

Regulatory Impact Statement

Enabling Service Transformation in Courts and Tribunals

Agency disclosure statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice. It provides an analysis of proposals to enable and govern the use of electronic technology in courts and tribunals.

The proposed changes are expected to benefit court users and the public more generally by removing legislative barriers to introducing innovative, administrative improvements. These improvements could significantly speed up the court system and make services more accessible and convenient. However, these benefits will not be realised until the necessary technology has been developed and each jurisdiction is ready to adopt it.

We have not been able to model the operational impacts of the proposals in this paper. This is due to time constraints and limited data on the costs and benefits of a court and tribunal system that operates predominantly electronically, as most jurisdictions still operate in a paper-based environment.

The intended introduction date for the legislation limited the amount of time available for consultation.

The Ministry does not consider these limitations are significant because the proposed legislation is enabling, rather than mandatory, and will allow courts and tribunals to keep up with technological change in other private sector and Government services and overseas jurisdictions. This is consistent with the Governments' Better Public Services programme.

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Background

1. Our court and tribunal system is one of the last areas of the New Zealand public sector that still operates within an almost entirely paper-based model. The legislation governing practice and procedure in courts and tribunals is largely designed for the use of paper as the principal medium by which information is communicated to and by the courts. This model requires court users and staff to file and hold original paper documents, and to file documents by delivering them personally or posting them.

Objective

2. The Ministry of Justice aims to substantially improve the efficiency of administering courts and tribunals and provide more modern, accessible people-centred justice services. In doing so, the Ministry aims to halve the time it takes to deliver services to the public by 2017. Using electronic technology more extensively across courts and tribunals is critical to achieving these objectives.
3. Electronic operating will also contribute to achieving the Government's Better Public Services (BPS) programme. One of the BPS targets is to enable New Zealanders to complete transactions with government digitally, to make it easier and more cost-effective for people to access services. The Government's goal is to have 70% of the most common transactions completed in a digital environment by 2017.

Problem definition

4. The Ministry has embarked on a comprehensive programme of service transformation in order to modernise the provision of justice services. There are opportunities to make innovative administrative improvements that could significantly speed up the court system and make services more accessible and convenient for users.
5. The vast array of legislation governing practice and procedure in courts and tribunals has evolved within a traditional paper-based system. As a result, many legislative requirements preclude the use of electronic technology. This presents a significant barrier to modernising the courts and tribunals system.

The paper-based system is inefficient and inconvenient for court users

6. Legislation governing most courts and tribunals require documents to be filed, served, issued, or otherwise dealt with in paper form. Specifically:
 - a. documents filed in a court or tribunal must have *an original signature*
 - b. documents must be filed *by post or in person*
 - c. judicial orders must have *an original signature* and/or have the *seal of the court* or tribunal attached
 - d. affidavits can only be filed as originals.
7. The lack of electronic or online alternatives for most court and tribunal transactions slows down the transfer of information and is inconvenient for users. People can shop, bank and pay fines online, but still have to take time off work to travel to court for routine matters and deliver or post documents which could more conveniently be transmitted electronically.

8. These requirements were originally designed to ensure the authenticity and integrity of official court documents. However, restrictions of this nature are no longer necessary because modern technology is widely used in commercial and public sector business transactions and provides alternative means of ensuring authenticity.

Geographic restrictions on where documents can be filed are too broad

9. Most courts and tribunals are governed by legislation that requires court proceedings to be filed and heard in the court or tribunal nearest to the defendant. These are traditional protections for the defendant because he or she has to post or deliver a response to the claim in the same court.
10. It may still be appropriate for proceedings to continue to be *heard* in the court nearest the defendant, especially if he or she has to appear in person. However, in light of modern technology and the ability to transfer files to other courts quickly, there is no longer a good reason to require filing to occur in a specific location. Some jurisdictions, such as the Tenancy Tribunal, have centralised, online filing, but several statutes and rules still prescribe where documents should be filed and cases heard, usually nearest the defendant.

The use of Audio-Visual Link technology is restricted by place of hearing rules

11. The Courts (Remote Participation) Act 2010 provides that the place of hearing for a proceeding where at least one party is appearing by AVL is the same as if AVL was not being used. In criminal hearings, this would usually be the court nearest the defendant. The requirement to hold the hearing at a particular court is unnecessarily restrictive in situations where AVL is used, as the Act includes comprehensive safeguards to protect participants' rights and ensure that AVL is used appropriately.
12. In practice, in criminal proceedings it is usually the defendant who is appearing by AVL. For example, where a defendant is a prisoner at Mt Eden Correctional Facility the AVL appearance must be held in the closest court, Waitakere District Court. The closest court with AVL facilities is Auckland District Court. This means that for each AVL appearance, the court has to make an order to transfer the file to Auckland District Court. Having to comply with this requirement is an inefficient use of court resources.

Evaluation criteria

13. The policy options to address the problem were assessed against the following criteria, which are central to the Ministry's objective of providing modern, accessible and people-centred court and tribunal services:
 - a. efficiency of service delivery
 - b. convenience for court and tribunal users
 - c. preservation of rights and natural justice principles (eg access to justice).
14. These criteria were selected because the ability to access services quickly and easily strengthens public confidence in the justice system. It reduces the impact of crime and legal disputes on victims and families and allows people to get on with their lives sooner. Enabling people and businesses to resolve their disputes fairly and efficiently also contributes to increasing productivity, which benefits the economy.

Regulatory impact analysis

Three options were assessed:

- A. the status quo
 - B. new enabling legislation specific to courts and tribunals (**Ministry's preferred option**)
 - C. apply the Electronic Transactions Act 2002 framework to courts and tribunals.
15. Aside from the status quo, there are no non-legislative options that would achieve the objectives because the primary barrier to providing more modern, accessible people-centred services is legislative.
 16. A summary of the analysis of each option is presented in the table on page 7.

Option A: Status Quo

17. Retaining the status quo will not achieve the Ministry's service transformation objectives because legislation prevents new electronic technology from being adopted extensively and consistently across all courts and tribunals.
18. Individual jurisdictions are gradually beginning to use technology to make proceedings faster, more cost effective and easier for people. However, this is occurring in a piecemeal way as each area of law is reformed. This process takes a long time and causes inconsistency across jurisdictions. It would be more efficient to take a strategic, Ministry-wide approach.
19. Examples of where technology is being used to improve court services include:
 - an electronic transcription service, which speeds up trials and reduces interruptions by enabling court proceedings to be recorded more quickly
 - the use of Audio Visual Links, which reduces the need for all participants to travel to hearings
 - the introduction of e-bench, which is expected to reduce the need to process approximately 250,000 paper-based criminal charge sheets per year and save around 86,000 hours of Police and Court staff time each year
 - an online service for filing applications in the Disputes Tribunal.
20. The Criminal Procedure Act 2011 significantly reformed the law governing criminal procedure and provided flexibility to introduce electronic technology. However, there are provisions in legislation outside the scope of this reform which may still present barriers to the introduction of technology in the criminal jurisdiction.
21. The Employment Court and some tribunals (eg, the Tenancy Tribunal and Disputes Tribunal, which together make up approximately 70% of all tribunal caseload) allow for electronic filing of certain documents, applications and payment of fees online.
22. Despite these advancements, courts and tribunals are still predominantly paper-based and have not generally kept up with the pace of technology change across the private sector and Government.

23. Our court system also lags behind several overseas jurisdictions. For example, courts in Australia, England, Wales, Singapore and the United States have already enabled traditional paper-based procedures such as filing documents to occur electronically (although the extent of electronic enablement varies between jurisdictions).
24. Paper-based processes have become out-dated and no longer meet public expectations of how services should be delivered and managed. The State Services Commission's 2013 *Kiwis Count* survey, which measures satisfaction with public services, shows that the internet is now the preferred channel for people dealing with public services. The survey report noted that 85% of respondents had looked for information about, and 90% had dealt with, public services online.

Option B: New legislation specific to courts and tribunals

25. This option is the Ministry's preferred option because it provides the opportunity to take a strategic, systematic approach to enabling and governing electronic operating in courts and tribunals. This approach is more efficient and will promote consistency across jurisdictions. It also provides a legislative framework to protect the rights and principles unique to the justice system. For example, when introducing new technology to courts and tribunals it will be important to consider how to protect the integrity of sensitive information and preserve access to justice.
26. This approach is the most likely of the three options to fully achieve the Ministry's modernisation objectives. Options A and C both take a piecemeal approach as each jurisdiction is reformed, which is slow, can lead to inconsistencies and reduces the opportunity to achieve administrative efficiencies.
27. Under this option, there would be new legislation, similar to the Electronic Transactions Act 2002, governing electronic dealing in courts and tribunals. The effect of the legislation would be that all paper-based requirements in existing courts legislation, rules, and guidelines could be interpreted as enabling electronic dealing.
28. The legislation would not make the use of electronic dealing mandatory, as this would affect the rights of court users who might otherwise have difficulty accessing the justice system (eg, people who do not have access to a computer).
29. The likely costs and benefits of increased electronic operating cannot be modelled at this stage as this will depend on the technology and supporting systems that are introduced and the extent to which people choose to deal with courts electronically. However, it is expected that efficiencies achieved through providing services electronically may lead to lower fees for online transactions, which provides an incentive to deal with courts in that way.
30. Specifically, the legislation would:
 - remove legislative barriers to introducing electronic technology more extensively across courts and tribunals
 - allow (but not require) court and tribunal documents, including applications, memoranda, affidavits, and decisions to be sent, received, and held electronically
 - remove geographic restrictions to filing, so court and tribunal users can file a document at any place within the right jurisdiction, or at some other centralised location, in person, by post, and (eventually) electronically

- remove unnecessary place of hearing requirements for matters to be heard using AVL. This removes the need for a judicial order to transfer the file to another court if there are no AVL facilities at the court at which the matter would otherwise be heard.
31. In some instances, electronic transmission may not be the most appropriate means of delivery, such as where documents need to be served in person. The legislation would specify these exceptions or allow for them to be specified in regulations or rules.

Option C: Apply the Electronic Transactions Act 2002

32. This option meets all the assessment criteria but is not preferred because courts and tribunals would be governed by legislation designed to apply to electronic transactions across a broad range of commercial and public sector business. This approach misses the opportunity to take a strategic approach to modernisation, which would assist in achieving administrative efficiencies and consistency across jurisdictions.
33. Relying on the Electronic Transactions Act 2002 (ETA) could potentially overcome many of the legislative barriers to electronic operating. However, as the ETA is not designed for the specific needs of courts and tribunals, it does not provide a complete solution and would not achieve the full extent of service transformation the Ministry seeks to achieve.
34. Option C would involve applying the ETA principles to all or most court and tribunal transactions. The ETA is an over-arching piece of legislation which enables certain transactions to be completed electronically in specified circumstances, even if other legislation refers to a paper format. It does not currently apply to courts and tribunals, except to the extent specifically provided by the rules or guidelines of each court. The only court which is subject to the ETA is the Employment Court, which is a small, specialist court with a low caseload.
35. One advantage of this option is that it makes use of an existing regime with well established principles and avoids creating a parallel regime. However, some of the ETA's provisions are not ideally suited to all types of court transactions. For example, all parties must consent to participate in an electronic transaction (which may be inferred). A party may make their consent subject to conditions as to the form of the information and the means by which it is produced and handled.
36. The consent provisions are likely to be too broad for the purposes of achieving efficiencies in administering courts and tribunals, which involves a high volume of transactions in circumstances unique to the justice system. The ETA would prevent the ability of courts and tribunals to specify situations in which consent is presumed in some situations, such as where a person provides an email address.
37. Another disadvantage is that the ETA does not apply to provisions of enactments dealing with certain documents that require a high level of integrity and assurance, including affidavits and wills.
38. There are good reasons to retain the current method of swearing affidavits for this reason and the preferred option would not involve any changes in this regard. However, applying the ETA principles would preclude the option of filing and holding these documents electronically. This reduces the ability to achieve efficiencies from electronic filing, as affidavits are often filed at the same time as several other documents.

Summary Table: Analysis of Options

Option	Features	Advantages	Disadvantages
A: Status quo	<ul style="list-style-type: none"> • Most documents continue to be filed on paper, in person at a designated court or by post • Electronic dealing gradually introduced as each jurisdiction/ area of law is reformed • Place of hearing rules require AVL hearings to be held at the court nearest the defendant, necessitating a file transfer if there is no AVL at that court 	<ul style="list-style-type: none"> • Does not require legislative change • Meets the following evaluation criteria: <i>Preserves rights and natural justice principles</i> 	<ul style="list-style-type: none"> • Incremental change is slow and leads to inconsistencies across jurisdictions • Does not meet the following evaluation criteria: <i>Efficiency of service delivery</i> • Paper-based processes generally take longer, requiring more resources <i>Convenience for users</i> • Detracts from the Ministry's ability to provide modern, accessible, people-centred court and tribunal services • Objective to halve service delivery times by 2017 less likely to be achieved

Option	Features	Advantages	Disadvantages
<p>B: Create new overarching Act (Ministry's preferred option)</p>	<ul style="list-style-type: none"> Legislation similar to Electronic Transactions Act 2002, but specific to courts and tribunals Paper-based requirements in legislation can be interpreted as allowing electronic dealing Preserves some exceptions from electronic transactions eg documents that must be served in person 	<ul style="list-style-type: none"> Most likely option to achieve the Ministry's objective of halving service delivery times by 2017 Most likely option to achieve the Ministry's objective of providing modern, accessible, people-centred services Meets the following evaluation criteria: <ul style="list-style-type: none"> <i>Efficiency of service delivery/ convenience for users</i> Greater provision of electronic services allows users to file documents remotely at their convenience, at any time of day <i>Preserves rights and natural justice principles</i> Potentially provides better access to justice by making it easier for individuals to deal with courts and tribunals 	<ul style="list-style-type: none"> Achieving the objectives relies on sufficient uptake of electronic dealing by court and tribunal users
<p>C: Amend court rules and guidelines to apply ETA</p>	<ul style="list-style-type: none"> Most (but not all) paper-based requirements in legislation can be interpreted as allowing electronic dealing 	<ul style="list-style-type: none"> Uses established framework for governing electronic transactions (avoids creating a parallel regime) Partially meets the following evaluation criteria: <ul style="list-style-type: none"> <i>Efficiency of service delivery</i> <i>Convenience for users</i> 	<ul style="list-style-type: none"> Inconsistency across jurisdictions <p>Will not fully achieve the Ministry's service transformation objectives because:</p> <ul style="list-style-type: none"> Broad ETA consent provisions may reduce uptake of electronic dealing and reduce efficiency

Option	Features	Advantages	Disadvantages
			<ul style="list-style-type: none"> <li data-bbox="1134 248 1390 539">• Affidavits cannot be filed electronically, so would have to be filed separately from accompanying documents <li data-bbox="1134 573 1390 864">• Does not address the issues of unnecessary geographic restrictions on the use of AVL and where documents must be filed

Consultation

39. The following agencies were consulted: Ministries of Business, Innovation and Employment, Economic Development, Primary Industries, Social Development, Education, Health, Women’s Affairs, Ministry for the Environment, Te Puni Kōkiri, Departments of Internal Affairs, and Corrections, Inland Revenue, New Zealand Police, Financial Markets Authority, Accident Compensation Corporation, Commerce Commission, Crown Law, and Treasury. The Department of the Prime Minister and Cabinet and Parliamentary Counsel Office were informed.
40. The intended introduction date for the legislation limited the amount of external consultation that could be carried out. The Chief Justice, Heads of Bench and chairs of tribunals administered by the Ministry of Justice were informed of the proposal to enable greater use of electronic operating in courts and tribunals.
41. The proposals were also discussed in principle with the New Zealand Law Society, Criminal Bar Association, New Zealand Bar Association, and Auckland District Law Society.
42. No significant concerns were raised.

Conclusions and recommendations

43. Options B and C are both suitable for enabling electronic operating in courts and tribunals. However, Option B is the Ministry of Justice’s preferred option because it more fully achieves the Ministry’s desired service transformation programme. It would also allow the electronic operating principles to be tailored to the specific operational requirements of courts and tribunals.

Implementation

44. If the preferred option is adopted, the legislation would be brought into force by Order in Council once the necessary technology is available and each jurisdiction is ready.

Monitoring, evaluation and review

45. The Ministry would monitor the implementation of the changes by measuring uptake of online services by court users and feedback from front-line staff. Court users' experiences would continue to be measured through the quarterly results of the continuous *Kiwis Count* Survey. Starting from 2013, the survey includes a module of questions about the ease of transacting with Government in a digital environment (this replaces the previous module of questions on channel use and preferences).