

SEEKING SOLUTIONS

*Options for
change to the
New Zealand
Court System*

HAVE YOUR SAY

Part 2



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

December 2002
Wellington, New Zealand

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About the Law Commission...

The Law Commission is an independent, publicly funded, central advisory body, established by statute in 1985 to promote the systematic review, reform and development of the law of New Zealand. In making its recommendations, the Commission must take into account te ao Māori (the Māori dimension) and give consideration to the multicultural character of New Zealand society. It must also have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable.

The Law Commission has up to six members who are appointed for terms of up to five years. The present Commissioners are:

The Hon Justice J Bruce Robertson – President

Judge Patrick Keane

Professor Ngatata Love QSO JP

Vivienne Ullrich QC



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Foreword: Seeking Solutions

Public confidence in the courts cannot be taken for granted. The maintenance of our democratic constitutional arrangements depends, among other things, on people in all parts of society having confidence in the justice system. Courts have to work well – and be seen to work well – for our democracy to work well.

The Law Commission published *Striking the Balance* – the first discussion document paper in this review of the courts, which the commission is carrying out at the Government’s request – to try to capture the day to day reality for all people who are involved in the court system.

We were heartened by the responses. The commission has received more submissions to *Striking the Balance* than on any paper in the past five years, and there has been further feedback through formal and informal consultation with individuals and groups. The breadth and depth of the contributions indicated the importance people place on our court system and how well it functions. The responses do, however, demonstrate that there are serious issues for people who come into contact with the courts.

This discussion document analyses these issues, and national and international issues and trends in court reform.

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. This exercise has proved – if proof was needed – that this is no longer the case in New Zealand. We are seeking solutions to redress this. Many of the issues are exceedingly difficult – but this is not a reason to avoid them.

We identify options ranging over an array of issues. Some will be attractive to some sectors but quite unacceptable to others. None are concluded views. We are raising possible changes which might – while the fundamental core of our system is preserved or enhanced – improve the operation of the courts and make them more accessible to the entire community and not merely parts of it.

We certainly do not have any monopoly on ideas as to the best changes. If we are to turn the rhetoric of universally available equal justice into reality, we have to look for better ways. It is unacceptable to say those who criticise or advocate change are just malcontents.

Our research suggests that altering jurisdictional lines and changing physical processes would be the least difficult part. Much more demanding will be changing attitudes and approaches which are deeply entrenched but which unintentionally create barriers and alienate too many people.



We have not lost sight of the fundamental tenet that the courts are an important part of our constitutional arrangements. Alterations can be made only after careful consideration. But if we are to acknowledge the dissatisfaction of many people in this country we must be prepared to hear everyone and treat their perspectives seriously.

New Zealand prides itself on being a leader of social reform. But when it comes to justice and its application through the courts we appear to be lagging behind countries we compare with such as the UK, Australia and Canada. Their recent experiences could assist us.

In the end we must have solutions that are of and for New Zealanders. Just as our law is better for being tested and tempered by society, so too will be any review of our courts where those laws are applied.

The Law Commission urges readers to respond.

J Bruce Robertson
President
Law Commission

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.

May 2001



About this document

Seeking Solutions is the second discussion document in a three-stage review of the New Zealand court system by the Law Commission.

This document is in five parts:

Voices summarises the most common and strongly held views that people voiced about the court system and the suggestions they made to improve it in the submissions and consultation meetings that followed the May 2002 release of *Striking the Balance*. Following the summary of general themes are four chapters presenting the views of four groups of New Zealanders who have particular perspectives on the system: **Māori**, people belonging to *ethnic minorities*, *victims* and *people with disabilities*.

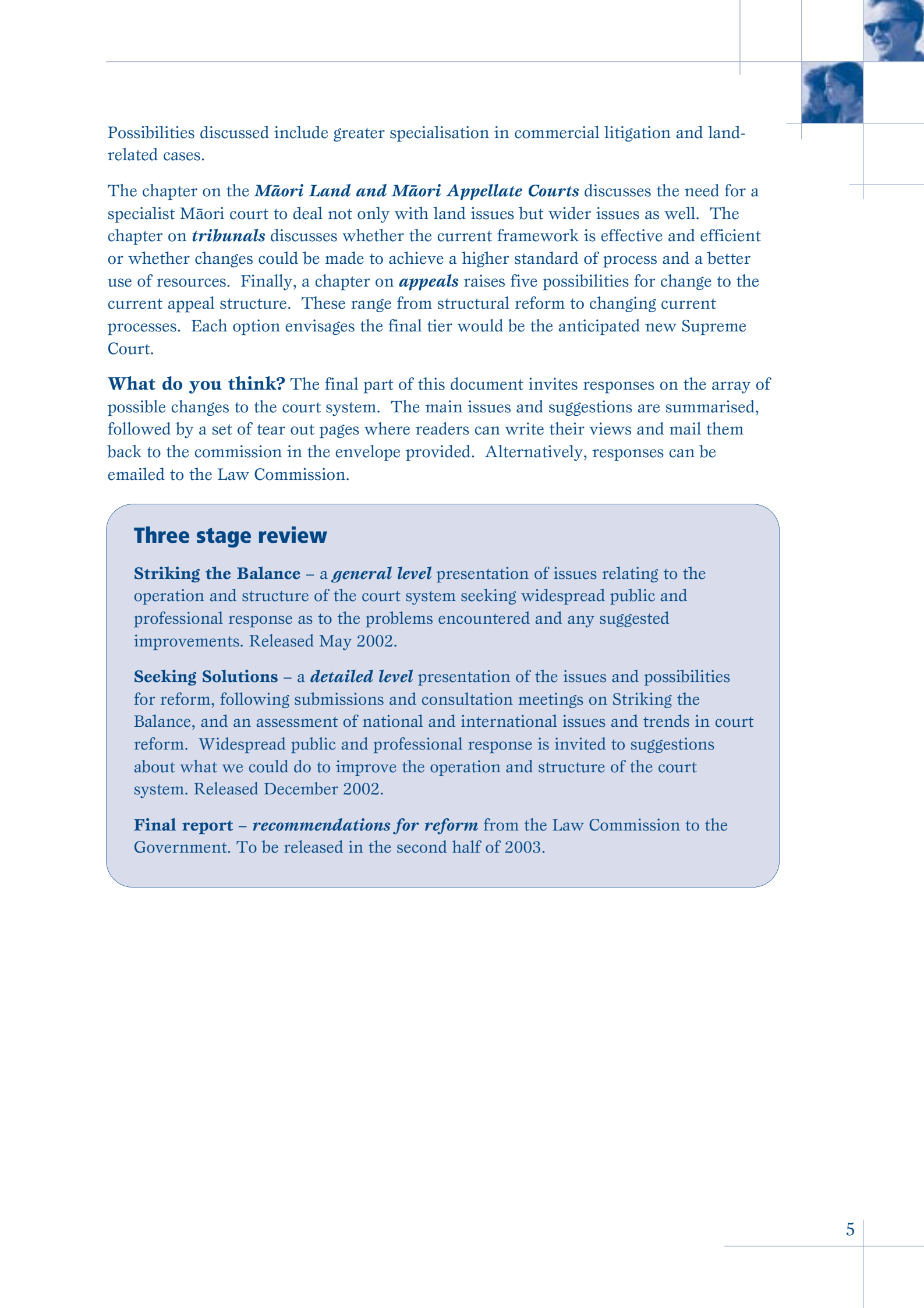
Access to courts discusses the four main problem areas for most people who use the courts. The first of these is the lack of available, and suitable, legal and court-related information to help people make informed choices about their rights and duties. When it comes to *connecting with courts*, questions about the best compromise between bricks and mortar and information technologies are considered. The system assumes that people coming before the courts will be represented by qualified, capable lawyers when, in reality, increasing numbers of people are without *representation*. Finally, more and more New Zealanders consider the *cost* of court action so high as to put access to courts beyond their reach.

Processes discusses criminal and civil justice processes and seeks ways to make the court system more efficient while ensuring that processes are proportionate to the issues, and the rights of all parties are safeguarded.

The *criminal justice* section starts with discussion of the ways the state deals with offenders *outside the court* such as the police discretion to warn, caution or divert, restorative processes, and minor and infringement offences. The *criminal list* chapter considers ways of making the list court a more understandable, less alienating place whilst retaining its efficiency. The next chapter considers ways of reducing delays by the pre-trial *management of jury trials*.

The *civil justice* section also starts with discussion of ways cases can be resolved out of court, by greater use of *alternative dispute resolution*. The next chapter examines whether the current use of *court rules and case management* to supervise civil cases can be reformed to bring greater efficiency and fairness to the system and reduce cost. The last chapter looks at the processes for *high volume cases* – debt and small claims – that make up the large majority of the District Court caseload, and whether these might be streamlined. The final chapter discusses *open justice* in both criminal and civil courts, in particular the public's access to court hearings and to the records of court hearings, as well as what can be published about hearings.

Structure discusses workloads in the *general courts*, and looks at options for distributing work between the High Court and the District Court. The options discussed include the concept of a unified court of original jurisdiction or increased concurrence between the courts, and the establishment of a new court of original jurisdiction below the District Court (or a new class of judicial officer) to deal with high volume civil and criminal work. A chapter on *specialist courts* reviews the existing specialist courts and discusses whether the present degree of specialisation in the court system is appropriate.



Possibilities discussed include greater specialisation in commercial litigation and land-related cases.

The chapter on the *Māori Land and Māori Appellate Courts* discusses the need for a specialist Māori court to deal not only with land issues but wider issues as well. The chapter on *tribunals* discusses whether the current framework is effective and efficient or whether changes could be made to achieve a higher standard of process and a better use of resources. Finally, a chapter on *appeals* raises five possibilities for change to the current appeal structure. These range from structural reform to changing current processes. Each option envisages the final tier would be the anticipated new Supreme Court.

What do you think? The final part of this document invites responses on the array of possible changes to the court system. The main issues and suggestions are summarised, followed by a set of tear out pages where readers can write their views and mail them back to the commission in the envelope provided. Alternatively, responses can be emailed to the Law Commission.

Three stage review

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

Seeking Solutions – a *detailed level* presentation of the issues and possibilities for reform, following submissions and consultation meetings on Striking the Balance, and an assessment of national and international issues and trends in court reform. Widespread public and professional response is invited to suggestions about what we could do to improve the operation and structure of the court system. Released December 2002.

Final report – *recommendations for reform* from the Law Commission to the Government. To be released in the second half of 2003.



What do YOU THINK

We need your help to make the courts work better for all New Zealanders. At the end of this document there is a summary of the main issues and the possibilities for change that we identified, followed by submission pages for you to tell us what you think.

Feel free to comment on as few or as many of the topics as you wish, briefly or in detail. Your responses will help us make recommendations to the Government on ways to improve the New Zealand court system.

The options are not designed to be a single package, but to be a range of possibilities to choose from. You will find that some of them would never fit together, while some would fit together well. There may also be issues or implications we have overlooked, and we welcome you highlighting these for us.

Please write your views on the tear-out submission pages following the summary – or separately if you prefer – and return in the addressed envelope provided. If you want to send your submission by email, please address it to com@lawcom.govt.nz, and put "Courts Submission" in the subject line.

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We need to have submissions by Easter - 17 April 2003.

Glossary of terms

<i>Legal words</i>	<i>Meaning</i>
<i>Ad hoc</i>	For a specific purpose.
<i>Adjudicate</i>	Judging or determining a matter in contention.
<i>Adjudicative bodies</i>	State-sponsored agencies with a decision-making function, eg, courts and tribunals.
<i>Adjudicator</i>	A general term for anyone who has the task of resolving an issue on which a decision has to be made.
<i>Appeal</i>	Reconsideration of a decision already taken by another court.
<i>Appellate</i>	A body that can hear an appeal ie, reconsider an issue that has already been determined at a lower level.
<i>Arraignment</i>	The accused is brought before the court to plead to the criminal charge.
<i>Call (first)</i>	The initial occasion when the case is considered in court.
<i>Case management (guidelines)</i>	Arrangements for the more efficient and disciplined progress and dispatch of litigation.
<i>Civil (disputes)</i>	All cases heard in the courts that are not criminal cases.
<i>Codified (procedure)</i>	Collected in one place (usually in legislation).
<i>Complainant</i>	The person against whom a wrong has allegedly been done.
<i>Court of Appeal</i>	The highest court within New Zealand, subject only to the right to go to the Privy Council in some circumstances. In most cases, the Court of Appeal finally determines legal rights and responsibilities.
<i>Courts</i>	The most formal adjudicative bodies created by the state.
<i>Defendant</i>	A person against whom a court process is initiated. The word is used in both civil and criminal cases. In the High Court, the person against whom an allegation is made is normally referred to as the “accused”.
<i>Discovery/Disclosure</i>	When one party in a legal action discloses to the opposing party documents that could be relevant to the dispute.
<i>District Courts</i>	The common courts of general jurisdiction in New Zealand. They deal with the overwhelming 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 the court is often informally referred to as one court rather than a collection of courts.



<i>Diversion</i>	A process which allows criminal cases to be concluded without a conviction being entered on a person's record.
<i>Due process</i>	Established court practices and principles that ensure fairness.
<i>Early disclosure</i>	Advising the opposing side what the contentious issues are, at the beginning of the legal process.
<i>Family Court</i>	The only court that can hear matters involving personal relationships, the consequences of their breakdown, and the position of children.
<i>Family Group Conference</i>	A meeting involving a young person who is alleged to have done wrong, together with those who are part of his/her life and those whom s/he is alleged to have wronged.
<i>First instance</i>	The primary consideration of a case by a court.
<i>General courts</i>	The High Court and the District Courts, as opposed to specialist courts.
<i>High Court</i>	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.
<i>Immunity (from prosecution)</i>	Exemption or protection from legal proceedings.
<i>Indictable (cases)/ indictably</i>	Cases where there is a right to trial by jury.
<i>Inherent jurisdiction</i>	The residual power that a court has to ensure the proper and complete administration of justice.
<i>Inquisitorial</i>	An adjudication in which the judge takes an active role in resolving the matter.
<i>Interlocutory</i>	A step after the court process has started but before the ultimate determination.
<i>Interrogatories</i>	A series of written questions required by one party to a court case to be answered by the other party.
<i>Judicial officers</i>	People who preside in courts and tribunals.
<i>Jurisdiction</i>	The area of the law which a particular court has the ability to deal with and make determinations about.
<i>Law Society</i>	The professional body representing all lawyers. Membership is currently compulsory.
<i>Litigant</i>	A person who is involved in a hearing or case within the court system.
<i>Magistrates' Court</i>	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.

<i>Master</i>	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.
<i>Natural justice</i>	Principles which to ensure that court processes are fair, robust and transparent.
<i>Non-defended hearing</i>	A matter where only the asserting party appears.
<i>Omnibus legislation</i>	A comprehensive statute covering many areas.
<i>Plaintiff</i>	A person who initiates a civil action in either the District Court or the High Court.
<i>Practice notes</i>	Directions issued by the Head of a Court as to how matters are to be conducted in that court.
<i>Precedent</i>	A decision in a previous case.
<i>Private good</i>	The benefit is substantially for individuals.
<i>Privy Council</i>	Presently the ultimate court in the New Zealand hierarchy. It sits in England and includes British Law Lords among its members.
<i>Proportionality/ proportionate</i>	Balancing the investment or effort against the possible outcome.
<i>Public good</i>	A society-wide as opposed to an individual benefit.
<i>Quasi-appeal</i>	A process which is similar to an appeal.
<i>Quasi-judicial</i>	Carrying out a function which is in part judicial.
<i>Quorum</i>	The number required to be present before a body can operate.
<i>Registrar</i>	The senior officer responsible for the organisation and administration of a court.
<i>Registry (court)</i>	The administrative and processing function in a court.
<i>Specialist courts</i>	Those courts which deal with defined areas of dispute, eg Family Court.
<i>Summary (cases)/ summarily</i>	Matters which are dealt with by a judge alone, without a jury.
<i>Tort</i>	A private wrong or injury (independent of contract law) for which a court will provide a remedy.
<i>Tribunals</i>	A variety of state-supported agencies that deal in a less formal way with particular sorts of disputes.
<i>Without prejudice</i>	Offers or positions adopted during negotiation which are not binding if the negotiation doesn't achieve a resolution.



Māori words

Meaning

hapū

A sub-tribe, extended family group linked through whakapapa to a common ancestor

iwi

Tribe, a number of related hapū make up an iwi.

kawanatanga

Government.

marae kawa

Marae protocol.

rangatiratanga

Chieftdomship.

rūnanga

Māori tribal organisation/authority, assembly, council.

taonga tuku iho

Highly prized property or treasure; a treasure as handed down (by the ancestors).

te reo Māori

Māori language.

tikanga Māori

Māori customs.

tino rangatiratanga

Sovereignty, the right to self-determination.

wāhi tapu

Sacred place, reserved ground.

whakapapa

Genealogy, the principle of kinship.

whānau

Family. The word whānau means to give birth.

whāngai

Nourish, bring up, feed - care for/adopt a child.



Part One: Voices

When the Law Commission released *Striking the Balance*, it asked New Zealanders for their opinions and experiences of the court system. In particular, it wanted to hear about problems people had encountered, and any suggested improvements.

The first submission came in by email the day after the document was released. Submissions continued until more than 300 had been received – twice what the commission has received on any paper in the last five years. About 50 came from community groups, 60 from lawyers and court-related organisations, and the rest from individuals.

The written submissions range from a single page to post graduate theses. Some focus on only one or two areas of concern, others have detailed comments on a whole range of issues. Some tell of bad experiences with the courts, but usually go on to suggest ways in which that might be avoided in the future.

Several community groups organised their own consultation processes, to represent faithfully their members' views and concerns. One community law centre consulted with 63 community organisations, a dozen refugee and immigrant groups, and collected 100 questionnaires from their clients. Buddle Findlay, a national law firm, made a major contribution through its survey of 28 leading corporate organisations throughout New Zealand.

Aware of the issues specific to Māori and Pacific people, the commission organised a programme of hui and fono. The commission extensively consulted women about justice issues just a few years ago, and that material has been reviewed.

As well as circulating *Striking the Balance* widely within the community, the commission encouraged submissions through media interviews and articles, held a workshop with national community organisations, and met with people both on remand and serving sentences in prison.

UMR Research Ltd was commissioned to undertake qualitative research. Six focus groups were held in different parts of the country 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.

Both the submissions and the qualitative research clearly show that there are serious issues for most New Zealanders who come into contact with the courts. These centre on inadequate information, cost, confusing processes, an intimidating atmosphere, perceived inefficiencies and delay. But while these criticisms are significant and strong, most think that at its core the system is essentially sound.

What follows is a summary of the general themes – the most common and the most strongly held views that people voiced about the court system, and some of the suggestions they made to improve it.

Following that we hear from four groups of New Zealanders who have particular perspectives on the court system. These are Māori, people belonging to ethnic minorities, victims, and people with disabilities.



General Themes

Information

A constant theme from all quarters was that current court-related information is inadequate. Many of the problems people have with the system can be traced to this inadequacy. A key concern is the extent to which people denied information are also denied justice through not knowing what they could or should do.

The call for more and better information spans the civil and criminal court processes. Those wanting to use the courts to enforce their rights report an almost complete absence of basic information. People wanting to collect a legitimate debt, or seeking help with a family issue, or to complain about what they see as the illegal actions of an individual or organisation, report that it is extremely difficult to find a way “in” to the court system.

“There is a lack of appropriate information for justice and court constituents, and a general lack of understanding about the court system, the processes within, the range of services available in the court, and support for people seeking justice.”

Citizens’ Advice Bureaux

“On page 19 [of *Striking the Balance*] the statement is made: The court system can be mysterious and many people from minority groups do not feel confident that they understand what goes on or that they will be fairly treated. The words ‘from minority groups’ appear to be redundant.”

NZ Business Roundtable

Those who receive a summons to appear in court often do not know such basics as where they should go, when they should go, what help they could get, what their rights are, what they could expect to happen, how much it might cost, or how long it would take. Some people acknowledged that some of that information may well have been included with the summons, but said they could not understand it because of the “technical” language used.

“Even if it’s a traffic offence, you ring your cousin and ask what to do. You can’t read the back of the piece of paper.”

Auckland fono

Perhaps the most consistent information issue raised was the extent to which people feel lost and intimidated when they arrive at the courthouse, not knowing what to expect or do. Submission after submission talked about the problem beginning from the moment people walk in the main doors.

“I was arrested in 1999. I had no previous convictions. When I was arrested I was in shock. Nothing prepared me for the court appearances. I did not know what to do. There was nothing available to inform me, no posters in the court foyer, no pamphlets. I did not know about legal aid or community law centres. I relied heavily on those around me who had been through the system before.”

Auckland individual

“When people come onto a marae, they stand outside and shudder – What do I do? When do I do it? How much of it do I do? It’s the same for people entering a court, except on a marae someone has a responsibility to explain.”

Individual at hui

There was a great deal of emotion in the submissions on this point. Many feel that the absence of basic information amounts to hostility towards those who enter the court doors. People cannot understand why courts should be so much more difficult than other similar places.

“Compare it with hospitals, where there are now information desks to direct visitors and signs in several languages in the entry areas, and with the airport, where there are people circulating (in distinctive jackets) just to help confused visitors. In both those situations people can be somewhat stressed and are in an unfamiliar environment, so help has been provided – why is this not done in courts?”

Auckland fono

“There is an almost wilful mysteriousness to the system.”

Cambridge individual

Court staff are often seen to be unhelpful, both in attitude and in the help they provide. There were suggestions that this is in part because they don't want to be seen to be giving legal advice in the place of lawyers, and in part because they are poorly paid and overworked.

“At the top of the escalators there is a desk on your right which is usually empty. There may be staff/people behind a grill area but if you try to talk to them, they don't assist because they're not on duty or they can't or won't help you. You then try to find the piece of paper with the name and courtroom on it. It is an A4 size piece of paper and I only found out about it because I sat and watched what other people were doing ... it's funny, very frightening, you feel like an idiot.”

Quoted by Wellington Community Law Centre

Once legal proceedings begin, there is a clear view that lawyers need to speak to their clients and their clients' families more simply, more clearly, and more completely, and be prepared to provide clear written information as well.

“There is an increasing incidence of people coming into the system, being processed and going out without fully understanding what has happened. This is the reality of the present system, defined by its use of 'legalese' – language and behaviours which are so foreign to everyday New Zealand life and experience.”

Salvation Army

“Lawyers often gloss over important things such as procedures as they are too close to the system and often strapped for time.”

Prison inmate

“They believe they know best and don't tell you enough or ask you enough for you really to be part of it.”

Prison inmate

Those who are at the centre of proceedings feel anything but.

“You can't hear anything being said – the solicitor, the court taker, and the judge will have private conversations and suddenly your matter is dealt with and you haven't heard a thing – ‘Did they say guilty, or not guilty?’”

Community workshop

“My experience here is that a lot of inmates are numbed by their Court appearance and dealings with 'the system'. A lot don't even know what happened!”

Prison inmate



Prison officers told the commission that many of the people they stand beside in the dock are unclear about what has happened to them.

“They turn to us and say, ‘What did he say? What’s my sentence?’ Why can’t they speak ordinary English?”

Prison officer

“We consider justice has not been administered in an acceptable manner if a defendant leaves court without a clear understanding of the proceedings and of what has been said and decided for them.”

Salvation Army

As well as the problems, improvements were suggested.

Some submissions listed the kinds of information that need to be easily available:

- **rights and obligations under New Zealand law**
- **the functions and types of courts and tribunals**
- **what to do in court**
- **how to initiate or defend actions, how to appeal**
- **concepts such as legal aid, jury service, witnesses, taking the oath, which are often obscure to newcomers to the system**
- **the role of judges and other court officers**
- **court services and role of support staff, eg, family advisors**
- **how to access professional interpreters.”**

Office of Ethnic Affairs

- **who to talk to**
- **choices available**
- **relevant law and procedures**
- **likely outcomes**
- **time involved**
- **costs**
- **where to get help.”**

Legal Services Agency

This information needs to be presented in plain, easy to understand language that assumes the reader has no knowledge of the courts.

“Court booklets have a lot of assumed knowledge in them, for example ‘see the duty solicitor.’ Who is that?”

Community workshop

“For instance, the term ‘legal aid’ has quite a specific and complex meaning, and if you don’t understand it then you can’t get your right to that funding.”

Auckland fono

Submissions suggested a wide variety of places where basic information could be available, both everyday and specialised, such as supermarkets, Citizens’ Advice Bureaux, libraries, KFCs, doctors’ surgeries, police stations, schools, Community Law Centres, the phone book, churches, and in an interactive site on the internet. If the information itself is not available in all these places, the fact that it exists, and how to get hold of it, should

be advertised in simple language in places like these and on a wide range of web sites.

At the point of receiving a summons to go to court, the submissions were consistent: basic information written in simple language should always be included with the summons. Most also suggested that the information should tell people in large type about where to go to get help.

“I think some form of a primer should be given to people before they go to court. It would outline what their rights are, what their responsibilities are, what some of their options may be, and what kinds of things they can expect.”

Auckland focus group

Inside the courts, there were several key proposals that turned up again and again:

- There should be people immediately inside the main doors of the court whose job it is to offer help in a friendly way.

“On first entering a court, there needs to be basic information in several languages, a desk labelled ‘Get Help Here’, a person circulating who approaches those who look uncertain.”

Auckland fono

- There should be good sign-posting to where various services are located. This is not only where each courtroom is, but where duty solicitors are to be found, for instance.

“Is sufficient attention given to sign-posting different areas of larger Court buildings so that first time visitors can find their way around with assistance? Some people may be too embarrassed to seek assistance for fear of exposing their ignorance or feel uncomfortable about approaching officials, particularly when they are of a different race.”

Māori Legal Services

- There should be information on what is scheduled in each courtroom and at what time. Many people made the comparison with airport arrival and departure screens.

“Suggested improvements include: a big screen playing an information video on what to expect next or whom to contact, a clearly labelled information or ‘help’ desk run by knowledgeable and unflappable staff, and stand-out uniforms or clothing which clearly identify well-trained personnel who can assist those coming to court, especially for the first time.”

National Council of Women

Cost

Cost is a very significant factor in preventing access to the courts and to justice.

People who would like to use the courts to protect or enforce their rights frequently said they could not contemplate taking a case to court because the cost involved often exceeds the value of the outcome of the case: a lose-lose situation for the aggrieved.

“Costs totally preclude me from any thoughts of using the courts.”

Wairarapa individual

“Taking an action to defend a wrong is not affordable.”

Wellington individual

“The cost of representation often outweighs the result: this encourages people not to bother pursuing cases, hence many innocent people are denied their rights.”

Wellington individual



“Cost plays a very large part in preventing people taking a civil action. They may often have lost their life savings in the situation that has brought them to consider taking legal action.”

Salvation Army

The Buddle Findlay research found opinion is little different in some boardrooms.

“Litigation is so expensive that there was little to be gained in pursuing small to medium sized cases.... It was felt by many that we are moving towards a situation where it would only be worth pursuing very small (eg, Disputes Tribunal) or very large claims.”

Buddle Findlay survey

There is much unhappiness over the cost of court filing fees which create a further obstacle for the poor. It was not uncommon for people to assert that access to courts should be free with no filing fees. Even the costs of the Disputes Tribunal are too high for many people, according to both individual and community organisations.

“Court fees, even ‘low’ fees in the Disputes Tribunal, represent a major barrier for many people accessing justice.”

Citizens’ Advice Bureaux

“We applaud the Disputes Tribunal, but even that is too expensive for some.”

Queen St CAB

One claim was that it is not uncommon for people, who wish to deny offences, to plead guilty to avoid having to take time off work and pay lawyers’ fees.

“In our experience, people commonly plead guilty or accept diversion because they cannot afford to defend the charge(s).”

Māori Legal Services

“The lawyer advised: ‘Don’t bother to defend it, the costs of defending it will be far greater than the fine.’”

Waikato individual

“I think it is wrong to have to pay a greater amount to prove your innocence than it is to plead guilty.”

Wellington individual

People are not happy with the state of legal aid. Criticisms are divided. Some think it goes to the wrong people – criminals. Others claim it is over-used in certain contexts – family court cases and criminal over civil matters. Others still feel it is abused by lawyers wanting to drag out cases. Some say it encourages people to embark on litigation when they could solve their problems outside the courtroom. But most take the view that legal aid is not generous enough to help many really in need. It is only available to the very poor, and other low income court users miss out.

“The system is too expensive and geared largely to those who can afford assistance or those who are granted legal aid.”

Quoted by Wellington Community Law Centre

Many New Zealanders believe that access to justice is dependent on a person’s ability to pay: “You get the justice you can pay for”, is what people say about the current system.

“I’d be confident of the system as long as I was playing the system which means getting a bloody good lawyer, simple as that really.”

Taranaki focus group



“Money can purchase ‘high’ quality legal advice and time to prepare your case, whilst those on low incomes have to rely on duty solicitors who have little time for you and are under pressure to rush through their caseload. ”

Quoted by Wellington Community Law Centre

The Buddle Findlay research shows commercial organisations hold this view just as strongly as individuals do.

“The reality is that justice is not blind; it is a feature of your ability to pay.”

Buddle Findlay survey

People’s personal experiences emphasise the point.

“In my case, I paid cash at first for my lawyer and he was really good, but when that money ran out and I went onto legal aid, he just wasn’t there for me.”

Prison inmate

A popular belief is that expensive lawyers are better lawyers. Lawyers working on legal aid are considered less competent than those receiving higher fees – unless the case is high profile. People conclude that those who are on legal aid are at a disadvantage.

“The better the lawyer, you are going to get less penalties for what you have done, aren’t you? If you can afford an expensive lawyer it sort of drops what you are liable for.”

Rotorua focus group

“If you’re paying for a lawyer or having one given to you – if you’ve got the money to pay for it, you’re going to get a better defence.”

Auckland focus group

“It’s not really a racial issue, it’s a socio-economic issue. Well-off people can hire a very good lawyer to represent them but poor people can’t. And there’s good and not-so-good representation. If the Law Commission could deal to just that problem it would make a huge difference.”

Individual at hui

There were fewer suggestions as to how to solve these problems. Many suggested making the courts more efficient. New Zealanders have seen most of our public services go through two decades of restructuring. This was mentioned repeatedly in submissions, prompting the question: why can’t our courts be made more efficient and cheaper to run?

“Among the most common criticisms was that the court system was inefficient, unnecessarily repetitive, and that not much was achieved in an eight hour day.”

UMR qualitative research


“10 o’clock you have a break, 12 o’clock you have a break, 3 o’clock you have a break and by the time you get the jury back in and seated you maybe get an hour before there is another break.”

Rotorua focus group

“If people ran their businesses like they run courts, we would all be in bankruptcy. It is terrible. It is a most inefficient situation. It’s a dinosaur.”

Christchurch focus group

Some suggested that efficiencies could be gained, and costs reduced, by employing organisation experts to take a careful look at the court system, to improve the use of staff, resources, technology, and time.



“They need to look for improvements in time management for a normal day’s courtroom activities.”

Taranaki focus group

“The court continues to follow systems and processes that, quite simply, do not work efficiently by almost any measure that takes into account the effect on all participants in the legal process.”

Telecom NZ

Specific solutions included reducing complex procedures as well as the number of cases that actually have to go to court.

“It should be possible for many more things, including the entry of pleas, to be done by communications not involving hearings. The difficulty with hearings is that everything is designed for the judge’s workload and everybody must meet at a certain point to wait in line for the judge’s time.”

Lawyer undertaking legal aid work, specialist adviser for Legal Services Agency

People want to keep as many civil and minor criminal disputes as possible out of the courts. There was remarkably high support across submissions for more non-adversarial approaches whether by mediation in advance, restorative justice where offences are acknowledged, or problem-solving approaches in the court.

“Alternative dispute resolution ought to be a core philosophy within the justice system.”

Anonymous

The Buddle Findlay research commented that the adversarial approach of the current system is not always best for business in the long term.

“Lawyers sometimes focus too much on ‘winning’ an argument or a case, without considering the underlying commercial context and broader issues, such as the need to preserve ongoing business relationships.”

Buddle Findlay survey

There were calls for a more “inquisitorial” approach to remedy the unequal abilities of lawyers, and any consequent inequality in access to justice. The argument is that if the judge could take a more active role, challenging and inquiring, then the different abilities of lawyers would be less critical to the outcome.

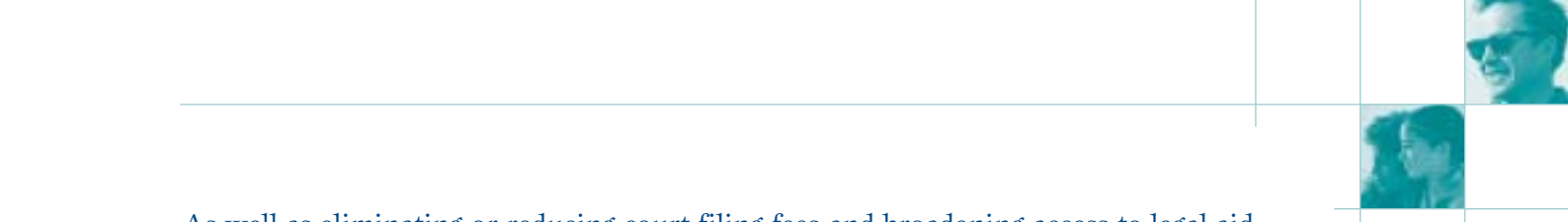
“A court should not be seen as a battlefield where the strongest wins, nor a game of chess where the cleverest wins. If a judge feels that an important point has been missed or is wrongly being interpreted, then it should be their duty to intervene, for the sole purpose of ensuring the truth is uncovered and justice is done.”

Churches’ Agency on Social issues

“The view persists that rich people can afford the best service from the justice system. An inquisitorial system has much to recommend it.”

National Council of Women

Such a change in the character of the court process would be radical; and in their submissions lawyers were wary of judges assuming a more active role or being given more powers.



As well as eliminating or reducing court filing fees and broadening access to legal aid, suggestions for reducing costs included better resourcing for, and an expansion of, the Community Law Centre network. Centres were widely praised as a source of legal support and advice for people on low incomes. They were, however, described as overloaded and too few in number. Large areas of the country are not served by a Community Law Centre at all.

One way people suggested to reduce costs was to allow lay people to represent parties in court, or to act as adjudicators. This might involve using Justices of the Peace for more low level dispute resolution, and people being represented in court more often by someone without a law degree. However, serious concerns were also expressed about this idea.

“The use of lay advocates could... create a two-tier legal system where the ‘haves’ are legally represented and the ‘have-nots’ make do with lay helpers without a proper understanding of the issues or technicalities involved.”

Māori Legal Services

People also argued that it should be possible to get basic information from lawyers on what legal costs are likely to be – for many other professions quotes for work are available, or standard fees, and people want this from the legal profession. As well, people thought that much of the information people pay lawyers for could come from other sources, so reducing costs.

There was a general call for lawyers to lower their fees, but the only ways to achieve this suggested were by regulation, or by more transparent advertising of fees for services.

Court culture

Written responses were split almost evenly between those who think the current degree of formality should remain and those who find the courts too formal and intimidating.

Formality is seen as being important to retain respect for the law, highlight the seriousness of the issues at hand, and ensure that due process is followed.

However, formal court processes are often seen as so obscure, intimidating or confusing that people go right through the system without really knowing what has happened to them – this is profoundly disempowering.

“I can sum up my experience regarding formality in court as intimidating and incomprehensible at times. To this day I still wonder the outcome that eventuated. I never said a word throughout the whole process. I just trusted the system and it wasn’t until I got to prison I found I had been found guilty of a charge that I believed had been changed.”

Prison inmate

“We need to change the legal jargon and terminology used in the court. In most cases defendants don’t even know what has happened to them. You can tell because there is no expression on their faces when you expect them to be relieved because the matter has been dismissed or shocked when they are to remain in custody. Most stand in court until the judge tells them they are free to go and then don’t realise why.”

Staff member, Auckland District Court

“The seriousness of offence does require a level of formality in the structure and conduct of the court system, but serves little purpose if only the court officials understand.”

Salvation Army



Submissions expressed the view that the current formality can affect the conduct of a case, resulting in disadvantage. Concerns were expressed that, in an intensely formal environment, people feel tense and constrained and unable to express themselves. This can lead to the whole truth not coming out.

“Traditionally British style courtrooms were deliberately designed to be intimidatory to those giving evidence, as it was believed this would discourage the giving of false evidence. ... Unfortunately this level of intimidation may deter not only untruthful evidence but also truthful evidence.”

Human Rights Commission

Incomprehensible formal language and processes can also mean that people do not know when they can speak, and are effectively silenced.

“The emphasis must be on maintaining order without intimidation by either the system or the people involved.”

Churches’ Agency on Social Issues

“They’ve got to be more approachable somehow. So the people involved can understand it and can use it to its full capability rather than being scared or frightened of it or totally bewildered by it.”

Auckland focus group

Language contributes very largely to the current formality – the use of Latin words in the courtroom, or more commonly of English so specific to the legal profession as to be unintelligible to almost anyone else. There was story after story of people, unable to make sense of what was happening because they could not understand what they were listening to.

“The language of the court system is often pompous and unfriendly to many court users.”

National Council of Women

“Some formality is required, but it can be overdone, particularly with overly legalistic language and Latin. A matter was adjourned ‘sine die’ and the family thought there had been a death sentence.”

Community workshop

“Formal, stodgy, slow, cumbersome, and arcane documentation in exclusionary language.”

Auckland focus group

People from other cultures feel particularly out of place, with formal aspects of their own cultural background excluded or not understood in the courtroom. There are now large populations of New Zealanders whose cultures are not European in origin.

Another source of great frustration was the lack of basic facilities. People spend many hours waiting their turn at court. No one likes bringing their children to court, but it is sometimes unavoidable, and there are few facilities for breast feeding, changing nappies, or caring for fractious children.

“Among the most common criticisms was the poor treatment of people who had to wait around in court cases.”

UMR qualitative research

"I have never found any child-changing facilities and sometimes we had to wait all day in the foyer to be called up. Ideally children should not be in the courts but realistically this is not possible. Also for many children this is the last time they will be with their parents before their parents are locked up."

Auckland individual

"Little is done to help solo parents with young children. There should be a crèche and cafeteria selling wholesome food."

Māori Legal Services

The culture of the courts is seen as one that favours those who work there but which is unfriendly, hostile even, to those who don't.

"Courts do not generally think of accused persons as their clients. The service appears to be designed for those who work in it – judges, lawyers, administrators. Unless defendants are treated with respect, there is the implication that they are guilty until proven innocent. Having to put up with confusion, inconvenience, and delays can be seen as part of their punishment."

Wellington individual

The courtroom is still seen as the domain of white middle class males. Many want the courts to be more reflective of our society, but only as long as those appointed are well qualified, experienced, and competent.

Overall, there is a strong view that our courts are a foreign and unfriendly environment, based on rituals imported from England that have little relevance to contemporary New Zealand society: "courts have to be formal, but this is not our formality".

Delays

Almost everyone thinks the court system is unacceptably slow. This is very frustrating and can be traumatic for those involved. Dissatisfaction was voiced by individuals, citizen organisations, legal firms and in the Buddle Findlay research.

"Virtually all respondents believed that the time taken for a case to reach trial was far too long."

Buddle Findlay survey

"Respondents reserved their strongest criticism of the court system for its delays, perceived inefficiencies and poor service provisions for the people involved. On these issues there was a very clear impression from respondents that they saw no real reasons why these problems should not be remedied."

UMR qualitative research

There was widespread criticism of the delay people have to endure after being called to the court at 10 am.

"I was called up twice to a window breaking I witnessed and I had to turn up at 10 am. I was there all morning. The guy who committed the crime never bothered to turn up so he was called back again and he still didn't turn up and I spent another morning there. Everybody else – all the other witnesses were hanging around and it was total waste of time."

Christchurch focus group

People likened the high volume criminal courts to a "cattle yard". Besides the frustration of waiting for hours, it can be costly. Often a whole day's work is lost, an expense few can afford.



“Being required to stay for hours in court, waiting, is very hard on people who have jobs. People sometimes plead guilty so they don’t lose their job by being away too much.”

Auckland fono

Submissions also made it clear that people pay a high emotional price for the time it takes to conclude a case before the court.

“The delay was a terrible penalty all on its own. He said he was innocent but he knew he had to prove that to the court – but waiting a year to be able to do that took a heavy toll.”

Taupo individual

“Having been the victim of a serious crime, I believe it is cruel to make me wait 12 months before the case can be heard in the High Court.”

Quoted by Wellington Community Law Centre

Delays are seen to be caused both by high workloads and by inefficiencies of process. Suggestions made to reduce delays that received strong support in the submissions included:

- appointments in court. People understand that it would be impossible to get precise appointment times, but said that even one- or two-hour time brackets would reduce their frustration and lost work time.

“Why can’t courts be split into two parts of the day? They must have some idea of how long each case will be, but they get everybody to turn up at 10 am.”

Christchurch focus group

- night courts, weekend courts and generally extending the very restricted hours courts keep now.

“The holding of court on Saturday, outside of the normal working hours of most offenders, would considerably reduce the cost of appearance. Court fines are compounded by hours of work lost and carries the possibility of loss of job when the reason for leave is stated. The offender can thus face the possibility of double punishment.”

Salvation Army

“Why not come at 6:30, after I’ve finished work? Or at 8 am?”

Individual at hui

“Business has gone 24/7, why not the justice system?”

Waikato individual

- reduction in unnecessary appearances, for instance, for remands.

“You arrive now at 10 am, wait until 2:30, then they call you and you stand in the box for 2 minutes and are told to come back in a month. Why not stay at work while my solicitor stands up for me?”

Individual at hui

- better access to good interpreters to reduce confusion, the drawing out of cases, even mistrials and retrials.

“The police will often already know a person’s language needs (or certainly should) so there is no reason why they cannot inform the court so that it is prepared when the individual comes up.”

Community workshop



Stringent controls on lawyers using delaying tactics in court and more court staff were other suggestions made to reduce delays.

The submissions to *Striking the Balance* represent a strong call by New Zealanders – whether as individuals or community or corporate organisations – to change the way the courts deal with people. The various possibilities are discussed in the rest of this document.

The particular perspectives four groups in our society have of courts, and ways to make the system more responsive to their needs, now follow.



Māori

We look for: a system of justice that properly recognises Māori values, and in which Māori have confidence.

Te Tiriti o Waitangi

The Treaty of Waitangi established the relationship between Māori and the Crown in 1840. The Treaty was an exchange of promises between two sovereign peoples, giving rise to obligations on each.

The Treaty is evolving. Its importance was made clear by the Court of Appeal in 1987 when it said that the Treaty should be interpreted as a “living instrument”, laying the foundation for “an ongoing partnership”¹. The Privy Council reinforced this in 1994, stating that the Treaty “is of the greatest constitutional importance to New Zealand”.²

It is the relationship between Māori and the Crown, founded on the Treaty, that is fundamental to the perspectives Māori have of the justice system.

Māori and the justice system

Both statistics and comments received show that all is not well in the justice system for Māori. There are two issues. First, what is happening to Māori in society that places them at greater risk of committing crime? Second, what is happening to Māori once they enter the justice system? Does the system ensure them justice?


Serious family problems, lack of educational achievement, lack of vocational skills, abuse of drugs and alcohol, lack of cultural pride and positive cultural identity are all risk factors that often lead to crime. While ethnicity of itself is not a predetermining factor, it is clear that Māori as a group are disproportionately exposed to these risks. Recommending actions to minimise these risks is beyond the commission’s brief, nevertheless the situation is of the highest importance to society as well as to the operation of the justice system, and does need to be appropriately addressed.

Perspectives relating to the second issue – what happens to Māori once they enter the justice system – are the focus of this chapter. It discusses criminal justice and procedural issues in the general courts – primarily the criminal jurisdiction of the District Court – since that is where many Māori encounter the courts (see also the Criminal Process chapter). Issues relating to the Māori Land Court are dealt with in the Māori Land Court and Māori Appellate Court chapter.

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. Crime committed by Māori on Māori may also be a significant issue.

¹ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) per Cooke P at 665; per Casey J at 702–703.

² *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) per Lord Woolf at 516.



To bring about real change, Māori must have a large hand in devising the answers and making them work. This chapter presents perspectives from submissions, and suggestions in response to *Striking the Balance*.

Māori perspectives of the justice system

Māori perspectives of the justice system, of which the courts are an integral part, have been surveyed regularly in the last 20 years. The rights of Māori under the Treaty of Waitangi, and within the justice system, have been increasingly recognised. Concern about Māori criminal justice statistics has grown. There have been many reports to successive governments.

Māori have been consistent on issues fundamental to them since the late 1980s. Many submissions refer to earlier reports, such as those by John Rangihau³ and Moana Jackson⁴.

Māori view the justice system as a whole. So their perspectives cover not just the court system but the police, probation officers, prison officers, lawyers and judges. A negative view of “actors”, anywhere in the system, carries through to the courts and how well they function.

First principles

New Zealand’s current court system is founded on the values, beliefs, and behaviours of nineteenth century England. The values, beliefs and behaviours of Māori were then, and for many continue to be, quite different. Māori have questioned, and may still question, the legitimacy of the justice system and how well it serves Māori.

As tangata whenua, and a partner to the Treaty of Waitangi, Māori expect that the justice system will recognise their values. Indeed, as the Chief Justice recently commented, “Māori have always expressed confidence that through law, justice will be achieved. It sets a high expectation for a legal system to live up to. It is not surprising if sometimes the expectation has been disappointed. The achievement of justice in these matters must inevitably take some working out.”⁵

As Māori rights have been increasingly recognised, so Māori expect more of the justice system, and look for change.

Much has been written about Māori values in relation to the justice system. These values inform the various expressions of tikanga Māori. While tikanga Māori is a dynamic concept, and varies between whānau, hapū and iwi, some elements are central to a Māori system of justice.

- *Whanaungatanga* – the concept of the importance of the relationships between people bonded by blood and other ties. Each individual is seen as part of a collective, and rights and duties are reciprocal. This may mean in a justice setting that the collective becomes responsible for the actions of the individual.
- *Mana* – the concept of Māori political power, authority, control, influence and prestige. This may be achieved through both whakapapa and contribution to the collective good. Recognition and inclusion of Māori leaders in a justice setting is therefore seen as essential.

3 Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare *Puao-te-ata-tu – Day Break* (Wellington, 1986).

4 Moana Jackson *The Māori and the Criminal Justice System: A New Perspective, Part 1 – He Whaipaanga Hou* (Department of Justice, Wellington, 1987).

5 Rt Hon Dame Sian Elias “Māori and the Legal System” (2002) 76 ALJ 620, 626.



- *Tapu* – the code of social conduct based upon keeping safe and avoiding risk, as well as the protection of revered persons and traditional values. In traditional Māori legal systems, tapu regulated the conduct of people within society just as the law regulates society today.
- *Utu* – the concept of reciprocity to retain balance and harmony in the community. One expression is muru, or compensation for wrongs done to a member of the community by the wrongdoer and his or her family.
- *Kaitiakitanga* – the notion of stewardship of taonga important to the community, often used these days to refer to natural resources but wider in scope.

However, not all Māori continue to share these values. Indeed, some say that it is precisely their absence that contributes to high Māori crime rates, victimisation, and dislocation from society. There are calls for offenders to be brought back within Māori structures, to be imbued with Māori values. They advocate Māori taking more responsibility for Māori offenders and victims.

Which justice system

Māori have identified approaches for these values to operate within the justice system. One approach sees the need for a parallel (or separate but equal) system, while the other approach further incorporates Māori values into the existing system (while processes may differ, the law remains the same).

To many Māori, shortcomings in the current system can only be remedied by the creation of a parallel justice system, expressing Māori values and using Māori processes.

In his 1987 report for the Department of Justice, *He Whaipāanga Hou*, Moana Jackson discusses comprehensively why, from the perspective of Māori, such a system should be created. He argues that the justice system is based on a set of beliefs and values alien to Māori and has created institutions alien to Māori.

It may not be the laws themselves, he suggests, that are unjust. Rather, he argues, the ways that they are enforced are, in effect, institutionally racist, because they ignore Māori values. Māori are disadvantaged and alienated, he concludes, and the only solution may be a separate Māori process.

Moana Jackson also identified a number of proposed reforms to the then existing justice system. Several of his ideas have been implemented.

Māori continue to promote both approaches to reform.

What we could do

The views of Māori obtained from submissions and focus groups fall into two main categories: the need for kaupapa Māori (Māori-centred) approaches to be used, and concerns about access and cost. Possibilities suggested are summarised here but some are also discussed in more detail in other chapters.

Alternative justice

Greater recognition of traditional Māori dispute resolution techniques

Such techniques would recognise tikanga Māori values in the methods and processes. There is no Māori word for “guilt”. It is enough that actions have caused offence, and require utu or muru to compensate the offended party.

“Sometimes the District Court process seems like a factory in which Pākehā (mainly) try Māori (mainly). Māori offending should be more the responsibility of the Māori community.”

Anonymous

Greater use of traditional Māori dispute resolution techniques is perhaps possible where both victim and offender are Māori (or where the offended party consents to such an approach). It would rely on use of traditional kin group structures and processes, or in urban centres use of Māori service providers using traditional processes.

These types of arrangements, which might be possible once guilt has been admitted or proven by a court, might be best suited to relatively minor crime or younger offenders. Many believe they will have far more success in reducing repeat offending in younger Māori offenders than does the current system.

“Māori offending should be more the responsibility of the Māori community and they are likely to use restorative, marae-based processes. [...This] could be more constructive for victims and offenders and would also reduce reoffending.”

Anonymous

Greater use of restorative justice

A number of restorative justice models are used in New Zealand and overseas (see also the Criminal Process chapter). They are mostly used alongside usual court processes, but some may provide an alternative to traditional sentencing arrangements. The Te Whānau Awhina programme, which has had some success, shares aspects of both indigenous justice and restorative justice models. It attempts to deal comprehensively with factors that lead to offending.

Community justice model

This would allow communities to manage justice matters in their own areas by responding to local concerns in a local manner. This may, for example, allow the appointment of district committees, or individuals, to oversee the sentencing and rehabilitation of offenders. Submissions from Māori called for the Māori Community Development Act 1962 to be adapted to enable this to happen. Māori committees might, for instance, hear minor offences involving Māori as has occurred in the past, for instance, under the Summary Proceedings Act 1957.

Marae justice

This concept does not appear to be well understood by non-Māori. For Māori, marae justice means using Māori processes like those contemplated by an indigenous justice model. It does not mean simply transplanting District Court processes to the marae. This on its own would be counter-productive. Marae justice would rely on kaupapa Māori and focus on reintegrating the offender into the community, taking the view that dislocation from the community in the first place influenced the offence.



Diversion, early intervention and the role of the police

A consistent theme is the need to steer young offenders away from the court system and the need to involve the Māori community as soon as possible – perhaps using alternative justice models.

The diversion scheme run by the police is thought not to be applied to Māori as often as it might be. Too much discretion is thought to lie with duty sergeants resulting in inconsistent practices across the country. A number consider a prosecution office independent of the police (see also the Criminal Process chapter) might be the best way to step beyond the negative ways in which Māori and police are now thought to see each other.⁶

A number of strategies have recently been followed by police which show promise. These include the creation and nurturing of partnerships with iwi and other Māori collectives, and a growing focus upon strategies to reduce Māori offending.

Particular courts

The Family Court

The need to involve the wider whānau in the processes of the Family Court is critical. The current processes are seen to neglect Māori values by focussing on the nuclear family. While the nuclear family may be the norm for many Pākehā, that is not necessarily so for many Māori. Many Māori contend that involvement of the wider whānau serves the best interests of the child.

However, while the wider whānau was traditionally intimately involved with the welfare of children and other family members, the modern reality for many Māori is single parent families, in which wider whānau links have been broken. Also, another perspective is that, sometimes, the best interests of the child are not well served by involving the whānau.

There is dissatisfaction with the way family group conferences operate. The process is still seen as too adversarial, and as damaging further rather than repairing relationships.

Acknowledgment of the issues raised by *Puao-te-ata-tu*⁷ with respect to the recommendations relating to the whānau and the care of Māori children is vital for many Māori.

Some Māori suggested that the Māori Land Court might be able to provide processes better suited to Māori than the Family Court.

Employment disputes

The use of mediation in employment matters was seen as a successful and appropriate way of settling employment disputes. It was suggested that mediation could be used more widely in other civil disputes.

⁶ MRL Research Group Ltd *Public Attitudes Towards Policing* (Wellington, 1995); Pania Te Whaiti and Michael Roguski *Māori Perceptions of the Police* (He Pārekereke/Victoria Link Ltd, Wellington, September 1998); Gabrielle Maxwell and Catherine Smith *Police Perception of Māori* (Institute of Criminology Victoria University of Wellington, Wellington, March 1998).

⁷ Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare *Puao-te-ata-tu – Day Break* (Wellington, 1986).



The District Court

District Court processes are seen as complex and alien. Several contributors commented that it is easier to plead guilty and escape the unwieldy process entirely than to defend a charge. Offenders are often not aware of the process, the system, or indeed who is acting on their behalf.

“The New Zealand court system has often been described by many, in particular Māori people, as mono-cultural, disempowering and institutionally racist in structure and conduct.”

Manukau City Council

Nor is the District Court considered the proper place to deal with younger offenders. Instead, it is felt that all younger offenders should be dealt with in the Youth Court where a less isolating environment exists.

The Māori Land Courts

The Māori Land Courts are where many Māori are most at ease. Māori staff are more likely to be available to help, families are better provided for, and the court’s philosophy and processes are pervasively Māori.

Some of these issues are also discussed in the Māori Land Court chapter.

Recognition of Māori community leaders

A major theme emerging is the need for kaumātua or appropriate Māori community leaders to be able to address a court on behalf of or as well as an offender.

“Me uru mai he kaumātua he whānau rangatira ranei hei hunga awahi i te tangata kei roto i te kooti. Kaumātua, recognised family elders, should be allowed to be a formal part of proceedings to assist the alleged offender if requested. They should be placed in close proximity to the offender and not in the public gallery.”

Prison inmate

Some courts allow this informally, but formalising such arrangements across the country is considered important. Many Māori feel this would ensure that the alleged offender’s side of the story is more likely to be told, and that at least the person speaking on their behalf, in contrast to a duty solicitor, would actually know them.

Allowing kaumātua to address the court would accord better with whanaungatanga, and respect the mana of community elders, who are often neglected in the court process, even when attempting to assume community responsibility for the actions of an offender.

There were calls for greater use of section 27 of the Sentencing Act 2002. Where a person has been convicted and appears for sentence, this section says they can call a witness to speak for them about their personal, family, whānau, community and cultural background.

Inside the court system

Judicial officers

There is unease at the shortage of Māori judicial officers across all benches, and a perception of a general lack of sensitivity towards Māori values from the bench.

Questions were raised about how judicial officers are appointed. One asked why judicial officers, seen as culturally biased, are not more accountable to the community.⁸

There is also seen to be a shortage of Māori Justices of the Peace and Community Magistrates – two areas where a greater contribution could be made to the court system.

Lawyers

A common view is that justice depends more on the ability of lawyers than on the merits of the case. Also lawyers are seen to increase Māori feelings of alienation through inadequate explanations to clients and family, and are perceived to be too little concerned with finding ways to make sure the result of a case is positive.

A system of public defenders, in which Māori lawyers are employed to represent Māori clients, was proposed to respond to the apparent shortage of Māori lawyers in the criminal area, and the feeling that Māori are poorly serviced by lawyers.

Cost

Cost is an increasing barrier to Māori getting effective legal representation. In addition, submissions suggest that the cost of defending a charge has other impacts.

“In our experience, people commonly plead guilty or accept diversion because they cannot afford to defend the charge(s).”

Māori Legal Services

Support services

Organisations like Maatua Whangai and the Māori Wardens are considered essential in the court system. These groups provide support and assistance to those appearing in court. Their services are greatly used both by those working in the courts and those appearing, and yet their role is not officially recognised. Submissions called for their role to be formalised, and their work paid for.

Te Reo

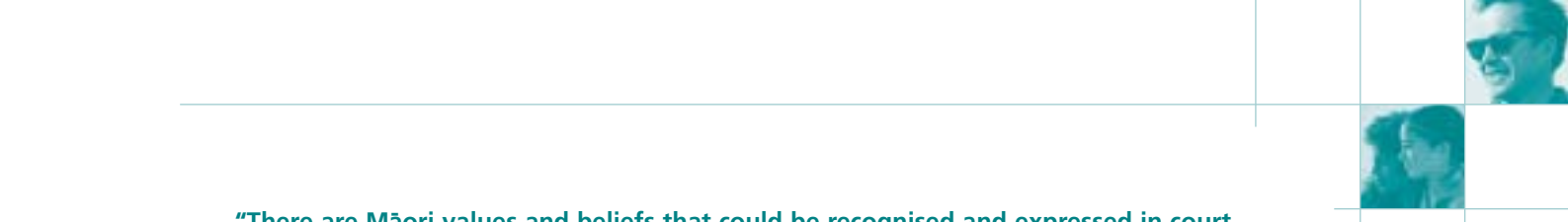
Māori has been an official language of New Zealand for some 15 years, but it is still difficult to arrange to have it spoken in court. Usually long notice is required, and that is seen as unacceptable.

The court environment

The physical environment of the courts – both the courtroom and the building itself – came in for consistent negative comment.

The courtroom is seen as an isolating place, where those appearing are separated from their families and communities.

⁸ We note that, at the time of writing, Sir Geoffrey Palmer is undertaking an independent report to be presented to the Attorney-General about the appointment, administration, servicing and termination of judicial and quasi-judicial appointments.



“There are Māori values and beliefs that could be recognised and expressed in court processes – for example: whanaungatanga – often families are there in support of others attending court – involving whānau in the process is important, providing rooms for families and children, providing personal assistance from court staff, hearing what the family has to say in the matter – making the court a ‘family friendly’ place for staff, and the community.”

Waitakere Safer Community Council Trust

As well, the culture and customs of the court are seen as overly complex and out of tune with society today. Fundamental rather than minor changes are thought necessary.

“Making minor changes such as saying karakia or singing waiata, and hanging tukutuku panels on the walls will not make courts a safer, more culturally appropriate place for Māori. There must be significant ‘cultural’ change to the organisational structure of the courts for real improvement to occur for Māori.”

Dunedin Community Law Centre

“Using or having cultural artefacts at courtrooms is not as important to me as the respect and adopting of cultural behaviours and procedures.”

Anonymous

The complexity of the courts is seen to extend to a lack of information at court, to help those going through a court process to understand what their responsibilities are.

“The court is a little like a marae – there is a whole language, protocols, its own culture. But on a marae, the tangata whenua are responsible for showing the visitors what they should do.”

Individual at hui

It was submitted that a number of these problems could be met by cultural education for those working in the courts, and by providing incentives to attract Māori staff to positions within the court system.

What do you think?

What improvements can we make so that we have a system of justice that properly recognises Māori values and in which Māori have confidence?

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



Ethnic Minorities

We look for: improved access to justice for ethnic minorities

The 2001 census identified 200 separate ethnic groups in New Zealand. It also showed a marked increase in the number of New Zealand residents who had been born overseas, suggesting many are recent arrivals.

The Office of Ethnic Affairs classifies ethnicity as referring to a broad range of factors including race, language, religion, customs, traditions, as well as geographic, tribal or national identity.

Equal justice should be provided to all, without discrimination. Submissions confirm that most New Zealanders believe the courts should ensure that people from all ethnicities are, and consider that they are, treated fairly and with respect.

“The courts need to consider different cultures and while there is one law for everyone, how people approach the law will be tempered by their cultural background.”

Quoted by Wellington Community Law Centre

Written submissions and consultation suggest that people of ethnic minorities in New Zealand do not feel that they are well served by our court system.

“Some ethnic groups have a view that the courts do not understand their community, cultures and contexts, so they feel the court is not able to help resolve disputes.”

Office of Ethnic Affairs

Treating people from ethnic minorities differently from other New Zealanders, could undermine equality before the law.

“Our legal system and the court system that operates under it is necessarily a subjective representation of cultural values. It will not, therefore, always be possible to meet the needs of people from different cultural and ethnic backgrounds who have diametrically opposed cultural values. We believe that the general principles of impartiality and the general rights extended to all under the Bill of Rights Act should be such as to ensure that the reasonable needs of people from all cultural and ethnic backgrounds are adequately met in court. ... Beyond this, there are real risks in treating people from different backgrounds differently. The risk is that if people are treated differently then they will secure different advantages/disadvantages from that different treatment. When that situation arises, equality and impartiality before the law are compromised.”

Auckland District Law Society

“While ensuring that people are not disadvantaged in interpretation and representation we need to be careful that the scales are not tilted in the other direction. [...W]e need to be careful that we do not set up separate ‘rules’ for different people and thereby fragment the system. We need to be seen as ‘one people’ in the eyes of the law. This is very important.”

Waikato Justices of the Peace Association

There is a need to strike a balance between these two positions so all court users can achieve equal access to justice, yet also have their culture recognised and respected.

Issues for ethnic minorities in the courts

Unfamiliarity with New Zealand laws

New immigrants from countries with very different legal systems often do not know their rights and duties under New Zealand law, what services are available to them, or even the fundamental values that the justice system upholds. Refugees and other migrants may fear the court system, as a result of what they have suffered in their own countries.

“Many refugees and migrants come from nation states where the police are feared and to go to a court means imprisonment or disappearance.”

Wellington Community Law Centre

Cultural differences

Cultural differences may stop people of ethnic minorities seeking, or obtaining, assistance from the courts. Some cultural values encourage conciliation rather than litigation and confrontation. Cultural conventions relating to gender roles, family dynamics, privacy, and the giving of evidence, may be inhibiting in the courts. Minority people may misunderstand what is expected of them, or be misunderstood.

“In some cultures, women or children are not encouraged to speak out, and to do so by giving evidence in court (or making a complaint) may have profound social repercussions for the witness/claimant. The court needs to be aware of these circumstances and provide safeguards as appropriate.”

Office of Ethnic Affairs

“Refugees and migrants may not consider evidence as the important issue. It is the story they want to convey to the court which is important, so often they do not see the importance of directly answering the questions asked. For example, the Chinese will be imprecise when answering questions as it is the custom to leave a margin of flexibility to manoeuvre with.”

Wellington Community Law Centre

Judges and lawyers are seen as insensitive to cultural differences in body language, manner, or expression and may misunderstand people of another ethnicity.

“In Tonga, for instance, when one is questioned by an older person, one should look down and not meet the questioner’s eyes, yet this can give a guilty impression. This can happen even when a witness or defendant is carefully briefed, because it is such a strong cultural taboo. And when you speak to someone in authority, there is a cultural taboo against standing up – couldn’t this be accommodated?”

Auckland fono

Cultural differences can easily go unnoticed, but this can have profound consequences.

Language difficulties

Submissions stressed that many people before the courts cannot participate in proceedings fully or at all, because English is not their first language.

Not only new migrants are affected. Almost a quarter of Pacific people who have lived in New Zealand between five and 15 years do not speak English fluently.⁹ For Asian people, this figure is 18 percent. Those speaking for Pacific communities said that many of their people, whether defendants, family members, or supporters, leave the courts with little idea of what has happened.

⁹ Jennifer Burns "Court Interpreters" [2001] NZLJ 475.



“I really don’t think palagis understand what happens in court, so imagine what it’s like if English is not your first language, or if you don’t speak much English at all.”

fono participant

“In the courtroom, older family members come to support but do not understand what is happening – they sit and smile because that is culturally appropriate, but they don’t even know when they should leave or what has happened.”

fono participant

Other problems arise. Forms and information materials offered only in English may discourage non-English speakers from taking a case to court. Once in court, a reluctance to speak may be attributed to an unwillingness to cooperate or to guilt, when the real reason is limited English.

Many made the point that even English speakers often do not understand legal terms, such as “indictable”, “summary”, and “committal”. This can be impossible for those with limited English.

The New Zealand Bill of Rights Act 1990 gives everyone charged with an offence the right to an interpreter if they cannot understand English. A number of issues surround the use of court interpreters, such as:

- determining when an interpreter is required
- ensuring that an interpreter is available when needed (which may be at several stages of the process)
- ensuring that the interpreter has a high level of competence in the language concerned, and knows the culture
- ensuring that the interpreter has a good understanding of the New Zealand legal system, terms and processes
- ensuring that the interpreter’s neutral role is not compromised by the need to give cultural explanations.

It is a constant challenge for interpreters to convey subtle points of meaning (such as cultural implications not stated in the original language) without embellishing or editing. Interpreters can also be blamed by lawyers for answers from witnesses that they find unsatisfactory.

Role of family

Many non-Western cultures place stronger emphasis on the collective identity of family than occurs in Pākehā New Zealand society. New Zealand court processes, which focus on the individual offender and the state, to the exclusion of the community, can therefore be alienating.

At fono held with Pacific members of the community, the commission was told that some Pacific defendants will plead guilty to a charge when they are innocent. They may do this to get the matter over and done with as quickly as possible, hoping to minimise the sense of shame felt by their families.

“The family is the foundation of our people – a child does not go to court on his own, he takes the dignity of the whole family wherever he goes. This is a key cultural aspect which is just not understood.”

fono participant



Many Pacific people want their families to be more readily welcomed within the court process, so as to provide support.

“Not just one person is on trial but the whole family. Yet they have to stand up there on their own, and they get taken away on their own.”

fono participant

“We want to have our family around us, not to be standing on our own. They’re a critical part of our reality.”

fono participant

The differing role of family and the emphasis on collective identity affects perceptions of justice. “The fundamental notion of Samoan cultural justice is that the communal interest overrides individual interests – and herein the major cause of conflict with western law.”¹⁰

Samoan justice, for example, involves the whole village. The emphasis is on the community, not the individual. The focus is on reconciliation rather than punishment.

Attitudinal barriers

Submissions and consultation also revealed some concerns about cultural stereotyping.

“Court staff treat us as if we’re offenders, no matter why we’re coming into the court house, as soon as they see we’re PI.”

fono participant

Whether this bias is real or perceived, it can affect public confidence in the courts. Minority ethnic groups consider that their cultural values are not seen as significant.

“The judge can’t see into our hearts without a good translator of our language and our culture.”

fono participant

This problem is seen as compounded by the European appearance of New Zealand courtrooms, and by the low numbers of judges or lawyers of non-Pākehā ethnicity.

Issues to consider

There are practical issues in trying to meet the needs of ethnic minorities within the court system. These include:

- Which ethnic minorities should be singled out for increased recognition?

“Where do you draw the line about what cultures get special treatment and what ones do not?”

Wellington individual

- How are they to be recognised?
- To what extent should cultural factors be taken into account at court?
- Are relatively minor changes in order, or are fundamental adjustments to the court system and procedures required?
- How can it be ensured that any changes, for example the incorporation of ceremonial practices, do not get in the way of legal process?

¹⁰ Aeau Semi Epati "Samoan Notions of Cultural and Social Justice: Conflicts with Western Law Systems" in *Re-Thinking Criminal Justice, Vol 1: Justice in the Community* (Legal Research Foundation Seminar, Auckland, 1995) 52.

“Personal experiences were presented where culturally sensitive and “open” courts had been in effect hijacked by groups to a point where due process was severely affected and to some extent the judiciary had been intimidated.”

Churches' Agency on Social Issues

What we could do

The issue of how to ensure equal access to the courts for ethnic minorities is by no means specific to New Zealand. Many overseas jurisdictions are grappling with similar concerns, and initiatives undertaken in these countries offer some useful insights.

Accessible information

One way to help people of ethnic minorities feel more at ease is simply to make court processes clearer to them.

The New Zealand Society of Translators and Interpreters suggests that – at the start of proceedings – an interpreter should explain what is about to happen; and that, if the courts' processes could be simplified and demystified that would help everyone, not just people of ethnic minorities.

Submissions suggest that more information on laws and the legal system in general should be available to new migrants. The Office of Ethnic Affairs stated that, to be useful to people of ethnic minorities, information must be:

- in plain English
- translated into key community languages
- distributed through community networks such as ethnic organisations, refugee and migrant centres, and community service centres
- available through alternate media such as video, access radio, ethnic print and the Internet.

Standards for interpreters

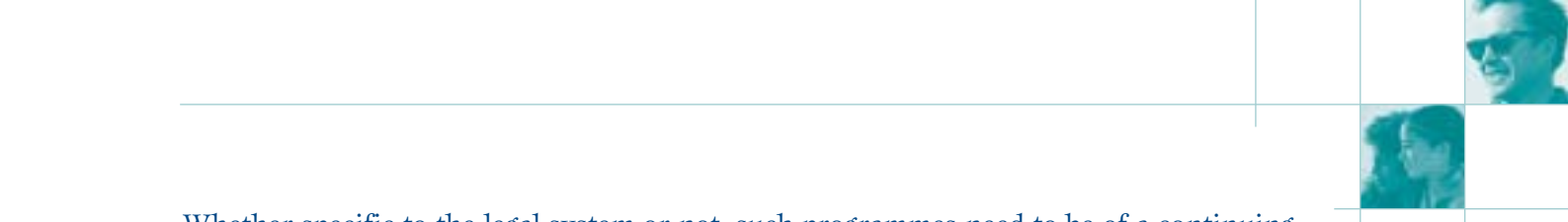
Access to an interpreter is provided for under New Zealand law, and interpreters may be needed at all stages of the process, inside and outside the courtroom.

There is general agreement overseas that it is very important to set minimum standards and qualifications for court interpreters. In New Zealand this is not uniformly the case. Policies vary between courts.

Some countries advocate specific programmes in legal interpreting with minimum skills such as:

- technical fluency in both languages
- a complete and in-depth understanding of the conceptual and cultural backgrounds to both languages
- a knowledge of the social organisation of both countries
- an outline knowledge of both legal systems
- a reasonable working knowledge of the relevant professional terminology
- an awareness of the expectations of lawyers and judges.¹¹

¹¹ Roger Frey, Len Roberts-Smith and Susan Bessell-Browne quoted in Ineke Crezee "How to Get the Best out of Your Legal Interpreter" (paper presented at Court Interpreters conference, Auckland District Law Society Continuing Legal Education Programme, Auckland, 28 June 2001).



Whether specific to the legal system or not, such programmes need to be of a continuing nature to ensure that practising interpreters retain a high level of competence.

Plain language

Communication difficulties in the court system for ethnic minorities are due in part to legal jargon. The use of less complex language in court has been recommended in the past in many countries: the challenge is to make it a reality.

Involvement of families

There were many calls for greater willingness to involve family members in the courts. Two separate issues were raised. First, whether family members could be allowed to be physically closer to an accused person in the courtroom, for example standing beside them in the dock in silent support, and second, whether they could speak during the court process.

Neither of these options is allowed now, though section 27 of the Sentencing Act 2002 allows family members to speak about a defendant's cultural background at sentencing. Work by the Ministry of Justice in 2001 shows that this section, when part of the Criminal Justice Act 1985, was not well known or often used.

The converse problem can be, as the ministry found, that family submissions can take over the court process. In one case study, members of a victim's family were reported to have spoken for two hours. This too needs to be faced up to.

Consensus dispute resolution

People of ethnic minorities may well respond best to processes like family group conferences and restorative justice programmes for adult offenders. Restorative models, like some forms of traditional cultural justice, acknowledge community structures, involve family members, and can be adapted to meet particular cultural needs.

Donald J Schmid, in his report "Restorative Justice in New Zealand: A Model for U.S. Criminal Justice" notes that, "[A] key to the effectiveness of restorative justice is its ability to accommodate cultural and ethnic diversity. Family group conferences, for example, can be held almost anywhere. The ability to conduct a conference on a marae or at the offices of a community group (with due deference to the view of the victim as to venue) can make an important difference. Even if held at a governmental office, the FGC procedure is flexible enough to allow prayer and other types of cultural accommodations."¹²

"Such processes draw on New Zealand's bicultural heritage, and may relatively easily be adapted to reflect the culture of participants."

Human Rights Commission

The use of restorative justice models in the New Zealand court system is discussed further in the criminal process chapter.

¹² Donald J Schmid *Restorative Justice in New Zealand: A Model for U.S. Criminal Justice* (Wellington, 2001) < <http://www.fulbright.org.nz/voices/axford/docs/schmidd.pdf> > .



Court workforce

Members of ethnic minorities told the Law Commission that, when they have to appear in court, they prefer to find a lawyer of their own ethnicity. They also said that they would feel much more comfortable in court if the judge was of their own culture.

“[Wider cultural and gender representation among the judiciary] is essential if people are to accept that everyone is equal before the law. That mission is somewhat clouded when one reads the demographics of the appointments.”

Lower Hutt individual

Many countries actively promote increased ethnic diversity amongst court staff through employment equity programmes. The Massachusetts Trial Court aims to employ a workforce in which minorities mirror the labour market. The UK Government wants seven percent of all magistrates to be from ethnic minorities: the same level as in the population as a whole.

While submissions generally asked for a judiciary that reflects the make-up of society, some questioned what this would achieve.

“Achieving a gender/ethnic ‘balance’ of judicial officers nationally gives nothing other than political correctness to the system. It does not assume that a female offender will appear before a female judge or an Asian offender before a Chinese judge, and even if it did, it could not matter to a Malaysian. Will a Pākehā offender benefit from a Māori judge?”

Anonymous

Submissions were emphatic that competence must remain the primary reason for selection. Could New Zealand do more, however, to encourage greater diversity among the judiciary and court staff in general?

Cultural facilitators

Many people stressed how important it was for them to be able to speak to a person at court who understands them, and whom they understand. Written materials and lawyers are less helpful.

“When someone has done something wrong, they feel isolated and pushed into a corner, particularly Pacific people for whom family is so important. They need to know who they can ask for help, who they can trust. This means there needs to be a cultural link for advice and support.”

fono participant

One possibility might be to engage court staff to:

- introduce ethnic minorities to the legal system, to advise on support services, and to liaise and advise the court on cultural factors
- recruit volunteers of different ethnicities, for example, Pacific leaders, to help at court like the Friends of Court or Maatua Whangai
- relieve interpreters having to explain court processes to those for whom they interpret, or advise court staff or lawyers about the cultural context.

Two recent initiatives in the Youth Court could be extended to other courts.

Lay advocates provide cultural support for young people in Youth Court proceedings, make sure that the court is made aware of cultural matters relevant to the case, and ensure that the person’s cultural needs are provided for.

The community liaison programme at Manukau Youth Court, which concentrates on Pacific minority groups, encourages families to become involved and communities to support young people, builds relationships with community organisations and agencies, and promotes cultural awareness among court staff.

Cultural awareness training

Another way to ensure that the needs of ethnic minorities are recognised is to assist the judiciary, and court personnel, with training.

“Judges, staff and lawyers can never have too much education on cultural differences if users from other cultures are to be comfortable.”

Auckland individual

The Australian Institute of Judicial Administration (AIJA) has released a report on cross-cultural training for the judiciary. The aims of the programmes that it recommends are to enlarge knowledge, to increase skills, and to review attitudes. For these programmes to be effective, members of ethnic minorities must have a part to play in planning and offering them.¹³

Handbook on cross-cultural awareness

The AIJA also recommended a handbook providing culturally specific information for the judiciary, to assist judges to speak appropriately to witnesses, to ensure that oaths are correct, and to assess body language more accurately.

The AIJA warns, however, of the need to be careful that any such handbook does not promote stereotypes.

Complaints procedure

The service charter of the Department for Courts guarantees that people of ethnic minorities, who come to the courts, will have their culture respected.

Submissions suggest this needs to be supported by a more actively promoted complaints procedure, allowing members of ethnic minorities to seek help when they find the attitudes of court staff negative or discriminatory.

What do you think?

What improvements can we make so that there is **better access to justice for ethnic minorities within the New Zealand court system?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

¹³ Julie Stubbs et al *Cross Cultural Awareness for the Judiciary: Final Report to the Australian Institute of Judicial Administration* (Australian Institute of Judicial Administration, Victoria, 1996) 91.



Victims Of Crime

We look for: improved access to justice for victims of crime

Submitters to *Striking the Balance* considered that victims of crime are poorly served by the New Zealand courts.

The Department for Courts defines victims as people who have suffered physical or emotional harm or have lost property because of a crime. If someone has died because of a crime, the family of that person is regarded as the victim.

To improve the experience of victims in the court system, certain fundamentals are considered essential.

“...ensure that the criminal justice system is responsive towards the needs of victims of offences, and that as far as possible contact with the justice system has a beneficial impact on people’s well-being.”

Human Rights Commission

How best to achieve these goals involves complex issues.

The effects of crime on victims

Being the target of crime can have wide ranging effects. These can be physical, psychological and financial, and vary depending on the crime and the victim. When the initial effects of the crime have subsided, victims will often be left with feelings of anger, anxiety, confusion, fear, a sense of powerlessness and a loss of trust in others, which may affect their relationships, work and attitudes to society in the long term.

What do victims need?

While the needs of individual victims will vary depending on their circumstances, all victims need:

- practical and emotional support in the period following the offence
- access to information on court processes and an explanation of their role
- to be treated with sensitivity and respect by those involved in the justice system
- to have their special perspective in the case taken into account
- to be kept informed of the progress of the case
- to have their privacy and safety protected.

The experience of victims in the court system

Victims entering the courts are particularly vulnerable, and their experience of the criminal justice system can play a pivotal role in their recovery. The New Zealand Council of Victim Support Groups says that victims who are recognised, respected, given access to services, and whose losses are acknowledged, are more likely to adjust well to their experience of crime.



However, many victims are very unhappy with their experience of the courts. Some of the negative aspects of the court experience highlighted by victims were:

- long periods of waiting both before and at hearings
- a lack of facilities at court
- having to be too close to defendants or their supporters, and being intimidated
- the trauma of recounting in public very private details relating to the crime
- a fear of cross-examination to test their credibility
- a general lack of responsiveness to their needs.

It is said both here and overseas that, for some victims of crime, going through the court system is so traumatic that it can increase their distress, and amount to “secondary victimisation”.

“It is frequently reported that victims who do elect to make a complaint experience the criminal justice system process as a trauma which is often as destructive as the rape itself.”

Auckland District Law Society Public Issues Committee

The New Zealand National Survey of Crime Victims in 1996 found that only two-fifths of all offences are reported to the police. The negative experience of victims at court is one reason given for the under-reporting of crime.

Wellington Independent Rape Crisis Centre estimates that 90 percent of rape cases never get to court, and the Support Network for Parents and Caregivers of Sexually Abused Children Inc claims that only 10 to 15 percent of cases of the sexually abused children that it hears about are ever prosecuted.

There may be several reasons for a crime not being reported. Rape victims, for example, may not report crimes because of fear that they will not be believed, fear of the stigma attached, and fear of retaliation.

However, if aspects of the justice process itself are inhibiting the reporting and prosecution of some crimes, this undermines access to justice.

Exclusion of victims

A persistent and consistent complaint is that victims feel left out of the process.


“Courts are generally seen as alienating for victims as they are oriented towards offenders and the offenders’ rights and needs are considered more important than those of the victim.”

New Zealand Council for Victim Support Groups

Many victims feel that the state encourages them to participate in the criminal justice system to prosecute offenders, but ignores their views, excludes them from decision-making, deprives them of relevant information, and does not provide them with sufficient support.

“Shouldn’t there be someone looking after my (the victim’s) interests?”

Anonymous



In its submission to Parliament on the Victims' Rights Bill, the Churches' Agency on Social Issues commented, "A major grievance voiced by victims is that they have no rights to participate in court hearings. The offender is represented by a lawyer. The state is represented by a prosecuting lawyer. No advocate represents either the primary victim or the associated victims. Victims may or may not be called as prosecution witnesses and even if they are it is only to provide evidence for or against conviction."

The historical role of the victim

Until the early part of the nineteenth century in England, the responsibility for prosecuting offenders lay with the victim, who had to gather the evidence and present it to the court.

In time that role was assumed by the state on the principle that the public interest is always involved.

For some, this has meant that the court system lost interest in the rights of victims – if the crime is against the state, the victim is simply the witness. The primary focus is the offender and the victim's interests or rights are secondary. In contrast, offenders' rights, which include the right to a lawyer, the right to be presumed innocent, and the right to a fair trial, are guaranteed by law.

There are benefits in the state taking over criminal administration from victims and other individuals. This:

- protects victims from retaliation and takes away the burden of pursuing offenders
- protects offenders by ensuring that the response to their offending is not decided by the particular victim, but is based on evidence, and respects their human rights
- lends consistency to criminal justice, by providing that similar crimes are dealt with in an equivalent manner.

The problem is perhaps not one of principle but of degree. Can a better balance be achieved?

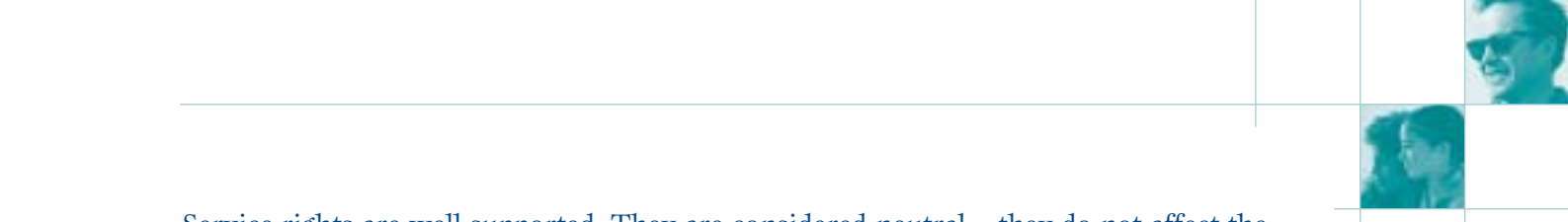
The evolution of victims' rights

Since the 1970s, victim assistance programmes have grown rapidly throughout the world. In many countries criminal procedural law has been modified to give victims of crime a more active role. In 1985, the United Nations General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power.

The Declaration, to which New Zealand is a signatory, proclaims that victims should be entitled to access to justice, fair treatment, restitution, compensation and assistance. Participating nations agreed to implement the Declaration. The Victims of Offences Act 1987 was a direct response.

The rights of victims fall into two broad categories:

- service rights: rights to services within the criminal justice system (eg, crisis counselling, being provided with information and support)
- procedural rights: rights to influence decisions in the criminal process (eg, victim impact statements, which can be taken into account at sentencing, and submissions to parole boards).



Service rights are well supported. They are considered neutral – they do not affect the way the court deals with the person charged. Critics point out, however, that service rights alone leave the victim in a subservient role – receiving services rather than having any influence.

Procedural rights are more contentious. They can conflict with the defendant's right to a fair trial, the orderly process of the court's business, and the state's responsibility to represent the whole of society.

In New Zealand victims have increasingly been granted a combination of both service and procedural rights.

Victims' rights in New Zealand

The victims' movement has flourished at a grass roots level in New Zealand. Since 1986, 77 Victim Support Groups have been formed, all affiliated to the New Zealand Council of Victim Support Groups.

The Victims of Offences Act 1987 gave general effect to many of the principles in the United Nations Declaration, including access to services, information about the progress of cases, return of property used in trials, and respecting victims' views in the proceedings.

The recent Victims' Rights Act 2002 recasts most of these principles as explicit service and procedural rights, enforceable through the Ombudsman, Privacy Commissioner, Police Complaints Authority and by direct approach to the agencies themselves.

Both the Sentencing and Parole Acts 2002 also extend the rights of victims to participate in the criminal justice process.

Provisions for victims at court

Information

The Victims' Rights Act 2002 provides that victims must be properly informed of progress in the case against the accused. The police must keep victims up to date with the investigation, decisions about laying charges and any possible trial. If there is a conviction, victims must be told what the sentence is. The Victim Notification Register enables victims to be informed about bail, home detention, release, escape and parole hearings. The Act extends the range of crimes for which victims may join the Victim Notification Register.

Services

The Victims' Rights Act 2002 requires that victims be treated with courtesy and compassion, and that their dignity and privacy be respected. Victims must have immediate access to any services or protection available for them. These include crisis counselling, support during contact with the justice system, and meeting follow-up needs.



Victims' Advisers, employed in District Courts, can:

- tell victims what is happening as the case progresses
- explain how the justice system works
- make sure the police and others connected with the case know if victims have concerns
- give information on other services available
- make sure property is returned promptly if it has been used in the case.

Privacy

The names of victims of sexual crimes are automatically suppressed, and they give evidence in closed courts. Addresses of victims cannot normally be read out in court. The 2002 Act restricts the disclosure of Victim Impact Statements.

The evidence of children alleging sexual abuse may be presented by a video interview taken beforehand, by closed-circuit television, or from behind screens. Persons with intellectual disabilities can also be screened from the defendant. Adults, however, can only be screened if there is a special reason and the court allows it.

Taking victims' views into account

In Victim Impact Statements, at sentencing, victims can describe the effects of the crime on them. The Sentencing Act 2002 insists courts take this into account. The Parole Act 2002 gives victims the right to make submissions to the Parole Board, when an offender is due for release. Victims' views on granting diversion and name suppression must be taken into account and on the granting of bail in certain cases.

Victims can play an active role in Family Group Conferences for young offenders. They can meet the young person and their family, tell the offender how the crime has affected them, and suggest a proper response. They are central to restorative justice processes involving adult offenders.


Financial assistance

At sentencing, a judge can order an offender to pay reparation to victims for loss or damage or emotional harm, based on the amount of damage, the costs to the victim and the offender's ability to pay. The Sentencing Act 2002 requires reparation, unless it would result in undue hardship, or there are special circumstances.

The offender may offer to make amends to the victim directly, or the court may order restitution of property to its rightful owner. Victims who have suffered physical injury as a result of a crime are eligible to apply for compensation from the ACC.

Could we do more?

Despite these rights, many victims remain dissatisfied with their experience of the courts. Some say that victims should be legally represented at every stage in the process. Most European countries allow this. In France, victims have a constitutional right to join the prosecution and receive legal aid. In the United States, victims can hire a lawyer to assist the public prosecutor.



Other submissions suggest creating a new specialist court for sexual abuse trials, involving specially trained judges and less intrusive questioning. A more inquisitorial process was also suggested: the judge inquiring actively into the facts of the case, instead of relying on evidence presented by prosecution and defence.

The Public Issues Committee of the Auckland District Law Society suggests the judge might initially question the complainant and defendant, and that lawyers might only do so afterwards. The committee also suggested that the complainant and the accused be allowed to tell their story as it happened, without having to be prompted by lawyers.

Such options would call for fundamental change in the court process.

More information for victims

Information is a primary need. Victims need to know about the progress of their case, their rights and duties, their role at court, and where they can go for help and assistance. The likely outcome of a hearing and the points to be considered in sentencing, as well as debriefing victims after an appearance in court, are also considered to be important.

Otherwise, victims are likely to experience greater difficulty dealing with the effects of the crime. The Australian Institute of Criminology observes that, “Victims’ need for information cannot be overemphasised... Providing victims with as much information as possible enables them to make choices and attempt to regain some of the control that was taken from them as a result of victimisation.”¹⁴

Judging by the submissions to *Striking the Balance*, a large number of crime victims do not understand what is required of them before they arrive at a hearing. Hopefully the new Victims Rights Act 2002 should bring about improvements.

Training for people serving victims

A principle of the Victims’ Rights Act 2002 is that any person who deals with a victim (a judicial officer, lawyer, member of court staff, member of the police, or other official) must treat the victim with courtesy and compassion and respect the victim’s dignity and privacy.

The Victims’ Task Force (set up for a five-year term by the Victims of Offences Act 1987 to monitor adherence to the Act’s principles) recommended staff training in its 1993 report to the Minister of Justice, to cover “the crisis reaction of victims, and the phenomenon of revictimisation by institutional systems”, as well as their needs and entitlements under law. Many argue these issues still require further attention.

Improved facilities for victims at court

The Department for Courts’ Service Charter promises victims and witnesses – at their request – a separate waiting area for personal safety reasons. Submissions say these are not always accessible or appropriate. Access to refreshments, privacy and safety are seen by many to be essential.

¹⁴ Bree Cook, Fiona David and Anna Grant *Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, Canberra, 1999) 76.



The Victims' Task Force also recommended in 1993 that courts provide a room for distressed witnesses to go to after giving evidence, to recover their composure. Submissions call for these security and safety issues to be addressed in existing and future courts.

More privacy giving evidence

Wellington Independent Rape Crisis Centre and several others call for increased privacy for adult victims of sexual crimes, when giving evidence. Alternatives include being screened from the defendant while giving evidence and recording evidence on video before the trial. These provisions currently apply automatically only to children and people with intellectual disabilities who are complainants in sexual cases.

The Law Commission suggested, in its 1996 proposals for reform of the Evidence Act, that all witnesses should be allowed to give evidence in these ways, where need is established, regardless of the nature of the crime.

Support people at trial

The Law Commission has also previously recommended allowing a support person to sit with an adult victim during the trial. Several submissions repeat the call for this.

This support person would not be able to speak to the victim while they were giving evidence, nor address the court, but victims might feel more at ease, and be better able to give complete and therefore more helpful evidence.

More effective reparation mechanisms

Reparation is another area where victims of crime have strong views.

“Victims can rightly feel very angry when they see taxpayer money being used to defend the offender and they have little chance of reparation or restitution for loss of property or for expenses incurred as a result of the crime.”

New Zealand Council of Victim Support Groups

The Sentencing and Parole Acts 2002 make reparation a priority, but offenders often have very limited financial means, and can be difficult to trace. The Human Rights Commission calls for reparation orders to be followed up more actively. An option might be for government to pay reparation to victims immediately and recoup it from the offender later. The Victims' Task Force recommended this option to the Minister of Justice in 1993.

Other suggestions to help victims with the financial effects of crime include:

- increasing payments to families where a family member is killed, to cover the full cost of the funeral
- extending compensation from ACC to those who suffer emotional trauma as a result of crime.



Restorative justice

Restorative justice is heralded by many advocates of victims' rights as the best means to engage victims, offenders and communities in the search for a more positive resolution to crime. This concept was strongly supported in many submissions.

"[Restorative justice] can be difficult for a victim, but it enables them to become central to the justice process."

New Zealand Council of Victim Support Groups

Restorative justice processes encourage victims to express their feelings about what has happened and to be involved in decisions about ways to redress the balance.

"[By] meeting the offender and being able to express feelings to the culpable party, to witness them as human beings rather than vague impersonal threats, to receive their apologies and exercise the privilege of forgiveness may help victims restore their personal equilibrium in a more direct and immediate way than would otherwise be possible."¹⁵

The Sentencing and Parole Acts 2002 recognise restorative justice processes, allowing any outcomes to be taken into account at sentencing or during parole hearings. The New Zealand Council of Victim Support Groups expressed support for restorative justice methods. It emphasised, however, that victims need to be well informed and better supported before and during the process.

This comment mirrored a more general concern that restorative justice processes need to be better defined and comply with basic standards. Restorative justice processes are discussed further in the criminal process chapter of this report.

What do you think?

What improvements can we make so that there is **better access to justice for victims of crime within the New Zealand court system?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

¹⁵ A Mace quoted in Carmel Benjamin "Why is Victim/Offender Mediation Called Restorative Justice?" (paper presented at Restoration for Victims of Crime Conference, Melbourne, September 1999) < <http://www.aic.gov.au/conferences/rvc/benjamin.pdf> > .



Disabled People

We look for: improved access to justice for disabled people

Access to justice for people with disabilities was a theme raised in many submissions to the Law Commission. This chapter looks at the court system from that perspective.

“You need to look at how people with high and complex needs are treated in court. Everyone's an individual and the court needs to understand that.”

Wanganui individual

The 2001 New Zealand Disability Survey, undertaken by Statistics New Zealand, found that 743,800 New Zealanders or 20 percent of the population have some form of long-term disability. Given that New Zealand's population is ageing, and that disability is more prevalent among older people, this figure will rise.

Defining “disability”

The New Zealand Disability Strategy *Making a World of Difference – Whakanui Oranga*, released by the Government in 2001, states, “Disability is not something individuals have. What individuals have are impairments. They may be physical, sensory, neurological, psychiatric or other impairments. Disability is the process which happens when one group of people create barriers by designing a world only for their way of living, taking no account of the impairments other people have.”

Barriers faced by people with disabilities

People with disabilities face barriers in many areas of everyday life. Half of all disabled adults require assistance from others, and one in eight have an unmet need for special equipment.¹⁶ The New Zealand Disability Strategy says that people with disabilities are less likely than others to have educational qualifications or to be employed, and are more likely to be poor, to find it hard to speak to others and to have difficulty getting about.

They also often face ignorance and prejudice. Many identify the negative attitudes of others as the major barrier in their daily lives. In the year to June 1999, discrimination on the basis of disability was the largest category of complaints to the Human Rights Commission.

Submissions received indicate that disabled people also face barriers when interacting with the New Zealand courts, whether as parties, witnesses, counsel, judges, jurors, court staff or spectators.

Some of the barriers are common to all people with disabilities; others vary depending on the individual and the disability involved. The majority of disabled New Zealanders have more than one disability.

¹⁶ Office for Disability Issues "Briefing to the Incoming Minister for Disability Issues Towards a Fully Inclusive New Zealand" < <http://www.odi.govt.nz/resources/minister-briefing/chapter2.html> > .



New Zealand Disability Strategy

The 2001 New Zealand Disability Strategy aims to remove the barriers that prevent disabled people from participating in, and contributing to, society.

The strategy covers public attitudes, human rights, employment and educational opportunities and support services. It requires individual government agencies to develop annual work plans. The Office for Disability Issues, established on 1 July 2002, is the lead agency.

One objective is to “foster an aware and responsive public service”. This requires government agencies to treat disabled people with dignity and respect, to advise them more actively of the services to which they are entitled, and to provide them with accessible general information.

The Department for Courts’ work plan involves reviews of recruitment policies, management training, equipment for disabled staff members, and access to the department’s buildings and website.

People with physical impairments

Around 430,000 people have physical impairments in New Zealand, according to the Disability Survey 2001.¹⁷ People with physical impairments require sufficient parking spaces close to court buildings, accessible entranceways, easy access to facilities such as bathrooms and telephones, and manoeuvring space and seating in courtrooms.

The New Zealand Disability Strategy comments that although New Zealand has standards for access, most public buildings and facilities are designed and built by non-disabled people for non-disabled users.

Submissions tell of the difficulties people with physical impairments have making their way around court buildings, and call for future buildings to be designed in consultation with disability groups.

Deaf people and people with hearing impairments

Some 223,500 New Zealand adults belong to the Deaf community or have a hearing limitation that cannot be corrected by a hearing aid. They cannot easily take part in court proceedings, which are largely oral.

“The needs of people with disabilities should be recognised at the earliest stages of the process.”

Life Unlimited Hearing Therapy Services

In its submission, the Hearing Association Incorporated said that the “loop” systems in many courts are incompatible with many hearing aids, and that the hearing-impaired are often unaware that the courts can offer other services like infra-red listening systems.

For profoundly deaf people other forms of help are required, for example, “real-time captioning”, used overseas, which allows almost instant translation into English on a computer screen of court reporters’ symbols.

¹⁷ The statistics in this chapter about disabled people in New Zealand all come from the Disability Survey 2001.



In New Zealand, sign language interpreters are sometimes used. They share the same problems as language interpreters, discussed in the ethnic minorities chapter. Relying on family members or others can lead to misrepresentation. Another problem is that interpreters may not be available at short notice, resulting in rescheduling and delays.

The Salvation Army recommends that the use of interpreters should be extended more often to interviews for diversion and with lawyers and probation officers. A lack of understanding at these times can result in missed appointments, and be seen as a refusal to cooperate.

Blind people and people with vision impairments

Some 81,500 New Zealand adults identify as blind or vision-impaired, according to the Disability Survey. Of these 7,800 are completely blind.

“The experiences of blind people who have participated in the court system indicate that finding their way around the court building is a major issue.”

Royal New Zealand Foundation for the Blind

The Royal New Zealand Foundation for the Blind calls for vision-impaired people to be given standard information before they go to court, in accessible formats: audio and video cassettes, large print and Braille, and text-to-voice software.

In the courts themselves, improved lighting, obvious contrast in interiors and signage in large print can make a significant difference to the less acutely impaired. Ground surface indicator matting can be useful to warn of potentially dangerous obstacles, such as stairs, escalators and entrances to buildings.

A variety of other devices are used in overseas courts to assist people with vision impairments. These include reading scanners, which scan text and read it aloud to the user, and closed-circuit cameras, which enlarge images and display them.

Compound impairments

An estimated 33,600 New Zealanders have both hearing and vision impairments. For these, and the many other New Zealanders with multiple impairments, the barriers to effective participation in the court process are compounded.


People with intellectual disabilities

About 32,400 New Zealand adults have an intellectual disability. Of these, 23,700 require help from support people or organisations like the IHC to live their daily lives.

It is well documented that people with intellectual disabilities have an increased risk of appearing in court as either victims or offenders.¹⁸ This reflects a worldwide pattern. People with intellectual disabilities are vulnerable and support in the community can be sparse.

Before people with intellectual disabilities even get to court, they are disadvantaged by the fact that they are unlikely to be aware of their rights, may have difficulty understanding what constitutes a crime, and may have trouble reporting the fact that a crime has been committed.

¹⁸ See Committee on Intellectual Disability and the Criminal Justice System "People with an Intellectual Disability – Giving Evidence in Court" (Sydney, 2000) < http://www.lawlink.nsw.gov.au/clrdl.nsf/pages/dis_report_2 > .



Appearing in court can be traumatic for any New Zealander. This is likely to be more intensely felt by people with intellectual disabilities, for whom unfamiliar locations and procedures can cause stress and anxiety. Waiting for several hours to appear at court and the rescheduling of cases at the last moment can cause increased disorientation.

“Considerable anxiety is caused when an important event that a person is expecting on a certain date is delayed.”

IHC

Intellectually disabled people will often need more time to understand information or answer questions, and have trouble following the language used by lawyers and judges. The use of plain language pamphlets and videos can be useful, but there is a need for direct help.

An intellectually disabled person needs a familiar and reassuring environment. The chance to visit the court prior to appearing is important, as well as support at the hearing itself.

A further concern is that not all intellectually disabled people are identified as possibly being under a legal disability. Some may plead to charges and conduct cases, while not being fit to do so.

“It is important to identify people with cognitive difficulties, including intellectual disabilities at the outset so that there can be an early determination of a person’s ability to give evidence, to consent to various processes and their ability to stand trial.”

IHC

People with psychiatric disabilities

Some 104,500 New Zealanders identified as having a psychiatric or psychological disability in the survey. One in five New Zealanders have a mental illness at any given time.¹⁹

Those suffering from mental illnesses, like anxiety disorders, depressive disorders and schizophrenia, face prejudice and lack of understanding each day. The fact that their disability is not always obvious can lead to scepticism or impatience from others, and this may well be their experience of court processes.

Some commented that while people with psychiatric disabilities are often in need of good legal representation because of their mental state, they may not be granted legal aid if their case is rated “non-serious”.

Trials are stressful for anyone. For those with significant psychiatric disorders, the stress involved can be expected to be very much greater.

What we could do

A common message is that court personnel must not assume one type of answer will satisfy the requirements of all disabled people. However, there are some common needs that call for a general response.

¹⁹ Figures from the Mental Health Commission.



Disability awareness training

A 1995 Californian survey of access to courts for people with disabilities found that “attitudinal barriers need to be addressed before any physical or programmatic accommodations for persons with disabilities can be effective in generating full and equal access”.²⁰

Problems of attitude may not always be ill-intentioned, and may simply result from a lack of knowledge of disability-related issues and how best to help.

Submissions strongly suggest that, to deliver a high level of service to people with disabilities, court staff, lawyers and members of the judiciary need training. They need to become aware of the diversity of disabling conditions, the varying access needs of each person, and the kinds of practical responses required.

Information for people with disabilities

There were many calls for more accessible information before the court process begins, such as accessible descriptions of the layout of buildings for the vision impaired, or information in writing for the hearing-impaired. Regularly requested forms could be standardised in Braille. Signs in court buildings identifying facilities and support services could be more prominent. Website information could be more accessible, using currently available website disability scans.

Hearing times

Waiting for long periods can be difficult for people with disabilities. They will also often be dependent on public transport and on the availability of support people, and may have strict medication schedules. Courts may need to be more flexible in their scheduling policies.

Expansion of legal aid criteria

Many people with disabilities rely on legal aid. There were calls to extend the levels of aid available to people with disabilities to cater for their additional needs; to reflect, for example, the fact that people with an intellectual disability may need more time with a lawyer than is usual, or to fund a support person in court.

Accessibility coordinator

Each court could assign a staff member to monitor how accessible information is, to direct, advise and help people with disabilities, and to assist with staff training.

People with disabilities need to be able to inform someone of their disability before they arrive at the courthouse. A coordinator could be the initial point of contact and could ensure that they get the help they need.

²⁰ Judicial Council Access and Fairness Advisory Committee "Summary of Survey and Public Hearing Reports of the Access for Persons With Disabilities Subcommittee of the California Judicial Council's Access and Fairness Advisory Committee" (California, 1997) < <http://www.courtinfo.ca.gov/reference/summarydisabilities.htm> > .



Review of current facilities and services

The NSW Attorney General’s Office in Australia has developed its own Disability Strategic Plan, which includes a review of services and the development of court support guidelines for people with disabilities, disability awareness training, development of alternative communication formats and an “access audit” focusing on accessibility of premises.²¹

The New Zealand Disability Strategy might be an appropriate framework for a similar expanded plan for New Zealand courts.

What do you think?

What improvements can we make so that there is **better access to justice for disabled people within the New Zealand court system?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

²¹ NSW Attorney General’s Department Access and Equity: *The Attorney General’s Department Disability Strategic Plan* (Sydney, 1998) < <http://www.lawlink.nsw.gov.au/agd.nsf/pages/dap> > .



Part Two: Access To Courts

Information

We look for: accurate, relevant, understandable and available legal and court-related information.

Long before people get to court they need ready access to easily understandable information so they can make informed choices about their rights and duties. Submissions show that people across all spectrums of New Zealand society have little understanding of basic aspects of the law and how the court system operates.

What people need

The information court users need is wide ranging and includes laws, processes, services and support. Areas that need explaining include peoples' rights and duties, the functions of the various courts and tribunals, what happens at court, the meaning of legal jargon and concepts relating to laws and procedures, the role of key players in the system, time involved and costs anticipated, and who to talk to for help and advice.

Submissions suggest the lack of understanding is so great that information needs to be very basic, assuming no knowledge of the legal system or its processes. Legal information should be:

accurate

- up to date
- of high quality
- subject to set standards
- regularly monitored and evaluated

relevant

- responsive to community legal needs
- targeted to those who face the greatest barriers in accessing justice
- understandable
- in plain language
- of varying degrees of complexity for different audiences
- available in many languages

accessible

- provided in a variety of forms
- sensitive to differences in the community
- ongoing
- proactive
- comprehensive
- free

“Simple flow chart pamphlets and posters with minimal writing in the different ethnic languages explaining the more common processes of the court are an urgent priority”

Wellington
Community Law
Centre



What happens now

A variety of law-related organisations contribute to the overall provision of legal information, some by funding, some by producing material and some by delivering the information. However, no organisation seems to have final responsibility and there is a strong case for a lead state agency to ensure that publicly available information is relevant, accessible and meets basic standards.

There are several legal information providers in New Zealand.

Legal Services Agency

This agency administers legal aid provision, helps establish and fund community law centres, finances law-related education and sponsors and initiates research into the provision of legal services. It has produced a number of pamphlets and books, available at community law centres and citizens' advice bureaux. It also produces an annual catalogue, "Law Access – Ngā Rauemi ā Ture", listing legal information materials produced by more than 130 organisations.²²

Increasingly the agency has taken a leading role in providing information to court users. Recognising gaps in public understanding, it has recently developed a strategy to "comprehensively address legal needs in the areas of legal information and education for both the general public and for specific communities of interest".

Community Law Centres

These agencies have long been leaders in providing legal advice, information and law-related education. Although few centres produce legal information resources, they are all very active in answering requests for information and resources.

The 25 independently managed centres aim to serve communities with unmet legal needs. Some serve a geographical area, while others serve communities defined by a characteristic like ethnicity. Centres typically provide legal advice and information about domestic violence, consumer affairs, debt, tenancy, school suspension, traffic, criminal and employment issues. Free advice and information in these areas would be largely unavailable without them.

The Department for Courts

The department produces court-related resources covering a wide range of topics, including status hearings, fines and collections, jury service and restorative justice. These are on display or available in courthouses and most written material is also available on the department's website.²³ Some are available in many languages. The Māori Land Court Advisory Service provides an active information advisory service for court users.

²² The catalogue is intended for use by community groups, teachers and the general public, and is available on the Legal Services Agency website, < <http://www.lsa.govt.nz> > .

²³ See, < <http://www.courts.govt.nz> > .



A snapshot of a Community Law Centre

YouthLaw Tino Rangatiratanga Taitamariki

YouthLaw provides free confidential information, advice, advocacy and education for children and young people up to the age of 25. Its philosophy is to empower young people to make their own decisions by providing information and explaining options. The main requests for advice and information include criminal, employment, education, traffic, consumer/contract and custody/access/guardianship matters.

YouthLaw's website²⁴ has a series of information sheets providing easy to understand descriptions of legal rights and processes. There is a comprehensive fact sheet on "going to court", explaining in simple and non-threatening language, procedures, timing, pleading options, sentencing and involvement of parents at the Youth Court.

Young people can call YouthLaw collect, send a fax, write, email, or visit the Auckland office.

Although court staff must remain neutral and not take sides in disputes that come to court, the department's service charter requires that staff help answer questions, provide referrals to other services and make pamphlets readily available.

The Citizens' Advice Bureaux suggested that courts should be the main source of general information and that although staff cannot offer legal advice, they should be able to offer clear and accurate advice on procedures. Submitters suggested that not all court staff are as helpful as could be expected.

Other government agencies

A range of departments and agencies provide some legal information in brochures, pamphlets, posters and videos. For example, the Ministry of Justice produces information on important new statutes such as the Sentencing Act 2002, and the Government has recently directed the Department for Courts and Ministry of Justice to develop a public information strategy for the Family Court.

Most government agencies have individual websites and the "E-government" Internet portal will mean people can quickly find information on the full range of government services through a single website www.govt.nz. The Parliamentary Counsel Office/ Te Tari Tohutohu Pāremata, in association with Brookers, has established free public access to unofficial versions of statutes and statutory regulations via the Internet.²⁵

The New Zealand Law Society

The Law Society is responsible for providing information to its members. It has a comprehensive programme of seminars and training for the profession. The society also produces pamphlets for the general public distributed through district law societies, law firms and voluntary agencies, and on its website.²⁶ It runs "Law Awareness" and "Law in Schools" programmes, aimed at educating the general public and young people on their legal rights, the law and how lawyers can help.

²⁴ See, < <http://www.youthlaw.co.nz> > .

²⁵ See, < <http://www.legislation.govt.nz> > . This temporary website is to be replaced in early 2003 by an official Parliamentary Council Office website.

²⁶ See, < <http://www.nz-lawsoc.org.nz/hmlawinsch.asp> > .



The society also established the Law Foundation to provide grants for legal research, public education and legal training. The Foundation has funded projects such as development information sheets for citizens' advice bureaux, and the funding of youth-focused legal pages in *Tearaway* magazine.²⁷

Citizens' Advice Bureaux

The Association of Citizens' Advice Bureaux is a national voluntary organisation providing free, confidential information and advice through its 88 bureaux. The association offers information sheets and step-by-step guides on a range of topics such as renting property, the breakdown of relationships and debt. Information may also be sought directly, through the CAB website or on 0800 FOR CAB.

The bureaux have dealt with more than 220,000 enquiries relating to the justice and court system since 1998. There was a 60 percent increase in such inquiries between 1995 and 2001, most resulting in referrals to legal advisers like community law centres.

Other providers

Many other community groups and organisations including district law societies, women's centres, women's refuges, Victim Support, People's Centres as well as voluntary workers in the court system such as Friends of Court, Maatua Whangai and the Salvation Army provide some legal information to the general public or sometimes to particular groups.

Issues with the existing situation

Public legal information needs to be accurate, relevant, accessible and understandable and there should be a clear system of responsibility for ensuring these standards are met. Despite the best efforts of many, a worrying number of New Zealanders still do not know where or how to obtain general legal information. This raises several issues.

No accountability

Since no government body or organisation has overall oversight for this area, it is impossible to know if existing information resources do meet community needs, are of a good standard and are widely available.

In its 1996 "Women's Access to Legal Information" consultation paper, the Law Commission commented on the lack of accountability for the provision of legal information: "... there is no system set up for assessing how well statutory obligations are being performed by the various bodies, how their functions or powers might be exercised more effectively, and how the efforts of all organisations playing a role in the provision of legal information might best be combined."

The commission also said: "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."

There is little evidence to suggest this duty has been met, or is even recognised as a central government responsibility. Even the agencies responsible for administering the operation of particular statutes do not appear to be accountable for providing accurate, ongoing legal information about their legislation.

Burden on charitable organisations

Community and voluntary organisations currently play a very important role in meeting public legal information needs. However, the absence of a coherent and accountable public system places a heavy burden on these organisations, especially if their primary role is assisting needy communities with legal advice.

Almost every community legal service provider identified lack of funding and resources as a major constraint. Many community-based providers are struggling to survive year to year. The future funding of community law centres, for example, is currently unclear, as their main source of financial support – interest generated by the Law Society Special Fund – has fallen dramatically.

Many community organisations give insufficient funds as the main reason why they cannot publicise their services more widely. Yet, as many submitters say, a service must be well publicised to be accessible. It was pointed out at the Auckland fono that Pacific people don't even know about the help that is available. That first step is missing.

Poor coordination of current services

Existing organisations work independently and often in isolation, so services can overlap and gaps exist. There is a need for increased coordination and cooperation, both between the agencies involved and between them and government.

“Potentially useful support services ... are compromised by division, funding restraints and by the absence of an umbrella agency to coordinate and facilitate collaboration ...”

Individual

What happens overseas

In most countries the government agencies that provide legal aid also provide or coordinate general legal information provision to the public. Their initiatives offer some useful insights into ways New Zealand might improve access to legal information.



Legal information providers

Australia and Canada have government-funded legal aid commissions.

Their main role is to administer legal aid but they also have a large number of legal aid offices providing access to free information and advice, even to people not eligible for legal aid. The commissions also manage public legal information services such as telephone advice, after-hours services and community legal education. The New South Wales commission travels to rural areas to offer advice and community law-related education.

Canada has an extensive national network of public legal education organisations. These non-profit and non-governmental organisations provide legal information and law-related education to the public. Common activities include producing newsletters, providing telephone services, administering on-line frequently asked questions, conducting public legal education workshops for specific groups in the community, school visits and producing publications.²⁸

New South Wales has a Legal Information Access Centre network, a partnership between the state library and the Law Foundation of New South Wales that provides access to free information through public libraries. Information can be given in person, over the telephone, or by mail to country clients. The central service answers around 19,000 inquiries a year and acts as centralised support for public libraries.

Legal information is provided by community legal centres, law centres and community legal clinics in Australia, the United Kingdom and Canada respectively. These countries' law societies, bar associations, law foundations and citizens' advice bureaux also engage in varying degrees of public legal information and education.

Legal information initiatives

Many legal information organisations in Canada and most legal aid commissions in Australia have freephone legal information lines.²⁹ While these are often person-to-person, some offer libraries of pre-recorded plain language information – available at any time. These services are particularly helpful for people who cannot read. After listening to a tape callers can be connected to a referral service.

Australia offers some particularly good ways to use the Internet effectively. "Lawlink"³⁰, administered by the NSW Attorney-General's department, is an extensive website giving information on topics such as "my rights at work", "going shopping" and "doing business". It also has sections on courts and tribunals, legal aid, government departments and agencies, as well as particular sections for young people, legal researchers, lawyers, people with disabilities and speakers of foreign languages.

28 See, Public Legal Information Association of Newfoundland website: < <http://www.publiclegalinfo.com/about.html> > and the website of the Legal Information Society of Nova Scotia: < <http://legalinfo.org> > .

29 See, Legal Aid Western Australia website: < <http://www.legalaid.wa.gov.au/Graphic/GettingLegalHelp/Default.asp?Page=Legal.xml> > .

30 See, < <http://www.lawlink.nsw.gov.au> > .



“LawAccess” in NSW³¹ is an impressive example of integrating telephone and Internet services to provide community and government legal services to people who would otherwise have difficulty getting information, for example, people in remote regions or with disabilities. It is an initiative of the Attorney-General’s department in collaboration with public and community organisations. The main function is a person-to-person telephone service during business hours, which caters for people who need translators and those with hearing difficulties or speech impediments. Pre-recorded messages (“law talks”) are also available 24 hours a day. People can seek information or relevant organisations through the website, which offers more than 1500 plain language and non-English language fact sheets.

Each Australian state publishes a comprehensive Law Handbook with plain English answers to common questions. In England and the United States, computerised information kiosks are being trialled in court foyers.

“Courtrooms and Classrooms”, a recent initiative of the Public Legal Education Taskforce of Ontario, provides opportunities for students to meet judges, lawyers, court staff and others involved in Canada’s judicial system.

Another way of capturing the general community’s attention is to filter information initiatives through the mainstream media. “Law Matters”, a weekly ABC television series in Australia has programmes on lawyers, family law, juries and judges. “What’s Your Problem?” is a daily column in the Adelaide Advertiser in South Australia, where people can write to the newspaper with specific legal issues that are then referred to the law society.³²

A culture change

If we are serious about providing a fair justice system then we must provide high quality legal information to the public. People need to know where they can get legal information, who they can talk to, where they should be and, most importantly, what is going on.

Many practical suggestions from submitters call to mind overseas schemes which offer imaginative ways to fill current gaps in New Zealand. However, New Zealand not only lacks many of these now well established initiatives, but they would be difficult to put in place in the present uncoordinated environment. Given the current level of dissatisfaction, a fundamental change of attitude seems to be needed.

The starting point for change seems to be to explore and define the responsibilities of government and the possible roles of state and community agencies.

“There should be a standard brochure/booklet available free of charge detailing court procedures and what one could possibly go through if accused of an offence”

Individual

31 See, < <http://www.lawaccess.nsw.gov.au> > .

32 See, < http://www.lssa.asn.au/community/community_services.htm > .



What we could do

Expanded roles for existing agencies

Submissions suggested that the Legal Services Agency and Department for Courts should take more active roles in making legal information more available to the general public.

Coordination: Legal Services Agency

This agency is already developing strategies to identify unmet information needs and sees itself as well placed to take on a central role in the production and delivery of basic information resources.

Additional functions it has identified include ensuring resources are aligned with community needs, establishing content and presentation standards, expanding its website as a gateway to resources, working with related organisations and offering training to those providing law-related information or education.

The agency could also adapt and promote many useful overseas initiatives such as plain language on-line databases, telephone services, delivering law-related education in schools, and radio and television information campaigns.

Delivery: Department for Courts

People already go to the department for information about court processes. It is open to the public, has branches throughout New Zealand, and could have a major role in the delivery of court-related information. Submitters strongly supported this option. A more active role in small communities is also suggested in the next chapter on Connecting with Courts, as is the need for improved signage and support to help people find their way around inside court buildings.

Production: existing providers

Many existing government and community agencies, and professional organisations currently produce legal information in the form of written material, website information or videos. All say they have inadequate funding to provide what they perceive is needed. While the material currently produced is generally of a high standard, the lack of a general strategy and accountability means there are likely to be gaps, and that resources may be inefficiently used. Is there a way resources can be produced more effectively and efficiently?

New legal information entity

All the possibilities discussed so far depend on existing agencies adding new responsibilities to their primary functions. A new agency, or entity within an agency, might be required.

Government-run legal information providers overseas, such as the Australian and Canadian free public “shop-front” services or the New South Wales Legal Information Access Centre scheme in public libraries, have no New Zealand equivalent.

A lead agency could provide strong leadership for all the agencies potentially involved in aspects of legal information provision, and could be a catalyst for change.

What do you think?

What improvements can we make so that there is **accurate, relevant, understandable legal information available to the general public?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.





Connecting With Courts

We look for: straightforward and uncomplicated connections to the court for the general public, whether by visiting a courthouse or electronic means.

Courthouses are places where New Zealanders connect with the justice system; whether to resolve disputes, defend claims or criminal charges, appear as a witness or serve on a jury. Most people see the courthouse as a vital part of their community, a powerful symbol of law and order where serious issues are dealt with and rights upheld.

This chapter discusses how communities connect with the courts and how this could be improved. Increasingly, the issue is whether the essence of a court is found in the court itself or in its processes – which may be provided anywhere with the appropriate technology.

People have fought hard, both here and overseas, to keep courts close to where they live and work. Submissions to *Striking the Balance* make it clear that people still want to retain functioning courthouses in small communities.

On the other hand, New Zealand, like other countries, has experienced an inexorable movement of people from regions to cities, accompanied by the centralisation of services and businesses. Distances have shrunk with better roads, and information technology has rapidly brought new and different ways to connect with courts.

Fundamental principles relating to access to justice still provide the starting point for planning. The overarching principle that justice must be accessible to all should ensure that those without links to the Internet (whether by choice or circumstance) do not become second class citizens. The same principle means courts should be provided where new communities develop, and that courts in smaller communities should not be closed where travel to another centre would take an unreasonable time, or public transport is not available.

This chapter shows that the ways people connect with courts are changing and that any development is a compromise between competing interests and practical necessities. We need compromises that provide communities with the reassurance of face-to-face justice, yet take advantage of technical advances.

Why we have courthouses

Courthouses have two principal functions. The most visible is for the judiciary, or other judicial officers, to conduct case hearings in which people can be involved in many ways – as spectators, witnesses, parties or defendants, victims, family or other support persons, jurors and reporters.

The second is the registry function in which court staff, usually working with lawyers, take care of all the preparatory work needed for a hearing. The court is also where people seek information, pay fines and reparation, arrange legal aid, receive bail bonds, and talk to the Victim Court Advisor or Family Court coordinator.



Signs and help desks

Many people complained in submissions that they could not find their way around court buildings. Some lack useful signs or anyone conveniently placed to give directions, let alone provide information about court processes. (See also the Criminal Process chapter.)

Bricks and mortar

New Zealand has fairly wide coverage of courthouses, given its sparse, spread out population. There are 63 District Courts, some with resident judges and some which judges visit on circuit. The District Court is the home for general criminal and civil hearings, Family and Youth Court hearings and Disputes Tribunals. The Tenancy Tribunal also sits in most District Courts.



The Environment Court has a central registry in Wellington but hears cases throughout New Zealand. The Employment Court is based in Auckland, Wellington and Christchurch and hearings can also be arranged in other places to suit the caseload. The Māori Land Court has seven registry offices – in Christchurch, Wanganui, Hastings, Gisborne, Hamilton, Rotorua, and Whangarei – and generally hears cases in these places.

“... there is a need to ensure that litigants, victims of crimes, families, witnesses, accused persons, support people and representatives are able to attend trials without being put to unreasonable expense or inconvenience.

Human Rights
Commission

High Court judges are based in Auckland, Wellington and Christchurch and travel on circuit to 13 other centres from Whangarei to Invercargill. The Court of Appeal is in Wellington, but sometimes sits in Auckland or Christchurch.

In 1979, 24 courthouses around New Zealand were closed in response to rural population decline. The operation of the Auckland District Court, with 116 full time employees and 2,583 hearing days in 2001, can be contrasted with Dannevirke District Court with two full time employees and 25.5 hearing days.

There are just over 100 buildings in the New Zealand court network. Most are more than 50 years old and a continuous maintenance and building programme is necessary to meet minimum facility and security levels. For example, the new Manukau and North Shore District Courts were opened in 2000 and 2001. Current work includes refurbishment of the Dunedin Court and building a hearing centre in Ruatoria.

Population shifts

The courthouse is one of the last central government facilities in some smaller towns. Yet it may seldom be used while new, fast growing centres have inadequate services. For example, it is an accident of history that there is no High Court in South Auckland with its large population. Yet there is one in Wanganui, only an hour's drive from Palmerston North. Court-building inevitably lags behind the population movement and changes are almost always contentious.

“Courts should be located or convened in the communities they serve”

New Zealand
Law Society

At the same time as the rural population has declined, courts with high workloads have needed more resources and facilities to deal with the increasing volumes of work. For administrative efficiency and budget management, resources need to be shifted. Successive governments have proposed this only to be met by strong community opposition. Yet unless some resources can be shifted from smaller communities, the provision of new facilities and services in new communities requires new funding.

A major practical difficulty in small communities is recruiting, training and retaining competent staff. Lack of support services for court processes, withdrawal of related government services, potential conflicts of interest for local staff dealing with family and friends, management of staff absences, and security for court staff, clients, and the judiciary are all problems. A minimum of two or three people must be employed regardless of the workload. The registry function cannot be centralised even if this would be more efficient. The same problems have been identified overseas.³³

³³ Giddings, Hook, Nielsen “Legal Services in Rural Communities – Issues for Clients and Lawyers” (2001) 26 *Alternative Law Journal* 57.



Four courthouses currently operate as hearing centres – opening only when the staff and judiciary visit. In all other courts, the registry is open during usual business hours. The issue is whether the principles of access to justice require this if another registry can be reached by telephone, mail, fax or email.

On the other hand, the closure of court registries in smaller communities may have wider repercussions for the community. As discussed in the previous chapter on legal information, rural people cannot easily gain access to general legal information. In smaller towns community groups are few and legal or library services are limited. Closing the registry means no staff to talk with face-to-face and, if there is no one else to ask, this may significantly reduce people’s ability to access justice-related information.

Departmental proposal

Earlier in 2002 the Department for Courts proposed revising the configuration of District Court services in 13 small centres as part of a plan to reduce delays and increase efficiency. The registry functions were to move to the nearest larger centre, where the judges and court staff would be located. They were to visit the 13 hearing centres³⁴ for the usual sitting days and documents were to be filed by mail or fax.

However, after extensive public consultation the Minister for Courts announced that, “people felt the proposal signalled a lessening of the government’s commitment to justice at the local level”³⁵ and it was rejected. The strong opposition has reinforced the importance of courthouses as symbols of justice in many towns.

Response to growing communities

Keeping pace with population change by shifting resources from rural places to growing urban communities is problematic for several reasons. The funding of new facilities is beyond the scope of this paper, but it is clear that the answers lie in some combination of information technology and bricks and mortar.

Response to small communities

Heartland Service Centres – a collaborative government initiative – provide one-stop shop access to government agencies such as ACC, Work and Income and Housing New Zealand in smaller communities. A coordinator provides a link between agencies, and there are public telephones and computers to help access government websites and other information. Most centres are in towns with functioning courthouses. Sharing facilities or staff seems a sensible way of solving some of the difficulties of providing services in small communities.

“There are significant examples of court services failing to meet the growing needs of “growth” areas.”

Auckland District Law Society

“We have for some time been concerned about the general withdrawal of government services from provincial and rural areas”

Citizens’ Advice Bureau

34 Dargaville, Warkworth, Te Kuiti, Opotiki, Wairoa, Waipukurau, Taihape, Marton, Fielding, Rangiora, Balclutha, Queenstown and Gore.

35 Media Statement – Hon Matt Robson (17 May 2002).



A similar scheme operates in rural Queensland in relation to legal services. The agency responsible for legal aid has established Community Access Centres where coordinators can provide video links to lawyers. The agency advises that this service needs well trained and personable coordinators and access to competent lawyers. Privacy and confidentiality is critical in smaller communities and time is needed to build awareness and confidence in the technologies.

Clicks and Mortals³⁶

Courtroom Technology

Video and audio links enable courts to function to usual standards even if the participants are in different and distant places. These technologies – standard in most courtrooms – are widely used in Australia for pre-trial conferences, evidence presentation and remand hearings in prisons. Judges can conduct hearings in remote locations, as happens with the native title hearings of the Federal Court.

Submitters see considerable potential for saving court time and resources if improved video link equipment was available in New Zealand, particularly for more isolated communities.

The availability and reliability of equipment provided in criminal cases was raised in several submissions, particularly from lawyers. It is not uncommon for parties in large civil cases to provide their own video and audio equipment in courtrooms. Good video and audio equipment would enhance both efficiency and accessibility, especially if combined with information technology options.

Information technology

Rapid development of information technology (IT) is an important agent for change. It offers opportunities for courts to serve communities better and make internal administration more efficient. These changes are well underway and in time may alter the way we see courts – as places or processes which may be provided anywhere with modern technology.

Over the past six years, the Department for Courts has been working on a modernisation programme consistent with, and contributing to an “e-justice” environment. There are two main initiatives: the COLLECT system for on-line payment and managing fines collection, now in place, and the Case Management System to manage the progress of court cases, due in 2003. Similar projects are also underway in most similar countries but most are not fully operational at national level.

Fully “electronic” courts would give judges, lawyers and court staff the ability to share the same document filing and case management database. There could be instant access to digital evidence presentations and case documents. Few countries have fully integrated electronic processes and there have been setbacks. Some ambitious projects have been abandoned.

³⁶ Professor Susskind, Visiting Professor of Law for Law, Computers and Technology at Strathclyde University, used this heading in a presentation to the “Visible Justice” Conference, (Wellington, September 2002).

Integrated electronic filing of documents has been implemented or is being trialled in some jurisdictions in Australia, England and the US. The New Zealand programme is not funded to expand to use of the Internet but it is expected that lawyers will wish to file documents electronically in courts as soon as possible. Such a facility could then be available to the public.

Using technology is expensive, however. The British Government is running a pilot to introduce information technology in the Crown Court and speed up justice, improve efficiency and provide better treatment for victims, witnesses and jurors, at a cost of some 94 million pounds.

The Internet

The Internet has immense potential to transform connections with courts. It allows 24 hour access to anyone from a personal computer or Internet centre. Using the Internet to seek information and file applications could provide access to justice for many people whose needs are currently not well met, either because of remote locations, cost of legal services, or the sheer difficulty of finding out their options.

The general level of electronic capability in New Zealand is high. Statistics for 2001 show:

- 47 percent of households have a home computer with 37 percent also linked to the Internet
- 88 percent of businesses regularly use computers, with 36 percent operating a website.

As noted in the chapter on legal information, the E-government initiative will enable people to find, quickly and easily, information on a range of government services and public information, including the Department for Courts website and the new free site for public access to statutes and statutory regulations.

Information available through the Internet for court users might include:

- legislation
- contacts for further legal advice
- court lists and sittings, information about court processes, and judgments
- downloadable forms and electronic filing
- legal research.

The future

The present need to have access to courthouses may seem less critical if technology can provide alternatives. Predicting the future may not be that simple, however. Submissions stress how important it can be to talk to another person about legal and court matters and the need for face-to-face courtroom justice. Professor Susskind suggests that growth of information technology in law is likely to make people more specific about the kinds of help they want, not remove the need for personal contact. He predicts information technology will provide a starting point for a vast number of people whose needs are currently not met at all.



For now, New Zealand has neither electronic filing, nor an interactive courts website, and not all homes have ready access to the Internet. Those with the least access to justice or legal services are also least likely to have home computers or easy access to them. “Intermediary” community and voluntary agencies such as community law centres, citizens’ advice bureaux and public libraries are likely to remain the best avenue for accessing and interacting with agency websites.

Although it is likely that more people will use the Internet for more services in the long term, plans to reduce court facilities now, based on assumptions about how information technology will change the future, seem unwise. Indeed, increased funding is likely to be needed to provide alternative court services like the self-help websites in California and the UK.³⁷

Professor Susskind considers an electronic legal marketplace and electronic public access to the law should bring about:

- a more efficient justice system
- improved access to the law
- reduction of delays, costs and time in resolving disputes
- greater empowerment of the voluntary sector
- greater confidence in the justice system.

He considers systematic and strategic planning is needed so technical possibilities are selected in an informed and controlled way, with choices made on sound policy grounds. Submissions to this review suggest that information technology opportunities to improve access to justice should be given higher priority.

What we could do

Maintaining services while conserving basic principles of justice in a time of transition requires compromises. Otherwise there may be a mismatch between facilities, volume demand, and expectations. There are, however, some basic possibilities.

Inside court buildings

Submissions reveal the many concerns people have about finding their way around court buildings. One simple and effective solution could be to have people inside courts to provide information, directions and support. Another could be to improve signage.

Video-conferencing and evidence taking facilities must be available to speed up the process

Family Court
Judge

Video Links

Video and audio links enable courts to function even if the participants are not all in the same place or if the court is in a remote location. This potential seems less well developed in New Zealand than in comparable countries.



Equitable provision of court services

In growing communities, equitable access to court services may require additional court facilities. To provide these without major expense may involve investigation of new ways to provide court services, focussing on the court processes rather than court buildings, and in combination with information technology.

In smaller communities, court staff might promote access to justice information through Internet portals and video links to other agencies or courts. This would increase rather than reduce services to remote communities, in line with the Government's commitment to the regions.

In smaller communities, courts could offer a "help-desk" or a "one-stop-shop" where people go to ask questions about court processes, get help to fill in forms and file papers and seek information about their options. Visiting staff from community law centres and visiting providers of services like mediation, restorative justice, and Family Court counselling might also be able to use the facilities.

The court might provide a range of services in addition to registry and court duties, such as:


- information resources
- Internet portals to legal information, legislation and relevant government websites, and help in using them
- information about providers of legal and related services such as community legal advice, mediation, restorative justice
- facilities for providers of these services to hold meetings or conferences
- video and audio conference facilities to judges or lawyers
- bail reporting facilities.

There may also be room for cooperation between courts in smaller communities and Heartland Centres and Outreach initiatives in responding to communities' needs.

Information technology

A decision about future priorities for further development of courts-based information technology will need to be made when the current courts IT project is finished.

Decisions will have to be made about which options offer the least expensive and most imaginative ways for courts to take advantage of the information technology revolution. Face-to-face discussion is very important and information technology is a starting point not a substitute for that.



One question may be whether improving access to legal and court-related information for the public is a higher priority than an electronic filing facility.

What do you think?

What improvements can we make so that there are **straightforward and uncomplicated connections to the court for the general public, whether by visiting a courthouse or by electronic means?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



Representation

We look for: improved access to quality representation in court for all New Zealanders.

Striking the Balance asked people for their views on representation. The responses received raise issues about the availability and quality of legal representation, and the effect that lack of representation can have on people's access to justice.

In this chapter, “representation” means one person acting on another's behalf, under their instructions, in a legal context. This may include appearing for that person in court, but it also means providing advice, assistance and information that can resolve a matter so that there is no need to go to court.

The general rule in New Zealand is that people can either present their case in court themselves or have a lawyer present it for them, but they cannot be represented by anybody else unless the court expressly allows it. As well, people appearing for themselves can be helped in court by someone who prompts, makes notes or quietly gives advice.³⁸ But that assistant cannot address the court without the court's permission.

There are exceptions. Some statutes do not allow legal representation, for example, people involved in Disputes Tribunal hearings are not normally allowed a lawyer. The Youth Court can appoint a lay advocate to appear in support of a child or young person charged with an offence, to represent their interests or their family's, and to ensure the court is aware of all relevant cultural matters. Lay representation can happen in employment cases, or in the Māori Land Court, with the court's permission.

Why is legal representation the general requirement?

Our court system is adversarial. It assumes the most just result will be achieved by presenting two conflicting arguments to an impartial judge who decides on the merits. It also assumes everyone has a proper opportunity to put their case, and to challenge the opposing case.

The arguments commonly made for legal representation in an adversarial system include effectiveness, fairness, legitimacy, efficiency, and ethics.³⁹

Effectiveness is argued on the grounds that unqualified and inexperienced people may do more harm than good to those they try to assist, especially where the law is increasingly complex and specialised.

Fairness is argued on the grounds that if one party has a lawyer, the other party should too, to ensure a level playing field. This is particularly important in the adversarial system where results are generally determined by the preparation and presentation of a case.

³⁸ Often known as a McKenzie friend, after the decision in *McKenzie v McKenzie* [1970] 3 All ER 1034.

³⁹ See, Dewar, Smith and Banks, *Litigants in Person in the Family Court of Australia* (Research Report No 20, Family Court of Australia, 2000).



The legitimacy argument says that equal access to the law is an important aspect of the equality of citizens in our system of government. Equal access to the law in practice requires equal access to legal services.

The efficiency argument focuses on the needs of the court system. Legal representation leads to cases being heard more efficiently, which is better for the system as a whole.

There are also ethical arguments supporting legal representation. For the adversarial system to work, the judge needs all relevant information. Under the rules of their profession, lawyers owe an overriding duty to the court. They must never knowingly mislead the court and they must put all relevant cases or statutes before the court, even if these do not support their argument. Lawyers who breach these rules, or any other ethical obligations, can be disciplined, even barred from practice. Lay advocates and self-represented litigants have no such duties.

While these are the reasons for legal representation in our court system, the reality is that people come before the courts without representation, or with a lawyer whom they do not feel represents them adequately. Either way, they may face real disadvantages. In submissions to *Striking the Balance*, people raised concerns about both these issues.

Improving legal representation services

Submissions suggested ways to improve legal representation, particularly the services funded by government such as legal aid, the police detention legal assistance scheme, and duty solicitors.

Legal aid – eligibility

There were many calls to review the present level and eligibility criteria of legal aid. Some submissions said that legal aid was too readily available, particularly in criminal cases. Others felt it was working well.

The Ministry of Justice is currently engaged in a major review of eligibility. The review examines whether there are individuals or groups not eligible for legal aid who should be, whether there are other proceedings for which legal aid should be available, and the appropriate financial criteria or means tests for legal aid.

Legal aid – information

People want more information about legal aid lawyers. One submission told of being arrested as a first time offender and having never used a criminal lawyer. The police provided a list of legal aid lawyers, but it described only broad categories of law, such as criminal and family. The person had no idea of the lawyers' skills or experience in relation to the offence he had been charged with. He recommended that legal aid lists should have more details to help people choose a representative.

A prison inmate described being given a list of lawyers to call when he was arrested. Only one was home, so that settled the choice. He called for some means of obtaining impartial advice to help people get the right representative.

Legal aid – standards

Submissions show that people think the quality of representation relates to how much lawyers are paid. There are specific concerns that the quality of representation available to many offenders in criminal cases on legal aid is uneven.

The Legal Services Agency (LSA), which administers legal aid, is developing listing criteria and service standards for legal aid lawyers. These will cover the legal aid, duty solicitor and police detention legal assistance schemes.

The criteria will determine if a lawyer can provide specified services. The aim is to ensure that the LSA approves and lists lawyers with appropriate levels of experience and skill. The criminal legal aid criteria are based on those operating now, which the New Zealand Law Society developed, but the agency is developing new civil and family criteria.

New service standards will be used to monitor service quality and consistency, and to support a charter setting out what quality of service legally aided clients can expect.

This project raises a number of policy issues which the LSA is working through with the New Zealand Law Society, district law societies and legal aid lawyers. The aim is to have the new criteria and service standards in use by February 2003.

Police Detention Legal Assistance Scheme

Submissions see a need for legal advice early in the process, when police detain or question people. The police detention legal assistance scheme, administered by the LSA, was established to meet this need. The police have a list of lawyers available to provide free advice. If people ask, the police can provide the list.

Spending on the scheme has declined in the last three years, from \$592,000 (excl GST) in the year to June 2000 to \$522,000 (excl GST) in the year to June 2002. The reasons are unclear. One possibility is that some lawyers are not claiming for the first hour or so of work before they claim legal aid for a case. A decline in public awareness is another.

The police are obliged to inform people of their right to consult a lawyer, but they do not have to give them advice that will “facilitate the exercise of that right”.⁴⁰

One possibility to be considered is whether the police should be required to provide a list of available lawyers and information about the detention legal assistance scheme.

Duty solicitors

The LSA also administers the duty solicitor scheme, which aims to ensure that every District Court has solicitors on duty to provide free help to people who have been charged with an offence but are not represented.⁴¹

The duty solicitor’s first task is to ensure that people charged know about basic court procedures. They also advise on pleas, bail and the sentencing options available to the court, and can help arrange private legal representation, or legal aid.

⁴⁰ *R v Mallinson* [1993] 1 NZLR 528.

⁴¹ Legal Services Act 2000, s 47.



They may obtain remands, adjournments, or help enter guilty pleas in simpler cases where there is no real likelihood of imprisonment. They are important to the functioning of the criminal courts. (See also the Criminal Process chapter.)

The duty solicitor scheme was strongly supported in submissions, but there is concern that it does not work as well as it should. Duty solicitors are seen as overworked, with insufficient time to advise clients. Submissions called for more duty solicitors to be rostered for each session, to reduce queues and improve representation.

Submissions also suggest the scheme needs a higher profile, to ensure people know they can get help. Proposals include pamphlets for community organisations and the police.

Similar issues were identified in a November 2000 report prepared for the Legal Services Board.⁴² It observed that the large number of people who do not qualify for legal aid, but cannot afford a lawyer, is putting increasing pressure on the scheme.

Duty solicitors interviewed emphasised the complexity of their work, the skills required, and the stress of working under very tight time constraints. The report made recommendations about training, a properly funded supervision scheme to support and guide less experienced duty solicitors, and for there to be improved information about the scheme.

Public defenders

Several submissions proposed a “public defender” system – lawyers employed by the state to represent people charged with criminal offences – and this idea is already being investigated.

Having public defenders is one way to increase legal services. Other possibilities include alternative contracting using bulk or preferred provider contracts.

The LSA is to undertake feasibility studies into piloting in-house representation services for criminal and family cases. It will also consider the feasibility of bulk contracting with individual private sector lawyers or organisations in family matters.

The feasibility study will look at two key issues:

- whether it is desirable to consider alternatives such as in-house lawyers and forms of contracting
- whether pilots can realistically be implemented and managed by the agency, and whether they can achieve quality services that are economic without damaging the availability of other quality services in the area.

The agency intends to report to the Minister of Justice in late February 2003 with recommendations as to whether it should implement pilots at one or more courts.

⁴² Anne Opie, *The General Practitioner in the Courts: Changing Organisational Environments and the Operation of the Duty Solicitor Scheme*, (Legal Services Board, November 2000).



Community Law Centres

The work these centres do providing legal information was described in the Information chapter. They also play a critical role in providing free advice, typically concerning debt, consumer affairs, domestic violence, tenancy, school suspension, traffic, criminal matters and employment. A few community law centres also represent people in court where they fail to qualify for legal aid and cannot afford a lawyer.

There is real support in submissions for the important role community law centres play in providing legal representation, but they face funding and resource constraints.

Quality of representation

Some responses to *Striking the Balance* raised issues about how well some lawyers – whether privately engaged or acting on legal aid – represent their clients.

The Law Practitioners Act 1982 covers complaints about lawyers. District law societies investigate complaints about conduct or costs and can lay a charge against the lawyer with either the District Disciplinary Tribunal or the New Zealand Law Practitioners Disciplinary Tribunal. The tribunals can censure, fine or restrict the practice of lawyers they find guilty. The New Zealand Tribunal can also strike a lawyer off the roll.

If people are unhappy with the way the district law society deals with their complaint they can write to the Lay Observer, a government-appointed non-lawyer.

There is concern that the system provides inadequate redress for people with legitimate complaints. A new Law Practitioners and Conveyancers Bill is being drafted, which will have more focus on redress mechanisms for consumers. The Bill will include proposals for an independent Legal Complaints Review Officer to review complaints and the way they have been responded to.

Is there a need for a wider role? For example, Victoria, Australia has a legal ombudsman whose role extends beyond individual complaints to alerting the profession and the government to practices among lawyers that should be improved.

People without legal representation – self-represented litigants

Despite measures to provide legal representation for people with limited finances, people continue to engage with the court system by themselves. In New Zealand they are generally described as unrepresented, self-represented, or “litigants in person”. The expressions are used interchangeably.

Self-representation is becoming an increasing issue throughout the world, particularly in family cases, and it seems to be increasing here too. In their submission, the Family Court judges commented on a growing trend and submissions also expressed concern about self-representation in the Environment Court.

There may be a need for detailed research and data collection, to identify whether self-representation is growing, and if so, in which areas of law, and why.

Why does self-representation cause concern? It may have some advantages. It may reduce costs for the self-represented person as well as increase their sense of control and satisfaction. The court may be less strict about procedural requirements than if they had legal representation.

But there are significant disadvantages, in terms of both efficiency and effectiveness, not just for the unrepresented person, but also for other parties, and for the system as a whole.

“There can be little doubt that the involvement of unrepresented litigants generally leads to ineffective use of time and resources and sometimes to an unjust result”

New Zealand
Law Society

- Self-represented litigants generally place greater demands on the time and resources of judges and court staff. They have more questions about court procedures, may be less organised in the presentation of evidence and argument and unaware of procedural steps and requirements. Usually proceedings will take longer, increasing costs to the system and the other parties.
- Self-represented litigants may not be able to look at the issues impartially. In a family law case they may find it hard to question their former spouse objectively or sensibly. In defending a criminal charge, they may feel a power imbalance that affects their ability to discuss matters with the police or prosecution.
- There may be a higher risk of the self-represented person losing the case. Lack of knowledge of the law may mean they do not have a good understanding of the issues to be resolved. Even if they win, they cannot claim for the time spent preparing and presenting the case, but can only recover “reasonable disbursements”, such as out of pocket expenses for travel and accommodation, or any sums paid to a lawyer for help preparing the case. This can make the other side less inclined to settle, since the risk of an award of costs against them is only for a limited amount.
- The role of the judge is difficult where one party is self-represented. If the judge becomes involved actively, the other party may perceive bias and unfairness. But if the judge takes no such role, the self-represented person may be significantly disadvantaged.
- Where both parties are self-represented, they may fail to disclose relevant information, expecting the judge will know it. Decisions may then be made on limited information.
- These issues may contribute to undermining the perception of a justice system that treats all people fairly and equally.

Why people represent themselves

People gave many reasons in submissions for going to court without a lawyer.

- Cost – particularly for people who do not qualify for legal aid, but cannot afford a lawyer
- Lack of awareness – people may not know they need a lawyer, or how to find one, or that they are entitled to legal assistance or are eligible for legal aid

- Mistrust of lawyers – this includes concern about ethics, views that lawyers complicate things, are intimidating, do not offer value for money, or are inadequate
- Personal choice – some see representation by a lawyer as giving up control of proceedings, or think they can do a better job themselves
- Shortage of lawyers – in rural areas, small towns and specialist areas of law
- Bureaucracy – prison inmates say the time legal aid applications take to process means they can spend a significant amount of time on remand
- No option – the case may be too hard, too time consuming, or lack merit. Vexatious or serial litigants often represent themselves for this reason.

Research is needed to identify which of these contributes most to self-representation.

What we could do

The key needs of unrepresented litigants have been described as:

- an understandable and responsive system
- information and advice on different ways of resolving problems
- information and advice on how to make a claim and how to respond to a claim as a defendant
- advice and assistance on preparing and presenting their case.⁴³

The first step is to identify the scale of the issue in New Zealand. If research confirms the international trend towards self-representation is happening here, how can we meet these needs?

Possible responses are discussed below. Some would help all court users, not just those without legal representation. Others should be targeted where research shows significant numbers of self-represented litigants. Once those are identified, an integrated approach is needed.

A 1998 Australian review recommended that courts have a “litigants in person” plan covering every stage of the court process – from filing to enforcement.⁴⁴

The Family Court of Australia provides a good example of an integrated approach for the rising numbers of self-represented litigants. It aims to provide services that are fair, open, consistent, understandable and conscious of self-represented litigants’ needs.⁴⁵ It includes information on court processes, rules, the Family Law Act, self-help kits, standardised practices, and simplified forms. Much of this information is available on the court’s website, as well as in hard copy.

“Unbundling” legal services

Traditionally, when a client employs a lawyer, the lawyer takes over the case and carries out all the necessary steps to see it through. “Unbundling” recognises that these steps can be divided into discrete tasks, such as giving advice, researching the law, gathering facts, drafting documents and appearing in court. These can be shared between lawyer and client.

⁴³ Lord Woolf, *Access to Justice*, Interim Report (1995).

⁴⁴ Prof Stephen Parker, “Courts and the Public”, (paper presented at the AIJA Conference, 1998), 166.

⁴⁵ See, < <http://www.familycourt.gov.au/litigants/> > .



- Unbundling, a fairly recent development in the US, is now also happening in Canada and is being considered in Australia, particularly in New South Wales.⁴⁶
- The client decides the extent and depth of the services the lawyer will provide. Proponents maintain that it reduces the client's costs, improves the chances of success for self-represented parties, reduces the delay and inefficiencies often associated with self-representation, opens a new market for lawyers and increases client satisfaction.
- Potential difficulties include a higher risk of advice being given on incomplete information and the client not being capable of completing the tasks allocated. Some tasks in a particular case may not be suited to unbundling.
- Professional rules in some states of the US deal with some of the issues unbundling raises, including requirements for informed consent by clients, and the proviso that limited representation is "reasonable under the circumstances". Professional bodies have also stated that limited representation must not undermine the profession's ordinary duties and obligations.
- Other agencies and bodies could provide unbundled services. Community law centres, for example, often identify what clients are capable of doing for themselves, and provide assistance and advice. The Australian Family Court is effectively providing unbundled services in the form of self-help kits and information on its website for certain parts of proceedings.

Information and educational material

One key need for self-represented parties is accurate, relevant, understandable and accessible information. Information must be realistic. There is no point providing information that makes a matter look simple, if it is complicated. People may gain false confidence about their ability to represent themselves, when realistic information might encourage them to seek legal advice. (See also the Information chapter.)

Simplifying procedure

Simplifying procedure would improve the situation for all court users, including unrepresented litigants.

One submission commented that the days of a butcher or grocer filing a claim for debt recovery, for instance, ceased when the District Courts Rules were aligned with the High Court Rules. The change to summary judgment procedure has meant that legal assistance is now required where before many creditors could bring debt collection proceedings themselves. (See also the Civil Process chapter.) The Disputes Tribunal procedure is only available for disputed debts.

The New Zealand Law Society's submission gives cost as a reason for the rise in self-representation. The society suggests costs could be reduced substantially by removing the need for a full-blown process of discovery and inspection in every civil case regardless of the amount of the claim.

Participants in the Buddle Findlay survey made similar calls for shorter and simpler procedures in cases involving smaller amounts. (See also the Civil Process chapter.)

Similarly, court forms should be as simple as possible, particularly in areas where self-representation is high.

Court-based assistance

While court staff cannot give specific legal advice, they can provide general information and assistance to litigants. In New Zealand, the Department for Courts has produced a service charter, which sets out the standard of service that court users can expect. The charter states: “In answering queries and giving information we will aim to give you accurate, timely and relevant information about your case. This does not include giving you legal advice, or making decisions for you.”

Australia’s Family Court service charter provides even more detailed guidelines for staff and litigants:

We can tell you what forms you may need to file for an application.

We can briefly explain and answer questions about how the court works, its practices and procedures.

We can usually answer questions about court requirements such as when certain documents need to be returned to the court.

We cannot give you legal advice.

We cannot tell you whether or not you should bring your case to court. We strongly advise you to seek legal advice before proceeding as to your rights, especially concerning children and property.

We cannot tell you what words to use in your court papers nor whether you have put forward enough information. However, we can check your papers for completeness (for example, we check for signatures, and that attachments are present and signed by an authorised person within your state).

A more detailed statement of what court staff can and cannot do may also be useful in New Zealand, as would manuals and training to help court staff deal consistently with self-represented litigants.

The judge

Even if it is accepted that the judge’s role is necessarily limited by the need to remain impartial, judges and judicial officers can help litigants in person by:

- using plain language and avoiding legal terms and jargon
- checking whether the self-represented party understands what is required, what will happen, and what has already happened.

In 2001, the Australian Institute of Judicial Administration prepared a discussion paper identifying issues the courts face in managing self-represented litigants. It included a set of possible guidelines for judges.⁴⁷ Other Australian jurisdictions have “benchbooks” giving judges guidelines on dealing with self-represented litigants. A set of guidelines could be prepared for judges and judicial officers here.

“Self-help” kits

The Connecting with Courts chapter discussed the potential for the Internet to transform the way people connect with courts. It also offers innovative ways of helping self-represented litigants.

⁴⁷ Australian Institute of Judicial Administration *Litigants in Person Management Plans: Issues for Courts and Tribunals* (AIJA, Victoria, 2001).



There is a huge variety of “do it yourself” websites based overseas, and a number have sprung up in New Zealand. The quality and accuracy of information and advice available on the Internet varies widely. Some websites provide truly free and genuinely useful advice, while others are effectively marketing tools, providing little information before referring users to a specific lawyer or firm, or requiring payment. Other websites offer self-help kits, but they use complex, technical language and are no more help than reading the legislation or court rules.

It can be hard to know which sites are reliable. If information comes from a court website, self-represented parties will have greater confidence that it is accurate. Self-help kits are not appropriate in all areas, and are not suited to all types of litigant. A recent Australian review was concerned that many legal aid and community law centres are offering services in areas not suited to self-help. Kits are best where substantial repetition and routine is involved, such as consumer disputes, conveyancing, wills, and debt collection.

However most have been in family law – where the issues are often highly emotional, the litigants are the most stressed, and a range of decision-makers exercise very substantial discretions. This is an area where self-represented litigants cause the most concern, and may require the most assistance. Self-help kits are not a substitute for legal representation, although they may help if used appropriately as part of a range of solutions.

If research here supports the concerns of the Family Court judges about self-representation, it may well be a good place to explore developing suitable self-help kits in New Zealand.

Self-help centres

The development of self-help centres is a more ambitious, long-term response to the issue of self-representation. A number of centres exist in the US and Canada offering a variety of levels of service.

One of the earliest was the Maricopa County Self-Help Center in Arizona. Critical to the service’s success are packets of clear, straightforward self-help material. Staff help litigants complete forms, but no legal advice is given. The information is also available on-line.⁴⁸

Other self-help centres offer wider services. The Unified Family Court in Hamilton, Ontario is an example of a centre providing wide ranging services. It has a facilitator to help with form filling, an advice lawyer who is paid legal aid rates and is available for a limited time to all litigants, and a referral coordinator.

Self-help centres can provide a focal point for information and meet the need submissions identify for an obvious source of help and information in courts.

Costs

Self-represented litigants in New Zealand are only entitled to an award of “reasonable disbursements” and cannot recover their costs for time spent preparing and presenting the case themselves.

In the UK, unrepresented people who succeed may be entitled to costs, including a sum for their work in connection with the proceedings.⁴⁹ New Zealand’s High Court has expressed the view that the arguments that persuaded the UK legislature to change its costs regime are equally compelling here.⁵⁰

Lay representation

All people involved in the court system should have legally qualified, competent and affordable representation at every stage. However, to achieve this would require substantial changes to the legal aid budget, or a major reorganisation of the legal profession.

If additional resources are not available – if the “gold standard” of competent legal representation cannot be met – can representation by a person who is not a lawyer sometimes be better than no representation?

In *Striking the Balance* the Law Commission asked for people’s views on when lawyers are essential in court and when they are not and why. The commission also asked what qualifications or qualities non-lawyers might need to represent others in court. Responses varied widely. Some thought only lawyers should be allowed. Others thought people should be able to represent themselves, or choose a representative in any hearing, whether or not the person was legally trained.

Submissions distinguish between cases and courts when considering whether lay representation is appropriate. Some say any representation may be better than none at all for some self-represented litigants. Lay representation is already allowed by statute in some courts and tribunals in New Zealand. But where there is no statutory right, much depends on the individual judge.

Discussions about lay representation raise many of the same issues as self-representation.

- Lay advocates do not have the same ethical obligations or constraints as lawyers. They may unnecessarily prolong proceedings, or fail to explore all avenues on their client’s behalf, and present the case poorly. There are no professional standards to rely on or disciplinary body to turn to.
- Many legal matters are complex and best dealt with by a lawyer. There is a danger of people with little knowledge giving the wrong advice.
- If lay representatives have no training or expertise, they may do little or no more good than if the person appeared with no representative.

Submissions supporting lay representation generally accepted that it is inappropriate in some types of cases and that there should not be a blanket right.

But should the situations in which lay representation will be allowed be more clearly outlined? One possibility is that lay representation remains generally at the court’s discretion, but that the grounds on which the court will allow it are more clearly defined. Another is that rights to lay representation could be extended by statute.

“... non legally-trained representatives would create a whole new stakeholder in the court system. This will bring with it a whole new range of issues relating to confidentiality, ethics and negligence.”

Mangere
Community Law
Centre

49 Litigants in Person (Costs and Expenses) Act 1975.

50 *Jagwar Holdings Ltd v Julian* (1992) 6 PRNZ 496.

The Auckland District Law Society said the right to non-legally trained representation in any court should always be at the court's discretion, but that the discretion should be exercised according to defined criteria. These could include:

- the nature and seriousness of the charge
- the complexity of the litigation
- the skill, knowledge and experience of the proposed representative
- the reasons for seeking non-legally trained representation.

Other submissions suggested that lay representation might be justified where people have difficulty representing themselves, for reasons of age, disability, education, language or culture.

Suggestions in submissions as to lay advocates' qualities and qualifications included:

- approval by the court
- recognised standing in the community or whānau
- sufficient understanding of court procedure
- necessary training and expertise.

“It is only natural that lawyers would feel threatened by lay persons taking their work.”

Prisoners Aid and Rehabilitation Society of Hamilton

Suitable cases might include simple or undefended matters, or submissions on sentence.

Some submissions suggested there could be a statutory right to lay representation in sentencing. Presently there are statutes that allow lay representatives to speak at sentencing, for example, section 27 of the Sentencing Act 2002, which allows a person convicted and appearing for sentence to call a witness to speak for them about their personal, family and cultural background.

What do you think?

What improvements can we make so that there is **improved access to quality representation in court for all New Zealanders?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



Costs

What we seek: a court system where access to the courts for those with a legitimate interest is affordable.

What is the price of justice? What is the damage done by a guilty plea entered when someone is innocent? Is justice delivered if a claimant spends more on the process than they recover?

This chapter examines factors that contribute to the cost of having anything to do with the court system. It discusses the main components, starting with overall system costs, lawyer's fees, court costs, cost recovery, and the way the state assists through legal aid. Some issues touch on economic and regulatory issues which may require further research.

As well, the chapter covers some territory already being debated in the legal profession or dealt with in other government reviews. These include the review of legal aid eligibility by the Ministry of Justice and the review of court fees by the Department for Courts.

The Ministry of Justice is also working on a Lawyers and Conveyancers Bill, to replace the Law Practitioners Act 1982, which is expected to be introduced into Parliament early in 2003. This Bill will deal with some issues in this chapter, particularly those relating to lawyers' obligations to give fee information to clients.

This chapter is very much just a starting point for further discussion. Cost is a difficult and controversial part of the court system. However, cost is the reason more and more New Zealanders say the system is out of their reach. This chapter summarises some of the practical changes to the current system that might help with some of the problems.

New Zealanders, like people all around the world, consider the cost of court action to be unreasonably high. The cost of the court system was probably the most discussed issue in submissions to *Striking the Balance*. People report:

- being unable to start good cases because of cost
- claims not pursued because the costs would probably exceed any recovery
- pleading guilty to criminal charges to close the matter more quickly and cheaply, regardless of their rights
- having to represent themselves because of cost
- difficulties in assessing and calculating the costs of legal action
- large personal debts from litigation.

Buddle Findlay's survey of leading New Zealand companies found that civil litigation is generally not seen as offering good value for money. It suggests we are approaching a point where it will be worth pursuing only small civil claims in the Disputes Tribunal or very large claims.



The UK, Australia and Canada are also trying to deal with these issues and their experience may assist us.

The “big picture”

It is fundamental that everybody should have access to justice. There are good reasons for making sure that cost does not block access for people with legitimate claims. Courts provide a means for disputes to be resolved peacefully and the resolution to be enforced without violence. Courts uphold rights and responsibilities and fair processes. Courts consider allegations of offending and impose penalties to deter offenders. When both sides in a case are adequately resourced, the system works well.

While access to the courts needs to be affordable, it should not be so affordable that people take legal action – at the expense of the taxpayer – unnecessarily or unwisely. There must be a balance struck, at both a personal and state level.

Cost is a legitimate factor for people to weigh up when deciding whether to use the courts, some other system like mediation or whether to just get on with their lives. However, when cost means people do not have a choice – injustice may result.

Before it is possible to assess whether the cost of access to the courts is affordable, we need to know who is paying and how much it all costs.

The overall cost of the court system (court buildings and infrastructure, judges and staff salaries, legal aid, technology and everything necessary for running the courts including enforcing their decisions) is largely borne by taxpayers, some of whom may seldom, if ever, use the courts. The Government currently allocates around \$424 million a year to run the court system and provide legal aid, (approximately \$336 million for the Department for Courts and \$88 million to the Legal Services Agency in 2001/02). It recovers some of this through court fees and court costs from court users, including \$9.5 million in legal aid recoveries.⁵¹ As well, there are the annual allocations to the Ministry of Justice for court-related policy advice and to several other agencies like the Law Commission, which contribute policy advice.

Taxpayers also contribute to the cost of the system when the state prosecutes citizens or is itself a party to litigation. Many state agencies are large users of the courts. To name a few: the police prosecutions section, Crown Law Office, Children, Young Persons and Their Families Service, Agriculture and Fisheries enforcement, Local Authorities, Customs, Commerce Commission, Securities Commission, Inland Revenue Department and the Serious Fraud Office. Taken altogether, the total cost to the state of court-related activities would be around \$1 billion a year.

Outside government are the costs that people and businesses pay from their own pockets. Private citizens who bring a matter before the courts generally have to pay the cost of this themselves. There are also travel, accommodation and personal costs for litigants, victims, witnesses and the family members of all those with a legitimate need to be associated with the court system. They may be able to get financial assistance, but this is generally only available to people on very low incomes or who face very high costs in a serious criminal trial.

In short, there is a huge range of costs that New Zealanders as taxpayers or as private individuals contribute to running the court system. Even small improvements in efficiency would reap significant savings for both court users and taxpayers.



The main costs for litigants

Lawyers' fees: This is the biggest cost. Lawyers usually charge for their time in preparing a case, preparing a strategy (which may involve non-court options such as alternative dispute resolution), and taking a case to court.

Disbursements: Lawyer's out-of-pocket expenses such as travel, accommodation, photocopying and toll calls.

Experts: Fees and expenses for expert witnesses.

Court fees: Various filing and hearing fees must be paid.

The other party's costs: The losing party may have to pay a proportion of the winning party's legal costs, on top of their own legal costs.

Personal costs: Indirect costs such as travel, accommodation, childcare, loss of wages and use of otherwise productive time. There are also emotional costs from stress and anxiety.

Lawyers' fees

Like other professional consultants there is a huge range of competency in the legal profession and a correspondingly large range in fees charged. Legal services are costly because the law is often complex requiring skill and experience in its application.

The New Zealand Law Society's Interfirm Practice Comparison for 2001 indicates charge-out rates for partners range from \$150 to \$300 an hour. The range for employed solicitors is \$80 to \$210 an hour.⁵² However, many lawyers do work that is unpaid (pro bono) or low paid.

The Rules of Professional Conduct for Barristers and Solicitors require their fees to be "fair and reasonable for the work done"⁵³, which allows for considerable freedom in calculating fees. Although time is only one factor taken into account, it tends to be the main one.

Research for the Australian Law Reform Commission showed that significant drivers of case costs are the numbers of parties involved, the number of experts, the total number of court events, the extent to which discovery is pursued and whether alternative dispute resolution (ADR) is attempted. All factors added to legal cost except ADR. Where ADR was attempted overall costs were reduced.⁵⁴

⁵² The actual range of charge-out rates is probably greater. These figures reflect the fee levels of the 95 firms that elected to take part. The rates do not necessarily reflect practitioners' actual hourly earnings. In this survey, partners only billed on average around 65% of the hours worked, while employed solicitors billed about 62%. Barristers' rates are not included in the survey.

⁵³ *Rules of Professional Conduct for Barristers and Solicitors*, Commentary to Rule 3.01.

⁵⁴ Australian Law Reform Commission *Managing Justice: a Review of the Federal Civil Justice System* (ALRC 89, Sydney, 1999) para 4.8.



Adversarial processes require a significant amount of legal work on both sides of a case. Adversarial processes can also affect fee levels because they allow lawyers to use strategies that inconvenience, delay and increase costs to the other side for tactical advantage (although this may result in increased costs being awarded). The potential to play the system tactically can be very significant where the resources of the parties are unequal.

Hourly billing

Hourly billing is the main way lawyers charge for their services. One reason is that it is simple to apply. As it is often difficult to know in advance what it will take to resolve a matter, hourly billing provides a measure for a non-standardised product. It is also a risk averse billing method for lawyers under which they get paid for the time and effort they put in.

Another reason for the near universal use of hourly billing by law firms is profitability. Hourly fees and hourly fee targets (x number of billable hours per year) are set for each lawyer to achieve the profit targets set by their firm.

Time-costing is the accepted norm for lawyers, but are there enough safeguards in it for clients, especially one-off consumers? Is it possible that other methods of charging might provide more affordable access to justice in the courts?

Flat-rate fees vs hourly billing

There are no easy or clear-cut alternatives to hourly billing for legal services. One possibility is flat-rate fee arrangements between lawyer and client for specified services or for taking an entire case. One lawyer commented to the American Bar Association Commission on Billable Hours that “Lawyers should be at least as capable to set fixed fees for most engagements as auditors, construction contractors and even car mechanics are. All of these other jobs have substantial risks of cost overruns due to unexpected difficulties.”⁵⁵

There are positive and negative aspects to flat-rate fees and hourly billing.

Flat-rate fees:

- provide greater certainty for consumers
- create a target for lawyers
- encourage upfront analysis of whether court proceedings are warranted,

but

- can be difficult for the lawyer to estimate costs, especially as the strategy of the other party may be a major factor
- create an incentive to minimise the time a lawyer spends on a case
- may discourage settlement negotiation.



Hourly billing:

- is simple to apply
- clients pay for actual services rendered
- lawyers are remunerated for time actually spent,

but

- creates an incentive to maximise time spent by lawyer and does not reward efficiency
- does not encourage full upfront analysis of the case
- involves uncertainty for the client as to final cost
- involves potential for a client to run out of funds halfway through
- may discourage client contact with lawyers.

For the legal profession, the culture of billable hourly targets may put pressure on lawyers' ability to build good relationships with clients or be involved in unpaid community work. It may also limit the time for professional development and mentoring of young lawyers.⁵⁶

The effect of cost recovery scales on fees

Cost recovery scales set out how much of the winner's legal costs are to be paid by the other party at the end of the case. Some countries have found cost recovery scales influence the setting of legal fees through providing some guidance on what is considered "reasonable". Various types of cost recovery scales set benchmarks for fees between lawyer and client.

In New Zealand, the use of scales to set lawyers' fees, even non-compulsory benchmark scales, has been and remains controversial. In the case of fixed fee scales, there is concern that these can become inflexible and may not reflect market rates unless reviewed regularly. They can place a "floor" under market prices – holding prices up – and reduce competition. There are also issues with event-based scales and whether they sufficiently encourage efficiency.

It is not clear if New Zealand's cost recovery rules influence the actual fees lawyers charge. Anecdotally, there seems to be little direct connection between the fees lawyers charge and the amount of costs awarded under the cost recovery rules.

In New Zealand, legal aid and prosecution counsel pay scales may potentially influence fees in a similar way that cost recovery scales do in some other countries. The precise impact of the legal aid scales (and in the Family Court the Counsel for the Child scale) on fees charged in the profession is also not known.

⁵⁶ Report of the American Bar Association Commission on Billable Hours (August 2002) p 49.



What is happening in other countries

Germany

The Federal Attorneys' Fees Act (BRAGO) regulates inter-party recovery of lawyers', and court fees. Lawyers normally charge the BRAGO rates as the actual charge to their clients, although a party can agree to pay higher or lower fees than the standard BRAGO fees.

Charges are calculated in fee units proportionate to the amount in dispute. They apply at various points in the process with incentives for settlements achieved either during or before the trial.

German lawyers take an "unders and overs" view. A mixture of claims, some high value, some low, means higher fees earned in higher value cases, which may not be complex, compensate for excess time spent on low value litigation.⁵⁷

Northern Ireland

A fixed rate cost scale applies in the County Court in Northern Ireland and in the Queen's Bench Division of the High Court, lawyers publish informal fixed rate scales. There, lawyers often use the scale as the basis for charging clients, but can charge more if the client agrees at the outset. Surveys suggest litigation costs in Northern Ireland are usually lower than in comparable proceedings in England and Wales and there are fewer delays.⁵⁸

South Australia

The South Australia Magistrates Court has had a lump sum scale since 1992. Although lawyers often charge their clients more than the scale, it provides a predictable level of costs for each stage, increasing as the process continues. Research suggests the scale has driven a cost-saving culture in the court.⁵⁹

Australian Federal Courts

The High Court, Federal Court and Family Court in Australia each have prescribed fee scales for cost recovery by the successful party, or to determine actual costs between lawyer and client where there is no costs agreement. Although not designed for this purpose, scales also provide information on costs and help some lawyers in price-setting. Australian Law Reform Commission data showed solicitors' fees were significantly lower where they were charged on the basis of the Family Court scale, compared with cases where charges were time-based.⁶⁰

⁵⁷ A A S Zuckerman and R Cranston (Eds), *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, Oxford, 1995).

⁵⁸ See, Andrew Cannon "Designing cost policies to provide sufficient access to lower courts" (2002) 21 CJO 198, 215.

⁵⁹ As above, at 217.

⁶⁰ Australian Law Reform Commission *Managing Justice: a Review of the Federal Civil Justice System* (ALRC 89, Sydney, 1999) para 4.11.



Contingency and conditional fees

These arrangements mean lawyers get paid only if the case is successful but that the client then pays the usual costs, plus a premium. The premium is usually a percentage of the claim recovered when it is a contingency fee or a set amount when conditional.

These agreements are not strictly enforceable in New Zealand at present. In 2001, a Law Commission report⁶¹ recommended against contingency fees but in favour of conditional fees, except in criminal, family and immigration cases.

While most submissions to that review wanted contingency fee limits removed to improve access to justice, the Law Commission concluded that doing this would only benefit a limited number of litigants. It was assumed lawyers would choose only those cases involving large-scale monetary or property claims and those with a high chance of success. Nevertheless, relaxing restrictions on these types of fee arrangements could allow greater flexibility and help some people who otherwise would be unable to bring a case to court.

It is expected that the Law Commission's recommendation approving conditional fees will be actioned in the Lawyers and Conveyancers Bill.

Information on lawyers' fees

Uncertainty about how much litigation is going to cost causes clients high anxiety. They are unable to budget accurately or make informed decisions about the course of the litigation, including the possibility of early settlement.

There is little public information available about appropriate fee levels. It is difficult to get useful information about legal costs, and it can be difficult to get a fee quote from lawyers. Submitters said that some lawyers do not provide useful advance estimates or advise clients about cost increases as litigation progresses.

The New Zealand Law Society (NZLS) provides no advice about specific rates but it recommends new clients:

- ask in advance for their lawyer's hourly rate
- request a written estimate or quote
- say how much they wish to spend, and ask to be advised before the amount is exceeded
- ask if they are entitled to legal aid.

The NZLS has produced a series of brochures to warn clients about hidden costs. *Seeing a Lawyer – Fees, Charges and Value*, advises checking whether an estimate includes GST and disbursements. It points out that predicting the total cost of litigation is complex, as it depends on which procedural path the case takes.

The NZLS also operates a cost revision system for dissatisfied clients. The Lawyers and Conveyancers Bill is expected to provide for the independent review of disputed costs.

“Going to a lawyer can be like signing a blank cheque - you may know how much money you have before you instruct one, but you don't know how much money will be left once the case is over.”

Individual

61 New Zealand Law Commission *Subsidising Litigation: NZLC R72* (Wellington, 2001).



Compulsory cost disclosure

In New Zealand, many lawyers write to new clients setting out their terms but there is no mandatory requirement for them to do this or to enter into written agreements.

If standard cost agreement forms were published, for example by the NZLS, this might provide clients with a starting point in their negotiation with lawyers over the provision of legal services and methods of charging.

The Lawyers and Conveyancers Bill may make changes in this area to require lawyers to give more billing information to clients.



What is happening in other countries

Australia

The Australian Access to Justice Advisory Committee considers a written costs agreement essential so that consumers receive full information about fee-related matters before committing themselves to legal action. In most Australian states, lawyers must keep clients informed about potential costs.

In Victoria, lawyers must give clients details of costing methods, billing intervals and arrangements, the right to negotiate a costs agreement, an estimate or range of estimates of total costs, and how to make a complaint. Without proper disclosure, a bill may be reduced in proportion to the seriousness of the failure to give the information. The New South Wales Law Society has reported that compulsory costs disclosure has led to a reduction in complaints about overcharging.

Australian Family Law Rules require lawyers to give clients a written memorandum setting out costs incurred to that stage, and an estimate of costs up to and including each further designated stage with copies provided to the court.⁶²

England

A practice rule in England requires clients to be offered the best information on costs possible, ideally a fixed fee, or a realistic estimate of the final cost. If this is not possible, it requires that clients be given an explanation why not.⁶³

⁶² See, Australian Law Reform Commission *Managing Justice: a Review of the Federal Civil Justice System* (ALRC 89, Sydney, 1999) paras 4.28-4.36.

⁶³ Robert Verkaik "Better Billing" (18 November 1998) *Gazette* 95/44, 24.

Court fees

Debate surrounds the extent to which court costs – the cost to the state of running the system – should be subsidised, if at all, by private users. At present, fees contribute about 15 percent of the civil court system’s costs, including the cost of the Family Court.⁶⁴

Fees are charged in civil cases and in the Disputes Tribunal, but generally not for family proceedings below High Court level, except those relating to adoption or marriage dissolution. No fees are charged for criminal cases, but as part of sentencing, there is frequently an order to pay court costs.

Some argue even this level of fees is unreasonable, given the courts’ important constitutional function as the “third arm of government”. They say “free” access – or access at no direct cost to the user – would ensure equality before the law and truly universal access to justice.

The opposing view is that courts provide only an indirect benefit to the state, and the individual user of the civil courts obtains the most direct benefit in having their dispute settled.

Review of fees

In 2000, the Department for Courts undertook a major review of 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 Courts⁶⁵
- increased scope to waive fees.

The increases in court fees have been criticised strongly. As well as filing fees, the fees to book a case for hearing rose dramatically from \$145 to \$450 in the District Court, and from \$650 to \$2,200 in the High Court. Fees may be waived where it can be shown that payment would cause undue hardship.

There is substantial concern these fees could reduce access. The department is currently engaged in the second stage of the fees review and a paper outlining proposals is due to be published early in 2003.

Methods of charging court fees

Multi-level, staged, or graduated fees attempt to provide incentives for litigants to shorten proceedings. Governments in several western countries are considering alternatives such as multi-level fees to encourage settlement, promote alternative dispute resolution, and accelerate hearing times. This is happening in Singapore, Germany and the UK.⁶⁶

“Litigants do not resort to legal proceedings for altruistic disinterested motives. They go to law to advance their own interests.”

Individual

⁶⁴ This percentage takes account of the recent fee increases.

See, Department for Courts *Equitable Fees in Civil Courts: Discussion Paper* (October, 2000) 15-16.

⁶⁵ Appeals to the High Court from administrative tribunals (such as those dealing with ACC, immigration or social welfare appeals), and applications for judicial review to the High Court, have been exempt from the fee increases.

⁶⁶ Australian Law Reform Commission *Managing Justice: a Review of the Federal Civil Justice System* (ALRC 89, Sydney, 1999) para 4.10 and following.



Singapore for example has no daily fee if the case is heard within a day, but fees apply and increase as the hearing lengthens. In the UK, fees are set for the three primary stages and charges are imposed each time the parties proceed.

Targeting fees to special types of cases is another alternative. For example, a low fee could be set for parties who bring disputes that go to court-approved mediation or ADR services, and a more substantial fee could be charged for cases that go to a defended hearing.

Cost recovery

The potential to pay or receive some or all of the costs of legal action is a critical issue for access to justice. After spending a considerable sum of money seeking justice, people are often profoundly unhappy if they are not awarded their full costs when they win. But this is what happens most of the time.

There are rules about what, if anything, an unsuccessful party should pay a successful party in civil litigation. These rules act both as a disincentive for unnecessary or dubious claims, and also as an encouragement to pre-trial settlements, since they add to the amount at stake.

The basis for cost recovery rules is that it is unfair for anybody to suffer financially when claiming their rights or when defending their innocence. Several competing public interest issues are relevant to the cost recovery rules:

- people should be encouraged to stand up for their rights in civil law
- people should be protected against vexatious litigants
- the law should be tested where it is not clear, for the benefit of other potential litigants
- there should be a level playing field for the wealthy and the poor to contest significant legal questions
- people who are innocent should not plead guilty to criminal charges because they cannot afford to pay the costs of defending themselves.

Civil proceedings in the High Court

A relatively new approach exists in the High Court to encourage greater predictability and efficiency. It awards costs that are reasonable in terms of time and skill, rather than on the basis of actual costs incurred. A complex assessment is carried out for each proceeding, but successful parties seldom recover costs in full.

The Buddle Findlay survey of leading New Zealand companies commented that costs awarded under the High Court Rules bear little relationship to the real costs incurred in major commercial litigation and are often regarded as “derisory”.

Civil proceedings in the District Court

Cost recovery in the District Court is assessed by reference either to a set scale or by what is considered reasonable in the circumstances. Where the court applies the set scale, cost recovery will usually depend on the amount of the claim.

Increasingly, costs in the District Court are being calculated in accordance with what is considered to be reasonable, since the court can award costs as it sees fit. Since 1997, it has been common for the court to consider the actual costs, and then discount this figure to a reasonable amount.

Costs rarely reimburse winning litigants in full and commonly fall within the “comfort zone” of 40 to 70 percent of the actual, reasonable costs incurred.⁶⁷

Family proceedings

The Family Court can also award costs but will generally only do so in exceptional circumstances. It is presumed that each party bears their own costs based on the rationale that there are no winners and losers in family litigation, but that each party benefits when disputes are resolved.⁶⁸

This approach has been criticised. In April 1993, the Boshier Report recommended that costs awards should be ordered in some cases, especially where one party’s non-compliance with court directions, like timetable orders, add to the cost of proceedings.⁶⁹

The offer to settle rule

Another aspect of cost recovery is the offer to settle rule. The High Court Rules provide that where a party refuses to accept a settlement offer without good reasons, the court may impose a higher cost award on the losing party. The same principle applies in the District Court.

In England and Ontario, the cost consequences of the “offer to settle” rule are tougher. A defendant who rejects an offer and does no better in court is generally liable to pay the claimant’s actual costs. A claimant in the same position is also penalised but is liable to pay costs to the defendant on a standard basis, that is, partial costs only.⁷⁰

Criminal proceedings

In criminal cases, costs may be awarded either for or against the defendant at sentencing, and the court has discretion to decide what is “just and reasonable”. After an acquittal there is no presumption a defendant will be awarded costs. The court must consider matters such as whether the prosecution acted in good faith in bringing the case, and whether the defendant was possibly innocent or had the benefit of a technicality. Under the present regime, awards for other than nominal sums are rare.⁷¹

State assistance with costs – legal aid

High earners and prosperous companies can generally afford their own litigation, while those on very low incomes can get legal aid to fund all or part of their litigation.


67 *Holden v Architectural Finishes Ltd* [1997] 3 NZLR 143, 150 per McGechan J.

68 *Gerbic v Gerbic* [1992] NZFLR 481, 501.

69 See, New Zealand Law Commission *Lawyers’ Costs in Family Law Disputes: NZLC MP10* (Wellington, 1997) 37.

70 Neil Andrews “A new civil procedural code for England” (2000) 19 CJQ 19, 31.

71 See, New Zealand Law Commission *Costs in Criminal Cases: NZLC R60* (Wellington, 2000).



But indications are that the number of people in between – in “the gap” – is increasing. Since the 1980s, top incomes have increased, but below that real incomes have fallen, especially in the low to middle income ranges, and the number of beneficiaries has increased significantly over the last 20 years (not all of whom are eligible for legal aid).

The “gap” includes two groups of people in quite different circumstances. Many people find their incomes cover basic necessities only, and for them any court action is completely out of the question. Those with higher levels of discretionary spending may save to go on holidays or remodel their kitchens, and could also meet the costs of a court action. The issue for this group is whether they choose to take court action where the costs can be out of proportion to the amount at stake, and the results can be uncertain. A former president of the Law Society has suggested that it is not worth pursuing a claim that is less than \$50,000.⁷²

It is clear from submissions that we need ways to lower the cost bar for people in “the gap” who struggle with self-funding litigation, but do not qualify for legal aid. This may require focus on the actual level of legal fees, but other steps like providing people with more information will also help.

If legal representation is not within the financial reach of everyone, can the current system of representation only by qualified lawyers be maintained? Should there be more choices for people who cannot afford the luxury of a lawyer?

Of course the system will deliver better justice where there are competent and committed lawyers on all sides, but when that cannot be afforded, is it better to exclude people entirely or modify the system?

How legal aid operates

Generally legal aid is only available to individuals who meet the criteria set in the Legal Services Act 2000. The Act is administered by the Legal Services Agency (LSA). A grant will be made where an applicant can show:

- their case is eligible and has merit
- they fall within the threshold for financial eligibility.


The legislation also provides a way to assess whether the applicant has any income or assets that can be used to offset the costs of legal aid. A charge on money recovered by the court action may also be required to repay all or part of the legal aid.

In addition to making individual grants of legal aid, Community Law Centres are funded in part by the LSA to provide general legal advice and representation. (See also the Representation chapter.)

Civil legal aid

Civil legal aid is available for a wide range of proceedings in the District and High Courts and related appeals. It is also available in some specialist courts, such as the Family and Environment Courts, the Māori Land Court, and some tribunals.

To be eligible for civil legal aid on financial grounds, a person and their partner’s disposable income cannot usually exceed \$2,000 per year.



In addition, an environmental legal aid fund has been set up to help groups bring cases in the Environment Court, administered by the Ministry for the Environment. There are two schemes, one to pay for lawyers and/or technical experts, and one to fund community-based legal advice on resource management issues.

Criminal legal aid

Criminal legal aid is available for defence proceedings in the District Court, including the Youth Court, High Court and related appeals.⁷³ It is also available for some proceedings before the Parole Board.

The LSA assesses whether the applicant has the means to obtain legal assistance. An application will have “merit” if it is considered desirable in the “interests of justice” that a person charged with an offence, or wishing to appeal their sentence or conviction, should receive aid.

While the Legal Services Agency has a wide discretion to determine the “interests of justice”, usually the merits test will be met if the case is of “sufficient gravity”. Offences punishable with a possible term of imprisonment generally qualify, given the high cost of defending them and the right to legal advice and representation under the Bill of Rights Act 1990.

The LSA also administers the Police Detention Legal Assistance scheme which provides initial free legal advice to people detained and cautioned by the police, and the Duty Solicitor scheme which provides free advice and representation to people first appearing in court.

Eligibility for legal aid

Legal aid is a limited resource. Since demand for it exceeds supply, it should go to those most in need. But how can we best determine who those people are? The Ministry of Justice is carrying out a review of legal aid eligibility at present.

Despite almost \$80 million being appropriated for aid in the last financial year, the pool of people who qualify for legal aid is actually decreasing. The financial threshold for civil legal aid has not been reviewed since 1969, and the living allowances deducted in calculating disposable income have not been reviewed since 1987. Even some people on very low incomes now fail to qualify.

On the other hand, some submitters believe legal aid is too readily accessible, especially in criminal matters, and say that it can be a drag on the tax dollar. There are criticisms, for example, of cases where applicants who have had multiple grants (and convictions) continue to receive aid.

The vast majority of civil legal aid is for family proceedings such as custody and access and domestic violence. These cases have a reputation for being protracted, and some critics assert that there is little incentive for legally aided people to conduct cases as efficiently as they would if they were personally paying the bill. (Although legally aided people generally do pay a contribution to the costs and there may also be charges on money recovered or retained property).

⁷³ Legal aid is not available for private prosecutions.



Streamlining delivery of legal aid

Whether someone is eligible for legal aid influences their choices, and this in turn can affect the progress of the case and efficiency of the court system. Attaching conditions to the way legal aid is delivered may also promote more effective treatment of cases within the court system.

Impact of mediation

In Queensland, for example, legal aid for family law matters is directly linked to mediation. Parties must attend a family law conference as the primary dispute resolution process, and from there they can apply for legal aid. After the conference, the chairperson recommends whether legal aid should be granted. About 75 percent of applicants resolve disputes at conferences, severely curtailing legal aid costs.⁷⁴

To speed up the resolution of cases and reduce the number of legal aid cases that progress further through the system, one possibility would be to make some form of alternative dispute resolution a condition of eligibility for civil legal aid.

Public defenders

Several submissions proposed that government employ public defenders to work in the criminal courts. From a cost perspective, the key difference from the existing system would be that the public defenders would be paid a salary rather than claiming legal aid scale hourly rates for their work.

In essence the idea is for the state to employ lawyers full-time to provide legal assistance directly to some of the people eligible for legal aid. An office of public defenders would probably supplement not replace the existing system.

Among possible benefits are:

- cost savings, giving scope to provide more people with assistance
- improved ability to control the quality of legal aid representation
- better incentives for upfront analysis of cases, resulting in early and definite pleas.

Public defenders offices exist in several countries.

The legal market

The legal services market is unlike most others in that at least half the parties do not make a willing choice to go to court. Most participants in the criminal justice system, and many in the civil court, find themselves in desperate and frightening situations not conducive to market choice.

In addition, as so many find when seeking basic information about who might represent them, the market is very poorly informed. A poorly informed market is likely to be inefficient.

Public information about legal costs

Clients need information on actual prices in the relevant market to decide if proposed charges are reasonable. At present this comparative price information is hard to get.

Large users of the courts, such as government departments and big companies, are in a more powerful position than individuals. Law firms may be asked to tender and make their best offers for bulk work, but these mechanisms are not available to the general public.

The government could be an important source of public information on fees. By publishing the costs incurred by government agencies for a range of case types, and the ranges of hourly rates paid for services, more information about legal costs could be available to the public.⁷⁵ While government agency litigation will not always be directly comparable to private litigation, it may be indicative, and could help to improve general knowledge about fee levels.

Fee surveys are another potential source of public information. In Australia, the Access to Justice Advisory Committee concluded that information about the range of fees being charged in an area, or average costs for stages of standard cases could provide valuable assistance.

However lawyers resisted being responsible for disclosing this information.⁷⁶ The task was therefore given to the Australian Competition and Consumer Commission, the Australian equivalent of New Zealand's Commerce Commission. It now looks at fee levels, the way they are set, and regional variations in costs and prices of providing services.⁷⁷

The state as purchaser

As the largest purchaser of legal services, the state could play a more direct role in limiting what are seen by many as escalating costs, by more consistently monitoring what it is prepared to pay for legal services.

On the surface this may seem a somewhat heroic suggestion. But given the extent of the government's role in the court system as funder, prosecutor and a frequent party to services, the fees it pays to lawyers must necessarily be a critical part of the cost question.

More research would be necessary to establish both the volumes and costs of in-house government litigation, and what it pays for external contracting.

Private assistance for litigants

Direct aid in the form of legal aid grants is not the only way in which litigants can be assisted to access justice through the courts. Market-based mechanisms could also assist litigants to overcome the barrier of cost but these are relatively limited for various reasons.

⁷⁵ See, Australian Senate Standing Committee on Legal and Constitutional Affairs *The Cost of Justice: foundations for reform* (Canberra, 1993) para 61; Australian Law Reform Committee *Review of the Adversarial System of Litigation: rethinking the federal civil litigation system* (ALRC IP20, Sydney, 1997) 117.

⁷⁶ Access to Justice Advisory Committee *Access to Justice: An Action Plan* (AJAC, Canberra, 1994) para 4.49.

⁷⁷ Alan Bollard "Competitive issues in the New Zealand Legal Services Industry" (paper presented to the New Zealand Law Conference, Dunedin, 1996).



There is potential for lawyers to make litigation more affordable for consumers through contingency or conditional fee structures, as discussed earlier. Other market-based mechanisms are legal cost insurance and legal assistance funds.

Legal cost insurance

Many forms of insurance for legal expenses are used overseas, but the New Zealand market is limited and legal expenses insurance is relatively unusual here. Insurance covers reimbursement for legal costs and expenses, including an opponent's legal costs which a party may be required to reimburse if they lose.

Legal expenses insurance has been most successful in Germany, where costs are relatively predictable under the BRAGO scale. Markets are also developing in the US, UK, France, Sweden and the Netherlands.⁷⁸

Attempts at introducing substantial legal cost insurance in Australia have not had a significant effect yet. The Law and Justice Foundation of New South Wales reported that community attitudes, market practices and the Australian adversarial legal system are not conducive to a viable legal cost insurance market.⁷⁹

The scope for encouraging a legal cost insurance market in New Zealand appears limited. Barriers are likely to be similar to those faced in Australia, but with an even smaller market. The absence of personal injury litigation in New Zealand may also mean consumers see less need for legal expenses insurance.

Legal assistance funds

Various contingent legal assistance funds or litigation lending schemes have been established in Australia to help civil litigants who cannot afford representation but are ineligible for legal aid. The schemes are designed to be self-funding, but require substantial initial capital from government.

Current schemes in Western and South Australia may fund all litigation costs, usually in return for any costs award or an agreed percentage of any award. They may also lend money for legal fees or disbursements, in return for repayment of principal and interest if the litigation succeeds.

What do you think?

What improvements can we make so that we have a **court system where access to the courts for those with a legitimate interest is affordable to all?**

Are there any gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

⁷⁸ Vivien Prais "Legal Expenses Insurance" in Zuckerman and Cranston (eds) *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, Oxford, 1995) 431.

⁷⁹ Law and Justice Foundation of New South Wales *Report on the operation of Legal Expense Insurance Ltd* < <http://lawfoundation.net.au/publications/reports/lei> > .

Part Three: Processes

Criminal Justice Processes

We look for: fair, open, efficient, proportionate, and humane criminal justice processes, which safeguard the rights of all parties.

Society expects offenders to be answerable under the criminal law and, no less importantly, that the law itself will be just, and will be administered openly and fairly, proportionately and humanely.

The process must first be fair. Those charged with offences are entitled to the assurance of a defined and open process, under which their rights and immunities will be respected. This is guaranteed by the New Zealand Bill of Rights Act 1990. The process should also be proportionate.

Not all criminal offending needs to go to court. In appropriate cases, the police can caution or warn without laying a charge. Some matters can be dealt with swiftly by a standard fine process, without a court appearance. Some can be diverted by the police. Some are better resolved by a community process, which can prove more flexible, and creative, and mean more to everybody affected.

These less formal processes may deserve a more central place in the administration of criminal justice. Their very informality, however, can inadvertently deprive offenders of their rights and immunities. The challenge is to keep the rights of society and of the person charged in balance with the discretions and processes that are more formally defined.

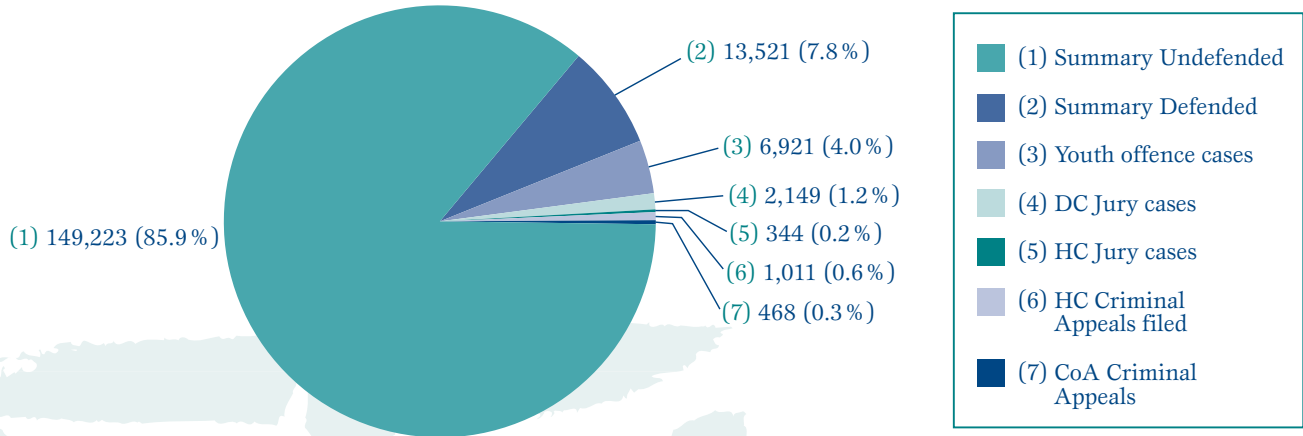
Many cases must be resolved before a court and need a formal process. But while the process will be more demonstrably fair, it can be slow and alienating. This is most obvious in the summary criminal jurisdiction of District Courts, where the highest number of people appear.

This chapter considers three particular aspects of the criminal justice process:

- processes independent of the courts, but sometimes initiated and supervised by the courts
- the summary criminal list court process of the District Court
- the pre-trial management of jury trials.

Where our criminal cases are currently resolved

Criminal Volume 2000/2001





“Outside” the Court

Some state responses to criminal offending do not involve a formal court hearing. But just as with formal court processes, these responses need to be clearly defined. They need a clear purpose (including criteria for who is and who is not eligible); defined roles (the police, the court, the victim, the offender and the community); settled rights (offender and the victim); and the structures necessary for effective monitoring and good practice.

Police discretion – police cautions and warnings

When the police decide that a case does not warrant the laying of a charge they can caution or warn. This usually happens where an offence is minor and the person either has no previous convictions, or any convictions are old or minor. This is a considerable power.

Police warning and cautionary practices vary across the country. Behaviour that attracts a warning or caution in one area may not in another. There is an argument that the police’s discretion should be more formally spelt out.

One possible model is the Crown Solicitor’s guidelines, which provide that a prosecution is only to be initiated where the evidence is sufficient and the public interest requires it. Another is the duty police have when assessing misconduct by children and young persons, to consider whether it is sufficient to warn the offender, except where that would be clearly wrong because the offence is too serious or the person has offended in the past.

Police discretion – police adult pre-trial diversion

The principal purpose of diversion, according to the 1996 New Zealand Police Pre-Trial Diversion guidelines, is to prevent re-offending. Offenders must acknowledge their offending and the harm they have done to any victim. They make some recompense to the victim and to the community, but they avoid a criminal conviction.

The fact of diversion is recorded on the police database. The 1996 guidelines state that “a divertee’s personal information is not to be disclosed except pursuant to an enactment or an order of the court”. The intent is that an offender is given a clean slate.

Diversion rests on the police discretion to prosecute, and their ability to withdraw a charge or have it dismissed. People who are diverted are charged and must appear in court, but do not have to enter a plea; if they return to court at all it is only after the requirements of diversion are complete. The police then ask to withdraw the charge or, alternatively, offer no evidence so that it will be dismissed. If the person does not complete the conditions of diversion, the charge remains in place and the court’s usual processes take over.



In theory diversion is offered where:

- the offender has no previous convictions, or where there are special circumstances which make diversion appropriate
- the offender admits guilt, shows remorse, and agrees to comply with conditions including full reparation to any victim
- the views of both the officer in charge of the case and the victim have been taken into account
- the offender agrees to diversion.

The offender may have to apologise to the victim, and to compensate the victim in full. The offender may also have to attend counselling, make a donation to a charity, do work in the community, and agree to other conditions (eg, living at home, non-association, participation in sport). Community agencies may supervise community work and provide counselling services. In that way offenders benefit from the diversity of the community's resources. Equally, individuals or groups within the community can accept responsibility for "their" offenders, and offer culturally appropriate responses to the offending.

Diversion entails a variety of issues.

As with cautions and warnings, diversion practices differ around the country. Offences that attract diversion in one area may not in another. The conditions imposed, and their severity relative to the offence, can also differ. There is an issue as to whether these differences are unavoidable or even desirable, or whether it might be better for practices to be uniform and, if necessary, formally set out in legislation.

Another issue is whether the offender, in reality, always achieves a clean slate. The Auckland District Law Society is concerned that in a number of instances details of diversion have been disclosed.

A more basic question is whether diversion "widens the net". There is concern that diversion is so attractive an option that sometimes the police charge, intending to divert, when a warning to the offender would have been enough. Conversely, some offenders may be buying their way out of a conviction by offering full reparation only if diverted.

By diversion, the police exercise what is normally a judicial discretion, although it is exercised by consent and only when guilt is admitted. The police say what the penalty is to be. It has been suggested this can sometimes be more severe than a court would impose. Yet the process takes place in private and is not subject to appeal or review. Are there sufficient measures in place to ensure that the process is fair?

The police are undertaking their own review of diversion, which they hope to complete in early 2003.

State prosecution services

The police currently both investigate and prosecute summary offences. In its report on Criminal Prosecution⁸⁰ the Law Commission considered whether this was appropriate or whether there should be an independent prosecution agency.

The commission was reassured by the fact that the police had instituted an independent national prosecution service, and recommended no change. It considered that the police had separated successfully their investigative and prosecution functions. Responses to *Striking the Balance* suggest that is not a universal view. Even with the intervention of the Crown Solicitors, there remains a feeling that the arrangement is far from satisfactory. We need to consider whether a stand alone, independent Crown prosecution service is required.

Restorative justice

Restorative justice is an international movement offering alternative ways to deal with conflict and offending in a wide range of settings. The use of restorative justice has grown very rapidly over the past decade. This year, the United Nations Economic and Social Council has identified basic principles, and member states of the European Union are to incorporate those principles in their national law by 2006.

Overseas models for restorative justice range from healing and sentencing circles among Canadian indigenous peoples, to South Africa's Truth and Reconciliation Commission.

In New Zealand the Sentencing Act 2002 makes restorative justice one of the purposes of sentencing, and requires the court to take into account any restorative processes that have occurred. Restorative measures can also be built into diversion, supervision, community work and imprisonment.

Community-based groups offer restorative justice services in many court locations. The focus is on the lower range of offending and usually involves a large component of voluntary work. Sixteen local groups are funded by the Crime Prevention Unit in the Ministry of Justice, others receive funding from private or local sources.

Te Whānau Awhina in Waitakere and Project Turnaround in Timaru are community-based restorative justice services operating successfully since 1996 and components of their schemes have been adopted by several other groups.

The Department for Courts is currently piloting restorative justice for more serious offenders in four district courts: Auckland, Waitakere, Hamilton and Dunedin. This large scale pilot has been in operation since 2001 and is being independently evaluated.

“Restorative justice may result in shorter, sharper sentences for a lot of crime AND more reparation.”

Individual

80 New Zealand Law Commission *Criminal Prosecution: NZLC R66*, (Wellington, 2000).



Restorative justice differs from diversion in at least three ways:

- participating offenders may still be convicted
- offenders answer for their offending at a conference, which can include any victim who chooses to attend and their family or representatives, the offender and their family or representatives, defence counsel, the police and members of the community
- the court retains ultimate control: the court adjourns the case to allow restorative justice processes to take place and, after a conference, the offender returns to court for sentence; what is agreed at the conference can be reflected in the sentence imposed by the judge.

Restorative justice processes involve discussion between the people affected by the offence to try to find a mutually satisfactory solution to the harmful events that have occurred and a means of ensuring they will not happen again. How this discussion takes place varies considerably, in particular, what happens between the victim and offender. In some models the emphasis is on the community's views, in some it is on the victim's wishes.

In both the Project Turnaround and Te Whānau Awhina models, victims are always invited to be present but community or whānau representatives take the leading roles. In Project Turnaround, when the victim is present they must agree on the outcome. In the model adopted for the courts pilot the focus is on the victim and a meeting between victim and offender always takes place. Any outcome from the conference must be agreed by the victim.

Māori have particular concerns about restorative justice. Some Māori wish to see their traditional ways of resolving disputes restored, and while they support community-based processes they question how well their cultural needs are being met in current processes. Some would prefer to devise their own community processes, to incorporate their own values, and to use their own methods.

Te Whānau Awhina is a model that has been adapted to suit its Māori community. It is based on Hoani Waititi marae in West Auckland and emphasises the relationship between the offender and their whānau and the wider Māori community. It aims to reintegrate into their own community young urban Māori, most of whom have appeared in court before and lack strong connections to their own marae or iwi. It assists culturally, educationally and with employment.

The Ministry of Justice has embarked on a review of restorative justice processes in the criminal justice system in New Zealand, looking at the purpose they serve, how they can complement the conventional court process, and what the procedures and standards should be.

Karen's story

Karen's story could have three different endings depending on how the system deals with her.



Karen, a 28-year-old solo mother with four school-aged children, is charged with wilful damage and theft from a motor vehicle.

Karen has struggled to make ends meet. She often faces unforeseen expenses. She is depressed. She suffers sleepless nights with sick children. She has tried to quit smoking. She cannot ask family, friends, or the community for help.

Returning home one evening, Karen notices a wallet sitting on the front seat of a vehicle parked on the side of the road. She smashes the window and takes the wallet. Karen is seen, located, arrested, and appears in court the next day.

At 18 she was before the District Court for disorderly behaviour, and at 22 for possession of a small amount of cannabis. She was discharged without conviction for disorderly behaviour, and diverted for possession of cannabis.

Prosecution and conviction

The police do not consider Karen eligible for a discharge without conviction or for diversion, because of her previous record. Karen pleads guilty and is convicted and ordered to pay for the car window plus court costs. She has already returned the untouched wallet to the police.

Diversion

The police decide that Karen is eligible for diversion despite having been diverted before. They consider the current offence out of character. The victim advises that he will be satisfied if Karen writes him a letter of apology and pays for the car window. The judge remands Karen for a month, and tells her that if she completes the conditions agreed to she need not reappear, and the police will withdraw the charge.

Restorative justice

The judge refers the matter to community-based restorative justice. At a community conference attended by community panel members, the victim, and Karen's family, Karen explains why she did what she did. The victim describes the inconvenience caused him. Karen apologises. It is agreed that Karen pay for the car window, and attend a stop-smoking course. Karen does both, this time with her family's support. The judge discharges her without conviction.

Youth justice model

A youth justice process is now well established, and provides a statutory model on which the adult community processes could draw.

The founding principle of the Children, Young Persons and Their Families Act 1989 is that children or young people⁸¹, who have committed offences, should not be prosecuted if there is a more constructive alternative. The intent of the process is:

- to reduce the number of children and young people appearing in court
- to induce children and young people to face up to their wrongdoing, to answer for it, and to meet any victim and offer amends
- to involve both victim and offender in a consensus decision.

Unless the child or young person denies responsibility or is diverted beforehand by the police (as 60 percent are) decisions are usually made at a family group conference, and before any formal admission of guilt.

The conference aims to arrive at an outcome, acceptable to everyone present: the child or young person and the victim (or a representative of the victim when the victim does not attend), their families, whānau or family groups, the youth justice coordinator, a police officer, a lawyer or youth advocate, and social worker.

The conference has wide powers to make decisions or recommendations and to formulate plans. Participants can decide whether the proceedings should continue, what reparation the offender should make, what other penalty should be imposed, and what might be done to assist the child or young person. Possible penalties include a written or verbal apology, community work, services for or a payment to the victim, a donation to charity, or a curfew on the offender.

The conference recommendation must be reviewed and approved by the court, which makes the final decision.

Therapeutic justice: problem-solving courts


In the United States and Australia there are “problem-solving” courts, partly because of increasing frustration with the heavy workloads in the general courts, and their processes. General courts are described by many as “McJustice” courts, or as “revolving door” justice.

Also, there is a growing recognition that traditional processes do not work for some entrenched classes of offender, and that more specialised processes are needed.

In these new courts offenders are diverted from the general court processes. The traditional roles of judges, lawyers and citizens are set aside. The same judge stays involved with each case throughout. The courts collaborate with other agencies and programmes. Some courts use elements of restorative justice to recognise the rights of victims.

In the United States there are drug courts, family treatment courts, domestic violence courts, community courts, courts dealing with offenders with mental health problems or mental disability, and gun courts.

⁸¹ Section 2 of the Act defines a child as a boy or girl under the age of 14 years. A young person is defined as a boy or girl of or over the age of 14, but under 17 years, but does not include any person who is or has been married.



Several states in Australia have drug courts, or diversionary drug treatment programmes for offenders with drug or alcohol addictions. In the Magistrates' Court in South Australia there is a family violence list, in which offenders are assisted in much the same way as in the Family Court in New Zealand. There is also:

- the Nunga Court for sentencing Aboriginal offenders – an Aboriginal elder sits with the magistrate to advise on cultural and community matters. The defendant sits with their lawyer and a close family member if requested. The defendant is permitted to speak, as is their family, the victim, if present, and other community members. On sentence, the rehabilitation of the offender and the reintegration of the offender into the Aboriginal community are given high priority.
- the Diversion Court for minor and summary offenders who suffer mental illness or intellectual disability, a personality disorder, a brain injury or a neurological disorder. They are allowed the opportunity to address their difficulties and their offending, and assisted while the case stands adjourned.⁸²

In the New Zealand system, the “therapeutic” approach can be found:

- in the Family Group Conference diversion process from the Youth Court, in which recommendations may have a therapeutic impact on the young offender
- in the Youth Drug Court pilot scheme, and the referral of young offenders to drug and alcohol treatment
- in the Family Court, where family violence is answered therapeutically by referral to non-violence programmes and counselling.

Youth Drug Court pilot

The Youth Drug Court pilot scheme⁸³ was introduced into the Christchurch Youth Court with the support of the Ministerial Taskforce on Youth Offending, and is an element in the comprehensive drug prevention strategy for young people.⁸⁴

The pilot is to run for 12 months, and will be monitored and evaluated by the Ministry of Justice. The first sitting was on 14 March 2002.

Up to 80 percent of defendants appearing in the Youth Court have an alcohol or drug dependency.⁸⁵ Binge drinking and cannabis use are particularly prevalent.

The Youth Drug Court places young offenders with identified moderate to severe drug and alcohol dependency linked to their offending on a treatment plan under judicial supervision. A single judge hears all cases and monitors the progress of each young offender referred to the scheme.

The judge, supported by an inter-agency group, coordinates and supervises the young offenders' treatment. The group comprises officers drawn from Child, Youth and Family, the Department for Courts, the police, the Ministry of Health (Youth Specialty Services), Youth Advocates, and the Ministry of Education (Group Special Education).

⁸² In South Australia it is estimated that 10-20% of people before the courts for minor criminal offences are people who suffer from a significant degree of mental disability or impairment.

⁸³ The specialist Drug Court had its genesis in the United States. They now operate in Australia and Dublin. (Per Judge Walker, address to Justices of the Peace, Blenheim, 3 August 2002).

⁸⁴ Governor-General's Speech from the Throne (opening of Parliament, 27 August 2002).

⁸⁵ Judge Walker (address to Justices of the Peace, Blenheim, 3 August 2002).



The objectives are to:

- improve the young person's health and social functioning and to decrease their alcohol or drug use
- reduce crime associated with alcohol or drug use
- reduce criminal activity.

The young person is remanded for an assessment by Youth Specialty Services, an educational report, and the development of a detailed plan of treatment.

The young person is encouraged to comply with their treatment programme by detailed bail conditions and regular review by the judge. On sentence the judge takes into account how well the young person has complied with their programme and the other requirements of their plan.

An issue is whether there is scope to expand the therapeutic justice approach, for example, for offenders with mental impairment or for adult offenders with drug addiction problems.

Minor offences and infringement offences

Some less serious offences, called “minor offences” and “infringement offences”, do not always require a court appearance.

Minor offences are criminal offences for which a fine of up to \$500 can be imposed, or traffic offences for which the fine may be up to \$2,000. There are some 850 minor offences, under a wide range of statutes. Few reach a court hearing.

The minor offence process was introduced in 1972 to relieve magistrates having to assess individual cases. If they are admitted, or not contested, a standard or moderate fine can be imposed by reference only to the papers filed. Any hearing will normally take place before Justices of the Peace.

Infringement offences have become a significant phenomenon. The police issue almost 1.3 million infringement notices each year, and other agencies also issue significant numbers. They are civil in character, and carry a penalty by way of a “fee” but no conviction results.

Most of the offences that lead to infringements are “strict liability” offences, to which there are only exceptional defences. Fees for infringements are fixed without regard to fault or ability to pay. Many are around \$200, but they can range from \$8 for a parking offence to \$2,000 for some overloading offences. Fees can be waived at the discretion of the enforcement agency, and the police do waive fees in five to 10 percent of cases.

An enforcement agency can, with judicial consent prosecute an infringement offence as an ordinary, or minor offence.⁸⁶

⁸⁶ Whether a conviction can then be entered is less than clear: contrast section 21(1) and section 78A of the Summary Proceedings Act 1957.

Minor offence and infringement offence procedure

MINOR OFFENCE	INFRINGEMENT OFFENCE
1. The police file a notice of prosecution, which specifies the offence, states the penalty range, and the court's power to discharge without conviction, and informs the offender of his or her rights.	1. The enforcement officer issues the defendant with an infringement notice, which specifies the fee payable, and the defendant's right to elect a hearing.
2. The registrar serves this notice on the defendant by registered post.	2. The defendant can just pay the fee, but if he or she does nothing, the enforcement authority, after issuing one or two reminder notices at 28 day intervals, can file the notice in the District Court.
3. If the defendant pleads not guilty, the case proceeds normally.	3. On filing, the fee converts to a fine, but there is no conviction.
4. If the defendant pleads guilty in writing, he or she can apply for a discharge without conviction, or propose what the court should take into account on penalty.	4. If the defendant requests a hearing, the defendant can admit the offence and make submissions on penalty, or deny the offence and it is then decided on evidence.
5. A judicial officer, on the summary of facts, deals with the defendant as if he or she had appeared before the court.	5. The court may or may not impose a penalty, it cannot impose a conviction.
6. The procedure ends with a discharge, or a conviction and sentence.	

The benefit of these processes is undeniable. In uncontested cases (the great majority) they penalise misconduct efficiently, and spare both the offender and the court the costs of a court appearance. Infringement offences do not carry the stigma of a conviction.

In 1989 the Law Commission recommended greater use of both procedures. It questioned whether fixed fees for infringement offences might be too inflexible and out of kilter with the offender's misconduct or beyond their means. It recommended that either judicial officers fix the level of the fees or legislators opt more often for the minor offence procedure under which there is discretion as to penalty.⁸⁷

Since 1989 the number of infringement offences has grown markedly. The majority are for parking and speeding offences but they arise under a variety of statutes and take various forms.

Infringement offences are now so various, however, that there is no longer a single consistent procedure. In place of the original standard procedure, different processes have been created by regulation (not statute) tailored to the priorities of enforcement agencies.

⁸⁷ There may be discretion to vary an infringement fee, when there is a court hearing: *Police v Ward* [1995] DCR 767.



Some departures are significant. The Biosecurity Act 1993, for example, allows people who bring prohibited items into New Zealand 14 days from the issue of the notice to pay the fee, before it is lodged in court for enforcement. By contrast section 21 of the Summary Proceedings Act allows as much as 56 days, taking into account the reminder period.

These variations may be justifiable, but they could distort the original model's balance between efficiency and the protection of the individual.

Another issue is that the more infringement fees increase, the less certain it becomes that they will remain mere "penalties", and that all those penalised will have the means to pay. Unenforceable penalties are not merely futile, they also make the process inefficient. In the year ending June 2001, there were 649,511 unpaid infringement offence reminder notices filed in the District Court by enforcement agencies for collection⁸⁸ and actual recovery is problematic.

The issues are not only procedural. The decision, where to draw the line between minor and infringement offences, is also one of principle: which types of dishonest, disorderly or anti-social behaviour justify decriminalisation, and which do not?

In 2000 the Legislative Advisory Committee issued guidelines:

- infringement notices are best used for offences of strict or absolute liability that are committed in large numbers and involve misconduct that is comparatively minor
- the procedure is usually practicable only if there is a significant number of enforcement officers available to issue notices and reminders
- the invention of new hybrid forms of infringement is to be discouraged
- reminder notices should provide a full summary of defences available in respect of the offence
- the level of the infringement fee should generally be less than \$500, to recognise that it is set without regard to the offender's culpability or means.



Issues to consider are whether:

- the line between minor offences and infringement offences is correctly drawn, or whether more offences could be usefully “decriminalised”
- there should be a uniform process for infringement offences, established by statute
- infringement fees should be set at a level more consistent with an individual’s ability to pay.

What do you think?

What improvements can we make so that criminal justice processes outside the court are **fair, open, efficient, proportionate, and humane**, which safeguard the rights of all parties?

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



The Criminal List

The criminal list in the District Court is the point at which most New Zealanders encounter our system of justice. To many it is our system of justice.

On the face of it, the criminal list court, often preceded by a registrar's call-over of cases, may appear successfully to combine principle and practicality:

- it seems to satisfy the principles of natural justice: the person charged, or their lawyer, has a chance to speak, then the judge or registrar makes a public decision in an open forum
- it seems efficient in that it gathers everybody in one court room: the judges, registrars, lawyers, court attendants, police, probation officers, forensic nurses, collections officers, voluntary agencies, and the person appearing – little time is lost for the system.

However, the overwhelming public response to *Striking the Balance* is that, in the list court, people feel confused, powerless and alienated.

Responses to *Striking the Balance*

People appearing in the list court may be under one or several disadvantages. They may not speak much English. They may have an intellectual disability, a mental illness, or be adversely affected by alcohol or drugs. They may be unemployed or in debt. They may be confused, and at a loss as to what their basic rights and options are. They can be unrepresented, or inadequately represented.



On or before the day of appearance, they may have questions such as:

- What does this piece of paper I have been given mean? What sort of trouble am I in? Do I have to do something? How can I find out? Who can explain it to me?
- Is there somebody who speaks my language? Are there any signs that tell where things are? Is there any list with my name on it? Who can tell me how this place works, and what I have to do?
- What are that policeman, and the lawyer, and the judge, saying about me? What is the judge saying to me? What has happened to me? Is it over now, or do I have to come back on another day?

For those appearing in the criminal list court, the principles of natural justice may not be apparent. Instead of serving the individual case, the process may appear to overwhelm it:

“Every institution has an image. For the courts, it’s the cattle yard.”

Individual

- the court is large, crowded, and intimidating and is filled with all or many of those involved in every case scheduled for that day
- the cases are called, and often recalled, in no apparent order, they can take no time or a great deal and both the timing and ordering of calls can seem entirely random
- discussion between the police prosecutor, the lawyers, and the judge, often cannot easily be heard, or are in a shorthand code that cannot be understood.

The court can seem a closed shop, and its efficiency can seem to come at a high price:

- there is a single decision-maker, and the pace of the process depends on their pace
- the process does not distinguish between judicial and administrative decisions – a significant reasoned decision may sit in a run of quick, routine rulings about what is to happen to cases and the person whom the decision affects may feel irrelevant
- simple administrative rulings may be held up by a significant decision and those waiting only for a quick ruling may feel that this is senseless
- the process is inflexible – the accused may not have seen the duty solicitor, for example, but may need to do so and this may only be discovered when the person appears late in the day, so a remand without result is inevitable.

“The criminal court is a madhouse where the duty solicitors barely know what is going on, much less the users. Dickens lives.”

Individual

It is not surprising that, in submissions, people described the list court as “State Highway One” and as a “cattle market”.

Those appearing in a list court may feel its pressures most acutely, but the pressures also affect:

- the court staff, ordering and re-ordering the day’s cases and the related papers
- the police prosecutors, laden with a day’s files, not always knowing which will prove most difficult or whether they will have all the information they need
- the duty solicitors, moving rapidly in and out of court, reconciling the needs of the court with the needs of those appearing, whom they are advising and assisting
- counsel, waiting around, sometimes interminably, for a brief appearance or two
- the probation service, trying to screen those remanded for reports, at the same time also interviewing those stood down for immediate reports
- the other agencies, on call throughout the day, however long it takes – the forensic nurses, the collections staff, sometimes also Maatua Whangai and the Friends of Court
- last but not least, the judge, who must make routine decisions swiftly, do justice in those cases calling for a considered decision, and in all cases keep the official record of each case.



What we could do

A phased process

The list court should be a court for the exercise of the summary criminal jurisdiction, or the necessary exercise of a judicial discretion. One way to achieve this might be to divide the process into three definite phases:

- *an induction phase*: in which the person appearing is immediately directed and assisted, from the door of the courthouse
- *an administrative phase*: in which the registrar makes most, if not all, the initial administrative decisions within a registry context
- *the judicial phase*: in which a judicial officer, sitting in the list court, exercises the criminal jurisdiction of the court, or decides truly contested matters.

The court's process must still remain open to public and media scrutiny, and the media must continue to have access to as much information as they now have.

The induction phase

Setting up an induction phase as set out below would require a radical shift of perspective and practice, but little else.

“The present system treats people as just another number to be dealt with ... a practice common at present in the District Courts due to an overloaded system and the pressure to push cases through.”

Individual

Courthouses are designed and organised on the assumption that everything critical happens in the courtroom. The registries are indispensable to the court's process, but their part in the actual administration of a case is secondary. The public areas are equally peripheral.

Too often it is not until a person is finally called into court, and prompted by the registrar or judge, that they begin to consider their options.

The cost to them and to the court process can be tangible. They may well have wasted a part or the whole of a day. Their appearance in the registrar's call-over or the list will have accomplished nothing, and they have to come back again. This recycling can contribute significantly to call-over and list court volumes.

To achieve a more purposeful and less stressful induction process, the police could always give a person charged a simple booklet which:

- states the date and time of appearance and the location of the court
- describes what will happen at court that day and the court process generally
- sets out basic rights and options
- explains how the citizens' advice bureau, or community law centre, and the local court can help and gives their addresses and contact numbers.

The same information should be explained by the police to those unable to read.

At the entrance to the courthouse, a court attendant, with the help of Maatua Whangai and the Friends of Court, could:

- assist generally all people entering the courthouse
- single out those appearing in the list and ensure that anyone unrepresented is taken to a duty solicitor (unless they are determined to represent themselves)
- keep an eye out for those with special needs.

Enough duty solicitors would be needed to spend sufficient time with each unrepresented defendant to give proper advice, and to see the case resolved if possible that day.

The administrative phase

The registrar has most, if not all, of the powers needed to direct cases through the initial administrative phase. As these powers are procedural, they do not necessarily need to be exercised inside a courtroom. That should be recognised and actively promoted. Normally a formal hearing is only required when bail or name suppression is opposed.

The registrar's powers include receiving pleas, granting adjournments, remanding offenders in custody (for no more than eight days), making orders to prohibit the publication of names, issuing summonses or warrants for the arrest of people charged, granting or varying bail in some classes of case, and even by consent, issuing warrants for the detention of people remanded in custody. An issue is whether the current range of registrar's powers should be supplemented.

These powers can be exercised administratively outside a courtroom, and in Christchurch this already happens. In many other registries it only happens in a fraction of cases. Many lawyers see their clients only at court on list days, and on those days many registries cannot cope easily with an influx at the public counter. The result is the registrar's call-over. But it is as inflexible as a judge's list and must normally be over by 10 am when the judge's list begins. The registrar may have less than a minute to give to each case.

The registrar's powers could be exercised much more flexibly and efficiently on the day of first call or later if necessary and not in a courtroom, but in an extension of the registry. This could be situated in or close to the public areas of the courthouse and function as far into the day as needed. Officers of other involved agencies could be close by.

Ideally, this might result in more complete decisions by the registrar on the first call, and fewer forced adjournments. The judge should then receive only those cases requiring a reasoned decision, and list volumes should reduce, freeing registrars and judges to give more time to cases that need it.

These proposals could answer many of the concerns in responses received to *Striking the Balance*, but only if achieved in a way that is compatible with the principle of open justice – the principle that decisions should be made publicly.



The judicial phase

Judges would then preside over a list reserved for the discharge of the summary criminal jurisdiction of the District Court, or truly contested issues calling for an exercise of discretion. Anything else would be the exception.

The volume of cases in the list court and delay

There are a variety of reasons for the volumes and time pressures on the list court, and the inefficiencies.

- A fundamental problem is the assumption that all criminal cases must come to the list court in their initial phase. This assumption needs to be critically reviewed as it is not required by law. Registrar’s powers under the Summary Proceedings Act are intended to be exercised in the registry, not necessarily in a courtroom.
- Police bail and summons date choices can be critical. The police usually choose to bail or summons people to the nearest court date consistent with their need to complete their paper work. That depends on an officer’s shift pattern and how often the court sits. List days often become unevenly loaded and the volumes can be unacceptably high, especially where there are multiple arrests. The police do have some latitude. In summary cases, following arrest, they must lay a charge within seven days, but can issue summonses to any day within two months. They have less latitude where they grant bail, but as long as the chosen day is within seven days of arrest, it need not be the earliest day.
- Important aspects of the process, like legal aid and probation reports are beyond the court’s control. Decisions by the Legal Services Agency whether to grant aid, and which lawyer to assign, can take time. Ideally this should happen on the first day so the person, who still has to plead, can leave the court with a lawyer appointed and not have to return just for that reason. Full probation reports can take some weeks to prepare. In uncomplicated, less serious cases, summary reports on the day of plea can lead to cases being resolved then and there.
 - There is little incentive for people charged to appear on time, and often they do not, because they expect there will be a long delay. To encourage them to be prompt, and to assist the court’s process, first-call appearances ought to be concentrated early in the day. In contrast the person who must appear a second or third time ought to be given an appointment time, fixed if possible, to minimise time off work.
 - The judge has to keep the official record of each case. That slows the court down and is inefficient. In addition, the record can be inaccurate or incomplete, and the judge can be distracted from the person and the case.

“The reality is that the present system means one has to take a day’s leave every time an appearance in court is required ... This puts undue strain on employers.”

Individual

Practical and principled answers to each of these difficulties are essential.

Wellington pilot

In response to the strong concerns voiced in submissions, the Department for Courts is developing plans to pilot a list court process in the Wellington District Court next year.

The Department in consulting with other agencies involved in the list court, including police, probation officers and duty solicitors, to develop and implement a

pilot process designed to assist the person appearing. But the main ideals of the pilot are likely to be as follows:



The Wellington Pilot

- The police will give each person charged or summoned, but not in custody, a specific appointment for the first call of the case, on a day, and at a time, when waiting time will be the least possible for the matter.
- The police will also give them a very simple pamphlet, which describes what is to happen on the first call and the process generally, and identifies the local community law centres (Porirua, Wellington, Upper / Lower Hutt) and Māori Legal Services, possibly also citizens' advice bureaux, as places where the person could seek advice.
- At court, a staff member (often supported by Maatua Whangai or Friends of Court) will meet people at a reception point at or near the entrance to the courthouse and: (i) confirm where the person is to appear and at what time; (ii) find out whether he or she needs to see the duty solicitor, or somebody else; (iii) identify those with special needs or problems; (iv) point out where the duty solicitors or lawyers can be contacted; and (v) answer any other practical queries.
- In every case, where the person does not have a lawyer, staff or volunteers will take them to the duty solicitor and they will have adequate time to get advice as to their options and plea.
- They will be seen without delay, by a court officer with the status of a deputy registrar: (i) who can speak about the case and confer there and then with the person's lawyer or duty solicitor, and with the police, probation, the forensic nurse, and collections; (ii) who can remand them to a date to allow them to take advice and confirm their plea; (iii) who can confirm a not guilty plea and remand to a status hearing; (iv) who can confirm a guilty plea and send the person straight into court that day; and (v) who can grant bail when it is not opposed.
- When there is a contest, complication, or final event, which calls for a reasoned decision, the person will be given a hearing before a judge in a courtroom, in which there is adequate time, and in which the distractions of the large scale list have no place. This hearing will take place on the first call, or later and without delay.
- The person will be given a card recording the decision taken and what is to happen next.

What do you think?

What improvements can we make so that the **criminal list process is a fair, open, efficient, proportionate, and humane process, which safeguards the rights of all parties?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



Criminal Jury Trials

An efficient trial process depends, ideally, on people pleading guilty or not guilty to charges early. Where there is to be a trial, it depends on the trial date being definite and the issues in dispute being identified beforehand so that the length of trial can be tailored to those issues.

These needs must be reconciled with two fundamental principles. The Crown has the burden of proving the case against the accused, and the accused is entitled to remain silent both when questioned after the arrest and at the trial itself. Our criminal procedure has been designed to safeguard these principles, but can the balance be better achieved?

The current process

Criminal cases commence with a charge laid in the District Court. If the offence is punishable by imprisonment for more than three months, a person charged can usually elect trial by jury. When serious offences are contested, jury trial is mostly mandatory.

At present, jury trials are preceded by a committal hearing to decide whether there is a case to answer. If there is not, the accused is discharged. If the evidence justifies a trial, the person charged will be given the opportunity to plead. If they plead not guilty they will be committed for trial in either the High or District Courts.

Before the trial occurs the case will be called before a judge to identify issues that need to be decided before the trial, and to fix a trial date. At that call-over the person charged will again be asked to confirm their plea. At the start of the trial itself, the person will confirm that plea finally and that is when pleas often change to guilty, and no trial is in fact required.

Workload and delays

Submissions stressed the pressures, particularly in the District Court. Statistical studies by the Department for Courts on the criminal jury caseload for the period 1998 to 2001 indicate that it would take about five months of additional resources to clear all outstanding cases in the District Court nationwide, and six months in the High Court. A six percent national increase in cases for trial over the next five years is predicted.⁸⁹

Statistics for the year to 30 June 2001 indicate that 94.6 percent of High Court criminal jury trials were disposed of within 78 weeks of the date of charge. The comparable figure in the District Court was 93.3 percent. There were eight successful applications for stays of proceedings in the District Court due to unacceptable delay.⁹⁰

Delays can cause evidential problems. But they take an equally important human toll. Victims of criminal offending, who have suffered trauma, particularly those who have been violated sexually, cannot begin to heal until the criminal process is complete.

⁸⁹ Department for Courts, *Trends in Criminal Jury Caseload, 1998 - 2001* (Courts Business Forecasting and Modelling Project: Report 4, August 2001) 1.

⁹⁰ Department for Courts *Annual Report* for the year ending 30 June 2001, 54.

Submissions received suggested that:

- delay leads some defendants to plead guilty simply to get things over and done with
- complainants drop their allegations because they cannot bear to wait any longer
- lawyers may employ delaying tactics to gain advantage, or because it is in their own interest.

Some considered that without the time taken in deposition hearings, the process could be sped up. Others suggested that the right to trial by a jury was too readily available and should be restricted to more serious cases only. Some went further and advocated abolishing juries altogether.

There was one consistent theme: the courts need to ensure that there is full disclosure and that complicated issues are sorted out early, to avoid delays once the trial begins.

Reform overseas



Victoria, Australia

In Victoria these sorts of problems were endemic until recently. In the main criminal trial court, the County Court, delays became intolerable. In the 12 months to 1 September 1999, half the cases awaiting trial were unduly delayed, and that number was increasing. The time between charge and case completion was lengthened unacceptably. Late guilty pleas, and inaccurate pre-trial estimates of the time required at trial, were also a significant issue.

To cope with this the court was obliged to overbook very heavily, with the result that many cases did not proceed on the first or even second call. The inconvenience to everybody, most especially complainants and witnesses, was considerable.

This led to the enactment of the Crimes (Criminal Trials) Act 1999 and a case-list management system based on it. The purpose of the Act is "to increase the capacity for judicial management of criminal trials and make other changes for the purpose of improving the efficiency of criminal trials".

Explicit objectives include facilitation of the just and efficient completion of cases including the early identification of pleas of guilty, providing hearing date certainty for cases, reducing the number of pending cases and the length and complexity of trials.

All preliminary matters are now attended to, and some issues dealt with, ahead of trial. Most significantly, comprehensive disclosure of the Crown case is compulsory and each party is required to inform the court of the matters in issue.

This has resulted in a large decrease in the time taken to resolve cases and a significant reduction in the backlog. Cases resolved at arraignment have increased from 15 percent to 60 percent, and 40 percent of those are resolved at the prior case conference. At trial, late guilty pleas have reduced from 36 percent to 20 percent.⁹¹

⁹¹ Report of the County Court of Victoria, *County Court Criminal Case and List Management System under the Crimes (Criminal Trials) Act 1999*, (2000), 1.



The United Kingdom

The British Government, in its white paper *Justice for All* (July 2002), issued in response to Lord Justice Auld's recent report, also favours simple and purposeful pre-trial processes, to get cases to trial quickly and to prevent or reduce actual and tactical delays. The paper estimates that £80 million is wasted each year as a result of trial cancellations and adjournments.

The Government wants judges to manage cases for trial more assertively, and places great emphasis on disclosure and the early identification of trial issues. The paper states: "we will tackle delay through better case preparation and will introduce a range of measures so all criminal justice agencies are focused on timely and prompt case management through the criminal justice system. Adequate case preparation and management of the listing systems will avoid overbooking in courts and will ensure more cases can be heard when scheduled. Preparatory hearings and adequate disclosure before the trial will ensure that the trial is efficient and focused on the issues rather than procedures and technicalities."

Changes in New Zealand

In a succession of papers and reports the Law Commission has urged this philosophy.

In February 1991 the Criminal Practice Committee issued a practice note in which it recommended that trials always be preceded by a pre-trial conference, at which counsel inform the court on a range of matters: representation, legal aid, plea and any possibility of a change of plea, any pre-trial applications, evidential matters, readiness and the time the trial is likely to take.

Most importantly the practice note placed on the agenda the refinement of the evidence required at a trial. Where the actual issues in dispute could be safely identified by the defence, it allowed that to be recorded. It allowed also for formal admissions.

The practice note was adhered to unevenly and has recently been revoked. The principles that it contains deserve to be revisited. The final answer may need to be by statute.

A Committal Hearings and Pre-Trial Disclosure Bill is being drafted, and a Criminal Procedure Bill developed to simplify criminal procedure. These will provide an opportunity for review.

What we could do

Raising the threshold

Raising the threshold for entitlement to trial by jury is one possibility. In the Australian Commonwealth Constitution the right to trial by jury is reserved for indictable offences punishable by imprisonment of 12 months or more.

In New Zealand the equivalent threshold is offences punishable by imprisonment of three months or more.

Committal hearings

Committal hearings will not in the future be such a time consuming part of the court's process. The Law Commission's recommendation in its report *Criminal Prosecution*⁹², that prosecution witnesses should not give evidence in person or be cross-examined at the committal stage except by leave of a judge, and then only if certain pre-conditions are fulfilled, appears likely to become law.

Late pleas

The most pressing problem is the late change of plea from not guilty to guilty, often on the day of the trial itself. This creates such uncertainty that in New Zealand, as in Australia and the UK, back-up trials are now scheduled routinely. But that does not answer the problem of which trials will go ahead, and which will not.

Sometimes the trial first scheduled goes ahead, and the back-up trials are never reached. Sometimes there are changes of plea even in the back-up trials and no trial goes ahead. This results in a waste of preparation and court time, and in England it has been estimated that over 40 percent of victims and witnesses are not actually called to give evidence on the first day they attend.

Where the plea is to be a guilty plea, it is desirable that it be made early, and that often depends on how fully the Crown has disclosed its case, and how clearly the issues in dispute are understood by the person charged and their counsel. Too often the true complexities of the case only become obvious to counsel, and the person charged, on the eve of trial and a change of plea may then occur.

New Zealand could potentially learn from the example of other countries where changes have been made specifically to avoid late changes of plea, most obviously the Victorian requirement that prosecution and defence disclose and define the issues.

Also, the UK white paper proposes that a clear tariff for sentence discounts be established for early pleas. A review of status hearings, presently being undertaken by the Law Commission and the Ministry of Justice, will assess and make recommendations about this important issue.

Any process in which issues are disclosed, and early pleas encouraged, must safeguard the rights and immunities of the person charged. There should be no risk that the innocent will feel impelled or encouraged to plead guilty.

“The current drip-feeding of information stymies an accused person from deciding to plead at an early stage.”

Anonymous

What do you think?

What improvements can we make so that **criminal jury trials are managed by fair, open, efficient, proportionate, and humane processes, which safeguard the rights of all parties?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

92 New Zealand Law Commission *Criminal Prosecution: NZLC R66* (Wellington, 2000).

Civil Justice Processes

We look for: widely available, just, fair, comprehensible and accessible civil justice processes, which are proportionate to the dispute.

“Litigation is a costly way of resolving disputes that is not necessarily to be encouraged ... [it] should be seen as a last resort, not as a taxpayer-funded system for resolving all disputes.”

New Zealand Business Roundtable

“We need to match the dispute with the process or processes which best meet the parties’ needs, the nature of the dispute, the timing and other factors.”

Wellington District Law Society ADR Committee

Our civil justice system resolves disputes between individuals and organisations, private and state, and seeks to safeguard both the individual’s right to justice and the community need to ensure that disputes are resolved justly.

Two values are always in tension: disputes must be resolved according to natural justice and the law, but the process must be in proportion to the claim. The ideal is that it be swift, understandable, responsive, certain, and effective.

By contrast, our processes are seen as slow, costly and overly complicated.

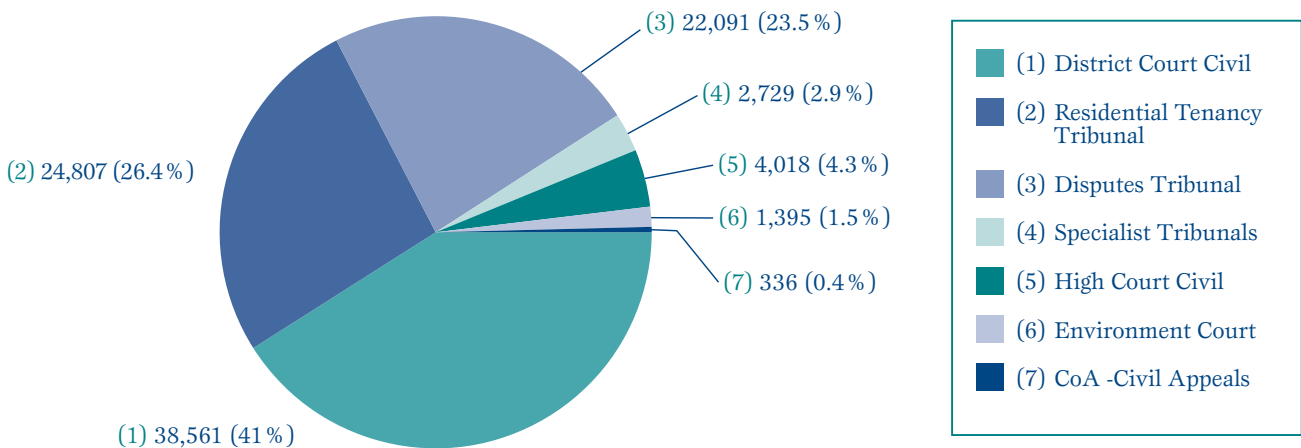
The Buddle Findlay research shows that major corporate organisations echo this. They describe the civil process as too costly, and too often drawn out.

An effective civil justice system or process should be based on three central principles:

- disputes that can be resolved without the courts should be kept out of the court system
- matters that require some court help should be dealt with by tailored procedures that are proportionate to the claim
- cases that have to go to trial should be actively managed to ensure they are resolved as efficiently, cheaply and quickly as possible.

Where our civil cases are currently resolved

Civil Volumes 2000/2001





The civil justice system in New Zealand today

Our civil process is adversarial. The parties define the central issues, and decide what witnesses to call and what evidence to present. As the preparation is at the discretion of the parties, there are rules to ensure procedural fairness governing the exchange of information between the parties (“discovery”) and determining what evidence is admissible. The decision-maker decides the case as the parties present it, and intervenes only to keep the case on track: the “truth” is reached through the parties’ efforts.

Problems with the adversarial system

One concern is that the adversarial process does not reach the truth reliably, and that the object of the parties is “always victory, not abstract truth”.⁹³

And there are other problems:

- the system engenders a climate of winners and losers; this does not encourage people to work together to resolve their differences
- before trial, too many issues can be contested, too many documents exchanged, and opposing lawyers tend to duplicate each other’s effort
- unless the court strictly controls the timetable and the pre-trial steps, parties can use delay and pressure opponents into unfair compromises
- lawyers, who are usually paid by the hour, have little incentive to be speedy or efficient
- the allocation of resources and court time is difficult when the parties are in control of the process.

Many submissions to the Law Commission were critical of the adversarial system.

Some advocated the court becoming more “inquisitorial” – taking more control of the investigation of a case, or taking charge of the trial process and, where necessary, calling witnesses itself. Many such possibilities for change are described in this chapter.

“I believe in this day and age the adversarial method is outdated. It should be totally reviewed. Nobody is a winner in the current system.”

Individual

⁹³ O Dixon, *Jesting Pilate*, (Law Book Co, Melbourne, 1965), 16.



Alternative Dispute Resolution (ADR)

Ninety percent of civil disputes are resolved by negotiation, mediation, or arbitration. Trial is a last resort since it is the most costly and lengthy way to resolve disputes.

Advantages of mediation

At mediation, parties can shape the process to suit their needs. It costs less and takes less time than litigation. It can take place in an informal setting and lawyers need not be present. The parties do not have to follow legal principles, or court procedures, or the rules of evidence. It is possible to reach practical solutions that would not be possible at trial.

Research shows that mediated settlements may cost no less to achieve than privately negotiated settlements – but an early successful mediation makes preparation for trial unnecessary and saves hearing costs and other expenses incurred when a dispute remains unresolved. Other gains can include maintaining personal and business relationships, a lower risk of further disputes, and the freeing up of court resources.

Even when litigation has begun, mediation can cut in with advantage. In one North Carolina scheme, mediation shortened case-processing time by around seven weeks. In the UK it has been reported that “Even on a very conservative estimate, mediated settlements occurred *several months earlier* than among non-mediated cases ... Solicitors felt strongly that mediation saved time”.⁹⁴

However, the same study also reported that “those whose cases did not settle often felt that the mediation had involved extra time”.

Overall, mediation achieves high settlement rates, and much higher rates than non-mediated cases, whether settlement occurs at mediation or afterwards. In one UK scheme, 62 percent of cases settled at mediation, and the same rate was achieved across different case types. Also, one Australian scheme reported that around 80 percent of mediated cases settled.

Satisfaction with mediation processes has been high. The UK scheme reported that parties were “overwhelmingly positive” about their experience. Solicitors valued “the skill of the mediator, the ability of ADR to get past log-jams in negotiation, the opportunity to focus on the strengths and weaknesses of cases and client satisfaction”.

On the other hand, a study of mediation initiatives in six districts in the US concluded that lawyers did not think them any more satisfactory or fair than normal litigation processes.



Outside the court – mediation in the community

In the commercial sphere, ADR processes are frequently used. However, individuals rarely use ADR. Perhaps many do not understand its benefits or how to access it. For others, it may cost too much.

Is this satisfactory? Everybody benefits if disputes can be resolved outside the courts, saving the individual all manner of costs and freeing the court for cases that really need to be heard.

Organisations like the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and Lawyers Engaged in Alternative Dispute Resolution (LEADR) coordinate private dispute resolution services. But there is currently no *general* state-funded body that provides, or has oversight of these services. (Judges do mediate in the Family Court, and the Employment Relations Service of the Department of Labour employs mediators to help resolve employment disputes.)

Mediation within the courts

In general civil actions,⁹⁵ the High and District Courts encourage litigants to attempt mediation. Most court registries hold information on registered mediators.

The courts cannot order the parties to attend mediation (as the Victorian County Court and the New South Wales Supreme Court in Australia can) or proactively encourage or offer incentives to the parties to mediate (as the Central London County Court and the Commercial Court in the UK can).

However, court-prompted or court-referred mediation can be “a useful addition to the armoury of the court”, as Chief Justice Spigelman of NSW recently put it.⁹⁶

There are some existing forms of court-referred mediation in New Zealand:

- Mediation is offered as part of the process of the Family Court, supported where necessary by legal aid. Chaired by a judge, these conferences are akin to settlement conferences, in which the outcome of cases is reviewed. But at mediation the parties are primary – lawyers are encouraged to take a back seat.
- Under the Employment Relations Act 2000, most cases coming before the Employment Relations Authority must have been to mediation first.
- The Environment Court can direct mediation with the parties' consent.

Debate about the benefits of integrating mediation into our general civil courts process is ongoing.

What we could do

A state-funded community ADR service

Should a state-funded ADR service be introduced to complement civil court processes? The Community Justice Centre scheme in New South Wales is a model worth considering.

⁹⁵ This excludes actions falling under the remit of the Employment Relations Act 2000 and the Resources Management Act 1991, and actions in the Family Court.

⁹⁶ Justice Spigelman AC, “Mediation and the Court” (2001) 3 Law Society Journal 65.



Its aim is to resolve minor community disputes quickly, informally and impartially, and to equip the involved parties with the skills to resolve themselves any disputes they might have in future.

These centres operate throughout New South Wales. The services are free of charge and the 480 mediators are trained, accredited, regulated and paid by the state.

The service deals with all manner of disputes between individuals and between community or ethnic groups. Claims usually involve money or compensation, a wish to have court action withdrawn, or a request for a specific action (such as fence repairs). But they can involve more diverse personal disputes. Disputes between neighbours make up nearly 48 percent of cases. The service has a partnership agreement with the Local Courts in New South Wales, which refer cases for mediation.

The centres respond swiftly to disputes, and resolve many promptly. In 2000 to 2001 the service opened 7,035 files, of which 54 percent were finalised within 21 days, and 75 percent within 30. Of the 2,607 disputes that proceeded to mediation, 84 percent ended in agreement.

Is this type of service a possibility for New Zealand? Such a service could contribute to the setting of standards for mediators and their training, and require that they be accredited. (AMINZ and LEADR do accredit their members but there is no restriction on who can call themselves a mediator.) It might also lead to a more standard definition of terms and consistency of approach and a more accurate understanding of the issues that cause disputes, and therefore more targeted education for mediators.

Although such a service would require funding, savings in court costs could offset that.

Court-ordered mediation

The Wellington District Law Society ADR Committee has suggested that courts should be able to direct parties to mediation; the decision should not be left entirely to the people involved in a dispute. It also noted that, if mediation is voluntary, much still depends on lawyers and judges.

Studies confirm that lawyers are critical to voluntary court-led mediation schemes as “gatekeepers”. They may be unwilling to encourage their clients without fully knowing what to expect themselves. They may fear that proposing mediation will be taken as a sign of weakness, as an admission that their case is not strong. Or they may consider that mediation is not in their own best interests.

The committee felt that “lawyers must get to grips not only with the legal issues involved in a dispute, but also with their clients’ and the opposing parties’ needs and interests. As long as lawyers fail to fully understand these, cases that are amenable to consensual processes will still be litigated. Mediation is still outside the comfort zone of many lawyers. No doubt education and training are part of the long-term solution to these problems, but the courts may require also some method of directing disputes to appropriate processes.”

Judges, the committee suggested, are no less critical. In practice, the committee said, the use of mediation in High Court cases has depended on “the enthusiasm and energy of a fairly small number of judges”. Otherwise the use of mediation has been relatively slight.

One possibility would be to give judges the power to order parties to attend mediation. Court-ordered mediation would take the weight of the decision from the parties and their lawyers, and the “shadow of the court” might encourage settlement.

As part of the court process, mediation might also allow cultural norms a more definite place. In the informal setting of mediation, and if the parties agree, family members, friends or even community representatives might be able to participate.

Court-ordered mediation might also have an educational effect and could improve the rate at which mediation happens voluntarily.

On the other hand, introducing court-ordered mediation into the court process would raise a number of issues.

- Court-ordered mediation, it has been argued, compromises the traditional role of the courts, and threatens their integrity and impartiality. The duty of courts and judges is to decide cases on the evidence and according to law.
- Court cases take place in public to ensure that the administration of justice is open to public scrutiny. Mediation, on the other hand, takes place in private and is confidential and there is concern that the image of justice might suffer.
- Mediation is held in private so that the parties are more at ease and to enable them, where mediation is unsuccessful, to continue their dispute in court unaffected at trial by anything that occurred during mediation. But, are there sufficient safeguards? A party might feel under pressure to come to a binding agreement during mediation that is not in their best interest.
- Although parties who fail to come to an agreement are then free to continue to trial, the time and cost of court-ordered mediation might become a barrier to their access to justice through the courts.
- It has been argued that, if mediation were to become part of the court process, it might become a purely procedural tool aimed at reducing delay and costs. Mediators might feel pressure to achieve settlements, and this might influence the parties and deter them from coming to a decision in their best interests.
- Many of the most enthusiastic advocates of ADR say that compulsory mediation is a contradiction in terms and that settlement is unlikely if parties are forced to go to mediation. A settlement under pressure may not be effective and lasting.



How court-ordered mediation might work

What types of case are appropriate for mediation?

“Although mediation is generally effective in resolving relationship-based disputes... it is not suited to resolving all disputes, some of which require... determination of the parties’ rights and obligations.”

Regional Law Society

“It would be wrong to refer all disputes indiscriminately to mediation. There will always be some cases where litigation is the most suitable process.”

Wellington District Law Society ADR Committee

There is little consensus about what types of case might benefit from mediation. On the one hand, it has been said that “there is always a benefit from the process. The process itself makes the clients think about their position in the litigation ... Even though the ADR itself may not lead to an immediate settlement, at least it makes everyone aware of their positions much more clearly than they would have been otherwise.”⁹⁷ However, most submitters felt that certain types of cases were not suitable.

Is mediation suitable in all cases that currently go to court, for example, claims for damages, or intellectual property actions, applications for judicial review or debt recovery actions?

At what point should cases go to mediation?

Should mediation be an “entry card” to the court system – compulsory even before a claim is filed – as it is under the Employment Relations Act 2000? If not, then at what point in the court process should it take place?

The earlier mediation happens, the greater the savings. Also, research suggests that it is more likely to succeed if it takes place earlier rather than later. The more time parties spend preparing for trial, the more entrenched their positions are likely to become.

On the other hand, mediation should occur when the chances of success are at their highest. Perhaps an order to mediate should not be made until after the parties have had the opportunity to decide on mediation themselves. As many people settle by themselves anyway, ordering early mediation may merely create an additional cost without benefit.

Whatever the timing, court proceedings need to be adjourned while mediation is taking place, to take pressure off the parties. In New South Wales, parties attempting mediation do not lose their place on the court list, so an unsuccessful mediation need not, by itself, lead to any extra delay.

Who should mediate?

In some models, mediation is carried out by trained court officers or by judges. This saves parties the costs of an external mediator.

However, a conflict of interest could arise. Court officers could feel pressured to achieve high settlement rates, which could compromise their neutrality. Judges who mediate might no longer be seen to be neutral and impartial.

An alternative is for parties to go to a private mediator. But then they would have to meet additional cost. Another possibility would be for the court to refer mediations to a state-funded national service, like the one described above.



Should lawyers be present?

The aim of mediation is to give the parties the opportunity to talk and hopefully to reach an agreement. If lawyers are present the danger is that they will take over. A study of one compulsory mediation scheme in the US reported that litigants did little talking during mediation. Instead, they took a back seat while their lawyers negotiated. There is a danger that mediations may become like formal court processes, with the parties remaining detached.

The other side of the coin is that if lawyers are absent, the parties' interests might not be sufficiently protected. Mediations do not incorporate the protection of formal procedures, they can take place before all the relevant information is known, and there are no limits on what evidence is considered.

Who should pay?

Whether parties who are required to mediate should pay for the service is a question of principle.

The state helps citizens gain access to independent, impartial processes for the resolution of disputes by partially funding the courts and by providing legal aid. People have a personal interest in their disputes being resolved so they meet part of the costs in court fees. Should that principle apply to mandated mediation?

Induced mediation

A less rigid approach might be to strengthen the incentives to go to mediation. Parties might at least be required to *consider* mediation seriously and to see litigation as a last resort.

This could be achieved by imposing sanctions on those who refuse to consider mediation. In a 2001 case, the English Court of Appeal decided that courts could ask disputing parties why they had made no attempt to resolve the dispute or narrow the issues through ADR. Lord Woolf said: "Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible."⁹⁸


The same court went even further in 2002, when a successful defendant was denied costs because of their refusal to consider ADR.⁹⁹

ADR pledge

In March 2001, the Lord Chancellor's Department in the UK announced the "ADR Pledge", according to which government departments pledge to settle cases by mediation or arbitration wherever possible, and to take cases to court only as a last resort.

98 *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803 at [26].

99 *Dunnett v Railtrack* [2002] EWCA Civ 302, [2002] 2 All ER 850.



The pledge has two main purposes. One is to declare a policy. As the Lord Chancellor said: “The Government wants to lead the way in demonstrating that legal disputes do not have to end up in court. Very often there will be alternative ways of settling the issues at stake which are simpler, cheaper, quicker and less stressful to all concerned than an adversarial court case.”

The second purpose is to reduce the public money spent on litigation and to lighten the workload of the courts. Between 2001 and 2002, mediation was attempted in 49 cases and the Treasury Solicitor’s Department has estimated an overall saving of legal costs of £2.5m.

There is no declared alternative dispute resolution policy in New Zealand.

What do you think?

What improvements can we make so that **alternative dispute resolution processes are widely available, just, fair, comprehensible and accessible, and are proportionate to the dispute involved?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

Court and Case Management Processes

Around the world, delay in civil justice systems is described as reaching unacceptable proportions. In the US the courts have been described as being in crisis.¹⁰⁰ How to balance justice and fairness with proportionality and effectiveness arises in every class of civil case. In response, civil rules and processes everywhere are constantly being reformed.

Case management

In New Zealand, the courts have assumed more formal control over the progress of cases to trial by “case management”.

Case management is the “... supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition, regardless of the type of disposition.”¹⁰¹

Formal case management systems were first trialled in New Zealand in the 1990s under three pilot schemes, in the High Courts in Auckland, Napier and Christchurch, and in five District Courts in the Auckland area. Reports evaluating their impact concluded that they were all successful in reducing the time cases take. A 1996 study of a sample of cases in the Auckland High Court showed that the average time between filing and resolution had dropped from 78 to 24 weeks.

Case management was implemented nationally on 1 January 2000 in the High Court and 1 March 2001 in the District Court.

Under the case management system, cases are allocated to “tracks”. Cases that receive a hearing date on filing (eg, summary judgment applications) are placed on the “immediate” track. Matters that need to come to hearing quickly (eg, appeals, applications for interim orders) are placed on the “swift” track. The rest are allocated to the “standard” track. There is also an “assigned” track for cases that require a particularly high degree of judicial management.

Each track has defined timetable steps. Non-adherence can result in orders to pay costs through to the proceedings being struck out.

“Case conferences” are held to monitor progress and are aimed at:

- clarifying the central issues of the dispute and eliminating any that are irrelevant, so that the trial can be focussed and kept to proper length
- checking the adequacy of the evidence that will come before the court, and keeping pre-trial issues to a minimum
- managing discovery and limiting it to “particular issues or identified classes of documents”
- getting the parties together early, and encouraging them to negotiate or mediate.

“We should approach disputes which reach our justice system in a more sophisticated fashion than we have until now.”

Wellington District Law Society ADR Committee

“Case management ... now means that litigation is effectively “court driven” ... if the parties choose to avail themselves of the courts they have some obligation to use the system as efficiently and economically as possible.”

Auckland District Law Society

100 See, Justice Hansen “Case Management in New Zealand Courts” (1998) 9 Otago LR, 319, 320.

101 Solomon and Somerlot, *Caseflow Management in the Trial Court*, (ABA, 1987), 3.



In 2000 to 2001 just over 61 percent of High Court defended civil proceedings were disposed of within a year of filing of the statement of claim (compared to 58 % in 1999 to 2000). In the District Court, just under 67 percent (63 % in 1999 to 2000) of cases were disposed of within a year of filing of the statement of defence. This reduction may in part be because of case management, but some 400 High Court and 800 District Court cases still took more than a year to resolve.

Submissions to *Striking the Balance* generally supported the concept, although some individuals and corporate entities consider an “even more vigorous” approach is necessary. Suggestions are that there should be fewer, but more effective, case conferences, timetables should be more strictly adhered to and enforced and adjournments restricted, and the court should be better able to discipline inefficient lawyers.

“The case management system has led to an increase in... judicial officers making decisions without receiving evidence or [hearing] the parties... Too many things now seem to be regarded as purely administrative.”

Individual

“Whilst case management has generally improved the speed and operation of cases ... it does ... also lead to delays and ... steps which are unnecessary.”

Auckland District Law Society

In the District Court no cases are *automatically* assigned to a judge for individual management and that was thought unhelpful. The New Zealand Law Society also commented that “in District Courts, the procedure still requires ... full discovery and any other interlocutories before issues are identified in a judicial conference. That needs to be remedied.”

However, others fear that justice might be sacrificed to efficiency.

Still others have concerns that management can get out of hand, and can actually cause inefficiency and delay.

Problems with case management

Lack of legislative change

The case management system was introduced without legislative support although the Rules Committee (the statutory body responsible for procedural rules) is currently working on incorporating aspects of it into the court rules.

This approach has been criticised as too piecemeal, and as underrating the value of case management.¹⁰² In relation to reforms in England and Wales, it has been said that “studies ... documented that members of organisations were more likely to change their behaviour when leadership and commitment to change were embedded in the system ...”¹⁰³

Lack of common approach

The approach to case management is not consistent. The Wellington and Christchurch High Court registries, for instance, function under an “individual list” system (cases are allocated to individual judges to manage and resolve), while other registries have a “master calendar” system (teams of court staff and judges manage each case).

102 M Smyth “Bringing Litigation into the 21st Century” (2002) NZLJ 227, 230

103 Lord Chancellor’s Department *Emerging Issues: An Early Evaluation of the Civil Justice Reforms*, para 5.10 available at < <http://www.lcd.gov.uk/civil/emerger/emerger.htm> > .

Also, case managers, judges and masters, are said to vary in how rigorously they supervise cases, and if more than one has a hand in a case, that can compound the difficulty.

The Buddle Findlay research reported that the aims of case management were incontestable but that it had not worked well in practice, partly because judges did not apply it sufficiently rigorously.

Compliance

The courts have been criticised for not insisting on compliance with timetables, but there can be tension between efficiency and fairness. A 1997 Court of Appeal judgment, allowing a case to proceed despite non-compliance by one party, said “the dictates of fairness must prevail over the demands of efficiency ... substantive rights are not to be readily defeated by procedural means”.¹⁰⁴

Where is the line to be drawn between maintaining the integrity of the process of case management, and meeting the just needs of a particular case?

Attendance at conferences

According to the report *Caseflow Management in the Year 2001*, “Early settlement of disputes is a major aim of effective caseflow management”.¹⁰⁵ However, in the District Court, parties do not have to attend case conferences and, although parties are supposed to attend High Court conferences, it seems that this does not always happen. This seriously diminishes the opportunity to encourage negotiation or mediation and keep discipline in the process.

Track assignment

Cases are currently assigned to “tracks” primarily on the basis of case type. This means that often a small and simple claim is dealt with in much the same way as a large and complicated claim. Some claims may demand a much simpler and even truncated process.

Reform in England and Wales – the Woolf report

In England and Wales, Lord Woolf’s 1996 report *Access to Justice* has led to the wholesale reform of civil procedure.

Lord Woolf argued that to ensure access to justice, a civil justice system has to be just, fair, resolve cases speedily at reasonable cost, be understandable to those who use it, be responsive to their needs, provide as much certainty as possible, and be effective. Litigation should be avoided wherever possible. He proposed that:

- *The rules of civil procedure be reformed completely to reduce their complexity and to set general standards:* as a result, the English Supreme and County Court Rules have been replaced by the Civil Procedure Rules (“CPR”) – a single set of rules for all cases in the general civil jurisdiction.

“The system often does not work well or efficiently. Different masters or judges may take different hearings, which requires counsel to start from scratch each time ... Masters and judges then take an indulgent attitude and reschedule conferences.”

New Zealand
Business
Roundtable

¹⁰⁴ *McEvoy v Dallison* [1997] 2 NZLR 11 at 21.

¹⁰⁵ *Caseflow Management in the Year 2001*, (Report of National Caseflow Management Committee, Department for Courts, May 2001), p 5.



- *“Plain English” should always be used:* Lord Woolf concluded that the language used in the court system can be outdated, complicated and a barrier to justice. As a result many legal terms have been replaced.
- *Case management should be proportionate to the dispute:* Lord Woolf proposed that management be proportionate to the amount at stake and that judges should only intervene in cases that require and repay it. Small claims, he proposed, should be dealt with speedily, unless particularly complex. As a result, cases are assigned to tracks depending primarily on their value.
- *The issues in dispute be established before a claim is filed:* pre-action protocols have been introduced to ensure that there is a real issue in dispute, the possibility of settlement is considered as early as possible and all relevant information is exchanged.

Fundamental to Lord Woolf’s proposals is the idea that the culture behind civil litigation has to change: that parties should be encouraged to resolve their disputes by negotiation and lawyers should be discouraged from promoting litigation as the first reflex.

The Woolf reforms have, on the whole, been hailed as a success. The new rules have been described as “providing a clearer structure, greater openness and making settlements easier to achieve”¹⁰⁶:

- practitioners have noted an improvement in the relationships between disputing parties and a greater willingness to be open with opponents
- fewer cases are being filed – between 1998 and 2000 the number of writs issued in the Queen’s Bench Division of the High Court fell from just over 100,000 to 26,876¹⁰⁷
- there are fewer settlements “at the door of the court”, and judge and court time can now be allocated more definitely and efficiently
- parties and lawyers are less able to allow cases to drag on for months, or years. The time cases take has reduced: for claims over £5,000, from 744 days in 1994 to 1997 to 450 days in 1997 to 2000.¹⁰⁸

A 1998 report on the impact of the Woolf reforms suggests that “court reforms work best when they work with other changes, to produce transformations in culture and approach that reach beyond the details of the specific rule”.¹⁰⁹ That shift has seemingly taken place.

However, the reforms have been less successful at reducing cost, mainly because “[each] potential saving is offset by other changes that require more work, or bring forward work to an early stage”.¹¹⁰

106 Goriey, Moorhead and Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-action Behaviour* (2002), iv.

107 Judicial Statistics Annual Report 2001 (Lord Chancellor’s Department).

108 *Emerging Issues: An Early Evaluation of the Civil Justice Reforms* (Lord Chancellor’s Department), para 6.5.

109 See above, note 106, viii.

110 See above, note 106, xxix.



What we could do

Current case management practices could be strengthened, entirely new practices could be introduced or there could be a fundamental reform of the rules of civil procedure.

Strengthen case management practices

The least radical possibility is to reinforce present case management processes. This could include:

- standardising case processing and management in court registries and by case managers so that cases are treated consistently wherever they are filed
- requiring parties to attend case conferences, unless they are excused because that would be disproportionate or serve no useful purpose
- managing pre-trial processes like discovery, penalising non-compliance with rules, rulings, and timetables, and allowing adjournments only by exception.

This possibility may recognise one real problem more explicitly than the others do: cases can involve cost and delay, and more radical case management can in fact push costs up.

More procedural reform

Pre-action protocols

The English pre-action protocols are seen as particularly effective in promoting settlement and reducing litigation:

- pre-action letters of claim can be as effective in prompting settlement as the issuing of proceedings
- pre-action exchange of information can lead to negotiation and settlement before court filing fees have to be paid and lawyers' fees get too high
- the parties are better informed and prepared, if proceedings cannot be avoided
- cost savings remove an avenue for bullying by more wealthy litigants
- contrived claims are less likely to be filed.

This may not be markedly different from what a good lawyer does now but the protocols could encourage the less efficient to follow suit.

Although some believe they have raised the standard of litigation in England and Wales, concerns have been expressed that the protocols are too numerous and specialised and make for needless complexity and the “front-loading” of costs.

Also, pre-action protocols can only be as effective as the sanctions used to enforce them. Some argue the sanctions are ineffective and, when not enforced, the unreasonable and unscrupulous can use the protocols for tactical advantage.

There is the opposite complaint: that the protocols unacceptably restrict parties, who should be able to pursue their disputes and conduct their cases as they wish.

“There is little that can be done to reduce some delays in a centrally funded and directed system... if measures are introduced to reduce delay, there is likely to be increased resort to litigation.”

New Zealand
Business
Roundtable

Pre-lodgement notice of claim

In South Australia, notices of claim in the Magistrates' Court serve the same purpose as the pre-action letter of claim. The notices do not go so far as to dictate pre-action steps but give notice that a claim is about to be issued and may prompt settlement. They are coupled with free pre-action mediation.

Offers to settle

Under the High Court rules, parties can make a written offer “without prejudice as to costs” to encourage settlement.

In England and Wales, a defendant who rejects a settlement offer and does no better in court is generally liable to pay costs on an indemnity basis. Also, parties can make such offers before proceedings are issued.

This possibility can be attractive where claimants have an accurate idea of what their claims are worth. The evidence suggests that this is resulting in early settlement. However, defendants are given a limited time period within which to respond and may not be able to investigate the merits of their cases properly. This pressure can be unfair.

Early neutral evaluation

The careful assessment of a case by a neutral party before it goes to trial can lead to the settlement of all or part of the case. Neutral evaluation involves an independent party assessing the relative strengths and weaknesses of each party's case and offering an opinion on the outcome, liability and damages.

This is available in some courts in Australia, the UK and the US.


In the New Zealand High and District Courts “settlement conferences” can be convened by judges or masters. Unless the parties agree, the judge or master holding the conference will not then preside at the trial itself. These conferences differ from case management conferences: their purpose is to explore settlement of either the whole case or an issue. The judge is allowed to assist, and that can involve expressing a view on issues in dispute.

One issue is whether settlement conferences should have a larger place in the court process.

Scope and management of discovery

Discovery is designed to ensure that parties know of all documents relevant to the case before the trial.

However, it can greatly increase the cost of civil litigation. In New Zealand the scope of discovery is governed by the test set out in the 1882 case *Compagnie Financière du Pacifique v Peruvian Guano Co*,¹¹¹ which requires the discovery of any document “relating to any matter in the action”. As technology has developed, this has made discovery a potentially mammoth task. In its report *General Discovery*, published in February 2002, the Law Commission recommended that the current test should be amended, as it has been in some other countries, to one of relevance to the issues in dispute.



Also, case management is increasingly being used in some countries to control discovery. The New Zealand guidelines state that “discovery may be limited to particular issues or identified classes of documents, and discovery may be programmed in stages”. In Western Australia, case managers take a far more active and even inquisitorial role, sometimes assuming complete control of discovery.

The Law Commission rejected such an approach in its report saying it was “very much dependent on case management proposals that do not readily fit the current New Zealand position”. But if case management practices are to be reviewed, more active control of discovery might be a possible area for reform.

Expert witnesses

In civil claims, parties can call as many expert witnesses as they like. This not only increases costs, it can make the case more adversarial. Parties call experts who support their side of the case. Such witnesses are not always the most neutral or the most likely to assist the courts in uncovering the truth. There can be a serious imbalance where one party is able to afford more or better experts than the other.

A new code of conduct for expert witnesses has recently been introduced in the High Court to try to counter some of these problems.¹¹²

A possible response would be for the court to have wider powers in relation to experts, such as:

- deciding whether the issues call for expert evidence
- assessing whether the case is appropriate for a single “joint” expert who would advise both sides
- deciding how many experts each party can call
- assessing whether an expert needs to give oral evidence at trial, or whether a written report is sufficient.

Wholesale reform of civil procedure

The most radical possibility is the fundamental reform of civil procedure including simplifying the rules of court, modernising the language used and introducing uniform case management principles and processes.

The first rule of the new English code, adopted after the 1996 report by Lord Woolf is a good starting point. It reads:

- “(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing justly with a case means, as far as is practicable:
- (a) ensuring that the parties are on an equal footing
 - (b) saving expense
 - (c) dealing with the case in ways which are proportionate:
 - (i) to the amount of money involved
 - (ii) to the importance of the case
 - (iii) to the complexity of the issues
 - (iv) to the financial position of each party.
 - (d) ensuring that it is dealt with expeditiously and fairly
 - (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

¹¹² See High Court Rules, rr 330A, 330B, Sch 4.



Redrafting the rules

The criticisms Lord Woolf made of the old English rules are made by some people of the New Zealand rules. They include the fact that there has been piecemeal change over the years, there are too many ways of doing the same thing, and the rules attempt to cover every eventuality and have become too elaborate. Key words are increasingly defined, and specialist terms used but not explained.

In New Zealand, case management principles and processes are superimposed on top of the rules, which adds complications.

There are about 1150 High Court Rules and 732 District Court Rules and almost as large a set of Family Court Rules has just emerged. Originally the High Court and District Court rules were separate because the monetary values and complexity of cases in the two courts differed. But their jurisdiction now overlaps and the District Court rules are modelled on and largely repeat the High Court rules. This overlap and diversity may be quite unnecessary and unhelpful. Should the two sets of rules be combined into one?

This may make for greater simplicity in both courts. But small claims in the District Court may still need a simpler process, which is proportionate, swift and involves minimal cost.

Language

Latin and legal terms still pepper the rules of court and the language of the processes. The words often have precise meanings and lawyers find them convenient. But to non-lawyers they are unintelligible. One Australian commentator has even suggested that “the survival of Latin tags in our legal system is primarily designed to give mystery and majesty to otherwise ordinary mortals”.¹¹³

If the courts’ processes are to be readily accessible, then simpler words will have to be found which are generally understood.

Case management

There is an argument that track allocation ought to be primarily on the basis of monetary value to maintain proportionality in time and resources in resolving a dispute. The fast-tracking of, and limitation of, costs spent on cases of low monetary value could be of real benefit. Small claims especially (if they are to be worth pursuing at all) need to be resolved simply and at minimal cost.

What do you think?

What improvements can we make so that **court and case management processes are widely available, just, fair, comprehensible, and are proportionate to the dispute involved?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

High Volume Cases

High volume cases (the cases that make up the majority of the civil workload of our courts) fall into three categories – small claims, claims heard in the Disputes and Tenancy Tribunals, and claims to recover debt.

Small claims

To all but the very wealthy, \$50,000 is a lot of money. But it has been suggested that it is uneconomic to initiate a civil claim for anything under that sum: “for any claim for \$50,000 or less it would be rare that the cost of a defended hearing was justified, when one takes into account preparations costs. Indeed, the ceiling at which a defended civil claim becomes economic is probably higher ...”¹¹⁴

If the courts are to resolve disputes beneath \$50,000, the court process will have to be simplified, and the roles of the Disputes and Tenancy Tribunals may also need to be rationalised and clarified.

Contested claims

In the District Court, contested claims below \$50,000 are subject to the same procedures as claims up to the full extent of the court’s jurisdiction, \$200,000. Before the substantive hearing there are two distinct phases.

The claim/defence/counterclaim phase

The claimant files a statement of claim stating the essential facts on which they rely, and the remedy they are asking for. The defendant files a statement of defence, admitting or denying what the claimant asserts (or asks the court to order the claimant to provide clearer and more complete information) and can also counterclaim. Either can ask the court to let others join their action as additional defendants or third parties.

The information exchange phase

The parties formally exchange lists of the documents relevant to the case, distinguishing those they allege are privileged. They can interrogate each other by listed questions, which must be answered formally. Before trial usually, witness statements are exchanged and an agreed bundle of other documents that the court needs is produced.

These pre-trial processes are designed to identify – reliably and without surprise – the scope of the dispute and all the facts needed to resolve it. Then in the actual court hearing the facts are established and the law applied.

In cases below \$50,000 the expense of these pre-trial processes can be overwhelming and a full contested trial may not be economically sensible.

114 A Forbes *Law Talk*, (April 1997), 473,11.



What we could do

Simpler process

A simpler process, like that in the Magistrates' Court of South Australia, could make the first phase less demanding. To initiate a claim, the claimant could file a notice of claim stating plainly what they want and why. The defendant would respond just as informally.

The exchange of information phase could be dispensed with. Instead, at a directions hearing the parties would choose one of three options:

- to negotiate a settlement that day
- to go to mediation
- to go to trial either with or without preliminary steps occurring.

If the first alternative is chosen, the judicial officer could help by identifying the issues, pointing out the realities, and suggesting solutions. If negotiation succeeds, court orders setting out what each party has agreed could be made. If negotiation did not succeed, the case would go to mediation and/or trial.

If mediation or trial were the chosen options, the judicial officer could assist in defining issues, identifying undisputed facts, highlighting critical disputed issues, confirming essential documents and the witnesses necessary, and allocating adequate time for the hearing.

The judicial officer then, at the hearing, could have the power to confine evidence to what is strictly relevant.

Disputes and Tenancy Tribunals

Just under 50 percent of civil matters are dealt with in the Disputes and Tenancy Tribunals. The Tenancy Tribunal hears all disputes between landlords and tenants where the disputed amount is \$12,000 or less. The Disputes Tribunal hears disputes where the amount is less than \$7,500 or, by consent, \$12,000.

Disputes Tribunals are designed to provide fast, cheap and informal ways of settling disputes worth relatively small amounts of money. They operate less formally than a court. In 2000 to 2001, almost 80 percent of claims were disposed of within 90 days of filing.

Tenancy Tribunal hearings are generally held within one or two weeks of an application. Though hearings are formal, most are completed within an hour.

A particular feature of the Tenancy Tribunal is the link with mediation. As soon as an application is lodged, a mediator attempts to obtain settlement and even where a matter is before the tribunal, the adjudicator can direct mediation. In 2000 to 2001, 79 percent of applications went to mediation, of which nearly 56 percent were resolved or withdrawn at that stage.



The main features of the two Tribunals are as follows:

	Disputes Tribunal	Tenancy Tribunal
Legal representation	No entitlement to legal representation.	Allowed in certain circumstances.
Public / private proceedings	Proceedings are held in private.	Proceedings take place in public, unless there is a reason why they should not.
Evidence	Normal rules of evidence do not apply and the proceedings have some "inquisitorial" features.	Normal rules of evidence do not apply and the proceedings have some "inquisitorial" features.
Who hears disputes, and how are they qualified?	Referees, who are not required to be legally qualified.	Tenancy Adjudicators, who are not all required to be legally qualified, but there must be "sufficient Tenancy Adjudicators who have a required qualification". Most of the adjudicators are solicitors or barristers.
Role of decision-maker?	To facilitate agreement by a process of negotiation and mediation. Where the parties cannot agree, the referee makes a determination according "to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities".	To make determination according "to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities".
Right of appeal?	Only in circumstances where the referee conducted proceedings in a manner which was unfair and which prejudicially affected the proceedings.	By rehearing for claims above \$1,000 to the District Court. In practice appeals are few.

Issues

In terms of cost, speed, and proportionality, there are few concerns with these tribunals, but there are complaints that the Disputes Tribunal process is not always fair, or does not always identify and resolve the real issues in dispute.

In the general civil jurisdiction, parties can be represented by lawyers and are protected by formal processes and the rules of evidence. Legally qualified judicial officers decide cases according to law. There is a right of full appeal. In the Disputes Tribunal these safeguards are substantially absent.

These safeguards were thought too complicated and unnecessary in a process designed to be easily accessible and inexpensive; and justice was not thought to suffer by removing them. But that is not the perception of many people who are required to have their cases resolved in this way.

What we could do

The Disputes Tribunal process

“The balance always needs to be struck between prompt, cost-effective disposal or proceedings and ensuring that each party’s case is properly put to the court”

New Zealand
Law Society

Whether the Disputes Tribunal process is simple and effective, or simple but unsafe, must be tested by asking hard questions.

- Is the combined conciliation / adjudication role of the referee flawed?
The referee first tries to reach agreement but may end up having to decide the case. One moment, the parties are negotiating, and the next everything they say becomes evidence.
- Is an answer to split mediation from adjudication (as the Employment Court and the Tenancy Tribunal do)? Mediation might be compulsory, or offered as a first option, as happens in tenancy cases. But would either create costs the parties cannot accept?

- Should the hearing be relatively informal, as it is now? Or should it be more conventional in form, as in tenancy cases?
- Is it enough to decide cases on their substantial merits and apparent justice, or should the law apply to all? Although objectively the amounts concerned may not seem great, to the participants, they, and the issues are of huge importance.
- Should lawyers be able to represent parties? If lawyers are seen as necessary, desirable or even essential in disputes about bigger sums, can their exclusion be justified here on the grounds of cost?

Qualifications of referees

The decision-maker’s qualification is a recurring issue. Does the range or complexity of disputes call for legally qualified referees? Should cases calling for special, non-legal, expertise go to an appropriate expert as medical cases or complaints about motor vehicle dealers do now? Common sense may be enough in many cases. But decisions at variance with the law can be unjust, and some cases have special factual features that call for more than common sense.

Right of appeal

The very circumscribed right of appeal is another question. To keep costs low there has to be finality. Consequently, the present right of appeal is very confined. Decisions can only be questioned where the referee has conducted the hearing itself unfairly and the appellant has been prejudiced. The merits of the decision are out of bounds. The referee may have got the facts wrong, or the law wrong, but nothing can be done about that.

A possibility is a complete right of appeal from the Disputes Tribunal in fact and law in every case, or only above a set minimum (as in the Tenancy Tribunal, where the minimum is \$1,000). Vexatious appeals could be discouraged by a filing fee, or costs awards.

Debt recovery

In the District Court a high proportion of cases are claims to recover debt. In 2002 just under 99 percent of summary judgments given in the court were for debt recovery.

These cases do not always require the court's full process. More often than not there is no dispute or defence, or if there is, it is narrow and technical, and neither witnesses nor discovery are required. The amount of the claim can be calculated reasonably accurately and proved readily.

Nevertheless, the 1992 District Court Rules require all actions to resolve disputes or collect uncontested debts to begin the same way.

Even in obviously uncontested debt cases, the plaintiff must wait 30 days after serving the notice of proceedings to find out whether the defendant intends to file a formal statement of defence. Only if no statement of defence is filed can the plaintiff apply for judgment, and that still sometimes calls for evidence.

Sometimes the person claimed against can hold things up by filing a statement of defence even though there is no defence. The only way then a claimant can obtain prompt judgment is to ask at the outset (or later with the court's consent) for summary judgment. But to do this the claimant must make a specific application, supported by an affidavit confirming the statement of claim, and stating the belief that the defendant has no defence.

A larger issue is that many of the applications for summary judgment that are made are not needed. The person claimed against turns out in most cases not to oppose judgment.

Sometimes too this process can be misused. Credit contracts often impose the cost of enforcement on the debtor. Applying for summary judgment involves no disadvantage to the creditor and may be more rewarding to the lawyer acting. The debtor, who may not actually oppose judgment, will bear the brunt. The work of the court will be increased needlessly.

A part answer may be to allow an application for summary judgment to be made only after a defence has been filed. But an altogether simpler process for debt cases may be better.

“The abandonment of the default summons procedure for liquidated debts means citizens who wish to obtain a judgment for a modest amount of money ... are limited to the full court process”

New Zealand
Law Society



What we could do

The English procedure

In England a summary judgment application cannot be made at the outset unless the court gives consent. It can only be made as of right after the defendant files a defence or at least acknowledges receiving a notice of proceedings.

The English process has other features worth considering:

- judgments on default of debt can be obtained under the rules for any claim for “a specified amount of money”, which can include claims for sums which are not definite but can be readily quantified and proved
- both the claim and the defence must be verified by a statement of truth
- the claim form tells the plaintiff and the defendant what to do and the defendant is served a “response pack” containing forms to be used to admit or defend the claim
- the defendant has 14 to 28 days after service to file a defence, and if that does not happen the plaintiff may obtain judgment by filing a pre-printed form requesting judgment.

Our 1948 District Court Rules

A still simpler approach to debt claims, and even small claims generally, may be to revert to the 1948 District Court Rules.

Where the claim was likely to be contested, the claimant began a full action by ordinary summons. If the debtor failed to file a statement of defence, judgment could be entered by the claimant on proof that the summons had been served and of the essential facts, often by way of affidavit. This might, but did not always, call for a court appearance.

Where the claim was unlikely to be contested, and the debtor simply lacked the means to pay, the claimant could commence the claim by default summons. If the debtor failed to file a notice of defence, the claimant could enter judgment by default by filing a document to be endorsed by the registrar. No appearance was required and the judgment was enforced by an equally simple process.

The vast majority of debt collecting cases were dealt with by way of default summons. In those exceptional cases that were contested, the action converted to an ordinary action and was dealt with in the full usual way.

A separate process

The volume of debt cases is so significant in the District Court that more than just simplified rules and procedures may be needed. An efficient debt recovery process, which keeps costs to a minimum, benefits the debtor as well as the creditor and may require a special organisational response.

In addition, there can be advantage in centralising recovery: debtors often have a number of creditors pursuing them, often at different courts. Duplication can be wasteful. The Australian Law Reform Commission favours a central debt recovery office so that creditors can consider all information held about a debtor before deciding whether to go further, or how.

Money claims on-line

In England, a pilot scheme is being run which allows money claims under £100,000 to be made on-line. The pilot is run from one office and court fees are paid over the Internet. The claimant can issue a claim, monitor its progress, obtain a judgment by default, and issue a warrant of execution.

All the claimant has to do to commence a claim is to fill out electronically a claim form incorporating the particulars of claim. To verify the claim they type their name under the claim statement. The court then serves the claim by post. It is officially considered served five days after it is issued.

The defendant can acknowledge being served with the notice by telephone or e-mail and file a defence by post or e-mail, but not electronically at the website. On the filing of a defence, the claim is transferred to the defendant's nearest court.

In the absence of a defence, the claimant can request judgment and a warrant of execution by sending an on-line request, and complete the whole process over the Internet. This is especially useful for large creditors and agencies.

In designing a debt recovery process, considerations would include:

- Whether there should be an upper or lower limit on claims.
- What sort of claims such a process should apply to – any claim as long as the amount sought is specified at the time the claim is commenced? Or only those where the amount claimed is easily quantified and readily verified?
- What level of detail a claimant should have to provide in the claim.
- Whether the defendant should receive more information than is contained in the current “Notice of Proceeding”.
- What information should be exchanged.
- If a defendant takes no steps to defend a claim, whether a court officer should be able to enter judgment without the need for any hearing (the defendant having the ability to apply to set aside any judgments wrongly entered).

What do you think?

What improvements can we make so that the processes for **high volume cases** are widely available, just, fair, comprehensible and accessible, and are proportionate to the dispute involved?

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



Open Justice

We look for: a rational, publicly acceptable balance between the principles of openness, and protection of privacy in courts.

Open justice is a fundamental principle of the New Zealand court system. This principle requires that courts should conduct their processes openly, unless to do so would itself result in injustice. It underlies a variety of rules, both statutory and judge-made, which deal with:

- whether the hearing should be public or closed
- whether there should be any limitations on the reporting of the hearing (eg, suppressing the names of witnesses or parties)
- whether records of the hearing should be open for inspection.

The court's function is to determine guilt or innocence, not to provide a backdrop on people's misery and misfortune.

Individual

There are exceptions to the principle set out in a range of statutes, regulations and court decisions. For example, the Family Court and the Youth Court are generally closed to the public and, in general, the media is not allowed to report what goes on in these courts. The underlying rationale for all these exceptions is that there are competing interests – for instance, privacy or the right to a fair trial, which may outweigh the requirement for openness.

This chapter looks at how and why openness operates in criminal proceedings, family proceedings, and civil proceedings. In each case it asks whether current arrangements are fair and appropriate or whether reform is needed.

Why we have openness

Openness in New Zealand is given a high priority because it is said that:

- it rests on the right to freedom of expression that is enshrined in statutory or constitutional provisions around the world – it is generally considered that the right to receive information is an aspect of the right to express views, which is expressly stated in section 14 of the New Zealand Bill of Rights Act 1990
- it maintains confidence in the administration of justice – if courts are closed the public may be suspicious that something improper is being hidden from them
- it ensures the accountability of judges – the public can see what happens at a hearing or trial and can judge for themselves whether the processes and decisions reached are fair.

It is also argued that open justice:

- improves the accuracy of the process
- results in publicity which can bring forward additional witnesses
- provides an outlet for community concern and assists in avoiding vigilante behaviour
- has an educative and instructive role
- has the potential for attendant publicity to deter crime.



What happens in other countries

The principle of open justice underpins the justice systems of many other countries including the UK, Australia, Canada, the US and Japan.

In some European countries, by contrast, civil cases particularly are often dealt with “on the papers”, and there is no public hearing although there is access to the ultimate decision.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, on its face, affirms the open justice principle. But the European Court of Human Rights has consistently held that courts are not required to hold public hearings, where, for example, both parties agree to a private hearing, a case is highly technical, the issues raised can be dealt with simply by reading the court file, or an oral hearing would be unduly expensive or time-consuming.

Criminal Proceedings

Public hearings – adult courts

Generally, all aspects of criminal trials involving adults are heard in courts that are open to the public. Judges can exclude people in some cases, but even then the verdict or decision and the passing of sentence must take place in public. There is a specific exception with regard to the evidence of complainants in cases of a sexual nature, where only specified people may be present in court.

“If you are found not guilty unfortunately it does not matter. Mud sticks and so do labels”
Individual

Public hearings and reporting – youth courts

In the Youth Court, which hears most criminal cases involving young people aged between 14 and 16, the public are generally excluded. Only specified people can be present. Anyone else needs permission from the judge.

Some say that the public should not be excluded where there has been serious offending; and that the public’s right to know should be preferred.

This needs to be kept in context. In no case may the name of a child or young person be published. But there is a power to transfer matters to the District Court from the Youth Court, and, after the preliminary hearing, the most serious of offences are dealt with in the same way as those involving adults. In all cases the media can be present with the consent of the judge.

The philosophy behind the general exclusion of the public from courts dealing with young people is that they are less responsible than adults, and may have offended as a result of disadvantage, or deficiencies in their background. There is also the view that rehabilitation (getting young people on the straight and narrow) is most important, and that public access is likely to undercut this. This is currently the subject of debate.

Reporting restrictions in adult courts

Although an adult criminal court is open to any member of the public, the presiding judge can still restrict what is reported.

“The public “right to know” and to protect themselves from harm ... outweighs the accused’s right to be hidden except in very exceptional cases.”

Waikato Justices
of the Peace
Association

The Criminal Justice Act 1985 allows or requires material to be suppressed, or the publication of names and other details to be prohibited. There are also specific powers, in the Evidence Act 1908, to protect the identity of undercover police officers, and to preserve the anonymity of some witnesses, when that is required in the interests of justice.

The most hotly debated issue is name suppression, and when it may be justifiable. The Criminal Justice Act 1985 gives courts the power to suppress the name of the person charged, and other persons connected with the proceeding. The section does not set out any criteria as to when that should happen. Various principles have developed.

It is for the judge to decide whether the detriment to the person charged, or others, if their name is published, outweighs the public’s right to know. The judge will take into account:

- whether the person has pleaded guilty or not guilty, or been acquitted or convicted
- the personal circumstances of the person seeking suppression, and others, for example, the effect on family and employment
- the effect of publication on rehabilitation
- the seriousness of the offending
- the public interest in knowing the identity of the person seeking suppression.

Regardless of these factors however, if publicity puts a fair trial at significant risk, then the open justice principle must give way.


Since 2000, there have been guidelines for in-court media coverage of court proceedings. Judges retain the final right to determine what can be published, but the guidelines are intended to ensure uniformity and consistency, and to balance the competing rights of the public to know and the dignity, privacy and safety of the persons involved in the case.

Some believe that, because a person charged is presumed to be innocent until proven guilty, name suppression should be granted to everyone unless and until they have actually been convicted. That was the law in New Zealand from late 1975 until July 1976. The media strongly oppose this idea.

Access to court files

The media and others interests, often ask to see evidence produced at a hearing, as well as documents. Access to these materials is however restricted; there is no automatic right to search criminal files before or after a trial.

Access in criminal cases is governed by the Criminal Proceedings (Search of Court Records) Rules 1974. These rules used to be understood to mean that criminal records should generally remain private, unless an applicant persuaded the court



that there should be access. This was recently rejected by the Court of Appeal,¹¹⁵ which held that judges should balance the competing interests: the privacy of the person charged and the witnesses, the principle of open justice, the right to free expression and to receive information, and the need to ensure that a fair trial will not be prejudiced.

In the District Court, the Summary Proceedings Act 1957 provides that a person with a genuine and proper interest may search the Criminal Records. The Criminal Records however only contain a brief summary of the court file. The District Court is said to have implied power to permit access to criminal files, on broadly the same principles as apply under the Criminal Proceedings (Search of Court Records) Rules.¹¹⁶

Some argue that as all this information is freely and immediately available to the public during a hearing, it is illogical to limit access to it out of court.

Issues

- Is the presumption that all parts of criminal cases involving adults should be held in a court open to the public the right starting point?
- Should an accused automatically be given name suppression until convicted?
- Are the existing statutory exceptions necessary or appropriate?
- Is it appropriate that most cases involving young people are dealt with in a court to which the public does not have a right of access?
- In any case where the hearing is open to the public, what rules should there be to suppress evidence, or prohibit publication, either temporarily or permanently?
- Should clear guidelines be set out in legislation as to when name suppression should be granted?
- Are the current rules with regard to searching court records of what happened in open court hearings fair, or sensible or equitable?

Family proceedings

The Family Court has been at the centre of the most heated debate about openness in the courts. Many people, in particular fathers' groups, argue that Family Court proceedings should be open to the public.

Critics of the court claim that, in deciding custody of children, judges can be biased against fathers. They are convinced that this is able to happen because neither the public nor the media are allowed to attend hearings.

The Family Law Section of the New Zealand Law Society strongly rejects claims of bias against fathers. There is no compelling empirical evidence dealing with the issue one way or the other.

It is not only custody cases that are held in private. Most hearings involving family law matters, or cases involving children and young people, are not open to the public and reporting is restricted. The rules relating to each type of case are contained in the relevant legislation: in the Adoption Act 1955, for instance, or the Guardianship Act 1968.

¹¹⁵ *R v Mahanga* [2001] 1 NZLR 641.

¹¹⁶ *L v Police* [2000] 2 NZLR 298.



Most of these cases are heard in the Family Court but they can also be heard in the High Court or Court of Appeal. The restrictions on who can attend hearings and what can be published apply whichever court is hearing the case.

The reasons for the rules are various:

- many family matters involve highly personal, or embarrassing facts; therefore the parties have a high privacy interest that is presumed to outweigh any public interest in openness
- children and young persons are particularly vulnerable, and the effect of publicity can be especially harmful
- parties and witnesses to family matters, or matters involving children, can be reluctant to give evidence in public
- family matters are thought better conducted in a less formal setting; public hearings may not allow this.

Criticisms of the present regime are that:

- lack of openness can lead to a lack of public confidence in the courts; the perspective of men's groups is an example
- deficiencies in, or exposed by, court processes do not receive the publicity or attention they warrant.

In November 2000 a Bill was introduced into Parliament to provide for more openness in the Family Court, but it was defeated on its first reading.

In Australia, there were similar criticisms about the Family Court. There most Family Court hearings are now open, though restrictions on reporting remain. In the UK, the issue was the subject of a major consultation paper,¹¹⁷ but no change has occurred since.

A final issue is the extent to which court documents should be open to public inspection. This needs to be related to whether the public should have the right to be present in the court in the first place. There may also be particular reasons for restricting or allowing access.

Currently there are a dozen different pieces of legislation, as well as case law, that determine access. Generally they say that persons asking for access must have a "proper interest" in the case. Again, the issue is whether a search of the records should require a different approach to that governing who can be present during a hearing.

Issues

Two issues need to be considered:

- When should court hearings be open?
- When should court hearings be able to be reported?

The two issues are, or could be, interrelated. One possibility is that the court could be open to almost everyone who wishes to attend, but that what could be reported could be restricted. Another is that the court could remain closed to the public, but that the media could attend and report in whole or part.

Rules on access to court documents might follow suit. For example, if Family Court proceedings remain private, and could not be reported, access to court documents might be equally restricted; or the converse might apply.

Possibilities for attendance

There is a range of possibilities:

- the court could be open to the general public (except for settlement conferences and mediation conferences led by judges)
- the court could generally be open to the public, but the judge could order a closed court or bar particular people
- hearings could generally be held in private but the judge could allow people with a genuine interest to attend, for example, relatives or foster parents
- hearings could be held in private but with media reporters present – there might be restrictions on the way cases can be reported
- the court could generally be open but the parties could request that the case be heard in private – as applies in property relationship cases
- some cases could be open and some private according to the type of case, for example, cases involving children could be in private, but other cases could be in open court
- all cases in the Family Court could be held in private.

Possibilities for publishing proceedings

Again there is a spectrum to consider:

- all cases in the Family Court could be published without any restriction in any type of media
- cases could be reported but with all identifying information removed
- different types of cases could be reported, for example, matters relating to children or mental health could not be reported, but other types of cases might be, with or without identifying information
- cases could be reported only with the court's permission with or without restrictions
- the present position could remain; media reporting is prohibited, but not reports in professional and technical journals.

Civil proceedings

Civil trials

Civil cases, by long-settled convention, are held in public unless that would impede the fair administration of justice. This balance has never been questioned.

Access to court files

Access to court records, under the rules of both the High and the District Courts, depends on whether the case has been concluded. There is almost always the right to search the file where the case has been concluded. Where a case is still in progress, the file may only be searched by a person with a genuine or proper interest.



Before the conclusion of a civil proceeding, the file only contains the bare claims of the parties. These may be withdrawn or amended prior to the trial, and may be misleading. They may do nothing to assist the public to understand the case. Further, if the allegations are broadcast before they can be tested at trial, a party may be harmed and the law of defamation may not assist.

As against this, it can be argued that access to court files, prior to hearing, assists the public to understand the case, and that, in some cases, the public will also have a legitimate interest in knowing the allegations made. In both the US and Canada, there is a general right to inspect court files.

Civil chambers hearings

Chambers hearings take place in private, out of court. The media and public do not have a right of access. The fact that there has been a hearing and the judgment on it may be reported.

These hearings are a convenient way of resolving issues before the main trial. Most are about procedure, but they can be fundamental, for example strike out applications can end the case.

The origin of the practice is hazy but it is suggested that it arose from the inconvenience of courts being closed and urgent work being undertaken at the judge's home or chambers.

Private chambers hearings can be objected to as contrary to the principle of open justice. Also practices can be inconsistent. Whether a matter is dealt with in chambers, or in open court, varies from court to court, and from day to day. Many chambers matters are, in fact, dealt with in a formal courtroom setting, not in the judge's room.

What do you think?

What improvements can we make so that we have a **rational, publicly acceptable balance between the principles of openness and protection of privacy in courts?**

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

Part 4: Structure

General Courts

We look for: a court structure that fosters competent, accurate, efficient decision-making in proportion to the issue to be settled.

Striking the Balance posed questions about court workloads, particularly the core functions of the High Court and District Court, the number and kind of cases heard in the District Court, and whether some less serious work should be allocated to a new body.

This chapter looks at the boundaries between the District and High Courts, the options for distributing work between them, and the possibility of establishing a third court to do some of the less serious work of the District Court.

Constraints

In considering the best way to structure our courts, we must take into account New Zealand's geographical shape and population distribution, as well as the relatively small size of the population. These affect the number of court jurisdictions we can sensibly sustain and the pool of potential judges. These factors shape the structures and processes that will be most appropriate and effective.

Also, when considering overseas models we need to remember that, unlike many other countries, our courts hardly deal with any personal injury cases.

The District Court

Most New Zealanders see the District Court as the face of the judicial system. It deals with an array of civil claims under \$200,000 in value, and most criminal work. Eighty-six percent of all jury trials are held here. The District Court is the court which hears most first instance cases. It is meant to be the “people’s court” – local and accessible, and with a minimum of delay, formality and expense.

History

Before 1980, District Courts were known as Magistrates’ Courts, and had limited civil and criminal jurisdiction. The 1978 Royal Commission on the Courts proposed that Magistrates’ Courts be reconstituted as District Courts, and be given an expanded jurisdiction. However, it wanted the new District Court to remain the “people’s court” with all sections of the community able to access it without anxiety or mistrust and with minimum fuss.

In 1980, when the District Court was created, stipendiary magistrates became District Court judges. They were empowered to conduct jury trials. Appeals from jury trials went directly to the Court of Appeal. The civil jurisdiction was set at \$12,000. The Family Court was established as a division of the District Court.



The Law Commission reviewed New Zealand's court structure in 1989. It proposed that the District Court's civil and criminal jurisdiction be extended to overlap much more with the High Court's jurisdiction.

The commission's recommendations were not fully implemented. The District Courts Amendment Acts of 1991 and 1992 retained a formal divide between the two courts, although the District Court's civil jurisdiction was increased to its current level of \$200,000. The criminal jurisdiction was also increased, but continued to be set according to the category of offence. The High Court has exclusive jurisdiction in the most serious cases, such as murder, manslaughter and treason. The two courts have overlapping, or concurrent, jurisdiction in "middle band" offences, with the presumption that these offences will be heard in the High Court unless transferred to the District Court.

Other legislation, such as the Accident Rehabilitation and Insurance Compensation Act 1992 (which provides for appeals to the District Court), has also extended the court's jurisdiction.

The District Court today

The District Court now shares a significant civil and criminal jurisdiction with the High Court, having absorbed considerable increases in its workload, both in volume and kind, over the last 25 years. Even dividing the work into categories, there is a wide range of work in each category: from complex contested civil litigation to high volume civil debt recovery, from criminal jury trials to undefended summary matters. As well as being the largest volume court of general jurisdiction, it has the Family Court and the Youth Court as divisions.


There are 120 judges in the District Court and its divisions, and they sit in centres widely distributed across the country. A degree of specialisation already occurs. Judges of the Family Court and the Youth Court are selected for their particular skills and experience, and not all District Court judges can conduct criminal jury trials – they must be "warranted" to do so. There is no such warranting system to focus the talent and experience of judges who hear contested civil litigation, although in some metropolitan areas, groups of judges with experience and interest in civil litigation have developed.

In some ways, the District Court can be described as a victim of its own success. Because it has shouldered each increase in jurisdiction, there is a risk of assuming it can continue to absorb even more.

Some submissions describe the District Court as overworked, especially expressing concern about delays. The District Court judges note that each increase in jurisdiction has widened the gap between court and community. The increasing workload affects the delivery of speedy and accessible justice, and makes it difficult to balance the range of work and set priorities.

There is a perception that the civil caseload of the District Court takes a back seat to its criminal workload and that District Court judges are selected more for their skills in criminal work than with an eye to managing complex civil litigation.

The middle band of criminal offences was introduced as a means of moving criminal work from the High Court to the District Court, according to criteria including the



gravity of offence, complexity of the issues, the need for prompt disposal of trials, and in the interests of justice. In practice, however, it can give rise to problems.

The High Court

The High Court is the constitutional cornerstone of New Zealand's court system. It hears the most complex and important civil and criminal cases, supervises lower courts and tribunals, and ensures that public power is exercised fairly, reasonably and according to law.

History

Established in 1841 as the Supreme Court, the High Court has almost unlimited original jurisdiction. The law relating to the Supreme Court was consolidated and amended by the Supreme Court Act 1860, and again in 1882 and in 1908. The Judicature Act 1908 confirmed it had all the jurisdiction possessed by superior courts in England at the time the 1860 Act came into force, and confirmed its inherent jurisdiction (the reserve of powers on which the court can draw to control proceedings and to prevent abuses of its own process).

The 1978 Royal Commission on the Courts proposed changing the court's name to the High Court, and freeing it from more routine business. Its original jurisdiction was to be the more significant litigation: civil cases involving large sums of money or important questions of law, the most serious criminal trials and oversight of lower courts and tribunals, together with review of their decisions. The High Court was to generally uphold the rule of law, freedom of the individual and basic principles of law and justice. These recommendations were largely implemented.

In its 1989 report, the Law Commission recommended that the High Court should continue to handle more significant cases, such as major commercial and public law cases, and retain jurisdiction in judicial review, arbitration, company matters, insolvency and intellectual property. It should not deal exclusively with any aspects of criminal law, but the most serious crimes would continue to be tried there, and it should concentrate on appellate and supervisory work.

As noted above, these proposals were not fully implemented.

The High Court has always been a single court of general jurisdiction, with one exception. An administrative division was established in 1968 which comprised four and, later, seven judges assigned by the Chief Justice. The division was to hear appeals from major administrative tribunals, and its expertise was expected to remedy inconsistencies and complexities in appeals from these bodies.

However, the division's small caseload lacked the critical mass needed for a successful specialty. As well, public law became a more mainstream aspect of High Court business. Judges' increased interest in and knowledge of administrative law gradually reduced the need for the specialty,¹¹⁸ and the Law Commission's 1989 report recommended abolishing the administrative division. It was abolished in 1991, and its function taken over by the High Court as a whole.

118 Stephen H Legomsky, *Specialized Justice*, (Wellington, 1988), 121.



The High Court today

The High Court maintains its key constitutional supervisory jurisdiction. It also hears the most important civil litigation and the most serious crimes. It hears appeals from the District Court and some tribunals.

In contrast to the District Court with 120 judges, the High Court has 30 judges based in Auckland, Wellington and Christchurch, who travel on circuit to other centres.

The principal advantage of having a superior court of general jurisdiction as the centrepiece of our legal system, is that it can act as an effective counterbalance to the legislature and the executive. In 1993, the Chief Justice Sir Thomas Eichelbaum, described the critical need for a court strong enough to withstand political pressure, or the risk or temptation to resort to that pressure.¹¹⁹ Any proposal for structural change must assess the risk of diminishing the court's authority, or reducing its effectiveness.

Distributing the work



To decide how to allocate court work, it is useful to ask *what, how* and *who*?

What: What is the nature of the work and what volume of work is there? What issues does the work encompass and what interests are affected? Is the work constitutionally significant or a matter of public importance, or of personal significance? Is it complex, lengthy, and/or routine?

How: How should the work to be done and the matter decided? Does it need a full, searching process conducted in the public eye, or does it involve private or confidential matters? Is the adversarial procedure or a more inquiry-based one appropriate?

Who: Who should the decision-maker be? What level of experience and skill should they bring to the job? Does it call for particular expertise?

Allocating civil cases

Some civil cases are heard exclusively or predominantly in the High Court. These include judicial review, probate and administration, intellectual property, admiralty, company insolvency, and commercial list matters.

As set out above, there is considerable overlap between the remaining civil cases that the High Court and the District Court can hear.

Where either court can hear the matter, the parties' choice of court may be influenced by court fees (which are usually higher in the High Court), the likelihood of getting a judge experienced in the subject area, or the possibility that the case will be heard sooner in one court than the other.

¹¹⁹ Eichelbaum CJ, "The New Zealand Court Structure, Past Present and Future" (Harkness Henry Lecture, University of Waikato, Hamilton, 1993).

If one person chooses to start a case in one court and the opposing party wants it heard in the other, some types of cases can be transferred. For example, a defendant has the right to have a proceeding transferred from the District Court to the High Court if it involves more than \$50,000. If such a transfer is not considered by the court to be appropriate, there is a risk that higher costs will be awarded against the defendant.

In other cases, the defendant may have to apply to the court for an order transferring the proceeding. Relevant factors include the nature, complexity, or public importance of the case, its length, and whether it raises a novel point of law.

The High Court has the power to transfer a proceeding from the High Court to the District Court of its own accord, if it is within the jurisdiction of the District Court, most usually when the factors just described do not feature.

What is the nature of the work?

At present the major factor in determining where a case will be heard in the general civil jurisdiction is the amount at stake. But that does not always reflect the complexity or length of the case, or the importance of the issues. It is usually said that the High Court is better resourced to hear complex or lengthy cases, and suited to hear cases of constitutional significance or public importance.

While monetary thresholds are not perfect, they provide a simple method of dividing work. Cases can be transferred from one court to another for reasons such as complexity and the nature of the issue, but this does not always help. For example, a case may involve a relatively simple breach of contract but, if the damages sought are more than \$200,000, the High Court cannot transfer the case to the District Court because it falls outside the District Court's jurisdiction.

Small claims, especially routine ones, may not require the resources of the District Court. A court below the District Court could perhaps hear them. Pre-trial rulings in the District Court, as in the High Court, might be better entrusted to masters.

How should the work be done?

Different processes may be appropriate for different cases. It was suggested that procedural steps, such as interrogatories and discovery, should be reduced or eliminated altogether for smaller civil claims. Buddle Findlay survey participants felt it was in litigants' interests to fast-track cases of low monetary value to keep costs in proportion to disputed sums (see also the Civil Process chapter).

Some work may require a more inquisitorial process, or a less public process as when sensitive family issues are involved. The current court system takes account of this in allocating certain cases to the Family Court or the Youth Court. On the other hand, there may be cases currently heard in those courts, which do not need to be conducted away from the public eye.

Who should the decision-maker be?

A range of skills is needed to deal with the array of civil matters requiring resolution. Some cases demand special expertise, while others suit a decision-maker with wide general expertise. The skills required for a lengthy, complex commercial case may differ from those needed for high volume criminal or civil matters.

“Major litigation ... should be heard by judges who are experienced in conducting such trials ... and who have the intellectual ability to grapple with the issues.”

New Zealand
Business
Roundtable



Responses were mixed as to whether present case distribution ensured the right decision-makers. Some felt the District Court was successfully exercising its greater civil jurisdiction. Others felt the District Court's criminal workload affected the quality and experience of its judges hearing civil cases.

One possibility is to limit the number of judges who hear civil cases in the District Court so that the work is concentrated in the hands of experienced civil judges. There are obvious advantages to judges building up expertise and experience and a need to match resources and skills to workload. On the other hand, there is danger in further dividing the judiciary and reducing the benefits of cross-fertilisation of ideas between judges and different areas of law. The risks in this regard may be lower in the District Court where there are 120 judges and the group warranted for civil work could still be quite large.

Some work may require a judicial officer, but not necessarily a District Court judge. There was support in submissions for the creation of a new class of judicial officer to hear some less serious civil and criminal work currently heard in the District Court. Some areas of work require skills that are more administrative than judicial and could be undertaken by a registrar rather than a judge.

Allocating criminal cases

Criminal cases are mainly allocated according to whether charges are laid summarily or indictably. Indictable offences (those where there is a right to trial by jury) were traditionally heard in the Supreme Court and summary offences in the Magistrates' Courts. The distinction has continued in the High and District Courts even though the separate jurisdictions have changed.

In 2001, the Law Commission recommended simplifying criminal procedure and summarised the current position, aside from minor offences and infringements, as comprising six categories of offence:

- purely indictable offences that can only be tried in the High Court
- purely indictable offences that may be transferred from the High Court to the District Court (these are "middle band" offences)
- purely indictable offences that can be tried in the District Court
- indictable offences triable summarily
- "summary-indictable" offences that are punishable by more than three months imprisonment (the defendant can elect trial by jury under section 66 of the Summary Proceedings Act 1957)
- purely summary offences that carry a maximum sentence of three months imprisonment or less.

What is the nature of the work?

Some offences, such as murder, treason and hijacking, are so serious that there may be public policy considerations attached to their being heard in the High Court. If the High Court hears those offences, there is an argument that it must also hear enough other criminal work to make sure its judges are experienced.

At the other end of the scale are comparatively minor offences, which might appropriately be heard in a lower court than the District Court, if there was one.



How should the work be done?

There is a fundamental distinction in the process for hearing cases in the criminal jurisdiction, between summary cases that are heard by a judge alone, and cases before a judge and jury.

Who should the decision-maker be?

The judges of the District Court are responsible for the bulk of criminal work and have the most experience in it, yet they do not preside over trials for the most serious offences. These go to the High Court. That could be seen as anomalous.

There was strong support in submissions for a new court or class of judicial officer to deal with summary criminal offences, which may not require a District Court judge.

What we could do

Three possibilities arise – we could:

- establish a unified court of original jurisdiction (with or without divisions), or one court for all civil cases and another for criminal cases
- retain a separate High Court and District Court, and increase the degree of concurrence between the courts; eliminate the middle band offences; and/or create a new role to deal with administrative work
- establish a new court of original jurisdiction below the District Court (or a new class of judicial officer) to deal with some high volume civil and criminal work currently heard in the District Court or in tribunals.

Unified courts

Several submitters said that court structure should be changed to reflect the civil and criminal jurisdictions, rather than the traditional hierarchy in place now.

There are a variety of forms such a structure could take. The civil jurisdictions of the High Court and District Court could merge, as could their criminal jurisdictions, into one court in which all judges have general jurisdiction, and are allocated work administratively. Or a unified court could be divided into a civil division and a criminal division, with judges allocated to each. Or there could be two separate unified courts, one criminal and one civil.

The argument supporting those approaches is that courts should only be separated on the basis of functional differences; that is, they do different things. If there are no such differences, then it is said to be inefficient and confusing to have more than one court doing essentially the same work.

The wide range of work within each court or division would require different grades of judicial officer to deal with it, and an administrative decision as to which judges should hear which cases. The New Zealand Law Society's submission suggested this decision could be made through the existing case management process. However, unified courts would involve a fundamental change to our present court structure.

Advantages of unified courts are said to be reduced delays (since cases are not transferred from one court to another), increased potential for case management, a perception of equality between judges, and less confusion about courts' jurisdictions.

Disadvantages of unified courts are said to be the ongoing need for different classes and grades of judicial officer, or for decisions as to who should hear which cases, and the development of criteria on which to base these decisions.



The Ontario Experience

The last 13 years has seen considerable unification of Ontario's civil jurisdiction.

In 1989, the High, District and Surrogate Courts merged to create the Ontario Court of Justice (General Division), now called the Superior Court of Justice. The criminal and family divisions of the former Provincial Court were merged to form the Ontario Court of Justice (Provincial Division), now called the Ontario Court of Justice.

The Superior Court of Justice has jurisdiction in all civil matters (except family law falling within the jurisdiction of the Ontario Court of Justice). It is also the superior trial court for criminal matters. It has three divisions: the Divisional Court, which deals with appeals; the Small Claims Court, with jurisdiction up to \$10,000; and the Family Court.

In 1978 the Royal Commission on the Courts considered unification, but ultimately rejected it. Although it agreed with many of the aims of a unified court structure and acknowledged that the New Zealand court system must be treated as an entity, it did not believe a unified court was the best or only means of achieving this.

Given the need for different classes of judicial officer within a unified court to deal with the concentration and specialisation of work, the Royal Commission felt the result would be a structure little different from the one already in place. It believed the benefits of unification could be enjoyed without fusing the courts into a single entity.

The Law Commission came to similar conclusions in 1989, noting that the range, difficulty, importance and variety of work coming before a unified court would require gradations and divisions within it.



The UK debate

In the UK, Lord Justice Auld in his *Review of the Criminal Courts* recently raised the possibility of a unified criminal court. He recommended the Crown and Magistrates' Courts be unified into one criminal court with the same practices and procedures, and a common administration. The single court would support all levels of jurisdiction, and have three divisions: Crown, District, and Magistrates'.

That recommendation was not adopted by the White Paper that formed the UK Government's response to the review. This concluded that the benefits of unification could be had without completely reordering the court system, by more closely aligning the Magistrates' and the Crown Court.



Single point of entry

One submission proposed that the District Court (including the Family Court) be the sole court of filing and hearing, except for matters like electoral petitions and those falling within the High Court's original jurisdiction. This would make the High Court largely an appeal court, and allow a hierarchical court system with a single point of entry.

Single point of entry to a court of first instance raises some of the same questions as the proposal for unified courts. For example, would all the court's judges be able to hear all cases? Would various levels of judicial officer be needed, and if so, would the allocation decision be made by the parties, judicial order, or according to legislation or regulation?

Making the District Court the single point of entry for most first instance hearings would increase the work of an already overloaded court. It would substantially change the role of the High Court, which would no longer be the premier court of first instance. It would also raise issues of judicial resources: a reduced High Court workload would no longer need the same number of judges while the District Court would require far more.

Retaining separate High and District Courts

If we retain the High Court and the District Court as separate courts, there are still a number of possibilities for change:

- the jurisdiction of the District Court in civil and/or criminal matters could be extended, so there would be more concurrence with the jurisdiction of the High Court
- the middle band could be eliminated
- there might be a new or increased role for masters or judicial registrars.

Greater civil concurrence

In 1989, the Law Commission recommended that, while the High Court should retain some exclusive jurisdictions, there should be more overlap between the civil jurisdiction of the District and High Courts.

It argued that this would remove the arbitrary monetary divisions in civil cases, and allow the court system to respond more quickly to changing demands and caseloads. Cases falling into the shared civil jurisdiction of the courts would start in the District Court and then, if appropriate, move to the High Court on the order of a High Court judge or by consent of the parties.

The Law Commission's suggestions are still relevant. The District Court judges' submission advocates that their court be fully vested with the civil and criminal jurisdictions the Law Commission proposed in 1989.

Advantages of increased concurrence are said to be less arbitrary allocation of cases and better use of District Court judges who would have the ability to handle a wider range of cases. There would be more flexibility for the court system to respond to changing pressures within the existing structure.



Disadvantages of increased concurrence are said to be that not all cases are suitable for hearing by District Court judges and allocating cases between courts could result in confusion about where a matter is to be heard. More cases being heard in the District Court might compromise the High Court's viability, while the District Court is presently overloaded and might not cope with an extension of jurisdiction. Greater concurrence could mean more duplication between courts and create inefficiencies.

Increased concurrence would mean deciding whether to allocate cases according to parties' choice, by court order, or by cost incentives.



South Australia

The civil jurisdictions of the Supreme Court and the District Court in South Australia have a high degree of concurrence. The South Australian Supreme Court deals with the most significant civil cases and the most serious criminal charges. It has exclusive jurisdiction in probate. The District Court is the principal trial court.¹²⁰ Its civil jurisdiction is not defined in monetary terms, and it has the same civil jurisdiction at law and in equity as the Supreme Court at first instance, except that it has no probate or admiralty jurisdiction, no supervisory jurisdiction, except as expressly conferred by statute, and no jurisdiction to grant relief in the nature of a prerogative writ. It does not have jurisdiction to hear matters given to the Supreme Court by statute.¹²¹

The parties decide for themselves where to start a civil action. Statutory cost provisions deter parties from bringing an action in a higher court than necessary. If a plaintiff brings a claim in the Supreme Court for compensation for injury caused by the use of a motor vehicle, when it could have been brought in the District Court, and the plaintiff recovers less than \$150,000, the plaintiff will not be awarded costs unless the court considers it just. The same applies to actions brought in the District Court that could have been brought in the Magistrates' Court. Similar cost incentives apply in Victoria.

Exclusive High Court civil work


There are some areas of civil work that are heard predominantly or exclusively in the High Court. Most will be discussed in the next chapter on specialisation. Two, namely judicial review and probate, are considered here.

Judicial review

Judicial review is a supervisory jurisdiction of the High Court to check the unlawful, unfair or unreasonable exercise of public power. The procedure is set out in the Judicature Amendment Act 1972, but the jurisdiction is much older than that, having its source in "prerogative remedies", which continue to exist independently of legislation.

¹²⁰ See, South Australian Courts Administration Website at < <http://www.courts.sa.gov.au/courts/district/index.html> > .

¹²¹ *Sherriff v Dudley* [2000] SASC 324.



The High Court's inherent jurisdiction complements that of judicial review, allowing it to deal flexibly with issues not covered by established procedure, and to protect the administration of justice. While the District Court has implied powers enabling it properly to exercise its statutory function as a court, these are not as wide ranging or far reaching as the High Court's inherent jurisdiction.

A number of factors support the position that judicial review should continue to be heard exclusively in the High Court. The issues are often of constitutional significance, and given the High Court's role as a counterbalance to the executive, are better suited to being heard by a concentrated pool of judges with experience in the area. There may be a community expectation that they should be dealt with in the High Court. No submissions suggested change in this area.

Probate

Probate is, strictly speaking, the court procedure for proving that a will is valid or invalid, but the term is now used more generally to refer to the legal administration of a deceased's estate. The business is often routine with court registrars rather than judges handling most of it. Given this, do probate matters need to remain the exclusive jurisdiction of the High Court or is there a case for conferring probate jurisdiction on the District or Family Court?

Greater criminal concurrence

As with civil jurisdiction, the grounds for determining which criminal charges are heard in the High Court do not necessarily reflect the complexity of the issues. The most serious criminal matters, for example murder, are not always the most complex. A better ground for determining exclusive High Court jurisdiction is the significance of the offence. The public may expect certain kinds of cases to be heard there.

In 1989 the Law Commission recommended complete concurrence of High and District Court criminal jurisdiction, anticipating, however, that murder trials would very often be heard in the High Court. It made detailed proposals as to how cases should be allocated between the courts based on their complexity and general importance. Those arguments are still relevant.



South Australia

The South Australian District and Supreme Courts have substantially the same criminal jurisdiction. Its District Court can try any offence except murder and treason, or attempts or conspiracy to commit either offence.

Cases are allocated according to graduated categories, with the opportunity for prosecution and defence to say into which category the case falls. Matters are referred to the District or the Supreme Court following committal in the Magistrates' Court, in accordance with a practice note.¹²²

There are four categories of criminal case. Category one can only be tried before a Supreme Court judge, and must be arraigned in the Supreme Court. Category four cases should preferably always be tried before a District Court judge. Category two and three cases can be tried by either court, but category two cases should go preferably to the Supreme Court (because of their complexity, gravity, or other appropriate reason), and category three cases normally to the District Court.

In all but category one cases, the presiding Supreme or District Court judge will invite counsel to express views on the appropriate court for the trial. These views are recorded and the presiding judge may also record his or her own views. In practice, the prosecutor suggests a category on committal, and the defence has the opportunity to comment. The Chief Justice or the judge supervising the list makes the final decision. The formal order to transfer a case from one court to the other is not made until just before a hearing, to allow maximum flexibility.

The middle band class of criminal offences

Middle banding is a mechanism for moving certain criminal hearings from the High Court to the District Court. There have been sustained calls for the middle band to be abolished.

The Law Commission prepared a 2001 advisory report for the Ministry of Justice, *Simplification of Criminal Procedure Legislation*.¹²³ It was asked, for the purposes of the report, to assume middle band offence provisions would continue.


Almost everyone who commented on the draft expressed regrets that middle banding was out of bounds for the review. Many said it should be abolished and offences in that category dealt with in the District Court.

The commission's report identified several anomalies and inconsistencies caused by the middle band and recommended legislative changes to resolve them. However, these and other problems were outside that report's terms of reference.

The middle band category is applied unevenly throughout the country. The proportion of cases the High Court refers to the District Court varies regionally because executive judges use different approaches, or there are varying workloads in relevant courts.

¹²² Memorandum as to the Arraignment of Persons committed for trial in Adelaide in the Supreme Court or the District Court, (28 February 1997).

¹²³ New Zealand Law Commission *Simplification of Criminal Procedure Legislation: NZLC SP7* (Wellington, 2001).



Transferring files from the District to the High Court and back again is inefficient. Furthermore, since the transfer mechanism lies in High Court hands, it can be difficult for the District Court to plan for the ebb and flow of work. The bulk of the work is eventually done in the District Court (as at June 2000, 73 percent of middle band cases), and there is a view that this should be recognised by a clean grant of jurisdiction.

One option would be to start all current middle band cases in the District Court, with a right to apply to move to the High Court on specified grounds. The High Court would retain exclusive jurisdiction in the most serious criminal offences.

However, eliminating the middle band also raises wider issues. Given the District Court's current workload, increasing its jurisdiction would create new problems unless some of its work could be moved elsewhere.

The principal argument against a clean grant of jurisdiction to the District Court in middle band matters is that it would reduce High Court experience and expertise in criminal law – experience and expertise it needs to continue hearing the most serious and complex criminal trials.

If, on the other hand, a smaller core of High Court judges were to hear its criminal caseload, then even if that caseload were proportionately reduced, there might be fewer concerns about maintaining adequate criminal trial experience.

The role of masters


There are currently five masters in the High Court. The office was created in 1986 to deal with pre-trial procedures in the court's civil caseload but not the final substantive hearing itself. Masters have the powers of High Court judges in specific areas, but there are restrictions on their powers and jurisdiction.

The Law Commission's 1989 report noted that masters were handling many high volume matters, especially summary judgments, bankruptcy petitions (affecting individuals) and insolvency petitions (affecting companies).

Since 1989, that work pattern has changed. Much of the summary judgment jurisdiction has been removed to the District Court, and case management developments have seen masters carrying out much more administrative work.

One retired master said the role had not been nearly as satisfying since case management was introduced and noted that, in Auckland, establishment of the commercial list had diminished the amount of "real legal work" for masters. Many cases that would otherwise have gone to masters were now on the list, and dealt with by judges.

It may be sensible to consider whether it would be more effective and efficient to divide masters' administrative and judicial functions. The proportion of company-related work of masters has increased, and requires more checking and administrative work. One proposal is for court registrars to carry out much of this work, subject to necessary training and support, thereby freeing masters for their areas of expertise, namely company and insolvency work.



Another master has called for better recognition and support for masters, and gave examples of restrictions on their jurisdictions that resulted in inefficiencies. He suggested they should be given jurisdiction over all personal and corporate insolvency matters, with power to grant interim injunctions and try civil matters where both parties consent.

District Court

It has also been suggested that masters or judicial registrars could be appointed to the District Court to hear non-defended criminal and civil matters and consider civil interlocutory applications.

Family Court judges suggest that an appropriately qualified judicial officer in their court could deal with chambers lists, consent orders, uncontested matters, all reviews, pre-trial directions and related administrative work. They propose such officers be legally qualified, and have appropriate experience and training.

A new lower court

Another possibility is a third court of original jurisdiction below the District Court, or a new class of judicial officer, to deal with some high volume civil and criminal work currently heard in the District Court and tribunals.

Potential benefits of a third court

The heavy District Court workload, and its problems in balancing priorities between the civil and criminal caseload, have already been described. Some of the cases currently being decided by District Court judges do not require the full range of skills of those judges, and could be done by a different kind of judicial officer. This would free up the District Court to deal with trial work.

According to Ministry of Justice figures, of the 85,000 criminal cases “finalised” in the District Court in 2000, 71,000 concerned summary offences. A Department for Courts study of cases in the Auckland District Court found that most civil claims are for relatively small amounts: 80 percent of undefended claims involved less than \$12,000.¹²⁴

Appointment criteria for a new class of judicial officer could be wider and more flexible than now. A legal qualification and some legal experience would be needed but other qualities and life experiences could be important, given that it would be the court most New Zealanders have contact with. A lower court or division might also be a less costly option eventually, as the judicial officers’ salaries would be lower than District Court judges’ and probably on a par with those of adjudicators and referees.

A distinct philosophy, and new, simplified processes for less serious criminal and civil cases, could take root in a new court, as they have in the Family and Youth Courts. The resolution of cases could be less formal and expensive for the parties.

¹²⁴ Department for Courts *District Court Civil Claims Under \$50,000* (Wellington, 2002). The study was limited to claims under \$50,000 but does suggest that claims taper off sharply above the \$12,000 level.



The Australian magistracy

Most Australian states divide the work done in our District Court between two levels of court.¹²⁵ District or County Courts are responsible for cases at the upper level of our District Court jurisdiction, while cases at the lower level go to Magistrates' or Local Courts.

In Queensland, for example, the Magistrates' Court hears summary criminal cases, and decides whether more serious cases should be committed for trial to the District or Supreme Courts. It decides civil cases of a value less than A\$50,000 and has jurisdiction over some family matters. A magistrate also presides in the Minor Debts Court, where debts less than A\$7500 can be simply claimed and enforced. In the Small Claims Tribunal, magistrates or lay referees settle disputes valued at less than A\$7,500.

Separate court or division of District Court

If a new court was established, it could either be a division of the District Court, or be separately constituted. The better option at the start might be for the court to be a division of the District Court. The new jurisdiction could be introduced gradually. An initial base of magistrates could be appointed, who could share the work in the Magistrates' jurisdiction with District Court judges initially. As judges retire, new appointments to the magistracy could be made. Over time, the balance would shift, until most of the work in the jurisdiction was being done by magistrates. By then the distinction between the two jurisdictions would have become as marked here as it is in Australia, and there would be potential to change to a separate court.

Criminal jurisdiction

In defining the possible criminal jurisdiction of any new court, its judicial officers would have to have the skills and qualifications to hear the work, and both the new court and the District Court would need appropriate volumes of work.

One possible point of reference is the former New Zealand Magistrates' Courts, before they became the District Court in 1980. Under the Summary Proceedings Act 1957, the Magistrates' Courts had jurisdiction over all summary offences, and a range of more serious (indictable) offences, which could be tried summarily. They conducted preliminary hearings to decide if there was enough evidence to justify trial in the then Supreme Court, and had other specific responsibilities.

Youth Court jurisdiction

Another issue is whether the new court should acquire or share the Youth Court's jurisdiction. The Magistrates' Courts had jurisdiction over children and young people, as Australian magistrates do now. But in New Zealand, the Youth Court has developed a philosophy and process that is quite distinct, and these might be compromised if jurisdiction were shared.

125 Except for Tasmania, Canberra, ACT and Northern Territories.



Youth Court jurisdiction extends to serious indictable offences that call for adults to be tried by jury. Even if some parts of the jurisdiction were shared, this aspect could be reserved to Youth Court judges. In the short term at least, it must be preferable not to extend the jurisdiction of magistrates to Youth Court matters. This question could be revisited as a new bench grew and matured.

A further issue is whether new judicial officers might exercise any summary jurisdiction geared to restorative or therapeutic justice, such as the Youth Drug Court. (See also the Criminal Process chapter.)

Role of Justices of the Peace and Community Magistrates

Traditionally, the Justices of the Peace have represented the community in the summary criminal processes, and their services have been highly valued. More recently, their work has been shared in some areas by community magistrates. Justices do not have to be legally qualified, although some are. Community magistrates cannot be practising lawyers.

The good sense and experience of lay officers are valuable qualities, but may no longer be enough on their own. There has been persistent concern about whether lay officers are equipped to decide even less serious cases, which can still be very demanding and procedurally complicated.

Civil jurisdiction

A new court's jurisdiction could be exclusive, or overlap with that in the District Court, in whole or in part. If a new jurisdiction was introduced gradually, an overlapping jurisdiction would allow the work to be shared.

Also, a claim might be small but complex, or the dispute might rest on important principles, and might be better suited to the District Court. Parties should, perhaps, have the right to choose their court, or to transfer to the District Court by right, or if the other side agrees. As the amount at stake rises, so does the significance of the decision. Cases are more strongly contested and more is demanded from the decision-maker.

Where the upper limit might be set would also depend on case volumes. We do not have good information about the volume of claims for amounts between \$12,000, the ceiling for Disputes Tribunal claims, and \$50,000. If the ceiling is set too high, a new court might be overwhelmed while the District Court would not have work it is well equipped to do, and in which judges need to retain expertise. In Australia the civil jurisdiction of Magistrates' Courts ranges between A\$25,000 and A\$50,000.

New Zealand's previous Magistrates' Court provides a starting point for considering the range of jurisdictions that might be involved. Apart from some significant exceptions, it covered "almost the whole field of civil law: contract, tort, recovery of possession of land, equity jurisdiction including claims for specific performance and rectification of contracts, and general ancillary jurisdiction and powers".¹²⁶

Disputes and Tenancy Tribunals

If a new court were introduced, its relationship to the Disputes and Tenancy Tribunals would need careful consideration.

These tribunals are discussed in the Civil Process chapter. They use their own distinct processes to resolve a large proportion of civil claims, most of which would be uneconomic to pursue by the general civil process. Applications for rehearings and appeals are few, although there have been some complaints about whether referees always properly identify and resolve issues. At present, Disputes Tribunals can decide cases up to \$7,500 or, with consent, \$12,000 and Tenancy Tribunals deal with all tenancy disputes below \$12,000.

While most Tenancy Tribunal adjudicators are legally qualified, this is less common among Disputes Tribunal referees. Yet a claim in the Disputes Tribunal may be just as important to the people involved as a higher value claim is to others. There is the concern that, unless decision-makers are legally qualified, some people with smaller claims may be denied justice.

A new court could take over or share these jurisdictions, which might reduce confusion about where claims should be filed. On the other hand, the processes used in the Tenancy and Disputes Tribunals have been developed to suit the types of claims brought before them.

Judicial officers

There would be a number of issues relating to the appointment of a new category of judicial officer. Their qualifications would need to be closely related to jurisdiction: the greater the jurisdiction, the greater the need for legal expertise and experience.

A very important issue is whether appointment should be for a fixed term, or permanent. Permanent appointment is seen as fundamental in ensuring the judiciary do their duty impartially, without fear of consequences.¹²⁷ Fixed term appointments might influence, or appear to influence, judicial officers because of the desire for reappointment.

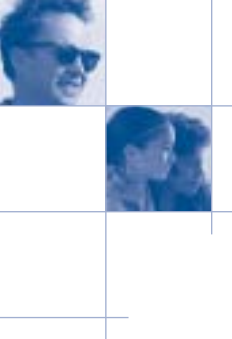
Community magistrates and Justices of the Peace are appointed permanently but Tenancy Tribunal adjudicators and Disputes Tribunal referees are appointed for finite terms, which can be renewed. Many of these judicial officers work part time in the court.

The grounds on which the new judicial officers might be removed from office, and the level of immunity they should have from lawsuits against them would need to be established.

Coroners

The Coroners Court is a special judicial proceeding within the court system. Under the Coroners Act 1988, a coroner must inquire into certain deaths to establish their manner and cause. A coroner's verdict, as an exercise of a statutory power, is open to High Court judicial review.

¹²⁷ *Millar v Procurator Fiscal, Elgin* [2002] 3 ALL ER 1041 (PC) per Lord Hope at [41].



Inquests are usually open to the public, although the coroner may exclude anyone in the interests of justice, decency or public order. A coroner may admit evidence whether or not it would be admissible in a court of law, but only where its admission is necessary or desirable for the purposes of the inquest.

The Law Commission has made a number of recommendations relating to the appointment and supervision of coroners¹²⁸ and a working group, coordinated by the Ministry of Justice, is developing proposals for amendments to legislation at present. Coroners are currently appointed as a warranted judicial officer with most of the powers of a District Court judge, but are not required to be either legally or medically qualified. The Law Commission has recommended that coroners should be legally qualified. There are 64 coroners and only two are full time.

Many coroners feel their court is the justice system's poor relation: they feel pressured by their many heavy responsibilities and too little support. Coroners' court work could be brought within the scope of a new court of general jurisdiction, effectively making coroners specialist magistrates on the basis that they exercise judicial powers. This may also increase the status of the Coroners Court within the court system. In New South Wales and some other Australian states, magistrates fill the role of coroners.

What do you think?

What improvements can we make to the general court structure that will foster competent, accurate, efficient decision-making in proportion to the issue to be settled?

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

Specialist Courts

We look for: a court structure that fosters competent, accurate, efficient decision-making in proportion to the issue to be settled.

Specialisation in some categories of cases can promote consistency and efficiency of decision-making. It is achieved either by setting up a court with special procedures and expert judges, or by introducing specialist procedures in general courts and allocating judges with relevant expertise.

Responses to specialisation issues raised in *Striking the Balance* ranged from calls to abolish particular specialist courts, to strong support for existing ones. Some wanted new courts, or procedures, or more specialisation by judges, while others urged caution.

Responses to the Buddle Findlay survey varied. Some felt the introduction of more complex legislation made more specialist courts inevitable. Others favoured specialist judges within the general court system.

The Auckland District Law Society favours the current specialist courts, and does not believe more are required. Others expressed caution about specialisation, suggesting that proliferation of courts might undermine the standing, principles and practices of the courts as a whole. A particular concern was the need to preserve the status and resources of the High Court.

Is the current degree of specialisation in the court system appropriate, or do we need to make changes?

Constraints

Judicial considerations

Legal specialisation has advanced significantly over the last 20 years and that is likely to continue. Some think it unrealistic for judges to continue being generalists, believing they would work more effectively within their own areas of expertise.

The arguments against this are that a small population with a small number of judges does not allow this luxury, and that judges must be able to handle a full range of cases. A generalist judge looks with detachment at a specialist area of law, bringing experience and ideas from other areas. Confining judges to one area of law can result in the law ceasing to develop.

“District court workload from my experience was a bit like visiting the GP who is expected to be multifunctional and yet has the fallback position of referral to a specialist ... the judges [are] open to criticism of being jack-of-all trades but master of none.”

Individual

Constitutional considerations

The courts have a constitutional role as a counterbalance to the powers of Parliament and the government, particularly in criminal and administrative law.

The courts are the forum for prosecution of criminal matters against citizens in accordance with legal process. This provides fundamental protections for the accused person against the might of the state.¹²⁹ The criminal jurisdiction can be seen as a specialist jurisdiction within the court system with its own principles and processes.

In administrative law, the High Court provides a check on the exercise of statutory powers by reviewing the decisions of government ministers and public bodies when these are challenged by those affected. As a court of general jurisdiction, the High Court needs to maintain sufficient critical mass to continue to perform its constitutional role.

The prospect of specialist courts with exclusive jurisdiction prompts concerns about diminishing the authority and constitutional role of general courts, and the High Court in particular.

Other considerations

Specialisation within the High Court and the District Court raises practical issues. Court structure and procedure should be kept as simple as possible and specialisation may place demands on the finite human and financial resources of the court system.

Making decisions about specialisation

How do we make principled and practical decisions about specialisation in the courts? A useful framework¹³⁰ is a checklist based on the “what, how and who” questions used in the previous chapter.



Questions for determining whether to allocate cases to specialist judges are:

What is the nature of the work?

- Mainly legal decisions favour a generalist judge
- Mainly factual or discretionary decisions favour a specialist judge (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.

Other factors favouring specialisation include the field being highly technical or rapidly changing, or issues raised often being identical or unique to a particular field.

How should the work 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.

¹²⁹ Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand Government under MMP*, (3rd ed, OUP, Auckland, 1997), 242.

¹³⁰ The factors in the checklist are based on criteria proposed by Stephen H Legomsky in *Specialized Justice*, (Wellington, 1988).



How much work is there?

A crucial factor is how many cases there are. 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.

Who should the decision-maker be?

After taking account of the above factors, on balance, should the decision-maker be a generalist or a specialist judge?

In this chapter the issues considered are:

- A specialist approach to commercial litigation, including company matters, insolvency, intellectual property and admiralty
- Specialisation in other areas, land disputes in particular
- The specialist courts – Family Court, Environment Court, Employment Court.

The Youth Court is not considered. Youth offending has been the subject of a review by the Ministries of Justice and Social Development, resulting in the *Youth Offending Strategy*,¹³¹ that has identified family group conference concerns, and recommended several amendments and clarifications to the Children, Young Persons and their Families Act 1989.

No one has argued that the Youth Court should be wholly independent of the District Court. The only issue may be whether, as asked in the last chapter, some or all of the jurisdiction of the court might be exercised by any new class of judicial officer, if not immediately, then eventually.

Nor is the coroners’ jurisdiction considered in this chapter. Presently, the only issue is whether coroners should become part of a new class of judicial officer.

A specialist approach to commercial litigation

Commercial cases cover a range of business matters. They are usually heard as ordinary civil cases, but in the Auckland High Court the commercial list provides an alternative pre-trial procedure for certain types of commercial cases.

Most Buddle Findlay survey participants felt that judges, particularly above District Court level, had a general understanding of commercial realities, or were quickly able to gain one during a case. Participants who did not think judges understood commercial realities, tended to base their views on experience of one judge.

There was, however, concern about judges with expertise predominantly in criminal law trying complex civil cases for which they were perceived to be ill-equipped. Some called for a separate court for business disputes, and commercial training for judges.

“Often the case for specialised courts suggests there are problems with the substantive law that ought to be addressed”

New Zealand Business Roundtable

131 Ministerial Taskforce on Youth Offending *Youth Offending Strategy* (Ministry of Justice and Ministry of Social Development, Wellington, April 2002).



An Auckland QC has questioned case allocation, without regard to individual judicial skills and experience.¹³² A retired senior judge, on the other hand, saw the need for specialist judges as “a bit of a myth”, since most commercial cases were straightforward contract disputes, not warranting specialist judges.¹³³

The commercial list

The commercial list offers streamlined preliminary procedures for certain kinds of commercial cases in the Auckland High Court. The list is a means of getting quickly to the heart of a case. Designated commercial list judges hear procedural applications, but any High Court judge can preside over the substantive hearing of a commercial list case.

The court may make directions for the speedy, inexpensive determination of the real questions. The issues are defined early. Interlocutory appeals are discouraged. Cases are called more frequently than is generally usual, to encourage faster progress.

Some believe the commercial list’s advantages have been largely superseded by case management procedures and the use of masters to deal with pre-trial matters. Some lawyers have criticised the commercial list’s narrow focus on pre-trial issues, and have suggested that specialist judges should hear the whole matter. Some call for these techniques to apply to all civil cases, and beyond Auckland.

Company matters

Under the Companies Act 1993, a range of company and company transaction matters can be heard in the High Court. Masters as well as High Court judges have jurisdiction over some Companies Act matters.

It has been suggested that more specialisation in company matters would make better use of masters’ expertise.

Insolvency

This mainly concerns creditors’ applications for individuals to be bankrupted, or a debtor company liquidated, where the person or company is in serious financial difficulty. As an alternative to bankruptcy or liquidation, applications are also made for the approval of proposals by insolvent persons to creditors under the Insolvency Act 1967, and for approval of arrangements between companies and creditors under the Companies Act 1993.

Company insolvency matters can be heard by High Court judges or masters. The District Court also has a limited insolvency jurisdiction.

A Law Commission paper concluded that New Zealand had very few insolvency professionals, judges, and lawyers, making specialist insolvency courts impractical. But specialist judges and masters, nominated by the Chief Justice, could hear specific classes of case.¹³⁴

¹³² Alan Galbraith QC “Facilitating and Regulating Commerce – the Court Process” (unpublished, 2002).

¹³³ F Martin “Familiar figure takes on the tough tasks” *National Business Review* (27 September 1991).

¹³⁴ New Zealand Law Commission *Insolvency Law Reform: Promoting Trust and Confidence: An Advisory Report to the Ministry of Economic Development: NZLC SP11* (Wellington, 2001).

The Ministry of Economic Development is conducting a major review of insolvency law. In a May 2002 discussion document,¹³⁵ the ministry outlined a proposal for the introduction of a company rehabilitation scheme which would allow a company in financial difficulty a short period of administration to try to avoid liquidation. If significant changes are made to the corporate insolvency regime, there may be further justification for greater specialisation.

Intellectual property

This specialised area of law deals with the protection of ideas and information of commercial value, including patents, copyright, registered designs, and trademarks. One increasingly significant aspect is information technology: intellectual property rights in computer software and other technology.

General jurisdiction judges currently decide intellectual property disputes. Intellectual property lawyers tend to file cases in the High Court, because of District Court overload and the greater chance of the case being heard by a judge with experience of intellectual property cases.

Some lawyers acting for small businesses are dissatisfied with lengthy court cases to enforce intellectual property rights such as trademarks and patents.

They want specialist judges to hear such cases, particularly to do with information technology. Generalist judges may be unfamiliar with the material concepts and terms used, unique to intellectual property. Parties may have less faith in the decision-making process. Lawyers may have to take time to explain concepts, which raises cost issues.

Admiralty

Admiralty deals with the law of shipping and the sea. Both the High and District Courts have admiralty jurisdiction, but cases involving the arrest of a ship are heard in the High Court. The caseload is small.

There is no formal allocation process, although some High Court judges have acknowledged expertise in this area. The High Court Rules and the Admiralty Act 1973 set out specialised procedures. Some shipping matters can, if parties choose, be heard under the commercial list.

There might be a case for a permanent admiralty judge designated by the Chief Justice.

Possibilities for greater specialisation in commercial litigation

What level of specialisation is appropriate for dealing with commercial cases, and what other specialist courts, if any, are needed? Some of the commercial specialties like admiralty and intellectual property may not generate enough cases to justify greater specialisation. But these areas could be included in a broader specialisation for general commercial cases.

The following possibilities would introduce greater specialisation in commercial litigation.

¹³⁵ Ministry of Economic Development *Business Rehabilitation: Discussion Document* (May 2002), available at <<http://www.med.govt.nz/buslt/index.html>>.



A specialist forum for commercial litigation

- A specialist Commercial Court
- Specialist commercial divisions of the High Court and District Court, or
- Expanding the commercial list's role to include substantive matters and introducing it in centres outside Auckland.

Specialist judges

- Specialist commercial judges could be nominated by the Chief Justice in the High Court to hear commercial cases
- District Court judges could be warranted as commercial judges, like those warranted to hear criminal jury trials, to create a core of specialist commercial judges in the District Court
- Specialist judges could be designated in particular specialist areas like intellectual property, company and insolvency or admiralty where there is sufficient justification for specialisation.

Other commercial list possibilities

- If the commercial list is not expanded to encompass substantive hearings, it could remain in place for pre-trial issues only but be used in other centres as well as Auckland
- The commercial list could be abandoned altogether, given the development of general civil case management procedures.

Possibilities for masters

- Masters could specialise in commercial matters, particularly in pre-trial stages and particularly in company and insolvency cases
- Depending on the level of specialisation, and the workload, masters could be used to sift cases so that the most commercially significant cases are heard by specialist commercial judges.

Introducing specialisation into the courts in other areas

Land-related cases

The Property Law Section of the New Zealand Law Society advocates a specialist land court, which is either independent or part of an expanded Environment Court.¹³⁶ It argues that this area of law potentially affects all New Zealanders through home ownership or occupation.

¹³⁶ In South Australia, a land and valuation division of the Supreme Court deals with disputes involving land, planning, development, the environment and land valuation. There is also an Environment Resources and Development Court at a lower level.



Land-related cases are stressful because they often involve where and how litigants live. Neighbourhood disputes can be particularly bitter. There may well be both social and economic reasons to resolve land disputes efficiently. This body could have jurisdiction alongside the Family Court to deal with some cases under the Property (Relationships) Act 1976.

Three difficulties are said to hamper efficient resolution of land disputes.

- Land-related cases are becoming more complex. Numerous separate Acts as well as Treaty of Waitangi legislation can now apply, and complicated high-density property developments have increased. These complexities may call for specialist judges.
- Many smaller land disputes are bogged down in general court process, which causes frustration, delay and extra cost. A specialist process might deal with these disputes more efficiently.
- Another problem is the need for fundamental legislation – the Property Law Act 1952 and the Land Transfer Act 1952 – to be overhauled. In 1994, the Law Commission reported on this¹³⁷ but no changes have yet been made.

Is specialisation desirable for land disputes?

Should specialist judges be assigned to land disputes? Some factors favour specialisation, for example, technicality, how rapidly the law is developing, and the need for a quick resolution of disputes.

Others favour disputes remaining in the general courts, for example, the type of decision-making required, fact and law; and the links between land law and many other areas of law like contract, tort, administrative law, environmental law and equity.

Would it be better to have a specialist process in the general courts to speed up resolution of smaller land disputes, or is delay and cost in land cases indicative of more general problems in the court system?

Alternatively, the Property Law Section of the Law Society has suggested that the Environment Court could be expanded to deal with both environmental matters and land rights. The position of the Environment Court, its special nature, and the issues it is facing, like heavy workloads and delays, are discussed later. Would it make practical sense to expand the jurisdiction of the Environment Court?

Combining two caseloads in one court would not be straightforward. The specialised processes of the Environment Court have been tailored to the Resource Management Act 1991. Land disputes are decided under standard legal processes.

Also the Environment Court is separate from the District Court and the High Court. Would it be desirable to shift an important part of the caseload out of the general courts?

The existing specialist courts

Are each of the specialist courts necessary or in the best place in the court system? Are the specialist courts able to perform their specialty effectively or do changes need to be made?

137 New Zealand Law Commission *A New Property Law Act: NZLC R29* (Wellington, 1994).

The Family Court

The Family Court, constituted in 1981 by the Family Courts Act 1980 as a division of the District Court, deals with a wide variety of matters affecting couples, families, children and others who come within its protective jurisdiction.

Under the 1980 Act the court was given jurisdiction over matters relating to marriage breakdown, including matrimonial property divisions, matters relating to children including guardianship, custody, access, and adoption, and applications for non-molestation orders (available only to married or formerly married people living apart).¹³⁸

The court's ethos and practice has developed from this, and as the Law Commission's *Report on the Structure of the Courts* in 1989 noted: "The [Family Courts] emphasis on conciliation and mediation of disputes along with changes in family legislation, have changed the Courts' role in family disputes and created Courts widely respected for their expertise."

Family Court judges, like other judges, hear evidence, make findings of fact, and interpret and apply the law in order to resolve disputes. But there are important differences.

Family Court proceedings avoid unnecessary formality, and are conducted in private out of the public eye. There is an emphasis on conciliation, and judges act as mediators as well as adjudicators. Judges can hear evidence largely as they think fit, and cases involving children call for more active inquiry. The first concern is to promote the well being of children into the foreseeable future.

Other differences between the Family Court and the general courts include the involvement of other professionals in court processes (for example psychologists and social workers). The court relies on a multi-disciplinary team.


The Family Court today

The Family Court has been required to absorb significant increases in work. The work of the court has grown to include:¹³⁹

- matters relating to children – child protection (abuse and neglect), international child abduction, and wardship of the court (where a child is placed under the guardianship of court rather than parents)
- domestic violence
- applications for compulsory mental health treatment
- protection of personal and property rights – property management for those unable to run their own affairs; decisions about personal care and welfare for adults who cannot make their own decisions
- family protection – cases under the Family Protection Act 1955 (where family members seek increased entitlement under a will) and the Law Reform (Testamentary Promises) Act 1949
- relationship property – in 2002 the Matrimonial Property Act became the Property (Relationships) Act 1976, extending exclusive Family Court jurisdiction to the property of de facto and same-sex couples.

¹³⁸ New Zealand Law Commission *Family Court Dispute Resolution (Discussion Paper)*: NZLC PP47 (Wellington, 2002), para 518. The above list does not include matters which are no longer within the Family Court's jurisdiction, or the significance of which has reduced.

¹³⁹ New Zealand Law Commission *Family Court Dispute Resolution (Discussion Paper)*: NZLC PP47 (Wellington, 2002), para 526 and following.



Anecdotal evidence suggests that cases are now longer and more complex, and that the breadth and quantity of the court's work has strained its resources and may have affected its efficiency.

There are 36 warranted and 6 acting-warranted Family Court judges. Many spend up to 25 percent of their time on District Court matters.¹⁴⁰ The District Court is dependent on this support because of its own heavy workload. While there are benefits in specialists spending time in the general courts, can this be maintained in light of the Family Court's own demands?¹⁴¹

Is there a need to reconsider the boundaries of the Family Court's jurisdiction? The court has been seen as the best place to decide an increasing variety of case types. But has this taken the court away from its core concern – families in crisis?

What we could do

Establishing the Family Court as a separate court from the District Court

In its 1989 review of court structures, the Law Commission considered whether the court should become a separate entity.¹⁴² It noted the court's special features, but was influenced by the opinion of leading Australian judges that the creation of a separate Family Court in Australia had been a mistake. It concluded that the New Zealand balance was right, and that it would be unwise to further detach the Family Court from the general court system.

Is that conclusion still correct? The Family Court is a well-established part of the New Zealand court system, with mainly exclusive jurisdictions. Its processes and procedures are at least as specialised as the Environment and Employment Courts, which are separate courts.

If the Family Court did have a separate identity, one immediate benefit would be that the judges could concentrate exclusively on the heavy workload of the court, without any conflict in priorities. There may be others.

The potentially significant cost and resource implications in establishing a separate court would need to be investigated. There may be alternative ways to promote the role of the Family Court without establishing a separate court.

Appointing new judicial officers

Family Court judges have suggested legally qualified and experienced judicial officers, who could be called “judicial registrars”, could handle some of their workload in preliminary and uncontested matters.

Reconfiguring Family Court jurisdictional boundaries

In any reordering of the boundaries of the court's work a key factor is the multifaceted nature of cases. A family may need Family Court assistance in a number of areas and the court's decisions have implications for members of the family other than the applicants, especially children.

¹⁴⁰ In accordance with the model recommended in the *Report of the Royal Commission on the Courts* (Wellington, 1978), 26 (“the Beattie Report”).

¹⁴¹ From the submission of the Family Court judges to the Law Commission, 16 August 2002.

¹⁴² New Zealand Law Commission *The Structure of the Courts: NZLC R7*, (Wellington, March 1989), paras 181, 207-217.



One area that may not always require the court's specialised processes are family property cases, including relationship property, testamentary promises and family protection. General courts might be given overlapping relationship property jurisdiction with the Family Court, in those cases where there are no family-related issues, in particular none affecting children.

In family protection and testamentary promises cases, where the Family Court and general court jurisdictions overlap, more cases might be directed to general courts, as long as those involving children's or other dependents' interests remain in the Family Court.

Some submissions suggested relationship property cases could be heard by the Disputes Tribunal, if the value of the property at issue did not exceed the tribunal threshold (\$7,500, or \$12,500 with the parties' consent).

Reallocation of family property cases

Mostly, the jurisdiction which the Family Court exercises is exclusive. Any greater sharing of jurisdiction with the general courts might be seen as a backward step. There may be issues associated with sharing work between different courts, such as a loss of consistency of decision-making, and loss of continuity of courts for court users.

Although relationship property cases may have more in common with the civil workload in the general courts than other Family Court matters, the processes offered in the Family Court, and the expertise of the judges, may still be better suited to them than the general civil process.

On the other hand, when there are no children, the expertise and ancillary services of the Family Court may be unnecessary.

Much would depend on what volumes of cases are fit to be shared. If there are many, the benefit of sharing might be tangible. If there are few little might be gained.

Shifting cases from an overloaded Family Court to an overloaded District Court may not achieve any discernible benefits for court users. Shifting cases would only make sense if there are resources available in the District Court to service these cases effectively.

The use of the Disputes Tribunal for relationship property matters has been considered before but the Family Court approach was preferred, even where small amounts are at issue.

Environment Court

The Resource Management Act 1991 (RMA) established the Environment Court as a separate court of record.¹⁴³ Its predecessor was the Planning Tribunal.

The RMA has legal oversight of the management of the natural and built environment, dealing with issues that involve both environmental and administrative law.

¹⁴³ Section 247 Resource Management Act 1991. The court structure diagram on page 53 of *Striking the Balance* incorrectly shows the Environment Court as a division of the District Court. Page 56 of *Striking the Balance* states that the Environment Court is subject to the scrutiny of the District Court on appeal. However, under section 299 of the Resource Management Act 1991, appeals from the Environment Court on a point of law are to the High Court, as per page 77 of *Striking the Balance*.

The Environment Court has judges with the status of District Court judges, and Environment Commissioners. Commissioners are appointed for their knowledge and experience.

The RMA requires the court to function differently from a traditional civil court. Civil courts usually deal with issues of proof, cause, liability, and damages, and are concerned about what happened in the past. The Environment Court must resolve policy and planning issues affecting the future, and these encompass social, economic, and ethical issues.

The court may need to go to sources not normally admissible in evidence such as government committee reports, scientific journals, professional standards, and voluntary industry safety codes; and take into account points of view, beliefs, and opinions.

Responses to *Striking the Balance*

The Environment Court attracted many submissions, most wishing to see it retained as a separate court. However, there were serious concerns about the court's large workload and practices.

The Business Roundtable questioned why there is any need for a specialist court, when specialities like trusts and company law are the business of the general courts. It suggested that RMA processes that encourage all interested parties to take part, result in prolonged proceedings, delayed projects, and added costs.

Some non-legal respondents consider the Environment Court to be good at accommodating parties without legal representation, but others found its adversarial nature intimidating.

Other submissions raised issues and made suggestions relating to case management, alternative dispute resolution, self-representation and the allocation of legal aid for environmental cases. There were calls for more Māori and non-Pākehā judges, and commissioners with a wider range of expertise.

Some of these issues are already being reviewed. In June 2001, the Government announced additional Environment Court funding, and an extra judge to ease the caseload. The court has been asked to review its case management techniques and to further promote its mediation service.

Other specific issues are the Environment Court's position in the court hierarchy, and appeals from its decisions.

What we could do

Promoting Environment Court to High Court level

Some argue that the work of the Environment Court is so significant that it should have a higher status. The New Zealand Law Society suggested promoting it to High Court status because of the "significance and importance of the matters it regularly deals with in terms of the public as well as the private interest".

“Expert judges can deliver quality, consistent decisions in this crucially important area of public interest law [the Environment Court]”

New Zealand Law Society



If the work does call for a court of higher standing, the High Court might assume the jurisdiction either generally, or in a division devoted to environmental cases. Or the court might have an intermediate status like the Employment Court.

Some submissions questioned whether appeals from the Environment Court should be to the Court of Appeal. Others proposed that, if appeals continue to be heard in the High Court, that they be heard by judges experienced in environmental cases.

Dividing the work between a tribunal and specialist court

The Environment Court could be restructured along employment law lines, with an inquisitorial tribunal under a specialist court. Employment law cases are generally always mediated as a first step. Mediation is sometimes used in environmental dispute resolution.

The inquisitorial model might be a better way to respond to multi-party actions. It might also accommodate self-represented parties' special needs, without unduly delaying proceedings.

A split model might cope better with heavy workloads, allow appropriate cases to be fast tracked, and cases at the lower level to be heard more quickly, and fewer at the higher level.

Employment Court

History

The Employment Relations Act 2000 established the Employment Court as a separate specialist court.¹⁴⁴ The Act also established the Employment Relations Authority (ERA) that generally deals with employment disputes before they can go on to the Employment Court, and gives first place to mediation before these more formal processes.

New Zealand has had a specialist employment court since 1894,¹⁴⁵ although its nature has fundamentally changed. Its principal role until the 1970s was economic arbitration of wages and conditions; its role now is adjudicating in employment disputes.

The last 15 years has witnessed fierce philosophical debate about employment law and its place in the court system. One view sees it as a contract matter between employer and employee, to be determined in the general courts.

The other emphasises the special nature of employment and the employment relationship between the employer and the employee as more than just a matter of pure contract. Employment law is seen as a specialist field requiring a specialist court.

Employment legislation has been continually adjusted to changing government policies, but a specialist court remains, separate from the general courts.

¹⁴⁴ The Employment Court was previously governed by the Employment Contracts Act 1991.

¹⁴⁵ Previous incarnations of the Employment Court include: the Labour Court, established by the Labour Relations Act 1987; the Arbitration Court, established by the Industrial Relations Amendment Act 1977; the Industrial Court, established by the Industrial Relations Act 1973; and, the Court of Arbitration, established by the Industrial Conciliation and Arbitration Act 1954.



The Employment Court today

The court today has exclusive jurisdiction over employment-related matters. Disputes are generally first considered in mediation, then if unresolved, heard by the ERA. A party dissatisfied with the ERA decision can have the matter heard afresh in the Employment Court. The court's primary role is deciding difficult points of law, determining applications for injunctions sought for strikes or lockouts, and hearing challenges from parties dissatisfied with ERA decisions. These challenges make up most of the court's caseload.

The Employment Court is a court of law, and operates as one. The Employment Relations Act 2000, however, requires it to proceed differently from general courts in several ways.

Unless there are good reasons, mediation must take place before the court hearing. The court must act in "equity and good conscience", and may accept, admit, and call for evidence and information it thinks fit, whether or not it is strictly legal. The court's rules of operation allow parties to represent themselves, or to engage a lawyer or another person to represent them.

Employment Court methods contrast with those of the ERA, which is required to establish the facts by investigation. For practical purposes this means that when parties fail to call for evidence for tactical or other reasons, the Authority can do so, and conduct its own examination.¹⁴⁶

The caseload of the Employment Court seems to have reduced. The court received 363 applications in the year to 30 September 2000 under the old Employment Contracts Act 1991. In the year to 30 June 2002, the court received 139 applications under the new Act¹⁴⁷ and 144 matters under 1991 Act.

Responses to *Striking the Balance*

Substantial submissions were received from the Employment Relations Service (ERS) of the Department of Labour and the Business Roundtable, expressing opposing views on the Employment Court's place in the court structure.

The ERS thought it advantageous for the Employment Court to be grouped with other employment relations services, independently of general courts.


The Business Roundtable has long argued against a specialist employment court, and suggested employment disputes be heard in the general courts. It raises the following constitutional arguments in favour of transferring the Employment Court jurisdiction to the general courts:

- The risk that concentration of an area of law in a specialist court erodes the authority of the High Court as a court of "general jurisdiction", which may have implications for its constitutional role
- The risk that excluding the High Court¹⁴⁸ from judicial review of the ERA and Employment Court, a traditional High Court preserve, may also erode the overall authority of the High Court
- The possibility that judges, appointed to hear particular disputes, may narrow in focus over time.

¹⁴⁶ Alastair Dumbleton, "The Employment Relations Authority Gets Underway" 26(1) NZJIR 119, 120.

¹⁴⁷ Submission of the Employment Relations Service to the Law Commission in response to *Striking the Balance*, para 10, (9 August 2002).

¹⁴⁸ The Employment Court hears applications for judicial review of the Employment Relations Authority, and the Court of Appeal hears applications for judicial review of the Employment Court.



The Buddle Findlay survey reported mixed views of ERA success. Submissions generally support mediation as a precursor to adjudication, an investigative rather than an adversarial process, and the use of non-lawyer advocates.

Some felt that extensive mediation and its resulting resolution of cases reduce the need for the Employment Court.

What we could do

Should there continue to be a specialist Employment Court? This question is not new. But the court's caseload seems to be reducing because many cases are being resolved at mediation or at the ERA.

Employment Court work could be shifted to the High or District Courts, or to a division of either. These could hear applications under the Employment Relations Act 2000, according to current Employment Court procedures. The High Court could hear applications for judicial review of the ERA. Several arguments support such a restructuring.

Employment disputes can be resolved at three levels: mediation, investigation by the ERA, and rehearing by the Employment Court. Mediation and investigation by the ERA resolve most disputes. Should the general courts become responsible for the balance?

New Zealand has a long history of a specialised industrial/employment court. This court and its predecessors have developed expertise that might be lost or dissipated if it were merged into the general court system.

The Employment Court is one element in a structure geared to low cost, accessible processes and remedies, and is accommodating of non-lawyer advocates. These advantages may be lost or diluted if employment cases are shifted to the general courts.

It may be difficult to preserve the Employment Court's more relaxed procedures and rules of evidence within the general courts.

What do you think?

What improvements can we make to the specialist courts that will foster competent, accurate, efficient decision-making in proportion to the issue to be settled?

Are there gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



Māori Land Court and Māori Appellate Court

We look for: a principled, accessible and acceptable court process for cases involving communally owned Māori assets and other significant Māori issues.

In *Striking the Balance* the Law Commission stated that the judges in the Māori Land and Māori Appellate Courts have expertise in a broad range of Māori tikanga and land issues and asked whether:

- the jurisdiction of these courts should be broadened to cover a wider spectrum of issues
- judges in these two courts should sit in other courts.

This chapter looks at the responses to these two suggestions and others received in submissions to *Striking the Balance*. A major theme in the submissions was the need for a specialist Māori court to deal with Māori issues including land, but including wider issues as well. A major point of difference was whether the Māori courts as they currently exist should be broadened, or whether an altogether new court should be created.

History of the Māori Land Court and Māori Appellate Court

The Māori Land 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 (who were Māori). Administrative control and quasi-appeal power were vested in the Chief Judge – features which continue today.

The Māori Appellate Court has its origins in the Native Land Court Act 1894. It was created, in part, to deal with the deluge of petitions to Parliament by Māori protesting the actions of the Native Land Court. Appeals from the Māori Appellate Court were to the Judicial Committee of the Privy Council.

The operations of the Native Land Court have been described as “the land-taking court” and an “engine of destruction”. Its purpose was to transfer Māori land from customary to statutory titles, to allow easier acquisition of land by settlers, and to assimilate Māori and their land under British rule.

Both courts had a catastrophic effect on Māori as detailed, for example, in the many reports of the Waitangi Tribunal. Today only 5.6 percent of New Zealand’s total land mass is held by Māori as Māori freehold land. The pain of this loss is still felt acutely by the Māori community, and the Māori Land Court still suffers some stigma from the actions of its predecessor, the Native Land Court.



The Treaty of Waitangi was acknowledged in the 1862 Act. The introduction stated that a purpose of the Act was to honour the guarantee in the Treaty, and to assure Māori “the full exclusive and undisturbed possession of their land and estates which they collectively or individually held so long as it should be their desire to retain the same”. It also recognised the Crown’s exclusive right of pre-emption over such lands Māori wished to sell.

The 1862 Act was short-lived and the 1865 Act made no mention of the Treaty.

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 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.

Major change finally came with the Te Ture Whenua Māori Act 1993. In contrast to the previous Māori Affairs Acts governing Māori land, the 1993 Act once again recognises the Treaty: “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 whanau, and their hapu[and to protect wahi tapu]: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu: 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 ...”

These words reflect the wider legal recognition of Treaty principles begun by the Court of Appeal’s 1987 decision when it said that the Treaty should be interpreted as a “living instrument”, laying the foundation for “an ongoing partnership”.¹⁴⁹

Te Ture Whenua Māori Act 1993 governs primarily how Māori are to administer, develop and retain their lands. It preserves the Māori Land Court as a court of record, together with the Māori Appellate Court.

The Māori Land and Māori Appellate Courts today

The Māori Land Court is primarily 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. Over the last three years the court has processed between 7,000 and 8,000 applications.

The Māori Appellate Court is a three-person bench made up of Māori Land Court judges, presided over by the Chief Judge or the most senior judge sitting. This court hears all appeals from final or provisional decisions of the Māori Land Court. It is unclear whether a further right of appeal to the Judicial Committee of the Privy Council from the Māori Appellate Court continues to exist.

The Chief Judge is currently the acting Chairperson of the Waitangi Tribunal, and all other judges are presiding officers. They spend approximately 25 percent of their time on Waitangi Tribunal work, although the proportion is higher for the Wellington-based judges.

The procedures of both courts are flexible. Judges are directed to avoid formality, to apply the rules of *marae kawa*, and to encourage the appropriate use of *te reo Māori*.

While a “keeper of the record” for land titles, the Māori courts also perform a number of other important roles for Māori. These include:

- being a valuable resource of Māori knowledge, notably *whakapapa* records
- adjudicating, often in a mediation role, in property disputes between kin members
- providing a public forum where Māori *whānau*, *hapū* and *iwi* can participate in decision-making about their communal lands
- acting as a civil disputes court by exercising a supervisory jurisdiction over kin-owned assets by means of trust and fiduciary duties
- acting like a family court to resolve, often by discussion, disputes usually between members of the same kin group.

Issues relating to the Māori courts

Empowering Māori

Consistent with the *tino rangatiratanga* guarantees in the Treaty of Waitangi, Māori have over the years called for greater power to control their own affairs, and to decide their own issues.

In 1986, the Advisory Committee on Legal Services suggested in *Te Whaingā i te Tika*¹⁵⁰ that the Māori Land Court be restructured to return decision-making power to *whānau*, *hapū* and *iwi*, and to establish tribal *rūnanga* to work through and decide their own issues.

In 1987, in *He Whaipāanga Hou*,¹⁵¹ Moana Jackson proposed a parallel justice system for Māori. Several of his suggestions did, eventually, lead to changes in the criminal justice system. In relation to the Māori courts, some proposals were similar to those from the Māori Land Court bench to the Law Commission’s *Structure of the Courts* project in 1989.

Extending the jurisdiction of the Māori Courts

This has been a relatively common theme.

In 1988, a submission from a Māori Land Court judge to the Royal Commission on Social Policy, proposed that both family and youth justice matters could be better handled in the Māori Land Court.

150 Report of the Advisory Committee on Legal Services *Te Whaingā i te tika / In search of justice* (Department of Justice, Wellington, 1986).

151 Moana Jackson *He Whaipāanga Hou / The Māori and the Criminal Justice System: a new perspective* (Department of Justice, Wellington, 1987).



In the same year, the Chief Judge and Māori Land Court bench proposed in a submission to the Law Commission that the Māori courts' jurisdiction be extended to include iwi and whānau courts, and commented that the latter might handle young offenders better than the general courts.

More recently, Te Ohu Kai Moana (the Fisheries Commission) has raised the possibility of the Māori courts becoming involved in mediating disputes arising out of the fisheries allocation, including, for example, the determination of tribal boundaries.

Determining the appropriate Māori groups with whom to deal has been an ongoing issue under the Resource Management Act 1991 (RMA) for both local authorities and those others required to consult with Māori.

Judges of the Māori Land Courts sitting in other jurisdictions

There have been calls for the extension of the role of Māori Land Court judges in the wider justice system. In 1986, *Te Whaingā i te Tika* suggested that Māori Land Court judges should sit in the District, Family or Youth Courts or the (then) Planning Tribunal.¹⁵²

Responses to *Striking the Balance*

The Māori courts remain as specialist courts

Submissions to *Striking the Balance* generally supported retaining the Māori Land Court and the Māori Appellate Court as specialist courts.

The Business Roundtable was opposed to retention. It considers that owners of Māori land should be able to deal with their own property, and that the need for the court's approval offends liberty and the rule of law. (An occupation order under Part XV of Te Ture Whenua Māori Act 1993 is necessary, for instance, to be able to occupy exclusively a house on communal land.)

Most other submissions supported the retention of these courts, but in a new and different form. Some considered the jurisdiction of the current courts should be extended. Others promoted a new court to deal with Māori issues.

Māori are wary of any approach likely to lead to more cases involving Māori issues being dealt with in the general courts, even if a Māori Land Court judge presides. Most would prefer the issues to be addressed in the Māori courts. One practical consideration is that the Māori courts are relatively inexpensive, and it is common for lawyers not to be involved at all.

The call for the Māori Land Court to be the only court responsible for Māori land issues was a consistent theme in public submissions on recent amendments to Te Ture Whenua Māori Act 1993. This call was partly addressed but not to the satisfaction of many. Māori continue to be uneasy about recourse to the general courts in matters affecting their taonga.



Extend the jurisdiction of the Māori courts

Many submissions suggested that the jurisdiction of the Māori Land Court should be extended to include other areas of work. Specific suggestions were that:

- The Māori Land Court should have more power to deal with Māori land in its entirety, noting that there is still too much scope for the general courts to be involved in the administration of Māori land
- The processing of Māori wills should be returned to the Māori Land Court
- The proposal to set up a “different bench” under the Runanga Iwi Act 1990 had merit. In cases involving Māori customary and mandating issues, the general courts usually do not appreciate the issues particular to Māori
- The court should deal with all communal assets owned by traditional Māori kin groups, and not just Māori land. The Māori Land Court bench saw as a natural evolution the resolution of disputes over Treaty settlement assets.

Several submissions opposed extending the courts’ jurisdiction because of the antipathy towards the Māori Land Court for its historical role in alienating vast tracts of Māori land out of Māori ownership.

Historical issues cannot be ignored, but the present court has very different purposes and processes from its predecessors.

The Chief Judge of the Māori Land Court has suggested that disputes involving Māori communities are of a similar nature, whether they involve land or other property. For instance, he has categorised the court as essentially the “Māori Lands and their Communities Court”, as behind every block of land there is a kin group community.

This echoes the comments of the Māori Land Court’s former Chief Judge, now Justice Durie, to the 1988 Royal Commission on Social Policy. He said the Court is both a court of law and one of “social purpose”, “... as distinct from most courts of law, it could be said that the main function of the Māori Land Court is not to find for one side or the other, but to find social solutions for the problems that come before it; to settle differences of opinion so that co-owners might exist with a degree of harmony, to seek a consensus viewpoint rather than to find in favour of one; to pinpoint areas of accord, and to reconcile family groups.”

Disagreements, similar to those over land, will arise over assets newly acquired on settlement of Treaty of Waitangi claims. Land is no longer the only communal economic asset held by Māori.


The Law Commission has recently suggested that the Māori Land Court’s jurisdiction be extended, and this is now being considered.¹⁵³

Judges of the Māori Land Court sitting in other jurisdictions

Several submissions suggested using Māori Land Court judges in other jurisdictions, in particular, the Environment Court and perhaps the Family Court.

The Auckland District Law Society suggested this could occur if judges in the Māori Land Courts were under-used, but noted that as their experience and expertise are specialised, they may not be best employed in that way.

153 New Zealand Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* : NZLC SP13 (Wellington, 2002).



Māori Land Court judges, sitting with Environment Court judges on cases involving Māori issues was advocated as better representing the principle of partnership enshrined in the Treaty. This could also help give effect to the specific Māori customary concepts contained in the Resource Management Act 1991. Decisions involving customary concepts by non-Māori judicial officers do not sit well with the Māori community.

The RMA presently allows Māori Land Court judges to sit as alternate Environment Court judges. Until now, this ability has been used sparingly, if at all. This may seem surprising, given references in the Act to the principles of the Treaty of Waitangi.

The Privy Council commented in a recent case: “Counsel for the appellants made the point that at present there are no Māori Land Court Judges on the Environment Court and only one Māori Commissioner out of five. In a case such as the present that disadvantage may be capable of remedy by the appointment of a qualified Māori as an alternate Environment Court Judge or Deputy Environment Commissioner... . It might be useful to have available for cases raising Māori issues a reserve pool of alternate Judges and Deputy Commissioners. At all events their Lordships express the hope that a substantial Māori membership will prove practicable if the case does reach the Environment Court.”¹⁵⁴

It has also been suggested that Māori Land Court judges could sit as Family Court judges in cases involving applications under the Guardianship Act 1968 and the Property (Relationships) Act 1976 (formerly Matrimonial Property Act 1976).

As to parallel jurisdiction with the Family Court – that court has in the past had concurrent jurisdiction with the High Court in property cases, with parties choosing which court to go to. The same principle might apply.

Processes in the Māori courts


Several submitters considered process issues in the Māori courts.

Some saw the courts as more culturally acceptable than the general courts, but considered them still Pākehā institutions, which draw on some aspects of Māori culture to oversee essentially Pākehā law.

This may underestimate the courts. The Māori language is used freely and Māori protocols are observed at all times. Appointment to the bench requires proficiency in te reo Māori and tikanga Māori. The courts are informal and inquisitorial, and sit comfortably with many Māori in a way the general courts do not.

There was some concern about the lack of accountability of the courts and the judges to the Māori community, especially in the appointment of judges.

The Māori Land Court is thought to have too wide a power to initiate investigations into the affairs of land-holding trusts and incorporations. In addition, it was suggested that some threshold should be set to stop litigants bringing trivial or vexatious claims, and that cost awards could be a further disincentive.



The exercise of judicial discretion to initiate investigations is intended to supervise the dealings of all owners of the land in question. One consequence of the massive fragmentation of interests in Māori land is that the court is often called upon to exercise its jurisdiction for what could in some cases be termed, “the silent majority”: those owners who are unable or unwilling to be involved in the management of their land. In traditional Māori terms, their rights may be seen to be less strong than those that are actively involved in administration, management and preservation.

The judicial discretion to initiate investigations might need to be reviewed, especially if the role of the court is to be broadened. The law might need to constrain that ability, unless a threshold is reached. Awards of costs against vexatious claimants might be well worth considering.

Section 30 of Te Ture Whenua Māori Act 1993, which gives Māori Land Court judges the power to place the tino rangatiratanga of the whānau, hapū and iwi under the court, was thought unacceptable. Another view was that even the ability to mediate under section 30 of Te Ture Whenua Māori Act 1993 will not prove sufficient and that court-initiated arbitration is likely to be better.

The July 2002 amendments to Te Ture Whenua Māori Act 1993 have given the Māori Land Court the ability to mediate, or appoint outside mediators, to attempt to resolve mandate and representation disputes. This acknowledges that adjudication may not always be the best answer. This new power is recent, and how well it works cannot yet be assessed.

The Māori Land Court bench suggested the appointment of pūkenga (traditional experts) and kaumātua to the bench to assist parties to resolve their own differences, increasing community involvement in the court’s processes.

The use of pūkenga and kaumātua on the Māori Land Court bench has some precedent. The original statute creating the Māori Land Court, the Native Lands Act 1862, provided for “assessors” to sit with judges. In practice, this meant Māori of chiefly status who sat in an advisory capacity.

These arrangements were short-lived. The Native Lands Act 1865 removed the reference to the Treaty, but assessors survived until further amendment in 1909.

Reinstating the services of pūkenga and kaumātua could result in communities becoming more involved in resolving their own disputes. It may be one way of creating the “different bench” advocated.

This would be consistent with the reinstatement of the importance of the Treaty in Te Ture Whenua Māori Act 1993, and could give better effect to the principle of partnership between Māori and the Crown.

Provisions now exist in the Act which allow experts in tikanga Māori to be involved in the hearing of cases. Extending this approach could give real effect to tino rangatiratanga in the most practical of ways.

In its submission, the Māori Land Court bench referred to the right of appeal from the Māori Appellate Court to the Privy Council. It emphasised the symbolic importance of the right, even if it has been used rarely. The bench recommended that if the Privy Council is replaced by a new Supreme Court, direct appeal to the ultimate court should be retained.



Whatever the correct position as to the present right of appeal from the Māori Appellate Court to the Judicial Committee of the Privy Council, it is an issue to be dealt with as part of the creation of a new Supreme Court.

Both the Māori Appellate Court and the Māori Land Court are creatures of statute (currently Te Ture Whenua Māori Act 1993). This means judicial review of a decision of either the Māori Land Court or the Māori Appellate Court is available by application to the High Court.

What we could do

The key suggestions for change to the Māori Land and/or Māori Appellate Courts are now set out.

The Māori Land Court to sit with pūkenga and kaumātua

The judges of the Māori Land Court have suggested that a body of up to ten pūkenga and kaumātua be assigned to each Māori Land Court registry, the quorum for the court to be two pūkenga/kaumātua and one Māori Land Court judge.

If adjudication is ultimately used, the judges suggest a majority of the quorum should be enough to reach a binding decision. They also suggest that some pūkenga would need to have commercial skills to deal effectively with land management and any new forms of assets from Treaty settlements.

Issues to consider include:

- how would these pūkenga be appointed?
- by whom?
- what types of cases should they hear? Should they be involved in all cases?
- what is the optimal number for a quorum? Is a simple majority of that quorum sufficient for a decision?

Widen the jurisdiction of the Māori Land Court to include all assets owned by traditional kin groups

This could include the resolution of disputes arising out of Treaty of Waitangi settlements.

Issues to consider include:

- should this jurisdiction be the only forum in which these settlement group disputes should be settled?
- what type of bench should hear these claims? Should it include the use of pūkenga and kaumātua?
- what form of dispute resolution should be used?
- should adjudication take place if alternative methods fail?
- should the jurisdiction of the court be widened to administer the communal ownership of other taonga?

Māori Land Court judges to sit in the Environment Court

Given the specific references to Māori cultural concepts in the Resource Management Act 1991, it could be desirable for a judge from the Māori Land Court to sit together with an Environment Court judge on cases involving significant Māori interests.

Issues to consider include:

- when would this option be required to be used?
- how would decisions be made by these two judges?

Māori Land Court judges to hear Family Court cases

Māori Land Court judges could sit as Family Court judges. A duality of this type is not new – in the past the Family Court has held a parallel jurisdiction with the general courts in such matters, the focus being on the personal choice and discretion of the parties as to which court proceedings were initially filed in.

Issues to consider include:

- should they have support services the same as, or similar to, the Family Court?
- how could this work in practice?

A new “Māori Court” be created to hear a wide variety of cases

There could be a new court to deal with a broad range of Māori issues apart from, but possibly including, the current jurisdiction over land enjoyed by the Māori Land Court and Māori Appellate Court.

Issues to consider include:

- does this option have merit?
- what form should such a forum take?
- what types of issues should such a forum hear?

What do you think?

What improvements can we make to the Māori Land Court and Māori Appellate Court so that we have a **principled, accessible and acceptable court process for cases involving communally owned Māori assets and other significant Māori issues?**

Are there any gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.



Tribunals

We look for: a principled, accessible, transparent, effective and efficient framework for the operation of tribunals.

During the past 50 years a great number of tribunals have been created with a wide variety of powers. Ninety-nine existing tribunals are listed in *Striking the Balance*, and another four are proposed. Each has been set up to serve a particular purpose without regard to the system as a whole.

Is what we have now the most effective and efficient framework for tribunals in New Zealand, or can we make changes that will result in a higher standard of process and a better use of resources?

The Law Commission's task is to "consider and report on the structure of all state-based adjudicative bodies". Four tribunals (the Banking Ombudsman, the Insurance and Savings Ombudsman, the Electricity Complaints Commissioner and the New Zealand Press Council) are outside that scope. These tribunals in the private sector have been set up by industries to respond to complaints from the public. There are some tribunals which are substantially advisory as opposed to adjudicative and they are not considered in any detail.

There are also bodies like the Waitangi Tribunal, the Commerce Commission, the Securities Commission, and the Takeovers Panel which have unique roles in our society and a review of their operations would require separate consideration.

There are 46 tribunals listed in *Striking the Balance* dealing with occupational groups – builders, plumbers, engineers, lawyers, car dealers, doctors, chiropractors, music teachers and many more. These bodies have power because their members voluntarily submit to their authority. The fact that these tribunals are created by Parliament means there is a community component.

From one perspective, the state should have oversight of their operation because of the strong public interest in ethical standards and rules. On the other hand, a case can be made that the state should not intervene in private industry and that these occupations should regulate themselves.

Similar issues of public versus private interest arise with tribunals like the Casino Control Authority. It is created by statute but funded by the casino industry and independently administered. Its scope extends only to licensees of casino premises. Does the fact that it was created by statute mean that it is intended to serve a wide public interest, or is it intended rather to enable the industry to regulate itself?

The trend has been towards minimal state intervention, and in favour of self-regulating industries and markets; the state is unlikely to take on costs currently met by industry.



Why we have tribunals

Tribunals occupy a place in the legal landscape between the courts and the administrative arm of government.

Tribunals resolve disputes between individuals and between citizens and the state. They provide specialist, speedy, less formal and less expensive justice in matters that do not require full court treatment. They also resolve problems that call for special expertise such as claims over accident compensation or objections to tax assessments.

Tribunals, like courts, decide disputed issues and make decisions that they can enforce, but they often also investigate wider issues and make recommendations to government ministers or agencies.

Tribunals not only make original decisions. Some hear appeals and others carry out merit reviews. (Appeals either uphold or set aside an original decision; merit reviews reconsider the facts, law, and policy aspects of the case, and may result in a new decision.) Of the tribunals listed in *Striking the Balance*, 78 exercise original jurisdiction, 19 appellate jurisdiction, and 30 make merit review decisions.¹⁵⁵

Tribunals are very diverse. They vary in size, make-up, the kinds of disputes they deal with, the way they deal with them, and the rights of appeal that exist about the decisions they make.

The first and most fundamental issue is whether tribunals are necessary at all. Should the work of tribunals that are more adjudicative be done by the courts, and should the work of tribunals that are more administrative be done by government departments?

Several adjudicative tribunals are intimately linked to the courts. District Court judges sit on the Land Valuation Tribunal, the Accident Compensation Appeals Registry, Taxation Review Authorities and the Liquor Licensing Authority. There are others that might more closely be linked to the courts, for example, the Motor Vehicle Disputes Tribunal, and the Copyright Tribunal.

Tribunals that perform administrative policy-making functions are sometimes criticised as set up to do the government's work, but in a way that is more acceptable to the public. This claim has been levelled, in particular, at tribunals dealing with occupational licensing and discipline for a large range of professions.

What tribunals should decide

The greater the policy and public interest in a decision, the more appropriate it is to be made by government ministers – they are responsible to Parliament and ultimately the electorate. Equally, a decision involving the interpretation of law may be best made by a judge, who is independent of the parties and applies legal rules. Tribunals sit at a mid point between the government and the judiciary.

Tribunals may complement the political process by applying policies as determined by the government. Alternatively, a tribunal may have the power to investigate a matter and make recommendations to government.

155 Some of the tribunals exercise both original and appellate jurisdiction.

Tribunals can be suited to high volume cases – as with the Disputes Tribunals with a dispute limit of \$7,500, or \$12,000 by consent. They generally dispose of cases faster than the courts.¹⁵⁶ Some people argue, however, that important principles can be sacrificed if efficiency is given too much priority.

A number of tribunals carry out advisory and policy functions on the one hand and adjudicative functions on the other. The issue for these tribunals is whether they can impartially judge the actions of an agency whose actions may have resulted from the tribunals' own advice.

Who should decide

“The use of judicial officers who are not legally trained should add to the range of expertise available to the tribunal or court and not detract from the quality of legal decision-making or case-law”

Human Rights
Commission

Lawyers or judges are best suited to make decisions that involve interpretation of the law. Elected officials are best suited to make decisions with high policy content. Decision-makers, who have specialised knowledge, are best suited to decide issues that require special expertise.

Tribunals do not always need to be staffed by people with legal qualifications. The membership of tribunals can include a mix of both legally and non-legally qualified, and in this sense represent the “best of both worlds”.

Some submissions to *Striking the Balance* expressed concern about non-legally qualified people on tribunals. Legal training was viewed as providing important process skills as well as an understanding of the law.

“The addition of some specialist lay persons to tribunals, eg, accountants where there is a complex financial matter, could be helpful”

Justices of the
Peace Association

The qualifications that members need may depend rather on the nature and subject matter of the cases to be decided. For example, the Abortion Supervisory Committee consists of three members, two of whom must be registered medical practitioners.

Other submissions objected to the practice of having departmental employees on tribunals, when the tribunal in question decides disputes arising from decisions of their agency. The example of ACC review officers was given. That is a separate issue.

How tribunals should decide

Tribunals are intended to provide a simple and accessible system of justice. The public should find them less mystifying and be more confident about using them.

Submissions to *Striking the Balance* repeatedly criticised the court process for taking too much time causing undue stress and expense for litigants. Most supported formal rules in complex cases, or those with potential to affect individual rights seriously. But they saw advantage in more informality, relaxed rules of evidence, and a more investigative enquiry. Tribunals are well suited to that philosophy and approach.

¹⁵⁶ In 2000/01 the Disputes Tribunals dealt with 23,512 cases at a departmental cost of \$7,745,000. (See Department for Courts Annual Report 2000/01.)

Informality might be essential also because of the kinds of issues to be decided. Issues of discrimination and sexual harassment can be highly emotionally charged and may require urgent resolution. Formal court procedures may be distressing to the parties, and may work against a quick and just settlement.

Perhaps the strongest criticism of the current court process was that it is too expensive. People decide not to take their disputes to court because it costs too much. The result may be a denial of justice.

Legal representation may not always be necessary in tribunal proceedings if the issues involved do not contain a high legal content and are comparatively simple. This means there is potential to reduce drastically the expenses involved, which may increase people's access to justice (see also the Representation chapter).

Administrative support for tribunals

Many submissions stressed the importance of tribunals being independent and neutral. But can a tribunal be truly independent if it is administered by the government department whose decisions it must review?

Of the 99 tribunals identified in *Striking the Balance*, 16 are administered by the Department for Courts. Other tribunals are independently administered, for example, the Casino Control Authority. A number are administered by agencies with an interest in their decisions.

Agencies that have administrative responsibility for tribunals include the Ministry for the Environment, the Department of Labour, the Legal Services Agency, the Ministry of Housing, the Ministry of Health, the Office of Veteran Affairs and ERMA New Zealand.

Tribunals in other countries

Diversity is not unique to New Zealand's tribunals but some countries have made attempts to rationalise their tribunal structure and standardise processes.

Australia

The trend in Australia, at both federal and state level, has been to amalgamate individual tribunals into umbrella structures with separate divisions.

Administrative Appeals Tribunal

Australia has a super tribunal that exists at the federal level of government, the Administrative Appeals Tribunal (AAT). The AAT is an independent body, created in 1975, that reviews, on the merits, a broad range of administrative decisions made by federal, and sometimes state, government ministers and officials.

The AAT's jurisdiction is contained in over 375 separate statutes covering areas such as taxation, social security, veterans' entitlements, employees' compensation and superannuation, criminal deportation, civil aviation, customs, freedom of information, bankruptcy and student assistance.





The tribunal sits in five divisions: general administrative, medical appeals, security appeals, taxation appeals, valuation, and compensation.

The president must be a judge of the Federal Court of Australia. All deputy presidents are lawyers. Senior members may be lawyers or have special expertise in other areas.

Although the AAT was intended to serve as an umbrella tribunal structure, a number of other tribunals have evolved outside. These include the Social Security Appeals Tribunal, the Refugee Review Tribunal and the Migration Review Tribunal.

Legislation to bring them together within a new tribunal, the Administrative Review Tribunal was defeated in the Senate in February 2001. The Senate did not oppose the concept, but objected to details of the proposal.¹⁵⁷



Victorian Civil and Administrative Tribunal

The Victorian Civil and Administrative Tribunal (VCAT), created in 1998, is another example of an umbrella tribunal structure – this time at the state level. It integrated 15 boards and tribunals into a one-stop shop. VCAT has three divisions: civil, administrative, and human rights.

VCAT aims to maintain the benefits of specialised tribunals, but to capture economies of scale, and to ensure that processes and decisions are to a high standard.

The president, a Supreme Court judge, is assisted by two vice presidents who are County Court judges. Most members are legally qualified, and many are practising lawyers.

VCAT has two types of jurisdiction – original and review. The civil division mostly exercises an original jurisdiction. It hears disputes between individuals that would ordinarily be determined by courts. The administrative division exercises the review jurisdiction. It conducts merit reviews of government decisions.

Each division has a number of lists of particular types of cases. The civil division consists of the civil claims, credit, domestic building, real property, residential tenancies and retail tenancies lists. The administrative division consists of the general, land valuation, occupational and business regulation, planning, and taxation lists. The human rights division deals with anti-discrimination and guardianship of the infirm.

Members are assigned to specific lists according to their expertise and experience. Depending on their qualifications, members may hear cases in more than one list. Some divisions require lawyers, for example, residential tenancies and small claims. Others call for different qualifications.

If the parties to the proceeding agree, VCAT can conduct all or part of the proceeding entirely “on the papers” without any appearance by the parties, their representatives or witnesses. The tribunal must act fairly and is bound by the rules of natural justice, but not the rules of evidence, or usual court procedures. Mediation is integral to VCAT’s work.



New South Wales Administrative Decisions Tribunal

New South Wales has an Administrative Decisions Tribunal (ADT) which began in October 1998. Like VCAT, the ADT integrated a number of individual tribunals into a single super-tribunal structure.

The ADT has six divisions, each responsible for particular areas. The divisions are: general, community services, revenue, equal opportunity, retail leases, and legal services. Parliament has passed legislation to establish an Occupation Regulation Division, but a start date has not yet been announced.

The ADT is headed by a president, a District Court judge, who also heads the General Division. The deputy president is also a judge and the heads of the other divisions are either judges or lawyers. Some divisions sit with a bench of three, and often the second and third members are not legally qualified. There are two rights of appeal on questions of law, first an internal appeal to a three member panel, and second a further appeal to the Supreme Court.

Hearings are traditional in form, and litigants usually legally represented. The Tribunal assists any who are unrepresented so that they are not disadvantaged. It is bound by statute to ensure that the parties have the fullest opportunity to be heard, or have their submissions considered.

The ADT is not bound by the rules of evidence and may inquire into any matter in any way it thinks fit, subject to the rules of natural justice. Although the tribunal has these powers it rarely uses them. The judges and lawyers may be more comfortable adhering to usual court practices, and the tribunal cannot afford to appoint its own experts, assessors or evaluators.

The United Kingdom

A recent review of tribunals in the UK by Sir Andrew Leggatt, *Tribunals for Users – One System, One Service*,¹⁵⁸ identified many of the same issues as arise in our review.

It recommended that the tribunals system be divided by subject matter into divisions. There would be one tribunal at the original level to deal with disputes between parties, and eight divisions to deal with disputes between citizens and the state: education, financial, health and social services, immigration, land and valuation, social security and pensions, transport, regulatory and employment.

It envisaged that there should be a single form of appeal for all tribunals to a single appellate division and from there to the Court of Appeal. It favoured excluding from the supervisory jurisdiction of the High Court decisions of the appellate division, and first level decisions if rights of appeal had not been exhausted.

The review also stressed that tribunals must be and must be seen to be independent from the ministers or other authorities whose policies and decisions they apply or review. It recommended that the Lord Chancellor be responsible for administration, and for all appointments or removals.

158 See, < <http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm> > .



The review recommended that a senior president, a High Court judge sitting in one of the appellate tribunals, head the structure, and that each appellate and first level division be headed by a judge, or at the first level, by a senior lawyer.

Each president would be required to promote – by leadership and coordination – consistency of decision-making and uniformity of practice and procedure. Divisional presidents would also be responsible for deciding whether non lawyer members should be able to sit on particular cases.

What we could do

Reform of the tribunal system could encompass a number of options. Given the great diversity of the current array of tribunals, a combination of the following options may be most realistic.

Structural options

No change

Amalgamation is not necessarily essential, or desirable.

Many tribunals have unique features and there may be good reasons for keeping them distinct and separate. Flexibility is seen as one of the great virtues of tribunals.¹⁵⁹ A fundamental justification for them is that they lack the rigidity and formality of the regular courts.

“Surely many of the different tribunals could be combined, with the membership representing the particular trade/profession changing, but with lawyer chairs and administrators dealing with all the different tribunals”

Individual

The Tenancy Tribunal and Privacy Commissioner, for example, are very different bodies. The Tenancy Tribunal decides disputes between landlords and tenants. Its function is quasi-judicial and it makes binding decisions. Disputes are confined to a limited number of issues and are relatively uncomplicated. It is not necessary for lawyers to represent the parties. The tenancy adjudicator’s decision is a court order, which both sides must obey.

The Privacy Commissioner, by contrast, deals with sensitive complaints involving the balancing of human rights, and has to make recommendations on alleged invasions of personal privacy. The commissioner’s function is substantially advisory.

It is questionable whether amalgamating the management of two such different tribunals would have any benefit.

There might be real disadvantages. Many other tribunals have their own distinguishing features.

Consolidation of current tribunals

The 1989 report from the Legislation Advisory Committee (LAC) recommended that New Zealand’s tribunals be rationalised into a smaller number of larger bodies to achieve shared expertise, and greater efficiency and economy.¹⁶⁰

159 G S Orr, *Report on Administrative Justice in New Zealand* (Government Printer, Wellington, 1964).

160 New Zealand Legislation Advisory Committee, *Report 3: Administrative Tribunals* (Wellington, 1989).



The LAC report identified the major tribunal groupings as:

- a welfare tribunal dealing with social welfare and other benefits
- a resources tribunal dealing with planning, environmental and scientific matters
- a revenue tribunal dealing with taxation and customs.

Each was to have legally qualified as well as expert members, and administrative support from the then equivalent of the Tribunals Unit of the Department for Courts. There was to be a single set of appeal arrangements.

They were to be models for the creation of other tribunals, such as economic licensing or censorship.

Super-tribunal

Most submissions supported the idea of an umbrella structure for all tribunals, similar to VCAT. They thought that this would greatly improve the independence of tribunals, and remove any risk of decision-makers becoming stale in one speciality.

Some submissions considered that specialist expertise is required in some areas. The question was raised whether an umbrella body might be administratively tidy, but might not deliver benefit to users.

There are a number of perceived advantages to a super-tribunal structure similar to the Australian models:

- a president who is also a judge could have oversight of the entirety, enhancing the independence, objectivity and consistency of the member tribunals
- a shared registry and facilities administered, perhaps, by the Tribunals Unit of the Department for Courts, could secure the independence of tribunals and maximise economies of scale.

Judicial leadership would need to be accompanied by a fair and transparent appointment and removal process. Similarly, the term of appointment of tribunal members would have to ensure their independence.

A larger structure could enhance the status of individual tribunals, which individually can be small, relatively unknown, and lack judicial membership. Public confidence might rise, and with that recourse to the tribunals and access to justice.

In assessing a larger structure, however, it is important to remember the crucial differences between New Zealand and Australia. New Zealand has one legal system, in contrast to the state and federal systems in Australia, and while our population is similar in size to Victoria, it is much more dispersed. Victoria's population is largely concentrated in Melbourne.

There must also be some doubt about whether a larger centralised structure would be more efficient in New Zealand. It might simply result in increased bureaucracy and unjustified cost.

“From being a tribunal head in New Zealand and seeing how the services to public have improved in Victoria, I am a big fan of the VCAT model”

Individual

Administration options

There is no single agency responsible for the administration of tribunals. Some are administered by the Tribunals Unit of the Department for Courts. Most are administered by the government department responsible for the policy and legislation the tribunal deals with.

In *Striking the Balance* we asked for comments on tribunals located within their sponsoring government departments. Most submitters objected to this practice. They stressed the importance of impartial decision-making, and the removal of any perception of bias. Such perceptions could undermine public confidence in the tribunal system.

The issues involved are illustrated by the following examples.

The Tenancy Tribunal and the State Housing Appeals Authority

The Tenancy Tribunal is administered by the Ministry of Housing under a contract to the Department for Courts. The tribunal decides disputes between landlords and tenants. The majority of disputes are between private individuals. However, there may be instances where Housing New Zealand is the landlord.

Although Housing New Zealand is technically a separate entity from the ministry there is a perception that their interests are linked, and that this may influence tribunal decisions.

Similarly, the State Housing Appeals Authority is administered by the Ministry of Housing. It hears appeals from reviews of decisions made by Housing New Zealand about income-related rents, and applicants' eligibility for Housing New Zealand housing. The same perception of bias exists.

The Removal Review Authority, Residence Appeal Authority, Refugee Status Appeals Authority

The Removal Review Authority, the Residence Appeal Authority, and the Refugee Status Appeals Authority are all administered by the Department of Labour. The Minister of Immigration appoints the members.

The decisions that are appealed to these bodies have all been made by immigration officers, who are employed by the Department of Labour. There is the potential for the tribunals to be biased in favour of the officers decisions, or to be seen to be biased.

The Catch History Review Committee

The Catch History Review Committee is administered by the Ministry of Fisheries. The committee comprises lawyers, who are not employees of the ministry, but who are appointed on its recommendation.

The committee decides appeals on the allocation of provisional catch history made by the chief executive for the Ministry of Fisheries. There is an inherent conflict of interest in the ministry being responsible for the original decision, as well as administering the appeal tribunal.

“The perception that self regulated organisations pay only lip service to investigation is quite strong. An independent body would remove this negative perception”

Community
Law Centre

A single agency administering the tribunal system could enhance the independence of tribunals and yield economies of scale. The most obvious contender is the Tribunals Unit of the Department for Courts. A 1999 review of the Unit considered that the tribunals and authorities it services should be rationalised.¹⁶¹

Procedural options

The Leggatt review of UK tribunals recommended a single consistent procedure for all tribunals. Whether New Zealand tribunals should follow a single procedure has been considered several times with various results.

A 1974 review came up with the following options:¹⁶²

- the courts might be left to develop the procedures
- each tribunal might be authorised, or required, to enact detailed rules
- parliament and/or the Governor-General in Council might enact detailed rules for each tribunal
- parliament might enact a single statute establishing uniform rules
- a non-binding guide could be drawn up to serve as a basis for action by those responsible for promulgating the rules.

The review favoured a non-binding statement of principles to guide those formulating procedures for particular tribunals.

In the early 1980's, the Departments of Justice and Internal Affairs drafted a Tribunals Procedure Bill to meet the needs of tribunals with the powers of a commission of inquiry. This Bill formed the basis for guidelines published by the LAC in 1991.

The current approach therefore consists of a non-binding guide.

Appeal options

The different appeal rights that apply to New Zealand's tribunals are another feature of the system's diversity.

Some tribunals have a right of appeal to another tribunal. For example, appeals from the District Law Practitioners Disciplinary Tribunal are heard by the New Zealand Law Practitioners Disciplinary Tribunal. Appeals from decisions of the Health and Disability Commissioner and Privacy Commissioner are to the Human Rights Review Tribunal.

Some tribunals do not provide for any rights of appeal. The [Racing] Appeals Tribunal, the Parole Board, and the Refugee Status Appeal Authority are cases in point.

“It is always preferable to keep tribunals part of the courts but I suspect departments and maybe some tribunal members might resist!”

“
Individual

I would like to see an independent structure for all tribunals, with adjudicators appointed independently – and paid independently – from the bodies being appealed against. The Department for Courts might be appropriate”

”
Individual

161 M Smith *Review of the Tribunals Division* (Unpublished report, 21 May 1999), 2.

162 New Zealand Legislative Advisory Committee *Administrative Tribunals* (Report No 3, Wellington, 1989), 94.



Most tribunals provide for appeals to courts. Sometimes there are two levels of appeal, first to another tribunal and then to a court. Some tribunals, for example, the Motor Vehicle Disputes Tribunal and the Music Teachers Registration Board, allow appeals to the District Court. Others, such as the Land Valuation Tribunal and the Deportation Review Tribunal allow High Court appeals. Appeals are sometimes restricted to specified grounds, matters of public importance, or questions of law.

The first question is whether appeal rights are necessary at all. Judicial review of a tribunal decision is always possible if the tribunal is exercising a “statutory power” of decision-making or is exercising a power that is “in substance public” or has “important public consequences”.¹⁶³ However, it can involve litigants in considerable expense and is subject to court timetabling delays.

Another possibility is that a presidential member of a tribunal could provide the first level of review. An appeal to a court could always exist as a second level review. In the Māori Land Court, the Chief Judge can cancel or amend an order of the court if satisfied that the order is wrong in fact or law. The Chief Judge may make other orders that are necessary in his or her opinion, in the interests of justice, to correct the mistake or omission.

If some form of appeal is necessary further questions arise, such as whether there is any good reason for the current proliferation of differing appeal rights and how many tiers of review should there be.

All appeals from administrative decisions might go to one Administrative Appeals Tribunal, doing away with numerous current tribunals. There might be a significant saving in costs, and greater harmony in decision making on administrative law principles.

The same options for structural change to tribunals discussed earlier in this chapter might also apply to appeal bodies. There could be separate appeal bodies for separate tribunals, or appeal bodies representing clusters of tribunals, or a super-appeal body incorporating appeals from all tribunals (see also the Appeals chapter).

What do you think?

What improvements can we make to Tribunals to give us a **principled, accessible, transparent, effective and efficient framework for the operation of tribunals?**

Are there any gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.

Appeals

We look for: a coherent, high quality appellate system.

The Government has stated its intention to introduce legislation during its present term to replace the Privy Council in the United Kingdom with a Supreme Court in New Zealand as our highest appeal court. The structure and operation of a Supreme Court was the subject of a review by an advisory group appointed by the Attorney-General in 2001.

In seeking to improve our current appeal structures and/or processes, the Law Commission is concerned with what happens lower down the appeal system – with first instance appeals – and the various pathways and processes they can follow to be resolved.

There has long been debate about how many levels or tiers of appeal should be available. The prevailing view in New Zealand is that there should be at least two opportunities to appeal judicial decisions in substantive matters. The Law Commission accepts this view.

Why we have appeals

Appeals serve several purposes:

- a “private” purpose of correcting errors made by lower courts or tribunals in decisions affecting individual citizens
- a “public” purpose:
 - the reconsideration of a previous decision clarifies and develops the law and establishes precedents that others can use in future cases
 - ensuring consistency in the administration of justice – making sure that the penalties or outcomes in similar cases are consistent.

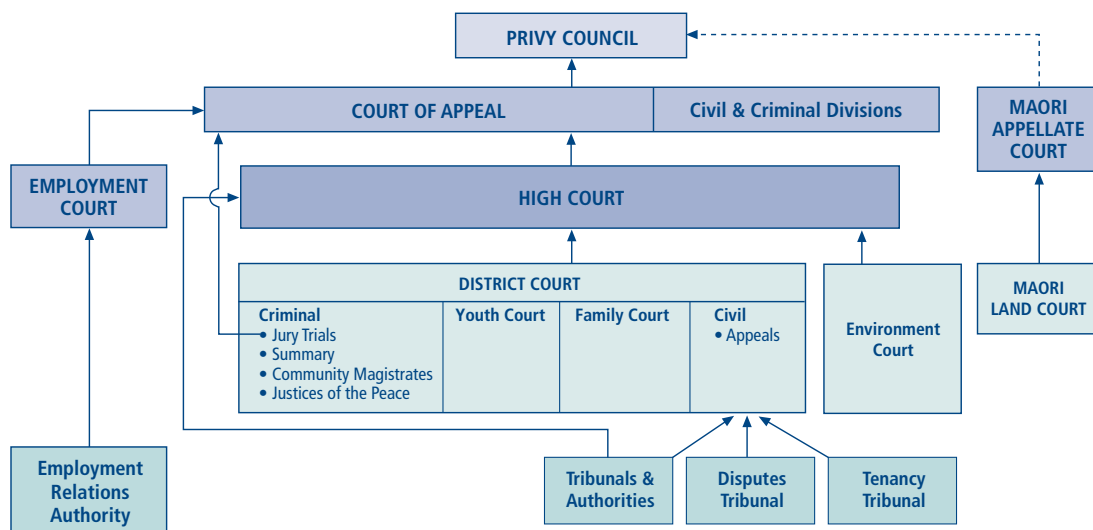
The appeal system today

The ability to appeal a decision by a court or request a review of the way the decision was reached is fundamental to our system of justice.

In practice today most – though not all – appeals go to the next level in the court hierarchy.

Regardless of where in the structure they are heard, first level appeals usually serve the private purpose of correcting errors that the courts have made affecting individual citizens.

Most individuals opt out after this stage, either because they are satisfied with the result, or because of time and cost.



Those appeals which serve a public purpose by clarifying the law and setting precedents for lower courts to follow, are generally second level appeals. In the current appeal structure, these second level appeals are usually heard in the Court of Appeal.

New Zealand's appeal structure operates on a number of models:

- general courts where judges hear both trial cases and appeals as part of their general jurisdiction, for example, High and District Courts
- appeal courts staffed exclusively with permanent appellate judges, like the Court of Appeal when sitting with its core of permanent members
- specialist appeal courts with rotating membership of specialist court trial judges, like the Māori Appellate Court, which hears appeals from the Māori Land Court and comprises any three or more judges of the Māori Land Court
- a combined model involving a core of permanent judges with other judges included on rotation, like when the Court of Appeal is sitting in either of its criminal or civil divisions with both permanent judges and one or two High Court judges.

Differences between appeal and judicial review

Appeals, need to be distinguished from the remedy of judicial review.

The High Court has a pivotal constitutional role of supervising lower courts, tribunals and administrative authorities. This supervisory function is exercised through both appeal and judicial review, but the two functions are different. As a matter of practice, even when applications for judicial review and appeals are filed in the same matter, they often proceed along different paths.

Judicial review is a supervisory jurisdiction, by which the High Court checks the unlawful, unfair or unreasonable exercise of public power. It is concerned with the scope of powers and the manner in which they are exercised. Fundamentally, it is about process. As such, judicial review serves a different purpose from appeal, which is normally concerned with the merits and correctness of the decision.



Issues with the current appeals structure

Workload

The New Zealand Court of Appeal decides more than five times the number of cases decided by most comparable counterparts overseas. This has led to one of its judges describing it as being stretched to the limit, “with the best will in the world, there is too great a risk of error because of the pressures Judges are under.”¹⁶⁴

Skill mix

Debate surrounds the most effective way to use judges in appellate work. Below the Court of Appeal, judges have to balance first instance and appeal work. There are differing views as to whether this is the best approach.

One view is that dealing with appeals efficiently and effectively requires specialised skills and functions different from those required of the judges at first instance. Appeals require a greater element of theory, principle and conceptualisation of the law. This view favours appellate courts made up of judges who specialise in hearing appellate work.

Proponents maintain such courts are more efficient because:

- there is no problem gathering the same panel of judges together to hear continued aspects of an appeal where it has been interrupted
- having the same panel of judges provides more consistent decision-making
- their combined expertise contributes to the more efficient disposal of appeal work, and can lead to the development of better case management techniques
- judges have more opportunity to discuss issues with colleagues and prepare judgments, which not only promotes effective and efficient decision making and prompt delivery of judgments, but also contributes to the coherent development of legal principle.

A differing view is that appellate specialisation of this kind is unnecessary, and that there are advantages in using general judges to hear appeals.

These include:

- more flexibility in the system to bring a bench of judges together to hear an appeal contributing to less delay
- a combination of first instance and appeal work means judges on appeal are aware of the realities of the life of first instance judges, and first instance judges are more aware of errors made and corrected on appeal
- increased work satisfaction for judges, arising from the variety that a combination of first instance and appeal work provides.

164 Tipping J, Notes for Privy Council Panel Discussion, NZLS Conference (October 2001).

Number of judges to hear each appeal

Below the Court of Appeal, most appeals in New Zealand go from one judge to another single judge.

It is often argued that this is not the best model, and that an appeal system should be an “inverted pyramid” where the number of judges hearing an appeal increases as the matter proceed. This means that more than one appeal judge would hear appeals from decisions of single first instance judges – as long as doing so was not out of proportion to the matter at issue in the case.

Inconsistencies

To a large extent the current appeals system has developed in a piecemeal way. In many cases it is difficult to identify why an appeal is directed to one court rather than another.

Some particular inconsistencies arise, as described below.

In general, appeal procedures across all jurisdictions are fraught with inconsistencies and technical difficulties

New Zealand
Law Society

- Different appeal rights apply depending on where in the system a case is first heard. Civil cases that begin in the High Court have a right of appeal to the Court of Appeal where they will be heard by at least three judges. However, civil cases that begin in the District Court are appealed as of right to the High Court where they will usually be heard by only one judge.
- Given the overlap in jurisdiction between the District and High Courts, the question in the District Court case may be just as substantial and the issues just as complex as the case in the High Court – yet the paths of appeal are quite different.
- Appeal provisions for criminal cases can be just as inconsistent. The courts have often expressed concern that the procedural provisions of the criminal legislation are unnecessarily complex and confusing, and this is particularly evident in the area of criminal appeals. The paths of appeal in criminal cases often cause real confusion.
- Complexity arises from the way in which criminal offences and charges are classified, as well as the number of separate statutes affecting appeals with interlocking and overlapping provisions. There is a wide range of variables to consider, and appeals from decisions in the District Court are sometimes wrongly filed in the High Court, when they should be filed in the Court of Appeal, or vice versa. Even if the appellant understands the pathways, anomalies arise as to whether an appeal is heard in the High Court or the Court of Appeal. The current situation is in desperate need of simplification and rationalisation.
- Decisions made in the specialist Family Court are presently appealed to the High Court. While two judges will sometimes hear an appeal from the Family Court, it is more usual for an appeal against a decision by a specialist Family Court judge to be heard by a single generalist judge. In their submission to *Striking the Balance*, the Family Court judges expressed concern that the element of specialisation present in the Family Court is lost on appeal. They consider the present appeal structure to be inappropriate. This was also discussed in the Specialist Courts chapter.

- Nor are tribunals free from inconsistencies. There is no principled system as to where appeals from tribunals are heard. In some cases, there are three tiers of appeal available from tribunal decisions.

Appellate mediation

The increasing focus and emphasis on alternative dispute resolution (ADR), particularly mediation, at first instance level in New Zealand has not been matched at appellate level. The possibility of using mediation at this level could be explored further (see also the Civil Process chapter).

What we could do

Five possibilities for change to New Zealand's appeal structure are discussed here. These cover a spectrum from structural reform to amending current processes. Each option envisages an ultimate appellate tier above the one described, and in most cases the final tier would be the new Supreme Court.

Single appellate court below Supreme Court

This option is a single appellate court to be called the Court of Appeal. This court would generally deal with all first appeals, currently heard in the Court of Appeal, High Court and District Court.

Such a Court of Appeal would need a permanent membership of about nine full time judges, with further judges appointed on an "as necessary" basis. The current Court of Appeal operates on the basis of about ten full time judge equivalents but 13 or 14 might be required for this proposal. The precise number could also depend on the extent to which a new court employed sifting and conferencing processes prior to formal hearings.

These further judges could come from the High Court, or from the particular court from which the appeal arose. For example, judges could be drawn from the Family Court for appeals in family law matters.

Normally cases would be heard by three judges. However, the presiding judge could direct that in less serious matters, one or two judges could hear an appeal. Likewise, on matters of high policy, five judges could sit. This would ensure that appeals are dealt with in ways that are proportionate to their complexity and subject matter. Appeals from tribunals would only go to the Court of Appeal after an initial reconsideration within the tribunal structure.

All appeals to the new Court of Appeal would be as of right. Generally the Court of Appeal would hear matters on the basis of the evidence of the court or tribunal below, but it would be able to hear further evidence if this were necessary in the interests of justice.

Appeals from the new Court of Appeal to the new Supreme Court would not be as of right. A party would first need to apply to the Supreme Court for leave or permission to appeal a decision of the Court of Appeal to the Supreme Court. The criteria for leave should be set out in legislation.

The court could have a permanent home in Auckland or Wellington but could also sit in up to half a dozen centres around the country.



The court would foster appellate knowledge and expertise, and provides an “inverted pyramid” structure, where more judges hear the appeal than heard the case at first instance. It would mean that hearing appeals would no longer be part of the core function of the High Court, although High Court judges would still hear appeals when sitting in the Court of Appeal.

The court could draw on the specialist knowledge and expertise of judges elsewhere in the system on a case by case basis. Drawing in individual judges on a temporary basis from the larger pool of first instance judges would increase the number of judges available, and ensure that judges would be aware of the considerations relevant to both first instance and appellate work.

Against these possible advantages is the decades-old debate over the appropriateness of using first instance judges as appeal judges. One perspective is that judges in this situation may be overly influenced by the prospect of having one of their own cases come up for review in the future.

Others consider that this is not a real problem. The use of first instance judges as temporary members of an appeal court is not unusual. In Australia the majority of appellate courts include judges from the general pool sitting in rotation. It also happens in the divisional hearings of New Zealand Court of Appeal now.

Some issues of duplication could arise. While in practice applications for judicial review and appeals are not often filed in the same matter, there will be occasions when a party may want both remedies. In such cases, separating the court for hearing appeals from the court with jurisdiction to hear judicial review may lead to duplication.

Combining appellate work with trial work provides diversity of experience for judges. There is a risk that removing the appellate role from the High Court and District Court could make appointment to the bench less attractive. On the other hand, in the year to June 2002, appellate work made up only about 14 percent of the High Court’s sitting time (not counting the time spent by High Court judges when seconded to the Court of Appeal).¹⁶⁵ First instance judges would still get the opportunity to hear appeals, sitting in the new Court of Appeal.

Variation

A variation on this structure would be to retain a limited appellate jurisdiction in the High Court, with all other appeals going to the new Court of Appeal. At the 2001 Law Conference, Justice Tipping presented a model for a two-tier appeal structure – a Court of Appeal with a Supreme Court above it.

Under this proposal, most appeals would go directly to the new Court of Appeal. The High Court would retain a limited appeal function dealing with appeals from criminal cases heard by a judge alone in District Courts and with civil cases involving up to \$50,000. The new Court of Appeal would be able to send an appeal back to be heard by a single High Court judge in appropriate cases.

Where there was a point of law of major public importance, appeals from the District Court to the High Court would be able to go straight to the Supreme Court, with its leave. The bypassing of the Court of Appeal in such circumstances would be deliberate, as the point of law would be such as to justify the attention of the Supreme Court. In rare cases, appeals from the High Court could leapfrog the new Court of Appeal to go straight to the new Supreme Court, again with its leave. The criteria for this should be very tight.

Justice Tipping proposed that this Court of Appeal would always sit as three. Numbers should be sufficient to allow two panels to sit at the same time, with several judges spare for leave, sickness and other commitments. The present seven Court of Appeal judges would need to be increased, at least to nine, perhaps to 11. The temporary secondment of High Court judges to the Court of Appeal would not be a feature of the new structure as he envisaged it.

Specialist appellate courts

This option divides the work of the appellate courts according to the subject matter of the appeal, creating specialist appellate courts with specialist jurisdictions. The Māori Appellate Court is a current example. The Māori Appellate Court sits with three judges of the Māori Land Court.

There have been calls in New Zealand to establish a specialist appellate division of the Family Court for many years. 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 the judges hearing an appeal must be members of the Appeal Division of the Family Court.

An Appeal Division of the Family Court could sit with three or more judges to hear appeals from the Family Court, as with the Māori Appellate Court. The judges would be drawn from the pool of Family Court trial judges.

Arguments similar to those supporting a specialist appellate court for the Family Court were made in submissions to *Striking the Balance* in favour of a specialist appellate court for the Environment Court. A similar appellate model could be used. (See also Specialist Courts chapter.)

Specialist appellate bodies of this nature could bring specialist expertise to bear on appeals and provide informed leadership for first instance judges in policy, practice and issues of law.

On the other hand, appeals are often concerned with general principles of law, rather than specific specialist issues raised in the court below. In practice, when specialist matters are at issue, a general appeal court tends to defer to the specialist knowledge and experience of the court below.

The more appellate courts there are, the more likely there are to be differences of approach from one to another and inconsistencies 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.

“New Zealand is not a country that can afford to have a wide range of both specialist courts and specialist appellate courts”

Auckland District Law Society



Drawing on the pool of first instance judges to make up the appellate division fuels objections raised by those who have concerns about judges hearing appeals on their peers' judgments. In the case of a specialist appellate court, such concerns are heightened by the smaller size of the pool.

High Court Appellate Division

This option would create an Appeal Division of the High Court. Consisting of a core of permanent judges, it would hear all appeals against first instance High Court, District Court and tribunal decisions. Three judges would usually sit to hear appeals, but in the interests of proportionality the number of judges could be reduced in specific cases to one or two.

Under this option, the next level of appeal would be the Supreme Court. Appeals in cases of significant public importance or urgency could leapfrog straight to the Supreme Court, with its leave.

This option would foster appellate expertise, while retaining the High Court's appellate function. It would meet concerns about the number of judges who hear appeals being greater than the number who heard the case originally.

This model raises the issues described earlier relating to judges of equivalent status hearing appeals from their colleagues, and the effect this may have on independent and robust decision-making.

Increasing appellate expertise in High Court


Another possibility is to establish an appellate division of the High Court, which would hear appeals from District Courts and tribunals, but not from first instance decisions of the High Court itself. Appeals from first instance decisions of the High Court would continue to go to the Court of Appeal.

A new division of the High Court could have a core of permanent judges appointed to it with further trial judges being appointed on a temporary basis as necessary. In the case of appeals from specialist courts such as the Family Court, it could sit with a judge from the specialist court.

The division would normally sit as a bench of three, but in the interests of proportionality, it would have the power to sit with one or two judges on less significant matters.

Under this option, the High Court would not lose its appellate function and its judges would be able to develop appellate expertise. The model accommodates the "inverted pyramid" with more than one judge able to hear appeals from the District Courts and tribunals – in appropriate cases.

There is some previous High Court experience of an appeals division. The Administrative Division of the High Court was established in 1968 to hear appeals from the decisions of many administrative tribunals. Its unsuccessful history is discussed in the Specialist Courts chapter. It was intended to remedy the inconsistencies and complexities in appeals from administrative tribunals, but because of its small caseload, it never had the critical mass of work necessary to sustain an effective division.



While the caseload of appeals from the District Court and tribunals would be considerably larger, the lessons to be learned from the failure of the Administrative Division still require careful consideration. It is questionable whether suitable and acceptable appeal regimes can develop where there is a low volume of cases.

Improving the current system

A number of the specific issues facing our current system of appeals could be addressed individually, without structural change of the kind outlined above. Legislation could be introduced to make changes in specific areas, either separately or by way of an omnibus bill. Changes might include:

- A review and rationalisation of appeals from decisions of tribunals to establish principled paths of appeal and consistent rules and procedures (see also the Tribunals chapter).
- Reform to meet the specific concerns about appeals from the Family Court, to provide that they should always be heard by a full bench of three judges of the High Court, either with or without a Family Court judge.
- Changes to the current system to meet concerns about appeals going from one judge to another single judge. In general, three judges should hear appeals from the District Court to the High Court. In matters that are not so complex, or of such importance as to require three judges, a senior judge should retain the power to order that two judges hear them.
- A review and rationalisation of the criminal appeals process, preferably as part of a wider simplification of criminal procedure.
- The development of a single appeal process in civil matters that would ensure all cases are dealt with similarly, with consistent time periods and discovery regimes.

While this approach could be adopted to deal with the particular problems raised, it has the disadvantages inherent in any piecemeal approach.

What do you think?

What improvements can we make so that we have a **coherent, high quality appellate system**?

Are there any gaps, issues or implications we have overlooked?

Turn to p 217 to tell us what you think.





What do YOU THINK

Chapter Summary

We need your help to make the courts work better for all New Zealanders. Here is a summary of the main issues and the possibilities for change we have identified, followed by submission pages for you to tell us what you think.

Feel free to comment on as few or as many of the topics as you wish, briefly or in detail. Your responses will help us make recommendations to the Government on ways to improve the New Zealand court system.

The options are not designed to be a single package, but to be a range of possibilities to choose from. You will find that some of them would never fit together, while some would fit together well. There may also be issues or implications we have overlooked, and we welcome you highlighting these for us. For further detail and discussion, turn to the relevant chapter.

Please write your views on the tear-out submission pages following the summary and return in the addressed envelope provided. If you wish to attach extra pages on any issues please do so. If you want to send your submission by email, please address it to com@lawcom.govt.nz, and put "Courts Submission" in the subject line.

The Law Commission

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We need to have submissions by Easter - 17 April 2003.



Part One: **Voices**

Māori (page 24)

We look for: a system of justice that properly recognises Māori values, and in which Māori have confidence.

Key issues

- The relationship between Māori and the Crown, as partners to the Treaty of Waitangi, is fundamental to the perspectives Māori have of the justice system. As tangata whenua of New Zealand, Māori expect the justice system to recognise their values.
- Māori are disproportionately represented in court, both as offenders and victims of crime, yet the way the courts currently operate is at odds with some Māori values.
- There are various ways to integrate Māori values into the administration of justice in New Zealand, and Māori need a greater hand in strategies to bring about meaningful change.

What we could do

- Use alternative justice models, including Māori dispute resolution techniques, existing restorative justice processes, community justice and marae justice.
- Place greater priority on the diversion of young Māori offenders and allow for involvement of the Māori community in the process as early as possible.
- Change processes in family-related cases, by involving the wider whānau in the Family Court, or using the Māori Land Court for such cases.
- Extend the use of mediation in civil disputes.
- Increase the rights of kaumātua or other Māori community leaders to speak in court proceedings.
- Address the shortage of Māori judicial officers and lawyers.
- Recognise and fund Maatua Whangai and Māori Wardens.
- Facilitate the use of Māori language in court.
- Change the layout of courtrooms so that whānau can be close to defendants.
- Increase cultural awareness of all involved in the court system.

What do you think? Turn to page 239 to respond.

Ethnic Minorities (page 32)

We look for: improved access to justice for ethnic minorities.

Key issues

- New immigrants often do not know their rights and obligations under New Zealand law.
- Cultural differences may make people of ethnic minorities uncomfortable when involved in court processes and lead to misunderstandings in court.
- Language difficulties are a serious barrier to understanding and participation.
- The emphasis on collective identity that exists in many cultures is incompatible with the focus of the New Zealand court system on individual responsibility.
- Some members of ethnic minority groups feel that they are treated negatively when they attend court.
- The European appearance of courtrooms and the low proportion of people of minority ethnic groups working in the courts can be alienating and intimidating.

What we could do

- Increase the availability and quality of information for court users.
- Set minimum standards and qualifications for interpreters.
- Encourage the use of plain language.
- Promote increased ethnic diversity among court personnel and the judiciary.
- Introduce cultural awareness training for court personnel and the judiciary.
- Produce handbooks, providing culturally specific information.
- Introduce lay “Intercultural Facilitators”.
- Allow family members to stand near an accused person in court, and/or to speak about, or on behalf of them during trial.
- Make greater use of alternative dispute resolution procedures rather than adversarial processes.

What do you think? Turn to page 240 to respond.



Victims Of Crime (page 40)

We look for: improved access to justice for victims of crime.

Key issues

- There is a balance to be maintained between respecting the rights of victims and those of defendants.
- If the court system is not sufficiently responsive to the needs of victims of crime, the experience of going to court may be an additional trauma.
- Victims' fear of involvement in the court system may contribute to the under-reporting of crime.
- Victims are unhappy with waiting for long periods at court, a lack of appropriate facilities, poor segregation from defendants, having to publicly recount private details relating to a crime, and aggressive cross-examination by lawyers.
- A longstanding concern of many victims is that they feel “left out” of the court process.

What we could do

- Provide more information to victims.
- Train court staff on the reactions of victims and how best to meet their needs.
- Provide separate waiting rooms for victims and make sure that the design of court buildings minimises the potential for defendants to encounter victims.
- Allow for more privacy in giving evidence.
- Allow support people to accompany victims while they give evidence.
- Make reparation orders more effective.
- Increase state-funded compensation for victims.
- Encourage and standardise the use of restorative justice models.

What do you think? Turn to page 241 to respond.

Disabled People (page 48)

We look for: improved access to justice for disabled people.

Key issues

- Not all courts meet New Zealand access standards for disabled people.
- Technological devices to assist people with hearing impairments and appropriately qualified sign-language interpreters are not readily available at all stages of the court process.
- Basic court-related information is often unavailable in formats that cater for disabled.
- People with intellectual disabilities are particularly disadvantaged in terms of understanding what is happening at court.
- People with psychiatric or psychological disabilities may experience high levels of stress at court.
- People with any form of impairment can face negative attitudes when going to court.

What we could do

- Provide disability awareness training for court staff and the judiciary.
- Improve the accessibility of information for disabled people.
- Introduce scheduled hearing times for disabled people.
- Extend the levels of legal aid available to disabled people to accommodate their additional needs.
- Have “accessibility coordinators”.

What do you think? Turn to page 242 to respond.



Part Two: Access To Courts

Information (page 55)

We look for: accurate, relevant, understandable and available legal and court-related information.

Key issues

- There is a widespread lack of understanding of the law and the court system, and a low level of awareness of how to obtain relevant information.
- There is no clear government responsibility for providing legal information to the public, and current legal information providers have poorly coordinated services.
- Charitable organisations carry a heavy burden in filling the gap and lack sufficient funding.

What we could do

- Expand the roles of existing agencies:
 - the Legal Services Agency to coordinate public legal information
 - the Department for Courts to provide improved court-related information.
- Establish a new state coordinated legal information network to ensure uniformity and full coverage.

What do you think? Turn to page 243 to respond.



Connecting With Courts (page 64)

We look for: straightforward and uncomplicated connections to the court for the general public, whether by visiting a courthouse or electronic means.

Key issues

- Shifts in population mean that courts in smaller communities are occasionally used, while others in urban locations are under huge pressure.
- Reallocating resources is sensible, but courthouses are a vital part of small communities and there is strong resistance to closing them.
- Any changes should not prevent anyone having access to face-to-face justice.
- Technological advances offer opportunities for improving people's connections with the courts and increasing efficiency, but there are costs and dangers involved.

What we could do

- Enable courts in rural areas also to function as justice information centres, and as venues for law-related services, such as mediation, legal advice and restorative justice.
- Make greater use of video and audio technologies in the courts.
- Speed up the use of information technology to improve public access to legal information and court processes.

What do you think? Turn to page 244 to respond.



Representation (page 73)

We look for: improved access to quality representation in court for all New Zealanders.

Key issues

- Our court system assumes that people coming before the courts will be represented by qualified, capable lawyers.
- There are a number of arguments for legal representation in an adversarial system, including effectiveness, fairness, legitimacy, efficiency and ethics.
- Some New Zealanders engage with the court system without adequate representation.
- It appears that increasing numbers of people are engaging with the court system without any representation at all.
- There are significant disadvantages to self-representation for the person, the other parties, and the system as a whole.

What we could do

- Improve existing services:
 - provide more information about legal aid lawyers
 - require the police to promote the Police Detention Legal Assistance Scheme
 - increase resources for, and awareness of, the Duty Solicitor Scheme.
- “Unbundle” legal services, so that there is a division of work between lawyers and clients.
- Provide better information for self-represented litigants.
- Simplify procedures and forms.
- Assist court staff in dealing with self-represented litigants.
- Pilot self-help kits in appropriate areas of law.
- Explore establishing self-help centres in New Zealand.
- Allow successful self-represented litigants to recover costs for work done in preparing and presenting cases.
- Reconsider the approach to and possibilities for lay representation.

What do you think? Turn to page 245 to respond.

Costs (page 85)

We look for: a court system where access to the courts for those with a legitimate interest is affordable.

Key issues

- Access to the courts needs to be affordable. New Zealanders consider the cost of court action to be too high.
- Lawyers' fees are the biggest cost for court users. Fees are usually calculated on an hourly basis, which may not be the best billing method for court users.
- There is little comparative price information available about appropriate fee levels for lawyers, and it can be hard to get quotes.
- Court fees cover about 15 percent of the costs of the civil court system but there is debate over the extent to which private users should subsidise the court system through court fees.
- Costs awards in favour of successful litigants generally do not cover the full cost of going to court.
- An increasing number of people do not qualify for legal aid but cannot afford the full costs of litigation.
- The amount the Government spends on legal aid is increasing, although fewer people qualify for it.

What we could do

- Lawyers' fees:
 - encourage alternative billing methods like flat fee arrangements and conditional (success-based) fee arrangements
 - investigate using benchmarks to influence legal fees between lawyers and clients, eg, cost recovery mechanisms and legal aid pay scales.
- Information about lawyers' fees:
 - encourage greater disclosure of fee information by lawyers, including costs agreements with clients.
- Court fees:
 - consider alternative cost models that give incentives for parties to use alternative dispute resolution and to shorten legal proceedings.
- Cost recovery:
 - review the current civil cost recovery rules in the High Court, the District Court and/or the Family Court
 - strengthen the cost consequences of the "offer to settle" rule against parties who refuse a settlement offer but do no better in court.
- The legal market:
 - undertake legal fee surveys to provide comparative fee information, possibly through the Commerce Commission, the Legal Services Agency or the Law Society
 - encourage the state to take a more direct role in monitoring and publishing the costs of its legal services.

What do you think? Turn to page 246 to respond.



Part Three: Court Processes

Criminal Justice Processes (page 101)

We look for: fair, open, efficient, proportionate, and humane criminal justice processes, which safeguard the rights of all parties.

1) Outside the court

Key issues

- Forms of alternative justice models have developed in an ad hoc manner, leading to a lack of uniformity and prescription.
- Flexibility is needed to allow the police and other enforcement authorities to exercise their discretion, but the rights of the individual must also be protected.
- Important points, when considering alternative justice models, include: the need for a clear purpose, criteria as to who is and who is not eligible, the roles of the parties, the rights of the offender and the victim, and the structures necessary for effective monitoring and good practice.

What we could do

- Define and standardise police discretion about when to caution, warn or divert.
- Introduce an independent state prosecution service.
- Broaden use of restorative and therapeutic justice models.
- Standardise and align minor offence and infringement offence processes.
- Change some minor offences to infringements so they do not result in a criminal conviction

2) Criminal list

Key issues

- The registrar's call-over and the criminal list court are the "clearing houses" of the criminal justice system.
- The criminal list process should both accord with principles of natural justice and be efficient. However, many people find the experience confusing and alienating.



What we could do

- Make sure that people entering the courthouse are met and given sufficient information about what to do.
- Make sure there are enough duty solicitors to spend sufficient time with each offender who needs help.
- Supplement the current range of registrar's powers so that more preliminary steps can be undertaken by them.
- Organise the process so that registrars exercise their powers outside the courtroom and throughout the day.
- Reserve for the judge only truly contested issues arising under the summary criminal jurisdiction.
- Make sure that anyone who has to appear for a second or third time is given an appointment time that is as definite as possible.

3) Criminal jury trial management

Key issues

- The process must meet two fundamental principles: the Crown has the burden of proving the case against the accused, and the accused is entitled to remain silent.
- Factors contributing to delay in criminal trials are poor definition of issues, incomplete disclosure, and excessive preliminary hearings.
- Before making a plea, an accused person must assess the strength of the prosecution's case against them. It is therefore essential that the prosecution disclose its case at the earliest possible stage.
- An efficient trial process depends on early and definite pleas, and early identification of the issues in dispute so that the length of trial can be better predicted and a definite trial date set.
- Legislative amendment is already planned to address some of these issues.

What we could do

- Ensure early and complete disclosure of the Crown's case.
- Identify the issues in dispute well before trial.
- Strengthen sentence discounts for those providing early and certain pleas.
- Raise the threshold for jury trial to offences so that more offences can be heard by a judge alone.

What do you think? Turn to page 247 to respond.

Civil Justice Processes (page 124)

We look for: widely available, just, fair, comprehensible and accessible civil justice processes, which are proportionate to the dispute.

1) Alternative Dispute Resolution (ADR)

Key issues

- The adversarial approach can discourage people from working together, may lead to delays and inefficiency and may not always be the best way to resolve disputes.
- Mediation can be cheaper, faster, and more flexible than litigation but many lawyers and judges have reservations about its incorporation in general court processes.
- There is currently no state-funded general mediation service in New Zealand, and courts do not have a general power to order parties to mediate.

What we could do

- Introduce a state-funded community-based ADR service.
- Make mediation compulsory for all cases going to court.
- Give judges the discretion to order parties to attend mediation.
- Use sanctions, such as cost orders to encourage parties to attempt mediation before coming to court.
- Encourage government departments to use ADR whenever possible.

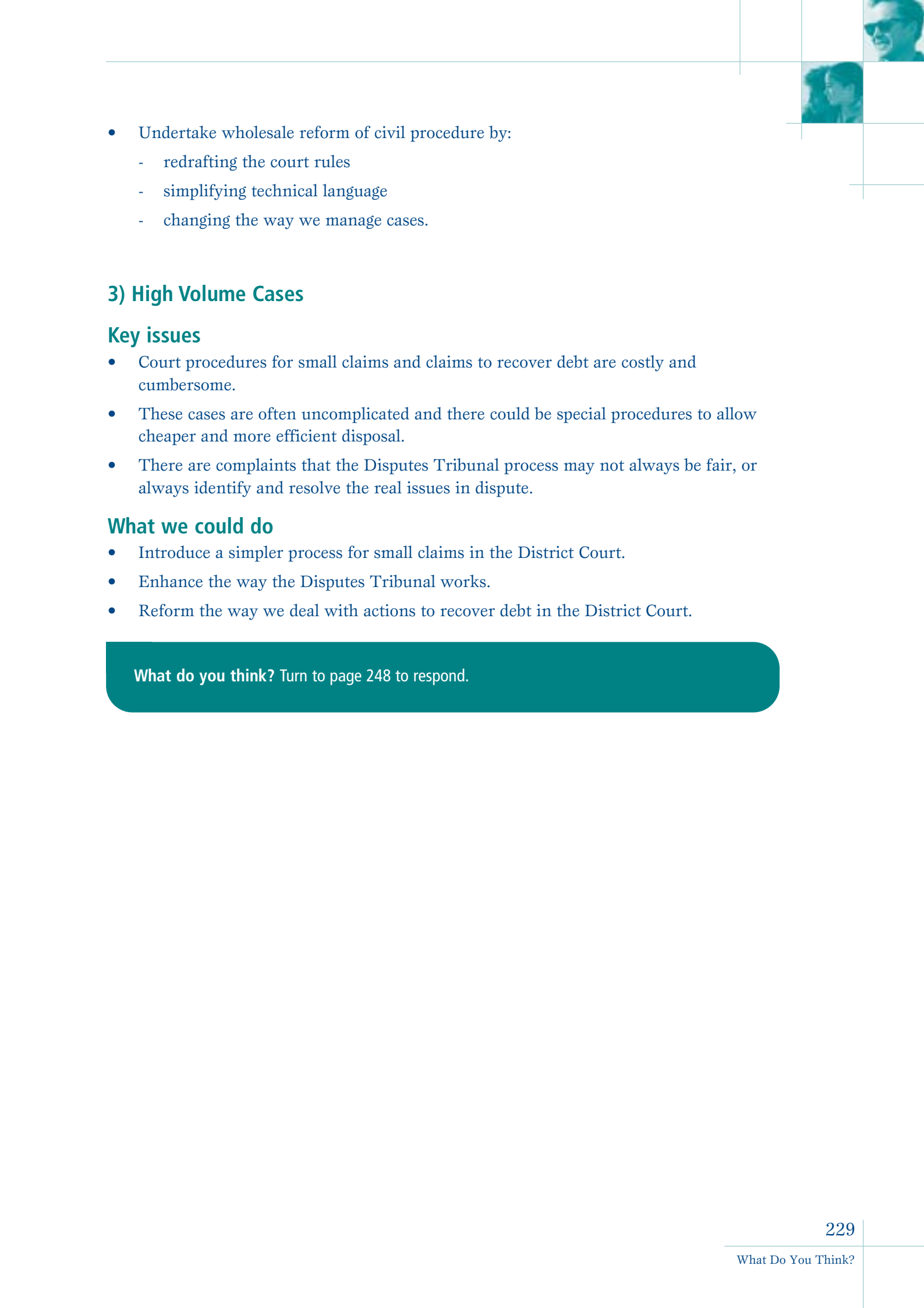
2) Court and Case Management Processes

Key issues

- Where litigation cannot be avoided, court procedures should be proportionate to the claim, and actively managed to ensure efficient, inexpensive and timely resolution.
- The civil jurisdiction of the District and High Courts is currently seen as slow, costly and complicated.
- The introduction of case management in New Zealand has been criticised as piecemeal, inconsistent, and insufficiently rigorous.

What we could do

- Strengthen our existing case management practices.
- Introduce procedural reforms, such as:
 - pre-action protocols
 - pre-lodgement notice of claim
 - changing the rules for offers to settle
 - early neutral evaluation
 - restricting the scope of discovery and the extent to which it is controlled by the court
 - increasing court control over expert witnesses.

- 
- Undertake wholesale reform of civil procedure by:
 - redrafting the court rules
 - simplifying technical language
 - changing the way we manage cases.

3) High Volume Cases

Key issues

- Court procedures for small claims and claims to recover debt are costly and cumbersome.
- These cases are often uncomplicated and there could be special procedures to allow cheaper and more efficient disposal.
- There are complaints that the Disputes Tribunal process may not always be fair, or always identify and resolve the real issues in dispute.

What we could do

- Introduce a simpler process for small claims in the District Court.
- Enhance the way the Disputes Tribunal works.
- Reform the way we deal with actions to recover debt in the District Court.

What do you think? Turn to page 248 to respond.



Open Justice (page 148)

We look for: a rational, publicly acceptable balance between the principles of openness and protection of privacy in courts.

Key issues

- There is debate over the exclusion of the public from Youth Court and Family Court proceedings, some believing this is important to protect privacy, and others asserting the public's right to know.
- There are conflicting views over name suppression and the circumstances when it is appropriate.
- There is some opposition to restrictions on reporting court hearings in the media and on barriers to access to court files during and after the court process.
- There is criticism of the closed nature of hearings that happen in the judge's chambers rather than in an open courtroom.

What we could do

- Name suppression:
 - automatically grant name suppression until there is a conviction
 - set out guidelines in legislation as to when name suppression should be granted.
- Family Court:
 - open the Family Court to the general public at most stages of the process
 - make the Court generally open to the public, but give the judge discretion to order a closed court or bar particular people
 - hold hearings in private but allow the media to be present
 - have the court open in general, but allow parties to request a matter be heard in private
 - provide for some proceedings to be open and some private, depending on the type of proceeding
 - continue to hold all Family Court proceedings in private.
- Publishing proceedings of the Family Court:
 - publish all proceedings in the Family Court without restriction
 - publish proceedings, but with all identifying information removed
 - publish proceedings only with the court's permission
 - retain the present situation where publication in the media is prohibited but reports of proceedings can be published in relevant journals.
- Civil records:
 - grant a general right to inspect court files, whether or not a case has been settled.
- Civil chambers hearings:
 - allow the public to attend chambers hearings.

What do you think? Turn to page 249 to respond.

Part Four: Court Structure

General Courts (page 155)

We look for: a court structure that fosters competent, accurate, efficient decision-making in proportion to the issue to be settled.

Key issues

- The District Court's workload has greatly increased in volume and diversity.
- This has led to delays, made the District Court less accessible, and created difficulties in balancing work.
- Some people feel that the civil caseload of the District Court takes second place to its criminal workload, and that its judges are selected for their skills in criminal law, not civil.
- The creation of a middle band of criminal offences has led to uncertainty and anomalies in criminal law and creates organisational problems for the District Court.
- The major factor in determining where general civil cases will be heard is the amount of money at stake, but this does not necessarily reflect the complexity or length of the case, or the importance of the issues.

What we could do

- Retain a separate High Court and District Court, but:
 - increase the overlap between the civil and criminal jurisdiction of the courts with case allocation based on the complexity and importance of the case
 - extend probate jurisdiction to the District and/or Family Court, as well as the High Court
 - start all "middle band" cases in the District Court, with a right to apply to move to the High Court
 - create a new or increased role for masters or judicial registrars to deal with work of a more administrative nature.
- Establish a new court below the District Court, or a new division of the District Court, to deal with some less serious high-volume civil and criminal work.
- Unify courts:
 - merge the current District Court and High Courts into one unified court with both civil and criminal jurisdiction
 - divide this unified court into civil and criminal divisions
 - create two separate courts, one criminal and one civil.
- Establish a single point of entry at the District Court for most cases.

What do you think? Turn to page 250 to respond.



Specialist Courts (page 173)

We look for: a court structure that fosters competent, accurate, efficient decision-making in proportion to the issue to be settled.

Key issues

- Increased legal specialisation brings pressure for greater specialisation in the courts. However, there are also constraints, including New Zealand's small number of judges, especially at High Court level.
- There is some concern, particularly in commercial cases, that generalist judges are unfamiliar with specialist areas of law, and that there is no formal process for allocating judges with specialist expertise to relevant cases.
- Increasingly complex land-related cases are leading to calls for specialisation.
- Some existing specialist courts face a number of issues:
 - the Family Court has absorbed significant increases in work, which may have strained its resources
 - the Environment Court has a heavy workload, and some question its current position in the court hierarchy and appeal path
 - there is a question as to whether the Employment Court should be maintained as a separate court.

What we could do

- In relation to commercial cases:
 - create a specialist forum for commercial litigation through a specialist commercial court, specialist commercial divisions of the High and District Courts, or extension of the commercial list
 - create procedures for designating judges with commercial expertise to relevant cases
 - expand the role of masters, to specialise in commercial matters and/or sift cases for allocation to specialist commercial judges.
- Create a specialist court for land-related cases.
- Address the workload of the Family Court by establishing it as a separate court from the District Court, appointing “judicial registrars” to assist in preliminary matters, and/or sharing Family Court property work with the general courts and the Disputes Tribunal or a land court.
- Make changes to the Environment Court:
 - make it part of the High Court or remain a separate court at, or nearer to, High Court level
 - have appeals go to the Court of Appeal rather than the High Court, or if appeals continue to go to the High Court, have them heard by judges with environmental expertise
 - divide the work between an inquisitorial tribunal and a specialist court.
- Transfer the work of the Employment Court to the general courts.

What do you think? Turn to page 251 to respond.

Māori Land Court and Māori Appellate Court (page 187)

We look for: a principled, accessible and acceptable court process for cases involving communally owned Māori assets and other significant Māori issues.

Key issues

- While the Māori Land Court gives effect to tikanga Māori in its work, there is still concern that the court remains essentially a Pākehā institution. This is seen to conflict with the rangatiratanga guarantees of the Treaty of Waitangi.
- Some Māori call for extensions to the jurisdiction of the Māori Land Courts to include a number of new areas of work including Treaty settlements, family and natural resource issues.
- Māori regret that the provision for Māori Land Court judges to sit as Alternate Environment Court judges has been used rarely and would like to see more Environment Court judges appointed who understand Māori values and terms.
- There is some concern regarding the exercise of judicial discretion in the Māori Land Court in initiating investigations into the affairs of land-holding trusts and incorporations.
- Māori generally consider there is too much scope for the general courts to be involved in the administration of Māori land.

What we could do

- Allow pūkenga and kaumātua to sit in the Māori Land Court to assist parties to resolve their own differences through mediation.
- Widen the jurisdiction of the Māori Land Court to include all assets owned by traditional kin groups, including the resolution of disputes arising out of Treaty of Waitangi settlements, and/or give Māori Land Court judges the ability to sit as Family Court judges in property and guardianship cases.
- Facilitate the sitting of Māori Land Court judges in the Environment Court, where significant Māori issues are at stake or Māori parties are involved.
- Better define the ability of judges to initiate investigations into the affairs of land-holding trusts and incorporations.

What do you think? Turn to page 252 to respond.

Tribunals (page 196)

We look for: a principled, accessible, transparent, effective and efficient framework for the operation of tribunals.

Key issues

- A large number of tribunals exist in New Zealand, varying widely in structure, processes and rights of appeal, which raises concerns of consistency, efficiency and coherence.
- Some believe that the state should intervene in the operation of tribunals and others believe that they should regulate themselves.
- Tribunals that perform a purely adjudicative function are criticised for encroaching on territory better suited to the courts.
- It has been suggested that the work of tribunals that have a more administrative function should be done by government departments.
- There is concern that the advisory and policy functions of some tribunals may give rise to conflicts of interest.
- There is concern that conflict of interest can arise where tribunals are serviced by an agency with a direct interest.
- There is debate over whether non-legally qualified people should serve on tribunals.

What we could do

- Structural possibilities:
 - keep the status quo of distinct tribunals
 - merge tribunals to form a smaller number of larger bodies
 - create an umbrella structure for all tribunals.
- Administrative possibilities:
 - introduce new structures where needed to ensure independence is not compromised
 - have all tribunals administered by the Tribunals Division of the Department for Courts.
- Procedural possibilities:
 - strengthen existing guidelines for formulating tribunal procedures
 - introduce a common system of rules and procedures
 - retain different procedures for each tribunal.
- Appeal possibilities:
 - remove the right to appeal from tribunal decisions but retain the right to judicial review
 - provide for a first level of review to be undertaken by a presidential member of a tribunal
 - introduce a single appellate procedure for all tribunals.

What do you think? Turn to page 253 to respond.



Appeals (page 207)

We look for: a coherent, high quality appellate system.

Key issues

- The current workload of the New Zealand Court of Appeal is high compared to overseas counterparts.
- Below the Court of Appeal, most judges undertake both first instance and appeal work. Some suggest that appellate courts should be made up of judges who specialise in hearing appeals.
- Most appeals go from one trial judge to another single judge. Some argue that it would be better for the number of judges to increase as the matter proceeds to appeal.
- There are inconsistencies in the New Zealand system as to why appeals from certain courts are directed to one court rather than another.
- The complicated nature of paths of appeal in criminal cases causes confusion.
- Concerns have been expressed that when appeals from specialist courts, such as the Family Court, are directed to a general court the element of specialisation is lost.

What we could do

- Establish a single appellate court to deal with all first appeals.
- Retain limited appellate jurisdiction in the High Court for appeals from lower level criminal and civil cases, with all other appeals going to a new Court of Appeal.
- Establish specialist appellate courts for some subject areas.
- Establish an appellate division of the High Court to hear all appeals against first instance High Court, District Court and tribunal decisions.
- Establish an appellate division of the High Court to hear all appeals from District Courts and tribunals, but with appeals from first instance decisions of the High Court going to the Court of Appeal, as at present.
- Address the specific issues facing the current system of appeals without undertaking fundamental structural change.

What do you think? Turn to page 254 to respond.





What do YOU THINK

Submissions

Please indicate if your submission is from:

an individual [tick]

a group or organisation [tick]

if a group or organisation,
please indicate how many people
your submission represents [number]

If you are willing for us to contact you to seek more information about your submission, or send you the final “recommendations” paper in this review of the courts, please supply your name and address.

Submissions are due by Easter - 17 April 2003

The Law Commission’s processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the commission will normally be made available on request, and the commission may mention submissions in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.





Part Three: Court Processes

Criminal Justice Processes

What improvements can we make so that we have a fair, open, efficient, proportionate, and humane process, which safeguards the rights of all parties?

Horizontal lines for writing the answer to the question.



Part Four: **Court Structure**

General Courts

What improvements can we make so that we have a court structure that fosters competent, accurate, efficient decision-making in proportion to the issue to be settled?
