

STRIKING THE BALANCE

Your opportunity to

HAVE YOUR SAY

on the

NEW ZEALAND COURT SYSTEM



LAW COMMISSION
NEW ZEALAND 1984

A REVIEW OF THE NEW ZEALAND COURT SYSTEM
2002

STRIKING THE BALANCE

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NEW ZEALAND COURT SYSTEM



LAW COMMISSION
TE AKA MATUA O TE TURE

April 2002

Wellington, New Zealand

This discussion document is also available on the Internet
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Preliminary Paper 51

The Law Commission

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About the Law Commission...

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

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

The Hon Justice J Bruce Robertson – President

DF Dugdale

Paul Heath QC

Judge Patrick Keane

Professor Ngatata Love QSO JP

Vivienne Ullrich QC



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Foreword: Striking the Balance

New Zealand's court system must provide justice for all through fair and timely processes.

One of the fundamental principles of our justice system is that every citizen is equal before the law. All citizens should be confident that they will receive equivalent treatment from the courts.

It is debatable whether this principle of justice for all is always being achieved in practice. If it is not being achieved, then we must examine why not.

Courts exercise tremendous power over the freedoms and property of citizens. Their power means they are one of the most significant institutions in New Zealand's constitutional makeup.

The maintenance of our democratic constitutional arrangements depends, among other things, on people in all parts of society having confidence in the justice system. Courts have to work well - and be seen to work well - for our democracy to work well.

New Zealand's court system does not currently enjoy the full support and confidence of all parts of our society. There are frequent complaints that the system is mysterious, too slow, too expensive, and not available to everyone who needs it. People from minority groups often do not feel confident that they understand what goes on, or that they will be understood and fairly treated by the courts.

There are concerns that the customs of the courts, many of which were imported to New Zealand from England 160 years ago, have little relevance in New Zealand's diverse society in 2002.

Māori have a special relationship with government in this country. They are the indigenous people of this land and their joining in the signing of the Treaty of Waitangi was a landmark of fundamental importance. There are sustained challenges to the court system and its operation from many Māori.

These issues and others need to be investigated if respect for and confidence in our court system is to be maintained.

The Government has asked the Law Commission to carry out a review of the structure and operation of the court system in New Zealand.

At the heart of the review is the question: What should we keep and what should we change in order to have a framework that best meets the needs of New Zealand now and into the future?



The starting point has to be the needs and expectations of New Zealanders. Courts should be of and for the community. It is for society as a whole to set the expectations and the standards for our courts to deliver.

What must be avoided is ‘insider-capture’ – when a system develops to meet the needs of those who work within it rather than meeting the needs of the people it is there to serve.

What then is the day-to-day reality? And what is the effect of this on people who appear in or use the courts?

The delivery of justice is rarely simple or straightforward. It involves prioritising, compromising, and balancing important, sometimes conflicting, principles. The purpose of this review is to ensure that, in light of those difficult decisions, the courts best reflect society’s values and preferences.

This exercise is not to promote change for the sake of change, but to identify where improvements can be made. By openly discussing these issues and being willing to challenge the status quo, we will help retain public confidence in the system. But this review must consider all reasonable changes and assess what alternatives exist. There must be no reluctance to challenge openly and frankly all that is done at the moment if it can be improved.

This discussion document presents information about the structure and operation of our court system today and raises a number of issues and questions. These are concerned with one basic issue: how best to improve New Zealand’s court system so that it does deliver justice for all in a timely manner.

The Law Commission urges readers to respond.

J Bruce Robertson
President
Law Commission

Terms of Reference from the Minister Responsible for the Law Commission, Hon Margaret Wilson

The Law Commission will consider and report upon the structure of all state-based adjudicative bodies for New Zealand (apart from the Court of Appeal and Privy Council or institutions in substitution therefore) including:

- (a) The volume and nature of work requiring attention.
- (b) The appropriate form, nature, and operation of the Courts and Tribunals required to meet all current needs and expectations.
- (c) The original jurisdiction of the District and High Courts and associated Tribunals.
- (d) The appellate relationship between the District and High Courts, including the form of the appellate regime for appeals from specialist Courts and tribunals, particularly the Family Court and the Environment Court.
- (e) The interrelationship of the Employment Court, the Māori Land Court and the Māori Appellate Court, with the District Court and the High Court.
- (f) The relationship between the District Court and the High Court and administrative tribunals and other quasi-judicial bodies with regard to both appeal and review.
- (g) The role and function of Masters and Registrars within the total Court structure.
- (h) The overall structure of how less serious criminal and civil matters may be dealt with in the District Courts.
- (i) The rights of appeal from the District Court and the High Court to whatever appellate structure exists above them.

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

May 2001



About this document

This document:

- a) outlines the fundamental functions and features of the New Zealand system of justice
- b) raises basic issues about how well the system's structures and processes are serving the needs of all New Zealanders
- c) contains a lift-out section for readers to use to comment on the issues discussed in this document.

This is a discussion paper not a solutions paper. It is intended to provide information, provoke thoughts, draw out comments. Through it, the Law Commission wants to obtain views from across New Zealand's diverse society. It wants to hear what different communities and different groups of people need and expect from New Zealand's court system with regard to some very substantial issues.

With this in mind, the Law Commission has presented the information in this document as plainly as possible so that the general public as well as those with a professional interest will be able to contribute.

The Commission has deliberately kept the wealth of available technical detail to a minimum since it considers including it could work against its objective of widespread public involvement.

There is more information on the various courts and tribunals that make up the New Zealand system of justice in a reference section at the end.

Your responses to this paper will help the Commission with a second document which will be an options paper, indicating possible areas of reform or innovation. Responses to the options paper will help the Commission formulate its recommendations to Government about changes to the current system.

As groundwork for this paper, the Law Commission has taken informal soundings from those who work in or close to the system to find out where they think change is needed including: the heads of the various courts and tribunals, representatives of the Law Society and Bar Association, the Royal Federation of Justices of the Peace, government departments with a direct interest and involvement, other agencies which provide the operational support, as well as lawyers around New Zealand.

There is also a continuing dialogue with Māori leadership and communities because of the particular issues which arise from their perspective.

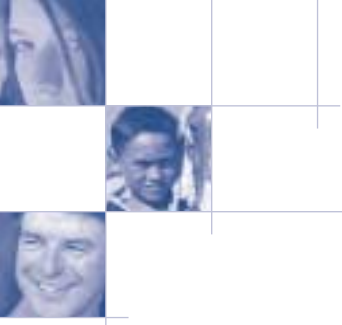
There is a programme of hui to seek the experiences and views of Māori who have direct experience of the courts.

These discussions have taken place alongside a consideration of similar reviews of court systems in other countries.

The Government is currently considering the future of appeals to the Judicial Committee of the Privy Council. This review by the Commission, however, involves a root-and-branch reconsideration of the entire array of state-supported adjudicative agencies and is not totally dependent on what sits at the top. The questions in this discussion document do not rely on any particular form of final court, although what exists at the apex will necessarily influence the Commission's final recommendations.

Three stage review

1. Discussion paper – a **general level** presentation of the issues seeking widespread public and professional response to questions about where improvements could occur.
2. Options paper – a **detailed level** presentation of the suggested improvements that emerge from responses to this discussion paper and other work on the issues by the Law Commission.
3. Final report – **recommendations for reform** from the Law Commission to the Government.



Tell us what you think

Please take the opportunity to tell us what you think about the important issues discussed in this document.

The issues are set out in a lift-out submissions booklet inside the back cover. We would like to hear your views about, or experiences of, any of the issues discussed in the report. Please tell us what is working well, what isn't, and what improvements you can suggest.

If you wish to attach extra pages with expanded views on any issues please do so. You do not have to give answers on all the subjects – some may be on aspects of court processes or structure that you are not familiar with or on which you have no views. However all contributions will be appreciated and considered carefully.

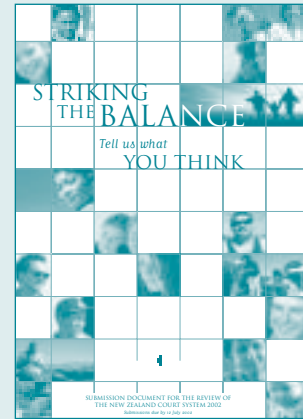
Your responses will help the Law Commission with an options paper and, out of that, recommendations to the Government on how to improve our court system.

Please write your views or experiences of any of the issues in the submissions booklet – or separately if you prefer – and return it in the addressed envelope provided. If you want to send your submission by email, address it to com@lawcom.govt.nz, and put "Courts Submission" in the subject line.

The Law Commission

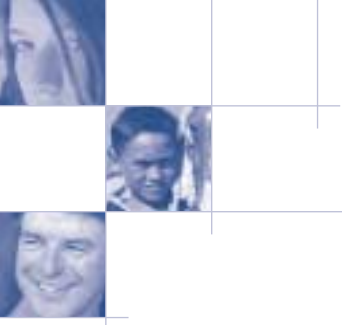
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Submissions are due by 12 July 2002



Glossary of terms

Term	Meaning
<i>Adjudicative</i>	Judging or determining a matter which is in contention.
<i>Adjudicative bodies</i>	State-sponsored agencies which have a decision-making function, e.g., courts and tribunals.
<i>Adjudicator</i>	A general term for anyone who has the task of resolving an issue on which a decision has to be made.
<i>Appeal</i>	Reconsideration of a decision already taken by another court.
<i>Appellate</i>	A body that can hear an appeal, i.e. reconsider an issue that has already been determined at a lower level.
<i>Bar Association</i>	The professional body representing barristers (lawyers who appear in court).
<i>Civil (disputes)</i>	All cases heard in the courts that are not criminal cases.
<i>Courts</i>	The most formal adjudicative bodies created by the state.
<i>Court of Appeal</i>	The highest court within New Zealand, subject only to the right to go to the Privy Council in some circumstances. In most cases, the Court of Appeal finally determines legal rights and responsibilities within New Zealand.
<i>Defendant</i>	A person against whom a court process is initiated. The word is used in both civil and criminal cases. In the High Court, the person against whom an allegation is made is normally referred to as the “accused”.
<i>Discovery</i>	When one party in a legal action discloses to the opposing party documents that could be relevant to the dispute.
<i>District Court</i>	The common court of general jurisdiction in New Zealand. It deals with civil cases where the amount in dispute is not more than \$200,000, as well as the overwhelming majority of criminal cases.
<i>Diversion</i>	A process which allows criminal cases to be concluded without a conviction being entered on a person’s record.



<i>Due process</i>	Established court practices and principles that ensure fairness.
<i>Early disclosure</i>	Advising the opposing side what the contentious issues are, at the beginning of the legal process.
<i>Family Court</i>	The only court that can hear matters involving personal relationships, the consequences of their breakdown, and the position of children.
<i>Family Group Conference</i>	A meeting in the Youth Court involving a person who is alleged to have done wrong, together with those who are part of his/her life and those whom s/he is alleged to have wronged.
<i>High Court</i>	The court which deals with major civil cases, all cases involving challenges to the exercise of statutory power, the most serious criminal cases, and some appeals.
<i>Indictable (cases)</i>	Cases where there is a right to trial by jury.
<i>Judicial officers</i>	People who preside in courts and tribunals.
<i>Jurisdiction</i>	The area of the law which a particular court has the ability to deal with and make determinations about.
<i>Law Society</i>	The professional body representing all lawyers. Membership is currently compulsory.
<i>Litigant</i>	A person who is involved in a hearing or a case within the court system.
<i>Magistrates Court</i>	The name used before 1980 for what is now the District Court. In many parts of the world, this is the name of the court which deals with less serious civil and criminal cases.
<i>Master</i>	An judicial officer of the High Court who deals with preliminary matters and some special jurisdictions including bankruptcy, insolvency and the winding up of companies.
<i>Natural justice</i>	Principles which have developed to ensure that court processes are fair, robust, and transparent.
<i>Plaintiff</i>	A person who initiates a civil action in either the District Court or the High Court.



<i>Practice notes</i>	Directions issued by the heads of each court about how matters are to be conducted in that court.
<i>Precedent</i>	A decision in a previous case.
<i>Proportionality</i>	Balancing the effort taken with the possible outcome.
<i>Quasi judicial</i>	Carrying out a function similar in some ways to judging.
<i>Registrar</i>	A senior officer responsible for the organisation and administration of a court.
<i>Specialist courts</i>	Those courts which deal with a defined kind of dispute.
<i>Summary (cases)</i>	Matters which are dealt with by a judge alone, without a jury.
<i>Tribunals</i>	A variety of state-supported agencies that deal in a less formal way with particular sorts of disputes.
<i>Without prejudice</i>	Offers or positions adopted during negotiation which are not binding if the negotiation doesn't achieve a resolution.



An introduction to the New Zealand court system

Why courts exist and what they do

Courts exist because:

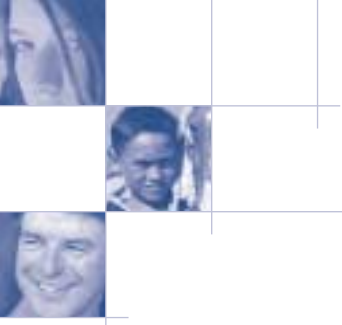
- individuals are not always the fairest judges of their own disputes
- the strong have a tendency to take advantage of the weak
- people may use or threaten to use force to get their own way.

It is in the interests of society as a whole, and of its individual members, for some disputes to be settled by someone outside the argument who can be trusted to be impartial and fair. This is essentially the role of courts. Courts provide a means for individual disputes to be resolved peacefully and the resolution to be enforced without violence.

Courts also have to ensure that the rules are applied consistently to everyone and everywhere. The rules must be stable and not able to be changed at whim or be ignored. Social and economic development can only occur in a country where these basic underpinnings are secure.

Whether the issue before the courts is a criminal or a civil case, the courts can exercise tremendous power over the freedoms and property of individuals and organisations.

- When charged with crimes, citizens face the state at its most formidable, as even their liberty can be at stake. The courts stand between individuals and the state. Before anyone can be convicted of any offence, the state must prove the offence to a high standard, by a fair process of which the courts are the guardian.
- When government ministers, public servants, or local body officers make decisions affecting individuals, communities, families, or businesses, they must comply with the law. If they do not, the courts can declare that they have gone beyond the law, that their decisions are of no effect, and that they should pay compensation.
- When there are civil disputes involving individuals or companies, whether between New Zealand or foreign interests, the courts can resolve them by finding the relevant facts and applying the law to them.
- When personal relationships break down and there are disagreements about how to divide property, or arrangements for continuing support, or how to share the care of children, the courts can make orders as to what is fair, or in the children's best interests.
- When people are in need of care, protection, or treatment, because of mental illness, social dysfunction, age, or some other circumstance, the courts can ensure there is proper treatment and protection.



For many people, the courts remain in the background. Those who have experience of the courts will have a sharper view. Given the central role the courts play in protecting the democratic way of life we enjoy in New Zealand, it is critical that the courts work as well as they can. Whatever the standpoint, it is important that everyone has a say in shaping the system.

The courts can and do change in important ways that reflect changes in our society.

- For more than 25 years New Zealand courts have not dealt with damages for personal injuries, because our accident compensation scheme (ACC) has changed this area of the law, although it remains a large part of the workload of courts in many other countries.
- The way courts deal with disputes in intimate relationships, both within the family unit and beyond it, has changed greatly in the last couple of decades.
- Resource management was virtually unknown 50 years ago and yet we now have an Environment Court dedicated to cases about the use of resources.
- The legal significance of the Treaty of Waitangi is different today from a century ago.

As we think about what we want or need from our court system, we must recognise the need for diversity and continual development. We need to ensure that it fits our society and its activities and aspirations.



When people might need the courts

After years of correspondence between you and the local Regional Council, you have received a formal demand to remove your garage which the Council says is built on a public road. It has been there for at least 30 years. The value of your property will drop markedly if you do not have garaging.



Mary and Joe have been living in a de facto relationship for the past eight years. Joe came home last week and found that Mary had gone and taken their two children and everything out of the house. Joe doesn't care that she's gone. He wants the children back and the property - all of which he paid for personally.



Mrs McGinty is 83. She lives alone with 13 cats in a house that is never cleaned. She's not eating properly and a con-man has persuaded her to give him signing authority on her cheque book which he is using to fund his gambling addiction.

Features of the New Zealand court system

Our courts are the product of a system developed over many centuries in England and imported to New Zealand 160 years ago. In the decades since, it has developed some distinct features while keeping those standards which are fundamental to any effective system of justice.

The fundamental features include the “**rule of law**” and the “**separation of powers**”.

The **rule of law** essentially means that the laws apply equally to everyone and no one is above the law.

Interlinked is the notion of **separation of powers**, which is based on the premise that there need to be internal checks on the power of government so that no significant power exists without a balancing power elsewhere.

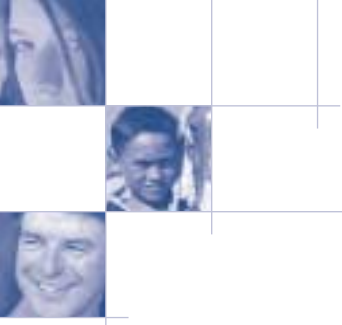
Government in New Zealand consists of three distinct groupings:

- the legislative branch - consists of members of Parliament elected every three years who make the laws by which the country is governed plus the Governor-General who represents the Queen as Head of State and ‘assents’ to new legislation.
- the executive branch – consists of Cabinet and the Executive Council. The Executive Council is a group of Cabinet ministers chaired by the Governor-General which can pass subordinate legislation – regulations and Orders in Council – that don’t need to go through the full Parliamentary lawmaking process.
- the judicial branch – consists of the judges in the court system.

The **separation of powers** means that the powers of the legislative branch, the executive branch and the judiciary are separate and independent and provide checks and balances on each other.

The legislative branch or Parliament makes the laws. The laws are applied through various public sector agencies, with the police having a particular role of enforcing them. Courts interpret the laws passed by Parliament and impose sanctions on those who do not comply with the law – whether central or local government or individual citizens.

In criminal cases the courts decide whether guilt is established, according to law. In civil cases courts resolve, in accordance with the law, disputes between individuals, and between individuals and central or local government.



A key principle is that courts must be **independent and impartial**.

The independence of the judiciary is at the heart of the court system in a democratic society. Courts protect citizens and ensure the government acts lawfully. To do this properly, courts must be independent of the government. Otherwise, they would be no different from the array of public service agencies that implement the policies of the government of the day.

Courts interpret and enforce the law, no matter who is standing before them, even when this means requiring the government itself to act lawfully, and to carry out its responsibilities toward citizens. That is what being impartial means – judges can have no personal interest in a case before them, and the only legitimate criteria for their decisions is the law.

Judges must be able to decide cases fairly, and they are sworn to ‘do right to all manner of people without fear or favour, affection or ill will’.

Though appointed by Government, all judges must be, and be seen to be, beyond the influence of the state, the powerful, the wealthy, or any interest group or influence. Their terms and conditions are designed to be fair and secure, and they can only be removed for serious misconduct.

Equally important, the system must equip judges with the resources they need to hear cases and to decide them promptly.

Anyone going to court should be able to be confident that the law will be applied by a **fair process**.

In the conduct of any hearing, the principles of “**natural justice**” are essential. These ensure that everyone has the decisions concerning them made according to fair and lawful – rather than arbitrary – processes, that everyone is treated equally before the law, has the right to be heard and test what is said against them.

To ensure this happens, courts are generally open to the public and the media. There are currently exceptions in family disputes, sexual abuse cases, cases involving very young people, or where there is a risk to someone’s safety.

Finally, the **power of judges is not unlimited**. The courts themselves must uphold the law – it is the law that is the ultimate reference point, not each individual judge. This is why judges make the reasons for their decisions available in writing and their decisions are open to appeal or review. Judges are subject to both statutes and precedents (decisions in previous cases), usually referred to as the common law.

Judges have to interpret the law. No statute is ever written in such a way that it can anticipate all possible situations or cases, so judges are often required to interpret. For example, laws are frequently written with general wording, such as requiring “due care” or referring to “the principles of the Treaty of Waitangi”, or penalising people for “reckless” behaviour. In these circumstances, judges have to probe behind the very general words to decide in a specific situation how to give effect to Parliament’s purpose.

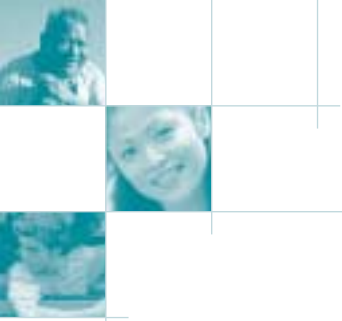


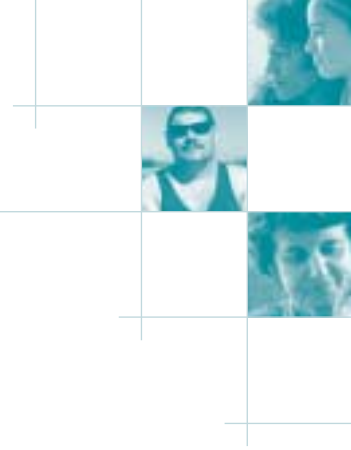
Judges must decide what the law means

Sandra was driving with her partner Bill in the seat beside her when she fell asleep for what seemed an instant. The car veered off the road and, although she tried to get it back under control, they hit the barrier. She was not speeding, she had not been drinking, it was not late at night. She just fell asleep. But Bill was seriously injured.

Sandra is charged with “reckless driving”.

The law does not state precisely what “reckless” means, just that driving recklessly is an offence. The judge has to look at the circumstances of this accident, and at what judges have decided in previous cases to decide what the law means in Sandra’s case.





Our court system – what should change and what stay the same?

There is no suggestion that the fundamental principles on which our court system is based will change as a result of this review.

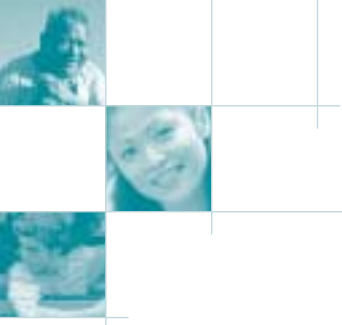
However the structures and processes by which these principles are put into practice are areas where changes for the better might be made.

This section divides the court system into two broad areas – **access to the courts** and **inside the courts**. Both have a major impact on the way justice is delivered.

This section identifies issues of concern in both areas and asks what changes are necessary to ensure the court system truly meets the needs of New Zealanders now and into the future.

Access to the courts

People become involved with the court system in various ways. They may wish to have a dispute sorted out by the court or they may have to defend themselves against someone else's claim against them. They could be accused of a crime, or be called for service on a jury. Whatever the starting point, various factors affect people's access to and involvement in the court system. These factors can be divided into four broad areas - **information and understanding, representation in court, geographical access and cost.**



“
**It is doubtful
 that everyone
 involved
 in court
 processes
 is getting
 all the
 information
 they need
 at present.**
 ”

Information and understanding

A basic requirement of “access to justice” is information about how the system works. People need to know what processes are available to help settle disputes, and how to take legal action against someone else in order to protect or preserve their position. If they are accused of a crime, they need to understand what rights they have and how the case against them will proceed.

Basic information must include who they should talk to, what choices they have, what the relevant law or procedures are, what outcomes are likely, what their involvement will be, how much time it will take, what it will cost and where help can be found.

At present the main source of advice and information about the court system is lawyers. An alternative to employing your own lawyer is to visit a Community Law Centre or other community agency for preliminary advice about the law and the choices that exist.



Appearing in court

Who can tell me how this place works, and what I have to do? Is there somebody who speaks my language? Are there any signs that I can understand? Is there any list with my name on it?



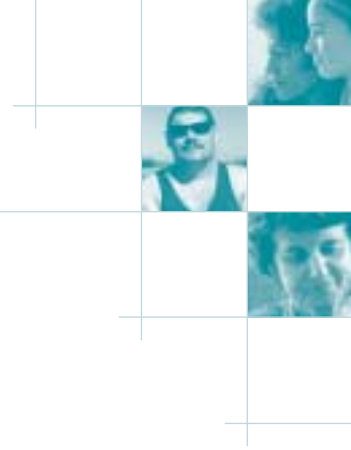
Which court do I have to go into? I heard them say over the loud speaker that some people appearing in court 6 are to go to court 5 - which one do I go to?



How do I find the people I need to speak to? How do I find my lawyer? My social worker? My probation officer? Where do I find the duty solicitor?



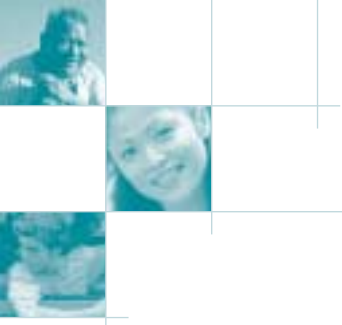
What are they doing in this court? I’m 10 minutes late – has it been my turn already? When will it be my turn? What will happen when it is? Do I have to stand in the dock? What will I say when the judge speaks to me? What does guilty/not guilty mean? I’m a little bit of both.



People who work in courts can answer questions across the counter about things like where to go for hearings, when to be there and who to see, but they are not usually legally trained. Many courts have Court Victims Advisers who can offer special support to victims, and the Family Court’s “Coordinators” are there to offer help.

It is doubtful, however, that everyone involved in court processes is getting all the information they need at present and those who cannot read well are particularly disadvantaged. The court system can be mysterious and many people from minority groups do not feel confident that they understand what goes on or that they will be fairly treated.

Tell us what you think about **information and understanding** on page 2 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



“...a significant proportion of people who come to court are either not legally represented or are not represented adequately by their lawyers.”

Representation in court

With the notable exceptions of the Disputes and Tenancy Tribunals, most courts and tribunals in New Zealand operate on the basis that each side will be represented by lawyers, and that those lawyers will be of roughly equal competence. This is a critical point, as our system is based on everyone having a proper opportunity to put their case and to challenge the opposing case.

The reality, however, is that a significant proportion of people who come to court are either not legally represented or are not represented adequately by their lawyers. Either of these situations causes real problems as it undermines a fundamental part of how courts are supposed to operate.

Some unevenness in legal skill is inevitable whether the case is argued by an outstanding lawyer against a very competent one, or by a very competent lawyer against an inexperienced one. What is important is the degree of unevenness and how it affects a person's chances in court.

One reason for not having a lawyer, or not having a lawyer who is as able or experienced as the other side's lawyer, may be cost. Another may be unease with the legal profession.

However, it is not just legal qualifications or experience that are important or necessary for competent representation in court. Cultural backgrounds are also important, particularly as many of those appearing in criminal courts are not of European descent – though most of their legal representatives are. People from other cultures often expect that they can be spoken for or assisted by elders or kinfolk but find the court may not allow this.



What should judges do if one or both parties does not have a lawyer?

Maurice has sued Sam over a car which he bought from him for \$14,000 and which gave up the ghost the very next day. Maurice has no money so is running his own case. Sam has a Queen Street lawyer to represent him. In court when Maurice tries to tell his story, Sam's lawyer keeps jumping up and saying that his evidence is inadmissible. Later when Sam is telling his story and Maurice wants to cross-examine him, both the lawyer and the judge keep interrupting. Maurice knows that the whole story is not being told but doesn't know how to go about telling it. He wants help from the judge. What can and should the judge do?

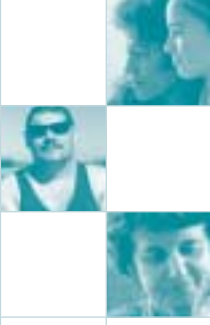
Some say that people should be able to have greater choice about who represents them in court. People can sometimes have a lay person act as their adviser, sitting with them in court though not able to address the judge.

If that concept were extended so that more people who are not legally qualified could represent others in court, there might be advantages such as greater choice and lower costs. But such a move would also create problems. The person who is not legally trained is less likely to know enough about the law or the court's processes. They may not be able to argue a case as well as a trained lawyer, or to respond to the other side. If a case has to be decided in strict accordance with the law, the person represented by a lawyer is likely to have a real advantage so increasing the potential for injustice. Also, the case is likely to take more time.

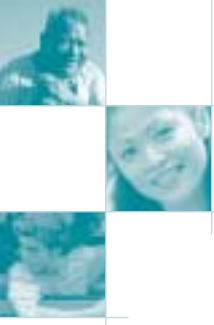
Judges are put in a difficult position when only one side has a lawyer or the lawyers are of markedly differing ability. The judge may try to correct an imbalance, in the interests of justice, but this can lead to claims that the judge is not impartial. When judges try to help people who are not represented by a lawyer, it is not uncommon for the decision to be appealed on the grounds that the judge provided too much or too little help.

Another argument against people without legal training representing others in court is the impact this would have on current court process. Lay people do not have to follow the same rules as lawyers and are not subject to the discipline and ethical constraints that underpin the present system.

Tell us what you think about **representation in court** on page 4 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



Judges are put in a difficult position when only one side has a lawyer or the lawyers are of markedly differing ability.



Geographical access

Both New Zealand's geography and the way the country has been settled means there is no coherent pattern to where court hearings are held.

Currently the Court of Appeal judges are all in Wellington, although that court occasionally sits in Auckland and Christchurch.

High Court judges are based in Auckland, Wellington and Christchurch but sit "on circuit" in another 14 towns and cities around the country.

District Court judges are based in or else go on circuit to about 65 towns and cities. Other courts and tribunals sit in various communities.

In all the places where a court sits, there is an office called a registry, where documents can be filed.

Location of Courthouses



The need for court offices to be available for filing documents in many towns and cities is less critical now that electronic transfer of information is common. Likewise, telephone conferencing or video conferencing (particularly for work that comes before a hearing) can mean that having everyone in one place at one time is less important than it used to be. Now that technology is changing the way people can access services, there is a need to rethink the best ways for courts to be accessible.

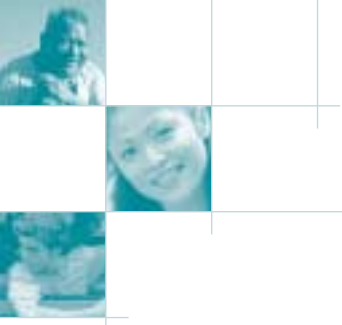


Where should court hearings be held?

The High Court currently sits in New Plymouth, Wanganui and Palmerston North which are all within comfortable travelling distance of each other. On the other hand, the High Court never sits in Tauranga which is an area with a large volume of work. Sessions in Timaru and Invercargill sometimes get cut short because there is no work to do.

Population size, while important, is not the only factor in deciding where courts should sit. The nearness of other centres, or a community's isolation, need to be taken into account. The value in justice being delivered in the place where the dispute arose or the wrong occurred is also important.

Tell us what you think about **geographical access** on page 6 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



Cost

It is fundamental that a lack of money should not stand in the way of access to justice. If the court system is fair and impartial but only available to those who can pay high costs, then justice is not freely available to all.

Equally, there is a limit to how much public money can be available for spending in the court system. A tax dollar spent in the court system is a dollar not available for health or education, for instance. It is therefore essential that the funds which are allocated for the court system are used in ways which ensure speedy, fair, and even-handed justice for all the community.

For individuals, the biggest cost in taking or defending cases in court is the cost of a lawyer to represent them. The amount charged relates to the complexity of the case, the time it takes to resolve, and the level of fee the lawyer charges.

There is some help available for people on low incomes. Currently, government-funded legal aid is the main way of helping people to be represented by a lawyer for both criminal and civil cases. People facing serious criminal charges can choose a lawyer from a list provided by the Legal Services Agency. In civil cases court fees can sometimes be waived or postponed because of an inability to pay.

Some people complain that it is very hard to get legal aid because the level of income permitted to qualify for it is too low. There are also complaints that the amount available for some sorts of cases is too limited. These criticisms are made in both the criminal and civil areas.

Others, however, say legal aid is too generous and that legally aided parties adopt stances and employ tactics they would never spend their own money on, particularly in criminal cases and in the Family Court.

There are also government-funded “duty solicitors” available each day in most District Courts. They provide free advice such as how to plead to the charge against you, whether you have a right to a jury trial, how to arrange private legal representation or apply for legal aid, and getting bail.

Legal Aid Expenditure – 1998/99 to 2000/01

Type of Aid	1998/99 \$000	1999/00 \$000	2000/01 \$000
Criminal	32,384	29,333	30,273
Family	39,612	34,855	33,655
Civil	8,108	8,077	6,144
Waitangi	1,513	3,066	4,206
Duty Solicitor	4,191	4,306	4,417
Total	85,808	79,638	78,695

Source: Legal Services Agency Annual Report 2000/2001



There has been debate recently about how much people engaged in civil disputes should contribute to maintaining the court system and how much of this the taxpayer should pay. The resolution of private disputes not only benefits the individuals involved, but also the public more broadly. It establishes precedents in the law that others can use if a similar situation arises. It settles conflict in the community. There remains controversy about the level of fees that individuals should pay, and in what sorts of cases.

Since the cost of employing a lawyer is a real barrier for some people taking civil disputes to court, what options exist? The range of possibilities could include lawyers charging lower fees or increasing the amount of taxpayer funding for people to hire lawyers using legal aid or looking at the financial levels to qualify for legal aid.

Another option is for the state to employ lawyers who offer legal services directly to the public (in the criminal area these are often called “public defenders”).

Another way would be for the government to question the level of lawyers’ fees it is prepared to pay, since it is a big user of their services.

“If the court system is fair and impartial but only available to those who can pay high costs, then justice is not freely available to all.”



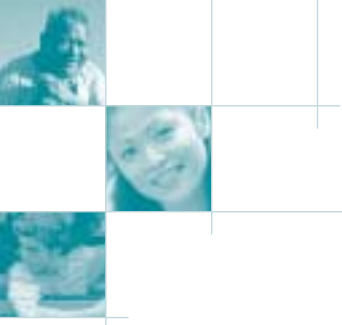
The cost of taking a case to court

A deal has gone sour and you have lost \$16,000. You go and see a lawyer who tells you that the law in this area is very unclear and that if you want to chase this money you may have to go to the High Court or even try to go to the Court of Appeal to get finality. You have been told it might cost you as much as \$10,000 or \$15,000. You feel there is an issue of principle involved and you want to pursue it. You go ahead and it ends up costing you \$50,000 and takes three years.

There has recently been significant change to the legal aid scheme, with a new Legal Services Agency responsible for ensuring nationally consistent approaches. Government has also indicated that there will be a review of eligibility for legal aid.

The current reality is that the conduct of trials for serious crimes has become so complex and lengthy that hardly anyone can afford to pay for their own defence. As a result, virtually all major criminal trials necessarily involve legal aid. This can lead to community disquiet, especially in high profile cases that involve horrific allegations.

Tell us what you think about **cost** on page 8 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



Inside the courts

Going to court can be a daunting and alienating experience. Courts are formal places run according to rules that many people do not understand. Often court processes seem needlessly complex and long-drawn out. Cases take not only time but also an emotional and financial toll on the people involved and on their families.

“**Courts are formal places run according to rules that many people do not understand.**”

New Zealand has an array of courts and tribunals. They have emerged at different times and in response to a variety of circumstances but not to a coherent plan.

Some people think changes are needed to the current structure of courts and tribunals to ensure that justice is delivered fairly, efficiently and as rapidly as possible. Many question whether the strict processes and rules by which our courts are run provide the best and fairest outcomes or are the most efficient use of resources.

Concerns about how the system is operating today raise questions about both the structures and the processes of our court system. The two need to be looked at together because any change in one area is likely to have major implications for the other.

For instance, many people think that the District Court is overloaded and its scope of cases too wide. One solution might be a structural change – establish another “lower” court to deal with less serious criminal and civil cases. Another solution might be to better streamline court processes so that cases that are clearly able to be resolved simply can be “filtered” out early rather than go through processes that take unnecessary time and money.

This section looks at major elements of the court system as it operates at present. It identifies areas of concern – both in court structures and court processes – and asks what might be changed to make the system better for those who use the courts and to ensure that the courts deliver justice in a timely manner.

Openness

Courts are generally open to the public so that justice can be seen to be done. We often take openness for granted, but it is as important a safeguard to fair process now as when it was first secured. Anyone can observe proceedings and make their own judgement about how justice is or is not being done. Or we can form our views through media coverage of major cases that go before the courts.

There are exceptions, for example to protect children or people bringing a complaint in sexual cases. The Family Court and the Youth Court are normally not open to the public and media reporting only occurs in restricted and controlled ways because of concerns for privacy.

In those courts that are open, the publication of names or other information can be prohibited if this is necessary in the interests of justice.

Prohibiting the publication of names or other information



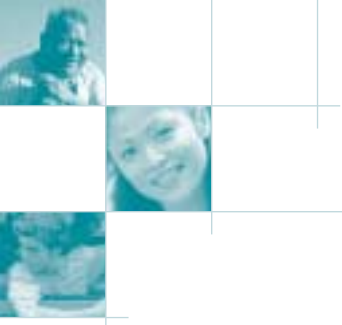
Harold, a well-known identity in a small town, was caught shoplifting at the local stationers. He has now been charged and his family want his name suppressed because the doctor says he is in early stages of Alzheimer's. The shopkeeper is vehemently opposed to any protection as he is fed up with people ripping him off.

Not everyone agrees with the way some courts and tribunals are closed, or with the practice of prohibiting publication of names or other information. There is a view that public exposure is part of the punishment for criminal behaviour. Others argue that publication should not occur until a person has been convicted. Following that line of reasoning would, however, cut across the openness of courts as they would essentially be closed until someone was found guilty.

In those courts which are currently closed to the public, the question arises as to whether it would better to protect personal and intimate matters by way of orders prohibiting publication of some information rather than by excluding everybody from the courtroom.

This is another area where there is no single best way to do things. Careful consideration of all options is needed to achieve the best outcomes.

Tell us what you think about **openness** on page 10 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



There is a real likelihood that some people come into the system, are processed in it, and go out without fully understanding what has happened or why it has happened.

Formality

The New Zealand court system was imported from England 160 years ago. Some of the customs and trappings have changed little since. There are rules about who stands where, who gives what to whom, who speaks when – and the rules are clear only to the court ‘insiders’, the judges, lawyers and employees of the court. Dress is formal: judges in most courts wear gowns, as do lawyers sometimes, and until recently many wore wigs.

Our courts are formal places. Some solemnity is necessary as there are serious matters at stake. Judges represent important values such as fairness and impartiality. That is why they sit apart from the others involved.

Courts differ in their degree of formality. Courts conducting jury trials are probably the most formal with criminal cases tending to be more formal than civil cases. Formality tends to reflect how public the issue before the court is and how great the public interest is likely to be.

In some of the specialist areas, for instance the Disputes Tribunal, the Youth and Family Courts and the Māori Land Court, things are less formal. Not everyone thinks the degree of informality is appropriate while others think these are still too formal. There is also a general concern that it is difficult to bring children into a courtroom.

There are arguments in favour of formality. It ensures the right to be heard in sequence without being interrupted. Formality underscores the authority of the court and prevents hearings getting out of hand as can happen in a ‘free-for-all’ atmosphere.

Conducting the court according to strict rules and procedures also means matters move through the court more quickly and with fewer misunderstandings. These qualities could be undermined if a less formal approach was adopted.

But do the rituals and formality go too far? Which parts are essential to the provision of good justice and which are unnecessary? There is a real likelihood that some people come into the system, are processed in it, and go out without fully understanding what has happened or why it has happened.

Some people feel that much of the current formality is inappropriate in our diverse and increasingly Māori, Pacific and Asian society. Perhaps some of the formal practices which we have maintained from the system’s English roots could be enhanced or replaced with symbols of solemnity from some of New Zealand’s other cultures.

Māori have a special constitutional place in New Zealand as the indigenous people. Some have suggested that singing waiata or saying karakia (prayers) should be part of courtroom practice where a case involves Māori.

Formality – have we got the balance right?

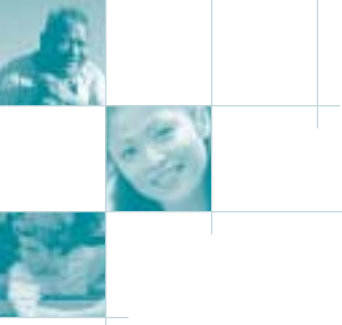


Iosefa was caught urinating behind a telephone box on the way home on Friday night. He has been charged with disorderly behaviour and is due to go to court. He is really sorry for what he did and his grandfather wants to go with him to apologise and make amends. When they get to court they are told that there is no place for his grandfather in our system. Iosefa is totally tongue-tied and doesn't know what to do or how to react.

Similarly having tukutuku (woven panels) or Polynesian designs on the walls could signal that the courts recognise the diversity of cultures that come before them and want to make the environment sympathetic for as many people as possible.

Courts are, and many say need to be, formal places. But that can be incomprehensible, intimidating and culturally alienating. How best to strike the balance? Is there one answer for all courts or might the balance shift with the nature of the court or the nature of the case?

Tell us what you think about **formality** on page 12 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



“It is unlikely that we will ever have a system where none of the judicial officers have to have legal qualifications, or that all do.”

Judges and judicial officers

The array of courts and tribunals in New Zealand means that, as well as judges, there are other people working within them as decision-makers. Other judicial officers include coroners, Justices of the Peace, Disputes and Tenancy Tribunal referees, and many tribunal members.

Legal qualifications

All judges are legally qualified but not all judicial officers need to be, although many are, and all receive training for their jobs.

Lay people make a considerable contribution to the court system as:

- *Justices of the Peace* exercise important parts of the jurisdiction of the District Court, including conducting many deposition hearings and deciding traffic cases.
- *Community Magistrates* sit in the District Court and consider minor criminal matters. They have a slightly wider jurisdiction than Justices of the Peace.
- *Disputes Tribunal referees* determine civil disputes up to \$7,500 (or \$12,000 if both parties agree).
- *Residential Tenancy Tribunal referees* have the jurisdiction to determine all landlord and tenant disputes.
- *Coroners* exercise substantial decision-making powers and exert substantial influence in making determinations about the circumstances surrounding unusual deaths or deaths in state institutions.
(Recent practice has been to appoint people who are legally qualified.)

Some people think greater input from the community in the delivery of justice will improve the ultimate outcomes. Others argue that a fair process requires all judicial officers to be legally qualified.

It is unlikely that we will ever have a system where none of the judicial officers have to have legal qualifications, or that all do. The issue is one of balance. We need to review which kinds of cases require judicial officers with a formal legal background, and in which cases a better outcome can be found using common sense and a general knowledge of the law.

The present approach in civil cases is that the number of dollars involved in a dispute decides which cases go to the Disputes Tribunal, where the referee does not have to be legally trained. Is this a good way to identify which are the really important, complex, and demanding cases?



In the criminal area, less serious charges as well as most preliminary hearings can be handled by a Justice of the Peace or a Community Magistrate, who are not usually legally qualified. Are the dividing lines right?

With the exception of judges, decisions about which groups of judicial officers must be legally qualified have been made in an ad hoc way over the years without any formal overarching set of principles. It might be useful to have a set of principles to decide two issues:

- Should the entire courts process be the responsibility of judges, or are there initial parts of some cases that could be delegated to others, like managers or mediators, who have other qualifications and skills?
- When do judicial officers in courts or tribunals need to be legally qualified and when might other qualifications be more useful?

Number and gender of judges and judicial officers in some courts and tribunals

High Court

35 – 31 men, 4 women

District Court

145 – 121 men, 24 women

Employment Court

6 – 5 men, 1 woman

Maori Land Court

10 – 8 men, 2 women

Dispute Tribunal referees

58 – 36 women, 22 men

Coroners

64 – 61 men, 3 women

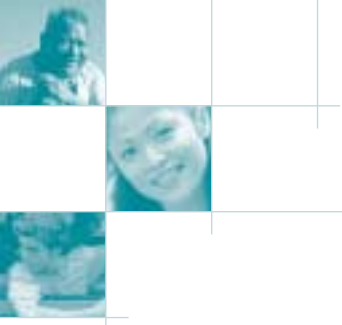
16 legally qualified

about 54 legally qualified

Suitability and availability

We also need to consider what personal qualities and attitudes are important in a judge or judicial officer and what sort of ethnic and gender mix is desirable on the bench as a whole. The issue is one of public confidence. Those who sit in judgment in our courts and tribunals must reflect the diversity of the society that comes before them.

While all judicial decision-makers should be able to reach beyond their personal identities to do their job impartially, few people would be comfortable if all our judges and judicial officers were of one gender or one ethnicity. For generations, almost all adjudicators were white middle-aged to elderly men. Now more women hold these roles in our courts and tribunals although very few adjudicators are of non-European descent.



One way to broaden the pool of people available to work as judges would be to allow more people to do this job part-time. Judicial officers in the various tribunals mostly work part-time. Some retired High Court judges also sit part-time as well as doing mediations and arbitrations.

While these situations are accepted, practising lawyers have not worked as judges on a part-time basis. This is because some see a contradiction between being a judge one day and an advocate the next that undermines the perception of judges being totally independent.

Again this illustrates tension between competing principles. It would be good to have more diversity in those sitting on the bench and part-time positions could help this. But it is also important not to undermine public confidence in the independence of the judiciary.

Tell us what you think about **judges and judicial officers** on page 14 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.

Not only winners and losers

Most New Zealand courts operate on an “adversarial” basis, where each party does the best they can to convince the judge that their version of events (or the law) is right and should prevail. The judge has a neutral role, ensuring that there is fair process and then reaching a decision.

While our system is mostly adversarial, there are particular courts within it where the judge takes a more active role in resolving the matter before the court. The Employment Relations Authority, Māori Land Court, and Coroners Court are examples.

The Family Court and Youth Court put heavy emphasis on resolving issues, bringing the parties together to try and reach solutions before a hearing. The aim is not “winner take all,” but rather finding a solution acceptable to all parties.

As well, there are a number of processes across the court system where the judge takes a more active role.

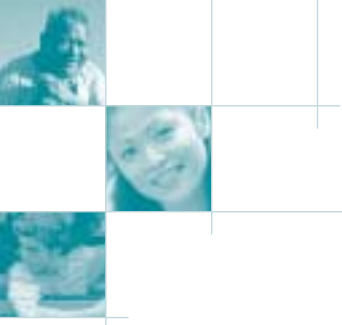
Status hearings are a pre-trial process held before a judge, in less serious criminal cases where the defendant has indicated they are pleading not guilty. These include some inquiry by the judge into what actually happened and whether or not the charges are appropriate. Status hearings take place at an early stage and can result in cases not going to trial.

“Restorative justice conferences” occur especially in cases involving young people, where the offender has admitted guilt. They allow victim and offender to meet, talk through the causes and the consequences of the crime, and then report to the judge on their discussions and any commitments (for reparation, for instance) by the offender.

Finally, when deciding the sentence in a criminal case, judges can take a more probing role to find out the circumstances of offenders and victims.

Some people believe more of these non-adversarial approaches, at least in some courts or in some types of cases, would provide better outcomes. Such a shift would have implications for the kind of skills needed by those who work in our courts.

“The aim is not “winner take all,” but rather finding a solution acceptable to all parties.”



A status hearing...

Annie, a 29 year old solo mother with two young children, has pleaded not guilty to a charge of receiving stolen cameras. Her lawyer tells the judge that she did find the cameras after a former boyfriend left, but didn't realise they were stolen. She has two prior convictions for similar offences, he says, and she fears that if she admitted the offence she might be sent to prison. Annie's lawyer asks the judge to indicate the type of sentence Annie might expect if found guilty.

The judge asks the prosecutor to read out the police summary of facts. The victim adviser confirms that the complainant understands that after the case is over he will get the cameras back, and he has no wish to see Annie imprisoned. The prosecutor adds that a person is being prosecuted for the theft. The judge then speaks to the probation officer, and finally says that if found guilty Annie would likely be sentenced to community service.

The lawyer, after speaking to Annie, tells the judge that she has decided to change her plea to guilty, and he explains to the judge more about her part in the offending and her circumstances. The judge sentences Annie to community service.

A restorative justice process....

Home from holiday, John, Amelia and their three young children walked inside to find they had been burgled. Close to \$7000 worth of property was gone, including a computer holding business notes. The loss of Amelia's jewellery, some from her grandmother and of sentimental value, really upset her.

Tony, a local 20 year with a record of petty offending was arrested fairly quickly after police found some of the goods. He pleaded guilty and agreed to a restorative justice conference. John, as victim, decided the case could go to a restorative justice conference. Although police recovered his computer, his main loss, he wanted to tell Tony exactly what distress he had caused and he also wanted to know how the burglary was done. Amelia was very nervous of meeting the offender.

The conference was organised by a trained restorative justice facilitator contracted by the Department for Courts. John and Amelia met with Tony and his father in the local community rooms one evening. The defence lawyer and police officer chose not to attend but the probation officer was there.

John had the first chance to speak and he was pretty hot. Tony apologised and said what he had done, also answering some angry questions about why he had done it. Amelia was relieved to find Tony was not as frightening as she had imagined and felt able to press him strongly about whether he was really sorry.

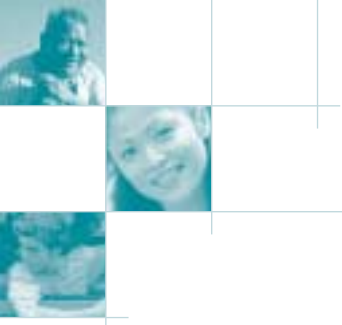


The meeting also talked about Tony's lifestyle and situation. Tony's father said he has younger children and Tony has been away from home for a while. After a short break apart, the meeting discussed what Tony could do by way of restitution and how he could stay out of trouble in future. He would like to join his partner who is pregnant and living in another town. He has never had permanent work but is interested in mechanics. John encouraged him to do something responsible about it.

An agreed plan was put together, including Tony agreeing to do some community work and paying \$25 weekly reparation. John accepted the apology was genuine and said he felt better having seen Tony face to face, but he still wanted to make sure Tony really did carry out his side of the agreement. He offered to talk with the volunteer fire brigade, where he is a member, about possible community work. The facilitator wrote a report of the meeting for the sentencing judge.

At sentencing, the probation officer confirmed that community work painting the fire brigade building had been arranged and the judge imposed a sentence of reparation and community work. The judge said that it was a serious offence and, without the report from the restorative justice conference, he would have imposed periodic detention if not imprisonment. He considered it was a last chance for Tony.

Tell us what you think about **not only winners and losers** on page 16 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



“We could do with more improvements and even entirely new ways of doing things that would give us a fairer, faster and less expensive court system.”

Can we improve our processes?

Courts use various processes to deal with cases. Some are as old as the court system itself and some have developed over time to improve on the old or to respond to changing attitudes in society about how people and the issues that affect them should be treated.

This part of the review of our court system discusses whether the processes we have now are the best we can achieve.

Many people may assume that what we do now is – by and large – how it should always be. But there is nothing ‘magic’ about the present court processes. We could do with more improvements and even entirely new ways of doing things that would give us a fairer, faster and less expensive court system.

In thinking how best to improve New Zealand’s court system so that it delivers justice for all in a timely manner we need to remember that two fundamental – but potentially conflicting – values underpin the way in which court processes operate.

The first is the right of every individual to be accorded due process of the law in a system that upholds the principles of natural justice.

The second is the need to maintain proportionality and to make best use of resources and to process cases as rapidly as possible without compromising justice.

These values must be constantly weighed against each other to ensure that justice is delivered. Have we got the current balance right – and if not, what changes might be made?

Justice away from the courtroom

The overwhelming majority of cases that start in the District Court – over 90 percent – are resolved without a full hearing and with only limited adjudication. But all cases begin with similar processes, whether they are quickly resolved at an early stage or are among the comparatively few that go the full distance to formal trial and adjudication.

On the one hand, this preserves the right of every individual to be accorded due process but, on the other, it is often out of proportion with what most cases require and, therefore, can waste time and money.

The challenge is to develop mechanisms to divert from full court processes civil and criminal cases that can be resolved otherwise more swiftly, inexpensively and positively – while at the same time ensuring that access to a formal trial remains available when required.



The challenge is different between civil and criminal cases.

Civil cases are mostly disputes between individuals, one of whom starts the process, about money or property. Criminal cases involve the public interest and are almost always initiated by the state. They carry the potential stigma of a conviction and a penalty that may involve loss of liberty such as imprisonment, periodic detention or supervision.

Civil processes can be more flexible than criminal processes and offer more scope to do things differently. In criminal cases, where personal freedom can be at stake, the person charged has many rights that must be recognised.

The court system already has a number of pre-trial processes to encourage early resolution of civil and criminal cases and so avoid having to go through the full court processes. These are discussed below. The question is whether these measures are enough, can be improved upon, or whether there are other options altogether.

Cases settled out of court

Only a small proportion of cases are settled by a defended hearing in front of a judge or jury, although judges are still closely involved through pre-trial matters or in sentencing.

District Court

- 8% of criminal summary cases go to a full hearing in front of a judge
- Only 2% of civil cases go to a full hearing.
- 66% of cases where jury trials have been elected do go to trial

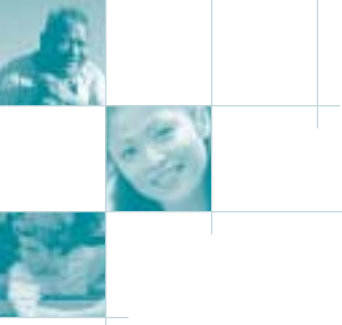
High Court

- 22% of civil cases go to a full hearing.
- 78% of cases where jury trials have been elected do go to trial

The difference between the High and District Courts is because more weighty cases are more likely to go to trial. The very low rate for District Court civil cases includes a large number of cases relating to unpaid debts, where people file cases just to enforce payment.

The proportion of cases that go to a defended hearing tends to also be high in the specialist courts – Family, Environment, Maori Land Court.

Source: Department for Courts



Criminal

Once a criminal charge has been laid, the case can follow one of two paths. Either the defendant can plead not guilty and the case goes to trial (with or without a jury) or there is a guilty plea and the case goes before a judge or judicial officer for sentencing.

Status hearings have been introduced in most District Courts to provide an opportunity to clarify the issues in criminal cases not serious enough to be decided by a jury (known as summary criminal cases). A status hearing is held when the accused person pleads not guilty and allows the judge to ask what happened and whether or not the charges are appropriate.

As a result, charges might be withdrawn or amended and not guilty pleas can change to guilty. Many cases stop there. Those cases that proceed to a defended hearing will probably have the issues narrowed.

Status hearings can streamline criminal cases. Are there other ways to deal with criminal cases in a timely, fair and sensible way?

One suggestion is to have some initial screening before cases come to court. The way the Youth Court works may offer some possibilities. Here, the circumstances of an alleged criminal offence can be discussed with the defendant without a guilty or not guilty plea being entered, provided the defendant does not dispute the event. The court can then make orders but does not enter a criminal conviction.

Also in the criminal arena, but not restricted to the Youth Court, is the increasing use of 'restorative justice' processes. These can lead to the dismissal of less serious cases without conviction, after certain actions agreed with the victim have been completed

Any sort of screening step would be challenging in the criminal area. First, it cannot prejudice any future trial and second, it must not compromise the right of defendants to rely on a presumption of innocence. These problems need not be insurmountable but require careful consideration.

Civil

Civil and family cases often get resolved before a defended hearing because the parties settle the matter. Sometimes they do this themselves or they find other ways to resolve the case such as mediation or arbitration, which are alternatives to more complex and costly court processes.

They may choose these alternatives after the case has been filed, often with strong encouragement from the court.



As with status hearings in the criminal area, judicial conferences on the merits of a case - held before the trial - can encourage parties to take the case out of court or, at least, narrow the issues in dispute.

Where arbitration or mediation takes place outside the court, this is generally a private matter where the parties define their dispute, choose their facilitator or arbitrator, and can agree to be bound by the outcome. But even where dispute resolution arrangements are private, the courts have a supervisory role and can be requested to enforce the deal if one side fails to deliver on the resolutions agreed in the private processes, whether arbitration, mediation, or conciliation.

The Employment Court insists upon a phased approach of mediation and investigation before adjudication, with the aim of settling the dispute at the earliest stage possible. The Family Court follows this pattern to some extent also. Could a formal phased approach be used more extensively throughout the court system?

There have been proposals to promote the use of private mediation or other alternatives, either voluntarily or compulsorily. For example, the court might require parties in some cases to take part in alternative dispute resolution processes with a neutral third party before a defended hearing can proceed, or even before a court process begins.

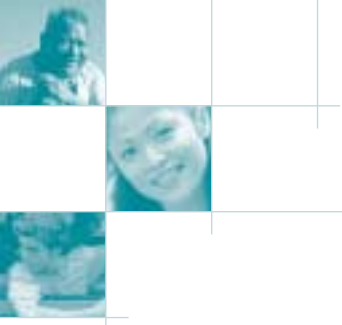
Another suggestion is to require each side to begin by recording their basic position. These short summaries, offered on a 'without prejudice' basis, could be used in an initial discussion with an independent person (who might or might not be a judge), to decide how best to proceed with the case, if the matter is not disposed of in that first meeting. This might be by using a court hearing or by some other means to resolve the matter.

The real challenge in this area is to see if there are better ways of resolving matters more quickly and cheaply than we have at the moment. Many people find the existing processes as difficult and distressing as the incident which led to the civil dispute or criminal allegation.

Can we make changes for the better?

Tell us what you think about **justice away from the courtroom** on page 18 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.

“
The Employment Court insists upon a phased approach of mediation and investigation before adjudication, with the aim of settling the dispute at the earliest stage possible.
”



The Employment Court's staged approach

The new employment law requires the parties to a dispute to work through a series of steps to try and sort it out before they can go to court. The aim is for parties to attempt each step before moving on to the next one, though the process does have some flexibility:

- First, everyone is expected to act in good faith at work, and to attempt to resolve disputes themselves.
- If that fails, then they are encouraged to go to mediation. There are state-funded mediators available for this.
- If that fails, the parties must go to the Employment Relations Authority and will usually be required to attend mediation if they haven't tried it earlier and if the Authority believes it would be helpful.
- If the mediation fails, the Authority can decide the dispute, but they do it via "practical justice" not technicalities.
- If one of the parties is unhappy with that decision, they can ask the Employment Court to rehear the case.

For more information, see the reference section, page 74.

Streamlining cases that go to trial

No matter what processes we have to filter out the large number of cases better dealt with elsewhere, some cases still require a formal trial or hearing. Again, what can be done in these remaining cases to tailor court processes to the case or to sort out the critical issues early? The issues in criminal trials are different from those in civil trials.

In a civil trial, the person who has brought the lawsuit must establish that they have a case. But it is sensible to identify early on which areas are in dispute so that court processes focus on these and not on matters that are beyond contention. Even the most complex commercial cases over millions of dollars can be distilled into some basic issues, but the present system seldom seems to achieve this.

In a criminal trial, the Crown must prove beyond reasonable doubt that the person accused committed the alleged offence. But often the court's time is taken up by the presentation of evidence about issues that are not in dispute. For instance, in a bank robbery lengthy evidence can be given to establish that the robbery happened when this is not in doubt and the only matter in dispute is whether the person charged was actively and knowingly involved.

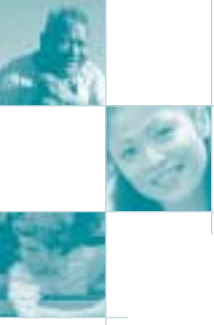
In either civil or criminal trials, are there ways for early and decisive focussing of the evidence so that the court's time is spent where it matters?

Disclosure of evidence

It is fundamental that there always be a proper opportunity to be heard for the defendant in a criminal case and for both parties in civil cases. That raises critical and controversial questions about the extent to which evidence should be disclosed in advance of a court hearing.

Early disclosure means that the parties are better informed about the strength or weakness of the other side's case, which can reduce the time for both preparation and hearing cases. But it also limits the operation of the adversarial process and the ability of parties to surprise or confound the opposing side. For better or worse, disclosure severely reduces the ability to produce 'rabbits out of hats'. Some work is being done in this area, but what more could be done?

“Even the most complex commercial cases over millions of dollars can be distilled into some basic issues, but the present system seldom seems to achieve this.”



Case management

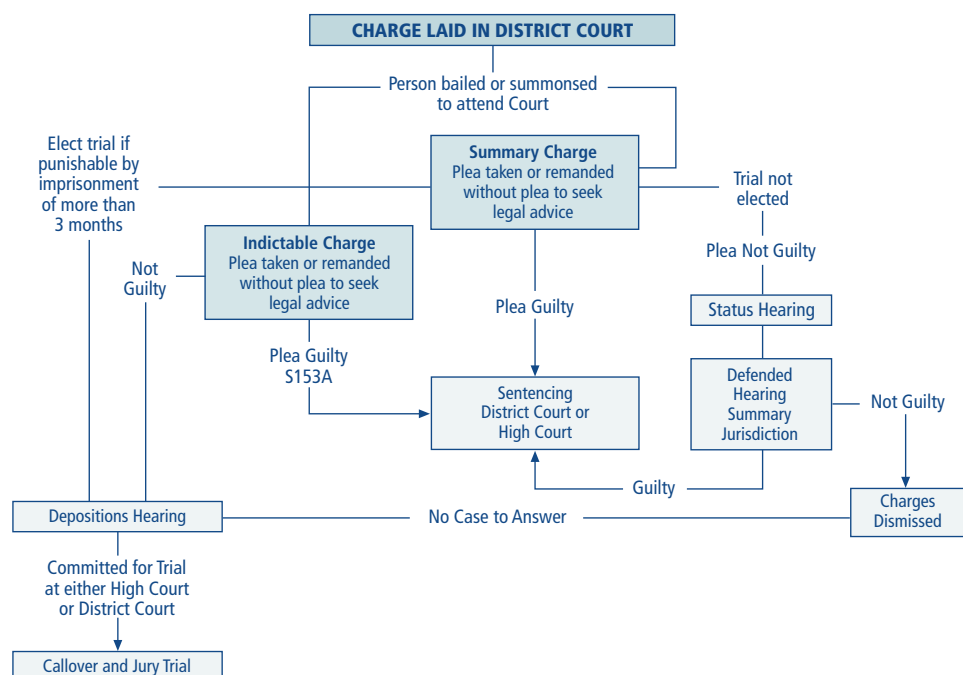
Case management is promoted as one way to streamline processes and reduce delay. Its introduction has been controversial. The basic idea is that a judge or registrar takes a close interest in each case and sets deadlines for certain actions to occur between the parties or to be reported back to the court. This contrasts with previous practice where only the parties and their lawyers initiated significant steps in the case.

Case management is aimed at streamlining and rationalising the conduct of individual cases. To do this, it requires co-operation from all involved. Because the approach fits somewhat uneasily with a pure adversarial approach, case management has had critics both on the bench and in the legal profession. Some argue that it is not appropriate for judges to intervene in the conduct of the case because it interferes with their essential detachment and impartiality.

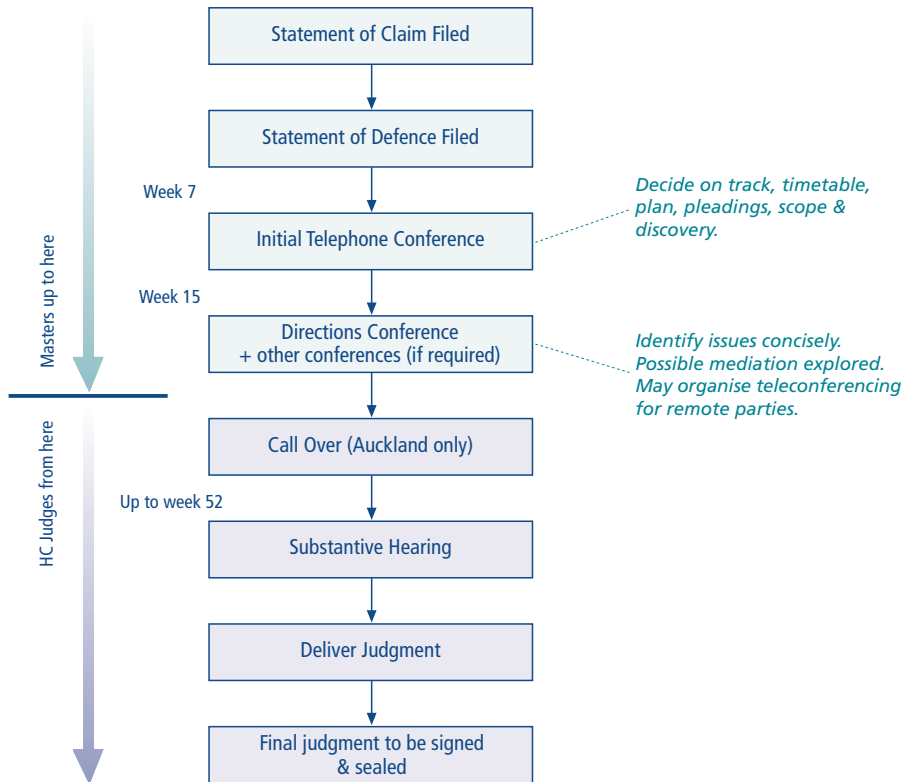
Others claim that it delays progress because lawyers have to report to the court instead of just getting on with the case, and that it reduces litigants' freedom to manage their own case. On the other hand, efficient administration of the courts has always required some degree of monitoring and setting priorities among cases.

Have means become more important than ends, with time, cost, and effort going into unnecessary procedures?

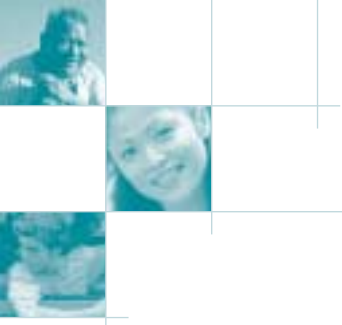
What happens in a criminal case



What happens in a civil case (High Court)



Tell us what you think about **streamlining cases that go to trial** on page 20 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



“The importance to everyone involved of getting cases resolved in a timely way cannot be over-emphasised.”

Timing of court processes

The importance to everyone involved of getting cases resolved in a timely way cannot be over-emphasised. Too often, however, “timeliness” seems to refer to time-frames that are acceptable to, and attractive for, those within the system rather than those who have to use the system.

For example, people required to attend a court sitting are frequently all told to come at the same time, say 10:00 am, although clearly they cannot all be dealt with at that time. This may be administratively efficient, or at least easy, but it can be frustrating and unsatisfactory for those who have to wait.

The most crippling effect of delay is not, however, what goes on in the courthouse. It is the effect on people waiting for court hearings and then decisions. The debilitating and distracting effect of any litigation on the parties and those associated with them cannot be over-estimated.

It is easy in the criminal context to appreciate the effect the process can have on the accused person and their family, but victims and witnesses can also have strong emotional reactions to the case. Long delay prolongs these stresses and recovery from them.

In the Family Court, delay in dealing with fractured or dysfunctional relationships can be destructive and sometimes dangerous.

In civil cases, being locked into an exhaustive and exhausting discovery exercise can be crippling for a business trying to survive.

Issues of efficiency must be constantly assessed in terms of their consequences on the people using the courts, not just in terms of what suits the internal workings of the system.

That said, it is only fair to point out that timeliness is not just a process issue, it is also a capacity issue – how much can be done given the resources in the system?

The time cases take to resolve

(Data from 1/7/99 to 30/6/01.)

Criminal

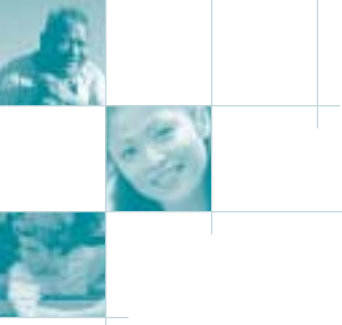
- **Undefended cases** – guilty plea – (63% of total): a third are finalised at first appearance, half are finalised within three weeks, and 90% are finalised within 15 weeks.
- **Defended summary cases** – no jury – (around 9% of total): half are finalised within four months and 90% within 10 months.
- **Defended jury cases** (around 2% of total – 14% in the High Court and 86% in the District Court): Half are finalised within eight months, and 90% within 16 months (excluding retrials).

Civil

- In the High and District Court about 60% of defended civil cases are finalised within 12 months. This includes a very high proportion of cases that are withdrawn before a hearing takes place.
- Information on average times for cases that do go to a hearing is not available but it can be noted that the civil jurisdiction includes a very wide variety of cases, from very complex and lengthy commercial cases to relatively simple appeals.

Source: Department for Courts

Tell us what you think about **timing of court processes** on page 22 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



“ It is reasonably apparent that the District Court is overloaded and that its range of work is too wide. ”

Workloads in the general courts

Before 1980, general court work was divided between the Supreme Court and the Magistrates Court on the basis of severity of potential penalty in the criminal area and the amount of money at stake in the civil area. Since the renaming of those courts as the High Court and the District Court, the demarcation lines have become blurred.

Nearly all criminal work can now be dealt with in either court although the High Court takes the most serious cases, leaving the bulk of work to the District Court. The District Court can now also hear a much greater range of civil disputes.

It is reasonably apparent that the District Court is overloaded and that its range of work is too wide. In the course of a week, a judge could have to deal with dog registration offences, the granting of a licence to an auctioneer, multiple rape, or a serious commercial dispute.

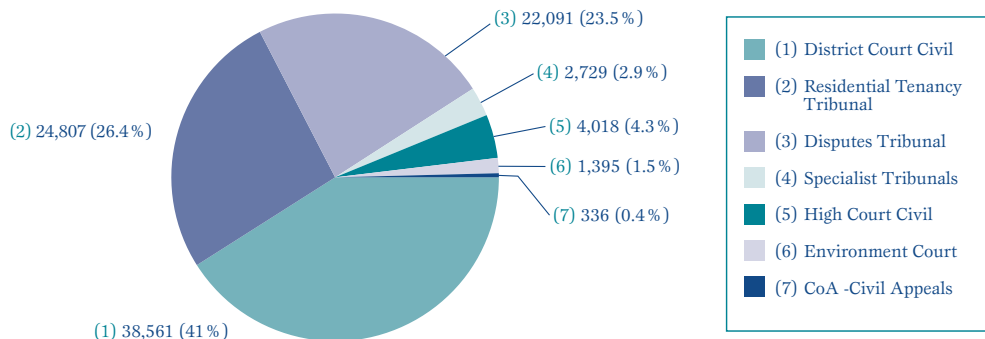
This has led to calls for the introduction of another level of jurisdiction to deal with less serious criminal and quasi-criminal cases, and civil cases up to perhaps \$50,000 – possibly similar to the old Magistrates Court.

Another option would be to increase the range of issues that are exclusively the responsibility of the High Court to achieve a better distribution of work. However, a close look at the content of cases being heard in the High Court might also suggest that some work currently heard there should more sensibly be heard in the District Court.

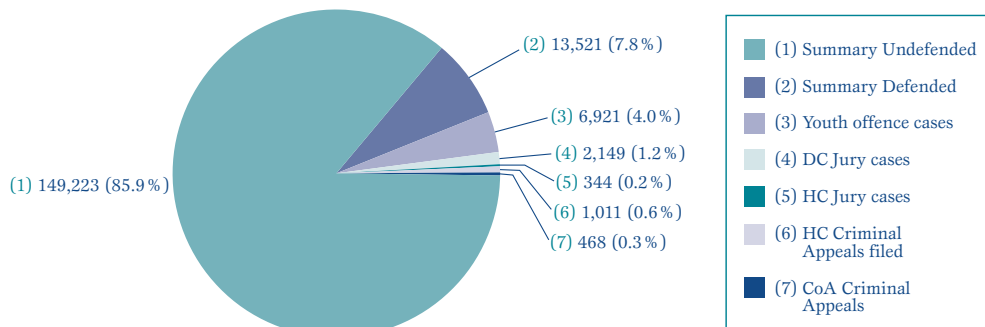
There may be other options. A reasonable approach, therefore, to redistributing the work might start with a clear definition of the core functions of each court.



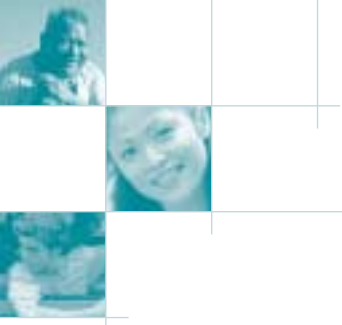
Civil Volumes 2000/2001



Criminal Volume 2000/2001



Tell us what you think about **workloads in the general courts** on page 24 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



The 10 am District Court List

The scene: 10 am on a Monday in a District Court anywhere in the country.

The actors:

The men and women charged with criminal offences. Lawyers. Police. Probation officers. Victims advisers. Forensic nurses. Fines collection officers. Court attendants. Court takers. Maatua Whangai. Salvation Army. Journalists. Families and friends. The general public. The judge.

The action:

'All rise for His or Her Honour the Judge!' Everyone stands. And then, when the judge sits, and the court settles, the day's cases begin.

John, an unshaven 48 year old, is brought from the cells. He is charged with murder. John's lawyer, who has just met him, asks that he be brought back to court the following week. The police oppose bail and the lawyer says that John is willing to stay in custody. The forensic nurse says that John may be mentally disturbed, may not be able to understand what is happening in court, and ought to be examined by a psychiatrist. The lawyer asks that John's name be suppressed – his wife does not know he has been arrested and his mental state is unclear. The police do not oppose this. The judge remands John in custody for one week, calls for a psychiatric report, and grants interim suppression of name. All this takes just a few minutes.

Sam, a 22 year old, has pleaded guilty to 15 fraud offences, and is for sentence. Over several days, using a stolen credit card, Sam bought clothes and alcohol worth \$1400. He has some minor unrelated convictions. The probation report says that the fraud offences are uncharacteristic, and that Sam can pay it all back. Community service and reparation are recommended. Sam's lawyer is ready to make submissions, and the judge has considered the papers and is ready to sentence. But Sam is not there. The lawyer admits that he has not seen Sam for two weeks. All the judge can do is issue a warrant for Sam's arrest, and pass swiftly to the next case. The preparation is wasted.

Mary, aged 37, appears for sentence for 10 shoplifting offences. She has many previous shoplifting convictions and recently has been warned that she is at risk of prison. When Mary admitted the offences, she had a lawyer, but she has sacked him and represents herself. The judge urges her to reconsider. She won't and, over 10 minutes, describes how difficult her life is and swears never to offend again. The judge still sentences her to a short term of imprisonment. The judge says there is no alternative. Every other sentence has failed. Mary's case takes 20 minutes.

Fred, aged 58, is charged with disorderly conduct. He has seen the duty solicitor. He admits that, when he was drunk, he was extremely offensive to passers-by on the street. He has convictions for doing this before, but not for some years.



He is very contrite. He got drunk, he says, when his best mate died unexpectedly. The judge convicts him and orders him to come up for sentence if called on within six months. This takes just a few minutes.

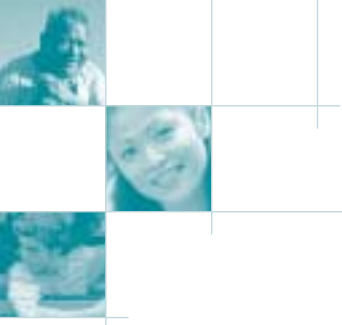
Alan, aged 35, appears from the cells charged with seriously assaulting his wife, and breach of a protection order. Alan's lawyer, who has spoken to him over the weekend, says Alan denies the charges. The most Alan will admit is a minor technical assault. Alan and his wife are separated and she has a protection order. But, Alan says, he was seeing their children, not her, and that is when they argued. He admits to pushing her. He did not intend her to fall, he says, but that is how she got her injuries. He denies that he repeatedly punched and kicked her. He wants bail. He says that he can stay with his brother on the other side of town, and will stick by a condition that he stay away from his wife and kids. The wife, through the victims adviser, says that she wants him out of the cells. The police oppose bail, saying Alan's wife is at risk. Alan assaulted her seriously two years ago, and has harassed and threatened her since. He has breached the protection order twice, and in the past breached bail. The judge decides that Alan cannot be trusted. To protect the wife, despite what she says, the judge remands Alan in custody for seven days. This takes half an hour.

Janette, aged 20, appears for wilful damage and disorderly conduct. She had been drinking and, when asked to leave a bar, spat at the bar staff, and threw a glass into a mirror. The duty solicitor, who has seen Janette, says that these are her first offences, she admits them, and she is willing to apologise for spitting and to pay for the mirror. The police say she is eligible for diversion. The judge remands her for a month, and tells her that if she does what she has promised to do she need not reappear, and the police will withdraw the charge. This takes a couple of minutes.

Stephanie, aged 40, appears for sentence for careless driving causing death and injury. She let her car drift across the centre line. Her car and an oncoming car collided. The driver of the oncoming car, a 28 year old woman, has severe back and leg injuries but her six year old son was killed. Stephanie is a solo mother with three children. She has no previous convictions. She was driving carefully, but lost attention. The probation report recommends a fine and reparation, but also suggests that sentence be postponed. Stephanie wishes to meet her victim, and her victim is willing to meet her. The Victims Adviser tells the judge that this meeting is important. The judge is ready to sentence, but postpones that for two weeks. This takes six to seven minutes.

The day:

Every day is different. A typical list may have 40-60 cases. There can be 20 cases, or 120. On some days most cases can be straightforward, on other days most can be difficult. Many may attract little public or media interest. Some attract a lot. Some lists are completed before 11.30 am, and the judge is able to move to other work. Large and complicated lists can run to 5-6 pm, and lists to 7-8 pm are not unknown.



“...our tribunals have mushroomed seemingly without rhyme or reason.”

Specialist courts and tribunals

Over the years, a number of specialist courts have developed to hear particular types of cases such as family disputes and employment problems, and environmental matters. This has benefits in that a multi-million dollar planning case heard in the Environment Court may well require different expertise and processes than a case about child custody heard in the Family Court.

Specialist courts have specialist judges who sit permanently and have developed their own approaches and processes.

However the choice of types of cases that go to specialist courts has developed in an ad hoc way. For example, intellectual property cases, which can have particular layers of complexity and nuance, are heard in general courts, while we have separate specialist courts to deal with all environmental and employment cases, which are also areas with distinct characteristics. There is a commercial list in the Auckland High Court but it only provides pre-trial specialisation. Have the best choices been made between general and specialist jurisdictions?

The Māori Land Court and Māori Appellate Court are specialist bodies that need particular consideration. They were developed in the 19th century to deal with the issues of that time. In recent years, however, the judges in these courts have developed substantial expertise in dealing with a broad range of Māori tikanga and land issues. These courts might well make a contribution across a wider spectrum of issues if their jurisdiction were broadened. In addition, the system as a whole might benefit if these judges could play a role in other courts.

Tribunals

During the past 50 years a great number of tribunals have been created with a wide variety of powers. Tribunals were created on the basis that they would provide specialist, speedy, or accessible justice in matters that did not require full court treatment.

Some like the Town and Country Planning Tribunals have developed into the full scale Environment Court where there are specialist judges who sit permanently and have developed their own approaches and processes. Others like the Commerce Commission, the Securities Commission, or the Waitangi Tribunal are very similar to specialist courts.

But many tribunals sit only occasionally and are often located in and resourced by the agency or organisation whose decisions or acts come under challenge before them. This can lead to perceptions of improper influence.

There are a number and variety of low level disputes that may well benefit from such mechanisms for resolution but our tribunals have mushroomed seemingly without rhyme or reason.

Specialist Courts & Tribunals

There are six specialist courts: the Employment Court, Environment Court, Family Court, Maori Land Court, Maori Appellate Court, and Youth Court.

There are about 100 different tribunals in New Zealand (see the reference section for descriptions).

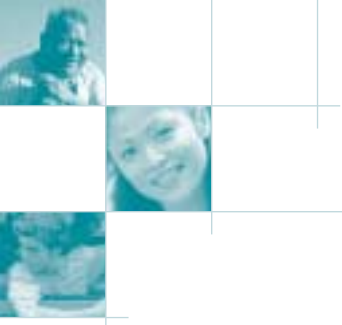
This diversity is not unique to New Zealand but in some places there have been attempts to rationalise and standardise processes. In New Zealand, there have been more than a dozen reports over the last 30 years from the Legislation Advisory Committee and the Law Commission (or their predecessors) on questions surrounding administrative tribunals.

An interesting response to this issue is found in the state of Victoria in Australia, where the Victorian Civil and Administrative Tribunal (VCAT) has been created. It is a stand-alone body headed by judges, with members available to sit in one or more of the many tribunals which come under this umbrella structure.

The benefits of an arrangement like VCAT include detachment from the agencies or organisations whose decisions are being challenged, a better use of resources, and a higher standard of process. The integrity of the system and the reality of independence have real bite.

VCAT is a compromise between having all decision-making in the regular courts and leaving matters in their present diffuse state. The concept might offer benefits in New Zealand.

Tell us what you think about **specialist courts and tribunals** on page 26 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.



“...a complex web of appeal structures has grown up.”

Appeal structures

The ability to appeal a decision by a court or request a review of the way the decision was reached is fundamental to our system of justice. To ensure this happens, a complex web of appeal structures has grown up. Considerable debate surrounds this part of our court system.

Nearly every full-time judicial officer has some appeal or review functions, even though some people believe the skills needed in an appeal judge are different from the skills required by those who hear cases the first time round.

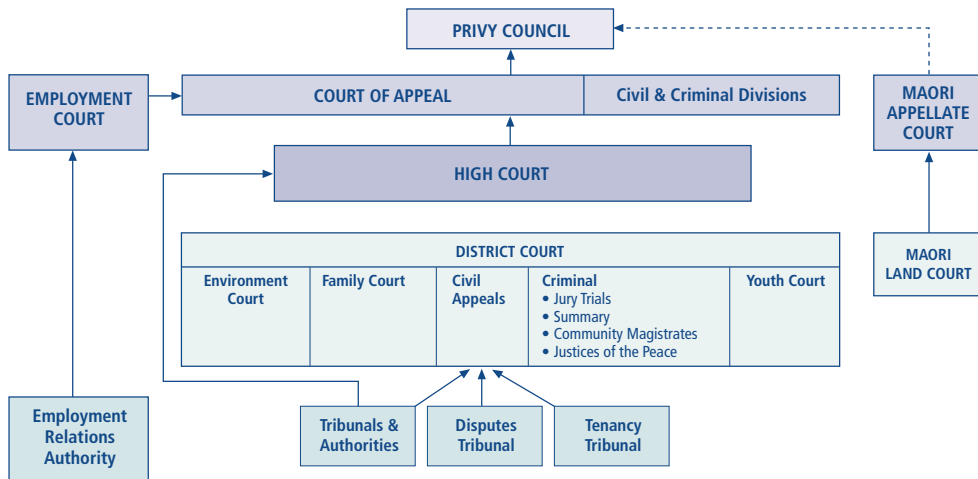
The fact that appeals from specialist courts or tribunals tend to go to generalist courts is controversial, with arguments for and against. In favour is the argument that when an appeal is being considered, wider issues of principle are more important and individual skill and expertise less so. Against is the argument that there can be fundamental misconceptions at the appeal or review stage because the judge does not have relevant experience and understanding.

One possibility would be for all appeals to go to a single court instead of to the next level in the court hierarchy, which is what tends to happen now. Such an appeal court could have a central core of permanent judges but could be supplemented by judges from the particular area of the law from which the appeal comes. (Something similar happens in one area now with High Court judges sitting in Criminal and Civil Divisional Courts in the Court of Appeal.)

The change would mean that an appeal was usually heard by a court that included one judge who had been selected for his or her particular skills and experience at hearing appeals, as well as a judge selected for his or her specialist skills and experience in a particular area of the law. For example, in an appeal from the Family Court one of the judges could be a person who was a Family Court judge.

Above this, there would be a court of final appeal for ultimate determinations when judges of that final court were persuaded that a particular case was of sufficient importance.

It is clear that the eventual outcome of the current debate on retention of the Privy Council or the creation of a new body in substitution will affect the ultimate appeal structure. However, whatever happens at the top, there are issues at the level below that require consideration now.



Tell us what you think about **appeal structures** on page 28 of the submissions booklet (inside back cover). Please give us your views or experiences or those of people you know. We are also keen to hear your suggestions for improvements.

