There are sound public policy reasons why the majority of family proceedings should be held in closed court.

## Recommendation

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

## Presence of support people and media in family proceedings

- 32 There are two areas where the Law Commission considers that the balance between openness and restrictions on reporting should shift.
- 33 First, while maintaining the general presumption that family proceedings are closed to the public, and retaining the court’s discretion to exclude people where necessary, we consider that parties should be able to request the attendance of people with a genuine interest in the proceedings. This would enable the provision of support for participants, and could be of particular benefit for some ethnic and cultural communities for whom dispute resolution is a communal process.
- 34 The other area concerns the presence of media and their reporting of cases. In contrast with the provisions of the Children, Young Persons, and Their Families Act 1989 with respect to the Youth Court, there is no provision generally permitting media representatives to attend family proceedings, even though they may be reported with leave of the court. We consider that accredited members of the news media should be permitted to attend family proceedings in the same

<sup>495</sup> C Baylis, above n 494.

way as the media presently has access to the Youth Court. Statutory provision should be made to confirm that entitlement.

35 We acknowledge that there may be concerns that the presence of strangers in the court may increase the stress for parties and potentially hinder frankness about personal matters, which the court needs to hear. For this reason, if introduced, the effect of the practice should be kept under review.

36 With respect to the welfare, care and protection of children, it is well established that the interests of the child should be paramount. The existing legislation, in its various forms, protects those interests, but as illustrated by the Care of Children Bill, presently before Parliament, an alternative approach is available to achieve both that goal and greater openness. Under the provisions of that Bill, the media may publish a report of proceedings either:

- where the report does not include the name or particulars likely to lead to the identification of a child who is the subject of proceedings, a party, a witness or other person connected with the proceedings; or
- with the leave of the court.

37 Apart from this limitation on the reporting of proceedings involving children, the publication of a report of other family proceedings should be permitted unless the court orders otherwise. The only exception would be the reporting of proceedings (other than a criminal prosecution) under the Domestic Violence Act where the parties should not be identified.

38 We consider that the following changes will facilitate better access to hearings by accredited media representatives and better reporting.

## Recommendation

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

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

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

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

## Vetting of media reporting of family proceedings

39 There is a further development in media reporting of family proceedings which requires reform and legislative clarification.

40 It arises in cases where the court agrees that material may be published, but on the condition that the applicant submits a copy of the proposed article to the court for consideration.<sup>496</sup> Such orders are said to be justified within the present standard statutory formula requiring the court’s permission before a report can be published. They raise important questions. In a minute in a case involving a ward of the court, Heath J noted:<sup>497</sup>

During the course of the conference call, I suggested the possibility of counsel and myself viewing the proposed programme. Naturally Mr Allen expressed some concern from the perspective of a television company about advanced scrutiny of a programme by the Court. I make it plain, however, that this is a case to which the usual principles of open justice do not apply as publication of guardianship proceedings can only (take) place with the leave of the Court. The Court’s paramount consideration in respect of any publication involving a child under its guardianship is with the best interests of the child.

41 It can be argued that the vetting of a proposed report is an appropriate way of securing the privacy or welfare interests of a vulnerable party. Such orders also appear to have been made in the past in the Youth Court.<sup>498</sup>

42 As a matter of principle, however, it is undesirable for any court to assume a vetting or an editing role in respect of the public reporting of its proceedings. The open justice principle is compromised when the court determines not only whether a report of the proceedings can be published, but also the content of the report. Also compromised is the role of the media to be the representative of the public interest and a check on the judiciary. While the court may have a special responsibility for the interests of the child in its unique role in wardship proceedings, it is nevertheless difficult to identify a basis to distinguish those cases from any other family proceedings where the welfare of a child is an issue.

43 The welfare interests of children will usually be sufficiently protected by the prohibition of identifying details. In the exceptional case where it may be argued that it is necessary for a report of proceedings to identify the child or children involved and leave is sought from the court to do so, publication should not be conditional on the court first vetting or editing the report.

## Recommendation

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

496 See, for example, *Re an Unborn Child; Chief Social Worker v “Nikki” and Others* (Media Applications) 9 October 2002, Heath J, HC Hamilton M171/02, where leave was granted to publish submissions, but not the evidence heard by the court. With respect to an application by a television company making a documentary about the case, leave was granted subject to the company submitting “a copy of the documentary it proposes to screen to the court so that the court can view it to ensure that it is an accurate account of the proceeding before it is screened.”

497 *Re an Unborn Child; Chief Social Worker v “Nikki” and Others* 11 November 2002, Minute of Heath J, HC Hamilton M171/02.

498 Information obtained from the Principal Youth Court Judge.

## 8.3

# Openness in the Youth Court

---

- 44 The Youth Court is the other place in our court system where openness is most restricted. The court deals with criminal offending, an area where the public interest in openness can be considered to be greater than with intra-family disputes or care and protection proceedings, which are directed solely at the welfare of the child.<sup>499</sup>
- 45 The Youth Court provides a relatively recent example of how the open justice principle has been modified to recognise both the principle and the welfare and privacy interests of children.
- 46 In cases before the Youth Court:
- the general public is not entitled to attend, though the judge may permit any person to be present. This allows people outside the family, including officials and court officers, to be present if the judge approves<sup>500</sup>
  - accredited news media reporters are entitled to attend<sup>501</sup>
  - publication of a report of the proceedings is prohibited except with the leave of the judge<sup>502</sup>
  - publication of the name of the child or young person, or their parents or guardian, or the name of their school, or any particulars likely to lead to the identification of the child or young person, or their school, is prohibited.<sup>503</sup>
- 47 There are three general arguments which underpin the question of whether to limit openness in the Youth Court.
- 48 The most fundamental is that the court is dealing with young people, of 14 to 17 years of age. Appropriate responses to less serious offending at this point in their lives may provide an opportunity to learn crucial lessons and change behaviour. Proceedings open to the public and to reporting in the media would make it more difficult to put youthful offending behind them.
- 49 Secondly, the processes in the Youth Court are designed to bring the key parties together to fashion effective plans of action to get young offenders back on the

---

499 Care and protection proceedings are heard in the Family Court to which neither the public nor the media have right of access except with the leave of the court. Reporting of proceedings is prohibited except with leave: Children, Young Persons, and Their Families Act 1989, ss 166 and 438(1).

500 Children, Young Persons, and Their Families Act 1989, s 329(1)(m).

501 Section 329(1)(l).

502 Section 438(1).

503 Section 438(3).

rails. One of the objects of the Children, Young Persons, and Their Families Act 1989 is:

Ensuring that where children or young persons commit offences,

- (i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and
- (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways.<sup>504</sup>

- 50 The processes in the Youth Court are different from the mainstream courts, and encourage honesty, emotional disclosure and healing. Public access to, and unrestricted media reporting of these proceedings are likely to limit the ability of participants to engage frankly and thus compromise the court's objectives.
- 51 On the other hand, the third argument acknowledges that in serious cases such as murder and manslaughter, or where a young person elects trial by jury, the public interest in openness intensifies. Restrictions in the Youth Court do not apply once the case is transferred to the District or High Court after the depositions stage.
- 52 The Law Commission considers that provisions relating to the publication of proceedings in the Youth Court should be amended to reflect our recommendations for the Family Court. At present, accredited media reporters are entitled to attend, but a report of proceedings may be published only with the leave of the judge. In line with our recommendation in respect of the reporting of family proceedings involving children, publication of a report of Youth Court proceedings should be permitted subject to the non-publication of material that might identify the young person concerned and there should be no judicial vetting or editing of the proposed report.

## Recommendation

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

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

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

504 Children, Young Persons and their Families Act 1989, s 4(f).

## 8.4

# Openness in the Criminal Courts

- 53 The principle of open justice carries its greatest force in criminal proceedings, where it is necessary to:
- [reflect] the immense power over the individual's freedom which the state has by virtue of the criminal law. If the public knows the grounds on which a charge is based, this provides a check on the deprivation of personal liberty.<sup>505</sup>
- 54 The principle is given specific statutory recognition<sup>506</sup> and applies to public access and reporting of proceedings unless there is a specific order of the court to the contrary.
- 55 Suppression of the defendant's name can arise in two distinct contexts: where publication would serve to identify a victim or other person whose identity is protected;<sup>507</sup> and where the court orders that the defendant's name or identifying particulars not be published because there are "compelling reasons" or "very special circumstances".<sup>508</sup>
- 56 There are no statutory criteria guiding this exercise of judicial discretion. Examples where suppression of the defendant's name may be justified include:
- where publicity would have a significant adverse impact on the accused outweighing the public interest in publicity<sup>509</sup>
  - to protect the safety of the accused or his or her family following the provision of significant assistance to the authorities<sup>510</sup>
  - where the impact of publicity on the family of the accused would be particularly severe<sup>511</sup>
  - where the publicity would have severe implications for the accused's employer or occupational class<sup>512</sup>
  - to avoid prejudice at a pending trial.<sup>513</sup>
- 57 One argument is that orders for name suppression should be used very sparingly: it is often necessary to name an offender to encourage witnesses to come forward, to deflect suspicion from other innocent people, and to ensure that justice is not only done, but is seen to be done. It is clear that some people believe that

505 C Baylis, above n 494, 180.

506 Criminal Justice Act 1985, s 138(1).

507 Criminal Justice Act 1985, ss 138(2) and 139(2).

508 Section 140(1). See *Victim X v TVNZ Limited* [2003] 3 NZLR 220; (2003) 20 CRNZ 194.

509 *ARCRSC v W* [1997] DCR 279.

510 *BCNZ v Attorney-General* [1982] 1 NZLR 120.

511 *S(1) & S(2) v Police* (1995) CRNZ 714.

512 "*A Defendant*" v *Police* (1997) 14 CRNZ 579.

513 *R v Liddell* [1995] 1 NZLR 538; *McDonald v R* 24/8/98, CA 84/98; *R v Burns (Travis)* [2002] NZLR 387.

suppression orders are made too frequently, in part due to the wide discretion vested in judges under the Criminal Justice Act 1985.

- 58 Another point of view is that name suppression should be granted more liberally, with the most extreme view being that names should always be suppressed in criminal cases until there is a conviction.

## Publication of name

- 59 In the absence of discretionary or prescriptive criteria in the legislation, four decisions of the Court of Appeal<sup>514</sup> provide a consistent and relatively clear framework for the principled exercise of discretion on the facts of each case.

- 60 While views have occasionally been expressed that the courts have exercised their discretion too liberally or too sparingly, feedback to this specific question in *Seeking Solutions* and from workshop discussion did not indicate a need to legislate to prescribe criteria to be taken into account.

- 61 The Court of Appeal has emphasised on a number of occasions that a high level of justification is required before the presumption in favour of freedom of speech and the principle of open justice can be set aside. In our view there is still a need to look with care at different stages in the process.

- 62 In this section we consider the present law relating to the publication of the name of an accused, victims and witnesses and make recommendations for change in some areas. The proposals we make start with the presumption that there should be name publication in criminal proceedings. A court will always be able to make an order contrary to the general presumption where the particular circumstances or the interests of justice require it.

### Before the first court appearance

- 63 There are no statutory restrictions on publishing the name of a person who has been arrested but who has not yet appeared in court. Nevertheless, it is a topic that deserves attention.

- 64 The convention is that the particulars of a person arrested for, or charged with, a crime are not published before the offender appears in court. This is partly because of the police policy of not releasing the person's name until this time.

- 64 From time to time cases arise where a person charged with an offence allows his or her identity to become public before they appear in court, usually through comments they make to the media. There have, however, also been isolated instances where the media has published the name of the person arrested or charged before their first court appearance without their knowledge or approval.

<sup>514</sup> *R v Liddell* [1995] 1 NZLR 538; *Proctor v R* [1997] 1 NZLR 295; *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546 and *Victim X v TVNZ Limited* [2003] 3 NZLR 220, (2003) 20 CRNZ 194.

- 66 The matter is not necessarily covered by the open justice principle since, by definition, it has yet to reach the court. At that point, it can be argued that the privacy interests of the person charged are paramount and their name should not be published. Also, publishing the name of a person charged with a crime before they appear in court pre-empts their right to apply to the court for a suppression order.
- 67 However, to publish a person’s name in these circumstances is not in contempt of court. Nor does it appear to breach any code of practice. There is no formal recognition of what is normal practice, and it should be clarified in legislation. Such an amendment to the law is required whether or not a change is made with respect to the non-publication of a defendant’s name during the initial court appearances, which we consider below.

## Recommendation

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

### Before conviction

- 68 Name suppression before the court considers the merits of a case raises more difficult issues. Often there is a tension between competing public interests. On the one hand, there is the presumption of innocence and the need for publicity not to prejudice the accused’s trial, and on the other, the open justice principle and the freedom to receive and impart information.
- 69 In *Proctor v R*<sup>515</sup>, the Court of Appeal held that the principles applicable to name suppression applied both before and after trial. The starting point was always the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report proceedings fairly and accurately as “surrogates of the public”. Before trial, the presumption of innocence did not of itself displace those principles, but it was to be taken into account and given such weight as was appropriate in the circumstances of the case.
- 70 In some earlier cases the High Court had proceeded on the basis that prior to conviction, the presumption of innocence should be accorded greater weight.<sup>516</sup> Since *Proctor* the burden in overcoming the open justice principle has been illustrated by the *Constable A* case. There, an application for the non-publication of the name of a police officer who was the subject of a private prosecution for murder was unsuccessful, even when the presumption of innocence was given “full weight” and there were fears for the personal safety of the officer if his

515 [1997] 1 NZLR 295.

516 See, for example *M v Police* (1991) 8 CRNZ 14 and *S(1) and S(2) v Police* (1995) 12 CRNZ 714.

identity was revealed.<sup>517</sup> However, in other cases, particularly where a preliminary hearing was pending, the pre-trial presumption of innocence appears to have been material in tipping the scales towards suppression.<sup>518</sup>

- 71 It is difficult to discern from the decisions after *Proctor* the weight to be given to the presumption of innocence and in what circumstances the balance will tilt. When this issue was considered in 1972 by the Criminal Law Reform Committee, two options were put forward to meet the competing interests of suppression of name before trial.<sup>519</sup> The majority recommended suppression of an accused's name until the charge was substantively considered by the court. An alternative, favoured by one member of the committee, was that there should be no publication of the accused's name before conviction.

#### Suppression of name until 'case gone into'

- 72 The majority of the Criminal Law Reform Committee noted arguments supporting a prohibition on the publication of the accused's name prior to conviction, but concluded that such an approach should yield to the overriding importance of the administration of justice being open and public.
- 73 To best meet the competing public interests, the committee proposed legislation requiring suppression of the publication of the name of the accused and of any identifying particulars until the case was gone into. That point would be reached:
- in summary cases, when the prosecution presented its case or the accused pleaded guilty
  - in the case of an accused who was to be tried by a jury, at the taking of depositions at a preliminary hearing.
- 74 An exception would be required to allow for publication to avoid others suffering through speculation or ill-founded rumour about the identity of the accused. Exceptions would also be needed where either the accused sought an order permitting the publication of his or her name, or if publication may lead to other witnesses or victims coming forward.
- 75 This recommendation did not find favour at the time, but the Law Commission considers that it requires fresh consideration. When compared with present procedures, the proposal for initial name suppression has a number of positive features:
- all persons appearing before the court in the initial stages are treated equally so far as the publication of their name is concerned

517 *Abbott v Wallace* [2002] NZAR 95 (FC).

518 See, for example *J v Serious Fraud Office*, 2 October 2001, Baragwanath J, HC Auckland, A126/01; *Wellington Newspapers v XI* [2000] DCR 161; *Serious Fraud Office v B & K* [1999] DCR 621.

519 Criminal Law Reform Committee *The Suppression of Publication of Name of Accused* (1972).

- it avoids inconsistency not uncommon in a busy court when an interim name suppression order is sought; an order may be made by a registrar if the prosecution consents,<sup>520</sup> but if opposed, the court would be obliged to require the present high threshold to be met before a suppression order could be made
- publication of an accused's name under the present law depends often on a variety of factors, including the presence of the media in the court at the time; it may often be a matter of chance
- it avoids the dilemma that presently faces an accused seeking name suppression, knowing that the threshold to be met is a high one and the possibility that the application itself, if unsuccessful, may attract the very consequence it sought to avoid
- the suppression of name is temporary. The public's right to know the identity of a person appearing before the court is simply postponed until the substance of the case is presented to the court. If further name suppression were then to be sought, the present test would have to be met.

76 There are also some difficulties with the Criminal Law Reform Committee's proposal:

- it does not give full weight to the Bill of Rights guarantee of the presumption of innocence in that it provides only temporary respite from name publication – an accused who is acquitted is in no better position than under the present law
- it could result in an accused trying to delay proceedings as long as possible to avoid the merits of the case being reached, or attempting to arrange for an appearance before the court so as to be less likely to attract notice
- widespread name suppression of the names of people appearing before the court can in itself lead to speculation and rumour.

77 The Law Commission is concerned that since the *Proctor* decision in 1997, the law relating to the pre-trial suppression of an accused's name does not appear to have given sufficient recognition to the presumption of innocence. The proposal of the Criminal Law Reform Committee offers an approach to this issue that should be reconsidered.

78 Any change should be presumptive only. It should always be open to a court to make an order contrary to the general presumption where the particular circumstances or the interests of justice require it.

### Suppression of name until conviction

79 Under this option the presumption of innocence principle is paramount and the name or identifying particulars of the accused cannot be published until there is

<sup>520</sup> Summary Proceedings Act 1957, s 46A.

a conviction. Legislation to this effect was in force in New Zealand from September 1975 until July 1976.<sup>521</sup>

80 A number of arguments support giving predominance to the presumption of innocence. In some cases merely being accused of a crime can affect a person's reputation as well as having consequences for his or her family. Even if they are acquitted the harmful effects of the accusation may continue. Publicity following an acquittal is rarely as extensive as that surrounding an accused's appearance before the court, or the evidence given at any trial. It is argued that every person accused of crime would then be treated equally, whereas the present practice can be regarded as inconsistent with only some people ever likely to gain the benefits of name suppression.

81 However, other than for the brief period when this represented the law in New Zealand, this approach has attracted little support here or overseas, and we do not recommend it. Giving the presumption of innocence such overriding force raises the considerable practical difficulty of making sure that the accompanying reporting of the trial process does not compromise the accused's anonymity.

## Recommendation

R156 After a person is charged, there should be a general presumption that publication of their name or identifying particulars should be prohibited until the substance of the case is gone into by the court. Exceptions should be made in certain circumstances.

## Suppression of name after conviction

82 The onus on a convicted accused seeking suppression of name is substantial. An order will not be made unless the circumstance are quite exceptional, or there are compelling reasons justifying it.<sup>522</sup> The Law Commission considers the present test is appropriate and makes no recommendation for change.

## Name suppression for victims or witnesses

83 There are two situations where the court may order name suppression for victims or witnesses. The first is where the court believes the interests of justice or the reputation of a victim require name suppression.<sup>523</sup> A second general provision empowers the court to prohibit the publication of the name of "any person connected with the proceedings", including victims and witnesses.<sup>524</sup>

521 Criminal Justice Act 1954, s 45B.

522 *Victim X v TVNZ Limited* [2003] 3 NZLR 220; (2003) 20 CRNZ 194.

523 Criminal Justice Act 1985, s 138.

524 Criminal Justice Act 1985, s 140.

- 84 As well as these general powers to suppress name publication, there is the absolute prohibition on publishing the name of any child witness in criminal proceedings<sup>525</sup> and the automatic prohibition against publishing the name of the victim of specified sexual offences.<sup>526</sup>
- 85 The Court of Appeal held recently<sup>527</sup> that the threshold for name suppression for victims or witnesses is no different to that applying to defendants. The court confirmed that the correct starting point is the principle of open justice – a principle that is supported in practice by the right to freedom of expression. The next step was to see if there were “compelling reasons” or “very special circumstances” justifying departure from the open justice principle. In the case before it involving the publication of the name of a kidnap victim, the court agreed with the trial judge that continued suppression of the victim’s name could not be sustained.
- 86 There are several arguments which support the current high threshold for name suppression of witnesses:
- everything that goes on in a criminal court including the identity of the parties and all participants ought to be a matter of public record with exceptions made only in the most limited of circumstances
  - the open justice principle itself is of such importance that compelling grounds should be required for suppression of the name of any participant
  - unless there are issues of personal security or other issues which currently justify name suppression, there is no obvious privacy or other interest of a witness that requires protection by a suppression order.
- 87 On the other hand the case can be made that it should be easier for victims or witnesses to be granted name suppression:
- the reasons underlying the open justice principle which support the high threshold for name suppression for an accused do not apply with the same force to witnesses; none of the goals of openness will be impugned by having a lower threshold for witnesses
  - the due process rights of an accused would not be affected
  - there is little justification for treating witnesses, victims and defendants alike for the purposes of name suppression; witnesses are invariably there because of their public duty, while for victims it often means reliving a painful experience

---

525 Criminal Justice Act 1985, s 139A.

526 Criminal Justice Act 1985, s 139.

527 *Victim X v TVNZ Limited* [2003] 3 NZLR 220; (2003) 20 CRNZ 194.

- it is important to encourage victims and witnesses to participate in court proceedings. The comfort of knowing that particulars of their identity would not be published if there were reasonable grounds for such a request would indicate that the law recognised the value of their participation and had some flexibility with respect to their personal wishes as to name suppression.
- 88 The special position of some victims who give evidence in criminal cases is partially recognised in s 139 of the Criminal Justice Act 1985 which provides for the name suppression of victims of certain sexual offences. A new subsection (1AA) was recently added to reinforce the protective nature of that section.
- 89 The Law Commission is of the view that there is merit in requiring a less stringent test to be met before the court may order the non-publication of the name of a victim. The Court of Appeal’s decision in the *Victim X* case was delivered after the amendment to the Criminal Justice Act and after *Seeking Solutions* was published, so there has been no opportunity to receive feedback on the issue. The proposal for a lower presumptive threshold with respect to the non-publication of a victim’s name would, however, be consistent with the most recent amendment to section 139 of the Criminal Justice Act and the policy behind the Victims Rights Act 2002. Various formulations of a lower test are possible. We propose such an order should be made at a victim’s request unless the interests of justice require otherwise.
- 90 We do not propose any change to the existing threshold with respect to the publication of the names of other witnesses under the general provisions of sections 138 and 140 of the Criminal Justice Act 1985.

## Recommendation

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

## 8.5

# Openness in the Civil Jurisdiction

### 'Chambers' or closed court hearings

- 91 An issue arises in the way in which many procedural matters in civil cases are dealt with 'in chambers' either before or during the course of a trial. Chambers hearings are held either in a closed courtroom or, very occasionally, in judges' private rooms (chambers) and are not open to the public. Interlocutory applications are heard in chambers unless the court orders otherwise.<sup>528</sup> Often, they concern non-contentious administrative or procedural matters such as timetabling conferences, or hearings to ensure the expeditious handling of the case, but occasionally important issues such as applications for interim injunctions are heard in chambers.<sup>529</sup>
- 92 Particulars of the hearing, decision, or both may be published unless the court otherwise directs.<sup>530</sup> The subject matter of some civil cases is of high public significance, including preliminary decisions of the court. Open justice principles should apply.
- 93 For the most part, matters are heard in chambers for administrative convenience and despite long practice, it is doubtful whether this is sufficient basis to exclude the public and media. Where chambers matters are heard in a courtroom, the public and media representatives should have access, subject to judicial discretion to exclude. Where the hearing is in the judicial officer's private room, or where a telephone conference is held, access may not be practicable. So that open justice principles can be given proper effect, these practicalities should be dealt with when the relevant rules are next considered.

### Recommendation

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

### Tribunals

- 94 The many tribunals identified in *Striking the Balance* take varying approaches to the issue of openness. Most of those making decisions in the area of human and cultural rights (for example, the Privacy Commissioner and the Health and

528 High Court Rules, r 251(2). An interlocutory application concerns issues subsidiary to the main issue in the case. For discussion, see J Burrows & U Cheer *Media Law in New Zealand* (1999), 228.

529 High Court Rules, r 441.

530 High Court Rules, r 72A; District Court Rules 1992, r 74.

Disability Commissioner) do not have public access to their hearings, yet others such as the Tenancy Tribunal and the Waitangi Tribunal do. Many of the tribunals responsible for occupational licensing and discipline conduct their hearings in public (for example, the Medical Practitioners Disciplinary Tribunal) yet others, such as the Police Complaints Authority rarely do. Although the Social Security Appeal Authority may order that all or part of an appeal be heard in public, many of the tribunals listed under the “welfare and benefits” section do not permit public access to their hearings.

- 95 There is no indication that legislative decisions with respect to the openness of the proceedings of tribunals have been made against particular criteria and it is possible to find practices across the ‘openness’ spectrum.
- 96 It has not been practical for this review to consider the extent to which the proceedings of each tribunal are open. In view of the recommendations in Part 7 of this report, however, the opportunity should be taken to apply a more uniform approach based on the principle of openness, when the operation of each tribunal is under consideration. As a starting point we consider that generally, public and media access to tribunals and the reporting of proceedings should be permitted, unless an overriding public interest requires otherwise.

## Civil proceedings

- 97 In civil cases there is an accepted presumption that trials will be held in open court, although the court has the power to order otherwise.<sup>531</sup> Likewise, the presumption of openness implies that anyone present at a trial or hearing may publish a report of it. The High Court can prohibit media reports of civil cases in the exercise of its inherent jurisdiction, although this power is exercised with great circumspection. In general, prohibiting the reporting of civil proceedings can only be justified in exceptional circumstances, such as when the matter relates to a secret process.<sup>532</sup>

## Disputes Tribunal

- 98 A significant exception in the civil area is the Disputes Tribunal, where hearings are closed to both the public and the media. In contrast, Tenancy Tribunal hearings are generally open to the public with only limited restrictions on reporting.
- 99 When the Disputes Tribunal was established in 1976, closed hearings may have been seen as desirable. The parties were required to present their own cases and the first obligation of the tribunal was to try and secure a mediated settlement. The Disputes Tribunal process has since matured, as has public confidence in the tribunal for the fair resolution of civil disputes. There would no longer

531 This is exercised rarely. See High Court Rules, r 496.

532 M McDowell “The Principle of Open Justice in a Civil Context” (1995) *NZLJ* 229.

appear to be any compelling reason for such a major compromise of the principle of openness. We consider there should no longer be a blanket restriction on access to these hearings.

- 100 Nevertheless, in the rare individual case where either the subject matter or the circumstances of a party warrant it, the tribunal should have the power to close the hearing or impose reporting restrictions. This would be in line with the legislation applying to the Tenancy Tribunal and accord with common civil law practice.

### Recommendation

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



---

## 8.6

# Openness Issues in all Courts

---

### Access to court records

- 101 As we noted in *Seeking Solutions*, access to the evidence produced at a hearing and to documents produced or filed in court is not automatic. Strict application of the openness principle as we have described it would suggest that the public should be able to access a court's records of proceedings and that the media should be able to report them.
- 102 At present, the rules and processes in the various jurisdictions are complex and inconsistent. They cause unnecessary frustration to most, if not all, of those who have to work with them, including judges, court staff, lawyers for litigants, and media representatives. Many of the rules were drafted long before the Official Information Act 1982 and the Privacy Act 1993 came into force. Much time and good will is lost, and the principle of open justice is unnecessarily compromised, because of the lack of clarity.
- 103 A range of issues relating to access to court records require attention and they will be investigated under a separate Law Commission project. We expect to receive the terms of reference for the project shortly and plan to issue a discussion paper later in 2004. Recommendations with respect to access to court records should await this opportunity to give the issues detailed consideration.

### Media coverage of court proceedings

- 104 The televising of court proceedings was permitted for the first time as part of a pilot in four courts in early 1995. Media representatives interested in expanded coverage of all or part of a case being heard in one of those courts applied to the judge, who determined whether it should be permitted, usually in conformity with a standard list of conditions. The rules permitted the use of delayed coverage for news broadcasts and, with special permission, for inclusion in documentary programmes. In June 1996, the pilot was extended to allow for radio coverage and still photography of court proceedings subject to additional rules.
- 105 Following evaluation of the pilot project by a committee widely representative of the judiciary, lawyers, the media and departmental officials, the Guidelines for Media in Court were revised and extended to all courts in 2000.<sup>533</sup>
- 106 The issues involved in media coverage of court proceedings are not free of complexity and though views on the topic often reflect differences of perspective, the presence of cameras in courtrooms is now common.

---

<sup>533</sup> Ministry of Justice *Guidelines for In-Court Media Coverage of Court Proceedings* (2000).

107 The Guidelines for Media in Court were recently the subject of further review and a revised set came into force on 1 January 2004. They provide a starting point for arrangements for in-court television or radio coverage and for the taking of photographs. Media coverage of an individual case always remains a matter of discretion for the presiding judge.

### Note taking in the court room

108 There has been a long-standing convention that, with the exception of media representatives, the public may not take notes in court. Whatever its historical origins, we have not found any principled reason to continue this limitation. The judge has the authority necessary to control conduct in the courtroom and that should be sufficient to maintain proper standards and to deal with any disruption to the business of the court in the unlikely event it should occur.

#### Recommendation

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



---

# Part 9

## Economic Implications

---

In this part we consider:

- ways of assessing the economic impact of our proposals
- an assessment of the current performance of our court system
- the economic benefits of the Community Court

- 1 In our assessment, unless there are sustained and substantive changes to the court system people will increasingly lose confidence in it, and that is ultimately unacceptable in a democracy. The case for change from a social perspective – so people continue to regard the court system as an effective instrument in maintaining a stable and civil society – is both compelling and reasonably easy to articulate. Equally compelling but less easily articulated is the case for change from an economic perspective.
- 2 Over the last 20 years the application of economic principles has transformed the way we look at social institutions generally. In both the privately and publicly funded sectors a variety of frameworks that promote accountability and measure performance have been developed. In New Zealand, the operation of the legal system has escaped some of the rigours this discipline has brought to other sectors, but the drive to improve efficiency is nevertheless an inseparable part of our expectations about how the legal system should operate.
- 3 Throughout this review we have been impressed by the commitment many people have to their part of the system, and to how well it works. Often, however, their energy does not extend beyond that part of the system to which their efforts are directed. Our perspective has necessarily been broader – to ensure there is a coherent and cohesive court system. Accordingly, we are calling for changes between the parts of the system as well as within them.
- 4 There are many competing priorities for society’s resources. How much money should be spent on the court system and how to spend this money for maximum benefit are critical questions. This part considers some of the economic issues entailed in achieving our objective of making the courts useful and more accessible.

## Assessing the economic impact of our proposals

- 5 We have been able to identify the broad variety of costs and benefits involved in the reforms we suggest for the New Zealand court system, and point to the potential value of some less tangible benefits. We have also identified the most critical proposals from the perspective of effective reform.
- 6 The proposed reorganisation of primary courts around the High Court, the creation of a uniform appeal path for all cases and the centralisation of the administration of tribunals are all changes which in substance make the system simpler. Simplification is also likely to have long-term economic benefits in terms of lowering the cost of the court system. It would reorganise the court framework along coherent lines to guide development in the future.
- 7 We have not quantified each recommendation, but have assessed the overall costs and benefits of the package of proposed reforms. We also commissioned an investigation into the current costs and performance of the court system. We found that broad information on volume, expenditure and times is available but there is very little comparative information in relation to the quality of justice being delivered.

- 8 In addition, we found there is a paucity of material internationally about economic analysis in relation to courts or associated justice initiatives. It appears to be particularly difficult to model or quantify the economic benefits of court systems. This is not an unusual situation. It is often easier to quantify the costs than the benefits of reform, but that does not mean that economic benefit is not real, nor that such an assessment should not be attempted to inform decision-making.
- 9 We suggest that the way forward in assessing the proposals is not to focus only on the dollar value of those aspects that are quantifiable, but to build on our identification of the most critical proposals from the perspective of effective change, and develop best possible estimates of their potential costs and benefits.<sup>534</sup>
- 10 In time the new computerised case management system will provide more data about the system but it is also clear from our work in this area that there remains much more to be discovered about applying economic principles to justice processes.

### Setting standards

- 11 Any cost-benefit work in relation to the court system needs to recognise that to be effective courts must meet certain quality standards and here we found some significant gaps in current management information. These gaps are by no means unique to New Zealand.
- 12 We assessed our proposals for change according to seven criteria. These are the principles that we consider any effective court system must uphold:
  - constitutional status of courts
  - quality decision-making
  - proportionality
  - principled appeal rights
  - accessibility
  - respect for all
  - efficiency.

<sup>534</sup> A similar approach was taken in a major evaluation of the Midtown Community Court in New York, Center for Court Innovation *Dispensing Justice Locally: the Impacts, Costs and Benefits of the Midtown Community Court* (2003).

- 13 Although similar standards for courts are recognised throughout the world, we have not found internationally accepted models or performance measures that assess how effective courts are in terms of such qualitative principles. The United States has developed trial court performance standards grouped around five key responsibilities, namely:
- access to justice
  - expedition and timeliness
  - equality, fairness and integrity
  - independence and accountability
  - public trust and confidence.
- 14 Adoption of these standards has reputedly transformed discussion of court-based initiatives by recognising that courts do have these responsibilities.<sup>535</sup> These responsibilities are very close to the principles the Law Commission has identified.
- 15 While progress has been made in developing performance measures, New Zealand has not adopted quality standards of this kind for the court system. Arguably, a first step in assessing the economic efficiency of the court system is the adoption of such standards as a benchmark. Our principles offer a starting place for discussion about this. Once standards are accepted, the next step would be to develop measurable indicators in relation to these standards, or to adopt some other way of monitoring performance to ensure the standards are met. This would enable the standards to be incorporated in a systematic way into economic assessment of reform proposals.
- 16 We acknowledge that this is hard to achieve, but suggest that more commitment to this area by the Ministry of Justice and Treasury is warranted.

## Assessing the current performance of our court system

- 17 Attached as Appendix D is a report we commissioned entitled *Indicators of Performance and Costs in the Courts System*.<sup>536</sup> This report provides a broad overview of the performance data currently available on the court system and looks, at a high level, at the overall costs involved in the New Zealand legal system, and the court system in particular.
- 18 The report assesses the data collected by the Ministry of Justice on various aspects of the court system. The available information permits analysis of demand, defined as the numbers of cases filed in the courts each year, plus three key “performance” indicators for the courts system. These are the key measurable indicators currently available:

535 A Phelan *Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part 1* (2003) 13 JJA 98.

536 P Barry *Indicators of Performance and Costs in the Courts System* (Taylor Duignan Barry Ltd, 2004).

- *throughput*, defined as the numbers of cases disposed of by the courts each year
  - *timeliness*, defined as the average time between when a case is lodged and when the case is decided
  - the *court time spent* (in terms of sitting hours) per case.
- 19 These indicators can be assessed for the main jurisdictions of the court system over the period 1999 to 2003, and the report examines them in relation to the District and High Courts and Court of Appeal.
- 20 There are a number of limitations to this analysis. The first is the limited time period and scope for which performance data on the New Zealand court system is available. The analysis is based on data for the last four years in relation to the general courts; similar data is not available for all courts.
- 21 Secondly, there is the difficult question of the weight to be given to the measurements. In particular we do not have complete information about why certain trends have emerged, yet these reasons are critical in terms of assessing the significance of the observed trends.
- 22 Thirdly, many qualitative performance measures relating to recognised principles are not included in the information databases at all, but they are essential to the effective performance of a court system.
- 23 While acknowledging these limitations, useful signals can be found in the quantitative analysis of the existing data. Based on the measures of timeliness, throughput and time spent, the court system does not appear to be moving towards greater efficiency or effectiveness.
- 24 The report's overall findings for the three jurisdictions are that demand and throughput are generally falling, cases are taking longer on average to come to court and the courts are typically spending longer on deciding them. In civil cases in particular, users appear to be moving elsewhere for justice or simply not pursuing a legally-based outcome. In other words, New Zealand's court system appears to be doing less work and doing it less efficiently. This is despite undoubted recognition of the problems and a firm commitment to improvement by both judiciary and administration.
- 25 In some cases the changes in these indicators are fairly small, and some of the more dramatic movements might be explained in ways other than reduced efficiency. They might, for example be attributable to policy changes. The trends are, however, occurring despite a steady increase in public expenditure (in inflation adjusted terms) on the courts system over the period.
- 26 Reading these statistics in light of the feedback from many court users, it is clear that the system is not performing well from the perspective of the users or the taxpayer, nor is there any indication of increasing overall efficiency. In the commission's view, the quantitative analysis confirms the case for reform.

## Overall cost of the justice system

- 27 The second part of the report *Indicators of Performance and Costs in the Courts System* looks at the overall costs of the justice system in relation to the New Zealand economy in general and the government budget in particular.
- 28 One graph shows overall private and public expenditure on law and justice in New Zealand (Fig 4), and illustrates that the cost of the court system in terms of Vote Courts is a small fraction of the total cost of the justice system.
- 29 By far the largest category of expenditure identified here is legal services (ie, lawyers' fees) at over \$1.6 billion per annum. This is followed by the cost of the Police at close to \$1 billion and of Corrections Services at close to \$500 million. The direct cost of Courts comes fourth at around \$400 million. The Courts' budget includes judicial and staff salaries, the court servicing costs of the Ministry of Justice, government-funded but privately provided costs such as counselling, and capital charges such as depreciation on buildings.
- 30 The cost of the court system is thus a relatively small component of the overall cost of justice. However, the impact of efficiency gains in the operation of the court system could be multiplied across the economy as a whole, with particular impact for government expenditure, which is the largest funding source of the justice system. If less judge and lawyer time is involved because matters can be handled administratively or with simplified processes, if parties are assisted to make well informed decisions earlier, if every appearance of the parties in court (together with their counsel and witnesses) is timely and marks significant progress in the case, the overall cost of delivering justice will be reduced.
- 31 Indeed, a large increase in Vote Courts could be worthwhile on purely cost grounds if the result was a decrease in expenditure elsewhere. An example of this would be expenditure to improve efficiency in the Environment Court to reduce delays relating to development projects.

## Reducing cost to parties

- 32 A recent speech by the Chief Justice of NSW, James Spigelman, captures the critical issues involved in reducing the cost of the court system to participants. Speaking at a function to mark the beginning of the law term of 2004, he said that matters of cost minimisation must be given a higher priority:

In many areas of litigation, the costs incurred in the process bear no rational relationship, let alone a proportionate relationship, to what is at stake in the proceedings. The principal focus of improvement, now that delays are well on the way to being acceptable, must be the creation of a proportionate relationship between costs and what is at stake ...

If the legal profession and the courts cannot deliver a more cost efficient service, then we will be bypassed in commercial dispute resolution as, to some degree, we have been bypassed in other areas of dispute resolution. This process requires a collaborative approach by the courts and the profession.<sup>537</sup>

537 Sydney Morning Herald, 3 February 2004, < <http://www.smh.com.au/articles/2004/02/02/1075570364264.html>. >

- 33 Reducing costs to the participants in court cases must be a major focus for court reform in future years. As Chief Justice Spigelman states, it is indeed difficult to justify a system in which inefficiency can be rewarded with greater remuneration, as has perhaps been the case too often in the past.
- 34 Initiatives with potential to change the court system in ways that will reduce costs are already in train and incorporated into rules and practice. Many predict that electronic technology will revolutionise both the administration of courts and public access to legal information. The ability of the court to require parties to meet time limits is now an established part of most jurisdictions through case management.
- 35 Reducing the cost for parties would be a very significant contribution to making the court system more useful and accessible, although it is not the only measurement by which reform should be judged.

## Assessing the overall costs and benefits of the Community Court

- 36 The most significant economic impact of our proposals is the shift in focus and investment to the high volume end of the courts where most people encounter the court system. Our recommendations here are a package of interlocking measures to transform the way this part of the court system works.
- 37 The proposed Community Court is where well over half the total work of Primary Courts will be dealt with, the major part being in the criminal summary courts. Expenditure in the District Court currently makes up 24 percent of all courts' expenditure at around \$100 million a year. Within the District Court, in the 2002/03 year, 138,565 of the 147,675 cases dealt with were in the criminal summary jurisdiction. Moreover these 138,565 cases make up 92 percent of all cases dealt with in all three courts.
- 38 The major civil workload at this level is currently carried by the Disputes and Tenancy Tribunals, which would form divisions of the Community Court, at some 20,000 cases each annually. It is anticipated that with the streamlining of court procedures for cases below \$50,000 and for straightforward debt claims, the Community Court will be more relevant and useful for people with disputes of this kind. The extension of state-managed mediation to ordinary civil cases would provide another option for dispute resolution at this level.
- 39 Supply-side changes such as providing more judges or legal aid, or just re-organising the court structure, will not bring about significant reform without attention to critical demand-side elements such as ensuring court processes are proportionate to the issue involved, providing simple processes for simple matters, dealing effectively with time-wasting litigants and case management. Simply adding more resource, although an important aspect of reform, will not of itself solve endemic problems.

- 40 The new Community Court must be supported by the detailed process and culture changes we call for. But these changes, even if accompanied by increased resources, will not by themselves turn around entrenched attitudes and practice. One of the main reasons for establishing a new court is to ensure there can be a new start, with leadership by a principal judge and commitment from the judiciary, administration, legal profession and the community. Furthermore, effective change must be ongoing and build on lessons learnt along the way.
- 41 In addition to proposals directly relevant to the Community Court, other proposals make an important contribution to the objective of establishing a more effective court at this level – including proposals to improve access to information and initial legal advice, to reduce costs and enhance the use of alternative processes outside the court.
- 42 It is difficult to predict the final balance sheet between possible new costs and potential savings in relation to the whole package of recommendations for the new Community Court. We suggest that better informed litigants and defendants, increased use of administrative staff, fewer delays and process changes should significantly decrease the amount of hearing time required from judges, and give them time to work more effectively. There will be no need for significant change in the facilities of current District Court buildings. The major shift of work from the High Court to the primary court level should, in the medium term, reduce overall judicial costs as the cost of a High Court judge is significantly greater.
- 43 The use of community justice officers should bring efficiencies in terms of dealing with cases expeditiously and appropriately, and can be seen as a new cost the system must face in order to ensure it meets the essential standards of an effective court system.

### Wider significance of the summary criminal jurisdiction

- 44 There may also be wider economic benefits that justify increased investment on the Community Court. Improved effectiveness there could result in less expenditure by parties, and by other government-funded justice agencies.
- 45 The summary criminal court is the place that first, usually young, offenders experience the court system. Numerous studies and our own investigation have shown that their experience of the court is far from beneficial in terms of changing behaviour – young defendants often neither understand the process nor what has happened to them personally. A lack of resource for the high volume, less ‘serious’ end of the courts’ business may reflect the view that offending of this sort is trivial, and that proper protection and assistance for defendants is not really required. This ignores the consequences for individuals and their subsequent criminal involvement.
- 46 While funding is available for imprisoning people at about \$60,000 per year per inmate, relatively little is available for early intervention, help and encouragement, which could avoid entrenchment of the offending cycle. If the

package of changes proposed for the Community Court means that the first contact of offenders with the justice system builds respect for the fairness of the process, rather than disillusionment; the downstream benefits for the police, welfare and wider community could be significant.

- 47 As noted earlier, investment in the Community Court could well be offset by reduced government expenditure on legal services and Vote Police. The operation of the summary criminal jurisdiction is not only a direct cost in Vote Courts, it is also very relevant to the \$1 billion of Government spending in Vote Police and the \$1.6 billion of annual expenditure on legal services.

## **Our assessment**

- 48 Our work suggests that a fully robust cost benefit analysis of our proposals would be hard to achieve. We would not wish to see reform delayed by such work.
- 49 We have found that there is a relative absence of rigorous economic analysis in relation to court systems in general, including in New Zealand. We have also found that the foundations for doing an empirical analysis are limited.
- 50 By introducing electronic management information systems, the Ministry of Justice has taken very significant steps towards providing a platform for empirical analysis in future. To make the best use of this information, our view is that there needs to be further work around developing and adopting quality standards that courts should meet, and finding ways to assess whether they are met.
- 51 For now, the question for government is whether we do have a well functioning court system. As we have reported, at the Community Court level, this is not the case. New investment is appropriate in order to make the system effective for the great majority of people who encounter courts at this level, and to ensure a new Community Court operates to appropriate standards on a cost-effective basis.





## The Way Forward

---

During this review we heard the court system being compared to a house that has had a series of owners over the years, all of whom have added, altered or redecorated it. Consequently, as you move from room to room you find an array of different styles and colours. There is now a pressing need to renovate the house along simpler, more internally consistent lines.

The Law Commission is making 160 recommendations to ‘renovate’ New Zealand’s court system into a coherent and cohesive whole. It is important to see our recommendations as a package, rather than an offering that can be picked from.

At the same time we recognise that they cannot be implemented simultaneously.

The Community Court stands at the centre of our recommendations. It is there that many of our proposals for delivering justice for all come together. Our review has focused on the experience of users of the system and the Community Court is where most people will meet it. For these reasons we regard the development and implementation of the Community Court concept as our priority.

The overall thrust of the reforms in this report is towards simplification of the court system and improving access to it. There are five further areas where early action is necessary. Making information and advice more available, reorganising first instance courts into the primary courts structure, reinforcing the pivotal constitutional role of the High Court with the creation of uniform appeal rights, and the creation of an umbrella framework to centralise the administration of tribunals. These are all changes which in substance will make the justice system simpler and more accessible.

From the point of view of court users, both the legal profession and the general public, a simplified system is easier to engage with. It will also have economic and other less measurable benefits that can guide development in the future.

When considering reform, the salutary and inescapable starting point must be that the current court system does not serve all New Zealanders equally well. Operational changes, together with a stronger structure, will bring greater discipline and focus, while in no way diminishing the essential principles. If we are to turn rhetoric into reality we must be prepared to make the necessary investment in ensuring the system is available to deliver justice for all.

# Glossary of Terms

---

| <i>Legal words</i>                 | <i>Meaning</i>  |
|------------------------------------|---|
| <b><i>Adjudicate</i></b>           | Judging or determining a matter in dispute.   |
| <b><i>Adjudicative bodies</i></b>  | State-sponsored agencies with a decision-making function, eg, courts and tribunals.   |
| <b><i>Adjudicator</i></b>          | A general term for anyone who has the task of resolving an issue on which a decision has to be made.  |
| <b><i>Appeal</i></b>               | Reconsideration of a decision already taken by another court. Appeals are taken on the basis that the judgment of the court at first hearing contains a mistake in interpreting the law or determining the facts.     |
| <b><i>Appellate</i></b>            | A body that can hear an appeal.   |
| <b><i>Arraign, arraignment</i></b> | When the accused is brought before the court to plead to the criminal charge.   |
| <b><i>Bar Association</i></b>      | The professional body representing barristers.  |
| <b><i>Calderbank letter</i></b>    | A ‘without prejudice’ offer to settle which can be taken into account on the issue of costs only.   |
| <b><i>Call (first)</i></b>         | The initial occasion when the case is considered in court.  |
| <b><i>Case management</i></b>      | Arrangements for the more efficient and disciplined progress and resolution of litigation. Cases can be assigned to a case management ‘track’ which sets the timetable prior to a full court hearing.                 |
| <b><i>Civil (disputes)</i></b>     | All cases heard in the courts that are not criminal cases.  |
| <b><i>Committal</i></b>            | The determination that a person who has chosen to go before a jury should stand trial.  |
| <b><i>Common law</i></b>           | Law contained in previous cases as opposed to statutes.   |
| <b><i>Complainant</i></b>          | The person against whom a wrong has allegedly been done.  |
| <b><i>Court of Appeal</i></b>      | The court in our hierarchy between the Supreme Court and the High Court.  |
| <b><i>Courts</i></b>               | The most formal adjudicative bodies.  |
| <b><i>Defendant</i></b>            | A person against whom a court process is begun. The word is used in both civil and criminal cases. In the High Court, the person against whom a criminal allegation is made is normally referred to as the “accused”. |
| <b><i>De novo</i></b>              | A new hearing of all matters.   |
| <b><i>Depositions</i></b>          | Presentation of evidence to support committal for a jury trial.   |
| <b><i>Discovery/Disclosure</i></b> | When one party in a legal action discloses to the opposing party documents that could be relevant to the dispute.   |



|  |  |
|--|--|
| <b><i>District Courts</i></b>                | The courts of general jurisdiction in New Zealand that deal with the over-whelming majority of criminal cases and civil cases where the amount in dispute is not more than \$200,000. Each court is established as a stand-alone entity, but are often informally referred to as one court rather than a collection of courts. |
| <b><i>Diversion</i></b>                      | A process which allows a criminal case to be concluded without a conviction being entered on a person's record.  |
| <b><i>Due process</i></b>                    | Established court practices and principles that ensure fairness.   |
| <b><i>Early disclosure</i></b>               | Advising the opposing side what the contentious issues are, at the beginning of the legal process.   |
| <b><i>Family Court</i></b>                   | The court that hears matters involving family relationships, the consequences of their breakdown, and the status of children.  |
| <b><i>Family Group Conference</i></b>        | A meeting involving a young person who is alleged to have done wrong, together with those who are part of his or her life and those whom he or she is alleged to have wronged.   |
| <b><i>First instance</i></b>                 | The primary consideration of a case by a court.  |
| <b><i>General Courts</i></b>                 | The High Court and the District Courts, as opposed to specialist courts.   |
| <b><i>High Court</i></b>                     | The court which deals with major civil cases, all cases involving challenges to the exercise of statutory power, the most serious criminal cases, and some appeals.  |
| <b><i>Immunity (from prosecution)</i></b>    | Exemption or protection from legal proceedings.  |
| <b><i>Indictable (cases)/ indictably</i></b> | Cases where there is a right to trial by jury.   |
| <b><i>Inherent jurisdiction</i></b>          | A reserve of power that the High Court has to ensure the proper and complete administration of justice, when faced with a difficulty that cannot be dealt with in a satisfactory manner using only the powers conferred by statute or the rules of court.  |
| <b><i>Injunctive relief</i></b>              | A court order requiring action, or requiring an activity to be stopped.  |
| <b><i>Inquisitorial</i></b>                  | A form of adjudication in which the judge takes a more active role in resolving the matter.  |
| <b><i>Interlocutory</i></b>                  | A step after the court process has started but before the ultimate determination.  |
| <b><i>Interrogatories</i></b>                | A series of written questions presented by one party to the other party in a legal dispute.  |
| <b><i>Judicial officers</i></b>              | People who preside in courts and tribunals.  |
| <b><i>Jurisdiction</i></b>                   | The area of the law which a particular court has the ability to deal with and make determinations about.   |

|  |   |
|--|---|
| <b><i>Jurisprudence/ jurisprudential</i></b> | Philosophy of law and legal principles.   |
| <b><i>Law Society</i></b>                    | The professional body representing all lawyers. Membership is currently compulsory for practising lawyers.  |
| <b><i>Litigant</i></b>                       | A person who is involved in a hearing or case within the court system.  |
| <b><i>Magistrates' Court</i></b>             | The name which was used before 1980 for what is now the District Court. In many parts of the world, this is the name of the court which deals with less serious civil and criminal cases. |
| <b><i>Master</i></b>                         | A judicial officer of the High Court who deals with preliminary matters and some special jurisdictions including bankruptcy, insolvency and the winding up of companies.                  |
| <b><i>Natural justice</i></b>                | Principles which have developed to ensure that court processes are fair, robust and transparent.  |
| <b><i>Non-defended hearing</i></b>           | A hearing where only the claimant appears.  |
| <b><i>Omnibus legislation</i></b>            | A comprehensive statute covering many areas.  |
| <b><i>Oral argument</i></b>                  | The presentation which occurs in person in the courtroom.   |
| <b><i>Plaintiff</i></b>                      | A person who starts a civil action in either the District Court or the High Court.  |
| <b><i>Practice notes</i></b>                 | Directions issued by the heads of each court about how matters are to be conducted in that court.   |
| <b><i>Precedent</i></b>                      | A decision in a previous case.  |
| <b><i>Private good</i></b>                   | When the benefit is substantially for individuals.  |
| <b><i>Privy Council</i></b>                  | Until recently the ultimate court in the New Zealand hierarchy. It sits in England and includes British Law Lords among its members.  |
| <b><i>Public good</i></b>                    | When the benefit is society-wide.   |
| <b><i>Quasi-appeal</i></b>                   | A process which is similar to an appeal.  |
| <b><i>Quasi-judicial</i></b>                 | When a non-judicial body carries out a function which is akin to judging.   |
| <b><i>Quorum</i></b>                         | The number of people required to be present before a body can operate.  |
| <b><i>Registrar</i></b>                      | A senior officer responsible for the organisation and administration of a court, and who can have a quasi-judicial role.  |
| <b><i>Registry (court)</i></b>               | The administrative office of a court.   |
| <b><i>Specialist courts</i></b>              | Those courts which deal with a specialist area of law, for example, the Family Court.   |
| <b><i>Summary (cases)/ summarily</i></b>     | Matters which are dealt with by a judge alone, without a jury.  |



|                                 |  |
|---------------------------------|--|
| <b><i>Tort</i></b>              | A private wrong or injury (independent of contract law) for which a court will provide a remedy.                       |
| <b><i>Without prejudice</i></b> | Offers or positions adopted during negotiation which are not binding if the negotiation does not achieve a resolution. |
| <b><i>Tribunals</i></b>         | A variety of state-supported agencies that deal in a less formal way with particular sorts of disputes.                |

| <i>Māori words</i>                 | <i>Meaning</i>  |
|------------------------------------|---|
| <b><i>hapū</i></b>                 | A sub-tribe, extended family group linked through whakapapa to a common ancestor. |
| <b><i>iwi</i></b>                  | Tribe, a number of related hapū make up an iwi.                                   |
| <b><i>kawanatanga</i></b>          | Government.   |
| <b><i>karakia</i></b>              | Prayer, religious service.  |
| <b><i>kaumātua</i></b>             | Elder.  |
| <b><i>kōrero</i></b>               | Speak.  |
| <b><i>marae</i></b>                | Meeting place of whanau or iwi.   |
| <b><i>marae kawa</i></b>           | Marae protocol.   |
| <b><i>pukenga / pū-wananga</i></b> | Lecturer, professional, skilled person.   |
| <b><i>rangatiratanga</i></b>       | Chieftdomship.  |
| <b><i>rūnanga</i></b>              | Māori tribal organisation/authority, assembly, council.                           |
| <b><i>tangata whenua</i></b>       | Local iwi, people of the land.  |
| <b><i>taonga</i></b>               | Something highly treasured and valued.  |
| <b><i>taonga tuku iho</i></b>      | Highly prized property or treasure; a treasure as handed down (by the ancestors). |
| <b><i>te reo Māori</i></b>         | Māori language.   |
| <b><i>tikanga Māori</i></b>        | Māori customs.  |
| <b><i>tino rangatiratanga</i></b>  | Sovereignty, the right to self-determination.                                     |
| <b><i>wāhi tapu</i></b>            | Sacred place, reserved ground.  |
| <b><i>whakapapa</i></b>            | Genealogy, the principle of kinship.  |
| <b><i>whānau</i></b>               | Family. The word whānau means to give birth.                                      |
| <b><i>whāngai</i></b>              | Nourish, bring up, feed; care for/adopt a child.                                  |

# Topic Index

| <b>Topic</b>  | <b>Paragraph number</b> | <b>Topic</b>   | <b>Paragraph number</b> |
|---|-------------------------|--|-------------------------|
| <b>access</b>   |                         | <b>civil processes</b>                                   |                         |
| – state responsibility to ensure access to courts ..... | 1.1                     | – in the Community Court .....                           | 4.133                   |
| – to information .....                                  | 1.38                    | – in the High Court and Primary Civil Court .....        | 5.107                   |
| – to initial legal advice .....                         | 1.6                     | <b>commercial list</b> .....                             | 6.52                    |
| – to representation .....                               | 1.62                    | – discontinuing the list .....                           | 6.59                    |
| – to court records .....                                | 8.101                   | <b>Community Court</b>                                   |                         |
| <b>alternative criminal justice processes</b>           |                         | – and Maori .....  | 4.75, 81, 86            |
| – formal cautions .....                                 | 2.50                    | – case for reform .....                                  | 4.8                     |
| – guiding principles .....                              | 2.20                    | – civil process .....                                    | 4.133                   |
| – infringement offences .....                           | 2.30                    | – consultation groups .....                              | 4.69                    |
| – limitations .....                                     | 2.6                     | – court fees .....                                       | 4.56                    |
| – minor offences .....                                  | 2.28                    | – criminal process .....                                 | 4.105                   |
| – police warnings .....                                 | 2.41                    | – judges .....   | 4.57                    |
| – problem-solving courts .....                          | 2.81                    | – jurisdiction .....                                     | 4.51                    |
| – restorative justice .....                             | 2.55                    | – liaison with Māori .....                               | 4.75                    |
| – therapeutic justice .....                             | 2.82                    | – national advisory group .....                          | 4.63                    |
| <b>appeals</b>  |                         | – statutory principles .....                             | 4.58                    |
| – Coroners’ Court .....                                 | 5.388                   | <b>community justice officers</b> .....                  | 4.210, 221              |
| – Employment Court .....                                | 5.290                   | – part-time .....  | 4.243                   |
| – Environment Court .....                               | 5.239                   | – remuneration .....                                     | 4.239                   |
| – Family Court .....                                    | 5.222                   | – tenure .....   | 4.236                   |
| – general principles .....                              | 3.30                    | <b>Community Law Centres</b> .....                       | 1.44                    |
| – leave to appeal .....                                 | 6.84                    | – representation .....                                   | 1.89                    |
| – Māori Appellate Court .....                           | 5.353, 362              | <b>community liaison officers</b> .....                  | 4.72                    |
| – number of judges on appeal .....                      | 6.93                    | <b>community magistrates</b>                             |                         |
| – type of appeal .....                                  | 6.82                    | – combining jurisdictions .....                          | 4.26                    |
| – from District Court jury trials .....                 | 6.86                    | – qualifications .....                                   | 4.30                    |
| – tribunals .....                                       | 7.69                    | <b>conditional and contingency fees</b> .....            | 1.157                   |
| <b>appellate mediation</b> .....                        | 2.171                   | <b>contingency legal aid (or assistance) funds</b> ..... | 1.158                   |
| <b>case management</b> .....                            | 5.125                   | <b>Coroners’ Court</b> .....                             | 5.374                   |
| – attendance of parties .....                           | 5.151                   | – appeals .....  | 5.388                   |
| – consistency .....                                     | 5.131                   | – structure .....  | 5.377                   |
| – definite early fixture date .....                     | 5.146                   | <b>cost</b>  |                         |
| – enforcement of timetables .....                       | 5.158                   | – advertising and comparative price information .....    | 1.144                   |
| – identifying the issues .....                          | 5.143                   | – complaints mechanisms .....                            | 1.136                   |
| – maintaining flexibility .....                         | 5.152                   | – how lawyers charge .....                               | 1.150                   |
| – second conference .....                               | 5.148                   | – improving the way the market works .....               | 1.121                   |
| <b>chambers or closed</b>                               |                         | – of going to court .....                                | 1.105                   |
| – court hearings .....                                  | 8.91                    |  |                         |
| <b>civil claims under \$50,000</b> .....                | 4.138                   |  |                         |



| <b>Topic</b>   | <b>Paragraph number</b> |
|--|-------------------------|
| <b>costs</b>   |                         |
| – cost recovery rules as a benchmark .....               | 1.137                   |
| – disclosure by lawyers .....                            | 1.124                   |
| <b>court fees</b> .....                                  | 1.165                   |
| – Community Court .....                                  | 4.56                    |
| – Family Court .....                                     | 5.215                   |
| – waiver .....   | 1.169                   |
| <b>Court of Appeal</b> .....                             | 6.98                    |
| – composition .....                                      | 6.112                   |
| – number of judges .....                                 | 6.111                   |
| – workload .....   | 6.105                   |
| <b>courthouse helpdesks</b> .....                        | 1.36                    |
| <b>criminal jurisdiction</b>                             |                         |
| – middle band offences .....                             | 5.10                    |
| – middle band offences (abolition) .....                 | 5.28                    |
| – transfer of cases .....                                | 5.36                    |
| <b>criminal jury trials</b> .....                        | 5.39                    |
| – eligibility .....                                      | 5.36                    |
| – majority verdicts .....                                | 5.65                    |
| – reforms in progress .....                              | 5.62                    |
| <b>criminal list</b> .....                               | 4.108                   |
| <b>criminal processes</b>                                |                         |
| – in the Community Court .....                           | 4.105                   |
| – in the Primary Criminal Court and the High Court ..... | 5.39                    |
| – disclosure .....                                       | 5.70                    |
| – identifying issues before trial .....                  | 4.123                   |
| – judicial case management .....                         | 5.74                    |
| – laying an information .....                            | 4.119                   |
| – preliminary hearings .....                             | 5.6                     |
| – prosecution .....                                      | 5.82                    |
| – record keeping .....                                   | 4.121                   |
| – status hearings .....                                  | 4.127                   |
| <b>debt recovery</b> .....                               | 4.176                   |
| <b>default judgment procedure</b> .....                  | 4.63                    |
| <b>disabilities</b> .....                                | 1.183                   |
| <b>discovery</b> .....                                   | 5.170                   |
| <b>discovery in the Community Court</b> .....            | 4.57                    |
| <b>Disputes Tribunal</b>                                 |                         |
| – general .....  | 4.185, 188              |
| – jurisdiction .....                                     | 4.205                   |
| – openness .....   | 8.98                    |
| – structure .....  | 4.203                   |

| <b>Topic</b>  | <b>Paragraph number</b> |
|---|-------------------------|
| <b>District Court</b>                               |                         |
| – civil structure .....                             | 5.92                    |
| – operational issues .....                          | 4.9                     |
| – process issues .....                              | 4.14                    |
| – structural issues .....                           | 4.18                    |
| – workload and scheduling .....                     | 4.24                    |
| <b>diversity</b>                                    |                         |
| – liaison officers .....                            | 1.200                   |
| – training .....                                    | 1.205                   |
| <b>duty solicitor scheme</b> .....                  | 1.72                    |
| <b>education and self-help</b> .....                | 1.30                    |
| <b>electronic filing</b> .....                      | 4.183                   |
| <b>Employment Court</b> .....                       | 5.269                   |
| – appeals .....                                     | 5.290                   |
| – case for a specialist court .....                 | 5.274                   |
| – judicial review .....                             | 5.298                   |
| – mediation .....                                   | 5.300                   |
| – place in court structure .....                    | 5.285                   |
| <b>Employment Relations Authority</b> .....         | 5.279                   |
| – qualifications of members .....                   | 5.304                   |
| <b>Environment Court</b> .....                      | 5.229                   |
| – appeals .....                                     | 5.239                   |
| – place in court structure .....                    | 4.35, 5.233             |
| – specialist assistance from Maori Land Court ..... | 5.265                   |
| – structure .....                                   | 5.223                   |
| – workload .....                                    | 5.253, 257, 261         |
| <b>ethnic minorities</b> .....                      | 1.180                   |
| <b>Family Court</b> .....                           | 5.179, 183              |
| – appeals .....                                     | 5.222                   |
| – jurisdiction .....                                | 5.209                   |
| – openness .....                                    | 8.7                     |
| – place in court structure .....                    | 5.190                   |
| – registrar’s role .....                            | 5.206                   |
| – workload .....                                    | 5.198                   |
| <b>High Court</b> .....                             | 6.1                     |
| – criminal jurisdiction .....                       | 6.5                     |
| – exclusive civil jurisdiction .....                | 6.12                    |
| – general civil jurisdiction .....                  | 6.8                     |
| – specialisation .....                              | 6.20                    |
| <b>information</b>                                  |                         |
| – need for a coordinating agency .....              | 1.9                     |
| <b>infringement offences</b> .....                  | 2.30                    |
| <b>interpreters</b> .....                           | 1.209                   |

| <i>Topic</i>                                   | <i>Paragraph number</i> | <i>Topic</i>                                      | <i>Paragraph number</i> |
|--|-------------------------|---|-------------------------|
| <b>judicial review</b> .....                   | 6.97                    | <b>masters</b> .....                              | 6.64                    |
| – <i>Employment Court</i> .....                | 5.298                   | – <i>proposal for dual warranting</i> .....       | 6.69                    |
| <b>juries</b>                                  |                         | <b>media coverage of</b>                          |                         |
| – <i>eligibility</i> .....                     | 5.46                    | <b>court proceedings</b> .....                    | 8.104                   |
| – <i>lengthy and complex cases</i> .....       | 5.55                    | <b>mediation</b>                                  |                         |
| – <i>representative and</i>                    |                         | – <i>choice of mediator and funding</i> .....     | 2.161                   |
| <i>competent juries</i> .....                  | 5.64                    | – <i>court mandated mediation</i> .....           | 2.131                   |
| <b>justices of the peace</b>                   |                         | – <i>Employment Court</i> .....                   | 5.300                   |
| – <i>combining jurisdictions</i> .....         | 4.226                   | – <i>existing mediation services</i> .....        | 2.107                   |
| – <i>existing situation</i> .....              | 4.216                   | – <i>presumptive mediation within case</i>        |                         |
| – <i>proposal for community</i>                |                         | <i>management</i> .....                           | 2.145                   |
| <i>justice officers</i> .....                  | 4.221                   | – <i>privilege and confidentiality</i> .....      | 2.161                   |
| – <i>qualifications</i> .....                  | 4.230                   | – <i>state mediation service</i> .....            | 2.97                    |
| <b>kaumātua</b> .....                          |                         | – <i>and the Community Court</i> .....            | 2.130                   |
| – <i>presence in the</i>                       |                         | – <i>mediator immunity</i> .....                  | 2.162                   |
| <i>Community Court</i> .....                   | 4.98                    | <b>middle band offences</b> .....                 | 5.10                    |
| <b>law clinics</b> .....                       | 1.102                   | – <i>abolition</i> .....                          | 5.28                    |
| <b>lay advocates in</b>                        |                         | <b>minor offences</b> .....                       | 2.28                    |
| <b>specialist tribunals</b> .....              | 1.99                    | <b>name suppression</b> – <i>see publication;</i> |                         |
| <b>lay representation and ‘McKenzie</b>        |                         | <i>victims; witnesses</i>                         |                         |
| <b>Friends’</b> .....                          | 1.92                    | <b>national trial court</b> .....                 | 5.15                    |
| <b>legal advice</b>                            |                         | <b>note taking in the court room</b> .....        | 8.108                   |
| – <i>definition</i> .....                      | 1.8                     | <b>offers to settle</b> .....                     | 5.165                   |
| – <i>initial legal advice</i> .....            | 1.38                    | <b>open justice</b> .....                         | 8.1                     |
| <b>legal aid</b> .....                         | 1.70                    | – <i>principles</i> .....                         |                         |
| – <i>tackling ‘the gap’</i> .....              | 1.154                   | – <i>civil jurisdiction</i> .....                 | 8.93                    |
| <b>legal information – definition</b> .....    | 1.8                     | – <i>criminal courts</i> .....                    | 8.53                    |
| <b>legal representation – definition</b> ..... | 1.8                     | – <i>Disputes Tribunal</i> .....                  | 8.98                    |
| <b>Legal Services Agency – strategy for</b>    |                         | – <i>Family Court</i> .....                       | 8.7                     |
| <b>legal information</b> .....                 | 1.25                    | – <i>Youth Court</i> .....                        | 8.44                    |
| <b>Māori</b> .....                             |                         | – <i>tribunals</i> .....                          | 8.94                    |
| – <i>and the Community</i>                     |                         | – <i>in all courts</i> .....                      | 8.101                   |
| <i>Court</i> .....                             | 4.75, 81, 86, 96, 98    | <b>police detention</b>                           |                         |
| – <i>information</i> .....                     | 1.176                   | <b>legal assistance scheme</b> .....              | 1.75                    |
| <b>Māori Appellate</b>                         |                         | <b>police diversion</b> .....                     | 2.42                    |
| <b>Court – appeals</b> .....                   | 5.353, 362              | <b>police warnings and</b>                        |                         |
| <b>Māori Land Court and Māori Appellate</b>    |                         | <b>formal cautions</b> .....                      | 2.40                    |
| <b>Court</b> .....                             | 5.306                   | <b>pre-action protocols</b> .....                 | 5.176                   |
| – <i>communal assets</i> .....                 | 5.323                   | <b>Primary Civil Court</b> .....                  | 5.87                    |
| – <i>history</i> .....                         | 5.313                   |   |                         |
| – <i>judicial resource</i> .....               | 5.334                   |   |                         |
| – <i>proposal to extend jurisdiction</i> ..... | 5.327                   |   |                         |
| – <i>structure</i> .....                       | 5.331                   |   |                         |



| <b>Topic</b>  | <b>Paragraph number</b> |
|---|-------------------------|
| <b>Primary Courts</b>   |                         |
| – consultative committee and coordinating judge .....         | 3.24                    |
| – framework .....   | 3.7                     |
| – judges .....  | 3.0                     |
| <b>Primary Criminal Court</b> .....                           | 5.1                     |
| <b>problem-solving courts</b> .....                           | 2.83                    |
| <b>public defenders</b> .....                                 | 1.87                    |
| <b>publication</b>  |                         |
| – suppression of name after conviction .....                  | 8.82                    |
| – suppression of name until ‘case gone into’ .....            | 8.72                    |
| – suppression of name until conviction .....                  | 8.79                    |
| – publication of name before conviction .....                 | 8.68                    |
| – publication of name before the first court appearance ..... | 8.63                    |
| <b>pū-wananga (pukenga)</b> .....                             | 5.335                   |
| <b>representation</b> .....                                   | 1.62                    |
| – by community law centre staff .....                         | 1.89                    |
| – improving representation .....                              | 1.75                    |
| – police detention legal assistance scheme .....              | 1.75                    |
| – McKenzie Friends .....                                      | 1.92                    |
| <b>restorative justice</b> .....                              | 2.57                    |
| – existing programmes .....                                   | 2.60                    |
| – possible solutions .....                                    | 2.76                    |
| <b>rules committee</b> .....                                  | 5.114                   |
| <b>rules of court</b> .....                                   | 5.114                   |
| <b>Sentencing Act 2000, s 27</b> .....                        | 4.96                    |
| <b>specialisation</b>   |                         |
| – High Court .....  | 6.20                    |
| – panels of judges .....                                      | 6.46                    |
| – and the Primary Courts .....                                | 3.15                    |
| <b>status hearings</b> .....                                  | 4.127                   |
| <b>summary judgment procedure</b> .....                       | 4.167                   |
| <b>supervisory jurisdiction:</b>                              |                         |
| <b>appeal and review</b> .....                                | 6.79                    |
| <b>support people in court</b> .....                          | 1.224                   |
| <b>Supreme Court</b> .....                                    | 6.114                   |

| <b>Topic</b>                                      | <b>Paragraph number</b> |
|---|-------------------------|
| <b>Tenancy Tribunal</b>                           |                         |
| – general .....                                   | 4.185, 191              |
| – structure .....                                 | 4.203                   |
| <b>tikanga</b>                                    |                         |
| – in the general courts .....                     | 5.344                   |
| – referrals to the Māori Appellate Court .....    | 5.341, 345              |
| <b>tribunal</b> .....                             | 7.1                     |
| – definitions .....                               | 7.6                     |
| – appeal rights .....                             | 7.69                    |
| – coherent framework .....                        | 7.1                     |
| – judicial leadership .....                       | 7.59                    |
| – lists and divisions .....                       | 7.35                    |
| – neutral administrative base .....               | 7.63                    |
| – openness .....                                  | 8.91                    |
| – principles for establishing new tribunals ..... | 7.51                    |
| – proposal for a new structure .....              | 7.21                    |
| – uniform processes .....                         | 7.55                    |
| <b>unbundling</b> .....                           | 1.59                    |
| <b>victims – name suppression</b> .....           | 8.83                    |
| <b>victims of crime</b> .....                     | 1.185                   |
| <b>wasted costs orders</b> .....                  | 5.162                   |
| <b>witnesses – name suppression</b> .....         | 8.83                    |
| <b>Youth Court</b> .....                          | 5.187                   |

# Appendix A

---

## Terms of Reference

The Law Commission will consider and report upon the structure of all state-based adjudicative bodies for New Zealand (apart from the Court of Appeal and Privy Council or institutions in substitution therefore) including:

- (a) The volume and nature of work requiring attention
- (b) The appropriate form, nature, and operation of the Courts and Tribunals required to meet all current needs and expectations.
- (c) The original jurisdiction of the District and High Courts and associated Tribunals.
- (d) The appellate relationship between the District and High Courts, including the form of the appellate regime for appeals from specialist Courts and tribunals, particularly the Family Court and the Environment Court.
- (e) The interrelationship of the Employment Court, the Māori Land Court and the Māori Appellate Court, with the District Court and the High Court.
- (f) The relationship between the District Court and the High Court and administrative tribunals and other quasi-judicial bodies with regard to both appeal and review.
- (g) The role and function of Masters and Registrars within the total Court structure.
- (h) The overall structure of how less serious criminal and civil matters may be dealt with in the District Courts.
- (i) The rights of appeal from the District Court and the High Court to whatever appellate structure exists above them.

The Commission will have particular regard to its statutory obligations to take account of te ao Māori (the Māori dimension) and the multi-cultural character of New Zealand society in this exercise.



## Appendix B

### District Court judges' proposals for reforming criminal list courts<sup>1</sup>

#### Introduction

- 1 This paper is concerned with improving the way the District Court list courts function. A subsequent paper will consider other aspects of the District Court summary jurisdiction.
- 2 The Law Commission initiated discussion of the matters covered by this paper. The interest of the commission in the list courts can only help to foster changes and improvements. For that reason it is welcome. That said, we do not believe that it is necessary to wait for the commission's report before the work starts on repairing the creaking list courts. This paper therefore is not primarily intended for the Law Commission. It hopes to stimulate action elsewhere.
- 3 Our view is that there is near-unanimity among court users about the problems of the court. It is also our view that the solutions to those problems in their broad outline are obvious. It would be wrong to excuse further inaction while waiting for the Law Commission's report. Steps can and should be taken to survey the list courts, analyse the problems, design corrective measures and obtain the necessary resources to fix the problems without further delay.
- 4 The Law Commission's preliminary work exposed widespread criticism of the way the criminal list court functions. In a submission made to the Law Commission in May 2003, we highlighted that there were admitted deficiencies in the way list courts functioned. We did not accept the Law Commission's tentative view that structural changes were required to remedy the situation. In particular we did not accept that the shortcomings in the way 'bottom end' District Court criminal work is done, pointed to the need for a new court or division of the District Court. We will not revisit that issue in this paper. However it is necessary to remind ourselves of some of the reasons why the list courts have got into an unsatisfactory state.
- 5 First, there has never been a high level systematic review of how the District Court summary jurisdictions function. There has been a general consciousness on the part of court users, judges and those who work in the court that the system has a great many shortcomings. But there has never been any concerted and systematic review to identify those shortcomings, assess their seriousness and prepare a proper response. Had such a review taken place it is likely that substantial changes would have been made many years ago. It might be useful to ask why it has taken so long for there to be a public and open acknowledgement of the shortcomings of the list courts, the specifics of which have been exposed

<sup>1</sup> This Appendix contains an extract from a paper prepared by the District Court judges.



---

in the work by the Law Commission. The fact that it fell to an outside agency, namely the Law Commission, to identify serious problems and to take the first steps to initiate some reform must be a cause of concern. Something is wrong with the governance of the courts if the inferior performance of one of the most important courts in the land is tolerated for so long. It may be that the problem has been that the list courts are, to borrow a phrase used elsewhere, the “undervalued workhorse” of the court system. The fact that matters have drifted for so long has exposed a ‘blindspot’ in the governance of our courts. The result is that the list courts today are operated in the same way as they were in the middle of the last century. It is hardly surprising that there are major problems with the courts, given the failure to adapt to change.

- 6 The second lesson that can be learnt from the deterioration of the list courts and the way they operate is that dissatisfaction has been experienced and voiced by judges for many years. And yet those complaints have not been translated into prompt measures to improve the way the courts operate. That may say something significant about the way our courts are managed.
- 7 The third point is that even if there had been an understanding of and acknowledgement of the shortcomings of the list courts, it would have been impossible to do anything because the District Court is so substantially under-resourced. One of the consequences of this shortage of resources is that the courts are constantly making do and the court staff and judges have to struggle just to keep up. This is not a promising atmosphere in which to develop ideas for reforming and improving the courts.
- 8 The main problems experienced in the District Court are encountered in the list courts. Unless changes are made, the same problems will be experienced in the Community Court – or whatever other court inherits the list courts.
- 9 The problems with the list courts are largely due to the press of numbers that the courts are expected to deal with each day. There are other things that have to be improved as well. Prominent among those is that the court should better respond to the fact that a large number of court users are Māori and Pacific Islanders. This paper though, is confined to improving the organisational aspects of the court which bear on managing the workloads. If the workloads are reduced, through better organisation and management, three benefits will accrue: the courts will be more cost effective; they will dispense better justice; and they will give an appearance of better justice.
- 10 To improve the list court it will first be necessary to reduce the number of cases which come before the list courts on any given day. We largely agree with all the ... Law Commission’s [proposals regarding the criminal list] and comment on these below. Several means are available to control the numbers of cases that come before the list courts. The first is greater use of pre-court diversion. The second is use of processes for some offences that do not require a court hearing. This involves extending the minor offences type proceeding.



- 11 Further, it is necessary to improve the way that the courts deal with those cases that end up in the list court. This can be attacked on several fronts.
- We must improve the way that cases are prepared for the list court. Too many cases come before the court before they are ripe for hearing; consequently they have to be adjourned. The process of adjournment is undesirable because it adds to the workload of the court on succeeding days; it is wasteful of time and money, and causes frustration for court users. Further, the courts must control the number of cases set down each day.
  - Improvements must be made to the way that cases are dealt with in court. This includes improving the way the court sets its priorities. There is a need to eliminate adjournments occurring once the case is being dealt with in the courtroom. Changes must be made to the work methods currently used in courtrooms. This includes making changes to ensure that a judicial officer does not have to carry out purely administrative tasks, for example, drawing up the record of a hearing.
  - Finally, any proposals for change in this area will need to take account of the views of those agencies with special expertise in the area of operations and processes as well as those organisations most affected by changes. The expertise of other agencies including the Police, Legal Services Agency and Corrections should be tapped into when considering changes. All of those named would have to be consulted in any event because they would be vitally affected by any changes. The legal profession would also be affected by the changes and will have valuable contributions to make on the subject of necessary changes.

## Summary of recommendations

- 12 The following is a summary of the main recommendations in this paper:
- a) Steps should be taken to reduce the number of cases coming before the list courts. Greater availability of diversion and extension of the use of minor offences type procedures should be explored.
  - b) Cases should not come before the courts until they are ready for consideration by a judge. This is to avoid defendants being required to come back to court on an excessive number of occasions, and judges', prosecution and defence counsels' time being wasted. The more appearances that are required, the greater is the risk that the defendant will not appear at court.
  - c) Improvements are needed to how defendants can access necessary assistance and advice before their cases are called before a judge. There is a need for multiple sources from which defendants can get assistance including telephone call centres manned by properly qualified staff. Defendants should be able to access advice without having to travel to an advice centre, courthouse etc.

- 
- 
- d) The process of obtaining assistance should not be commenced when the defendant comes to court on their summons date, because that attempts to squeeze too much of the process into too short a time. It should be commenced earlier.
  - e) All the services that a defendant will need to prepare for a court hearing should be physically located at the courthouse. These include Legal Services Agency, prosecution officers, forensic nurse etc. These agencies should have sufficient personnel, resources and IT assistance to deal with the defendant's case at any time within office hours, not just on the day the defendant is summonsed.
  - f) A defendant should be able to take the necessary steps to process his case (eg, advice on plea, processing of legal aid applications) at any courthouse in the larger centres and not just the one where he has to appear.
  - g) Information about a case should be available electronically. This will aid efficiency and will also mean that the information can be easily accessed on any day, not just the day the case is set down, and at any court, not just the one it was commenced at.
  - h) The courts, and not prosecution agencies, must control the dates on which defendants are summonsed or bailed by police to appear. Until this happens workloads will be uncontrolled leading to grossly overloaded list courts. This change will involve the courts electronically scheduling cases. The system will allocate hearing dates that are then inserted into summonses and police bail forms. list court numbers will be limited to a pre-set maximum.
  - i) Once defendants arrive at court, court staff will actively steer defendants towards the necessary agencies. Defendants will be required to check in before their case is called. Their case will be assessed to see if they have completed legal assistance etc. Defendants will be called before the judge in the order that they check in.
  - j) There may be problems trying to establish appointment times for defendants' court appearances. Nonetheless the idea is worth trialing.
  - k) Court rituals and language should be simplified to make them more readily understandable and therefore accessible.
  - l) The present system of the judge writing up the record of the list court hearing on informations should be scrapped. Instead a simple document ("an abstract") summarising the outcomes of the hearing should be prepared by a clerk, printed and a copy handed to the judge for checking and signing. A pre-formatted notice of next appearance should be printed and given to the defendant. Bail bonds should be printed and signed in court. There must be adequate staff provided to carry out these tasks.
  - m) There needs to be a substantial reduction in the number of adjournments of list court cases. Case management rules should be considered which provide for this. The judiciary should discuss and adopt agreed best practices which would provide guidance in this area.



- n) Timely information about changes of address of those on bail should be made available by the courts to other agencies including police and probation to ensure that they can maintain contact with defendants.
- o) The provisions of the Bail Act should be reviewed to make it harder for those who have failed to attend court when required to get bail when they next come before the court.
- p) Registrar's powers should be exercised in an administrative form without the need for a hearing in an open court. It should be investigated whether registrars should be able to take pleas where a probation report is required and to order a pre-sentence report.
- q) At a more advanced level:
  - Immediate consideration should be given to moving from a paper-based system to one where all charges are in electronic format. The requirement for a sworn information should be abolished.
  - It should be possible for the judge to access information about the current pending proceedings in any court in New Zealand while on the bench. This will make it possible to collect together all charges for sentencing or other disposition (other than a defended hearing) in one court on one occasion.
  - Previous notes of sentence and abstracts of earlier hearings should be available to the judge on line.
- r) Video link technology should be used to avoid having to bring prisoners to courts for pro-forma (routine) hearings.
- s) Policy-makers should be advised of the undesirability of pursuing new initiatives which have the effect of placing additional responsibilities on list courts and judges. Such initiatives should not be pursued until there has been a substantial improvement in the courts' capacity to carry out their core responsibilities. Any such new initiative should not be adopted without there first being a careful analysis of the additional resources that would be necessary, including court staff numbers, buildings, judge numbers etc. The judges should be closely consulted about the effect that adoption of a new initiative would have on the courts' ability to meet their existing obligations.
- t) A comprehensive review should be carried out to determine the actual resources required by the courts generally if they are to properly carry out their functions.

# Appendix C

## New Zealand Law Commission *General Discovery: NZLC R78* (Wellington, 2002)

### Changes recommended to the High Court Rules

C15 Replace Rule 293 by the following:

*General Discovery—*

- (1) After a statement of defence has been filed, any party who has filed a pleading may issue, as of course without any application to the Court, an order for discovery.
- (2) The Court may, at any stage of the proceeding, make an order for discovery addressed to any party.
- (3) An order for discovery shall direct the party to whom it is addressed to give discovery on oath of the documents—
  - (a) which are or have been in that party's possession or power; and
  - (b) which are directly relevant to any matter in question in the proceeding.
- (4) A document is directly relevant to a matter in question in the proceeding if it is one—
  - (a) on which the party giving discovery relies; or
  - (b) which adversely affects either that party's own case or another party's case or supports another party's case.
- (5) An allegation remains in question until it is admitted, withdrawn, struck out or otherwise disposed of.
- (6) An order made under this rule is an order to which Rule 277 applies.
- (7) A party to whom an order for discovery made under Rule 293(1) is addressed may apply to set such order aside on the ground that it is insufficiently clear from the pleading of the party who has issued the order what are the matters in question in the proceeding.

C16 Replace Rule 294 by the following:

*Compliance with Order—*

A party required to give discovery by an order for discovery under Rule 293 must give discovery within not less than 28 days (or if he be resident out of New Zealand 42 days) after the day on which the order for discovery is served on that party by filing and serving a list in accordance with Rule 298 verified by affidavit.



C17 Replace Rule 295 by the following:

*Modification of general discovery obligation—*

- (1) The Court may on the application of a party required by an order for discovery under Rule 293 to give discovery, make an order varying that party's obligation—
  - (a) by excusing such party from giving discovery of a specified class or classes of document; or
  - (b) by authorising modes of discovery less expensive or time consuming than providing such a list enumerating the documents as Rule 298 requires; or
  - (c) by directing that discovery take place in stages.
- (2) The Court may make an order under this rule only if it is satisfied that if it does not do so—
  - (a) the expeditious disposal of the proceedings will be unreasonably impeded; or
  - (b) the cost to the party giving discovery of so doing will not be proportionate to the importance of the proceedings or the amount of money involved in the proceedings.
- (3) Each party may, at any time, without the need for leave so to do being reserved, apply for an order varying the terms of an order made under this rule on the ground that compliance or attempted compliance with the original terms of the order has revealed a need for reconsideration or that there has been a change of circumstances justifying reconsideration.

C18 Delete Rule 297 and substitute:

*Enforcement of order for general discovery—*

- (1) On an application made under Rule 277 on the ground of default in complying with an order made under Rule 293 the Court, if satisfied that the default was wilful, must make such an order as is contemplated under Rule 277(2)(a) or (b) unless satisfied that there are special reasons why such an order should not be made.
- (2) It is a defence to an application made under Rule 277 on the ground of default in complying with an order made under Rule 293 that it is insufficiently clear from the pleading of the party making the application what are the matters in question in the proceeding.

C19 Rule 298(1) delete the words “or Rule 297”. Delete 298(9) and substitute:

- (9) The list need not include unmarked copies of listed documents or copies of documents filed in Court.

(10) If a party includes in a list of documents, documents that are not required to be included and the number of such documents is so great as to impede the process of discovery and inspection, the Court may order the party making the list to pay costs to any other party or parties.

C20 Insert new Rule 298A.

*Order for particular discovery where general discovery insufficient—*

(1) Where it appears to the Court that, notwithstanding compliance by a party with an order under Rule 293, there are in the possession or power of such party further documents that may assist in the just determination of a matter in question in the proceedings, the Court may either order that party to file an additional list of documents in accordance with Rule 298 verified by affidavit or direct a mode of discovery of such documents less expensive or time consuming than providing a list.

(2) The Court may make an order under this Rule only if it is satisfied that if it does so—

(a) the expeditious disposal of proceedings will not be unreasonably impeded; and

(c) the cost to the party giving discovery of so doing will be proportionate to the importance of the proceedings or the amount of money involved in the proceedings.

C21 Rule 305. Add new subclause (2).

(2) Such leave may be granted only if the omission of the document from the list is explained to the satisfaction of the Court and the granting of the leave will not delay the completion of the trial or unduly prejudice the party or parties not at fault.

C22 Rule 307. Add new subclause (3).

(3) The Court may at any time make such order as it thinks appropriate to facilitate efficient inspection, and without limiting the generality of the foregoing may make such order as it thinks fit regulating the manner and order in which documents are to be arranged when produced for inspection and requiring the party producing the documents for inspection to assist in locating and identifying particular documents and classes of documents.

C23 Rule 312. Substitute “299 to 310” for “297 to 310”.



# Appendix D

## Indicators of Performance and Costs in the Courts System

5 February 2004

| Table of Contents  | Page |
|--|------|
| 1. Introduction .....                                      | 354  |
| 2. Indicators of performance for the courts system.....    | 354  |
| 2.1. Background.....                                       | 354  |
| 2.2. Analysis by jurisdictional level .....                | 356  |
| 2.3. Summing up.....                                       | 359  |
| 3. Expenditure on the courts system.....                   | 360  |
| 3.1. Economy-wide expenditure on the justice system .....  | 360  |
| 3.2. Public expenditure on the courts system.....          | 361  |
| 4. Conclusions.....  | 363  |
| Annex 1: Performance indicators for the courts system..... | 364  |
| Annex 2: Analysis of expenditure on Vote Courts .....      | 368  |
| Endnotes: .....  | 371  |

Taylor Duignan Barry Ltd  
P.O. Box 2500  
Wellington  
New Zealand  
Tel: (644) 934 8740  
Mobile: 021 478 426  
Email: [phil.barry@tdb.co.nz](mailto:phil.barry@tdb.co.nz)

## 1. Introduction

Over the past twenty years there have been strong trends towards greater accountability of public institutions, including courts, in most democracies. As part of this trend, public institutions have been required to produce more and better information on how they are performing, the costs of their activities and how the outputs they produce relate to the desired outcomes.

Obtaining accurate measurements of the quantity and quality of the outputs that are produced is inherently difficult for many core government services, including the courts, defence, foreign affairs and police. Fortunately, better information is now available on how most of these agencies are performing. In the case of the courts system in New Zealand, information is now available on key indicators like throughput, timeliness and the costs of the services. The available information is by no means perfect or complete. Nevertheless, despite the inevitable limitations of the available measures, these quantitative indicators provide information on how things are going, including whether things are getting better or worse in respect of the particular indicators.

The aim of this paper is to review the available empirical evidence on the performance and costs of the courts system in New Zealand in recent years. The paper provides a high level overview of trends in these aspects of the court system. Given the inherent difficulties in assessing performance and costs in the courts system, this paper does not purport to assess the overall performance or efficiency of the courts system. Rather this paper is intended to help focus attention on some important trends in the system. It is hoped that the information presented in this paper will be of assistance to public sector managers and judges as they seek to improve the efficiency and effectiveness of the courts system. It is emphasised that the paper seeks only to describe the trends. It is beyond the scope of this paper to explore the factors that may explain the trends that are identified.

## 2. Indicators of performance for the courts system

### 2.1 Background

Some measures of the performance of the court system are inherently qualitative in nature. For example, it has been suggested that the best overall measure of the performance of the court system may be “whether the person who loses still thinks they have had a fair go”. Others have suggested that the key measure is the predictability and certainty of the decisions that the courts make. It is naturally very hard to measure such intangible elements.

The Ministry of Justice records and produces information on various aspects of the courts system. The available information permits analysis of three key “performance” indicators for the courts system. These indicators are:



- throughput, defined as the numbers of cases disposed of by the courts each year;
- timeliness, defined as the average time between when a case is lodged and when the case is decided;<sup>1</sup> and
- the court time spent (in terms of sitting hours or hearings) per case.

In addition trends in demand, defined as the numbers of cases filed in the courts each year, are presented to provide a context for the analysis.

The above four indicators (the three performance indicators plus trends in demand) are able to be calculated for the main jurisdictions of the courts system over the period 1999 to 2003.

A number of important caveats must be emphasised in regard to the data:

- the indicators are inevitably partial, in the sense that they do not cover all dimensions of performance and the data is not available for all the jurisdictions in the courts system (for example, indicators for the numerous tribunals have not been analysed);
- the indicators are necessarily derived from summary statistics. It would be preferable to be able to assemble the analysis by extracting information from data on individual cases rather than having to rely on aggregate estimates, but until the Ministry's new Case Management System has been operational for some time, systematic tracking of individual cases will not be possible;<sup>2</sup>
- the measures provide only limited information (in regard to timeliness) on the quality of justice that is being delivered and are at best only indirect indicators of the confidence citizens are likely to have in the institutions of the court;<sup>3</sup>
- inevitably, the indicators used by the Ministry of Justice tend to focus on that which is readily measurable. Ideally, measures of outcome would be available that measure the performance of the system for the users; and
- finally, it should be noted that the numbers provided below are broad national averages. Trends at the regional level and the experience of individual cases will in some cases be considerably better and in some cases considerably worse than these national averages.

Given the limitations in the data, we caution against inferring too much from trends in the indicators provided in this report. In particular, care should be taken in drawing inferences from trends in these indicators about the efficiency of the courts. Many of the factors influencing these indicators are beyond the direct control of the judiciary and the Ministry of Justice. For example, the volume of cases registered in any year is to a large extent driven by the "demand" of citizens for judicial services. (Nevertheless, if the waiting times and/or other costs of the courts system are too high, people will tend to seek alternative ways of accessing justice, e.g., through alternative dispute resolution

mechanisms). In addition, the length of time a case takes to progress through the system depends on decisions taken by the plaintiff, the defendant and/or their respective counsels and will depend more on the incentives these parties face rather than the direct actions of the judiciary.

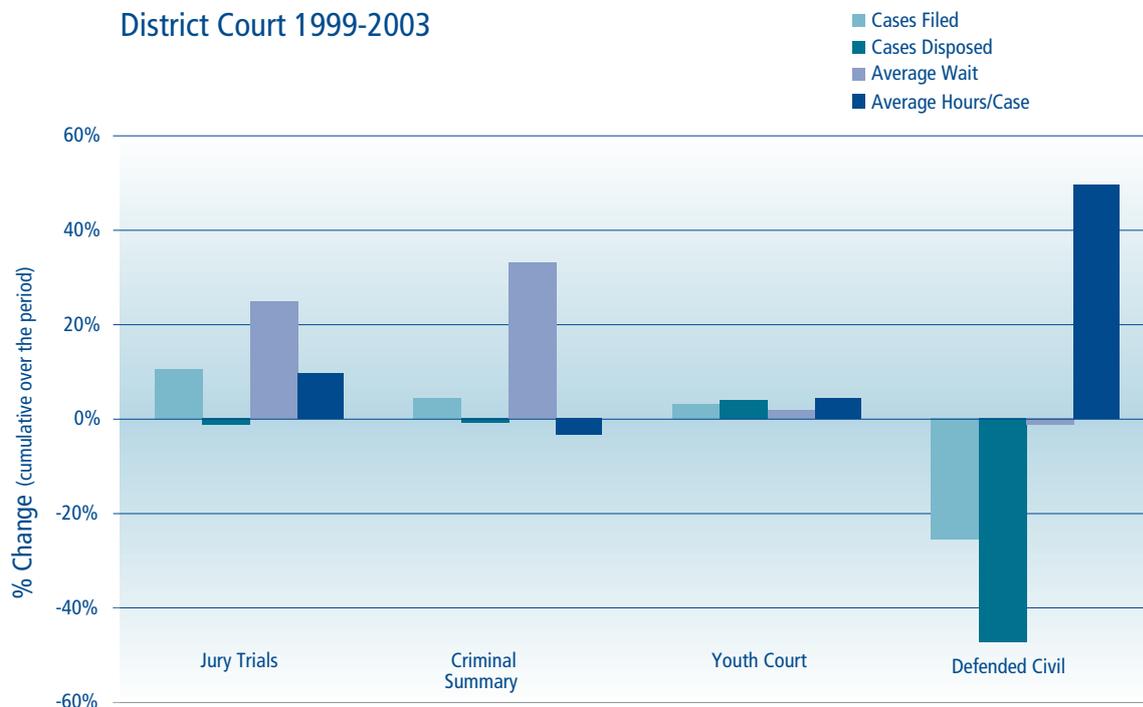
## 2.2 Analysis by jurisdictional level

This section examines the trends in the four key indicators noted above – demand, throughput, timeliness and time spent per case – on a jurisdictional basis for those major jurisdictions for which data is available. Data on these three indicators is available from 1999 for most jurisdictions of the District Court (but not the Family Court or Environment Court) and for the High Court. Data is available for the Court of Appeal from 2000. We focus below on the trends in the four indicators over the period for which data is available. More detail on the indicators, including data on the absolute levels of the indicators, is provided in Annex 1.

### 2.2.1 District Court

Indicators for the District Court are available separately for jury trials, criminal summary, Youth Court and defended civil hearings. The cumulative changes since 1999 in the key performance indicators for these four activities are provided in figure 1 below.<sup>4</sup>

Figure 1: District Court Performance Indicators





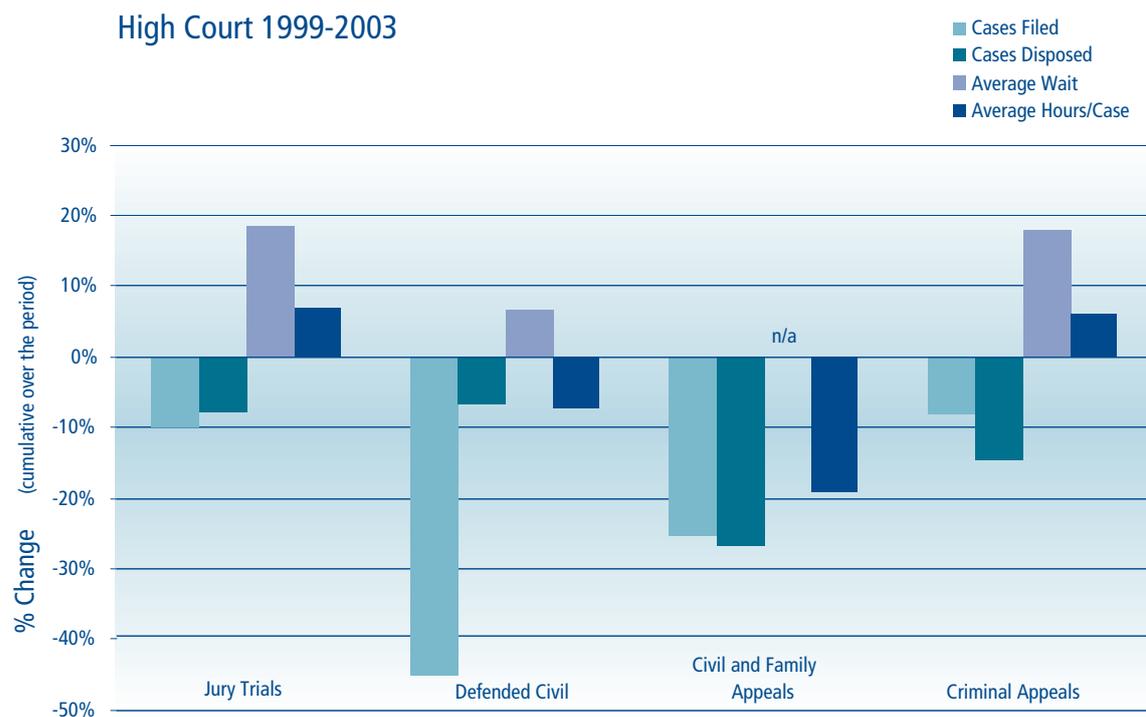
The graph indicates that at the District Court level:

- the number of cases filed has risen for jury, criminal summary and, to a small extent, Youth Court trials over the period 1999-2003. The number of defended civil cases filed, however, has fallen by more than 20 % over the four years;
- the number of cases disposed of over the period 1999-2003 has risen for the Youth Courts but fallen in the other three District Court categories. The number of defended civil cases processed by the court has fallen by nearly 50 % over the four years<sup>5</sup>;
- average waiting times have fallen slightly (by 2 %) for defended civil cases but increased in the other three categories, with waiting times increasing by 25 % for jury trials and 33 % for the high volume criminal summary proceedings. Despite the large decline in numbers of defended civil cases filed, average waiting times for these cases remain high at around 10 months; and
- the average number of sitting hours taken for each case has declined (by 4 %) for criminal summary proceedings but increased in the other three categories. The number of sitting hours taken per case has increased by 50 % for defended civil cases over the last four years, at the same time as the number of cases processed has fallen by a similar amount.

### 2.2.2 High Court

Performance indicators for the High Court are available for jury trials, defended civil hearings, civil and family appeals and criminal appeals. The changes since 1999 in the key performance indicators for these four activities are provided in figure 2 below.

Figure 2: High Court Performance Indicators



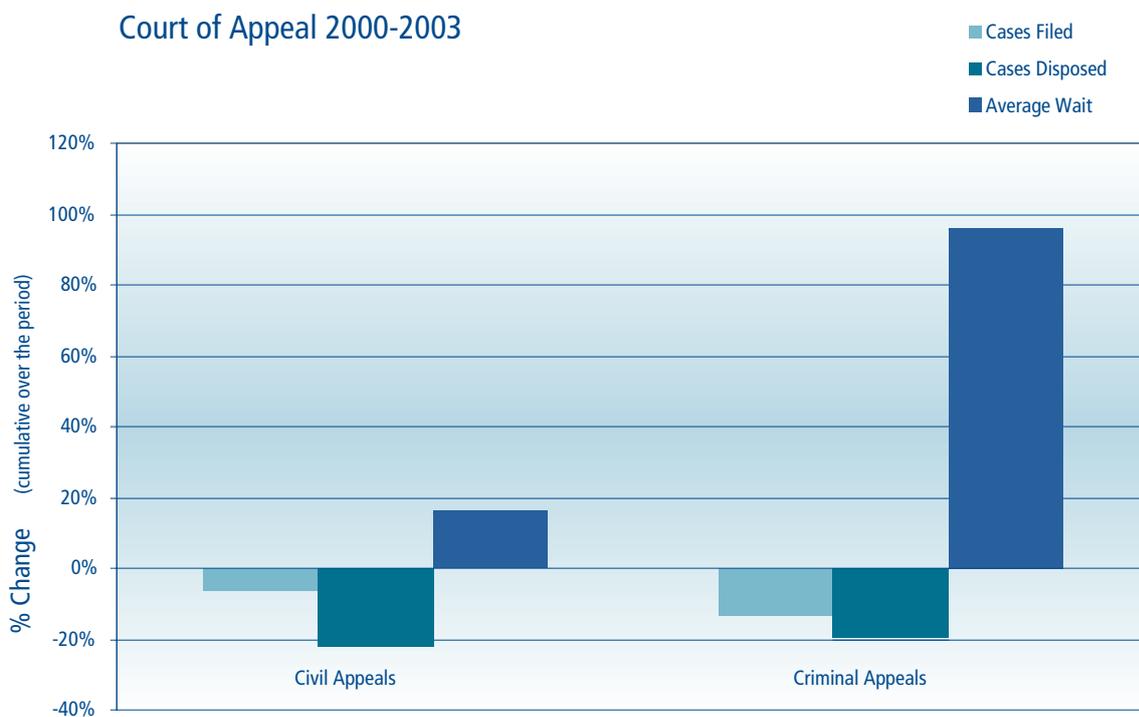
The graph indicates that at the High Court level:

- the number of cases filed has fallen in all four categories. The number of defended civil cases filed has fallen most sharply, declining by more than 40 % over the four years;
- the number of cases disposed of over the period 1999-2003 has also fallen in all four categories. The number of civil and family appeals processed fell most sharply (by 27 % over the period), while the number of cases processed for the more resource-intensive jury trials and defended civil cases fell by 7 to 8 % ;
- average waiting times have increased in all three categories for which data is available, despite the decline in number of cases filed noted above. In the case of civil and family appeals, no estimate is provided as the underlying data is not considered by the Ministry of Justice to be sufficiently reliable; and
- the average number of sitting hours taken for each case has declined for defended civil and civil and family appeals and increased for jury trials and criminal appeals.

### 2.2.3 Court of Appeal

Indicators since 2000 at the Court of Appeal are available separately for civil appeals and criminal appeals. The changes since 2000 in the performance indicators for these two activities are provided in figure 3 below.

Figure 3: Court of Appeal Performance Indicators





The graph indicates that at the Court of Appeal:

- the number of cases filed has fallen for both civil and criminal appeals, although by less than 10 % for the former;
- the number of cases disposed of over the period 2000-2003 has fallen by more than the decline in demand for both categories; and
- at the same time, average waiting times have increased in both categories, with average waiting times for criminal appeals almost doubling over the period.

Data on sitting hours is not available for the Court of Appeal.

## 2.3 Summing up

The available information indicates that, for the jurisdictions and time periods considered, there have in most cases been:

- falling levels of demand and throughput, with the Youth Court being the only jurisdiction where data is available where the volume of cases disposed of has increased. For half the categories considered, the numbers of cases processed has declined by more than 10 %;
- increased waiting times, with District Court defended civil cases being the only instance where waiting times have declined (and even here the decline is minimal and is in the context of a large decline in the number of cases filed); and
- increased time taken per case, with the numbers of sitting hours (or hearings) taken per case increasing in five of the eight categories for which data is available.

We emphasise that the numbers do not indicate the reasons for the trends noted above. The reasons are likely to be complex and multidimensional. The increasing time spent on cases may well be warranted for cases where the issues at hand are significant and complex. Further, as noted above, the trends may, in part or in whole, reflect factors beyond the ability of the courts system itself to directly control. Throughput in the Courts system is to some extent demand driven. Thus, for example, the marked decline in the number of civil cases is consistent with the trend towards increased reliance on mediation and arbitration evident in many countries in recent years. On the other hand, it may be that the increased waiting times for civil cases is one factor behind the apparent move to private mediation and arbitration services.

The following section considers the trends in expenditure in the court system in recent years. Developments in expenditure are a significant factor that need to be taken into account when considering the trends in the performance indicators of the court system noted above.

### 3. Expenditure on the courts system

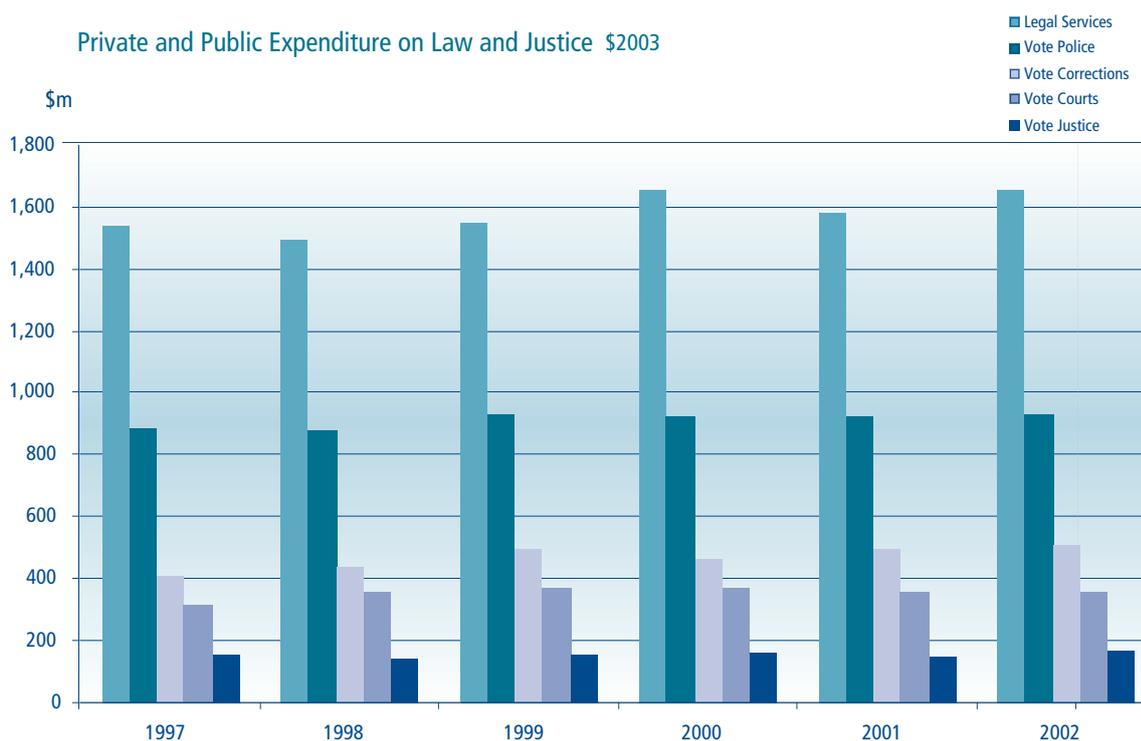
#### 3.1 Economy-wide expenditure on the justice system

The costs of the courts and justice system include:

- i. legal services costs (eg, lawyers’ fees);
- ii. the costs of the services provided by the Crown (eg, the courtrooms and the services of the judges and the Court support staff); and
- iii. the opportunity costs incurred by people when they use the courts system (eg, the time spent by the different parties in waiting, preparing for and attending court cases).

Little if any aggregate data on the third item (the opportunity costs) is available. However, information relating to the levels of expenditure on the other two items (the nation-wide costs of legal services and the costs to the taxpayer of the court system) is available and is presented in figure 4 below.

Figure 4



Sources: Legal Services data: Statistics NZ’s Annual Business Survey<sup>6</sup> Other data: The Treasury

Figure 4 above provides the levels of economy-wide expenditure on “legal services” (which is primarily private expenditure on lawyers’ fees) and public expenditure on justice-related activities (Votes Police, Corrections, Courts and Justice) over the period 1997 to 2002. The category “legal services” refers to total expenditure in the economy on legal services, including services provided by barristers, solicitors, and related legal service providers (refer endnote 6).



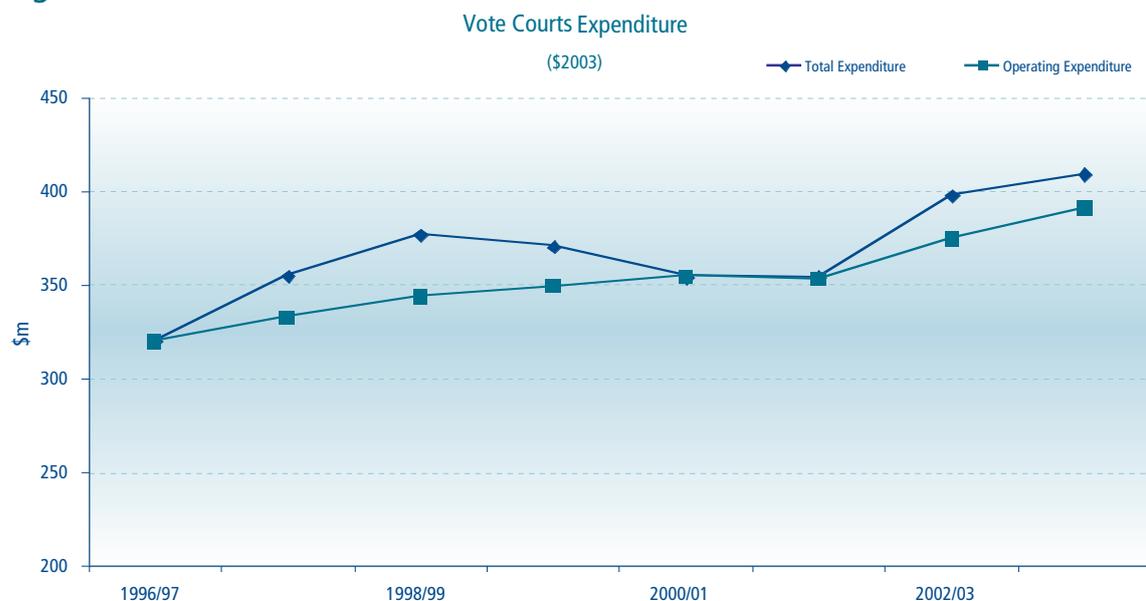
Figure 4 indicates that total expenditure on legal services was the most significant cost of the wider justice system (leaving aside opportunity costs), with total expenditure on legal services around \$1.6b in 2002.<sup>7</sup> Total public expenditure (ie, the total of Votes Police, Corrections, Courts and Justice) on the justice system was around \$2b. Public expenditure on Vote Courts (\$349m in 2002) equated to around 20% of the total costs of the wider justice system.

The legal services sector accounted for around 1.3% of GDP in NZ in 2002 and remained relatively stable as a percent of GDP over the six years for which data is available. Compared to the litigious US society, where total tort costs alone exceed \$US200b annually or 2% of GDP,<sup>8</sup> expenditure on legal services in New Zealand is relatively low.

### 3.2 Public expenditure on the courts system

Figure 5 below presents the trends in Government expenditure on court activities (Vote Courts) over the period 1996/97 to 2003/04. The figures are presented in 2003 dollars (ie, on an inflation adjusted basis). Total public expenditure on Vote Courts is budgeted to be \$408m in 2003/04. Total expenditure has risen (after allowing for inflation) by 28% over the last 7 years (or by 3.6% per annum). Operating expenditure (ie, total expenditure excluding capital spending) for Vote Courts has risen steadily on an inflation adjusted basis, from \$320m in 1996/97 to \$391m in 2003/04. The growth in public expenditure on Vote Courts has exceeded the growth in the overall economy by around 1 percentage point per annum over the period: as a result, operating expenditure on Vote Courts has risen marginally as a percent of the nation's Gross Domestic Product (GDP), from 0.29% of GDP to 0.30% of GDP.

Figure 5



Source of data: The Treasury

More detailed analysis of public expenditure on Vote Courts (refer Annex 2) indicates:

- expenditure on departmental outputs has increased (in 2003 \$) by 2.4 % p.a. on average;
- expenditure on judicial salaries and allowances has increased (in 2003 \$) by 4.8 % p.a.;
- expenditure on non-departmental outputs (e.g., Family Court counselling services) has increased (in 2003 \$) by around 4.4 % p.a.;
- expenditure on departmental servicing of the District Court accounts for around 24 % of total Vote Courts. Expenditure on departmental servicing of the District Court has grown by 1 % p.a. in inflation-adjusted terms over the period 2001- 04;
- the next most significant areas of institutional expenditure are departmental servicing of the Family Court (8 % of total) and the High Court (7 % of total), with expenditure on departmental servicing of the Family Court growing by 1.3 % p.a. (in 2003 \$) over the period, while expenditure on servicing the High Court has declined by 2.4 % p.a. (in 2003 \$) over the period;
- expenditure on departmental servicing of the Environment Court (2 % of the total) has grown strongly (by 12.5 % p.a. in 2003 \$), as to a lesser extent has servicing of the Waitangi tribunal (3.7 % p.a. in 2003 \$), while expenditure on departmental servicing of the Court of Appeal (1 % of the total) has declined by 5.9 % p.a. over the period (in 2003 \$); and
- expenditure on the “other” category (primarily debt collection and enforcement) has grown strongly (by 7.2 % p.a. in 2003 \$). The growth in expenditure in this category accounts for 37 % of the total growth in expenditure on Vote Courts over the period (refer Table 5 in Annex 2).

As noted in section 1 above, this paper is not intended to address the reasons for the observed trends in expenditure. Some of the changes noted above will be due to policy changes such as the decision to have security guards, the decision to expand the victims’ advisors service and the appointment of additional judges to address the consequences of the sentencing and parole reforms. Similarly, there will have been increased costs associated with the new court buildings at North Shore and Manukau. Costs associated with the provision for and write off of bad debts arising out of the former Department for Court’s share of fines revenue will have increased due to the increase in infringement fines lodged with the courts for collection. Further, during the period under review there have been a myriad of broader changes in the justice system, including changes to case law, changes to court procedures (driven by statute and judge-driven decisions – particularly affecting family and criminal jurisdictions), changes in police practices and the application of the criminal law, changes in civil court fees, etc. These changes will have significant but differing implications for the different court jurisdictions and the justice system as a whole.



## 4. Conclusions

This report has examined the available empirical information on trends in the performance and costs of the courts system in recent years. The available information indicates generally declining levels of throughput, increasing average waiting times and often increasing time spent in processing cases in the District Court, High Court and Court of Appeal over recent years. The declining levels of throughput have only partially been accompanied by falling levels of demand, while the lower levels of demand have not been associated with reduced waiting times. The analysis of expenditure in the courts and wider justice system indicates that the most significant item of expenditure in the wider justice system is the (largely private) expenditure on legal services, which amounted to around \$1.6b in 2002. Public expenditure on Vote Courts, while a relatively small item of total expenditure on the wider justice system, has grown by 3.6% per annum (after allowing for inflation) over the last seven years. Within this overall growth in public expenditure on Vote Courts, however, there have been some significant reprioritisations over the last four years, with areas of relatively strong growth being expenditure on fine collection and enforcement services, non-departmental outputs, judicial remuneration and departmental servicing of the Environment Court.

# Performance Indicators for the Courts System Annex 1

This annex provides background information on and further analysis of the performance indicators available for the courts system. In addition, trends in demand are provided by way of contextual information.

## 1. Demand

The Ministry of Justice has provided information on demand for the services of the courts over recent years.<sup>9</sup> Table 1 below presents the available information on the numbers of cases filed in the different courts in recent years (this data underlies the information provided on demand in the main report).

Table 1

| Cases filed in the courts     |                         |  |  |
|-------------------------------|-------------------------|--|--|
|                               | Number filed<br>2002/03 | Change since<br>1998/99 <sup>(1)</sup> | % change since<br>1998/99 <sup>(1)</sup> |
| Jury Trials (D.C.)            | 2,761                   | 253                                    | 10%                                      |
| Criminal Summary (D.C.)       | 141,658                 | 5,926                                  | 4%                                       |
| Youth Court (D.C.)            | 4,372                   | 115                                    | 3%                                       |
| Defended Civil (D.C.)         | 2,136                   | -752                                   | -26%                                     |
| Jury Trials (H.C.)            | 376                     | -41                                    | -10%                                     |
| Defended Civil (H.C.)         | 757                     | -622                                   | -45%                                     |
| Civil & Family Appeals (H.C.) | 255                     | -86                                    | -25%                                     |
| Criminal Appeals (H.C.)       | 887                     | -79                                    | -8%                                      |
| Civil Appeals (App Ct)        | 264                     | -19                                    | -7%                                      |
| Criminal Appeals (App Ct)     | 481                     | -75                                    | -14%                                     |

Source: Ministry of Justice 1. Court of Appeal Data is since 1999/2000.

The table indicates that, as would be expected, the District Court received by far the largest number of cases, with criminal summary proceedings dominating the figures. As is discussed in the main report, the trend over the last four years has been one of declining demand for most of the court services. The number of cases filed has declined in seven of the ten categories presented above. The number of civil cases filed has fallen particularly strongly, with numbers of defended civil cases filed in the District Court falling by 26% over the last four years and in the High Court by 45%. It is only for jury trials at the District Court that the number of cases filed has increased significantly in percentage terms over the period.



## 2. Throughput

Information on activity levels in the courts system over recent years has been provided by the Ministry of Justice. Table 2 below presents the available information on throughput volumes for the court system. The information presented is the number of cases “disposed of” by the different courts in recent years (this data underlies the information provided on throughput in the main report).

Table 2

| Cases “disposed of” by the courts |                            |                                     |                                       |
|-----------------------------------|----------------------------|-------------------------------------|---------------------------------------|
|                                   | Number disposed in 2002/03 | Change since 1998/99 <sup>(1)</sup> | % change since 1998/99 <sup>(1)</sup> |
| Jury Trials (D.C.)                | 2,633                      | -44                                 | -2%                                   |
| Criminal Summary (D.C.)           | 138,565                    | -1,546                              | -1%                                   |
| Youth Court (D.C.)                | 4,171                      | 150                                 | 4%                                    |
| Defended Civil (D.C.)             | 2,306                      | -2,085                              | -48%                                  |
| Jury Trials (H.C.)                | 382                        | -32                                 | -8%                                   |
| Defended Civil (H.C.)             | 836                        | -60                                 | -7%                                   |
| Civil & Family Appeals (H.C.)     | 282                        | -103                                | -27%                                  |
| Criminal Appeals (H.C.)           | 920                        | -157                                | -15%                                  |
| Civil Appeals (App Ct)            | 244                        | -70                                 | -22%                                  |
| Criminal Appeals (App Ct)         | 451                        | -112                                | -20%                                  |

Source: Ministry of Justice

1. Court of Appeal Data is since 1999/2000.

As is discussed in the main report, the number of cases processed has declined in recent years in nine of the ten categories presented above. The number of civil cases processed has fallen particularly strongly, with numbers of defended civil cases processed at the District Court falling by 47% over the last four years and at the High Court by 7%. It is only in the Youth Court (4% increase since 1999) that some increase in volumes is evident.

### 3. Timeliness

In regard to timeliness, our analysis of the data from the Ministry of Justice is presented in table 3 below (this data underlies the information provided on timeliness in the main report).

Table 3

| Average Waiting Times (months) |                                       |  |
|--------------------------------|---------------------------------------|--|
|                                | Ave. waiting time in 2002/03 (months) | Change from 1998/99 <sup>(1)</sup> to 2002/03 (months) |
| Jury Trials (D.C.)             | 5.4                                   | 1.1  |
| Criminal Summary (D.C.)        | 2.6                                   | 0.6  |
| Youth Court (D.C.)             | 3.7                                   | 0.1  |
| Defended Civil (D.C.)          | 10.3                                  | -0.2   |
| Jury Trials (H.C.)             | 4.1                                   | 0.7  |
| Defended Civil (H.C.)          | 4.9                                   | 0.3  |
| Criminal Appeals (H.C.)        | 1.4                                   | 0.2  |
| Civil Appeals (App Ct)         | 7.0                                   | 1.0  |
| Criminal Appeals (App Ct)      | 4.6                                   | 2.2  |

Source of raw data: Ministry of Justice 1. Court of Appeal Data is since 1999/2000.

The table indicates that in 2002/03, average waiting times varied from around 1.4 months for criminal appeals at the High Court level to 10.3 months for civil cases at the District Court level. Average waiting times have increased in eight of the nine categories in recent years, despite a decline in the number of cases filed in most cases (refer table 1 above). For example, average waiting times for criminal appeals in the Court of Appeal level have increased by around 2.2 months since 1999/2000, despite a 13% decline in the number of cases filed. For jury trials at the High Court, average waiting times have increased by close to three weeks, despite a 10% decline in the number of cases filed. On the other hand, the 26% reduction in the number of defended civil cases filed at the District Court level has been associated with a small decline (of 0.2 months or 2%) in average waiting times.

It should be recognised that courts may have only limited control over how long a case takes or over any delays sought by prosecutors or defence counsel. Nevertheless, the reasons for the increase in average waiting times over the last three to four years in all but one of the ten categories considered above is likely to be worthy of further investigation.



## 4. Sitting hours spent per case

Sitting hours spent per case is a measure of how long it takes, in terms of court sitting hours, for a case to be processed. Table 4 below shows trends in sitting hours per case by jurisdiction over recent years (this data underlies the information provided on hours per case in the figures in the main report).

Table 4

| Hours per case                |  |   |
|-------------------------------|--|---|
|                               | Hours per case in 2002/03 <sup>(1)</sup> | % change from 1998/99 <sup>(2)</sup> to 2002/03 |
| Jury Trials (D.C.)            | 6.5                                      | 9%  |
| Criminal Summary (D.C.)       | 0.2                                      | -4%   |
| Youth Court (D.C.)            | 0.7                                      | 4%  |
| Defended Civil (D.C.)         | 2.1                                      | 50%   |
| Jury Trials (H.C.)            | 18.7                                     | 7%  |
| Defended Civil (H.C.)         | 5.6                                      | -7%   |
| Civil & Family Appeals (H.C.) | 2.6                                      | -19%  |
| Criminal Appeals (H.C.)       | 0.9                                      | 6%  |

Source of raw data: Ministry of Justice

The table indicates that the average court time to handle a case has increased in five of the eight categories for which data is available. Most notable is the 50% increase in the average court time taken to handle defended civil cases in the District Court. In contrast, the average court time to handle civil and family appeals at the High Court has fallen by 19% over the period.

It should be noted that the hours recorded are sitting hours only: ie, the numbers do not include time spent considering or processing cases outside the hearing. Information on sitting hours is not available for the Court of Appeal.

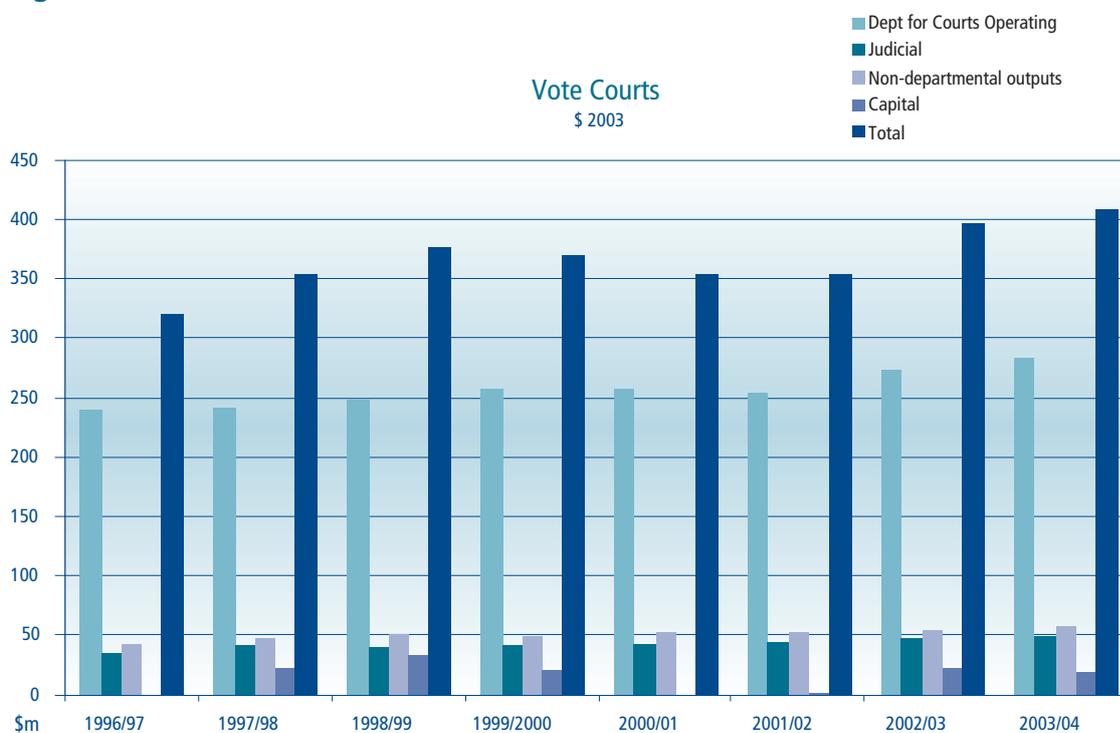
# Analysis of public expenditure on Vote Courts Annex 2

This annex provides background information on the analysis of expenditure on Vote Courts.

## Expenditure by category of expenditure

Figure 6 below disaggregates the public expenditure on Vote Courts (on an inflation adjusted basis) into the major categories of expenditure.

Figure 6



Source of raw data: The Treasury. Prior to 1999/00, non-departmental outputs were classified as part of Department for Courts expenditure. For the purposes of the above analysis it has been assumed that non-departmental outputs prior to 1999/00 were the same percent of total expenditure as they were in 1999/00.



The figure indicates:

- expenditure on departmental outputs has increased (in 2003 \$) from around \$240m in 1996/97 to \$288m in 2003/04: a real increase of 2 % p.a. on average;
- expenditure on judicial salaries and allowances has increased (in 2003 \$) from \$35m to \$49m: an average real increase of 4 % p.a.; and
- expenditure on non-departmental outputs (eg, Family Court counselling services) has increased in total from around \$43m to \$58m (in 2003 \$): an average real increase of 4 % p.a.

## Detailed analysis of public expenditure

A more detailed analysis of expenditure over the period 2001- 04 (refer Table 5 below) indicates:

- 24 % of total Vote Courts is accounted for by departmental servicing of the District Court. Expenditure on departmental servicing of the District Court has grown by 1 % p.a. (in inflation-adjusted terms) over the period, with expenditure on criminal jury trials accounting for most of the growth at the District Court level;
- the next most significant areas are departmental servicing of the Family Court (8 % of total) and of the High Court (7 % of total), with expenditure on servicing the Family Court growing by 1.3 % p.a. (in 2003 \$) over the period, while expenditure on servicing the High Court has declined by 2.4 % p.a. (in 2003 \$) over the period. We understand the decline in expenditure on servicing the High Court largely reflects reductions in the capital charge and some reallocation of overheads. The decline in High Court expenditure has occurred in civil case management, with expenditure on criminal case management increasing;
- expenditure on departmental servicing of the Environment Court (2 % of the total) has grown strongly (by 12.5 % p.a. in 2003 \$), while expenditure on servicing the Court of Appeal (1 % of the total) has declined by 5.9 % p.a. (in 2003 \$). We understand the decline in estimated expenditure on servicing the Court of Appeal largely reflects reductions in the capital charge and a reallocation of overheads; and
- expenditure on the “other” category (primarily debt collection and enforcement) has grown strongly (by 7.2 % p.a. in 2003 \$). The growth in expenditure in this category accounts for 37 % of the total growth in expenditure on Vote Courts over the period.

**Table 5: Vote Courts Expenditure Analysis**

|  | 2000/<br>01 | 2001/<br>02 | 2002/<br>03 | 2003/<br>04 | % of<br>total<br>2004 | Growth<br>2001-04<br>\$m<br>2003 | Contribution<br>to<br>Total Growth | Growth<br>2001-04<br>% | Growth<br>rate<br>2001-04<br>% p.a. |
|--|-------------|-------------|-------------|-------------|-----------------------|----------------------------------|------------------------------------|------------------------|-------------------------------------|
|  | \$m 2003    |             |             |             |                       |                                  |                                    |                        |                                     |
| <b>Departmental Op Ex</b>              |             |             |             |             |                       |                                  |                                    |                        |                                     |
| District Court                         | 93          | 93          | 95          | 97          | 24%                   | 4                                | 7%                                 | 4%                     | 1.0%                                |
| Family Court                           | 29          | 29          | 30          | 31          | 8%                    | 2                                | 3%                                 | 5%                     | 1.3%                                |
| High Court                             | 32          | 31          | 30          | 29          | 7%                    | -3                               | -6%                                | -9%                    | -2.4%                               |
| Other Tribs and Auth                   | 12          | 11          | 12          | 11          | 3%                    | -1                               | -2%                                | -7%                    | -1.7%                               |
| Disputes Tribunal                      | 9           | 9           | 8           | 8           | 2%                    | -1                               | -2%                                | -9%                    | -2.3%                               |
| Maori App Ct and<br>Land Ct            | 7           | 8           | 8           | 8           | 2%                    | 1                                | 2%                                 | 11%                    | 2.5%                                |
| Waitangi Tribunal                      | 6           | 6           | 8           | 7           | 2%                    | 1                                | 2%                                 | 16%                    | 3.7%                                |
| Environment Court                      | 4           | 5           | 6           | 7           | 2%                    | 3                                | 5%                                 | 60%                    | 12.5%                               |
| Court of Appeal                        | 4           | 4           | 3           | 3           | 1%                    | -1                               | -2%                                | -22%                   | -5.9%                               |
| Other (1)                              | 61          | 59          | 73          | 81          | 20%                   | 20                               | 37%                                | 32%                    | 7.2%                                |
| <b>Total Departmental<br/>Op Ex</b>    | <b>259</b>  | <b>255</b>  | <b>273</b>  | <b>282</b>  | <b>69%</b>            | <b>24</b>                        | <b>45%</b>                         | <b>9%</b>              | <b>2.2%</b>                         |
| Judges Salaries and<br>Allowances      | 43          | 45          | 48          | 49          | 12%                   | 6                                | 11%                                | 13%                    | 3.1%                                |
| Non-Departmental<br>Outputs            | 53          | 53          | 54          | 58          | 14%                   | 5                                | 10%                                | 10%                    | 2.4%                                |
| <b>Total Operating<br/>Expenditure</b> | <b>355</b>  | <b>353</b>  | <b>375</b>  | <b>389</b>  | <b>95%</b>            | <b>35</b>                        | <b>65%</b>                         | <b>10%</b>             | <b>2.4%</b>                         |
| <b>Capital Expenditure</b>             | <b>0</b>    | <b>1</b>    | <b>23</b>   | <b>19</b>   | <b>5%</b>             | <b>19</b>                        | <b>35%</b>                         |                        | <b>0.0%</b>                         |
| <b>Total Expenditure</b>               | <b>355</b>  | <b>354</b>  | <b>398</b>  | <b>408</b>  | <b>100%</b>           | <b>54</b>                        | <b>100%</b>                        | <b>15%</b>             | <b>3.6%</b>                         |

Source: Department for Courts and the Treasury. The figures consider only direct expenditure by the Department for Courts at the different institutions.



## Endnotes

- <sup>1</sup> Average waiting time is defined as the average time between when a case is filed and when the case is heard, settled or withdrawn (generally when a case is heard it is decided, but in some cases a decision is reserved). In the case of jury trials, the starting point is taken as when the case is committed for trial.

Technically, average waiting time (AWT) is calculated in this paper as a stock-turnover ratio where the stock is the number of cases on hand (COH) and the turnover is the number of cases disposed of per annum (CDOannual):

$$\text{AWTmonths} = (\text{COHbeg} + \text{COHend}) / 2 / \text{CDOannual} * 12$$

It should be noted that the estimated waiting times may be affected by the relatively small numbers in some categories (the Appeal Court cases and High Court Jury Trials and Civil and Family Appeals) and by fluctuations in the timing of new cases being lodged or cases being disposed of.

- <sup>2</sup> The Ministry of Justice's new Case Management System will enable analysis of individual cases to occur but it has not been in place long enough to enable trends to be determined.
- <sup>3</sup> Indicators such as the number of appeals to a higher jurisdiction or the number of cases stayed in the criminal jurisdiction could usefully be developed if the information is available and resources permit. These indicators would be likely to provide insights into the quality of the processes and information presented in the primary courts.
- <sup>4</sup> It should be noted that the numbers provided are the cumulative changes over the four years 1999 to 2003 (i.e. not annual average changes). They are summary averages and as such do not reflect volatility in the series during the period. The estimates will inevitably be influenced by the levels of the indicators at the start and end of the periods.
- <sup>5</sup> The decline in the number of civil cases is likely to reflect in part a switching of civil cases to private dispute resolution, with or without lawyers. The court system is only one aspect of people's access to justice.
- <sup>6</sup> The legal services data has been obtained from Statistics NZ's Annual Business Survey, Australian and New Zealand Standard Industrial Classification (ANZSIC) sub-class L784100: Legal Services. This sub-class is defined as units mainly engaged in providing legal services and includes advocates, barristers, conveyancing services, notary (own account), solicitors, legal aid services and patent attorneys. The L784100 industry data is at a lower level than designed industry groupings. Statistics NZ caution that because sample sizes and weights are designed at a higher level, sample error at lower levels is not controlled and year on year data movements should be interpreted in the context of possible changing sample sizes.

- 
- 
- <sup>7</sup> The different parts of the justice system are closely interrelated and behaviour in one part of the system is likely to influence costs and behaviour in another. Thus, for example, the use of the courts is likely to be very significantly influenced by behaviour and costs of the legal system. On the one hand, effective use of the legal system may reduce the demand for the courts (eg, by resolving disputes). On the other hand, demand for the court system might also be reduced if the costs of the legal system are too high relative to the expected benefits to the client.
- <sup>8</sup> <http://www.triallawyersinc.com/html/part01.html>
- <sup>9</sup> The data includes information on the number of cases outstanding at the beginning of each year, the number of cases filed and the number of case disposed of at the national level for 10 different categories. Annual data is available for all categories since 1998/99, except for the Court of Appeal where data is available since 1999/2000.