REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE

SUBMISSION

[4680 WORDS]

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INTRODUCTION

01. A number of important reforms to civil procedure have been introduced in recent years, many of which have been very positive. They extend to discovery, lodgments, appeal papers, case-management, legal submissions, the scope of books of authorities. They have been overlaid upon the architecture of the 1986 Rules of the Superior Courts, however. The scale of change which the litigation landscape has undergone in the thirty years since though, means that the time is perhaps now ripe for substantial modernisation of the rules of civil procedure.

02. It should be emphasised that this submission is not derived from empirical research or systematic analysis but is made in a personal capacity based on subjective experience as a practitioner, and a basic familiarity with alternative processes which apply in other common law jurisdictions and their perceived success or otherwise.

03. It is submitted that the following overarching principles should subtend the introduction of any procedural reforms regarding the administrations of civil justice:
    - Ensuring the fair and just resolution of legal disputes;
    - Promoting access to justice, through affordability and clarity;
    - Achieving efficiency, consistency and cost-effectiveness in the administration of justice;
    - Delivering a civil justice system which responds to the needs of modern society.

04. Procedural reform should also be accompanied by a basic Civil Evidence Act to facilitate the efficient administration of civil justice.

05. Whilst it may well be that many of the existing procedures should be preserved in modified (or in some cases un-modified) form, the introduction of a new, streamlined civil procedural code would present the opportunity to deliver a modern and more accessible system of civil justice. The following are a selection of proposals for consideration by the Review Group, which predominantly concern High Court and Appellate Court practices. Many of these recommendations represent simplified or more systematic applications of existing provisions or procedures.

(A) IMPROVING PROCEDURES AND PRACTICES; REMOVAL OF OBSOLETE, UNNECESSARY OR OVER-COMPLEX RULES OF PROCEDURE

06. This submission recommends the following principal proposals:

i. Limiting Time for Oral Submissions

ii. Reforms to Interlocutory and Procedural Motions

iii. Adopting standard directions timetables for (i) complex and (ii) non-complex cases, with facility for variations to same;

iv. Simplifying pleading documents and reducing the variety of originating documents;

v. Facilitating use of interrogatories & admissions in ease of discovery;

vi. Pre-Trial Steps to include:

Pre-trial conference in complex litigation;

Outlines of proposed witness evidence;

Issue lists and chronology;

Lodgement of core books;

vii. Simplifying tender/settlement offer processes.

I. LIMITING TIME FOR SUBMISSIONS

07. Time for oral submissions should be limited as a matter of course. This is routine in very many jurisdictions and will ensure more focussed submissions.

08. Interlocutory Appeals: There are currently significant backlogs in the Court of Appeal. Delays in the hearing of appeals on interlocutory matters is particularly undesirable. Save with leave of the Court, most interlocutory appeals should be primarily based on written submissions, with oral argument limited to circa 15 minutes for each party. This would facilitate much more expedited hearing of interlocutory appeals.

09. Trials: Trial judges should have the power to impose limits on submissions within standard ranges. It is submitted that in all but very lengthy cases, concluding submissions could be restricted to 45 minutes each, and in many cases 30 minutes would suffice. If submissions are to be limited, it would be sensible to introduce 'protected time' for Counsel perhaps in the order of 10-15 minutes. It is also submitted that in all but very lengthy cases, openings should be restricted to 30 minutes to 1 hour.

10. Serious consideration should also be given to requiring Counsel to estimate witness times, with some reasonable flexibility allowed. A contingency of circa 20% could be built into estimates. Where it is exceeded, Counsel would ordinarily be expected to catch up at some stage in the trial. Whilst latitude has always been afforded Counsel in cross-examining witnesses, it should not be regularly permitted to compromise the efficient running of trials, which is an equally important objective of an effective system of justice.

II. REFORMS TO INTERLOCUTORY AND PROCEDURAL MOTIONS

11. Many current procedural motions do not necessarily warrant full Court hearings. This submission proposes the introduction of case conferences, so it would be important to eliminate interlocutory costs elsewhere, including unnecessary procedural motions.

12. Most motions for default of appearance and pleading should not require a full court hearing. The next section of this submission outlines proposals for default timetables for directions. The initial consequences of default might be relative automatic. On the expiry of the standard time provided for any event, an 'overdue notice' would automatically issue to the defaulting party. Failing delivery of the relevant document within a further 14 days, a costs award would be imposed against the defaulting party and a further extension of 14 days would be provided, though no court application would be ordinarily required on the first default. (A defaulting party could apply for an extension of this time).

13. On the occurrence of a second or subsequent default, a court motion would be required, where default judgment or strike out would be a possibility, though extremely rare. In the case of second defaults, an adverse costs award without a stay would be the standard outcome. Motion forms could be simplified with solicitors certifying a brief chronology and the applicable directions timetable, and if appropriate any reason why further extension should not be permitted any response would simply identify reasons why standard orders should not be made.

14. Whilst it may be appropriate to retain Monday listing for some motions, it is submitted that it may be sensible to move towards motions being listed across more days of the week, perhaps commonly between 9:30 and 11.00, with 15 or 30-minute listings. Most judges allocated for trial would then be afforded a break between 11:00 and 11:30, which would be commonly occupied by discussions between parties, before hearings would commence.

15. A single rule should identify what motions may be brought ex parte.

16. Motion dockets could be simplified (per current ex parte dockets) to indicate:
    - Title of Proceedings and Record No.
    - Applicant & Respondent
    - Orders Sought
    - Documents / Evidence to Be Relied Upon
    - Solicitor contact details

III. STANDARD DIRECTIONS TIMETABLES

17. Plaintiffs should be required to indicate whether they assess their claim to constitute (i) complex or (ii) non-complex litigation, in which case default timetables for exchange of pleadings and case progression will apply. On the application of either party a court may form a different view.

18. Complex should be understood in the sense of requiring significant court supervision. Most litigation is to be regarded as non-complex. Most claims for personal injuries, liquidated debts, defamation, judicial review and pure issues of law would be non-complex.

19. A very rough mooted standard timetable for each is identified in Schedule 1 of these submissions. It is vital that default timetables not be overly ambitious for the needs of standard proceedings, so that they would risk being more honoured in the breach that the observance. Application could be made for variation of these timetables (either acceleration or deferral) by consent or in default of agreement, by application to the court. Solicitors should be able to engage with scheduling software maintained by the courts services.

20. It is submitted this may achieve greater routine pace of progression of litigation, and may also achieve cost efficiencies, in terms of initial motion costs around default.

IV. SIMPLIFICATION OF ORIGINATING PLEADING DOCUMENTS

21. Unnecessary distinctions between differing originating documents should be eliminated.

22. It submitted that summonses should follow a relatively standardised format where possible. All Plaintiffs/Claimants should be required to complete a Claim Form/Summons setting out the following matters:
    A. Court in which claim is being pursued;
    B. Broad Nature of Claim, per exhaustive enumerated categories:

       e.g. i) Personal injuries; ii) Plenary Damages/Debt Action; iii) Other Plenary Action; iv) Statutory Appeal; v) Judicial Review; vi) Companies Act application; v) Issue of Pure Law (i.e. matters formerly subject of special summons)
    C. Parties and their description;
    D. Statement of Material Facts;

       e.g. decision impugned (if applicable); description of legal duties owed; particulars of facts comprising the wrong.
    E. Statement of Losses or Damage;
    F. Cause/s of Action;
    G. Applicable legislative provisions.

23. Where urgent (e.g. injunctive) reliefs are sought, provision could be made for completion of an abridged claim form. Provision would be made for summary judgment following initial exchange of pleadings, where appropriate.

24. Pleadings should annex any document specifically referenced in the pleading where practicable, or same should be provided as a matter of initial disclosure within a further

14 days. Provision could be made for excusing this requirement in limited circumstances. (see NZ High Court Rules 2011). There should be no obligation to disclose at the pleading stage what expert evidence will be called.

25. The practice of requesting extensive particulars should be discouraged and should be limited to complex litigation. Measures requiring initial documentary disclosure, and later issue lists and precis of witness evidence should obviate requirements for extensive particulars.

V. INTERROGATORIES AND ADMISSIONS

26. The use of interrogatories and notices to admit facts prior to and in ease of discovery should be widely encouraged.

27. It should be permissible to raise up to 25 closed-question interrogatories, prior to discovery (or subsequent to discovery) without leave of the Court. Delivery of greater numbers of interrogatories would require leave of the Court.

28. More widespread use of Notices to Admit facts should likewise be encouraged. Omission to respond to same can be matter which may be raised at pre-trial conference, and made the subject of directions.

VI. PRE-TRIAL STEPS

29. ***Pre-Trial Conference*:**

There should be at least 1 pre-trial conference in any case called on for longer than ½ a day, scheduled shortly after the matter is set down for trial. If the parties agree or the court designates, such pre-trial conference may be dealt with before a registrar. An issue paper together with a chronology and core pleadings should be lodged 7 days in advance of the pre-trial conference.

In complex cases, the court may direct that the parties' experts would prepare an experts issues' paper. Conferences may last as little as 15 minutes in routine cases, but should not ordinarily exceed 1 hour.

30. ***Issue Paper*:**

Parties should be required to prepare an issue paper – preferably agreed - comprising no more than 3-4 pages, with a chronology appended. The issue paper should address:

(1) agreed issues;

(2) factual issues in dispute;

(3) legal issues in dispute;

(4) issues on which expert evidence will be adduced.

In the event there is disagreement between the parties as to the composition of the issue paper, the issues which both parties agree should be included in it should be set out first, followed by issues the inclusion of which is disputed.

31. ***Witness Statements*:**

In cases scheduled to last 4 days or upwards, parties should be required to deliver witness statements. Save in the case of expert witnesses, these should not normally exceed 750-1500 words.

In cases scheduled to last less than 4 days, parties should be required to provide a schedule of proposed witnesses and a précis of their intended evidence (no more than 200-400 words each).

Limited fixed costs would be recoverable in respect of witness statements which should adhere to the ordinary language of the witness. Ordinarily, witness statements would be delivered subsequent to discovery, unless the Court considers that the necessity for general discovery could be obviated.

32. **Lodgement of core books:**

Parties should be required to agree a core book, which in the case of cases scheduled to last less than 4 days should not, save in exceptional circumstances exceed a single lever arch folder. This should be lodged 7 days in advance of trial or in accordance with any court directions. If there is dispute as to its composition, a supplementary folder can be lodged by either side.

VII. SETTLEMENTS AND LODGMENTS

33. The rules around settlement offers and lodgments should be simplified. The following principle underpins this submission:

Where the relief claimed is monetary damages, it is almost universally desirable that the parties should resolve their differences without the need for trial. If an offer for the proper value of the claim is made, a plaintiff should only be entitled to their costs up to that date.

Lodgement/Tender

34. It should be permissible for a defendant to make a lodgment (or any approved entity a tender) at any time. Similarly, they should be permitted to augment that sum at any time up to a maximum of 2 occasions, without leave of the court. A lodgment shall be presumed to be in satisfaction of the entire claim, though it may be made clear that it relates to a specific cause of action. A lodgment should be capable of being accepted within 14 days of the offer or at any later date with the consent of the Defendant or the permission of the Court.

35. If the damages achieved do not exceed the lodged sum, any costs from after the lodgement or tender are made shall not be recoverable, save where special cause is shown.

36. Consideration should be given for provision to be made for non-approved parties to acquire a bond from an approved bond-provider (such as an insurer) *in lieu* of a lodgment. Provision for tenders as between defendants should be preserved.

Formal Settlement Offer

37. Separately the rules should formally provide for settlement offers ("**Formal Offer**") to be made by either party at any time in lieu of tender/lodgment, though in such instances, in deciding upon the award of costs, the courts will retain a greater discretion. The Part 36 Offer procedure in England & Wales has much to commend it.

38. A Formal Offer would be made without prejudice save as to costs. A standar period for acceptance would apply (e.g. 14 or 21 days). It may be made either pre-action or at any time up to judgment. It must:
    - be in writing;
    - be described as a "Formal Offer";
    - specify whether it relates to all or part of the claim;
    - if there is a counterclaim, it must make clear what impact if any it has on that. If it fails to, the counterclaim is deemed to be compromised also).

39. A Formal Offer must be accepted in writing, and may not be withdrawn during the period wherein it is operative. Court permission is required for later acceptance where the Defendant does not consent, and the court may impose such terms on late acceptance, including in relation to costs as it deems just.

40. Ordinarily, payment under a Formal Offer must be made within 8 weeks of acceptance or such other period as is stipulated in the Formal Offer and may be agreed between the parties.

41. In the event of failure to make payment per an accepted Formal Offer, application may be made at the election of the Plaintiff to re-enter the proceedings or to enforce the Formal Offer as a final judgment.

42. A Formal Offer may be made by the Plaintiff as well as the Defendant. In the event a Plaintiff obtains judgment on at least as advantageous terms as the Formal Offer, the Court may consider imposing either costs on an indemnity basis or interest on costs from the date of offer, at the rate of 4% per annum.

(B) REVIEWING THE LAW OF DISCOVERY

43. Discovery currently accounts for a disproportionate share of litigation costs and results in significant delays in the resolution of much legal proceedings. Whilst the move towards category-based discovery in 1999 seemed laudable, the use of open-textured language in defining categories and the multiplicity of categories commonly requested has resulted in a very expensive and protracted process. Whilst the volume of electronically stored data has increased exponentially over the past 20 years, developments in software have created the potential for more cost-effective relevancy-based document retrieval.

44. It is submitted that the following principles should underpin any reform of discovery obligations:

- Discovery obligations must be proportionate to the litigation; i.e. cost-efficiency is a valid consideration in the just resolution of disputes;
- Trial by ambush should be avoided;
- Relevant documents should not be suppressed by the parties;
- Discovery should not be permitted to be used as a tool of oppression in litigation
- Discovery should be based around issue papers, or in default of agreed issue papers, the pleadings.

45. Writing in 2002, the New Zealand Law Commission assessed that the primary cost of discovery is the need to compile a written indexed list of documents (NZLC – Rep 78 – General Discovery). New Zealand, Australia and the United Kingdom all favour standardised discovery, albeit more restrictive than the *Peruvian Guano* test, to category-based discovery.

46. In 2012, New Zealand introduced an approach based around basic discovery obligations which may be supplemented, where appropriate with tailored discovery (see 2012 New Zealand High Court rules). It is submitted that there is much to commend such an approach, favouring a basic level of discovery based around issue papers with provision for tailored discovery, or conversely for discovery to be dispensed with.

47. It is submitted that reforms in relation to the following aspects of discovery should be considered:
    - Formalising the obligation on parties to cooperate re: discovery;
    - Introduce pre-discovery case conference in complex litigation;
    - Abandonment of category-based discovery and re-introduction of standard discovery based on pleadings and issue papers;
    - Establishment of Rules Committee E-discovery Working Group tasked with promulgating e-discovery protocols;
    - Provision that documents generated post-litigation will be non-discoverable save in exceptional circumstances;
    - Introduction of clear protocols around redaction in relation to production of discoverable documents;
    - Provision in the rules for Orders for the following:
        - Dispensing with the need for discovery;
        - Varying discovery orders on proportionality grounds;
        - Providing for tailored discovery: production of specific documents or categories;
        - Directions re: protocols for e-discovery;
        - Further and better discovery orders;
        - Inspection facilities, including e-discovery inspection.

Co-operation

48. Parties should be required to ensure that the discovery process is proportionate to the proceedings. They should take steps to preserve relevant documents and endeavour to agree approaches to reduce the burden of discovery, such as agreed formats for making

e-discovery, e-discovery search methodologies, technology platforms, identifying relevant custodians and devices, etc. Good practice guides by the likes of the Commercial Litigation Association of Ireland can be drawn on towards developing reasonably standardised discovery checklists.

Initial disclosure

49. Ordinarily, no later than 14 days from delivery of pleadings, a party will be expected to make disclose or produce:
(1) any document expressly referred to in the pleading; and
(2) any non-privileged document relied upon in preparing the pleading on which the party may intend to rely on at hearing.
This initial disclosure of centrally relevant documents is provided for in New Zealand (see Part 8 High Court Amendment Rules) P and may hopefully ensure more focussed subsequent discovery. Provision may be made for exemption in exceptional circumstances.

Case-conference

50. Given the scale of current litigation costs currently taken up with discovery, it is submitted that in any case in which there is likely to be a large volume of discoverable materials, a pre-discovery case conference is warranted. In advance of any such case conference, an issues paper should be prepared. The following should be lodged:
    - Issue paper
    - Pleadings
    - Any agreed (wholly or partially) discovery checklist or protocol
    - A booklet of document expressly referred to in the pleadings should be available for the court unless objection be made to their admissibility.

51. Effective use of such a process will also require prior co-operation between the respective legal teams around appropriate protocols and methodologies, keyword and predictive searches, etc. It will also necessitate the court being appropriately briefed around discovery issues. The Court may make orders in relation to discovery including for (I) standard discovery; (ii) tailored discovery or (iii) dispensing with discovery.

Standard Discovery

52. The empirical evidence from the UK, and Australia does raise doubts about whether a restriction of the test to confine discovery to 'directly relevant' as opposed to 'indirectly relevant' documents or ones which 'lead to a train inquiry' reduces the volume of discovery material.

53. It is submitted that standard discovery should be introduced requiring the discovering party to make reasonable searches having regard to the scale and complexity of the proceedings; the ease of document retrieval and the number of documents involved.

54. Discovery would be required to be made of the following relevant documents:
(1) Document on which a party intends to rely

(2) Documents adversely affecting a party's own case
(3) Documents supporting the opposing party's case
(4) Documents adversely affecting the opposing party's case
This accords with Australian Federal Court Rules 2011, Rule 20.14 and is consistent with the English approach post-Woolf reforms.

55. An agreed issue paper would be the starting point for determining relevancy, though in default of an agreed issue paper, the pleadings would define relevancy.

56. It may be that certain categories of cases would warrant practice guidance on the scope of standard discovery (e.g. Plaintiff discovery in standard Road Traffic accidents).

57. E-discovery search methodologies (including keyword search and/or predictive searches) can be permitted *in lieu* of individual document review, but they should be sought to be agreed with the other side, and the terms of any such searches should be disclosed. Upon application to the court, and at the expense of the party seeking discovery, application may be made for an independent expert to inspect and conduct additional searches. Such costs may be subsequently recovered if the discovering party's methodologies are adjudged to have been deficient.

58. Discovery should be confined to documents which are or have been in a party's control, including documents held by someone from whom the discovering party would have a right to compel their production.

Modified/Ancillary Discovery Orders

59. Provision should be made for modified or ancillary discovery orders including orders dispensing with discovery; for tailored discovery; for further and better discovery and for directions around e-discovery. Tailored discovery would have to be specially justified and would involve either specific documents or custodians or categories of documents, which would have been justified by the exigencies and/or complexity of the specific litigation. Examples may be found in Part 8 of the New Zealand High Court Rules and/or Rule 20.15 of the Federal Court Rules 2011 regarding the appropriate scope of modified or ancillary orders for discovery. Rule 8.9 of the New Zealand rules provide for certain presumptions as to where tailored discovery would be appropriate.

(C) ENCOURAGING ALTERNATIVE METHODS OF DISPUTE RESOLUTION

60. Adequate pre-action engagement should be required, and should be a key factor in costs awards, though it should be based predominantly around flexible principles rather than rigid, prescriptive protocols. Those principles should be focussed around clear communication of the claim basis, transparent provision of relevant information and reducing the areas of dispute, if litigation cannot be avoided.

61. Express provision should be made in the rules regarding potential costs sanction where there is a failure to write an appropriate pre-action letter of claim. Ordinarily, a letter of claim should set out:
    1. The identity of the prospective claimant/plaintiff and correspondence address;
    2. The nexus/relationship to the prospective defendant;
    3. The general nature of the grievance and the material dates.
       Any relevant agreement should be specifically referenced;
    4. The specific allegation against the defendant;
    5. The loss or damage sustained, quantified where possible;
    6. Nature of redress sought;
    7. Request that the claim be brought to attention of legal representatives or insurers.
    8. Request response within appropriate time, in all the circumstances.
    9. Any documents which the plaintiff requires (if a compromise offer is not forthcoming) may be identified if desired.

62. Letters of claim should ordinarily be acknowledged within 14 days, and substantively responded to within a further month, save where the urgency of the situation merits an earlier reply.

(D) REVIEWING THE USE OF ELECTRONIC COMMUNICATIONS INCLUDING E-LITIGATION AND POSSIBILITIES FOR MAKING COURT DOCUMENTS (INCLUDING SUBMISSIONS AND PROCEEDINGS) AVAILABLE OR ACCESSIBLE ON THE INTERNET

E-Litigation

63. Trial Presentation: The use of electronic trial presentation methods should be encouraged, especially in longer and more complex cases, though not mandated. Flexible protocols should be adopted regarding up-loading of video, audio and image evidence, e-books of core documents, authorities and/or in larger cases, e-booklets for individual witness. Highlighting, though not other markings, of relevant passages are to be encouraged. At first instance hearings, representatives should be expected to agree admission of most evidence and documents in advance for this purpose. The Bula-Fyffes formula should be codified either in the Rules or in a Civil Evidence Act.

64. Automated Processes - Pleading Default: First instances of default of pleadings or litigation should be capable of being dealt with by way of automated electronic notification, followed by imposition of a fixed costs sanction, as outlined above.

65. Fixing Dates: Consideration should be given to providing for application for dates to be routinely conducted by way of parties indicating respectively convenient dates through software applications, with automated allocation of dates thereafter. Provision for application to court in the event of disagreement or urgency should be retained.

Access to Justice

66. In furtherance of the constitutional principle of the open administration of justice, ordinarily, submissions before appellate courts should be available for general inspection

electronically. High Court submissions might also be made available, perhaps for a small administrative fee.

67. There may also be an argument to permit access to filed court pleadings, though not exhibits. Given the potential for disclosure of sensitive data, it should be carefully considered. If this is favoured, it would seem that provision should be made for applications limiting access on particular grounds, anonymisation measures or redaction of sensitive material, consistent with established principles per *Sunday Times v Gilchrist*.

68. In this context, it may be desirable that Summons/Claims forms would provide for the addresses of parties to be lodged in an appendix or schedule so that these items would not be disclosed as a matter of course in the event of pleadings being made accessible.

(E) ACHIEVING MORE EFFECTIVE AND LESS COSTLY OUTCOMES FOR COURT USERS, PARTICULARLY VULNERABLE COURT USERS.

69. It is submitted that pro-active control of trial duration and oral submission length, together with upholding default timelines for case progression, alongside light-touch case management in all but complex litigation has the capacity to achieve more effective case progression and lower legal costs.

70. Whilst the introduction of witness statements in the United Kingdom (and to some extent in the Irish Commercial list) has resulted in another layer of costs, provision for a short précis in all but complex litigation, and the introduction of fixed recoverable costs for these items should avoid excessive costs.

71. It is also submitted that a number of very simple measures can be introduced to achieve more effective outcomes for courts users:
    - Adopt clear and readily comprehensible procedural rules which non-lawyers can reasonably understand;
    - Uphold standard, though not unrealistically demanding, timetables for progressing litigation;
    - Introduce a simple Civil Evidence Act to facilitate efficient proof of documents in civil litigation.

SCHEDULE 1

Non-Complex Litigation

Event	From commencement
Summons/Claim Form	
Appearance	10 days
Plaintiff (Initial Disclosure)	2 weeks
Defence	4 weeks
Defence (Initial Disclosure)	6 weeks
Reply (if any)	7 weeks
Standard Discovery*	14 weeks
Issues List & Chronology	17 weeks
Case Conference	18 weeks
Precis of Witness Evidence	(3 weeks pre-trial)
Submissions	(1 week pre-trial)
Trial Date	

*Note: If application is made for summary judgment, standard discovery is stayed.

Complex Litigation

Event	From commencement
Summons/Claim Form	
Appearance	10 days
Plaintiff (Initial Disclosure)	2 weeks
Defendant Request for Further Particulars of Claim	4 weeks
Replies to Particulars	7 weeks
Defence	9 weeks
Defence (Initial Disclosure)	11 weeks
Reply (if any)	13 weeks
Issue list & Chronology	14 weeks
Case Conference – Discovery	15 weeks
Standard Discovery*	23 weeks
Witness Statements	
Pre-Trial Conference	
Legal Submissions	
Trial Date	