

# REFORMING CIVIL PROCEDURE

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*This paper proposes that the Rules Committee's membership should be altered, and that civil procedural rules reform should be viewed from all four of the perspectives – the judicial, and those of the litigation lawyer, the litigant and the public. It is also suggested that more thought needs to be given to the location of procedural requirements – in rules or in practice notes, or left to judicial administration. The author explains why rules are almost always preferable to practice directions. Fundamental issues of principle and policy, for example whether all rules should be readily comprehensible by non-lawyers, need to be addressed when changing the rules of civil procedure but are all too often ignored because they are too difficult and because the empirical research has not been done.*

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## **I INTRODUCTION**

New High Court Rules for New Zealand were introduced by the Judicature (High Court Rules) Amendment Act 2008 (HCR). Since then further reform of the rules of civil procedure has occurred. The years 2009–2011 have notably seen:

- the High Court (Access to Court Documents) Amendment Rules 2009;<sup>1</sup>
- the High Court Amendment Rules (No 2) 2010 (correcting some minor mistakes in the principal rules and improving some, mainly probate, forms);<sup>2</sup> and
- the High Court Amendment Rules (No 2) 2011 (a major switch to mainly electronic discovery and inspection of documents, and introducing "tailored discovery").<sup>3</sup>

As far as district courts are concerned, the District Court Rules 2009 (the DCR) contained several novel features,<sup>4</sup> notably a requirement to serve a notice of claim before filing. Pursuant to

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1 High Court (Access to Court Documents) Amendment Rules 2009.

2 High Court Amendment Rules (No 2) 2010.

3 High Court Amendment Rules (No 2) 2011.

s 122B of the District Court Act 1947, the DCR may "apply or incorporate by reference, with or without modification, provisions of the High Court Rules." The 2009 Rules, at some cost to *elegantia juris*, did so massively.<sup>5</sup>

There has been a constant groundswell of dissatisfaction with either particular portions of our procedural rules or individual rules. It seems unlikely that we will ever arrive at a golden time when there is no significant delay in having cases disposed of, and when the "just, speedy and inexpensive determination of any proceeding or interlocutory application", to quote r 1.2 of the HCR, is a fact of legal life rather than merely "the objective of these rules".

Exactly the same realistic but pessimistic mood prevails in England, notwithstanding the reforms introduced after the Woolf Report.<sup>6</sup> In that country there was less dissatisfaction with procedural law when the law was simpler, the documents relevant to the disposition of an ordinary case were much fewer in number and the reforms achieved by the Judicature Acts 1973–1975 (UK) were producing their widely applauded beneficial effects. Professor Jolowicz has captured the mood that prevailed at the turn of the 20th century:<sup>7</sup>

A few grumbles can, of course, be found in the literature of the time, but the general euphoria that prevailed at the end of the nineteenth and beginning of the twentieth century can be seen in an essay by Lord Bowen in 1887 and a lecture by Blake Odgers QC in 1901. Lord Bowen was prepared to assert "without fear of contradiction that it is not *possible* in the year 1887 for an honest litigant in her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation", and he considered that the county court legislation and those who carried out its provisions in the provinces had furnished the population of the country "at their very doors with justice, cheap, excellent, and expeditious". Blake Odgers, while conceding that perfection had not yet been achieved, repeated Lord Bowen's sentiments in words not very different and concluded, "Litigation in 1800 was dilatory and costly; now it is cheap and expeditious." To borrow the language of Lord Brougham, the procedure of our courts was in 1800 "a two-edged sword in the hands of craft and oppression; it is now the staff of honesty and the shield of innocence".

## II *FOUR PERSPECTIVES*

Under s 51B of the Judicature Act 1908 New Zealand's Rules Committee consists of:

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- 4 These are also made by the Rules Committee, but the Chief District Court Judge's concurrence is substituted by s 122B for that of the Chief Justice.
  - 5 Further changes are contained in the draft District Courts (General) Amendment Rules 2011 subject to consultation at time of writing, notably a relaxation of previous restrictions on the availability of summary judgment.
  - 6 Lord Woolf *Access to Justice: Final Report* (Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, July 1996).
  - 7 JA Jolowicz *On Civil Procedure* (Cambridge University Press, New York, 2000) at 356 (footnotes omitted).

- (a) the Chief Justice (currently Dame Sian Elias);
- (b) the Chief High Court Judge (currently Winkelmann J);
- (c) two other High Court Judges appointed by the Chief Justice (currently Fogarty J (who is chair of the Committee) and Asher J);
- (d) the Chief District Court Judge (currently Judge Doogue);
- (e) one other District Court Judge appointed by the Chief Justice on the recommendation of the Chief District Court Judge (until recently Judge Doherty and currently Judge Susan Thomas);
- (f) the Attorney-General (Hon Christopher Finlayson MP, who on occasion attends meetings personally because of his considerable interest in civil procedure and otherwise is represented by a private secretary Ms Briar Charmley);
- (g) the Solicitor-General;
- (h) the Chief Executive of the Departments of Courts;
- (i) two practitioners nominated by the New Zealand Law Society and approved by the Chief Justice (currently Andrew Beck and Bruce Gray QC); and
- (j) three members appointed by the Chief Justice "for special purposes": BWF Brown QC, the Hon Judge Doherty and Stephen Mills QC.

Even with the most useful inclusion of these experienced counsel from the profession, this composition reflects a clear intention that the judiciary should dominate civil procedure rule making. This traditional policy goes back to s 23 of the Supreme Court Establishment Ordinance 1841.<sup>8</sup> At that very early time in our legal history the procedure of the then principal court was to be prescribed by the judges of that court – without any checks or balances. The Court of Appeal and the Supreme Court are not discretely represented. But over recent years Chambers J was at one stage Chair, and was latterly a member of the Committee and has taken the initiative in proposing reforms some of which affect the Court of Appeal's work. An example is the substitution of a revised r 12A of the Court of Appeal (Criminal) Rules 2011 in 2010,<sup>9</sup> which removed the compulsion on a criminal appellant to file a written waiver of privilege when the conduct of the appellant's counsel at trial is a ground of appeal.

Is it ideal to compose the Rules Committee in this way? I submit that it would be preferable to reconstitute the Rules Committee by amending s 51B to provide for, say, two fewer judges and two

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8 Supreme Court Establishment Ordinance 1841 5 Vict 1.

9 Court of Appeal (Criminal) Amendment Rules 2010.

more lawyers, perhaps one academic and one practitioner with a current extensive district court practice. We must, I suggest, distinguish the four perspectives on civil procedure – as the rules presently work in the various courts and as their procedure should be.

These four perspectives are exhaustive. They are:

### ***A The Judicial***

While all generalisation is dangerous, a judicial perspective is typically characterised by the attachment of importance to: reduction of delay; the desire that material (evidence and legal submissions as well as pleadings) be neatly served up; a wish to reduce the burden of judgment writing; a commitment to justice and the rule of law and the reputation of the court; and a desire that access to justice be maximised.

### ***B The Litigation Lawyer***

This perspective is typically characterised by an overriding concern to win the litigant's case, a nervousness about the costs of litigation and the difficulty of explaining both costs and delays and technical court procedures to the often over-anxious litigant, his or her client; a need for flexibility of procedure (recognising that new evidence may come to light at even the eleventh hour before trial, and new relevant decisions may be given in appellate courts) and an attachment to comparative orality, by which I mean that the advocate will be aggrieved if he or she is legally prevented from developing the client's case by over-strict requirements about prior commitment of the evidence or arguments to paper.<sup>10</sup>

### ***C The Litigant***

This perspective is characterised by a desire to win and (at least if the litigant is a plaintiff) as expeditiously as possible; a lack of concern about other litigants in the queue or the public interest; a fear about solicitor-and-client costs and about the chances of recovering party-and-party costs in a quantum which covers the greater proportion of the litigant's own solicitor-and-client costs and disbursements; and an acute awareness of the non-legal dimensions of the resolution of the dispute. These non-legal dimensions vary almost infinitely, of course, but include:

- the possible effects of commencing and continuing, or defending the litigation on business or personal relationships;
- the possible adverse publicity that a trial (as opposed to interlocutory skirmishes) will generate, the precedential effect of a win or a loss – especially important if the party is an insurance company or the litigation is in the nature of a test case; and

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<sup>10</sup> See Tim Parkes "The Practitioner's Perspective" in Deidre Dwyer (ed) *The Civil Procedure Rules Ten Years On* (Oxford University Press, USA, 2010) 436.

- a desire to reduce the nervous stress of living with unresolved litigation for many months; in the case of a corporate party, the desire to reduce the costly and distracting effect of the company being caught up in document collection for discovery, and of the preparation of witness briefs by directors or managers who played a part in the transaction.

#### ***D The Public Perspective***

This will obviously vary from one type of case to another but recurring elements of this perspective in New Zealand are: a concern about the overall cost of civil justice; concern that cases take so long to be disposed of; worry about the availability and adequacy of civil legal aid; and some resentment about the mysteriousness of courtroom proceedings, contributed to by the fragmentary media reportage of what is said in court, and the often total failure of the media to identify the issues for a reading and viewing public.

### ***III BALANCING THE PERSPECTIVES***

These perspectives overlap only in part. Civil procedural reform should be sensitive to all of them; often it is not. Revised procedural rules are often represented as 'more efficient' or 'more conducive to achieving justice'. And so they are from one or two of the four perspectives, but not from the others.

Consider two examples:

#### ***A Example 1: The Issues Conference***

The High Court Amendment Rules 2012 will require defended proceedings to be classified as 'ordinary' or 'complex'. Under the new r 7.5 of the HCR an issues conference may be directed for both ordinary and complex defended proceedings. This is designed "to advance the identification and refinement of the issues".<sup>11</sup> The judge may issue a direction requiring the attendance at the issues conference of all or any of the following:

- instructing solicitors;
- all counsel engaged; and / or
- the parties (or in the case of corporate parties their senior officers or authorised representatives).

The usefulness of this large attendance on occasion is beyond doubt, if we mean 'useful' to the judge and useful from the public perspective. Common ground is recognised early on, non-issues are eliminated and trial time is consequentially shortened. It is simultaneously likely to be seen as an expensive vexation from the litigation lawyer's and the litigant's perspectives. This is due to

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<sup>11</sup> High Court Amendment Rules (No 2) 2012, r 7.5. The text of these proposed rules, to come into force on 1 August 2012, has been settled by the Rules Committee, but further change is possible.

difficulties in organising the team members, extra cost, and the view that "all we need is a good report on the conference from our counsel, it is better tactics for just one person to speak for our side, so I can't help anyway and it is a waste of time because settlement negotiations look promising".

### ***B Example 2: Preparing for trial***

Under the new pt 9 subpt 1 of the HCR, proposed to be substituted by the High Court Amendment Rules (No 2) 2012, when the parties are applying the now revised rules about written briefs and common bundles, they must "pursue the just, speedy and inexpensive determination" of the proceeding.<sup>12</sup> Under r 9.2 "documents to be relied upon" at trial must be listed, and when further such documents are added an updated list must be supplied "so that the other parties always have an up-to-date list". The parties must, under r 9.4, cooperate in preparing a common bundle. This includes giving advice and assistance to one's opponents. The common bundle is to be presented to the judge with all the documents arranged chronologically, each page numbered, and served within the prescribed time.<sup>13</sup> At the same time any objections as to admissibility must be resolved and "the objection must if practicable be recorded on the common bundle".<sup>14</sup> All this takes place at a time when senior counsel is often simultaneously engaged inter alia in:

- difficult settlement negotiations;
- finalising the briefs;
- conferencing with a possibly nervous client; and
- preparing the compulsory written opening.

In practice he or she will quite likely be unable to delegate very much of this work. For most of the 20th century, counsel could refine his or her opening right up to the point of starting to speak in the courtroom and did so. He or she could adjust for any last minute developments and fine-tune the words used to express points, thus often improving clarity. The new pt 9 subpt 1 obviously improves the lot of the judge but, despite r 9.1, erects a higher hurdle for the legal practitioner, and is more costly from the perspectives of the litigation lawyer and the litigant. So be it, of course, if it is calculated that the judge's perspective, with a tinge of the public perspective, is so important that it overshadows the perspectives of lawyer and litigant. My experience is that this crucial weighing of inconsistent interests is rarely expressly performed: the efficiency of the process and the convenience of the judge operate as trump cards. The recent practice of the Rules Committee in consulting widely, notably with the New Zealand Law Society and the New Zealand Bar

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12 High Court Rules, r 9.1.

13 Rule 9.4.

14 Rule 9.5(2).

Association, clearly mitigates this criticism. But it is quite common for professional commentators themselves to concern themselves (and very helpfully) with points of detail, and not to make submissions that the litigation lawyer's and litigant's perspectives would seem to call for.

#### ***IV RULES, PRACTICE NOTES OR DIRECTIONS, AND JUDICIAL ADMINISTRATION***

What are the respective proper functions of rules of court; practice notes or directions; and judicial administration?

"Judicial administration" in this article is a convenient label for the control of court practice by means other than procedural rules, for example practice notes or directions, or unpublished written instructions issued by the Chief High Court Judge to registrars or court staff generally.

Practice notes or directions, often referred to in England as "Practice Statements", have been a prominent method of control, and an aid to consistency and orderliness for many years. Typically, they have coexisted with formally promulgated rules of procedure. The question of the proper relationship between practice directions and rules has generated almost no academic or professional discussion.<sup>15</sup> The question is similar to the problem of relating primary and secondary legislation: in that case there is certainly no widely agreed formula for determining what should go into the one rather than the other, and it is irresistible that convenience has often played a large part. I suspect that the consignment of certain mandatory obligations placed on litigants to practice directions rather than rules has similarly often been a matter of convenience rather than principle.

The question is very much a practical one; it is not merely theoretical or philosophical. It is therefore disappointing that there is so little on the subject in Lord Woolf's *Access to Justice*,<sup>16</sup> although glancing blows were struck in two places. Lord Woolf wrote:<sup>17</sup>

The new rules are deliberately not designed expressly to answer every question which could arise. Rule 1, the statement of the objective, provides a compass to guide courts and litigants and legal advisers as to their general course. Where detailed instructions are needed, matters of general application will be dealt with in the rules; other matters will, I hope, be capable of being dealt with in practice directions and practice guides.

This unfortunately begs a number of questions. First, it is unclear how we should recognise "matters of general application" which are to be dealt with by formal rules of procedure. The distinction possibly being drawn is between ordinary cases, and proceedings in specialist

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15 JA Jolowicz "Practice Directions and the Civil Procedure Rules" [2000] CLJ 53 seems to be the only significant article directly in point.

16 Lord Woolf *Access to Justice*, above n 6.

17 At [12].

jurisdictions such as Admiralty. But, if so, there seems no sense in treating specialist jurisdictions differently as regards procedural obligations which plainly lend themselves to being formulated in rules enacted or otherwise made into law in the ordinary way. What on any view would rank as "detailed instructions" are needed for both ordinary actions and actions in Admiralty, Bankruptcy or (in England), the Commercial Court or (in New Zealand) the Commercial List (which in my opinion no longer serves a useful purpose and should be forthwith discarded).

Secondly, the practice directions actually now in force in England do no bear out the distinction suggested by Lord Woolf, and indeed do not, as I shall show, reflect any coherent distinction.

The only other reference to the rationale for including matter in the practice directions "and guides" is:<sup>18</sup>

The group' refers to RSC Order 31. This Order gives the court wide powers to refer matters to Conveyancing Counsel. It also goes into detail as to the reference, which are matters more appropriate to a practice direction or guide. Order 43, rules 4-7 contain various matters of detail which could be incorporated into a practice direction. Order 44, rules 4-8 (accounts of debts) relate to the old administration action, which is now almost obsolete and need only be put in a practice direction or guide. A third example is that the procedure for enquiries as to creditors in the context of a reduction of capital under section 136(3) to (5) of the Companies Act (now in Order 102 rule 7-15) can be left to a practice direction or guide, as again such enquiries are very rare.

This passage implies a different rationale altogether, namely that very detailed matters should go into practice directions or guides. The difference, if any, between "direction" and "guide" is unexplained. It then moves to a further rationale: if prescriptive material, in the shape of detailed procedural steps that must be undertaken, relate to a process which is "very rare", this is a justification for relegating it from practice rule to a practice direction or guide.

Volume 1 of the Civil Procedure Rules (CPR) that followed the *Access to Justice* report, contains "practice directions, pre-action protocols and forms". Each Part starts with the formal rules (white) and then immediately moves to the related practice direction (blue). In England the power to make practice directions is regulated by s 5 of the Civil Procedure Act 1997. The Lord Chief Justice has delegated powers to make practice directions which are subject to the approval of the Lord Chancellor.<sup>19</sup> In order to work out what must be done at a particular stage of the proceeding a lawyer must carefully examine not only the CPR but also the succeeding practice direction for the Part which governs that stage. If there is any difficulty with the meaning of either the procedural

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18 Ibid at [13]. Note that "The Group" referred to by Lord Woolf is the Chancery Working Group that advised Lord Woolf between the interim report and his final report. General reference may be made to AAS Zuckerman and Ross Cranston *Reform of Civil Procedure; Essays on "Access to Justice"* (Oxford University Press, New York, 1995).

19 Constitutional Reform Act 2005 (UK) sch 2, pt 1 at [2].

rule or the practice direction a third source, the *White Book* commentary, or perhaps Zuckerman *Civil Procedure*,<sup>20</sup> will also need to be consulted.

Almost any Part illustrates the complexity that may arise from this way of doing things. I have selected pt 12 randomly. Rule 12.1 defines "default judgment". Rule 12.2 lists claims in which a default judgment may not be obtained. Rule 12.3 sets out at length the conditions to be satisfied before obtaining a default judgment. Rule 12.4, replete with cross-references, states the procedure to be followed, namely "a request in the relevant practice form". There follow several lengthy rules about the nature of a default judgment, interest, deciding an amount or value, claims against more than one defendant, default judgments for costs only, judgments by application rather than request, and supplementary provisions when applications for default judgments are made (again replete with cross references to three Acts). The blue practice direction "supplements CPR Part 12". Clause 1.1 reverts to the question of definition. Clause 1.2 reverts to cases where it is impossible to obtain a default judgment, as does cl 1.3. Clause 2 distinguishes request from application. Clause 3 specifies forms for a request. Clause 4 is a lengthy clause dealing with evidence.

In 1998 Lord Bingham of Cornhill CJ issued a practice statement about the purpose of providing counsel with a draft version of a judgment.<sup>21</sup> "These guidelines", as Kirsty Hughes refers to them in a recent article on draft judgment procedure, were adopted on an experimental basis.<sup>22</sup> Legal advisers could "submit a written list of corrections". Similar guidance for Court of Appeal cases was offered in a practice note in 2011. The process is now governed by *Practice Direction 40E (Reserved Judgments)*, emphasising an obligation of confidentiality. The Supreme Court Rules 2009, like the CPR, are silent on the issue but *Supreme Court Practice Direction 6 (The Appeal Hearing)* provides some guidance.<sup>23</sup> Complexity, variation between courts and vagueness abound. If there must be draft judgments open to comment by counsel before finalised judgments are issued – and I personally am opposed to the practice and the opportunities for abuse that it opens up – let there be a firm and legally binding rule laying down, in plain English, what can and cannot be done upon receipt of a draft judgment.

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20 Adrian Zuckerman *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, London, 2006).

21 *Practice Statement (Supreme Court: Judgments)* [1998] 1 WLR 825 (SC).

22 Kirsty Hughes "The Use, Abuse and Implications of the Draft Judgment Procedure" (2011) 127 LQR 565.

23 In New Zealand, by contrast, draft judgments are almost unknown. Reliance is instead placed on memoranda to counsel in which the judge seeks information on matters which he or she is doubtful about, and sometimes asks for focused further submissions. Another useful technique obviating any need to issue draft judgments is the interim judgment, usually employed in complex cases when liability is first established and the final judgment of the court follows, precisely calculating damages for example, after further input from counsel.

In England, both rules and the practice direction have to be read together, and it is easy to miss something that in a practical sense has to be observed along with the rule itself. Worst of all, it is not obvious that treating the practice direction as "subject to" the rule necessarily resolves all problems that may arise relating to the relationship between the rule and its associated practice direction. All that the *White Book* says on this issue is:<sup>24</sup>

Practice directions supplementing CPR provisions differ from rules in the CPR in that—

- (a) in general they provide guidance that should be followed, but do not have binding effect; and
- (b) they should yield to rules in the CPR where there is a clear conflict between them.<sup>25</sup> They are "at best a weak aid to the interpretation of the rules themselves".<sup>26</sup>

Surprisingly, Zuckerman's policy-oriented *Civil Procedure* contains no discussion of the question as to the proper criterion for distinguishing what should be in rules and what should be in practice directions.

CPR r 3.10 is the Non-Invalidation Rule for situations "where there has been an error of procedure such as a failure to comply with a rule or practice direction". CPR r 3.1(2) empowers the court to "extend or shorten the time for compliance with any rule, practice direction or court order". In both these rules there is an equiparation of rules and practice directions, despite their different provenance and status. This is apparently not felt to be a matter worthy of further elucidation.

The practice directions in the CPR expressly lay down some requirements that would normally be dealt with in New Zealand by judicial administration. Another problem is the absence of any coherent structure within the various practice directions. Within many practice directions, successive directions range across completely unrelated procedural areas. This problem is only partially alleviated by the side notes, because the side notes have to be carefully studied and they follow each other in no particular order.

In New South Wales s 15 of the Civil Procedure Act 2005 states:

Subject to rules of court, the senior judicial officer of the court may issue practice notes for that court in relation to civil proceedings to which this Act applies.

Under s 16(1) of the same Act:

In relation to particular civil proceedings, the court may give directions with respect to any aspect of practice or procedure for which rules of court or practice notes do not provide.

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24 Lord Justice Walker (ed) *Civil Procedure* (Sweet & Maxwell, London, 2008) vol 2 at 12-16.

25 *R (Mount Cook Land Limited) v Westminster City Council* [2003] EWCA Civ 1346 at [68].

26 *Godwin v Swindon BC* [2001] EWCA Civ 1478, [2002] 1 WLR 997 at [11].

There are problems here. Section 15 probably means that practice notes must not conflict with rules of court. There is obviously no difficulty in applying that rule when there is a straightforward conflict, but what if a particular New South Wales court, sitting in a particular town, has a local requirement? If a practice note addresses that requirement by qualifying the rule, does it conflict with the rule simply by qualifying it? What, also, of additional procedural obligations imposed on parties, in circumstances where it is at least arguable that the rule should be treated as exhaustive of those obligations?

When practice directions overlap with rules in the sense that both documents simultaneously relate to the same procedural area, the following disadvantages arise:

- the reader, judge, lawyer or non-lawyer, will have to read two separate documents, comparing them with each other and working out their relationship: at the very least there is complexity and uncertainty;
- it will often be easy to overlook the practice note, and thus fall into error, with whatever legal consequences that entails;
- there are the relationship issues, particularly those not clearly resolved by a 'subject to the rules' rule;
- commentary will be needed on both rules and practice directions, and the commentary will itself be more complex because of the need to keep distinguishing between the separate contents of the two documents; and
- there is some danger of the practice direction being held ultra vires in a few cases. It could be persuasively argued that the intent of s 51C of the Judicature Act 1908 is that rules regulating the practice and procedure of the High Court should be initialled and approved by the Rules Committee under s 51C *and not made in any other way*. This argument has, so far as I know, never been raised in a New Zealand court. Given the wide connotation of "practice and procedure" in s 51C it would sometimes be plausible to so argue – certainly when the practice note significantly tightens the obligation imposed by the rule itself, or adds a further, perhaps costly, step that must be taken.

As against those disadvantages, what some may see as the compelling advantage of practice directions is that they are more flexible. They are easier to change than rules, and can therefore be changed more quickly if circumstances require quick action.

In New Zealand we have muddled along pragmatically but it is unsatisfactory to leave the allocation of matters between rules and practice directions to instinct or convenience. There should be a rationale, and it should be consistently followed as far as possible. We should also recognise that many matters relating to court organisation and day-to-day operations are unsuited to be dealt with by either rules or practice directions. The distinction between rules and practice directions should be driven by considerations of simplicity and the ability of litigants as well as lawyers to

obtain knowledge of procedural requirements affecting their cases in well organised and simply stated rules. Access to justice should be facilitated and not frustrated by the relevant rules of procedure. Technicality, if unavoidable, is one thing; a mystifying jigsaw puzzle is another.

Some matters of practical importance for the running of courts extend beyond rules of procedure. The concept of 'procedure' is very wide but it is submitted that it should not be thought of as including (for example) the allocation of cases to judges, rostering of judges and registry-specific standing orders, that is to say matters which relate to one registry only. It is obviously important to retain utmost flexibility to enable change to administrative practices to be effected quickly. It is submitted that it is important, though, to have a clear conception of the difference between matters suitable for rules, and matters that fall within judicial administration and are thus not governed by written directives of any kind.

There should be a presumption that *rules* of the High Court must be promulgated in relation to all procedural *requirements*. This presumption would be rebuttable only by emergency or practical necessity. Procedural obligations on parties, in whatever degree of detail, should be contained in rules, not practice directions. Thus the detailed requirements about signing documents, manner of service and format of documents should all be covered by detailed rules and available in one place for each court. Rules should cover the making of submissions, their form, the time within which they must be lodged and related matters. Distinctions between the ordinary jurisdiction of the High Court and its specialist jurisdictions (Admiralty and others), if justifiable at all, should not be permitted to eject the specialist material into a document of lesser legal rank. A separate art or Parts, however, will aid finding and comprehension. Nothing which is judicial administration material (as defined below) should be included.

Practice directions should be issued as seldom as possible, having regard to their disadvantages. If something should properly be included in a rule, or set of rules, it should never be included in a practice direction.

Judicial administration includes:

- all registry-specific standing orders (for example those relating to communications between judges or associate judges and court officers);
- rostering of holidays;
- the allocation of cases to judges or associate judges;
- refinements of listing and calling cases;
- the method of making decisions on applications for a full court, and any decisions about unusual places of sitting;
- maximum times for argument in particular types of case; and

- special adjournments for emergencies or celebrations.

Practice directions will continue to be needed for matters of *evidence* rather than *procedure*. The distinction between *evidence* and *procedure* is clear enough although there is a fuzzy borderline. The present suggested scheme is not intended to question, for example, the wisdom of granting power to the Chief Justice to issue a practice note under s 30(6) of the Evidence Act 2006. A *Practice Note on Police Questioning* was duly issued by Elias CJ on 5 November 2007.<sup>27</sup>

Over the years courts in both the United Kingdom and New Zealand have often felt it desirable to set out statements about standards, and what judges expect of counsel. Very often such practice directions implicitly accept that rules are inappropriate because special situations will call for special responses from counsel and court officers in the discharge of their respective duties to the court. Hortatory guidance is appropriately contained in practice directions rather than rules. A recent example is the *Practice Statement (House of Lords: Appearance of Counsel)* of 22 May 2008. A practice statement guides by stating expectations and issuing encouragements. Thus counsel "are expected to be present at and throughout the hearing". Counsel "should not ordinarily accept instructions to appear in the House for a hearing on a fixed date if they already have a commitment which conflicts with the fixed date of the hearing in the House". But if circumstances arise, the "proper course then is to write to the presiding Law Lord and seek his or her leave to be absent".<sup>28</sup> Guidance such as this does not lay down firm obligations, nor does it confer discretions on the court or a judge. It is therefore inappropriately included in rules.

The above scheme has never been formally adopted by the Rules Committee, but it was certainly in my mind when coordinating the drafting of the current rules introduced by the Judicature (High Court Rules) Amendment Act 2008, and I believe it was accepted by the small committee which made decisions at the final stages of drafting (Baragwanath J, then chair of the Rules Committee, Randerson J and Christine French, now French J) and by the Rules Committee itself.

## V LURKING ISSUES

If this article has any general message, it is that underlying many sets of technical rule changes there lurk difficult issues of principle and policy which are too often either ignored or not explicitly discussed. New Zealand appears not to be alone in being content with pragmatic and practical reforms that relegate those issues to a 'too hard basket'. The reform of civil procedure in this country bears comparison with the reform of New Zealand law generally before the Law Commission was constituted by the Law Commission Act 1985. The Rules Committee's *modus operandi* relies on collective decision-making by those whose main occupation is to judge or present cases or to

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27 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

28 *Practice Statement (House of Lords: Appearance of Counsel)* [2008] 1 WLR 1143 (HL).

discharge many and various functions in the Ministry of Justice. No academic lawyer is a regular member of the Rules Committee. The "concurrence of the Chief Justice" is a mandatory condition of rule-making under s 51C of the Judicature Act 1908 and so the Chief Justice has the legal power to veto any proposal.

In the case of the pre-Law Commission part-time law reform committees<sup>29</sup> it is almost trite to say that despite their composition, and method of proceeding they produced work of very high quality.<sup>30</sup> In the same way the Rules Committee work product, leading in most cases to reform by Order in Council under s 51C, must, I think, be regarded as comparing very favourably, in content, style, and simplicity of expression, with civil procedure reform in other common law jurisdictions. The structure of the HCR is user-friendly. Obscurity and ambiguity are rare. The troubling question is whether the detailed rules need to be better related to wider considerations and architectural basics. Putting it another way, if we addressed questions which cry aloud for research, reflection and informed collective opinions might we produce a more socially useful civil procedure, and one that promoted to a greater extent the "just, speedy and inexpensive determination of any proceeding or interlocutory application?"<sup>31</sup> It must be stressed, however, that from the very beginning of the process of drafting the current HCR it was accepted by all that it was not to be a root-and-branch project, and that fundamental issues such as access to justice generally could not practicably be addressed.

I shall now introduce (in a way which I think George Barton would have approved) some of those difficult issues, inevitably without resolving them. First and foremost, is it the task of a civil court to search for the truth?<sup>32</sup> Or is the court essentially a social mechanism designed for the peaceful resolution of those disputes that fail to settle? This question immediately takes us to the fundamental questions about civil justice brilliantly and provocatively opened up by Professor Dame Hazel Genn,<sup>33</sup> and to issues raised by Winkelmann J, Chief High Court Judge.<sup>34</sup> If mediated

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29 I had the privilege of serving on the Torts and General Committee, the Public and Administrative Committee and the Evidence Law Reform Committee.

30 The committees met for effectively two-thirds of a day with monthly or two-monthly intervals; stimulating ideas were not immediately followed up; they enjoyed little research assistance; and there was little time for prolonged discussion of difficult points, sometimes leading to a rubber-stamping of a single member's ideas.

31 The objective of the HCR: see r 1.2. This objective is repeated for emphasis elsewhere; see for example r 7.1(1), substituted by r 4 of the High Court Amendment Rules (No 2) 2012 (the purpose of reformed case management).

32 There are dicta against: see Lord Wilberforce in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 at 438–439 and the discussion in Deidre Dwyer (ed) *The Civil Procedure Rules Ten Years on*, above n 10, at 55. Spigelman CJ has recently separated three views about the relationship between truth and the adversarial system, preferring the view that the system seeks the truth subject to qualifications: see James Spigelman "Truth and the Law" (2011) 85 ALJ 746.

33 Hazel Genn *Judging Civil Justice* (Cambridge University Press, New York, 2010).

settlements increasingly become the dominant way of resolving our conflicts, this fertilises the idea that dispute resolution is more important than truth attainment. But I do not think that it is. If my property loses value of \$100,000 because of my neighbour's activities which damage my land and constitute the tort of nuisance, is it socially important that my secondary right to receive \$100,000 is enforced, or is it satisfactory to government and the judges themselves that "economic common sense" (the high cost of litigation in New Zealand), coupled with the requirements imposed by procedural rules, induce me to settle for \$60,000? When the chips are down, do we really value *civil rights* and the resolving of disputes by reference to facts held to be true by a judge? Is a 'sensible' compromise necessarily a "just determination" in the language of r 1.2? I would answer no. In my view, where we come down on this controversial issue would impact the content of procedural reform in several areas including the following: the introduction of class actions;<sup>35</sup> the acceptability of compulsory but expensive judicial settlement conferences; and the extent of judicial involvement to insist on full disclosure, and wisely order "tailored discovery".<sup>36</sup>

Another example of a deep lurking issue is the relationship between *civil procedural rules* and *legal culture*. What do we mean, in any event, by 'legal culture' – an expression that often surfaces when lawyers debate rule changes? Is it perhaps another example of "well-meaning sloppiness of thought"? According to Professor Jolowicz, "no real change can come without a change in attitudes of mind".<sup>37</sup> When consideration was being given by the Rules Committee and a specialist subcommittee in 2010–2011 to changing the rules on discovery and inspection,<sup>38</sup> it was accepted as obvious that if the new rules were to be effective there would have to be changes to the profession's

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34 Helen Winkelmann, Chief High Court Judge "ADR and the Civil Justice System" (paper presented to the Arbitrators' and Mediators' Institute of New Zealand Inc, August 2011). The Chief High Court Judge expressed concern about the undermining of the civil justice system, detecting "an anti-litigation discourse which suggests that litigation is always expensive, unpleasant and unnecessary." For a provocative recent discussion see John Doyle "Imagining the Past, Remembering the Future: The Demise of Civil Litigation" (2012) 86 ALJ 240.

35 The Rules Committee's completed Class Actions Bill awaits introduction into Parliament by the Minister of Justice. For general commentary see V Morabito "Opt In or Opt Out? A Class Dilemma for New Zealand" (2011) 24 NZULR 421.

36 "Standard discovery" is defined in HCR r 8.7. By r 8.8 "tailored discovery" must be ordered when the interests of justice require an order involving more or less discovery than standard discovery. See the High Court Amendment Rules (No 2) 2011.

37 On such change resulting from the extensive use of case management in England, see JA Jolowicz "The Woolf Report and the adversary system" (1996) 15 CJQ 198.

38 The subcommittee included Asher J (Chair) and Chambers J (now of the Supreme Court).

mind-set.<sup>39</sup> In particular, along with the shift to electronic discovery, and a drastic modification of the *Peruvian Guano* test,<sup>40</sup> there would have to be:

- a shift towards early cooperation by the lawyers involved with each other;
- adjustments in arrangements within legal firms, and between firms and instructed barristers, so that counsel would be involved in reading and evaluating documents at an earlier stage than previously; and
- the assumption, by associate judges particularly, of a new responsibility to be 'on top' of the pleadings by the time of the first case management conference, so as to be a good tailor if the parties themselves fail to agree on the application of standard discovery or the particular variety of tailored discovery to be adopted for this proceeding.

Legal literature mostly ignores the process of altering professional legal culture and the difficulty sometimes experienced in overcoming the innate conservatism of the profession. All I can do in the space available is to articulate the questions that have buzzed around in my mind while drafting procedural changes recently, and express the hope that some judges, senior lawyers and legal academics will see fit to stand back and engage with them philosophically:

- (1) Does the 'adversary system' have a number of fixed features, or is it merely a vague label for a civil justice system which generally entrusts the initiative in making procedural decisions and adducing evidence to the contending parties rather than a judge?
- (2) Does the extension of case management, certainly involved in both the new discovery and inspection rules and the proposed revised case management rules, tend to undermine the adversary system and, if so, should we be concerned?<sup>41</sup> Perhaps it ought to be undermined! The answer to the first question posed is very likely to influence the answers here.
- (3) Given that extensive consultation before, and Law Society seminars after, a procedural rule change are, and will continue to be, the normal practice, are there any ingrained habits or professional imperatives that procedural rule change could never effectively overcome?<sup>42</sup>

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39 The new pt 8 of the HCR was substituted by the High Court Amendment Rules (No 2) 2011, in force from 1 February 2012.

40 *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

41 On this see Deidre Dwyer (ed) *The Civil Procedure Rules Ten Years on*, above n 10, at 391.

42 Chambers J's suggestion in 2011 that the rule in *Re GJ Mannix Ltd* [1984] 1 NZLR 309 (CA) might be changed so as to permit companies to apply to be represented by non-lawyers in court, provides an interesting case study here. Among common law jurisdictions, only New Zealand has no express rule-based discretion to permit companies to appear in some cases by officers or agents. After consultation it was

The last example of a deep issue is important but concerns the users of procedural rules. Should the HCR, for instance, be formulated:

- (1) So as to maximise their comprehension by users who have no legal training?; or
- (2) Ignoring their needs and assuming that such users will obtain legal advice if involved in, or contemplating, litigation?; or
- (3) Neither (a) or (b), but making considerable effort to avoid unnecessary technicality? On this approach *some* technicality is necessary and is therefore adopted without qualms.<sup>43</sup>

The HCR 2009 were drafted, but not without heart searching (at least on my part) on basis (c).<sup>44</sup> Plain English was used – as in all Parliamentary Counsel Office drafting these days. Gender neutrality was achieved. Latinate expressions were avoided if possible: *ex parte* thus became "without notice". Treasured expressions were abandoned if, but only if, this could be done without loss. Thus "of his own motion" became "on the Judge's own initiative". "Fit" and "proper" (for example, "order, on such terms as the Judge thinks fit") gave way to "just". Anything unjust can hardly be fitting! Mysteries, unjustifiable special rules for the Crown, and rules that no longer apply in today's conditions were eliminated.<sup>45</sup> The virtually incomprehensible previous r 628 dealing with extraordinary remedies in their relationship with the unified but not exclusive remedy introduced by the Judicature Amendment Act 1972 was radically simplified. I would have been happier eliminating extraordinary remedies altogether.

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decided to retain the status quo which judges say works well. The practising profession (New Zealand Law Society, New Zealand Bar Association) concurred.

- 43 Outstanding examples of this approach are provided by the deliberate retention of "cause of action", "interpleader" and "interlocutory application".
- 44 I do not imply that the HCR are more important in their social impact than the DCR, or that the audience for the DCR (or for specialist courts' rules) is essentially the same. The forms for the current DCR were developed by outside consultants to the Ministry of Justice so as to be readily intelligible to lay users. Basis (a) above was thus preferred, without debate as to rationale. Is the average New Zealand layperson unintelligent or easily confused? In England Michael Zander has referred to some procedural reform as without "any solid basis of knowledge of the nature of the problems being tackled": Michael Zander "The Woolf Reforms: What's the Verdict?" in Deidre Dwyer (ed) *The Civil Procedure Rules Ten Years on*, above n 10, at 419.
- 45 Thus rr 494 and 495 of the HCR 1986 provided for the setting aside of judgments and verdicts. They applied to both judge-alone and jury trials but were significant only for the latter. They became obsolete with the decline of civil trial by jury, a decline mainly due to the end of personal injuries litigation by the Accident Compensation Act 1972 (as from 1 April 1974).

A catalogue of the minor drafting policies reflected in the current HCR would serve no practical purpose. Entirely new parts of the Rules were developed to deal with, for example, e-filing, attachment orders, freezing orders and search orders.

## **VI CONCLUSION**

Let me conclude by framing (but again not resolving) the precise question that this deep issue brings to mind:

- (1) Granted that lay litigants are increasing, and that their unfamiliarity with law and courtroom procedure is causing an increasing number of judicial headaches (so the judges anecdotally report, citing colourful examples), should the law of civil procedure subserve a policy of virtually forcing litigants to be represented by lawyers at all stages of a proceeding? Harder still, is such a policy socially acceptable?
- (2) Is there a significant number of cases where an injustice would have been occasioned if a lawyer's participation had been insisted on? Answering this with any precision would admittedly be almost impossible. We here come up against the paucity of empirical data caused by the existence of many registries and the fact that court files in New Zealand are often silent on points a researcher would want to discover.
- (3) Is lay comprehensibility really more a matter of degree than of 'yes or no?' I would argue that it is. In other words a lay person with a standard New Zealand education, and *a fortiori* an average company secretary, can find the relevant procedural requirements and can understand and apply most of them with the balance being resolvable by an inexpensive enquiry of a lawyer. If that is right, the fact that most litigants, including corporations, elect to be represented by lawyers is due to an unwillingness to take any procedural risk and the prudent desire to have an expert adviser. Even simple debt collection cases occasionally mushroom into quite complex pieces of litigation.

I confess that what I have just written is guesswork. What we need, I contend, as procedural reforms inevitably continue, is:

- (1) more empirical research, especially into the true causes of delay;
- (2) a greater willingness to grapple with deep issues. In 1966 George Barton himself wrote:<sup>46</sup>
  - a. Another and differently composed committee would be a more appropriate group [*sc* than the Rules Committee] to consider and re-examine the fundamental assumptions, the inarticulate premises, upon which the practice and procedure of the superior Courts rest.

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46 GP Barton "Reform of Procedure" [1966] NZLJ 219 at 220.

- (3) an acceptance that a carefully crafted civil procedure (the legal requirements and the cost of litigating) is essential to the vindication of rights; and
- (4) a recognition that there are four perspectives on civil procedure and its reform, not just one.

### ***On a Personal Note***

For all his huge knowledge of common law and equity, and his lifelong fascination with international law, my friend and colleague in the Law Faculty of Victoria University of Wellington, George Barton, was also greatly interested in civil procedure. He taught the subject at Victoria University for several years and wrote about its reform.<sup>47</sup> He produced his own softback edition of the Code of Civil Procedure for his students. He even litigated against me, when I was a Crown Counsel, about the (non) availability of the then Code of Civil Procedure from the office of the Government Printer.<sup>48</sup> I cannot resist mentioning that this attempt to obtain an order in the nature of mandamus was unsuccessful.

We were opposing counsel in several cases, ranging from employment issues at power stations to disputes under farming leases. The most notable was the *Takaro* case, where George came in as senior counsel at the Privy Council stage.<sup>49</sup> This followed 12 previous rounds in the courts and the Court of Appeal was held wrong, or possibly wrong, on each point discussed in the various judgments. In all our clashes George was fastidiously fair, easy to deal with, and with a penchant for precise formulation. Whether the detail concerned the formulation of a principle or rule of substantive law, or one of procedure, made no difference to the level of his assiduity.

After George's death I was happy to organise the distribution of books from his extensive chambers library. A considerable number was despatched to both the Supreme Court and the Law Library of Victoria University of Wellington, including, in the latter case, George's personal copy of his PhD thesis on jurisdiction over visiting forces.

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47 GP Barton "Reform of Procedure" [1966] NZLJ 219.

48 See *Victoria University of Wellington Students Association Inc v Government Printer* [1973] 2 NZLR 21 (SC Wellington).

49 *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC).

