STREAMLINING THE NEW ZEALAND CIVIL JUSTICE SYSTEM

Is it time for further reform?

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Abstract

This paper examines the state of the New Zealand civil justice system and questions whether it is time for further reform. It has been just over a century since the legal profession was urged by Dean Roscoe Pound to address the problems of delay and poor administration. Since that time things have become progressively worse. The demand on court resources has been ever increasing and may even be greater today than what they were in 1906. Failure to address these mounting pressures on the judicial system could eventually render the effective administration of justice impossible. World-wide civil justice systems have experienced numerous problems – such as delay, excessive cost and complexity. Overseas jurisdictions have already examined their civil justice systems and implemented reform. Previously, New Zealand has implemented some of the reforms found overseas, for example, case management systems. However, like the overseas jurisdictions, these reforms have limited success. This limited success led to the Law Commission proposing a complete change of the lower Court system. This paper discusses the reforms which overseas jurisdictions have implemented, previous reforms of the New Zealand civil justice system and the Law Commissions proposed restructure of the courts. Finally, this paper recommends ways in which New Zealand could reform its civil justice system to ensure that it offers a cost effective, simple and speedy way to resolve disputes.

CONTENTS

INTRODUCTION

STREAMLINING THE CIVIL JUSTICE SYSTEM

This paper discusses whether the civil justice system in New Zealand is performing adequately, or whether the system is failing its users and needs to be changed. This paper sets the discussion in the context of the different approaches already established in other overseas jurisdictions, the differing objectives of the parties, the profession and the judiciary. This paper will also consider the shifting attitude towards litigation.

Like other democratic countries New Zealand operates under the Rule of Law. An important element of this is that the State provide its citizens with a court system for the orderly and impartial resolution of disputes in accordance with law. As Lord Diplock found in *Attorney-General v Times Newspapers Ltd*[1] there are 3 requirements for the due administration of justice. His Lordship noted that "all citizens should:

a) Have unhindered access to Courts for the determination of disputes as to their legal rights and liabilities;
b) Be able to rely on the Courts as free from bias against any party and for decisions based only on facts proved in evidence properly adduced; and
c) Once the dispute has been submitted to a Court, be able to rely upon there being no usurpation by any other person of function of the Court to decide it according to law".[2]

But court systems have limitations. One important limitation is that court cases generally produce a winner and a loser. This is because courts find the facts, identify the relevant law and then apply that law to the facts as found. But a "winner takes all" outcome may not be desirable in the long term.

[1] [1974] AC 273 at pg 307, cited in *Solicitor-General v Smith* [2004] 2 NLZR 540.
[2] *Solicitor-General v Smith* [2004] 2 NLZR 540 at pg 548.

Both nationally and internationally, alternative dispute resolution has been promoted as a way to encourage early case settlement and provide for greater flexibility in terms of outcome. Alternative dispute resolution delivers benefits not only to the parties, but also to the courts.[3] The problems which civil justice jurisdictions face in the resolution of disputes by the courts are basically the same world-wide. The concerns are based not only on the limited range of outcomes available but also on the court processes, which are seen as being too expensive, too slow and too complex. The cost, time and complexity of court processes are powerful disincentives to their use, and place some parties at a disadvantage when comparing them to their opponents.

One must be wary that efforts to divert disputes away from the civil court system may run the risk of destabilising the common law institutions. The rise in alternative dispute resolution mechanisms, whilst a good thing, does present a threat to the continued viability of a court system that relies on litigants to raise new, unexplored issues, which help develop the common law. Private alternative dispute resolution runs the risk of possibly ridding the Government of its responsibility to provide neutral decision making in a transparent court system. Even though this risk is present, it is still important to examine how New Zealand can integrate alternative dispute resolution into the civil justice system.

Alternative dispute resolution is aimed at resolving legal disputes outside of the courts. It encompasses mechanisms such as mediation, arbitration and other hybrid processes in which a neutral party facilitates the resolution of disputes. Alternative dispute resolution mechanisms are said to reduce the cost of resolving disputes as such mechanisms are likely to be cheaper and faster than the traditional form of dispute resolution which is judicial proceedings. Generally alternative dispute resolution processes do not focus on the application of law to facts as found (although many arbitrations do have this focus). Accordingly they enable the

[3] These benefits will be discussed later in this chapter.

reaching of resolutions that are best suited to the needs of the parties and their interests. These processes also experience improved *ex post* compliance with the agreed settlement.

Court processes involve adjudication by an independent judicial officer. Adjudication is the legal process by which a state authorised official (a judge) reviews evidence and argumentation, including legal reasoning, set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Lord Denning noted that "in the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role."[4]

Typically courts deal with three types of civil dispute:

1. Disputes between private parties, such as individuals or corporations.
2. Disputes between private parties and the state (including public bodies or officials).
3. Disputes between public officials or public bodies.

Negotiation

Broadly speaking, negotiation can be described as an interaction of interests and influences. Such interactions, for example, involve the process of resolving disputes, agreeing upon courses of action, bargaining for individual or collective advantage, or crafting outcomes to satisfy various interests. Accordingly in some contexts, negotiation is a form of

[4] *Jones v National Coal Board* [1957] 2 All ER 155, at pg 159.

alternative dispute resolution. Negotiation involves two basic elements: the process and the substance. The process refers to how the parties negotiate: the context of the negotiations, the parties to the negotiations, the relationships among these parties, the communication between these parties, the tactics used by the parties, and the sequence and stages in which all of these play out. The substance, however, refers to what the parties negotiate over: the agenda, the issues, the options, and the agreement(s) reached at the end[5]. Except where negotiation is maintained or controlled by law (as in the employment context) the parties have control over both process and substance.

Mediation

Mediation, a form of alternative dispute resolution, aims to assist two disputants in reaching an agreement. The key component of mediation is that whether or not an agreement is reached, and the nature of any such agreement, is determined by the parties themselves rather than being imposed by a third party. In any given case, the dispute may involve states, organisations, communities, individuals or other representatives with a vested interest in the outcome. Mediators use appropriate techniques and skills to open and improve dialogue between disputants, aiming to help the parties reach an agreement (with tangible effects) on the disputed matter. The role of the mediator is to act as a facilitator, communicator, motivator, and scene-setter. The mediator is responsible for creating the right environment for the process to be effective. Mediators must be independent of both the parties, and also impartial. In theory, they must not give legal advice, offer opinions or coerce parties into agreement. A mediator should check that all parties fully understand what they are agreeing to. Mediation can apply in a variety of disputes, such as commercial, legal, diplomatic, workplace, community and divorce or other family or relationship matters[6].

[5] http://en.wikipedia.org/wiki/Negotiation
[6] http://en.wikipedia.org/wiki/Mediation

Arbitration

Arbitration is a legal process for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound. Arbitration is generally described as a form of alternative dispute resolution, although often it has more in common with court proceedings than with processes such as mediation. So it may be more helpful simply to classify arbitration as a form of binding dispute resolution, equivalent to litigation in the courts, and entirely distinct from the various forms of non-binding dispute resolution, such as negotiation, mediation, or non-binding determinations by experts. Arbitration can be thought of as a mini-trial. Yet others may see a mini-trial as quite a distinct process from arbitration.

To some extent a mini trial is a bit of a misnomer because mini trials are not actual trials. They can be more accurately described as a form of non-binding settlement proceedings, which have been developed to resolve disputes between commercial entities. In a mini trial, each side gets a chance to present their case to the arbitral panel. The mini trial is confidential and consists of a summary of the evidence and testimony that would be presented at a full hearing (if required). At a minimum, a mini trial can narrow the issues, and if a settlement is reached, a mini trial can also reduce costs. On the other hand, mini trials can be more expensive when compared to other alternative dispute resolution mechanisms and may not be optimal when the dispute is small. Furthermore, mini trials may not be all that effective where the parties have substantially different bargaining power.

Presently, arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions and is sometimes used to enforce credit obligations. It is also used in some countries to resolve other types of disputes, such as labour disputes, consumer disputes or in some

jurisdictions even family disputes, and for the resolution of certain disputes between states and between investors and states[7].

Overseas jurisdictions have already embraced some alternative dispute resolution procedures to reduce the problems experienced with their civil justice systems. In 1996, the United Kingdom began to implement the recommendations found in Lord Woolf's Report "Access to Justice"[8] ("the Woolf Report"). These reforms include such things as court assisted mediations, active case management by judges and court staff, and imposing costly penalties on those parties that delay the resolution process. Case management can be defined as a structured and formal process, whereby a facilitator has a clear responsibility to help assist the disputing parties, in a planned way, to resolve their dispute. The process must deal with any needs or circumstances that impede the achievement of this resolution. To do this, the parties are helped to access the full range of available, relevant services, from services provided by the court right through to alternative dispute resolution mechanisms.

Since the introduction of these civil justice reforms, the United Kingdom civil justice system has experienced some benefits. For example, the delay that parties once experienced has been reduced. In the Small Claims Court, the time from issue (or filing) to hearing fell from 600 days in 1997 to 522 days in 2000. With claims of £5,000 or under, the time was reduced from 674 days in 1997 to 537 in 2000. Finally, claims for £5,000 or more experienced the largest reduction in delay, from 744 days in 1997 to 450 in 2000[9].

However, some of the perceived benefits of the reforms have not come to fruition. For example, Lord Woolf believed that as a result of his recommended civil justice reforms, costs to the parties would be reduced.

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[7] http://en.wikipedia.org/wiki/Arbitration

[8] Lord Woolf, *Access to Justice* (Final Report), July 1996, Department of Constitutional Affairs http://www.dca.gov.uk/civil/final/index.htm

[9] Department of Constitutional Affairs, *Emerging Findings: Evaluation of the Civil Justice Reforms,* Lord Chancellor's Department, March 2001.

Unfortunately the United Kingdom has not experienced this. In fact the opposite has happened. Costs have remarkably risen. There could be simple explanations for why costs have increased; for example inflation has increased costs regardless of the civil justice reforms. It could also be that counsel are now required to "do more", and to do it at an earlier point in the process, and therefore that has increased costs. For example, counsel are required to attend more case management conferences.

Other jurisdictions have also examined alternative dispute resolution mechanisms to determine how they could be integrated into the civil justice process. The United States, Canada and Australia have implemented procedures such as case management and court assisted mediation. These jurisdictions have noticed that there is a reduction in delay. However, like the United Kingdom, they have seen little or no effect on the cost of civil justice.

International literature[10] identifies five major advantages of alternative dispute resolution. They are:

- An increased rate of settlement;
- Improved party satisfaction with the outcome or the way in which the dispute is resolved;
- A reduced time involved in resolving the dispute;
- A reduction in costs relating to the resolution of the dispute; and
- An increase in party compliance with the agreed solution.

When examining overseas jurisdictions, it is clear that 4 out of these 5 advantages ring true.[11]

Some of the potential disadvantages of alternative dispute resolution are:

- Resolution of the dispute may be delayed if alternative dispute resolution mechanisms either do not work or are unsuccessful.

[10] As discussed in Ministry of Justice, *Alternative Dispute Resolution: General Civil Cases,* June 2004.
[11] This will be discussed further in Chapter 2.

Unsuccessful alternative dispute resolution could potentially make the problem worse;

- If alternative dispute resolution is unsuccessful, it adds to the total legal costs; and
- Settlements may be hard to enforce.

These disadvantages are dependent on the parties who participate in alternative dispute resolution mechanisms. There are limited ways in which to make a party attend or comply with alternative dispute resolution. For example, a party may be granted a stay of proceedings on the proviso that they attend some form of alternative dispute resolution. Outcomes achieved through alternative dispute resolution mechanisms can in some circumstances be enforced. For example, if a mediation results in a settlement agreement, that agreement may be able to be enforced as a contract. Arbitral awards can be enforced through the Courts[12].

Keeping in mind the variables found with the perceived disadvantages, one could reasonably conclude that the advantages outweigh the disadvantages of alternative dispute resolution.

The civil justice system in New Zealand has been slower than overseas jurisdictions to implement alternative dispute resolution mechanisms. The implementation of such mechanisms is dependent on three factors:

1. The awareness of parties and the legal profession of alternative dispute resolution processes;
2. Whether there is the infrastructure to support those who wish to take up alternative dispute resolution; and
3. The perceived advantages and disadvantages of alternative dispute resolution.

The awareness factor could easily be fixed. If information relating to alternative dispute resolution was available when parties filed in the

[12] Arbitration Act 1996.

courts, parties, along with their legal representatives, would be able to make informed decisions whether to pursue litigation or not. New Zealand's infrastructure would need examining to determine whether it could cope with the added responsibility of providing alternative dispute resolution. Even if New Zealand's infrastructure in its current form was not able to accommodate alternative dispute resolution fully, there are ways in which to strengthen it.

CHAPTER ONE

THE WOOLF REPORT

During the 20th century, in the United Kingdom there was a need for a major change to the civil justice system. The civil justice system was heralded as being too complex, too slow and too expensive. Since the mid 19th century there have been numerous reports on aspects of the system[13]. These reports and repeated efforts to reform the system in order for it to better achieve its objectives did not work. Major law reforms of the 19th century aimed at improving access to justice and making it more affordable and less complex were failing. In 1838 the Common Law Procedure Amendment Act simplified procedure, by reducing legal fees and the length of proceedings. Despite this Act being implemented, business litigants began to use arbitration in increasing numbers as a cheaper and faster alternative to going to court.

In 1985, the United Kingdom established the Civil Justice Review "to improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration and in particular to reduce delay, cost and complexity"[14]. When that report was presented to Parliament in 1988, it contained 91 recommendations. In his Interim Report in 1995, Lord Woolf noted that most of those recommendations had been implemented. Interestingly, the key recommendations on court control had not been implemented. Whilst the limited procedural reforms had been received well[15], serious flaws still remained in the United Kingdom civil justice system. In 1992, a joint independent working party was established by the General Council of the Bar and the Law Society to re-examine the justice system. In 1993, the working party reported that the previous problems still existed, stating

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[13] Lord Woolf reported that there had been sixty reports since 1851 dealing with aspects of reform in the English justice system, see Lord Woolf, *Access to Justice* (Interim Report, June1995), Ch. 2, para 2.

[14] Ibid.

[15] The Supreme Court Practice 1993 noted that the reforms were a great leap forward.

"despite the implementation of many of the reforms ... our system of civil justice remains in urgent need of further fundamental reform and modernisation"[16].

Finally, the Department of Constitutional Affairs enlisted the help of Lord Woolf to examine whether the civil justice system could be enhanced. In 1996, Lord Woolf issued his report[17] which highlighted a number of problems with the current United Kingdom civil justice system. Lord Woolf also made hundreds of recommendations for improving access to the civil justice system. Among the various problems identified by the report were the following;

- Civil litigation was too slow and too expensive;
- Wealthy litigants enjoyed a disproportionate advantage over those of more modest means;
- It was difficult to predict in advance how long litigation would take and, therefore, what it would cost;
- The language used in the description of the litigation procedure was difficult to understand, especially for non-lawyers;
- No single body had overall responsibility for the whole system, so different procedures applied to different courts; and
- The process of litigation was run by the litigants, not by the courts. Rules of the Court were often flouted without penalty.

Lord Woolf noted that the key problems were cost, delay and complexity. He went on to note that these three problems were interrelated and stemmed from the uncontrolled nature of the civil justice system and the litigation process. In particular, Lord Woolf noted that there was no clear responsibility for managing individual cases or for the overall administration of civil courts[18]. It is this proposition which lies at the heart of the Woolf Report.

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[16] Supra n 13, at Ch 2, para 6.
[17] Supra n 8.
[18] Ibid, at pg. 7, para 1.

The main aim of the Woolf Report was for greater case management which would speed up the judicial process. Other significant reforms include:

- The division of claims into three `tracks':
  - a `Small Claims track' for claims of up to £3000,
  - a `Fast-track' for claims of £5000 to £15000, and
  - a `Multi-track' for more expensive or complex claims (small claims are limited to £1000 in personal injury cases);
- Unification of claims procedures in the High Court and the county courts (the Civil Procedure Rules 1998);
- Encouragement of alternative dispute resolution;
- Strict timetabling of litigation;
- Cases managed by judges rather than litigants;
- 'Case Management Conferences' used to decide preliminary issues;
- Increased use of information technology; and
- All parties would be encouraged to settle at any stage in the proceedings.

Lord Woolf was clearly an advocate for case management. His Lordship exhibited his passion for case management throughout his Interim and Final Reports[19]. The recommendation that there be a fundamental transfer in the responsibility for the management of civil litigation from the parties to the courts is the most important of Lord Woolf's recommendations. Case management origins can be traced back to the American legal scene in the 1970's. The United States was the first jurisdiction to examine implementing case management across the country.

[19] Supra n 13 (Interim Report) and supra n 8 (Final Report).

The Woolf Report was strongly influenced by the American model (this will be discussed further in Chapter 2).

The 'Fast Track' is one of the more unique and important developments in the Woolf Reforms. It is also where the new developments can be most prominently seen. Proceedings for claims between £5000 and £15000 will be restricted to a thirty day pre-trial period and one day in court. As a result much of the work must be completed before the trial commences and the parties would be expected to disclose the nature of their cases and any documents relied upon to the other party in this pre-trial period. An agreed timetable would be set and deviation from it would result in heavy sanctions. Importantly, it would only be in very exceptional cases that the trial date could be postponed[20]. These procedures clearly highlighted Lord Woolf's fondness for case management. Judicial intervention or control is at the forefront in the "fast track" system.

Lord Woolf recommended a unification of the civil procedure in the United Kingdom. This resulted in the introduction of the Civil Procedure Rules 1998 ("the Rules"). The objective of the reforms introduced by the Rules has placed greater responsibility on the court and the judiciary to deal with cases justly. This objective recognised the inherent complexity of the civil justice landscape, the need for flexibility and the need to be responsive to the different situations of disputing parties.

Lord Woolf shared the belief that alternative dispute resolution has the advantage of saving judicial resources and that it offers parties numerous benefits. Whilst Lord Woolf's recommendations did not propose compulsory alternative dispute resolution as either an alternative or as a preliminary step to litigation, Lord Woolf did propose that courts should provide up-front information regarding alternative dispute resolution processes and actively encourage parties to pursue it in

[20] For a full discussion see supra n 8.

appropriate cases. This encouragement by the court was to be reinforced by the court's power to punish behaviour that was considered unreasonable. For example, a party that refused to attend or participate in alternative dispute resolution in a reasonable way could be punished financially. Lord Woolf's Report notes that alternative dispute resolution was to be encouraged at case management conferences and at pre-trial conferences by both court staff and the judiciary.

Lord Woolf's case management reforms created a funnel-like effect with a mass of cases being diverted from the court system by early settlement. Those that remained in the court system were monitored by the judiciary to ensure that the issues became increasingly clarified as the case progressed.

The British Government did not stop reforming the civil justice system once Lord Woolf's recommendations were implemented however. The Government was, and still is, committed to supporting the growth of alternative dispute resolution. This can be seen through the changes the Government made to the Legal Aid system in 2000. A new set of rules relating to the granting of Legal Aid was introduced[21]. These new Legal Aid rules included covering the cost of mediation. For example, Funding Code section 3C-010 lists allowable disbursements, including non-family mediation fees. Now Legal Aid can also be claimed for:

- The cost of advice and assistance in preparing a case for arbitration, mediation, early neutral evaluation or an ombudsman scheme; and
- The cost of a party's legal representative attending a mediation session where appropriate, (usually for civil or commercial mediation, but not for family or community mediation as representation is not normally encouraged in these types of cases).

[21] The rules relating to Legal Aid are known as the "Finding Code 2000".

The rules went even further providing a condition that applications for Legal Aid could be refused if there were alternative dispute resolution processes that ought to be tried before litigation. The Funding Code 2000, criterion 5.4.3 states "An application for legal representation or Support Funding may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued". This means that parties to a dispute, who apply for funding for legal representation in litigation, must have either attempted mediation, or should be able to show why it was not possible to attempt mediation. It is also worth noting that the terminology of the Funding Code requires that the alternative dispute resolution option be "tried" rather than just "considered", though the agreement of both parties is needed for mediation to be tried. Even though the wording in the Funding Code is clear regarding parties' attempts or lack thereof at trying alternative dispute resolution, in practice Legal Aid for representation for individuals is rarely refused because a party has not tried alternative dispute resolution mechanisms before applying to the court. However, Legal Aid for public law cases is increasingly being restricted if alternative dispute resolution mechanisms have not been tried first.

Lord Woolf's report paved the way for these further reforms. The report provided information to the public, the legal profession and the judiciary on alternative dispute resolution. This meant that the reforms were embraced rather than shunned.

Since then the British Government has reinforced its commitment to mediation. All government departments use alternative dispute resolution mechanisms to resolve disputes whenever possible. The British Government has gone further, including a mediation option in contracts as the procedure for resolving disputes. In March 2001, the Lord Chancellor published a formal pledge, which committed British Government

Departments and agencies to resolve any disputes by using alternative dispute resolution mechanisms in all suitable cases[22].

Have Lord Woolf's reforms worked?

As already discussed, Lord Woolf noted that the problems[23] found with the civil justice system were not new problems. Any reforms of the civil justice system would have to be evaluated to ensure that they are working. Currently, there have been no comprehensive evaluations of the impact of the Woolf reforms. However, there have been numerous minor assessments of the reforms provided by civil servants, judges and academics. The Department for Constitutional Affairs has published 2 evaluations based on data drawn from the courts, and anecdotal evidence offered by the legal profession[24]. The conclusion which can be drawn from these evaluations is that the reforms are working reasonably well in relation to promotion of earlier case settlement, and there is a greater co-operation between parties. For example, there is better communication and exchanges of information between parties, and there are better opportunities for early settlement[25].

The evaluations report that:

- There is a continuing drop in the number of claims issued;
- The reforms relating to pre-trial matters are promoting settlement;
- Settlements that used to happen at the last moment on the courts' door step are becoming fewer;

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[22] See http://www.ogc.gov.uk/documents/cp0077.pdf and http://www.dca.gov.uk/civil/adr/adrrep_0102.htm for further discussion on the alternative dispute resolution pledge.

[23] As discussed, the problems with civil justice include excessive cost, delay and complexity.

[24] *Emerging Findings: Evaluation of the Civil Justice Reforms,* Lord Chancellor's Department, March 2001, and *Further Findings: A Continuing Evaluation of the Civil Justice Reforms,* Lord Chancellor's Department, August 2002.

[25] Ibid.

- The numbers of trials on fast-track and multi-track are decreasing;
- The time from filing through to disposal of the case has decreased on the fast-track and multi-track;
- On the small claims track, the time between filing and disposal has increased; and
- After what appeared to be an increase in cases being resolved by mediation, the actual number of these cases appears modest.

Both evaluations agree that the problem of delay has been addressed; however the problem of costs has not been improved. In fact it has remarkably become worse. Costs are more often than not, front loaded. Work that would traditionally have been performed in the preparation period immediately prior to trial must now be performed much earlier in the process, often shortly after the proceedings are initiated. As a result, costs are incurred at an earlier stage. The evaluations also highlighted that there is evidence of an increase in disputes about costs.

Other overseas jurisdictions, which have implemented civil justice reforms, have also experienced this phenomenon. Whether this lack of substantial improvement to the area of costs can be referred to as a failure of the Woolf Report is debatable. The civil justice system in the United Kingdom is not alone with their battle to reduce civil legal costs. The overseas evidence indicates that the costs problems is apparent in the majority of civil justice systems.

Lord Woolf hypothesised that by increasing the efficiency of the civil justice system in the United Kingdom, by diverting disputes from the court process and by reducing delay, the number of cases filed in court would be reduced. The Department for Constitutional Affairs[26] found that this hypothesis was wrong. The Department noted that in the business world there is a tool commonly known as the "Quality Triangle". This

[26] Peysner, Professor J., and Seneviratne, Professor M., *The management of civil cases; the courts and post-Woolf landscape,* Department for Constitutional Affairs Research Series 9/05, November 2005.

triangle provides that of the 3 objectives in a business – speed of delivery, production costs and the quality of production – it is often possible to improve 2 out of 3 but it is very rare to improve all 3 objectives. For example, it is possible for a business to provide services quickly and cheaply, but this may be at the expense of quality. The Department noted that since Lord Woolf's recommendations were implemented, case management and court based alternative dispute resolution has delivered quality justice at a vastly improved pace, but not at a reduced cost.

The problem with costs is concerning. The Civil Justice Council (which was established to oversee the implementation of the Civil Procedure Rules and to evaluate the progress of civil justice reforms) has been sufficiently concerned about this increase in costs to establish a Costs Working Party. This working party has produced numerous reports considering different alternatives for reducing, or at least stabilising costs. One paper[27] concluded that "It is generally agreed that costs are now forward loaded and that the costs of pre-trial applications have increased". For Lord Woolf's recommendations to be fully implemented, it is necessary to introduce further reforms to ensure that gains experienced though reduced delay are not sacrificed.

None of Lord Woolf's recommendations proposed to change the United Kingdom civil justice system to a less adversarial one. Woolf's report does not suggest that requirements such as pleadings or discovery should be disposed of. His report is based on numerous interlocking improvements. As discussed, Lord Woolf proposed a system in which the courts would be responsible for managing the case and ensuring it progresses well. It was Lord Woolf's view that if his recommendations were implemented there would be a reduction in litigation.

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[27] Peysner, Professor J., *Research and Conclusions,* Civil Justice Council Working Group on Costs 2003, discussed in Glenn, Professor H., *Solving Civil Justice Problems, What might be best?,* Scottish Consumer Council Seminar on Civil Justice, January 19, 2005.

Some commentators have viewed Lord Woolf's report with some scepticism. Some were of the view that the reforms did not go far enough, and that such reforms would lead to an increased cost to the Government[28] as more judges would be required to completely implement the case management reforms. Lord Browne-Wilkinson[29] highlights that it may have been better for the United Kingdom to consider moving towards a more inquisitorial or investigative system, rather then reforming the adversarial system. Lord Browne-Wilkinson notes that Germany and France have justice systems which use an inquisitorial system in civil (as opposed to criminal) matters. Apart from the nature of the system, the major difference between the two systems is that in Germany the major cost of litigation to the state is the actual cost of litigation, whereas in the United Kingdom, it is both the cost of the system and the cost of Legal Aid. Germany has relatively low levels of legal costs. Most of the burden of litigation has been transferred from the parties to the court. It is clear that some commentators are concerned that the Woolf reforms will not fix the problems previously associated with the English civil justice system, and that more needs to be done.

Overall, however, Lord Woolf's recommendations have been well received. Whenever there is a major change to a legal system, there are always critics who believe the previous method was better. Most of the report's objectives have been fulfilled. The one that remains unfulfilled, and possibly the most important objective, is the inability of the reforms to reduce costs. It is unfortunate that this particular objective failed. Generally speaking however, the Woolf reforms have achieved their objectives with great success. The civil justice system in the United Kingdom is working more efficiently and under less pressure.

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[28] Lord Browne-Wilkinson, *The UK Access to Justice Report: A Sheep in Woolf's Clothing,* Western Australian Law Review, Vol 28, July 1999.
[29] Ibid.

CHAPTER TWO

OVERSEAS JURISDICTIONS

Like the United Kingdom, many other overseas jurisdictions have encountered issues around the excessive cost of litigation, and also delay. This suggests that it is civil justice itself that is problematic, not the courts in each jurisdiction. This chapter looks at 4 overseas jurisdictions, 3 of which have recently implemented civil justice reforms which include the promotion of alternative dispute resolution. These reforms are of a similar nature to those recommended in the Woolf Report. It should also be noted that these jurisdictions are not the only overseas jurisdictions which have such reforms. For example, Scotland and Ireland are in the process of reforming their civil justice systems to include alternative dispute resolution mechanisms and case flow management. It is also important to point out that the court systems in the jurisdictions mentioned in this chapter are different to the New Zealand Court system. These jurisdictions have Federal Courts and State Courts, whereas New Zealand does not. The fourth overseas jurisdiction to be examined in this chapter has not implemented similar civil reforms, yet their civil justice system works exceptionally well. This jurisdiction is perceived to be quick and cost effective in its delivery of civil justice.

United States of America

After reading the Woolf Report, one could conclude that it was heavily influenced by the American experience. The American approach to civil justice can be traced to the adoption of the Federal Rules of Civil Procedure 1938. At the heart of these Rules, the American Government sought to diminish the importance of pleading and to introduce a system of pre-trial discovery that was free of judicial control. This however proved problematic with protected or complex litigation.

In the 1960's Judge Aldisert[30] began to pioneer techniques to deal with the congestion found in the American civil justice system. At the core of these techniques, was judicial involvement. This involvement covered management of cases from the initial filing of the case through to its disposal. In the US these techniques came to be known as case flow management. This concept of judges being involved in managing the case from the outset was radical. It was a major departure from the norm. The classical view of the role of the judiciary was that judges did not have any involvement in any cases which they were to adjudicate.

Courts were seen as organisations dealing with input (formed by the court's cases) and turning it into output (the trial and judgment in the case) by established processes. There were three key areas in which courts did not have control. First, there was no control over the input demand. That is, if a party wished to commence court proceedings there was nothing that prevented them from doing so. Secondly, the court had no control over the survival of the case. For example, some cases which on the face of it looked overly complicated, were capable of early settlement. Of course, there would be other cases which would not settle and remain in the civil justice system for unpredictable periods. Thirdly, the court had, at best, a very limited control over the length of the trial. As parties were in control of the case, they determined how many issues were to be argued, and the number of witnesses they wished to call.

Turning the courts from 'passive' courts into 'active' court needed the introduction of case flow management[31]. This allowed the courts to tame their environment by taking control of the cases. In turn, the courts were able to gain some control of the three key points discussed above. Courts could also provide information on alternative methods of dispute resolution. Obviously there was nothing the courts could do about the

[30] At the time of introducing the techniques, Judge Aldisert was a judge of the Allegenhy County Court of Common Pleas in Pittsburgh, Pennsylvania. Judge Aldisert was later appointed to the 3rd US Circuit Court of Appeals.
[31] Case flow management is the American term for case management.

input demand. Progress could however be made in controlling the length of time it took for the trial to commence by implementing strict timetables. Thus, with case flow management, the courts attempted to control the survival rate of cases.

By 1973, case flow management had become firmly established in America. Some did see this as a threat to judicial impartiality. For example, it was argued that a judge might see information that would not be admissible at trial and might therefore prejudice their decision. There are undoubtedly judges who do get too involved in attempting to persuade parties to settle and their impartiality could be questioned, but this was apparent even before the introduction of case flow management. Such judges have always existed, and therefore their existence can not be blamed on case flow management.

In the 1990's, the Civil Justice Reform Act ("the CJRA") was implemented in the United States after a decade of concern that civil cases in federal courts took too long and cost too much. The CJRA mandated a series of steps at both the local and national level to make civil litigation more affordable, more accessible and less time consuming. The CJRA required that each federal district develop a plan for civil case management to reduce costs and delay.

The CJRA[32] directed that the following principles be incorporated into case management plans:

- Differential case management;
- Early judicial management;
- Monitoring and control of complex cases;
- Encouragement of cost-effective discovery through voluntary exchanges and co-operative discovery devices;
- Good faith efforts to resolve discovery disputes before filing motions; and

[32] See Civil Justice Reform Act 1993.

- Referral of appropriate cases to alternative dispute resolution programs.

The CJRA also required that all Federal District Courts adopt a Cost and Delay Reduction Plan. These plans generally promoted case management and simplified discovery. Studies[33] noted that case flow management was working as things in the United States had not got worse despite an increase in filings. The idea that judges should take responsibility for the progress of cases was attractive not only to the judiciary, but also to lawyers and the parties involved.

In the United States, the courts use a single assignment system (the individual docket system) which means that one judge is responsible for the case from the initial filing until the matter is disposed of. However, case management styles vary considerably between jurisdictions, and even between judges. Perhaps this discrepancy between jurisdictions and judges stems from the previous lack of judicial management but it is likely to reflect also the range of different jurisdictions and environments within which judges operate. The need for judicial independence generally means that judges deal with their cases without much supervision from other judges. Individual judges may leave control of the development of the case and timetable to the lawyers. Inevitably this would result in an increase of costs as lawyers engaged in 'gaming' tactics. Gaming can be defined as delaying tactics, or 'dragging one's feet'.

It has been estimated that parties have experienced a 1.5 to 2 months reduction in median time to dispose of a case since the introduction of case flow management procedures[34]. Strangely, even with the decrease of time to dispose of the case, the cost (in terms of lawyer hours) has been increased by 20 hours. Energetic case flow management tends to cause the

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[33] Kakalik, J. S., Dunworth, T., Hill, L. A., McCaffrey, D., Oshire, M., Pace, N. M., Vaiana, M. E., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act,* The Institute for Civil Justice, (1996) RAND.

[34] Ibid.

lawyers to do more work under close judicial scrutiny, with judges having to press lawyers to get the job done faster. This means that the issue of delay is addressed, as cases are taking less time to complete. However it does not necessarily mean that costs are reduced.

It has been noted that as a result of the CJRA pilot programs, there appear to be four case management procedures which affect the time to disposition of the case[35]. They are:

- Early judicial intervention;
- The setting of a hearing date early on in the proceedings;
- Reducing the time for discovery; and
- Having the parties directly involved in telephone conferences or settlement conferences.

Of these four procedures it is only early judicial intervention which also appears in the principles of the CJRA.

Since the CJRA was implemented, certain jurisdictions have introduced arbitration as a dispute resolution alternative to court. Studies have shown that the use of arbitration has not significantly reduced delay or costs[36]. Jurisdictions, which have used mediation, have experienced better results[37]. The mediation programs appear to increase the likelihood of the parties achieving a settlement. Both lawyers and litigants generally support these mediation programs. They have viewed the programs as being worthwhile, not only in general terms, but also in terms of their individual cases[38].

The American Government realised the importance of dispute resolution in the court process. By law, Federal Courts are required to offer some form of alternative dispute resolution[39]. Many State Courts

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[35] Supra n 32.
[36] Ibid.
[37] Such jurisdictions include California, New York, Texas and Oklahoma.
[38] Supra n 32.
[39] See Alternative Dispute Resolution Act (2003).

require that parties attempt to resolve their disputes through mediation[40]. This must be done before they can obtain a hearing date. Adoption of mediation as a preferred mode of dispute resolution gave the opportunity for the parties to reach resolutions that both could live with – "win / win" outcomes rather than "win / lose" outcomes. In addition, mediation is more likely to nurture relationships. This meant that if mediation failed, the parties' relationship was not completely destroyed, and they could still proceed to a hearing without too much difficulty. By the mid 1990's courts had embraced mediation. Some jurisdictions[41] certify mediators who have completed a required number of training hours. These mediators are linked with the courts. Obviously parties do not have to use these mediators, they are free to choose their own dispute resolution facilitator.

Outside of the court, it appears that arbitration is being used more readily[42]. Arbitration has long been seen as an attractive option, with companies using binding arbitration for years as an alternative to the courts. Court arbitration programs were favoured by businesses, as they would have an enforceable judgment at the end of the arbitration hearing. Mediation programs, on the other hand, offer private settlements, in which the parties, lawyers and mediators are bound by law to keep whatever transpired during the mediation confidential. There is no such confidentiality provision with arbitration. Over the years, the court arbitration programs have withered away making way for mediation programs, and case flow management programs.

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[40] The National Center for State Courts tracks alternative dispute resolution developments in State Courts, see for example *Court links to the 50 States,* at http://www.ncsc.dni.us/KMO/Topics/ADR/States/ADRusmaps.htm

[41] The State of Florida has one of the most comprehensive mediation statutes in the United States. The State provides, by court rule, for training and certification of mediators. The Florida Supreme Court publishes a list of those mediators that are certified. The State has also appointed a Mediation Training Review Board which is charged with enforcing mediation standards.

[42] The American Arbitration Association has reported that from 1990 to 2002, their workload increased more than 379%, for example, in 2002 the American Arbitration Association administered more than 200,000 arbitration proceedings, see http://www.adr.org/index2.1.jsp?JSPssid=16235

When looking at the civil justice system in America over the last couple of decades, it can be concluded that the most significant development has been case management. As already mentioned, case management reduces delay, but not necessarily costs. It is noted that if case management is implemented properly, then it could reduce costs, or at least be effective without increasing costs[43]. This lack of reduction of costs in the American system is similar to results found in other overseas jurisdictions. It is believed that it is the judiciary's ability to ensure the widespread implementation of case management which is the key to ensure that America achieves the positive effects of case management[44].

American judges are now required to meet with counsel for various pre-trial conferences, scheduling conferences and discovery conferences. These conferences are designed to identify the issues and rationalise the proceeding early on. American judges are beginning to take less of an umpire-like role and more responsibility for the development of the case. This movement has been hampered by some constraints however. They are:

1. There is a constitutional requirement that all determinations of disputed facts be reserved to the jury[45]. Judges are not permitted to make preliminary determination on the issues in dispute to ensure that they do not influence the jury[46].
2. The American civil justice system as it currently is does not provide the judges with the information that they require to take a more active role in case preparation and fact finding. Parties are able to file sketchy pleadings which are often amended during the discovery process. Judges do not participate during

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[43] Supra n 32.
[44] Ibid.
[45] The United States Constitution, 7th Amendment – "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law".
[46] American judges do not even share their views on the evidence, unlike the United Kingdom.

this time. Nor do they receive the material produced or discovered; and

3. The staffing levels in American courts do not permit judges to spend a vast amount of time on each case. The American judiciary carries a much higher workload than other jurisdictions. If American judges are to have a more active role in civil case management there will have to be more judges provided[47].

Even though the concept of judges actively managing their caseloads in the United States is a step in the right direction, effective implementation of such processes will require more reforms of the American civil justice system. Such reforms will require a greater commitment by the judiciary to work towards a unified effective civil justice system.

Australia

As with other overseas jurisdictions, Australia has experienced problems with its civil justice system. There was a widespread community belief that the court system was costly, inaccessible and riddled with delays[48]. The increase in litigation, the need for accountability in the courts and the increase in self represented litigants are all factors in the increase of alternative dispute resolution in Australia.

In 1994, the Access to Justice Advisory Committee ("the AJAC") released a report on the state of the civil justice system in Australia. That report identified three principal objectives that the Committee believed needed to be pursued. The first was equality of access to justice. That meant that "Australians, regardless of means, should have access to high

[47] If one compares the number of judges per capita in America – 9 per 100,000 inhabitants, with Germany (whose civil justice system works remarkably well) – which is 27 judges per 100,000 inhabitants, it is clear that more judges in America are required.

[48] See Access to Justice Advisory Committee, *Access to Justice – an Action Plan,* 1994, Commonwealth of Australia for further discussion.

quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests"[49]. The second objective was one of national equity, which meant that "Australians should enjoy, as nearly as possible, equal access to legal services and to legal services markets that operate consistently with the dictates of competition policy"[50]. The final objective was equity before the law. This objective has been interpreted as requiring positive measures to combat any discriminatory attitudes and practices within the civil justice system. These attitudes and practices were directed particularly at women and Aborigines.

The Australian report is unlike the Woolf Report in the sense that it chose not to focus exclusively on reforming court procedures. The report addressed a range of issues such as:

- Regulating the legal services market in light of the principles of competition;
- Restructuring Legal Aid;
- Finding alternative sources of funding for litigation;
- Promoting alternative dispute resolution mechanisms; and
- A consumer complaints system.

The report identified two significant principles relating to the role of the courts in enhancing access to justice. The first principle has been described as the "principle of accountability"[51]. As the courts performed services for the public and used public resources, this principle applied to the courts. The Australian courts do recognise this principle. They publish their objectives and report on their performance in meeting those objectives. But public accountability is complicated by the need to preserve judicial independence. The second principle was the desirability for the courts to adopt a more consumer-orientated approach. The AJAC believed that the legal system, including the courts, needed to be more

[49]Access to Justice Advisory Committee, *Access to Justice – an Action Plan,* 1994, Commonwealth of Australia, par 1.9.
[50] Ibid, par 1.12.
[51] Ibid, par 1.19.

responsive to the needs of people who were involved in the civil justice system, for example, providing better advice to parties on the available dispute resolution services.

The Australian higher courts had moved from a laissez-faire approach when conducting litigation to a more interventionist approach in managing their workloads[52]. Active case management and procedural reforms which were designed to encourage early disclosure, and hopefully early settlement, were thought to be the key to reducing the cost of civil litigation. Case management would also provide more flexibility for courts to explore other ways in which to resolve a dispute.

The Australian report also highlighted the issue of judicial education, and its significance in promoting access to justice. Judicial education programs in Australia were in their infancy[53]. It was noted that there was a need to explore the possibility of establishing a national judicial education program.

It was also recognised that any dispute resolution process, whether it be through the courts or an alternative dispute resolution mechanism, must include an element of individualised justice. The element of individualised justice stems from the trend towards a preference for individualised, flexible solutions as opposed to the highly principled application of general legal rules. It provides redress in a manner tailored to the individual case.

The most obvious change is that Australian courts now actively manage their caseloads. Case flow management requires the courts to accept onerous managerial responsibility for the progression of cases. As the courts begin to accept greater responsibility for administering the justice system, the traditional judicial role has changed. The United States

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[52] *Access to Justice Report*, par 17.5, citing Sallmann, P.A., "*Managing the Business of Australian Higher Courts*" (1992) 2 JJA 80, pg. 80.
[53] Ibid, par 15.82.

and their delay reduction programs initially influenced this change towards case flow management. It is interesting to note that the Australian courts were quicker than other jurisdictions such as the United Kingdom, Canada and New Zealand to adopt the principles of case flow management.

Some Australian courts have committed themselves to determine matters in an orderly, cost effective and expeditious manner[54]. Case flow management is considered very important to Australian courts. The judicial role in Australia has transformed from the traditional role of the decision maker who was not particularly concerned with the public perception of the civil justice system, to a role in which the courts would actively revise procedures and administrative processes in order to achieve their defined outcomes. Courts were required to accept the responsibility not merely for managing the conduct of civil cases, but for a wide range of activities which were designed to enhance accountability and responsiveness of the legal system.

In 2003, a review of the civil justice system indicated that there were a number of reasons for the development of more efficient ways in which to resolve disputes. These reasons have led to more active approaches to case management and a greater use of alternative dispute resolution[55].

In relation to case management, Australian courts often use a "master list" method. This is the alternative method to the one used in the United States. This method allows for cases to be controlled by the court registry, so that cases are assigned to different judges at different times for different purposes. When the specific event has ended, the case is returned to the pool in order to await the next step. Some courts, although not

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[54] See for example discussion in *Access to Justice – an Action Plan,* 1994, Commonwealth of Australia.

[55] Alternative dispute resolution has been available in the Australian Federal Courts since 1987. It is now being used more often.

many, have chosen to use the individual list system.

In the Federal Courts, the mediation settlement rate has averaged at around 55%[56]. Both mediation in the Federal Courts only makes up a small proportion of the caseload of both the Federal Courts, and the Federal Magistrates Courts. For example, in 2003 –2004, 330 Federal Court cases out of around 4,000 cases and 134 Federal Magistrates Court cases were referred to primary dispute resolution out of a total of 6,672 cases filed[57].

Court registrars are trained in mediations in order to assist in court connected dispute resolution. With the use of court officers as mediators, the court is in a better position to oversee the quality of the mediation, and mediation can be offered quickly and at any stage throughout the proceedings. Some have had concerns that court connected dispute resolution suffers from the negative view that some members of the public hold toward the court and its processes[58]. In other words, it is unable to create a positive environment.

The Federal Courts can order parties to participate in mediation if there is the possibility that mediation would be valuable.[59] Referral to arbitration still requires consent by the parties. This power to order mediation was never envisaged to be used frequently. It would be used according to the circumstances of each case. It appears that the introduction of this mandatory mediation has been relatively well accepted and has not produced any significant problems.

There is one area of contention however. That is when a judge participates in court connected dispute resolution. There is a danger that judicial involvement may threaten public confidence in the impartiality of

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[56] See Buck, T., *Administrative justice and alternative dispute resolution: the Australian experience,* Department of Constitutional Affairs Research Series 8/05, November 2005.
[57] Ibid.
[58] Supra n 49.
[59] Federal Courts of Australia Act 1976, s 53A.

the courts. Mediation models allow for the mediator to speak with each party separately, this is sometimes referred to as "caucusing". There was also an issue whether it would be possible to educate the public as to the proper role of the judge as a mediator.

The High Court of Australia has developed principles to test whether the performance of such a function would be incompatible with judicial powers. In *Grollo v Palmer*[60] the High Court noted:

"Incompatibility might consist in so permanent and complete commitment to performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her functions with integrity is compromised or impaired. Or it might consist [thirdly] in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial with integrity is diminished."

When looking at the third principle in *Grollo*, it appears that a judge who undertakes mediation would contradict this principle. However, where there is a high likelihood that mediation would be successful, a judge might be entitled to conduct the mediation, although measures would have to be taken to ensure that the judge played no further role in the case if mediation was unsuccessful.

When examining the Australian court system, one has to examine whether the reforms have been successful in reducing costs and delay. Unfortunately, issues surrounding the cost effectiveness of case management and court connected dispute resolution have not been the subject of significant research in Australia. It could be concluded that as

[60] *Grollo v Palmer* (1995) CLR 184.

with other overseas jurisdictions, case management has not had the desired effect of reducing costs.

Australian courts have experienced some success in reducing delay. Like other case management programs, Australia imposes strict time frames for filing. Compliance by the legal practitioner is considered necessary to ensure that the case processes smoothly. Some legal practitioners believe that the key to reducing delay is not by adherence to these strict timetables, but rather by increasing the number of judges available[61].

In summary, like the other jurisdictions covered, Australia has managed to reduce delay to an extent, but not costs.

Canada

In 1996, the Systems of Civil Justice Task Force[62] released its report[63] on the Canadian civil justice system. The report offered 53 recommendations to enhance the viability and accessibility to the Canadian civil justice system.

Some of the recommendations[64] are as follows:

- Every court jurisdiction should provide for case management, especially where there is the need for judicial supervision or intervention which is ongoing;
- Every court jurisdiction should establish simplified proceedings;

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[61] Matruglio, T., and Baker, J., *An Implementation Evaluation of Differential Case Management: A Report on the DCM Program in the Common law Division of the Supreme Court of New South Wales,* Civil Justice Research Centre, 1995.

[62] The Canadian Bar Association in early 1995 created this task force. The task force was responsible for inquiring into the state of the Canadian civil justice system, and to develop strategies to modernise the justice system so that it would be better able to meet the future needs of Canadians.

[63] Canadian Bar Association, *Systems of Civil Justice Report* 1994, http://www.cba.org/CBA/Pubs/pdf/systemscivil_tfreport.pdf

[64] See *Systems of Civil Justice Report* 1994 for further discussion

- Every court should provide advice at the time of filing to parties on available dispute resolution mechanisms in the civil justice system; and
- Every court should establish an advisory committee to advise on ways to improve the administration of justice, to reduce or remove any barriers to justice and to implement, evaluate and monitor any reforms.

Since the introduction of the Civil Justice Reforms, a number of initiatives have been introduced. As an example, Saskatchewan has a court connected mediation program. This program was introduced in 1994. Initially there was some scepticism as to whether the program would work. However, the view of judges and lawyers has changed since then. Lawyers are becoming more comfortable with their role in mediation and have experienced positive results[65]. This court connected mediation program was offered as an alternative to trial. Court connected mediation[66] tends to be interest based[67].

Each jurisdiction is free to put in place different dispute resolution processes. For example, in Ontario[68], persons drawn from the private sector facilitate mandatory mediation. These people are placed on a roster system. In Saskatchewan, public sector employees offer mediation services. Many jurisdictions expect that parties will attempt at least one alternative dispute resolution mechanism, usually mediation, early on in

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[65] See *Integrating ADR into Civil Litigation – What are the Challenges we Face?*, Into the Future Conference, May 2006.

[66] It should be noted that court connected dispute resolution programs are not restricted to mediation. Mediation tends to be the preferred option.

[67] In interest-based mediation an impartial and independent mediator facilitates a discussion between disputing parties. The mediator assists parties to explore matters at issue between them and to identify what is most important to them; their needs, expectations, desires, concerns, hopes and fears. Once these interests have been identified, parties explore options for settlement and if they wish, create an agreement that addresses as many of their interests as possible. Such a mediation is normally completed in four stages, including an introduction, the identification of issues the parties wish to resolve, an exploration of the facts and interests, and a solutions stage in which the parties create an agreement. The agreement is tested to ensure it meets the parties' interests, is in accord with objective criteria, and is realistic and workable.

[68] Alberta is another state which uses this system in their small claims dispute resolution. See their website for further information http://www.albertacourts.ab.ca/

the litigation process.[69] Some courts mandate front-end judicial conferences. This helps to identify the issues in dispute and also provides the opportunity to discuss the possibility of settlement. If a second attempt at dispute resolution is needed it is usually done via pre trial conference[70].

Each jurisdiction is also free to adopt mandatory or voluntary use of mediation. For example, early mandatory mediation is used in Saskatchewan in five designated judicial centres. Ottawa, Toronto and Windsor have early mandatory mediation for most of their case managed actions. In the Superior Court in Alberta there are two pilot programs which mandate the use of dispute resolution mechanisms for some family law issues. The Provincial Court in Alberta uses a screening process to see whether small claims are suitable for mediation. If the claim is suitable, parties must participate or apply to the court for an order exempting them from mediation. Of course, there are other jurisdictions which adhere to the voluntary nature of dispute resolution.

From the time that Canada implemented the Civil Justice Reforms, judges have had to assume a greater role in encouraging and facilitating settlement. At judicial conferences, judges explore whether it is possible for the parties to reach an agreement without the necessity for continuing to trial. Judges are also required to encourage parties to use dispute resolution mechanisms. Some jurisdictions actually schedule judicial time specifically to discuss or facilitate dispute resolution.[71] Alberta even goes one step further by offering judicial dispute resolution at the appellate court level. Small claims courts tend to mingle the roles of case manager, settlement facilitator and adjudicator into one. The Superior Courts do not do this. Judges who participate in case management or settlement facilitation do not usually conduct the trial.

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[69] Supra n 63.

[70] These conferences have also been referred to as settlement conferences and judicial dispute resolution conferences to name a few.

[71] Examples of such jurisdictions are Alberta and Manitoba.

Even though these recommendations have been implemented, the question of whether civil justice is still priced out of the range of the middle class must be asked. In reality, even with the reforms, Canadian legal services are still expensive. The Canadian Government does fund some dispute resolution options, which means that there is no cost to the parties. For example, Saskatchewan provides for a 3 hour mediation at no cost. In most cases, however, the cost of any dispute resolution mechanism used falls on the parties. Another advantage of using court connected dispute resolution is that as judges are participating it is the civil justice system which absorbs the costs. For example, in Ontario, adjudication in small claims matters is performed by the deputy judges (members of the Bar appointed for 3 years). In Saskatchewan, judges run alternative dispute resolution in order to give an opinion on the merits of the case.

The Civil Justice Reforms proposed seven strategies for reducing delay. They are:

- Establishing a case flow management system;
- Setting fixed trial dates;
- Introducing multiple litigation tracks;
- Imposing time standards for hearings;
- Providing for individual case management;
- Automatic dismissal of cases that are not moving forward; and
- Establishing time standards for the delivery of judgment.

The provision for automatic dismissal of cases which are not moving forward has not been well received. Most Canadian jurisdictions have a provision for dismissal on order of the court; for example, if a party is non-compliant, the other party can apply to the court for an order dismissing the case. Alberta has a "drop dead" rule which means that if after 5 years nothing has been done to materially advance the matter, the Court must dismiss the action.

Once again, each jurisdiction is free to choose which, if any, of the reforms to implement. Some have implemented early court intervention in

order for the issues to be clearly defined. Some jurisdictions[72] automatically impose timetables for the filing of certain documents in order to guide the pace of litigation. This allows the parties opportunities for settlement and exploration of dispute resolution.

An interesting strategy is the establishment of time frames for the issuing of judgments. It was recommended[73] that judgments be rendered promptly, and by no later than 6 months after the hearing. This has been implemented by nearly all jurisdictions in Canada. In Alberta, Saskatchewan and British Columbia, the courts have systems which track judgments and report any delays to the Chief Justice.

Another area of reform which is being implemented is a training system which will also monitor and supervise all individuals who provide court connected dispute resolution. Again, this has not been established in all jurisdictions. In British Columbia, there is a Dispute Resolution Office[74] which oversees the Court Mediation Program. This program offers an opportunity for trained yet inexperienced mediators to practice mediation skills in a high quality "practicum" (or clinical) environment. In jurisdictions which have mandatory mediation, Local Mediation Committees[75] monitor the performance of mediators. In Quebec, staff who work in the Department of Justice are trained in mediation and they are subject to performance assessments.

Not only has Canada encouraged the courts to use alternative dispute resolution mechanisms, law schools are also being encouraged to offer alternative dispute resolution subjects to students. There are six law schools which offer a component on dispute resolution as a mandatory first year subject.[76] Victoria also offers dispute resolution in a mandatory upper

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[72] For example Ontario and Windsor.
[73] Supra n 63, Recommendation 11.
[74] See http://www.ag.gov.bc.ca/dro/
[75] See http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/guidelines.asp
[76] These Universities are Victoria, Ottawa, Queen's, Windsor, Saskatchewan and Osgoode.

level course. The Nova Scotia Barristers Society[77] notes that dispute resolution is a required course at Dalhousie. Education and training in dispute resolution is being incorporated into the Bar Admission[78] courses and is being offered in continuing legal education programs. In Quebec, one of the four educational objectives of the Bar Admission program deals with learning how and when to use or suggest alternative dispute resolution.

Canadian Courts are therefore seen to be embracing the implementation of alternative dispute resolution mechanisms as an alternative to trial, or as a supplement to the trial process. Canada has also taken further steps to increase the level of understanding of dispute resolution in Universities. Undoubtedly these steps have and will continue to enhance understanding of the court process and alternatives to it.

Germany

The civil justice system in Germany can be considered the 'odd one out' when examining overseas civil justice systems. The German civil justice system is based on a highly active judicial role. The German system gives judges the responsibility to act in a positive manner to ensure that the proceedings are conducted in a way to ensure that there is a fair and just outcome. The Zivilprozessordnung ('the ZPO")[79] carefully defines this responsibility. The view of the German civil justice system is that it is inquisitorial or judge centred (rather than adversarial or party centred). The reality is that the system involves a refined balance and co-ordination of activities. Combined with this is the responsibility of the parties, their counsel and the court to promote fair and just outcomes of civil disputes quickly and inexpensively.

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[77] See http://www.nsbs.ns.ca/index.htm

[78] For example, Bar Admission programs in Alberta, Saskatchewan, Ontario and Quebec (to name a few) include dispute resolution course.

[79] See http://translate.google.com/translate?hl=en&sl=de&u=http://bundesrecht.juris.de/zpo/index.html&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3DZivilprozessordnung%26hl%3Den%26rls%3DGGLD,GGLD:2005-19,GGLD:en

In the majority of civil disputes, it is the parties that fundamentally determine the scope and the conduct of the proceedings. The parties are able to determine the subject matter of the proceedings, when they are initiated and even when or if the proceedings will be voluntarily terminated. The German civil justice system is therefore to this extent adversarial[80]. Interestingly, the other overseas jurisdictions previously discussed in this chapter claim that it is 'party control' which causes numerous problems with the civil justice system.

Most civil cases require representation by legal counsel. This is a requirement of all the state district courts, the state appeals courts and in family cases in the local courts[81]. The judges, rather than passively sitting back, are responsible for conducting the proceedings in a way in which will reach a prompt, economical and just resolution of the civil dispute. Judges are able to exercise these responsibilities by:

- Reviewing complaints and submissions in order to determine whether the prerequisites for the suit or claim (*Prozessvoraussetzungen*) are satisfied;
- Ordering the legal and factual issues to ensure that the proceedings progress efficiently;
- Examining the witnesses and other means of evidential proof proffered by the parties;
- Appointing expert witnesses on fact issues when the judge requires such specific expertise; and
- Providing hints and feedback to the parties and their counsel on the issues of law and fact.

The case is structured by both the parties and the judge. The parties determine the scope of the dispute by the claims for relief in their

[80] The German civil justice system has been recognised by overseas commentators as being fundamentally adversarial. See Murray, P.L., and Sturner, R., *German Civil Justice,* Durham, N.C., Carolina Academic Press, 2004.
[81] This is required under ZPO s 78.

pleadings, as well as any evidential proof submitted by the party. The judges and the court are responsible for how and in what order the issues will be resolved[82]. The court determines the timetable for the hearing and deadlines for filing of submissions by the parties[83]. This concept of an early hearing date and strict timetables for filing submissions has been identified by other overseas jurisdictions as being very important to reducing delay in the civil justice system. The court can also raise additional legal issues, which relate to the claim, if the court believes that such issues need to be addressed in order to resolve the civil dispute[84]. The court has the power to commence and to mediate settlement conferences and to propose settlements[85].

Part of the court's responsibilities is to order and maintain the processing of the case. This can be regarded as efficient judicial case management. As part of this, the judge is required to expose their thinking process to ensure that the parties are not taken by surprise. This also prevents injustice. Efficient judicial case management is an important feature in the German civil justice system. In fact, the failure of the judge to sufficiently exercise this role is often used as a procedural ground for review. This obligation to give hints and feedback should not be confused as being inquisitorial in nature. Rather it should be considered as judicial advice and assistance to help the parties resolve their dispute according to law.

However, it is important that hints and feedback are given in a way that enables the parties to consider and meet them, that is, the parties must be given fair notice of the court's thinking[86]. The parties are then able to take these hints and adjust their approach to the proceedings. The court can also provide hints and feedback through procedural orders. These types of hints are usually restricted to the setting of deadlines for

[82] See ZPO ss 136(3), 139, 272, 273 and 278.
[83] See ZPO ss 214, 274, 283, 296 and 358a.
[84] See ZPO s 139(2).
[85] See ZPO s 278.
[86] See ZPO s 139(4).

submissions. It is definitely not appropriate for the court to provide hints and feedback to the parties or their counsel through *ex parte* communications via the phone or in writing. If the court does not provide adequate forewarning before exercising its discretion, or dismissing a claim for lack of proof, or if it bases its decision on a point which was not completely addressed by the parties, there can be grounds for appeal. These appeals would usually result in a reversal or remand of the decision.

The court must tread a fine line between providing too much or too little judicial engagement in the preparation and presentation of the case. Judges who over-exercise their obligations may appear to be biased towards the party who benefits from this judicial assistance. Alternatively, judges who act only as an umpire and withhold hints and feedback may be considered to be failing to comply with the requirements of the ZPO. German commentators have likened the role of the judge as a chess player who is playing against himself[87]. The judge is required to advise each party on the best "move". Judges must be very careful not to overstep their boundaries. Some may think that the easy solution would be to remove the judge entirely from the process. This would require the judge to adopt the kind of detached judicial neutrality normally found in the other overseas jurisdictions that this paper has already discussed. However, this approach would be inconsistent with the concept of the State's responsibility to provide civil justice.

The German courts enjoy a long history of judicial independence. Today, this judicial independence is guaranteed by the Constitution. Article 97 of the German Constitution 1949 provides that "Judges are independent and subject only to law". Competent professional judges are one of the core elements in the German civil justice system. German jurists often celebrate the high standard of their judiciary and are exceptionally protective of it as well. German judges are selected based on their scores from the First and Second State Examinations. Soon after their

[87] Murray, P.L., and Sturner, R., *German Civil Justice,* Durham, N.C., Carolina Academic Press, 2004.

Second State Examination, judges are appointed as probationary judges. Normally this happens without having practiced as legal counsel. The judges are also subject to evaluation by the senior judges of their court. This system appoints young highly academic lawyers as judges, who are then trained in the successive judicial roles. Promotion is based on seniority and meritorious service. Germany tends to produce judges of a very high technical standard and work ethic. However, there has been criticism that this approach has produced judges that are less innovative than those of overseas jurisdictions.

This is different to the American and New Zealand system of appointing judges. In these systems, judges are appointed to the bench after a certain period as a practitioner. Legal practitioners generally undertake judicial service after many years of practice. Becoming a judge is considered as the crowning achievement of their legal career. These judges share a baseline legal education in common with all lawyers. However there is no guarantee that the intellectual quality of the judges is above this baseline. They do however bring their practical experience to prepare for their judicial role. In this context it is important to remember the famous statement of Oliver Wendell Holmes Jr, Associate Justice of the US Supreme Court, that "the life of the law has not been logic, it has been experience", suggesting that common sense judgment is as important for judges as technical legal skills.

The German civil justice system is provided with a large investment of public resources, possibly more so than the United States. Germany provides its citizens with more judges per capita than overseas jurisdictions.[88] It also appears that Germany provides more funds for legal aid than other jurisdictions (see Figure 1). These investments only provide half the picture. Overseas jurisdictions require legal professionals to do more work and charge more and higher fees than those professionals found

[88] In Germany, there are 27 judges per 100,000 inhabitants. Compare this to New Zealand which has 4 judges per 100,000 inhabitants, and America which has 9 judges per 100,000 inhabitants.

in Germany. The overseas jurisdictions expect counsel to do more than the German system does. German legal professionals receive fees according to the German statutory schedule of fees based on the amount in dispute. This fee schedule does not provide compensation for discovery or time consuming pre-trial activities. By contrast, in other jurisdictions, counsel are typically paid by hourly billing, which usually includes a lengthy discovery process.

Germany has a judge-led process with limited discovery and expert witnesses appointed by the court. This is as opposed to the wide discovery and party presented expert witnesses found in the American civil justice system. Germany and the United Kingdom do not have such an extreme difference. There are very limited civil jury trials in the United Kingdom, and with the recent reforms found in the Woolf Report, the fact finding process and the role of both legal counsel and the judiciary have been brought slightly closer to the European model than the American model.

The German system expects counsel to have developed their relevant factual assertions by the time they file their statement of claim. They should be able to identify sources of evidential proof for these assertions. There is no discovery as such. The court can order the production of documents from the parties and also third parties. This can be done in the pre-trial preparation stage or in an evidentiary hearing. Progressing the case in this way allows for the judges to become familiar with the party's factual claims and what evidence they will refer to at an early stage in the proceedings. This means that the judge can take an active role in the factual shaping of the case. For example, the judge can indicate which issues they believe are unimportant. As stated above, the judge is also able to provide hints and feedback throughout the proceedings.

The pre-trial process in Germany is extremely efficient. There is focused concentration on the facts that are likely to be helpful to the court early on in the process. The court is engaged with what is going on. This however can be slightly problematic. Facts that may be complex and ill

understood may not be given a sufficient opportunity to be developed effectively. Although the German civil justice system is very flexible and it ensures that the parties and their counsel have input at every stage, there are occasions where a judge may focus on one issue without permitting the development of another which may prove valuable to the fair determination of the dispute.

When comparing the German civil justice system with other jurisdictions, it is apparent that the system achieves its goals in terms of costs and avoidance of delay. Commentators note that German parties are able to obtain a judicial determination of a dispute at a fraction of the cost and within a shorter time than overseas models[89].

The largest component of the costs borne by the parties are legal fees, court fees and expert fees. The German system provides for the compensation of the lawyers for both parties to be determined by the Federal Attorneys Fees Law (*Bundesrechtsanwaltsgebuhrenordnung* or *BRAGO*) and its fees schedules. Because of this, German lawyer's fees represent a much smaller litigation cost than is the case in the United States.

There is a fundamental difference between the German courts and the American courts in that Germany requires parties to bear a greater amount in relation to court fees. The United States only charges a nominal fee for civil cases. The filing fee in the American District Court is a mere $150. This figure was similar to the filing fee in the New Zealand District Court $140. In Germany however, parties are required to pay court costs which are based on the amount in dispute and how much judicial activity is required to resolve the matter. The balance between the set legal fees and the higher court cost favours Germany as opposed to other overseas jurisdictions.

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[89] Supra n 87.

The high cost of civil justice in overseas jurisdictions already discussed above has been subject to critical comment and reforms. The high price of civil justice has a serious negative effect on access to justice. In Germany the cost of civil justice appears relatively reasonable and under control. The civil justice system limits and contains the largest aspect of litigation costs, that is legal fees, by limiting the scope of legal activity and by limiting legal compensation. The German system divides the case workload between both the judge and counsel. This maximises the efficiency of both counsel and judge in the progression of the case and reduces costs.

The German civil justice system, like overseas jurisdictions, is concerned with excessive delay. Reducing delay in the civil justice system has long been the goal of reform in practically every civil society[90]. In 1996 the average time between the initial filing and the determination of the dispute was 4.6 months in the Local Courts and 6.5 months in the State District Courts[91]. Compare this with the average time of disposal in New Zealand, now averaging 26 weeks[92], and in the United States the average of state trial courts took 340 days, or 751 days if it was a civil jury trial, to conclude. In the Federal District Court the time to disposal was 420 days, or 588 days in civil jury trials. Jury trials are clearly more prone to delay than non jury trials[93].

The German civil justice system is more compatible with the United Kingdom civil justice system. This compatibility received a boost with the introduction of Lord Woolf's reforms. Many of these new reforms appear to move the United Kingdom system in line with the European systems. In particular, the emphasis on judicial management, the limits on discovery, the use of court appointed experts all resemble the

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[90] Every country has a long history of procedural attempts to reduce delay and costs, yet few have managed to achieve a workable balance.
[91] Supra n 87.
[92] This will be discussed further in the following chapter.
[93] The process of jury trials in civil matters is now generally disused. Countries such as the United Kingdom, Canada, Australia and New Zealand no longer use such trials.

German civil justice system, as opposed to the American civil system.

The German civil justice system appears to work very well. Germans seem to be satisfied, possibly even proud of the performance of their civil justice system. Complaints about the explosion of litigation, excessive delay and rising costs, so common in other overseas jurisdictions, are relatively rare in Germany. Any reform of the New Zealand civil justice system should include a close examination of the German system.

CHAPTER THREE

THE CURRENT NEW ZEALAND SITUATION

Like the overseas jurisdictions, New Zealand has had its share of difficulties with the civil justice system. The New Zealand civil justice system resolves disputes between individual's and organisations, private and state. It also seeks to safeguard the individuals right to justice and also the community's need to ensure that disputes are resolved justly and without delay. There are two values that are always in competition in relation to civil justice. They are:

- Disputes must be resolved according to the principles of natural justice[94] and the law; and
- The process must be proportional to the claim.

Ideally, the civil justice system should be swift, understandable, responsive, certain and effective. Currently, the New Zealand civil justice system is seen as slow, costly and over complicated[95]. The question of balancing justice and fairness with proportionality and effectiveness arises in every type of civil case.

An effective civil justice system should be based on 3 central principles:

- Any disputes that can be resolved without the help of the Court should be kept out of the Court system;

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[94] Natural justice refers to fair processes in legal proceedings. The concept is very closely related to the principle of natural law (Latin: jus naturale) which has been applied as a philosophical and practical principle in the law in several common law jurisdictions. Natural justice has certain basic legal principles, which are required by nature, or are so obvious that they should be applied universally without needing to be enacted into law by a legislator.

[95] The Hon Justice John Hansen, *Courts Administration, The Judiciary and the Efficient Delivery of Justice – A Personal View,* F.W. Guest Memorial Lecture, Otago University, 28 September 2006.

- Matters that require limited Court help should be dealt with by procedures that are tailored to fit the case and those procedures should be proportionate to the claim; and
- Any cases that have to go to a hearing should be actively managed to ensure that the case is resolved as efficiently, cheaply and as quickly as possible.

If access to justice, or the courts, is denied, New Zealand runs the risk of eroding public confidence in the court system. The court system is under pressure, not only from the public, but also from the Government. For example the Government, more so politicians, will often criticise the judiciary. This criticism is often related to the criminal justice system. For example, politicians criticise the judiciary in relation to how the courts sentence people and apply name suppression rules.

Currently the New Zealand civil justice system is an adversarial one. It is the parties that define the issues central to the case. They decide which witnesses to call and what evidence to present. There are rules that ensure procedural fairness, as it is the parties who prepare the case. These rules govern the exchange of information (discovery) and also determine what evidence is admissible. It is the decision-maker (the judge) who determines the outcome of the case after the parties have presented their evidence and legal arguments. The judge will only intervene to ensure that the case is kept on track.

There are numerous concerns with the adversarial system in New Zealand, such as:

- The adversarial process does not always reach the truth reliably;
- The system provokes a climate of "winners" and "losers" which does not encourage parties to work together to resolve their differences;
- There is the possibility that too many issues will be contested, discovery will be cumbersome and lawyers for each side often

tend to duplicate each other's efforts (therefore doubling the amount of documentation in front of the court);

- Parties can use delaying tactics to pressure the other side to agree to an unfair compromise unless the courts are in control of the timetable and any pre-trial steps;
- Lawyers (who are frequently paid by the hour) have very little incentive to be speedy and efficient, or to use alternative dispute resolution mechanisms to resolve the dispute; and
- Allocating court time and resources is difficult when the parties are in control of the process.

Delay

The adage "justice delayed is justice denied" has been around for centuries. Despite being a cliché, this saying continues to hold true.

At the turn of the 20th century, Dean Roscoe Pound[96] began to urge judges and court administrators to address the inherent problem of delay in the court process. Since then, the problem has only got worse. The ever-increasing demands on the court system and its resources continue, and it does not appear that this will change in the near future unless something is done.

There are numerous ways in which a case can be delayed. For example, parties can delay the proceedings by failing to adhere to the timetable for filing of documents. Normally the courts, if provided with a reasonable explanation of why the documents were late, will still accept them for filing.

[96] See Pound's 1906 lecture, *The Causes of Popular Dissatisfaction with the Administration of Justice*.

Lawyers and judges quite often overlook the effect of delay. Not only are there the direct significant financial costs in terms of legal fees and indirect financial costs in terms of lost opportunities, there are also the hidden costs such as the associated anxiety which most litigants experience. These indirect financial and psychological costs are quite often overlooked or ignored.

Another associated delay is the delay in getting a judgment. Justice Hansen[97] noted that it was unacceptable for people to wait 12 months (or more) for a judgment to be delivered; for people to turn up for their court case just to be told that it will not be reached that day and for witnesses to hang around courtrooms for hours waiting to give evidence. There is some current legislation which does limit the length of time parties should wait for a decision[98]. Two of these statutes will be discussed further later in this chapter. There should be further examination relating to whether there should be more extensive judgment delivery timeframe requirements.

Cost

The issue of costs is one of the major problems which the civil justice system encounters. The issue of costs is also linked to the issue of delay (as the longer the delay, the higher the associated costs). Also, the longer the case continues, the higher the legal and the emotional costs. Costs are a significant problem because:

- The expense involved means many can not afford to pursue litigation without financial help;
- The legal costs incurred (lawyers fees, expert witnesses fees and court fees) are often out of proportion to the issues involved, or the amount of the claim; and
- Litigation costs are uncertain in amount as they normally follow the conclusion of litigation. This means that the parties have

[97] Supra n 95.
[98] For example, the Employment Relations Act 2000 and the Weathertight Homes Resolution Service Act 2006.

difficulty in predicting what their ultimate liability might be if their claim is lost.

Cost is a major barrier to having a successful civil justice system. The issue of costs not only deters some deserving litigants from pursuing a claim, but also compels some litigants to settle a dispute on unfavourable terms even though they have no wish to do so. Costs allow the financially stronger party to take advantage of the weaker party. Litigation costs also have an adverse effect on the Legal Aid system, as the Legal Aid system is not an unlimited fund. Besides, parties who have been granted Legal Aid are expected to make some degree of repayment, and in certain cases may be required to repay the full cost of the Legal Aid services they have received.

The cost burden on parties is not just confined to court fees and legal costs. There are other "cost" demands that the litigation system places on parties. For example, for a private individual, there is the cost of expending their own time, effort and energy. For corporations, the cost involved includes diverting employees or executives from their normal activities to deal with the litigation. This can lead to a lack of focus and profitability for commercial entities, particularly smaller ones.

It is worth reiterating at this point that jurisdictions which have implemented case management systems, or incorporated alternative dispute resolution techniques into civil litigation as a result of spiralling court costs, have noted that costs, rather than decreasing as expected, have continued to climb. It is possible, however, that they have increased less they otherwise would have.

Maybe the road to reducing costs actually involves increasing certain costs. Currently to file a dispute in the District Court costs $140, while in the High Court it costs $1100. There are other costs involved

when the case is set down for hearing[99]. If court costs were increased this may encourage people to use alternative dispute resolution mechanisms instead of going to court. This proposition will be discussed further in Chapter 5.

Case Management

New Zealand courts have begun to assume more control over the progress of cases by using case management techniques. In the 1990's, case management systems were first trialled in the High Courts in Auckland, Christchurch and Wellington. Five District Courts in Auckland were also involved in the case management pilot scheme. All these schemes were successful in reducing the time that cases took. The Auckland High Court showed that the average time between filing and resolution had dropped from 78 weeks to 24 weeks[100].

The pilot scheme was considered a success and case management systems were implemented nationally in January 2000 in the High Courts, and in March 2001 in District Courts. Under this case management system all cases are allocated to "tracks". These tracks can be defined as:

- Immediate track - cases that receive a hearing date on filing (for example summary judgment applications);
- Swift track – matters which need to come to hearing quickly (for example appeals, applications for interim orders);
- Standard track – any other cases; and
- Assigned track – for cases that will require a high degree of judicial management.

Each of these tracks has defined timetables. If a party should not adhere to the timetable, it could result in remedies, from the court ordering that party to pay costs through to the court striking out the proceedings.

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[99] See http://www.justice.govt.nz/fees/feeschedule.html#hc for a list of Court Fees.
[100] Supra n 95.

Between 2000 and 2001[101] just over 61% of defended civil proceedings in the High Court were disposed of within a year of filing the statement of claim (compared to 58% in the previous year). Likewise in the District Court, just fewer than 67% of cases were disposed of within a year (63% in the previous year). Whilst this reduction in the length of time it takes to dispose of a case can be attributed to the case management system, it is interesting to note that there were still 400 High Court and 800 District Court cases which took well over a year to resolve.

There are some problems with the case management system. For example, the system was introduced without any legislative support. The case management approach was also considered too piecemeal, and was criticised as underrating the value of case management. Both the High Court Rules[102] and the District Court Rules[103] now have provisions relating to case management.

Notwithstanding, even with the new case management provisions, there remains a lack of a common approach to case management in New Zealand. The Wellington and Christchurch High Court Registries function under what is known as an individual list system, like the Untied States. This is where cases are allocated to individual judges to manage and resolve. Other registries have a master calendar where teams of court staff and judges manage each case, like Australia. Not only are there different procedures in different courts, there is also a difference in how rigorously case managers, judges and associate judges supervise cases.

There is much debate, but little evidence, about which of these two case management methods is more effective. However it is interesting to note that in the United States, one of the most litigious jurisdictions, the courts have adopted the individual docket system. More significantly, the

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[101] Statistics taken from Department of Courts, *Report on Case Management Outputs,* 2001.
[102] See Rules 425 - 431 High Court Rules.
[103] See The Practice Note, District Court Rules
http://www.justice.govt.nz/practicenotes/dcccm.html

Californian court system (which is one of the largest court systems in America) has moved from the master calendar system to the individual docket system.

One of the advantages of the master calendar system is that the trial judge will not normally sit on interlocutory matters or on pre-trial hearings ensuring that judicial impartiality remains. The High Court Rules[104] outline how the court can assist with negotiating a settlement. With the individual docket system, judges are more openly accountable for their workload. It also allows for judges to be more familiar with the cases that have been allocated to them. Whilst this method is preferred by some[105], it is also criticised on the ground that it cannot make slow judges go faster.

Although this paper is concerned with examining the civil justice system in relation to the High Court and the District Court, it is worthwhile briefly discussing the Appeals Courts. The Court of Appeal assigns cases to individual court staff, however they do not get assigned to individual judges. The Court of Appeal uses a master calendar list.

The Supreme Court not only assigns cases to individual court staff, but it also assigns cases to 3 specific judges. This is a slight variation on the individual list. Of those 3 judges, one is considered the lead judge. It is that judge who is responsible for the progression of the case. The other 2 judges are there to assist the lead judge, and also to make up the Court's coram (on leave decisions) as required by statute[106]. All three judges will however determine whether to grant the appeal leave[107].

Fundamental to both types of case management is the setting of a case management conference. At this conference, parties will be able to

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[104] See Rule 442 High Court Rules.
[105] The Hon Justice John Hansen, *Case Management in New Zealand Courts,* (1998) 9 Otago LR 319.
[106] Supreme Court Act 2003.
[107] Leave can be defined as getting the permission of the Court to progress a case through to a substantial hearing. If leave is granted, the Court hears the substantive matter as a full Court of 5.

discuss all aspects of the case. Parties can outline the main issues in dispute. They can discuss future timetables for interlocutory steps. The most important part of the conference is that parties can discuss whether settlement is possible, or whether some sort of alternative dispute resolution method would assist them. There is the possibility for further case management conferences as the case progresses.

Another problem with the current system is that Courts do not always insist on compliance with timetables. This can seriously undermine confidence in the effectiveness of the case management system. There needs to be a balance between efficiency and fairness. In 1997, the Court of Appeal allowed a case to proceed despite non-compliance by a party. The Court of Appeal noted that "the dictates of fairness must prevail over the demands of efficiency ... substantive rights are not to be readily defeated by procedural means"[108]. It is hard to determine where the line should be drawn between maintaining the integrity of the case management process and meeting the needs of a particular case. In the District Court, parties do not have to attend case management conferences, and in the High Court, whilst parties are supposed to attend such meetings, it appears that this does not always happen. This lackadaisical approach seriously diminishes the opportunity to encourage negotiation and / or mediation. It also diminishes the court's ability to keep discipline in the proceedings.

General Observations

It is significant that whilst case management has been successfully integrated into the court process, it has met with limited success[109]. It is this limited success which highlights a certain flaw in the case management methods in New Zealand. Some judges, lawyers, court administrators and parties have embraced case management, while others have not. For a case management system to be effective, all New Zealand Courts must be enthusiastic about case management and be willing to use it.

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[108] *McEvoy v Dallison* [1997] 2 NZLR 11, at pg. 21.
[109] Supra n 95.

In New Zealand there is one Judge for every 22,757 New Zealanders[110]. When one compares this figure with those of other overseas jurisdictions[111], one could assume that New Zealand is on par with similar legal systems. This is however misleading. From 1974 New Zealand has had a no fault accident insurance scheme, operated by Accident Compensation Corporation ("ACC"). As a result, the courts are no longer tied up with personal injury cases whereas personal injury cases still make up a large amount of court work in other overseas jurisdictions. Because of this, one could reasonably assume that the caseload of judges in overseas jurisdictions is greater than in New Zealand.

New Zealand's attempts at reforming the civil justice system have been designed to refine the current system. Justice Hansen notes[112] that none of the steps that New Zealand has implemented have reduced costs. He goes on to note that the reforms have only had a partial success in relation to delay. None of the reforms have attempted to question the validity of the New Zealand civil justice system. They have, as mentioned, only attempted to modify the system in its current form.

For any change to be successful there needs to be a commitment from not only the judiciary and court staff, but also the legal profession and parties. An effective system that is both cost effective and speedy cannot be dependent upon the subjective approach of the participants. Past refining of our civil justice system has not led to the civil justice system becoming more efficient.

It has been suggested that it is the adversarial approach itself that prevents reform[113]. An adversarial approach tends to distort the truth as parties want to win at all costs. It also is labour intensive, which is the

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[110] Supra n 95 – this figure takes into account only the District and High Courts.
[111] In Australia the ratio is 1: 20,297; in England and Wales the ratio is 1: 22,486; and in Canada the ratio is 1: 15,686.
[112] Supra n 95, at pg. 21.
[113] Ibid, at pg. 23.

main reason for the high legal costs that parties face when proceeding with litigation. This in turn has morphed the legal profession into a business[114].

Perhaps it is time to abandon the thought that the current New Zealand civil justice system is one of the best in the worlds, and start investigating how we can achieve a system that is fair, cheap and speedy.

New Zealand has recognised that resorting to the regular court system is not a viable way of dealing with some forms of dispute, particularly consumer disputes. As a result there are in New Zealand various tribunals which deal with what are in effect small consumer claims. Examples are the Tenancy Tribunal set up under the Residential Tenancies Act 1986 and the Motor Vehicles Disputes Tribunals established under the Motor Vehicle Sales Act 2003. Some of these make provision for mediation, for example there is provision for the appointment of Tenancy Mediators in the Residential Tenancies Act.

Parliament seems increasingly to be recognising the potential of mediation as a mechanism for resolving disputes in area that could be very contentious. For example, the Employment Relations Act 2000 provides for mediation to be used in the first instance when resolving employment disputes. Also, the Weathertight Homes Resolution Services Act 2006[115] has specifically set up mediation and adjudication as the methods of resolving disputes round leaky homes.

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[114] The Lawyers and Conveyancers Act 2006 allows for law firms to be incorporated with shareholders who are not lawyers. This will aggravate the view that the legal profession is now a business.

[115] Previously known as the Weathertight Homes Resolution Services Act 2002. The Government recognised the difficulties with resolving leaky home claims in New Zealand under the previous Act. By establishing the Weathertight Homes Resolution Service the Government aimed to resolve disputes in a cost effective, speedy manner. The 2006 Act provided for enhanced services, including setting up the Weathertight Homes Tribunal and giving it (the Tribunal) greater powers to resolve disputes faster. Recently, the Government has introduced an amendment to the WHRS Act which will allow parties to apply for damages, as well as the cost for fixing the leaks.

Employment Relations Act 2000

The Employment Relations Act 2000 ("the ERA") is one of the few statutes found in New Zealand which specifically provides for alternative dispute resolution to be used as the primary source of resolving disputes. The object of the ERA is "to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship". The ERA achieves this by:

- Recognising that all employment relationships have to be built on good faith behaviour;
- Acknowledging and also addressing the inherent inequality of the parties bargaining power in employment relationships;
- Protecting the integrity of individual choice;
- Promoting mediation as the primary problem solving mechanism; and
- Reducing the need for judicial intervention.

Part 10 of the ERA outlines and establishes the three institutions which are responsible for resolving employment disputes. These are:

- The Mediation Services[116];
- The Employment Relations Authority[117]; and
- The Employment Court[118].

When an employment dispute arises, it is open to the parties to use the provisions of the ERA in order to resolve the dispute. The starting point for solving a dispute using the ERA is to see whether the dispute could be resolved using the Mediation Services. It should be noted that there are very few exceptions to using mediation[119]. The Mediation Service has been established not only to assist in employment disputes, but also to help parties by providing general information about employment rights and

[116] Employment Relations Act 2000, ss 144 and 145.
[117] Sections 156 and 157.
[118] Sections 186 and 187.
[119] Section 159(1)(b) in relation to the Employment Relations Authority, and s 199(2)(b) in relation to the Employment Court.

obligations. Although the ERA provides for Mediation Services through the Department of Labour, it should be noted that parties have the choice of using private mediation if they want to. In fact the ERA expressly records that it does not prevent the use of private mediation[120]. There is concern that private mediations may not be protected by the confidentiality provisions of the ERA. However, given the way in which the ERA treats both private and statutory mediation, and given the need to protect the integrity of the mediation process, there appears to be no reason why private mediations will not receive the same benefits relating to confidentiality and settlement, as achieved through the Mediation Service. An advantage of using the Mediation Services is that the Department of Labour is able to maintain the standard of mediators. There is one downfall with using private mediation – the settlement would have no status under the Employment Relations Act. Therefore, if the parties want their settlement to be final and binding, they would need to have it signed by a mediator from the Mediation Services.

The Employment Relations Authority ("the Authority") was established under the ERA[121]. The Authority is jurisprudentially innovative and it represents a new way of thinking for New Zealand. It is similar to a Court in the sense that its proceedings are judicial proceedings[122]. However, that is where the similarities end.

In New Zealand, courts have traditionally used the adversarial model[123] for resolving disputes. Another model, which has received support in Europe, is the inquisitorial model[124]. The inquisitorial model is not new to New Zealand[125]. The Authority carries out its duties in an

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[120] Section 144(f).
[121] Section 156.
[122] Section 176(2).
[123] In the adversarial model, the judge leaves the task of bringing the evidence before the court up to the parties. That evidence is tested by the opposing party and judge – done through cross examination.
[124] In the inquisitorial model, the judge takes an active role in fact gathering.
[125] See for example the Human Rights Act 1993, ss 11(b), 75 and 127 which allows for the Race Relations Conciliator to investigate complaints about racial discrimination, and also the Immigration Act 1987, in which the New Zealand Immigration Service has an inquisitorial role.

inquisitorial manner. It is not inhibited by strict procedural requirements. However there are certain procedural directions which the ERA outlines. These are extremely sparse in their content. In fact the Authority has the ability to be highly interventionist, conducting the proceedings in order to suit the needs of the parties. This means that the Authority is very different from other New Zealand institutions. The Authority is viewed as a weighty tribunal. It is also assertive and directive. It resolves disputes by establishing the facts and making determinations on the merits of the case, not the technicalities of the case. Parties can be represented if they wish, but there is no requirement that the representatives be lawyers. If they were, this is where the main costs would lie. The Authority has a nominal fee of $70. The Authority is also required to release their decision within 6 weeks of the hearing[126]. At times the Authority will even release their decision on the day of the hearing. Proceedings conducted by the Authority are to be speedy, informal and are to provide practical justice to the parties[127]. The ERA also outlines the manner in which the Authority's decision is to be given. The Authority is to:

- Do no more than state the relevant findings of fact[128];
- Explain its findings on relevant issues of law[129];
- Base its conclusion on the matters it considers important to determine in order for the dispute to be resolved[130]; and
- Outline what orders it makes – if any[131].

The Employment Court is the last of the specialist institutions dealt with by the ERA. The Court can be described as a court of record[132]. Parties can take a matter to the Employment Court at any stage. However, the Court will consider whether mediation would be constructive in

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[126] See Employment Relations Authority Practice Note 2000.
[127] Section 174.
[128] Section 174(a)(i).
[129] Section 174(a)(ii).
[130] Section 174(a)(iii).
[131] Section 174(a)(iv).
[132] A Court of Record can be defined as a court in which the proceedings are recorded, transcribed, and maintained as permanent records. In common law jurisdictions, a court of record is a court that keeps permanent records of its proceedings. Judgments of a trial court of record are normally subject to appellate review.

resolving the dispute. The Court is able to direct the parties to attend mediation at any stage of the proceedings. The Court is both a court of first instance (that is a court in which a claim can be commenced), and also it is an appeals court. These appeals however, are not technically appeals in the traditional sense, they are a full judicial hearing of the original problem. The Court is required to come to its own decision on the merits of the case placed before it[133]. The Court is not required to have regard to the Authority's decision. Unlike an appeal, the Court is not required to affirm, reverse or modify the Authority's decision. Lawyers or Union representatives are strongly recommended, as parties need to have someone familiar with the workings of employment agreements, applicable legislation and the court process. There are limited rights of review of the Courts proceedings[134]. There are also limited appeal rights[135]. The Court of Appeal and Supreme Court may hear appeals from the Employment Court[136] but only within a circumscribed area. The ERA works extremely well, with few complaints surrounding its dispute resolution methods.

Weathertight Homes Resolution Service

During the 1980s and 1990s building methods in New Zealand changed. As a result of the new methods of building, many new homes began to develop leaks. The New Zealand Government originally downplayed the extent of the problem. However, after the Hunn Report[137] was published in 2002 the Government was forced to take action. The Government responded by introducing the Weathertight Homes Resolution Service Act 2002 ("the WHRS Act"), which established the Weathertight Homes Resolution Service ("the WHRS"). This Act has now been replaced with the Weathertight Homes Resolution Services Act 2006. The

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[133] Section 183.
[134] Section 213.
[135] Section 214.
[136] Sections 217 and 218.
[137] Hunn, D., Bond, I., and Kernohan, D., *Report of the Building Industry Authority Overview Group on the Weathertightness of Buildings to the Building Industry Authority,* Building Industry Authority, Wellington, 31 August 2002 http://www.dbh.govt.nz/UserFiles/File/Weathertightness/Reports/pdf/bia-report-17-9-02.pdf

WHRS is an alternative dispute resolution mechanism which provides either negotiation, mediation or adjudication to resolve disputes. Interestingly the WHRS was designed to relieve pressure on the District Court, reduce costs and delays, and to provide satisfactory compensation to owners of leaky homes.

The purpose of the WHRS Act is "to provide the owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost effective procedures for assessment and resolution of claims relating to those buildings"[138]. The WHRS Act is not just concerned with "effective" dispute resolution, but with "cost effective" dispute resolution.

Last year the WHRS Act experienced a major overhaul. There is now a 'Lower value WHRS claims process' which is used for claims of $20,000 or less. This process includes negotiation, mediation and adjudication. The negotiation aspect of the WHRS is new. It was not found in the previous 2002 Act. There is also a 'Standard WHRS claims process' which is used for claims $20,000 and over. These claims are resolved through the Weathertight Homes Tribunal. The Tribunal resolves claims by using adjudication. There is a process that the Tribunal has to follow, which will be discussed later in this section.

Lower value WHRS claims process.

The lower value WHRS claims process offers negotiation and mediation as resolution mechanisms. Negotiation is an informal discussion between parties. During the negotiation process, parties try to reach a solution. The WHRS assists in arranging the negotiation, however it is the claimant's responsibility to chair the negotiation session. The WHRS also provides a settlement advisor who will discuss how the negotiation might work. The settlement advisor will also be able to identify any issues that the parties need to be aware of. The WHRS strongly suggests that any

[138] See Weathertight Homes Resolution Service Act 2006, s 3.

negotiated settlement be put in writing. That way the agreement will be enforceable in the District Court. There are problems with this negotiation process however. It is a voluntary process, so parties can not be ordered to attend. Also, parties may not feel entirely confident chairing the negotiation by themselves. This is especially true if the opposing party has legal representation. If parties do not want to attempt negotiation, the next stage is mediation.

Mediation through the WHRS is a confidential service[139]. The Chief Executive is responsible for determining how the mediation services will be provided[140], and must also engage mediators to provide the services[141]. The mediation process is also a voluntary process. This means that if the respondents do not agree to attend the voluntary mediation, the claimant is forced to pursue their case through adjudication. Alternatively, the claimant could withdraw from the WHRS and pursue their claim through the court system, or another alternative dispute resolution method. If the parties agree to mediation, the parties must sign a 'referral to mediation'.

Once the parties have agreed to mediation, the WHRS will assign a mediator. The parties do not get to choose their mediator. This is similar to the process covered by the ERA. The mediators are independent professionals who are available to help resolve a dispute. The mediator will help the parties to come to an agreement. Once again, this agreement should be in writing so it is enforceable in the District Court. Mediation is able to help the parties clarify the issues. This can be useful even if the mediation is not successful and the parties need to advance through to adjudication. Both the mediation process and the negotiation process are free to the claimants.

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[139] Section 84.
[140] Section 77.
[141] Section 78.

If mediation has failed, the claimant can commence adjudication by serving a notice of adjudication on the other parties and the WHRS. To opt for adjudication, there is a $400 fee[142]. Adjudication is considered to be a judicial process where a Tribunal member will determine the dispute. The Ministry of Justice supports the Weathertight Homes Tribunal.

With the lower value claims, adjudication can only be initiated after all else has failed. This is to ensure that the process is as cost effective as possible. To proceed to adjudication, the application has to be accompanied by a certificate from the Chief Executive of the Department of Building and Housing. This certificate confirms that the parties have made reasonable efforts to resolve the dispute through negotiation and / or mediation. These lower value claims are normally determined 'on the papers', which means that there is no need for a formal hearing. This substantially decreases the cost, as there is little need for legal counsel. The Tribunal will also manage the claim as effectively as possible. Again, this limits the cost. As with the traditional court process, the Authority's decisions can be appealed, however most parties do not proceed with an appeal, therefore the Tribunal's determination is normally final.

Unlike mediation though WHRS, adjudication decisions are intended to be final (although they are subject to appeal[143]). They are also binding on the parties. The parties must comply with the decisions immediately[144]. Adjudication decisions are considered to be an order of the District Court[145], and can be enforced as such.

Standard WHRS Claims Process

As previously mentioned, the standard WHRS claims process is for claims $20,000 and above. A claim is lodged, and a Ministry of Justice

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[142] Section 62.
[143] Section 93.
[144] Section 97. See also s 96 which provides that an appeal of an adjudication decision does not operate as a stay of the determination.
[145] Section 98.

case manager is assigned to the claim. Like the lower value claims, there is a $400 fee for adjudication.

The adjudication process has the following steps:

- Pre-hearing stage – this involves processes such as joinder or removal of parties. At this stage the timetable for adjudication is established. The use of mediation is also discussed at this stage;
- The opportunity for mediation – the Tribunal may refer the claim to mediation if they believe mediation will be of assistance;
- The adjudication hearing – this is a judicial proceeding where the Tribunal will clarify and test the evidence presented to them; and
- Finally, the decision – this is produced by the Tribunal. It is a binding, enforceable decision.

If the parties attempt mediation during this process, the settlement can be placed in front of the Tribunal. The Tribunal can record the agreement as its own decision. Adjudications are public and the decisions are published on the Weathertight Homes Tribunal website[146]. The Tribunal is required to adhere to a strict timetable when setting down the adjudication hearing, and also with the timeframe for delivery of judgment[147]. This requirement of a timeframe for delivering a decision is similar to the one found in the ERA.

Obviously, the WHRS Act does have its strengths. It was established to be flexible enough to allow for a cost effective, speedy dispute resolution service. It provides home owners with an alternative to taking the dispute through the court process. However, WHRS has experienced difficulties. For example, there was (and possibly still is) considerable delay when parties initially make a claim through WHRS.

[146] http://www.dbh.govt.nz/weathertightness-index
[147] Section 89 states that a determination should be given within 35 working days.

The parties can wait for months to have their homes assessed. As the WHRS Act has made assessment a prerequisite, this delay may significantly slow the process. Also, parties have delayed the process by "dragging their feet" – for example, not agreeing to mediation until the very last moment. Another problem with the WHRS Act is that negotiation and mediation are voluntary. This means that it can be very hard for the claimants, who wish to pursue these forms of alternative dispute resolution mechanisms, or even the WHRS staff themselves, to get the other parties to attend.

In part it was this "dragging of feet" or gaming which influenced the Government to reform the WHRS Act. The Hon Clayton Cosgrove announced in May 2006 that there was to be a shake up of the WHRS to prevent gaming of the system, to encourage adjudicators to take a more investigative approach and to provide better assessments, support and information to claimants[148]. These reforms aim to ensure that claimants using the WHRS to resolve their disputes are better supported. There was great criticism of the WHRS when it was first established. The legislation was passed quickly. As a result, many viewed the WHRS as being ineffective in its purpose as defined in the WHRS Act.

Mr Cosgrove highlighted that a 2005 review of the WHRS identified a need for a more active and investigative approach to adjudication. It was at this stage when the decision to move the adjudication processes to the Ministry of Justice was made. Placing the adjudications with the Ministry was considered a natural fit. It allowed for the independence of the judicial functions of adjudication to be maintained. Mr Cosgrove noted[149] that by removing adjudication from the Department of Building and Housing, the role of WHRS advisors would be strengthened. Also, any perceived conflict of interest over the Department providing both advisors and adjudicators would be removed.

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[148] See Hon Clayton Gosgrove *More steps to improve leaky homes service*, 2006, 25 July www.beehive.govt.nz/Print/PrintDocument.aspx?DocumentID=26570

[149] Ibid.

In August 2007, the WHRS Act was amended once again. This latest amendment permits the parties to sue for general damages. Politicians and lawyers had believed that the previous laws covering leaky homes allowed people to sue for damages, to cover such things like mental distress. However in March 2007, the High Court ruled that no legal right existed[150]. The Government acted quickly to amend this.

Both the ERA and the WHRS Act use alternative dispute resolution as their primary form of dispute resolution. The ERA dispute resolution process has been well received by the public. There is little criticism of the Authority or the Employment Court. Unfortunately that cannot be said for the WHRS. The public perception of the WHRS has been poor. There have been numerous reports in the media of claimants being unhappy with the process and the eventual outcome. Media have also highlighted that parties who use the WHRS are often still out of pocket even after their dispute has been successfully resolved.

One reason for this difference in the success of these organisations could be that the WHRS was established quickly. The Government was possibly unprepared for the number of claims that the service experienced. Initially, the WHRS was somewhat understaffed which led to the service becoming overloaded. This overload meant that claimants were experiencing lengthy delays. Since then, the WHRS has been overhauled with the Department of Housing and the Ministry of Justice now responsible for running the service. Only time will tell if the service will experience a turn around in the public's perception of it.

When discussing the current New Zealand civil justice system it is imperative to evaluate the infrastructure of the New Zealand Courts, and discuss whether it could support major reforms. The Ministry of Justice

[150] *Hartley v Balemi and Ors* HC AK CIV 2006-404-002589 29 March 2007. This was the first case to be appealed to the High Court from a determination of an adjudicator under the WHRS Act.

commissioned a research programme[151] evaluating the experiences and impacts of alternative dispute resolution from the perspective of:

- The parties;
- The legal profession;
- The Judiciary;
- Court staff; and
- Accredited alternative dispute resolution practitioners[152].

The Ministry's report noted that the overall view in New Zealand was that the use of alternative dispute resolution is on the increase. However, accredited alternative dispute resolution practitioners noted that the take up of these processes had not been as pronounced as expected in the 1980's and 1990's. It was also noted that there was a decrease in the take up of arbitration and a move towards using mediation techniques.

Lawyers indicated that they would be less likely to pursue arbitration as they could not see the same benefits as mediation. Arbitration can be problematic, just like the civil justice system. Arbitration can be costly, and appointing an arbitrator can involve considerable delay. Arbitration can be seen as embracing the adversarial nature of the civil justice system. Somewhat ironically, arbitration does so without the safeguards of the civil justice system, for example, the ability to rely on precedent and the right of appeal. Some felt that there was an increasing trend by legal professionals to challenge the arbitration decision on technical grounds. This would result in added costs to the parties.

The Ministry's report[153] also noted that there were some lawyers who believed that Judicial Settlement Conferences rather than alternative dispute resolution had become the preferred method of parties. They noted that the Christchurch High Court was providing rapid access to such

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[151] Ministry of Justice, *Alternative Dispute Resolution: General Civil Cases,* June 2004 Http://www.justice.govt.nz/pubs/reports/2004/adr/index.html

[152] For example: members of AMINZ and Leadr.

[153] Supra n 151.

conferences. The conferences were effectively managed. The legal profession noted that they had seen a benefit in having the judiciary encourage parties to attend alternative dispute resolution, and also noted how the judiciary could encourage parties to have a realistic view of the implications of litigation. The judiciary were careful to highlight that whilst they use mediation-like techniques in their settlement conferences, the conferences were not considered mediations.

The trend towards a closer synergy between the courts and alternative dispute resolution means that some perceive judicial settlement conferences as a type of mediation. Alternative dispute resolution can potentially provide numerous benefits to the civil justice system. The Ministry of Justice's report noted that such benefits could be:

- A reduction in filings;
- Encouragement of settlement;
- Reduction of legal costs and court costs; and
- The development of settlement solutions that are less likely to be subjected to re-litigation.

The Ministry's report indicated that in the High Court, approximately 61% of disputes taken to a lawyer for legal advice were eventually filed. In the District Court that figure was 70%[154]. These figures show that a reasonable proportion of disputes do not end up being litigated. However there is room for improvement. For example, it was indicated that only 13.1% of the legal profession that typically worked in the High Court discussed alternative dispute resolution mechanisms with their clients. An explanation for this figure being so low is that the legal profession is concerned whether alternative dispute resolution:

- Delivers a reduction in costs and a reduction in delay:
- Delivers an outcome that is sound and fair; and
- Generates agreements which are sustainable and enforceable[155].

[154] Supra n 151.
[155] Ibid.

The legal profession expressed concern that alternative dispute resolution not only increases costs (this is especially true for arbitration, however arbitration is still cheaper than litigation), but also delays resolution of the dispute, as time taken to participate in an unsuccessful mediation could have been used preparing for a hearing in court.

Even alternative dispute resolution practitioners were somewhat critical in the report. The practitioners noted that the full range of benefits, particularly the benefits relating to user satisfaction with the outcomes and *ex post* compliance, would not be fully recognised while alternative dispute resolution mechanisms focused on risk assessment, the possible costs benefits or penalties, or the likelihood of success in court, instead of focusing on a mutually agreeable solution. Practitioners in the Auckland region expressed concern over parties using techniques directed at trading off the potential of success. This was described as the defendant being bullied. This type of behaviour is not typically linked to alternative dispute resolution. If this problem of trading off does not improve, parties will eventually become hesitant about using alternative dispute resolution. This would lead to the civil justice system being unable to capture the full benefits of alternative dispute resolution.

Alternative dispute resolution practitioners noted that in order for alternative dispute resolution to be effective, judicial support was a very important factor. They indicated that while the courts have implemented case management and provided a platform for the judiciary and court staff to inform parties of alternative dispute resolution mechanisms, it varies from court to court and even from judge to judge. It was pointed out that some judges were inclined to push the parties towards judicial settlement conferences rather then referring the parties to alternative dispute resolution. In doing this the courts lost their ability to reduce their caseloads. It is believed that the courts should be more proactive in promoting alternative dispute resolution[156]. The majority of practitioners

[156] Supra n 151.

supported the notion that the courts should have the power to order disputing parties to attend alternative dispute resolution. This type of mandatory referral to alternative dispute resolution would provide the perfect opportunity for parties to explore the potential of such mechanisms.

The legal profession also expressed the view that alternative dispute resolution could potentially benefit the civil justice system through a reduction in pressure on the courts, encouragement of early settlement, the ability to narrow the issues which required determination and developing settlements that will be less likely to be re-litigated. The Ministry's report noted that:

- 90.7% of the legal profession believed that court intervention in ordering parties to use alternative dispute resolution would reduce the costs incurred by parties;
- 88.1% believed that such court intervention was justifiable because it would potentially increase the rate of settlement;
- 78.0% believed that intervention by the court was justifiable as it would also reduce the time to settlement; and
- 44.1% firmly believed that any intervention would reduce the pressure on the civil justice system[157].

These results show that both the legal profession and alternative dispute resolution practitioners believe that the courts should have the ability to order parties to explore other mechanisms to resolve their disputes. Whilst there was criticism of this approach, it was in the minority, with the perceived benefited outweighing the disadvantages or concerns. Any intervention would however have to be conscious of the obligation the court has to provide parties with access to justice. It would be inappropriate for the court to exclude those who wanted to pursue litigation from doing so.

[157] Supra n 151.

Members of the judiciary reported[158] that they see alternative dispute resolution and judicial settlement conferences as complementary, as both provide parties with the opportunity to explore settlement options before requiring formal judicial determination. Overall the judiciary indicated that they were supportive of those parties that wished to pursue alternative dispute resolution before filing. The judiciary noted that alternative dispute resolution provided:

- A choice to the parties;
- Encouragement between parties to develop a wider range of solutions, some of which would be outside the ambit of the court;
- Confidentiality for the parties. The judiciary did note that confidentiality also applied to judicial settlement conferences as related papers would be sealed if the matter did not settle; and
- A saving in costs.

The judiciary was unsure whether it was their responsibility to direct parties to attend an alternative dispute resolution mechanism. It was felt that the judiciary's ability to direct parties to attend a judicial settlement conference was enough, and that this would encourage a settlement.

Finally court staff were undecided about whether there should be a mandatory referral to use alternative dispute resolution[159]. Staff did feel that it was desirable for the courts to provide information on such mechanisms. There was concern that any mandatory program would increase their workload, and possibly the pressure on the courts.

As the Ministry's report indicates, the legal profession, alternative dispute resolution practitioners, court staff and the judiciary all see the potential benefits of introducing more alternative dispute resolution mechanisms into the pre-trial process. However numerous concerns were also highlighted. Whilst New Zealand currently has an infrastructure that

[158] Supra n 151.
[159] Ibid.

would embrace alternative dispute resolution as part of the civil justice system, more work would have to be done to ensure that enough information is available for those involved. For example, numerous legal professionals noted that one of the reasons why they did not discuss alternative dispute resolution with clients is because they themselves did not know much about these mechanisms.

Four factors were identified in the Ministry's report as being barriers to the take up of alternative dispute resolution. Those are:

- A lack of awareness and understanding of alternative dispute resolution mechanisms between parties and the legal profession;
- A failure of the legal profession to fully inform their clients of such options;
- A lack of helpful information about accredited alternative dispute resolution practitioners and how to access them; and
- An under-supply of such practitioners.

There are a number of ways in which the take up of alternative dispute resolution can be improved. It has been suggested that mediation could be promoted by having its own statue, similar to the Arbitration Act 1996. The introduction of such a statute would be able to promote mediation and increase confidence in using mediation by regulating service delivery.

Furthermore, better training for the legal profession on alternative dispute resolution mechanisms could be provided. The New Zealand Law Society Continuing Legal Education offers affordable programmes to the legal profession to ensure the continuation of legal education. Interestingly, over the last 10 years, there have been only one or two programmes specifically related to alternative dispute resolution. The New Zealand Law Society has previously offered a negotiation seminar. The New Zealand Law Society Continuing Legal Education programme would be the perfect place to start educating the legal profession on the benefits of

alternative dispute resolution. Alternatively, New Zealand could require that alternative dispute resolution papers are offered in law schools, similar to the papers found in Canadian law schools.

The concern regarding the number of alternative dispute resolution practitioners could also be fixed. If legal practitioners are more familiar with alternative dispute resolution mechanisms, they may be more willing to combine their legal practice with alternative dispute resolution facilitation.

These factors are, in the author's opinion, easy to fix. The New Zealand justice system and Government should develop ways in which to fix these barriers sooner rather than later. Overall the civil justice system does work, albeit slowly and at some cost. Commitment to alternative dispute resolution methods is required from all those involved in the civil justice system in order for the performance of the system to be enhanced.

CHAPTER FOUR

LAW COMMISSION PROPOSALS

In 2004 the New Zealand Law Commission published a report[160] on the structure of the courts. The Law Commission made 160 recommendations aimed at improving the way the court system works. This chapter will discuss whether it is necessary to "go as far as" the Law Commission proposals, or whether it would be more productive for the court system to implement a few of the proposals.

The Law Commission report was a response to the Government's request that all state-based adjudicative bodies have their structure and operations reviewed (apart from the Court of Appeal and Supreme Court). The problems that were identified in the report are summarised as follows:

- There is a lack of information or understanding about what the court system is, how the system can be used to initiate action, and what possibilities exist when someone is drawn into a court dispute against their will;
- The high cost of legal fees and court filing fees, coupled with the economic consequences of the court case – for example, the reduction of productive activities such as business activities;
- The time and the delay associated with court cases and the physical and emotional exhaustion of all parties involved in court proceedings; and
- Parties felt that they were not adequately able to tell their story, were misunderstood or were responded to in a way in which was not meaningful to them.[161]

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[160] Delivering Justice For All: A Vision for New Zealand Courts and Tribunals - NZLC R 85, found at http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=89. It should be noted that this report examines all aspects of the New Zealand Court system, not just the civil justice system.

[161] Ibid.

The Law Commission envisioned a system where courts were responsive and accountable to the court users and a system that was efficient, fair and accessible. The Law Commission report raised some primary themes which include:

- Courts are not accessible to most New Zealanders;
- Courts fail to deliver justice for all; and
- Courts do not meet the needs of the majority of the community.

The Law Commission also identified that New Zealanders found the court system costly, slow, complex, and not transparent. The report also found that the public believes there is a lack of proportionality between the problem, process and possible outcome when dealing with matters through the courts.

The report said that users of the court system found that information about the law and the court processes was not easy to obtain. Users found the system and the overall court experience to be disempowering, and many felt that their lack of understanding was a hindrance in accessing justice.[162] The report went on to note that if justice was to be effective, then significant improvements would have to be made with regard to the provision of help to the public to navigate and understand the court system and the laws it protects and enforces.

The report recommends that New Zealand should examine overseas jurisdictions in order to promote access to legal information. As an example, the report discusses the Canadian system in which every province has a legal organisation which is set up to provide essential information to the Canadian public. These organisations do not provide legal advice, they are there to inform and educate Canadians about the law and legal system. These organisations are co-ordinated by the Canadian Public Legal Education Association and are partly funded by the Canadian Government. These organisations provide services such as telephone information lines, lawyer referral systems and school visits to disseminate information. They

[162] Supra n 160.

also hold seminars and produce publications. In New South Wales, Australia, there is a Legal Information Access Centre which is a state wide service. This centre provides free information to the public about the law and legal issues through the New South Wales libraries.

This type of organisation would be useful in New Zealand. Having worked in the courts, it is obvious that there is nowhere for people to go with general court enquiries. Often, these queries are directed to the first court registry that people speak with. For example, people often call the wrong court registry for information and yet they still assume that they will be assisted. Usually, it is the wrong court, and staff at that court are unable to help, as they do not have the working knowledge of other courts in New Zealand. New Zealand does have Community Law Centres which are designed to deliver legal education and to provide legal assistance[163]. There are 25 centres nation-wide. The level to which these services are provided depends on the individual law centre. Some centres focus their activities on education, some on legal advice. The centres are flexible with what services they provide, which allows them to tailor the centre to the most significant needs of the local community. As noted, there are only 25 centres in New Zealand. Unfortunately these centres are inaccessible to some New Zealanders. For example, 9 of the 18 centres situated in the North Island are situated in the Auckland and Wellington areas. There are also only 7 centres in the South Island. The Legal Service Agency has also begun to produce legal information and education kits.

The report noted that the most common suggestion was that there should be a helpdesk inside the court building where people can go for assistance and help. Overseas jurisdictions which have such helpdesks provide assistance to parties who represent themselves as well as providing information to legal practitioners. The range of services includes helping parties to fill out forms through to referring parties to other professionals.

[163] The primary function of the Community Law Centres is "the provision of community legal services to communities with unmet legal needs, and in particular to people with insufficient means to pay for legal services" – Legal Services Act 2000 s 85 (1).

This recommendation is good in theory, however it may not work in practice. The helpdesk would only work effectively if people were able to physically get to the court. A telephone help line would cover people who needed assistance, but who could not physically get to court.

The Law Commission proposed that a state agency should be responsible for creating and maintaining a national legal advice network which would provide initial advice to parties about their legal situation. It would also provide information about where the parties could go for further help. The Commission noted that such initial legal advice requires experience, knowledge, empathy and the ability to talk with all kinds of people. Ideally, as the Commission notes[164], people experienced in the practice of law should staff the service. This would mean that many court staff would not be appropriate for this position. Some court staff may have a legal degree, but few, if any, would have experience in practicing law.

Court Structure

The Law Commission recommended a slightly different court structure to the one that New Zealand currently has (see Figure 2 for the current New Zealand court structure). The report recommends a structure where there are nine "Primary Courts"[165]. The main points of difference of this new structure compared with the current structure are:

- The general jurisdiction of the District Court would be split into three new courts. The new courts would consist of a Community Court, a Primary Civil Court and a Primary Criminal Court. Each court would have their own Chief Judge;
- The Family Court and the Youth Court would become courts in their own right – they would no longer be a division of the District Court;

[164] Supra n 160.
[165] The function of the Primary Courts would be to conduct the first hearing of a case and make a decision.

- The Environment Court, Employment Court and Maori Land Court would be integrated with the Primary Courts;
- There would be a Chief Primary Court Judge to oversee all Primary Court jurisdictions; and
- There would be greater flexibility for judges to sit on more than one of the nine Primary Courts (see Figure 3 for the Law Commissions proposed court structure).

Any proposal to change the current court system would inevitably carry with it a significant degree of risk and cost. The recommendations, if implemented, would have a great impact on the court process and its infrastructure. Whether New Zealand has the infrastructure to manage such changes has already been discussed in Chapter 3.

The Law Commission's recommendations can not be expected to deliver solutions in the short term, or even in medium term. In fact, any re-structuring of the court system would involve a level of disruption to court services for an initial period. Therefore, if New Zealand were to implement the Law Commission's recommendations, the benefits would only become apparent in the long term. Obviously, having these benefits appear in the long term would not solve at least some of the existing problems. The courts are presently affected with numerous problems, and it is a solution that is capable of having an immediate impact that is required in order to fix these problems.

Any changes to the court system would be more effective, easier to achieve and more affordable if the changes were based on making improvements to the court processes rather than the court structure itself. Fostering attitudes, which are focused on delivery of service, is imperative.

Court Processes

The civil justice system in New Zealand does work reasonably well. The delays that other overseas jurisdictions face are not as pronounced in New Zealand. The population size and the introduction of the ACC regime means that the New Zealand courts do not have to contend with as high a volume of civil cases as overseas jurisdictions do.

The Law Commission has recommended a new, simpler court process. This process would be tailored to meet the particular needs of civil cases. For example, the Law Commission recommends strengthening the case management processes which would provide greater clarity for civil matters in the District and High Courts. The Law Commission recommends:

- A redraft of the Rules (currently the High Court Rules are being redrafted. Once that is completed the District Court Rules will be redrafted); and
- Regular seminars and training on case management processes.

As already discussed, changes to the court processes would be preferable to an overhaul and re-structuring of the court structure. Changes to the court process could be achieved quickly and economically. It would be important to ensure that any changes achieve their aim by improving access to the courts. As just noted, a redraft of the current High Court Rules is currently being undertaken. To what extent the new Rules change the court process still has to be determined.

Community Court[166]

The Community Court was recommended by the Law Commission as a result of the criticisms made by users of the District Court. Such criticisms were that there is a lack of information given before a court

[166] Supra n 160, at Part 4.

hearing and that there is a feeling that the courts are operating for those that work in the court, rather than those that use the court. The Community Court would be responsible for dealing with the high volume of less serious civil cases which are currently heard in the District Court. The Law Commission recommends that this court should have jurisdiction to hear civil cases up to a value of $50,000. The court would be a specialist court with its own principles, style and process.[167]

The Law Commission recommends that in the Community Court, the processes should be simple, understandable and there should be a wide amount of information readily available. The civil processes should be simplified in order to facilitate access to justice and to ensure that they are in proportion to the amount in dispute. The Commission then goes on to recommend a 2 stage process, which includes a 'case assessment conference' and a full hearing, if the case is not settled before then. The Commission also recommends that a different judge sit on the full hearing. Judges would be required to take an active roll in both stages by assisting the parties to identify the disputed issues and by exploring the possibility of early settlement. Discovery in the Community Courts would be limited to the 5 most important documents.

The initial case assessment conference should take place within 30 days after the defence has been filed. This type of conference should not take more than one hour. Parties would be expected to appear, along with their counsel. The judge would facilitate the conference, assisting the parties to determine what issues are in dispute and whether there is the possibility of settlement. If a settlement is reached at this early stage, that settlement should be binding. If there is no settlement and the matter goes to a full hearing, the conference judge should make directions as they see fit. A directions summary should be completed which would include:

- A list of the agreed facts;
- Any orders to be completed before the full hearing; and

[167] Supra n 160.

- An estimated time for the full hearing.

If a full hearing was required, it should take place within 90 days of the conference. As mentioned, the Commission recommends, that a different judge preside over that hearing. The judge should have an active role, especially if one of the parties is not represented. Finally, the Commission recommends that if the judgment is reserved, it should be released within 30 days of the hearing.

Primary Courts[168]

The Law Commission has recommended that there be a new Primary Court structure (see Figure 3). Included in this would be the new Primary Civil Court. This court would have an upper limit jurisdiction of $500,000. This would be higher than the current limit in the District Court, which is $200,000. The report recognises that there are a growing number of average New Zealanders who are becoming involved in legal disputes which involve more than $200,000. It is vital that these ordinary New Zealanders are able to access the court system.

The Primary Civil Court should be led by a Principal Primary Civil Court Judge. It would be their responsibility to provide leadership, oversight, judicial resourcing, scheduling, and policy development in the civil justice arena. The Principal Judge would also be responsible for looking after the interests of their jurisdiction.

The Primary Court and the High Court would both have jurisdiction to hear cases of up to $500,000. It is the Law Commission's intention is that the parties would be free to choose which court they wished to file in. Currently, under the District Courts Act 1947, there is provision for cases between $50,000 and $200,000 to be transferred to the High Court[169]. The Law Commission recommends that this provision be kept, but that the

[168] Supra n 160, at Part 5.
[169] See District Courts Act 1947, s 43.

amount is raised from $50,000 to $200,000. This would allow the High Court to hear the most serious of civil cases.

Mediation

The Law Commission has made two recommendations in relation to mediation which are significant. Those recommendations are:

- That one organisation should be responsible for co-ordinating all state-owned mediation services. This would include mediation services such as the Employment Relations Authority and the Weathertight Homes Resolution Service. Mediation should be available through this service to parties with disputes of less than $50,000. There would be a small fee charged for this service;
- That there would be a presumption that cases which are filed on the standard case management track in the proposed Primary Court and in the High Court would go to mediation before the 13th week after filing, providing that:
    - Judges would have the discretion to excuse parties from mediation, or to allow parties to delay mediation; and
    - There would be a working group[170] who would oversee the implementation of court mandated mediation. The working group would also advise on the qualifications mediators would need to be placed on the court list, the need for a code of ethics and a complaints procedure and Rules relating to privilege and confidentiality, mediator immunity and the good faith obligations of the parties involved in the mediation.

[170] This working group would consist of mediation practitioners, lawyers, policy makers and trainers.

- Parties should be entitled to choose whichever mediator they like, regardless of whether the mediator is contracted to the Ministry of Justice;
- If parties do elect to use a mediator who is contracted to the Ministry of Justice, they should pay an additional fee. This fee would be set at a level which protects access to justice and be in accordance with the established principles for setting civil court fees[171].
- Waivers, which are currently available for court fees, should be available for mediation fees; and
- If the court is dealing with an appeal, the Judge should be able to order the parties to attend mediation prior to the hearing.

State-managed mediations operate in several specific jurisdictions[172], where mediation is seen to have benefits because of the nature of the proceedings. One problem with such mediations is that there is no consistent standard of training or quality assurance of training. Whilst there are places, such as LEADR NZ, which do provide training (a 4 day intensive mediation course) for mediators, such training is not compulsory. This means that there is no guarantee over the standard of mediators and mediation.

Case Management

As previously mentioned, case management was introduced in the 1990's. Before this, it was the parties that controlled the pace of litigation. The court played a passive role, waiting for one or other party to seek the court's assistance in resolving the dispute. With the introduction of case management, this view has changed. The court is now required to take greater control of the progression of the case. The court is responsible for

[171] The Law Commission recommends that the fee should be a percentage of the relevant setting down fee. For a full description of the Court fees, see http://www.justice.govt.nz/fees/

[172] For example, the Weathertight Homes Resolution Service.

the management of the time frames for filing and the time tabling of events to ensure that the case moves through the court system as efficiently as possible. However, even the best case management system can not be effective in reducing delay unless the judicial officers, the legal practitioners and the court staff are committed to supporting the system. Justice Hansen notes that in New Zealand case management can be described as being "dependent on total co-operation and commitment from the profession, the judiciary and court staff. Without that level of co-operation and commitment, the ability of case management to reduce delay and cost is limited"[173]. The Law Commission reported that legal practitioners emphasised the need for court staff to be well trained with the legal process.

The Law Commission notes that an effective case management system should be aimed at ensuring that:

- The cases are dealt with in a consistent manner while still providing flexibility for those cases that do not fit the typical mould;
- The issues are identified as early as possible;
- All opportunities for settlement are explored throughout the proceedings; and
- A hearing date is allocated at the earliest possible time.

These are very similar to recommendations which overseas jurisdictions have found to help case management systems run effectively.

As outlined in the previous chapter, there are different methods of case management used in different New Zealand Courts. The Christchurch High Court runs on an individual list, whereas other High Courts and District Courts run on a master calendar list. In Auckland, cases which are expected to be longer and more complex than usual are assigned to an individual judge early on in the proceedings. Otherwise, Auckland uses

[173] Hansen. J, *Payment for Litigation*, a paper presented at the New Zealand Law Society Conference, Christchurch, October 2001.

the master calendar system. The Law Commission notes that there is no apparent difference in either system as both have been successful in reducing the amount of time from filing to resolution[174]. The Commission does note however that this is an area that will require continued evaluation. They note that one system may work well in some areas of New Zealand and not so well in other areas. Reasons for this could include the fact that in courts where there are temporary judges, it would be difficult to assign cases under an individual list as the temporary judge may not return to that particular court for some time, thus compromising the principles of case management, that is reducing delay and cost. The Commission does not believe that there is any reason to enforce a change to the case management processes if both systems are achieving efficient and effective results and there are no major procedural inconsistencies between regions. Given the relatively small size of New Zealand and its civil jurisdiction, it is important to ensure that the differences between regions are not confusing for the legal profession.

The most critical issue relating to case management, according to the Law Commission, is the alignment of rules between the proposed Primary Civil Court and the High Court. Presently, there is a difference with case management rules between the District Court and the High Court. The Commission recommends that the case management rules in the High Court be adopted in the Primary Court.

Currently in the District Court the first case management conference is held in week 13. This is done after discovery and inspection. The report notes that practitioners expressed concern that having the conference so 'late in the game' did not encourage the parties to focus on identifying the issues or exploring settlement options. By adopting the High Court case management procedures an early case management conference would be held in both the High Court and the Primary Court. If the proposed High Court Rules were implemented, this case management

[174] Supra n 160.

conference would take place in week seven and would take about 10 – 15 minutes. These conferences are vital to ensure that parties are able to focus on the disputed issues as early as possible, particularly in situations where mediation has either been unsuccessful or not attempted at all. The High Court Amendment Rules 2003 allows for a second case management conference to be held in week 13 – only if required. At this second conference, the High Court Amendment Rules require that a hearing date be allocated. It has long been recognised that the fixing of an early hearing date has the most significant effect on delay and costs[175]. If the proposed Primary Court were to be implemented, the same rules would apply.

Whether the parties would be required to attend these conferences would be at the discretion of the judge. Case management conferences are valuable in the progress of a case. If the parties did not attempt or even attend mediation, this conference would be their last chance for negotiations and settlement discussions. In this situation, if mediation is not attempted, the parties should be required to attend the second conference.

When evaluating the court system, the Commission noted that some practitioners believed that there were too many conferences. They went on to note that while practitioners liked the idea of case management some thought that it was too rigid in form[176]. One view is that over-conferencing stems from a lack of co-operation or lack of adequate case management training. Straightforward litigation would not need as many conferences as more complex cases. The case management rules should be flexible enough to allow judges to adapt them to suit the particular needs of the case. The Law Commission report indicates that there are some judges who do away with the standard format of case management to allow the parties to set their own agenda – provided that the case is still progressing

[175] See Kakalik, J. S., Dunworth, T., Hill, L. A., McCaffrey, D., Oshiro, M., Pace, N. M., Vaiana, M. E., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, The Institute for Civil Justice, (1996) RAND.

[176] Submissions received from the New Zealand Law Society, *Delivering Justice for All.*

towards completion. The case management system should not railroad parties onto a predetermined path. Parties should be able to agree upon a different approach if they wish.

Cost

The Law Commission made a number of recommendations to improve the way in which the legal system works, and to ensure that parties have adequate information regarding costs and alternative options to ensure that the parties can make informed decisions[177]. The Law Commission recognised that accessibility and simplification of the court process would possibly reduce the costs to parties. The New Zealand Government[178] is committed to ensuring that the costs of court proceedings do not deter parties from pursuing a claim, and also that they do not unnecessarily increase the expenses incurred by parties.

The Law Commission noted that one of the stronger themes which came to light throughout its consideration was the cost of taking a dispute to court. Numerous people were concerned that litigation costs effectively limited access to justice. There was unfortunately a somewhat cynical view that parties get the justice that they pay for. The Commission noted that the most important way of reducing costs was to simplify and streamline the court process, thereby eliminating any unnecessary steps. Interestingly, the Commission did not include restructuring of the courts themselves when highlighting ways to reduce costs. Perhaps this was because court costs may have to increase to fund the proposed changes to the court structure.

The Commission suggested that costs should be front loaded, similar to the cost reforms found in the Woolf Report. Legal professionals should be required to provide a detailed estimate, including items such as

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[177] Supra n 160.

[178] See *Government Response to Law Commission Report on Delivering Justice for All,* Presented to the House of Representatives.

disbursements and court filing fees, so that their clients can be fully informed prior to instructing counsel. This recommendation would not necessarily reduce costs however. While parties would be more informed of the costs and in a better position to seek the "lowest" legal fees, this would not, of itself, necessarily reduce costs.

Most civil justice users are not in a position to judge the price and quality of legal work, as the public's understanding of legal work is low. It is difficult for the public to predict what costs are involved with the court system. This means that the public are unable to make informed decision about how much is considered reasonable to spend on taking a dispute to court. This lack of available information also leads to the perception that legal costs are overpriced and that lawyer's over-charge.

Changing legal costs may not be as easy as changing court costs. The legal profession is regulated in the form of entry requirements. Setting such requirements limits how many people can become lawyers although the number of lawyers has grown in recent times with universities experiencing an increase in student enrolments in law schools. Once lawyers are qualified and have been admitted as a barrister and solicitor, they are governed by the Rules of Professional Conduct. These Rules restrict lawyer's practices, although some restrictions on competition between lawyers, for example, scale fees, have been removed. Some restrictions are essential to the operation of the profession.[179] Many ethical and professional restrictions are there to ensure members of the profession conduct themselves in a way that is consistent with the public interest.

The Government recommends that one of the ways in which to reduce costs is to reduce the cost of legal fees, through the Government exerting a more direct influence over the amount that the legal profession

[179] Without developing a full discussion on such restrictions, an example of such a restriction is client privilege. Client privilege can be defined as a legal concept that protects communications between a client and their lawyer and keeps those communications confidential. This privilege encourages open and honest communication between clients and lawyers.

charges. Any Governmental influence would have to be careful not to over-regulate the legal profession. Any price regulation may possibly inhibit competition. With this in mind, it is necessary to discuss what areas of the legal profession the Government already regulates. Such areas are for example Crown Solicitors, Legal Aid Lawyers and Counsel for the child in Family Court matters. In addition, the Government and its departments are substantial users of legal services, and often instruct legal counsel, and thereby influence the legal services market.

The Law Commission recommends that rather than price regulation, a better approach would be to remove some of the existing barriers to legal services. A way in which some barriers could be removed is by making information regarding legal professionals and the legal process available to the public. This would allow the public to see what steps are required and what procedures are used in the civil justice system, perhaps putting them in a better position to determine whether the wish to pursue litigation. Whether this would actually reduce costs is unclear. However, it could reduce the number of parties who complain about being overcharged. New South Wales experienced this when they introduced compulsory cost disclosure. Complaints relating to overcharging fell from 304 in the 1995 – 1996 period, to only 4 in the 1997 – 1998 period.[180]

The Commission also recommended that there be ongoing evaluation of ways in which to reduce costs. Like overseas jurisdictions, the cost factor is the last thing to be evaluated. This is unsatisfactory as it is costs which are most concerning to civil justice users. There is a real need in New Zealand for an in-depth evaluation of legal costs and how to reduce them.

The Law Commission's report does make some excellent recommendations. However, some would be too expensive to implement, or alternatively, there is no real need for them. Recently the Law

[180] See Australian Law Reform Commission, *Managing Justice: A review of the Federal Justice System,* Report 89, 1999.

Commission announced that there would be a major rewriting of New Zealand statutes, a clean up of ancient language so to speak. This would provide the perfect opportunity for the unification and simplification of the rules relating to civil procedure.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSIONS

This paper has shown that the civil justice system in New Zealand still has room for improvement. There are many aspects which need to be reformed. This chapter will discuss such reforms. In the author's opinion the areas of the civil justice system that require consideration for reform are:

- The court structure, court processes and case management;
- Procedures causing delay;
- The level of information made available to the public, legal profession, court staff and the judiciary; and
- Costs.

Court structure, court processes and case management

As experience in overseas jurisdictions has indicated, it is important to have a workable case management system. Whilst New Zealand does have such a system in place, it is confusing for parties and legal counsel as each jurisdiction determines what form of case management to use. This makes it difficult for the users as they may be unsure of the applicable processes. Unification of processes would be beneficial. This is underway to some extent as the High Court Rules and District Court Rules are being unified.

Case management in New Zealand should be a merging between the traditional case management methods already found in New Zealand, and the case management style found in Germany. Judges should be required to actively participate in the development of cases. They can assist in identifying which issues will have a better chance of success and which are weak. Everyone would be able to express their views on

timetabling matters. The judges would also be able to inform parties of any sanctions if certain timetabling steps are not met.

In localities where there are permanent judges,[181] an individual list should be implemented. This allows individual judges to become familiar with the dispute, and to develop a better "feel" for what will be required to resolve it. It also allows parties and lawyers to understand what the judge needs in order to expedite resolution. In areas where there are no permanent judges[182], a master calendar list would be preferable. For a master calendar system to work effectively in these circumstances, it would be the responsibility of the court staff to ensure that case files are fully updated, and that there is a clear paper trail for a new judge to follow. The case file would have to include:

- All documents filed in the court in relation to the dispute;
- Minutes from any case management conference or judicial settlement conference; and
- Any other notes that the registry believes will assist the judiciary in resolving the dispute[183].

This should effectively allow a judge, who knows nothing about the dispute, to become familiar with the case very quickly. It would also mean that court staff would have to maintain extremely up-to-date files, which does not always happen at present. In jurisdictions where there are limited legal practitioners, or no permanent judges, there should be a greater requirement for court staff to assist parties quickly, without the need to refer them to other areas. This proposition may require that court staff have some form of legal background.

The amount of staff that each court currently has would have to be examined to determine whether the staffing level is adequate for the

[181] Jurisdictions with permanent judges include Wellington, Auckland and Christchurch High Courts and District Courts.
[182] For example, Greymouth, Timaru and Palmerston North High Courts and Masterton, Levin and Blenheim District Courts.
[183] This could include notes which previous judges have made in relation to the case through to the availability of alternative dispute resolution services and whether it has been attempted.

number of cases. It would be important to ensure that where possible, there are staff who specifically administer civil cases and staff who administer criminal cases. That way, staff can become very familiar with the different resolution mechanisms. There would need to be a commitment from the Ministry of Justice to provide more staff if the levels are found to be inadequate. Currently court registries are under a lot of pressure to deal with the high demand for civil justice. An increase in case management would inevitably add to this pressure unless staffing levels are increased. Although this paper is not concerned with the criminal justice system, part of the reason why court staff are under pressure is the ever increasing workload in the criminal sector.

To assist the civil justice system at court level, the Law Commission proposed a reform of the courts themselves. In the author's opinion it is not necessary to go this far. Reforming the courts themselves would be an extremely costly and time consuming undertaking. Not only would such reforms affect the courts, court users would be affected too. Cases would have to be deferred in order to accommodate the new structure. This would only add to the problems with delay, although the problems may not remain once the new structure was fully operational. The legal profession would have to be re-educated about the new system. They in turn would have to re-educate their clients. Court staffing levels would inevitably need to be increased. The High Court Rules and District Court Rules would have to be changed. Considering the Government is currently re-writing the Rules, it seems illogical to have to re-write them yet again if a new court structure is in place.

Perhaps a more viable option is to keep the court structure as it is, except for incremental changes. First and foremost, a national case management system needs to be established. The procedures would need to be the same throughout New Zealand. It would not be necessary for the whole country to use the same list system[184]. There would have to be a

[184] Either the individual list system or the master calendar list system.

commitment from the judiciary to actively participate in the progression of disputes, and recommend where practicable, alternative dispute resolution as an option. As previously mentioned, a unified system is very important. Legal practitioners need to be sure that they are familiar with the procedure. They should be able to walk into any court in New Zealand and know what the timetable will probably look like. Counsel would know how much preparation particular cases involve. Counsel would be able to provide more accurate quotes to their clients. This would lead to costs becoming front loaded, which is one of the Law Commission's recommendations. Eventually New Zealand could have a system similar to the German system *BRAGO,* which specifies what fees legal practitioners can charge. It is doubtful that we will see this anytime soon, especially considering New Zealand has already dispensed with a previous fee scale and given also that New Zealand Governments in recent times have been philosophically opposed to price control.

Secondly, the jurisdiction of the District Court should be increased, as the Law Commission suggests, to $500,000. This would relieve some of the pressure on the High Court. The High Court would then be free to concentrate on the more complex cases. As outlined in the previous chapter, many typical New Zealanders are finding themselves involved in legal disputes, which involve sums of over $200,000.

Expanding the jurisdiction of the District Court may lead to a higher demand for judges. The New Zealand system of judicial appointment means that it is many years before legal practitioners are appointed to the bench[185]. By that stage, many legal practitioners may not be willing to leave a profitable position in legal practice. One option would be for New Zealand to explore whether it would be better to implement a system similar to the German system. Promising law students could join the judiciary directly from law school. There would be a probationary period where a senior judge would mentor the junior judge.

[185] New Zealand requires that legal practitioners hold a Practising Certificate for 7 years before they can be appointed to the bench.

Any mentoring program would not have to be excessively demanding on the senior judge. For example, the junior judge would be able to sit in and observe case management conferences and judicial settlement conferences. They would also observe hearings. Fundamentally, the junior judge would assist the senior judge whilst learning at the same time. Once the probationary period had finished, the junior judge would be able to resolve disputes without assistance. By increasing the ratio of judges per capita disputes could be resolved faster. New Zealand currently has a ratio of one judge for every 22,757 people[186]. A more likely option, however, is that lower level tribunals and possibly courts could be staffed by lawyers with less practical experience. This has in the past happened in the District Court, with the appointment of judges in their mid 30's.

Finally, court filing fees could be increased, although this would contribute to issues relating to costs. Increasing filing fees has two potential benefits. First, if filing fees increase, more money would be coming into the court. This would relieve financial pressure on the courts and the Government (to an extent). Increasing filing fees would also provide finances for any extra court staff and judges that may be needed. Secondly, fees should be set at a level, while still affordable to the majority of the public, would be enough to make some parties reconsider using the court system for dispute resolution. This would also relieve pressure on the court. Of course, Legal Aid, and fee waivers, would still be available for those that needed financial assistance.

These proposals are similar to the German civil justice system. The reasons for proposing them for the civil justice system in New Zealand is that Germany has not had to reform its civil justice system in the same ways as the other overseas jurisdictions previously discussed have. The German civil justice system has worked very well without the need for change. The German public appears happy to pay more in filing fees provided that they are not paying too much for legal fees.

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[186] Compare this to the German civil justice system, which has 27 judges for every 100,000 people.

Delay

Too often comments relating to delay stem from the belief that delays in delivery of judgment are due to work pressure. This belief is far from true. Justice Hansen noted that judges that were under pressure showed greater productivity that those with less pressure[187]. In numerous American jurisdictions which use the individual list case management system, outstanding judgments are published as part of the Judiciary's annual report. There is also at least one American State which has implemented legislation stating that if a judge has outstanding reserved judgments of more than 6 months, their salary will be stopped. In the Federal Magistrates Court of Australia, procedures have been developed for the handing down of reserved judgments. In the Federal Magistrates Court, the benchmark for the handing down a reserved judgment is within 3 months of hearing or receipt of submissions in writing. It is probably not necessary for New Zealand to go as far as stopping judge's salaries; however more judicial accountability is required[188]. New Zealand should consider publishing a list of outstanding judgments in order for the public to be aware of how well the civil justice system is, or is not, working. Having said that, it is absolutely essential that the judiciary have plenty of writing time to produce judgments that are sound, and hopefully less likely to be appealed.

Statutes which currently have judgment delivery time restrictions have worked well since their introduction[189]. If judges were aware of the time constraints right from the start they would be in a better position to get the judgment out within time. Besides, if parties and their legal counsel are

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[187] Supra n 105.

[188] The author has heard of occasions where parties have waited nearly 2 years to receive a judgment. In fact, in one case, the hearing had to be re-argued as there had been a delay of 2 years from the hearing, and the court had forgotten what the case was about.

[189] See Employment Relations Act 2000 and Weathertight Homes Resolution Service Act 2006.

required to adhere to a timetable, why shouldn't the judiciary be required to do so too?

Information available to the public, legal profession, court staff and the judiciary

Of the three reforms mentioned at the beginning of this chapter, this reform is possibly the easiest to implement. Information relating to alternative dispute resolution would be relatively easy to produce. The Ministry of Justice currently publishes numerous information booklets on a range of topics[190], and a similar approach could be taken in this area. The cost involved in making these booklets available would be nominal.

Offering more alternative dispute resolution papers at Universities would be beneficial in disseminating information. Even more so if the papers were compulsory. All future lawyers would be experienced, even if at a very basic level, with alternative dispute resolution methods, what types of outcomes are produced and what the advantages and disadvantages of the various processes are.

Finally, the New Zealand Law Society Continuing Legal Education programme could provide an alternative dispute resolution course. Currently, there is only the negotiation seminar available.

Costs

The Law Commission's proposals relating to costs need to be further examined. Their proposal that the legal profession become more up front and proactive in revealing their costs is important. In the United Kingdom, solicitors are required to give clients the "best costs information possible" which needs to be at a level that is appropriate to the particular

[190] For a full list of the publications available see http://www.courts.govt.nz/pubs/courts-publication/index.html

client[191]. This information can be an agreed fixed price, providing a realistic estimate of what the costs will be or what the cost of the next stage will be. Lord Woolf indicated in his report[192] that previously this would have been hard to predict. However with the introduction of case management this has become much easier.

In Australia costs estimates are to be given as soon as possible. This allows parties to consider their options before retaining a particular legal practitioner. In New Zealand most practitioners are good at providing cost information to their clients. The Law Commission believes that with a little extra effort, more information could easily be provided. They note that the New Zealand system is not dissimilar to that found in the United Kingdom and Australia. The Commission believes better-cost information, as currently found in the United Kingdom and Australia, could be achieved here. In fact, the Auckland District Law Society produces forms which include a "Terms of Engagement" form for practitioners. This form establishes the terms on which the practitioner will undertake work. It includes information such as the client's instructions, any fee estimates, the credit limit of the client and the practitioner's billing policy. The Commission commends the Auckland District Law Society for their proactive approach to demystifying legal costs.

New Zealand also needs to explore whether it is time for the legal profession to advertise their costs. Currently there is a requirement that advertising must be "consistent with the maintenance of proper professional conduct"[193]. This does not allow comparative advertising as it is believed that this will bring the profession into disrepute. The legal profession does not advertise their legal fees except for the standard conveyancing fees.

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[191] See Solicitors' Costs Information and Client Care Code 1999.
[192] Supra n 8.
[193] New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors*, R 4.01.

This lack of comparative advertising means that clients are at a disadvantage as they are unable to determine what a reasonable fee is or "shop around". Australia and the United Kingdom have recently removed some of the restrictions on legal advertising. If New Zealand allowed legal advertising in relation to costs it is doubtful whether there will be a significant increase in the amount of legal advertisements. Advertisements could include the hourly fee or fixed rate of counsel. The Law Commission considers that the New Zealand Law Society should have the responsibility of providing comparative costs information. This appears to be an excellent recommendation, as it would increase the general public's knowledge of legal costs.

Finally, it is necessary to discuss court costs. In 2000, the Department for Courts reviewed court-filing fees. Fees were eventually increased. The setting down fee (a fee payable when the proceeding is given a hearing date)[194] is $750 in the District Court and $2,600 in the High Court. This was a substantial jump in fees. This paper has previously discussed the possibility of setting even higher fees to ensure that alternative dispute resolution methods were seriously considered as an option. With these recent fee increases, the amount of cases filed has not been reduced. This clearly shows that the current fees do not put parties off filing in the courts. If fees were to be increased again, it would have to be a fine balancing act, ensuring that fees were not excessive. The Court of Appeal noted that "...court fees are the price the Government charges for access to the courts and fees that are high in relation to the means of the litigants inhibit access to the system ... If access to the courts is impeded because court fees are set at a level that pose significant impediments to access both the constitutional principle and the fundamental right [of access to justice] are breached"[195]. It is important that court fees are regularly reviewed to ensure that parties are able to get access to justice on a reasonable basis.

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[194] This fee is in addition to the filing fee which was discussed in an earlier chapter.
[195] *Wiseline Corp Ltd v Spaceways Holdings Ltd* (2002) 16 PRNZ 374, at [18] and [19].

To conclude, the New Zealand civil justice system has made initial steps to address the concerns over problems with access to justice. However these steps do not go far enough to solve the problems. As previously indicated, civil justice in New Zealand is too slow, too complex and too expensive and in some contexts at least it may not produce solutions that are in the best interests of the parties. Change can be achieved however.

New Zealand has taken the preliminary step of introducing case management systems. These systems have had some success in reducing delay, but not costs. It is imperative that all courts embrace case management, and that the judiciary become proactive in the progression of cases, so that they retain effective control over the court's processes. Effective case management would achieve this.

Further examination of overseas civil justice jurisdictions should be undertaken, especially in relation to the German civil justice system. New Zealand should consider whether it is time to move to a less adversarial system, that is, to a more inquisitorial system. This, combined with case management would enhance civil justice, reducing the complexity of court, delay, and potential costs.

As previously indicated, the Government has sought to promote the benefits of alternative dispute resolution mechanisms, mediation in particular. Gradually changes are being introduced within the court system and the legal profession to encourage greater use of mediation, but much remains to be done to ensure that mediation becomes established as an important mechanism for enabling people to resolve civil disputes. In some situations at least it is more important that the parties be able to resolve their problems in a way that both can live with and move on rather than go through a formal court hearing.

This paper has given some indication as to potential solutions for the issues surrounding problems with the civil justice system, but it has not

attempted to make policy choices on where the direction of the New Zealand civil justice system should lie. One conclusion can be drawn with certainty however, and that is that the present situation is unsustainable, and change is necessary in order to ensure that the civil justice system is easily accessible for the future generations.

FIGURE 1

Comparative Civil Legal Services Investments[196]

[Nations are ranked by relative share of GNP invested in publicly funded civil legal services—lowest to highest]

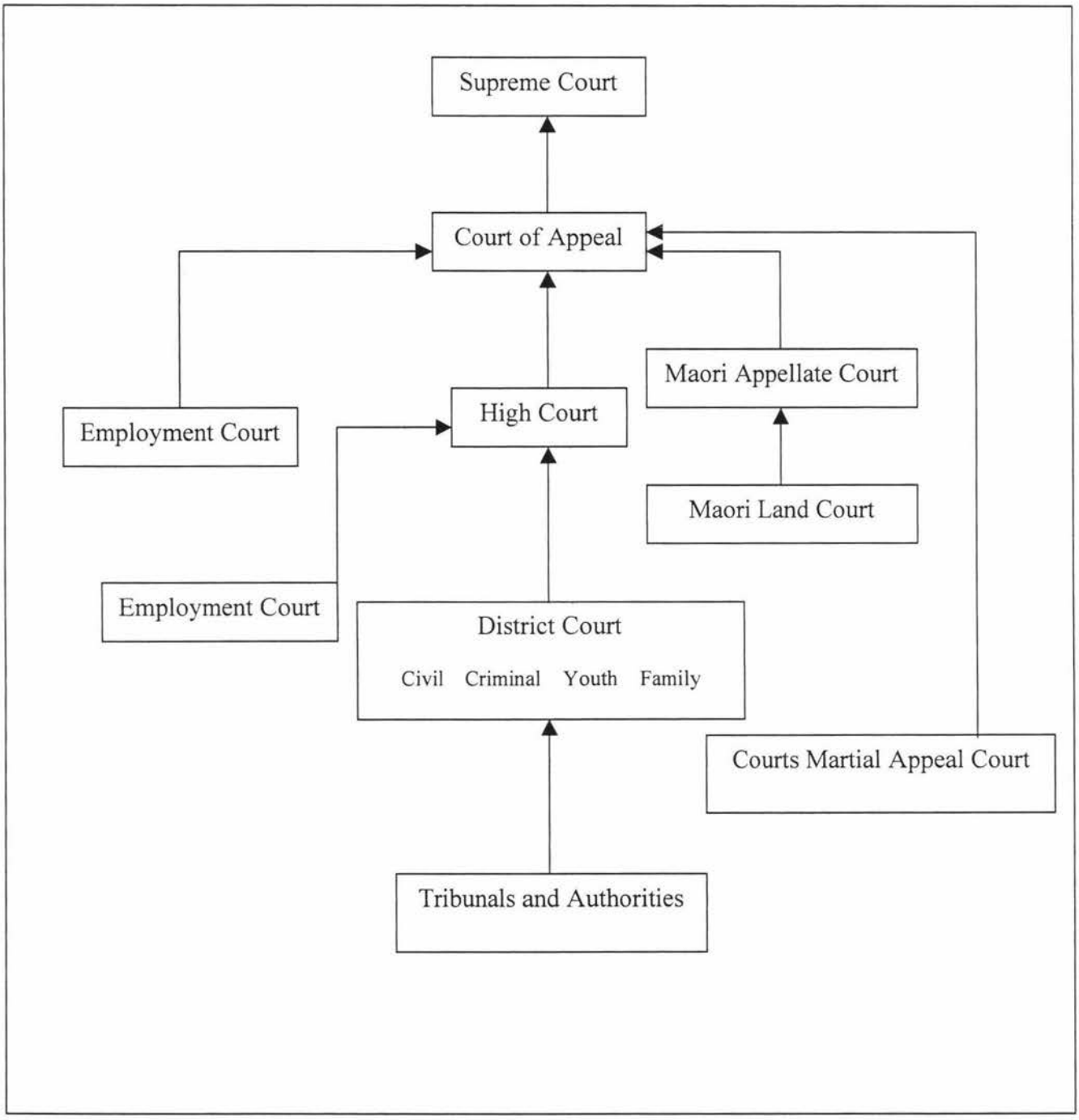
	Nation's TOTAL Government investment / Nation's population	Government's Per Capita investment	Government's investment Per $10,000 of GNP	Total US investment if the US invested as much of the GNP as this nation	How many times greater is this investment than the US investment (as % of GNP)
UNITED STATES (includes Federal, State, local Government and IOLTA* expenditure)	$600 million / 270 million	$2.25	$0.70 [=70 cents]	$0.6 BILLION [e.g., 600 million]	////////// //////////
GERMANY	$390 million/ 80million	$4.86	$1.90	$1.6 BILLION	2.5 times
FRANCE	$270 million / 59 million	$4.50	$1.90	$1.6 BILLION	2.5 times
AUSTRALIA	////////// //////////	////////// //////////	[Each State has its own program]	////////// //////////	////////// //////////
-New South Wales	$31 Million / 6 million	$5.12	$2.75	$2.3 BILLION	4 times
CANADA	////////// //////////	////////// //////////	[Each Province has its own program]	////////// //////////	////////// //////////
-Quebec	$52 Million / 7.3 million	$7.07	$3.50	$3.0 BILLION	5 times
-Ontario	$82 Million / 11.5million	$7.06	$3.60	$3.0 BILLION	5 times
-British Columbia	$32 Million / 4 million	$7.80	$4.00	$3.34 BILLION	5.8 times
NETHERLANDS	$150 Million / 15.5million	$9.70	$4.20	$3.5 BILLION	6 times
NEW ZEALAND	$27 Million / 3.8 million	$7.10	$5.10	$4.25 BILLION	7 times
ENGLAND	$2 BILLION $1.35 BILLION / 53 million	$39.00 $26.00	Gross=$17.00 Net = $12.00	$14.2 BILLION $10.1 BILLION	23.5 times 17 times

*IOLTA = Interest on Lawyers Trust Accounts

[196] Figure taken from http://www.equaljusticelibrary.org/international/comparative.asp

FIGURE 2

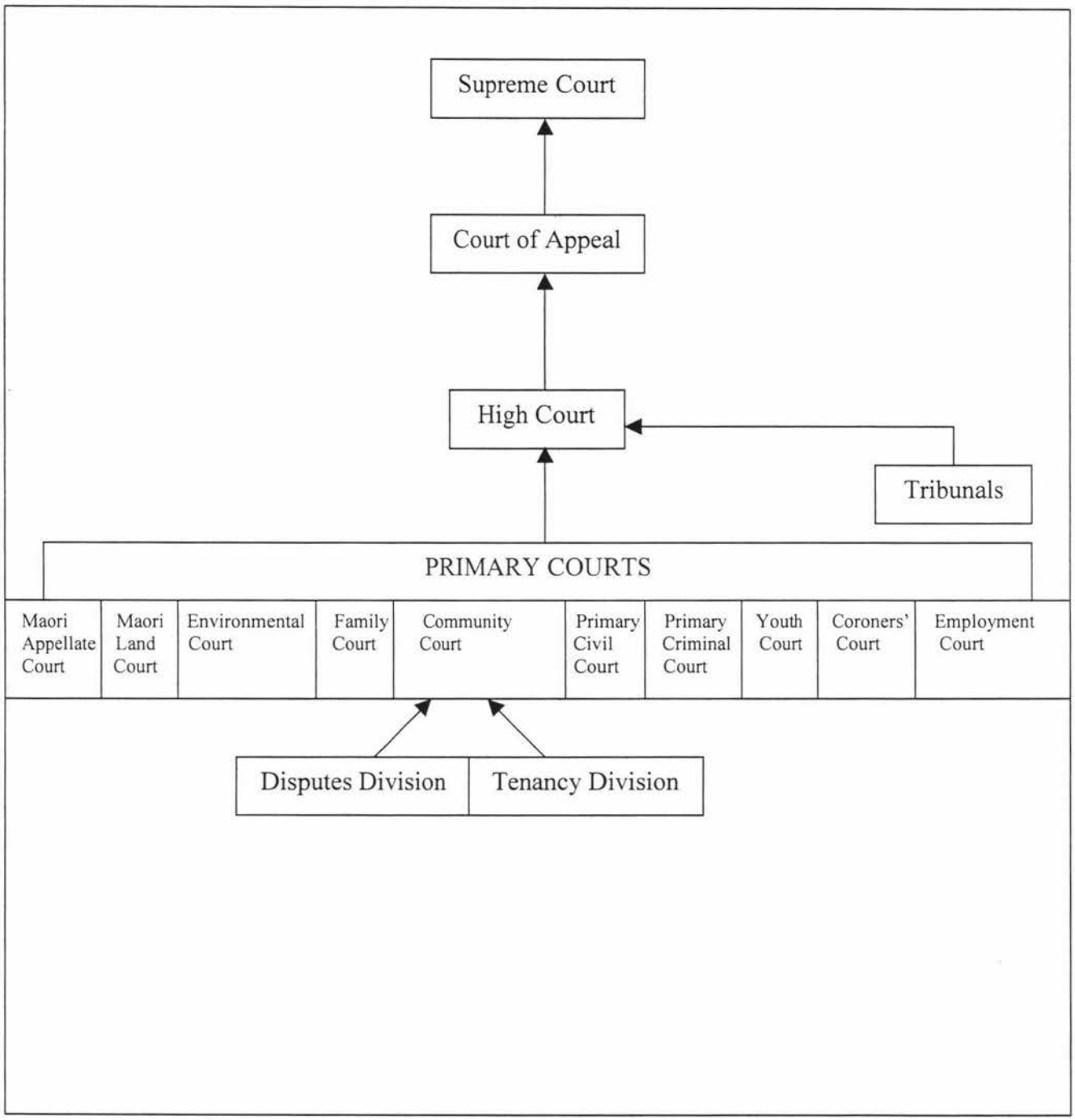
The current New Zealand Court Structure[197]



[197] Figure taken from Ministry of Justice
http://www.justice.govt.nz/education/nz_court_sys.html

FIGURE 3

The proposed court structure[198]



[198] Figure taken from Law Commission, *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, NZLC R 85

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