Regulatory Impact Statement: Improvements to District Courts Rules

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice.

It provides an analysis of options to reduce the time and cost involved in resolving cases in the civil jurisdiction (non-criminal and non-family) of the District Courts.

This RIS relies in part on anecdotal evidence from court participants (principally lawyers) to determine the size of the impact on parties of current court processes. This evidence was provided through consultation seminars and submissions on a range of court-related legislation.

The analysis assumes that the number of cases proceeding to a defended hearing will not change if the pre-court procedural steps prescribed in the District Courts Rules 2009 (the Rules) are reformed. It assumes the Rules are not affecting the number of cases being pursued. While there has been a reduction in the number of defended cases in the District Courts since the Rules were introduced, available information does not enable the introduction of the Rules to be isolated from other factors, such as the economic downturn, which could have affected case volumes.

The impact of reforming the pre-court procedural steps cannot be fully quantified, as the full number of parties currently completing the steps is not known. This is because most of the pre-court steps are completed independently of the Courts. Parties are not required to notify the Courts when they undertake a step, meaning available information does not indicate the full number of parties undertaking the pre-court steps, or the number of steps they complete.

It has not been possible to undertake a full assessment of the likely impact on the speed of case disposal of applying the High Court Rules to the District Courts, due to the number of variables that would affect the impact (for example, decision-making by judges and schedulers as to how to treat a case).

None of the policy options discussed is likely to impose additional costs on businesses or impair private property rights, market competition, or the incentives on businesses to innovate and invest. Nor should any of these proposals override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines).

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Courts and Tribunals Policy Manager, Ministry of Justice 1 May 2014

Executive summary

1. The District Courts Rules 2009 (the Rules) prescribe pre-court procedural steps that require parties in civil cases to exchange lengthy court forms before their case comes before a judge. These requirements are time-consuming and can make limited contribution to resolving a case.

2. This RIS reviews three options for addressing these problems:

    A. retaining the status quo;

    B. adopting the High Court Rules; or

    C. adopting a modified version of the District Courts Rules. This would involve reducing pre-court procedural steps and the time allowed to complete them, shortened forms, and more intensive case management.

3. The RIS concludes that Option C performs best against the objectives of speed of case disposal, limiting costs to parties, and limiting costs to the Crown.

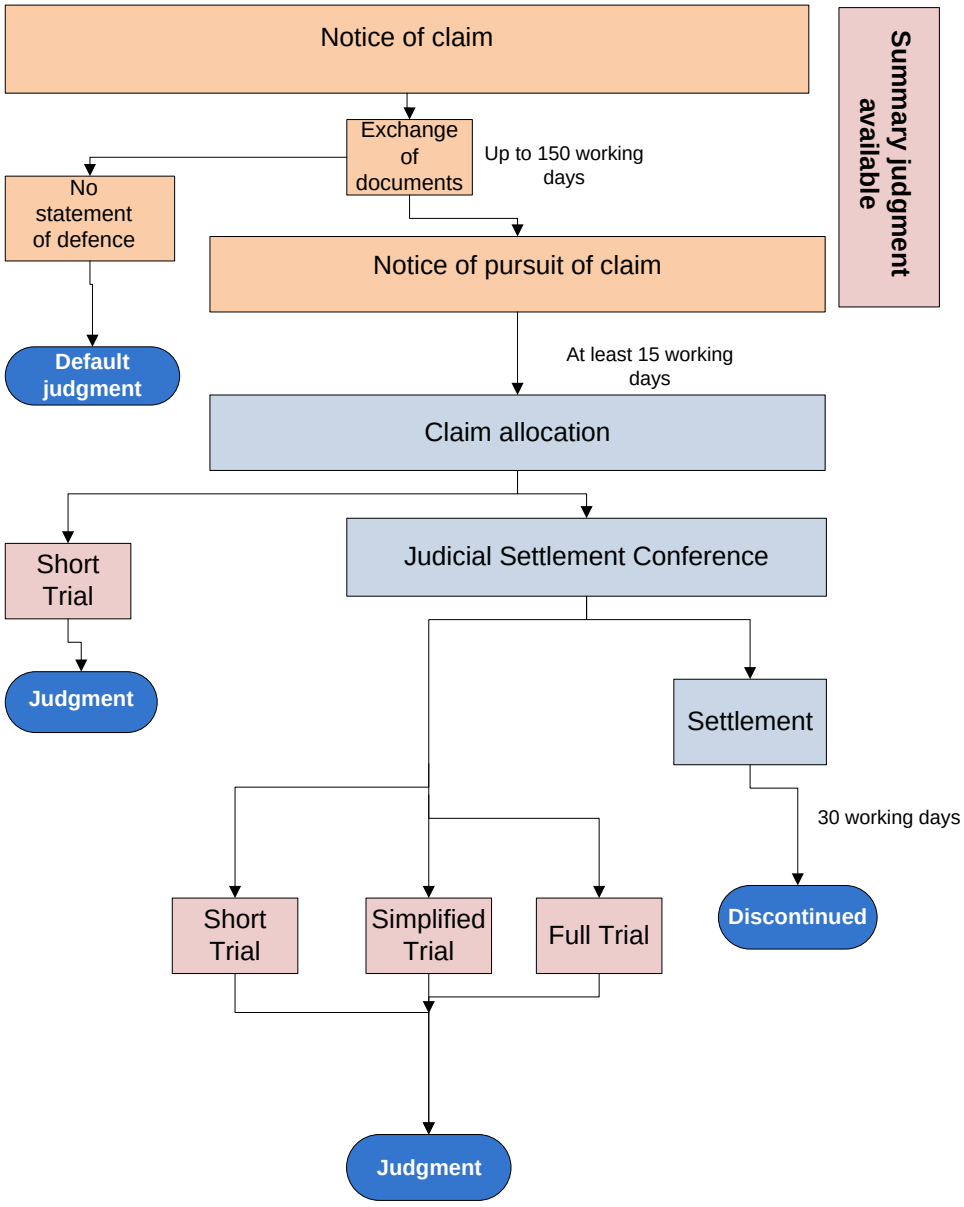
Status quo

4. The Rules set out the processes that court participants (such as judges, parties and lawyers) must follow when a case is in the civil jurisdiction of a District Court.

5. The Rules require most parties to complete and exchange statutorily-prescribed forms, within set time frames, before their case can be considered by a judge or registrar. The forms comprise about 15 pages of questions and extensive instructions. They require parties to identify their legal issues, defences and relevant evidence. If the parties do not settle their case during the exchange of forms, the plaintiff can file the forms and seek a judgment. Picture 1 outlines this process.

6. The Courts' principal users fall into two broad groups: parties seeking to recover a debt and general civil claimants (eg, with contractual disputes). The average value of all filed claims is about $26,000. The average value of claims that proceed through the system to a defended hearing (rather than being settled or receiving a default judgment, for example) is about $73,000.

Picture 1: Current system



Problem definition

7. An effective civil justice system is necessary for a strong economy and a fair society. The Rules form part of the framework of laws that helps to ensure that predictable, fair, and transparent rules apply to the resolution of disputes and enforcement of rights, and thereby gives people the confidence to enter legal relationships.

8. New Zealand's civil justice system is regarded as strong, but it has shortcomings.[1] Some District Court procedures are not working as efficiently as they could be. Some procedures are unnecessarily time-consuming and make limited contribution to the resolution of cases.

[1] Agrast, M et al (2012) *World Justice Project Rule of Law Index 2012-2013*, p120; World Bank (2013) *Doing Business Report 2014: Understanding Regulations for Small and Medium-Sized Enterprises*, p213.

Pre-court procedural steps are time consuming and costly

9. The Rules set time-consuming pre-court steps (the exchange of documents that occurs between the filing of a claim and the next court event, such as filing a notice of pursuit of claim).

10. Completing all the pre-court steps involves the exchange of five sets of forms. This takes an average of 118 working days[2] and can take up to 150 working days, with associated costs to parties. Cases that proceed to defended hearings must complete all the pre-court steps.

11. The long periods allowed for completing the pre-court steps enable tactical use of the procedures. Parties can significantly prolong a case during the pre-court stages for tactical purposes, with attendant costs to the other party.

Some procedures make limited contribution to resolution of cases

Duplication of processes

12. The pre-court steps often make only a limited contribution to the resolution of a case. The Rules do not take account of the extent of interaction that typically occurs between parties before the court process is initiated. Lawyers report that the procedural steps duplicate exchanges that they will usually already have completed independently of the court system in an effort to resolve a case. By the time parties enter the court system, they will typically need a court's assistance to resolve the dispute.

13. The pre-court steps do not appear to increase the rate of out-of-court settlement. The proportion of cases disposed of without the Courts' involvement has remained steady since the pre-court steps were introduced, with just under half of cases not proceeding beyond filing.

14. The pre-court procedural steps were developed on the understanding that most applicants are self-represented, and that a prescriptive pre-court process was required to elicit relevant information that would ensure that parties fully understand the case and evidence of the opposing party, and thereby encourage resolution. Recent analysis shows that only about five percent of plaintiffs are self-represented when they start a case.

Unfocused forms

15. Lawyers and judges report that the forms prescribed by the Rules are repetitive and unfocused, and do not assist with the early resolution of a case. Lawyers and judges report the forms result in pleadings that often do not adequately identify legal issues. This can make it difficult to identify the precise nature and strength of a party's case, and can lead to lengthy documents as parties seek to address every possible argument in the opposing party's form.

16. The forms were intended to enable non-lawyers to complete them. However, most parties are represented by lawyers, with about 95 percent of cases taken by legally represented plaintiffs.

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[2] Calculated from the date the notice of claim is filed.

Problems are relatively large

17. The pre-court steps set out in the Rules are limiting access to justice, as they are adding unnecessary time and cost to the resolution of disputes. Delay in progressing cases increases the cost of dispute resolution and undermines the certainty of transactions, and restricts parties' ability to plan for the future. Delays also undermine confidence in the justice system.[3]

18. About 14,500 civil cases complete at least one of the pre-court procedural steps in the District Courts each year. About 550 of those cases complete all the pre-court procedural steps before going before a judge or registrar. The remaining cases receive a default or summary judgment,[4] or are settled, discontinued, struck out or referred to another jurisdiction. The number of pre-court steps that these cases complete cannot be quantified, as the steps are completed independently of the Courts (with the number of steps determined by the nature of the claim and parties' decisions). Parties do not notify the Courts when they undertake these steps, so there is no central record of steps taken.

19. Anecdotal evidence suggests that the identified problems are a significant concern to court participants. Lawyers and commercial litigants have emphasised problems with the Rules during consultation undertaken by government, the Law Commission and the Rules Committee on court-related reforms over the last 18 months.[5]

Objectives

20. The Rules should enable the just, speedy and inexpensive determination of disputes. In particular, procedure in the District Courts should:

    a. ensure speedy resolution of cases

    b. not impose undue costs on parties, and

    c. not impose undue costs on the Crown.

21. The Rules were intended to achieve these objectives when they were introduced in 2009. In particular, they were designed to encourage early, low cost resolution of cases and ensure court processes were short and proportionate to the nature of the case. As set out below, these objectives have not been achieved. Other procedural options that could better meet the objectives are considered below.

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[3] OECD analysis suggests that a 10% increase in the average length of trials is associated with a decrease of around 2% in the probability of confidence in the justice system: OECD (2013) *What makes civil justice effective? OECD Economics Department Policy Notes*, p2.

[4] Judgment without a full trial, where a defendant does not or cannot raise or disclose a real defence.

[5] For example, such feedback was received during Rules Committee consultation on proposals to reform the Rules; Ministry of Justice consultation on Family Court reforms; Law Commission consultation on trust law; and Rules Committee consultation on reforms to summary judgment in the District Courts.

Options and impact analysis

OPTION A: STATUS QUO

22. The status quo does not achieve the objectives of the Rules.

Impact of Option A

Cases slow to resolve

23. The Rules do not enable cases to be resolved as speedily as they could be. They impose procedural requirements that take time to complete and often do not assist parties to progress their cases.

Process costly for most

24. The Rules can limit access to justice as disputes are expensive and time-consuming to resolve, particularly for parties to cases that must complete all the pre-court steps before proceeding to a defended hearing. The Rules can also restrict access by enabling tactical use of the pre-court steps. This can impose significant legal and opportunity costs on parties.

25. The Rules do facilitate access to the courts for a sector of court users. The pre-court procedures are designed to enable self-represented parties to access the Courts, as the forms are directive, written in plain English, and can be completed by a person without significant legal experience. They can therefore aid access by people unable to afford a lawyer.

26. However, people without access to a lawyer constitute only a small proportion of parties in the District Courts. As noted above, about five percent of cases in the Courts are taken by self-represented plaintiffs. By the conclusion of the pre-court procedures, about 2.5 percent are self-represented. Compared to other civil jurisdictions, such as the Employment Relations Authority, the District Courts have few legally-aided litigants.[6]

Crown costs limited

27. The pre-court steps are completed independently of the Courts and therefore do not require judicial or court time.

[6] Fewer than 300 grants of general civil legal aid were approved for District Court cases in 2012/13.

OPTION B: ADOPT HIGH COURT RULES

28. This option would involve replacing the District Courts Rules with the procedures set out in the High Court Rules. This would:

    a. reduce the procedural steps that parties must complete before their case comes before a judge or registrar

    b. shorten timeframes in which the pre-court steps must be completed

    c. shorten forms

    d. introduce more intensive case management (the processes used by judges and registrars to manage the progression of cases between the filing and hearing of a case), and

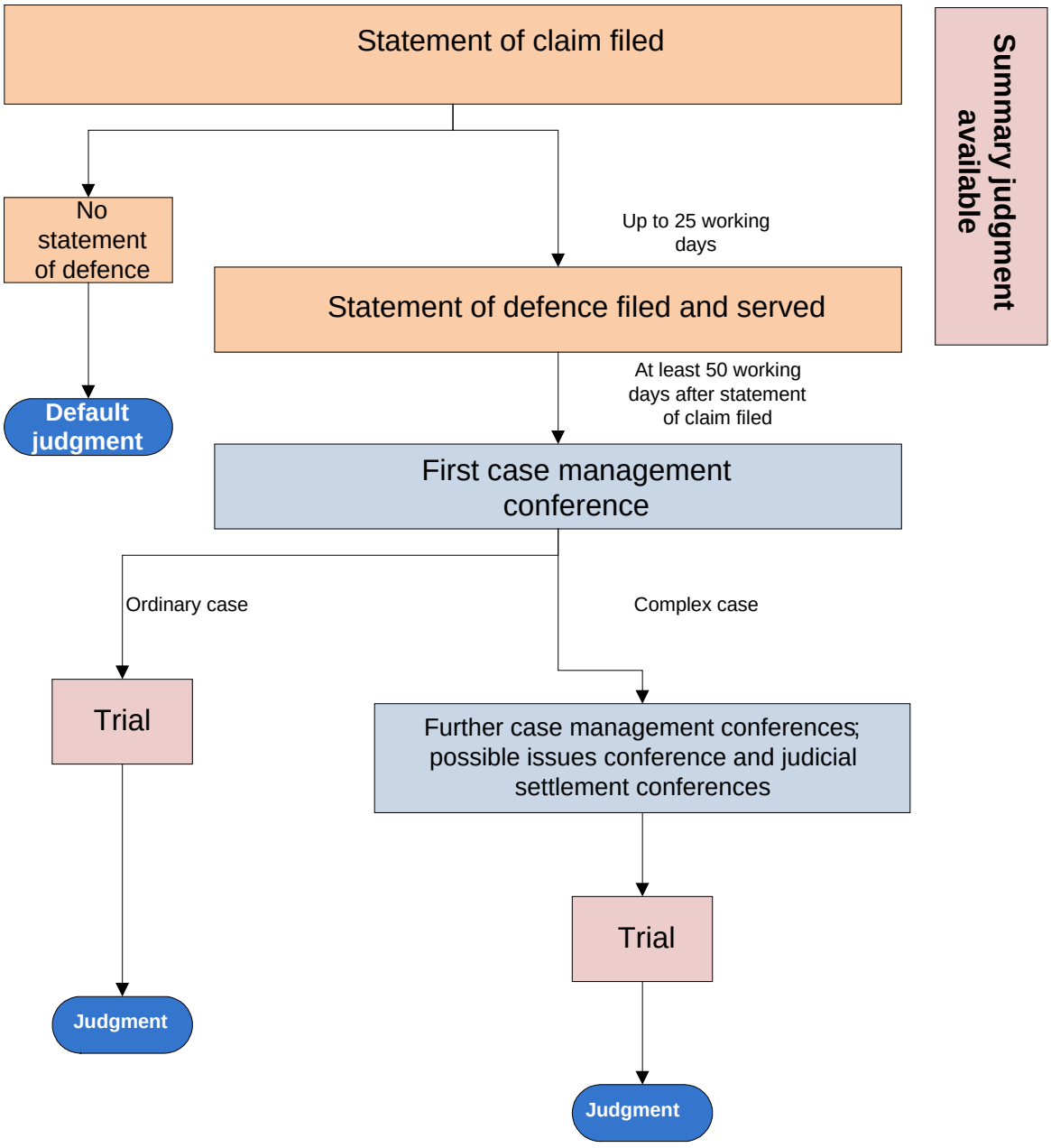
    e. remove distinctive District Court procedures such as short trials and compulsory judicial settlement conferences.

29. Change (d) would involve the triaging of cases based on their complexity. Judges would categorise cases as complex or ordinary. All cases would have a case management conference scheduled once a statement of defence has been filed. This would replace "case allocation", which exists under the current Rules and which involves a registrar or judge selecting the appropriate pathway through a Court for a case.

30. Complex cases would have further case management conferences and may also have an issues conference (which focuses on identifying and refining issues) and/or a pre-trial conference.

31. Picture 2 sets out this option.

Picture 2: System under option B



Impact of Option B

Impact on speed will depend on case type

Reduction in pre-court steps

32. This option would reduce the time parties spend completing pre-court steps. The plaintiff and defendant would exchange only one form each before the case could go before a judge or registrar. The forms would be shorter and more targeted than the existing forms. The pre-court steps could be completed in as few as 50 working days if the claim is defended, or within 25 days if no defence is filed.[7]

33. Greater case management is likely to reduce the time cases take to proceed through the court system. It will require parties and judges to give early consideration to matters such as issue identification. New Zealand and international experience is that case management reduces the time for a case to proceed from filing to disposal.[8]

34. These changes would have the most significant impact on the 550 cases proceeding to a defended hearing, as these cases currently have to complete all the pre-court steps. Other cases, which complete just some of the pre-court steps, may resolve more quickly as forms would be more succinct and there would be less opportunity to cause tactical delay.

35. This analysis assumes there would not be an increase in the number of issues requiring resolution within court. This assumption is based on the fact that the current Rules do not appear to have increased pre-court settlement rates, and early case management will be available to enable early resolution of issues.

Loss of procedure that can shorten cases

36. This option would remove distinctive features of the Rules that promote swift resolution of cases proceeding to a defended hearing. Distinctive trial types would also be removed. The Rules currently allow cases to be allocated a short, simplified or full trial depending on the nature of the case (eg, the number of parties, complexity of the case, size of a claim, and parties' preferences). This allows procedure to be tailored to the requirements of a case, which can increase the speed of a hearing (eg, by restricting the amount of time for giving evidence, and limiting the making of interlocutory applications). The High Court Rules do not enable such extensive tailoring.

37. Compulsory judicial settlement conferences would also be removed. Compulsory settlement conferences are ordered for about 85% of cases proceeding to trial in the District Courts. Settlement conferences are overseen by a judge and give parties an opportunity to negotiate a settlement of the case or any issue. About 50 percent of cases that enter a settlement conference are resolved, removing the need for a trial. There is no presumption that these conferences would be held under the High Court Rules, and they are far less common in the High Court.[9]

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[7] Calculated from the date the statement of claim and notice of proceeding are filed and served (HCR 7.3).

[8] Law Commission (2004) *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85), p197. OECD (2013) *What makes civil justice effective? OECD Economics Department Policy Notes*, p5.

[9] A High Court practice note states that the High Court will only allocate judicial settlement conferences to those proceedings where such a conference would be more appropriate than mediation.

Overall effect on speed

38. The overall effect on speed of adopting this option would depend on the case type. Changes to the pre-court steps would benefit most cases, but this impact would be outweighed in some defended cases by the loss of compulsory judicial settlement conferences and distinctive trial types. The extent of the effect would depend on a range of variables, such as the subject matter of the case, parties, and judicial decision-making (eg, whether a judge would choose to order a judicial settlement conference under the new rules in the absence of a presumption).

Potentially more costly for parties

Less costly pre-court steps

39. This option would reduce costs for parties. Unnecessary pre-court steps would be removed, reducing legal and opportunity costs to parties. There would be a shorter document exchange period and forms would require legal issues to be better identified, removing the ability of parties to use the pre-court steps to delay cases.

40. The changes to the pre-court steps would require consequential changes to the points at which some court fees are charged, which could reduce the fees paid by about 140-160 parties each year. More defendants would have to pay the prescribed fee for filing a statement of defence (unless they receive a fee waiver), which is set at $75 to reflect the registry time in processing documents. This would be a new cost for approximately 500 - 550 people annually. Under the current Rules, most defendants do not need to file documents and therefore are not subject to this fee.

41. This option could make the process of initiating a case less accessible for self-represented parties, as the pre-court processes would no longer be specifically focused on facilitating their access. However, as noted above, people without access to a lawyer constitute only a small proportion of parties in the Courts and very few legally aided parties are involved in cases in the Courts. The impact of the change would therefore be small.

Loss of procedures that reduce costs

42. As noted above, Option B would lead to the loss of distinctive aspects of the current Court process. In particular, the Courts would not have the ability to allocate a case to a trial type that corresponds to a case's particular characteristics. This would make the cost of the trial process under Option B less proportionate to the value of claims. All cases would proceed to a full trial in which there were far fewer regulatory restrictions on the conduct of the case, increasing the cost of participating.

Overall effect on costs

43. On balance, Option B could make the District Courts more costly to parties, as the High Court Rules would not accommodate distinctive nature of the District Courts' business.

Crown costs marginally increase

44. This option could increase costs to the Crown. Some parties who are currently self-represented could seek legal aid as a result of the removal of procedures that are specifically designed to facilitate self-represented parties' access. The numbers are expected to be very low. As noted above, people who have a dispute and who are unable to afford a lawyer will most commonly be involved in cases in other jurisdictions.

Further, access to civil legal aid is subject to strict criteria regarding an applicant's assets and the merits of the case.

45. This option could result in a net reduction in fees revenue. This would arise from a result of a consequential change to the points at which court fees are charged, and an increase in the number of defendants paying filing fees.

46. Judges would be required to manage the case management conferences. About 125-165 extra hours of judicial time annually would be required.[10] This is a minor increase that could be accommodated within existing judicial capacity and would not require additional Vote Courts funding.

OPTION C: ADOPT MODIFIED DISTRICT COURTS RULES

47. This option would involve adopting a modified version of the District Courts Rules. This would:

    a. reduce the procedural steps that parties must complete before their case comes before a judge or registrar

    b. shorten timeframes in which the pre-court steps must be completed

    c. shorten forms

    d. subject cases to more intensive case management, and

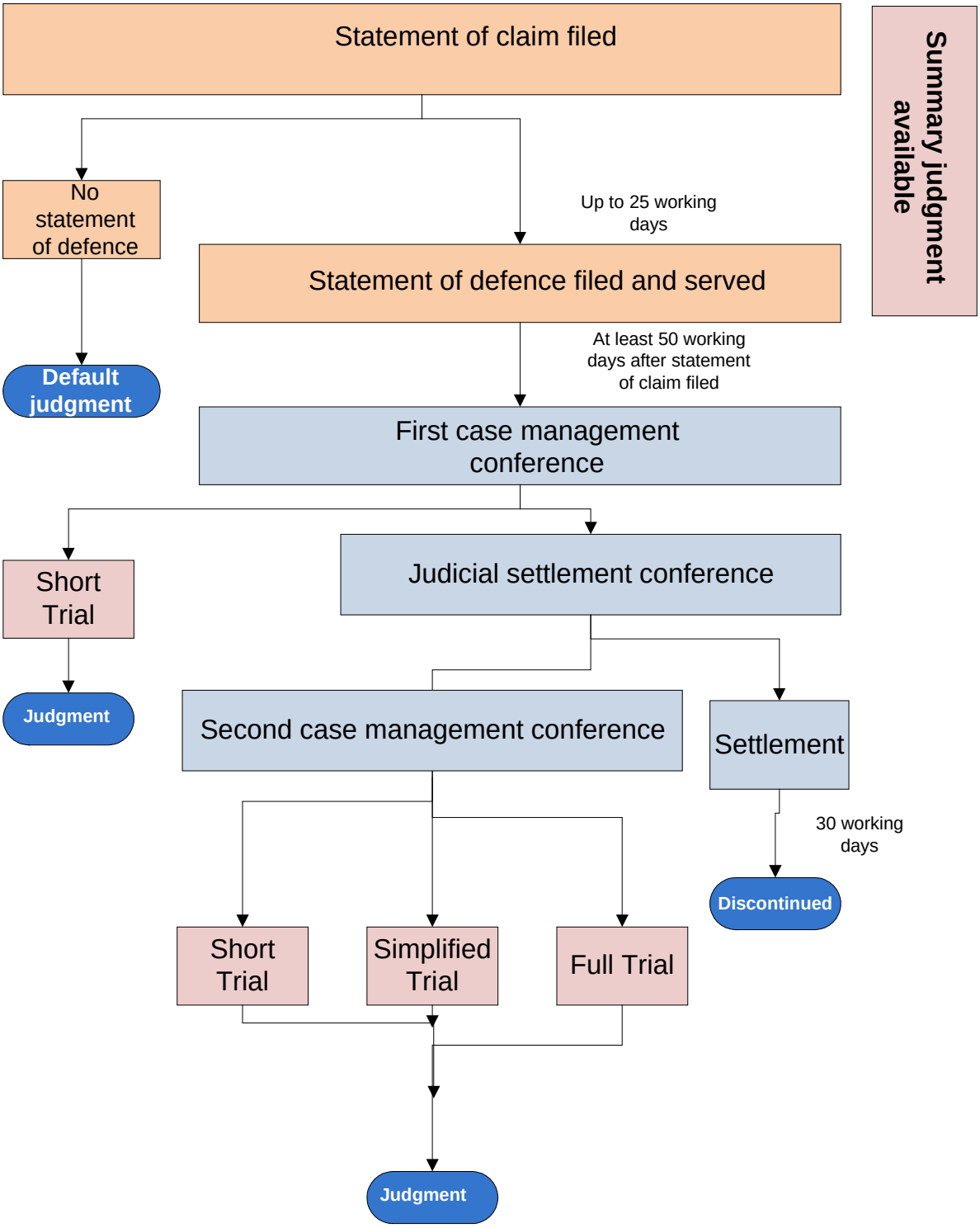
    e. preserve distinctive District Court procedures such as short trials and compulsory judicial settlement conferences.

48. Changes (a) to (c) are the same as Option B.

49. Change (d) would introduce a modified version of the case management that exists in the High Court, tailored to suit the distinctive District Court trial types. This would involve the introduction of two case management conferences to help identify issues and set timeframes for next steps. The first conference would take place after the statement of defence is filed and take the place of case allocation. A second conference would be convened later in the court process if required. Picture 3 sets out the proposal.

[10] Based on 500 cases being scheduled for a 15-20 minute first case management conference (assuming all cases would be treated as ordinary cases and receive a single case management conference).

Picture 3: System under option C



Impact of Option C

Cases would resolve more speedily

50. This option would promote quicker resolution of cases. As with Option B, forms would be more targeted and fewer forms would need to be exchanged. The pre-court stages could be completed in as few as 50 working days if the claim is defended, or within 25 days if no defence is filed.[11] Greater case management could reduce the time cases take to proceed through the court system.

51. Aspects of the current Rules that can facilitate speedy resolution, such as judicial settlement conferences and different trial types, would be preserved.

Less costly for most parties

52. This option would reduce costs for parties. Like Option B, this option would remove unnecessary pre-court steps. Parties would have less scope for protracting cases for tactical reasons.

53. Parts of the Rules that can reduce costs to parties, such as different trial types, would be retained.

54. Like Option B, this option would require consequential changes to the points at which some court fees are charged, which could reduce the fees paid by about 140-160 parties each year. This option would also lead to about 500 – 550 people more defendants annually paying the $75 fee for filing a statement of defence.

55. This option could also make the process of initiating a case less accessible for self-represented parties because processes would no longer be specifically designed to enable their access.

Crown costs marginally increase

56. Like Option B, this option would marginally increase Crown costs as some parties who are currently self-represented could seek legal aid as a result of a reduction in the procedures that aim to facilitate their access.

57. As with Option B, this option could result in a net reduction in fees revenue arising from consequential changes to the points at which court fees are charged and an increase in the number of defendants paying filing fees.

58. About 165 - 220 extra hours of judicial time would be required each year to manage case management conferences.[12] This is a minor additional requirement only, and could be accommodated within existing judicial capacity.

Risks

59. Any changes to the Rules would come into force in mid 2014. The changes would coincide with a period in which judicial resource in the District Courts is expected to be

[11] Calculated from the date the statement of claim and notice of proceeding are filed and served.

[12] Based on 500 cases being scheduled for a 15-20 minute first case management conference and a 150 being scheduled for a 15-20 minute second case management conference.

relatively low due to other resource constraints. However estimates of the additional judicial time required are very low and the increase can be accommodated.

Consultation

60. The Rules Committee, an expert statutory committee established for the purpose of developing appropriate rules of court procedure, ran two rounds of consultation on District Court procedure. The first round focused on the functioning of the current Rules. The Committee invited the New Zealand Law Society, New Zealand Bar Council, senior lawyers in the District Courts, and financial and debt collection companies (which are the largest users of the civil jurisdiction of the Court) to consultation meetings in the main centres.

61. The second round of consultation sought comment on Option C. In late 2013, the Committee published draft rules based on Option C for approximately eight weeks of consultation. It also hosted consultation meetings in the main centres. The meetings were notified through articles in legal publications and through letters sent to the district law societies, banks and debt collection companies. The attendees were mainly lawyers. One representative of a debt collection company attended.

62. The Ministry of Justice invited comment on the draft rules from financial and debt collection companies and the government agencies that use the civil jurisdiction of the Courts.

63. Only a small amount of feedback was received on the proposed reforms, largely from lawyers and legal associations. Submissions were overwhelming positive. Suggested changes were generally small and related to the drafting of particular rules, and many could be accommodated within Option C.

64. Several submitters proposed options involving greater alignment between the High Court and District Courts Rules. These proposals were not adopted as the distinctive nature of business in the District Courts would mean the proposals would increase the expense or time required to progress cases. A handful of submitters favoured the reintroduction of certain types of application. These proposals could also have increased delay and were not adopted.

Conclusions and recommendations

65. Option C best meets the objectives of the proposed reform:

Key Meets objective Partially meets objective Does not meet objective	**Option A: Status quo**	**Option B: High Court Rules**	**Option C: Modified District Courts Rules**
Speed	**Cases slow to progress:** pre-court steps can take up to 150 working days	**Impact dependent on case:** pre-court steps reduced, but procedures that shorten cases removed	**Cases resolve more speedily:** pre-court procedures reduced
Cost to parties	**Costly for parties:** time and expense associated with pre-court steps disproportionate to the size of average claims	**Costly for parties:** unnecessary pre-court steps removed and parties would have less scope for protracting cases for tactical reasons. Procedures facilitating proportionate case disposal also removed	**Less costly for parties:** unnecessary pre-court steps removed. Parties would have less scope for protracting cases for tactical reasons
Cost to government	**Inexpensive for government:** courts are not involved in pre-court steps	**Marginal increase in government cost:** potential for limited increase in legally-aided cases and minor court fee reduction in revenue	**Marginal increase in government cost:** potential for limited increase in legally-aided cases and minor reduction in court fee revenue

Implementation plan

Option 1

66. Option 1 would not require any implementation.

Options 2 and 3

67. Options 2 and 3 require the Rules to be amended. Amendments are made by the Governor-General in Council with the agreement of certain members of the Rules Committee.

68. Amendment Rules would establish transitional arrangements for parties who had entered the court system before the Rules changed, to ensure parties were not disadvantaged by the procedural amendments. The Rules would also seek to limit the period in which the old and the new procedures run in parallel, as this would be costly and complex to administer.

69. The Ministry would make changes to the Courts' operational and IT systems, training materials, forms, and website.

Monitoring, evaluation and review

70. The Ministry and Rules Committee would monitor the impact of any reform of the Rules. The Ministry undertakes weekly monitoring of the performance of the Courts, examining factors such as the number of active cases, new filings, case disposals, and the average age of cases. These factors would help to assess the impact of the rule changes on the time taken to resolve cases.

71. Anecdotal evidence about the impact of the rule changes would be available through the Rules Committee, which contains both judge and lawyer members. The Committee monitors the functioning of court rules and regularly receives submissions on the functioning of rules from judges and court users.