The Rules Committee
Te Komiti mō ngā Tikanga Kooti

Costs for Self-Represented Litigants

Consultation Paper

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Introduction and summary

1. The Rules Committee is further consulting on changes to the Rules in relation to the award of costs in favour of self-represented litigants.[1] It previously consulted on this issue between May and September 2020.[2] The last consultation paper is available from the Committee's website.[3] That paper details the current position and the background to the Committee's decision to consult on this issue.

2. The Committee has made a number of preliminary decisions, including a decision that self-represented litigants should be eligible for a costs award if they succeed with their litigation. The prohibition on any costs recovery if a self-represented litigant succeeds can no longer be justified as a matter of principle, or logic. First, self-represented litigants are liable for costs

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1 The relevant Rules will encompass the Rules for the District Court, High Court, Court of Appeal and Supreme Court.

2 Rules Committee *Consultation Paper: Costs for Litigants-in-Person* (Office of the Chief Justice, Wellington, 5 May 2020).

3 See www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/lay-litigants-costs-consultation/.

if they do *not* succeed. Secondly, if they *do* succeed, however, they will have expended cost and time to do so in lieu of retaining a lawyer. The *unsuccessful* party opposing them pays costs if the successful litigant had retained a lawyer and they should not get a free ride if the successful litigant is self-represented. On the view we take, costs are not out of pocket expenses only, but compensation paid to a successful party for the expenditure, time *and* effort in having to take a meritorious case (or defence) to court. The remaining question is what level of compensation a successful self-represented litigant should be paid for their time and effort.

3. There are a series of questions that arise as a consequence of the Committee's decisions upon which the Committee seeks further submissions. That is the point of this consultation paper.

4. The first relates to the basis upon which successful self-represented litigants should be awarded costs. The Committee has decided that this should be done by way of a new daily recovery rate which is prescribed for self-represented litigants in the schedules to the Rules. The Committee proposes that the rate should be less than the lowest rate currently prescribed. The Committee seeks submitters views on what the rate should be, but with a suggestion that it should be $500 per day.

5. The Committee has decided that whenever lawyers are the party to the litigation they should be treated as a self-represented litigant and only eligible to recover at the new rate prescribed for self-represented litigants. The Committee sees no justification for continuing the exception that lawyers be entitled to recover at the full rates.

6. The Committee has also addressed the position of in-house lawyers and seeks the views of submitters on whether they should be treated differently from other self-represented litigants and whether there should be a further new daily recovery rate prescribed for in-house lawyers. That rate would be greater than the rate for self-represented litigants, but less than the rates currently prescribed when there is external representation. For the purposes of submissions it proposes a flat rate of $1,000 per day. This compares with the current rates when there is external representation which range from $1,270 to $3,350 per day.[4] That view is based on two interrelated considerations:

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[4] See [23] below.

a. that such lawyers undertake this role as trained lawyers with professional obligations and that this justifies a rate higher than the self-represented litigant rate; but

b. the actual cost to a party when conducting litigation using an in-house lawyer rather than external counsel may be less, justifying a lower daily recovery rate than the rate prescribed on the basis of the cost of external counsel.

7. The Committee also seeks the views of submitters on whether Crown lawyers, i.e. government lawyers, should be treated differently from other in-house lawyers. If the Committee establishes a new daily recovery rate for in-house lawyers a question arises whether the rate would apply to Crown lawyers or whether different treatment is justified. In addition the Committee's preliminary view is that where counsel from the Crown Law Office appear, the Crown should be eligible for an award of costs on the daily recovery rates currently prescribed for external counsel. This is due to the Solicitor-General's constitutional responsibility as a Law Officer to ensure the Crown's litigation is properly conducted, and to exercise this duty independent from political direction or influence. The Crown Law Office assists and supports the Law Officers of the Crown, and charges for its services, such that a normal costs award is appropriate in these circumstances.

8. The current regime is based on the costs award being a contribution to the external legal expenditure incurred by a party. The Committee's decisions involve taking into account other forms of cost that are involved in the conduct of litigation. In light of this, the Committee seeks submitters views on whether that the remaining references to actual legal expenditure within the regime, including the principle that a party should not recover more than external legal expenditure (High Court Rules 2016 r 14.2(1)(f)), be either revoked or amended to recognise that self-represented litigants should be eligible for a costs award notwithstanding those rules.

Self-represented litigants should be eligible for a costs award

9. The Committee has decided that self-represented litigants should be eligible for a costs award if their litigation succeeds.

10. The Committee does not believe that the current approach preventing any recovery even though the claim succeeds can be justified. When a self-represented litigant conducts litigation they are liable to have a costs award made against them. But the reverse is not the case if a self-represented litigant succeeds. Such a successful self-represented litigant is ineligible for an award of costs other than an award to compensate for recoverable disbursements. The Committee is of the view that that cannot be justified as a matter of principle. The different level, or nature of the "costs" the self-represented litigant incurs needs to be taken into account in deciding what the award should be, but the complete prohibition on any award of costs is not justifiable in the Committee's view. Costs are based on deemed reasonable recovery rates set by the schedules. A successful party still incurs forms of "cost" when conducting litigation even if there is no external legal expenditure.

11. It is the Committee's assessment that it is more consistent with the fundamental principle of equality before the law and access to justice to allow self-represented litigants to be eligible to receive costs awards if they are successful. This would allow all parties, represented or otherwise, to receive an allowance for the nominal amount of work done by them or on their behalf in prevailing in litigation, according to a scale approach. This would ensure that all parties recover on the same objectively calculated basis.

12. Some submitters also pointed out that objectives of the costs regime are undermined in cases where one party is self-represented because it serves to "inoculate a litigant facing a self-represented party against any risk of an unfavourable costs award", and in turn "distorts the risk-reward calculation for represented parties", as Dr Toy-Cronin put it in her submission. This leads to represented parties not settling where they otherwise would be incentivised to do so. A defendant may more readily defend a claim brought by a self-represented litigant in the knowledge that the defendant cannot be liable for a costs award. Indeed such a defendant could exhibit the behaviour that would normally warrant an award of increased or indemnity costs in accordance with r 14.6 of the High Court Rules 2016 but be free from any such consequences. In the Committee's view that is not justified. This illegitimately disadvantages the unrepresented party and undermines the Courts' policy of promoting settlement.

13. The Committee does not see inconsistency between this decision and other areas of the law. Submitters raised concerns that allowing self-represented litigants to recover would be inconsistent with the prohibition on recovering costs as damages or lead to inconsistency with

the security for costs and legal aid regimes, or with the provisions for witnesses under the Witnesses and Interpreters Fees Regulations 1974. While self-represented litigants may receive more generous recompense than do people compelled to attend as witnesses this does not provide justification for preventing a successful self-represented litigant being awarded costs when successfully exercising their right of access to the Court.

14. In terms of broader policy considerations, the Committee does not accept that allowing self-represented litigants to recover when they are successful would engage floodgates concerns by encouraging more litigation. Self-represented litigants would only be eligible for a costs award if they are successful, and are liable for costs if they are not. So the incentives will only change for claimants with meritorious positions.

15. The Committee accepts that one legitimate objective of the costs regime is incentivising parties who are able to obtain representation to do so, and that it is beneficial to the Courts to have the assistance of independent counsel, who are trained lawyers that are officers of the Court and subject to ethical obligations. The Committee accepts that self-represented litigants can proceed in a less helpful and efficient manner more often than do represented parties,[5] and that their presence in litigation can create additional burdens and ethical obligations on counsel for represented opposing parties,[6] and the Courts.[7] Overall, the Committee accepts that this can have a negative impact on the efficient functioning of the Courts, justifying the use of the costs regime to incentivise parties to obtain representation. But the Committee does not consider that this objective justifies completely prohibiting self-represented parties from

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[5] See, for a few of the many judicial recognitions of this phenomenon, *Cachia v Hanes* (1994) 179 CLR 403 at 415; *Mihaka v Police* [1981] 1 NZLR 54 (HC) at 58; *Re W (Permission to Appeal)* [2007] EWCA Civ 786; *Cabot Investment Ltd v Smith* [1998] EWCA Civ 1100; *McInnis v R* (1973) 143 CLR 575 (HCA) at 590; *Forrester Ketley and Co v Brent* [2003] EWHC 1847 (Pat); Hon Justice Emilios Kyrou "Managing litigants in person" (2013) 25 Judicial Officers Bulletin; *Rabson v Registrar of Supreme Court* [2015] NZSC 123; *Siemer v Heron* [2011] NZSC 116 at [7].

[6] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 10 and rr 12-12.1. See further Peter Gunn "Lawyers' Obligations When Dealing With a Self-Represented Person" in *Professional Responsibility in New Zealand* (online looseleaf, LexisNexis) at [29.2] and [29.7], referring to *O'Brien v Hertsmere Borough Council* [1998] EWHC Admin 35; *Siemer v Heron* [2011] NZSC 116 at [7]; *Nottingham v Real Estate Agents Authority* [2017] NZCA 1; and G E Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [21.275], citing *Serobian v CBA* [2010] NSWCA 181 at [42]; and *Belling v Belling* (1996) 9 PRNZ 296 (HC).

[7] Hon Justice Helen Winkelmann, "Access to justice — who needs lawyers?" (2014) 13 Otago L Rev 229 at 235-237; compare Geoffrey Venning, Chief High Court Judge "Access to Justice – A Constant Quest" (Address to New Zealand Bar Association Conference, Napier, 7 August 2015) at 5. See further Peter Gunn "Lawyers' Obligations When Dealing With a Self-Represented Person" in *Professional Responsibility in New Zealand* (online looseleaf, LexisNexis) at [29.2], referring to *Slavich v R* [2011] NZCA 457 at [23]; *Siemer v Heron* [2011] NZSC 116; and *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [49].

obtaining an award of costs when they succeed. Fairness dictates that a winning party not go unrecompensed, but efficiency dictates that incentives remain for the engagement of legal representation. So the real question is about the rate of recompense.

16. On the empirical research available the cost of legal representation is not the only barrier to parties seeking representation. As well as those who "can't pay", many self-represented litigants "won't pay". Self-representation is influenced not only by cost and the restricted availability of civil legal aid, but also by self-represented litigants' perceptions that their cases are too straightforward to need a lawyer, or that they could do a better job than a lawyer. These litigants, who may be encouraged to litigate by the availability of costs, could pose an additional burden for the Court system if incentivised to litigate.

17. While acknowledging these potential incentives, the Committee notes that in England and Wales, where the rule preventing self-represented litigants recovering costs was abrogated in 1975, there was no significant growth in the number of self-represented litigants appearing in courts, at least until legal aid became greatly restricted in its availability in that jurisdiction in 2012.[8] This suggests that the availability of costs by itself does not influence self-represented litigants' decision to litigate as much as other factors.

18. More generally, the Committee agrees with the submission of Dr Toy-Cronin that these concerns are based on "a stereotype of both lawyer and [self-represented litigant] conduct where the [self-represented litigant] is modelled on 'minority of the worst' (vexatious litigants taking unnecessary steps) and the lawyer is modelled on an image of the ideal lawyer (expeditious conduct of litigation, taking no unnecessary steps)". The Committee agrees that this cannot be true in all cases, especially bearing in mind that costs will be made available only to those who succeed in litigating. Moreover, it agrees with the Law Society submission that problematic self-represented litigants can be appropriately dealt with using the vexatious litigant order regime, the Courts' power under the rules of court and their inherent jurisdiction and power to prevent abuse of their processes,[9] and by ordering querulants to pay indemnity or increased costs. Most problem cases (or defences) are unmeritorious; those litigants will

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[8] Gabrielle Carton Grimwood *Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales* (House of Commons Library, London, April 2013).

[9] As to which powers under the rules and statute, see Senior Courts Act 2016, ss 166-169; High Court Rules 2016, rr 5.35A-5.35C and 15.1; and District Court Rules 2014, r 15.1. As to the inherent jurisdiction and power, see *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [56].

be paying (not receiving) costs. Inefficiency in litigation by those pursuing meritorious claims, or reasonably defending actions, can be responded to, and deterred, by the making of reduced costs orders or refusing to award costs.

What should the new daily recovery for self-represented litigants be?

19. Given this decision, the Committee seeks the views of submitters on what the new daily recovery rate for self-represented litigants should be.

20. The Committee has not determined what the new rate should be, beyond determining that:

    a. it should be set lower than the rate applicable to category one proceedings under r 14.3; and

    b. a single rate ought to apply to all categories of self-represented litigants, as opposed to the Committee introducing a range of new rates for self-represented litigants responsive to the three categories of proceedings (for reasons of conceptual consistency and practicality).

    Efficiency is encouraged (if not ensured) by standard time allowances for specified litigation tasks – regardless of whether they are conducted by a lawyer or by a successful self-represented litigant. The unsuccessful litigant, who has forced the contest, should expect to pay something for those tasks, regardless of who conducts them.

21. Determining what the new rate should be involves a number of considerations that might be relevant. For example:

    a. The regime involves compensating the litigant for particular tasks involved in the litigation as set out in the schedules. The opposing party can be expected to contribute to the cost of undertaking those tasks when so ordered. This is only a contribution to those costs rather than a full indemnification.

    b. A self-represented litigant might be expected to take longer to undertake many of these tasks than would a trained lawyer.

c. Self-represented litigants will not have incurred external legal expenditure when undertaking those tasks. But they will incur opportunity costs, having devoted time and energy to the litigation at the expense of other activities they could otherwise have engaged in. Taking opportunity costs into account might involve considering factors such as the national average wage, while recognising that individual litigants will be in very different circumstances.

d. There are other costs involved, for example the stress and emotional commitment that is required to conduct litigation.

e. The rate should not be set in a way that contemplates the litigant profiting from the conduct of the litigation. It should be compensatory only.

f. The incentive for litigants to retain external counsel should remain, given the benefits to the justice system overall of litigants using qualified professionals.

g. The rates should promote simplicity and predictability of costs awards.

22. The Committee notes that Justice Grice, in her recent decision in *Accident Compensation Corporation v Carey*,[10] determined that persons represented by non-lawyer advocates in appeals from ACC decisions in the District Court were entitled to receive costs awards. She was then required to determine the measure of those awards. Having weighed essentially the same considerations as those identified above,[11] the Judge determined that it was appropriate to employ a modified scale approach similar to that to which the Committee has provisionally decided to adopt,[12] based on awarding parties represented by advocates who were of assistance to the Court 50 per cent of the otherwise applicable daily recovery rate. By analogy to r 14.7, the Judge indicated there could be a reduction or refusal of costs where the advocate was of little assistance.[13] The Judge considered that this approach would allow for the skill and expertise of the advocate — which the Judge assumed would generally be lesser than lawyers who, unlike advocates, are obliged to have a level of expertise and competence in the law —

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10 *Accident Compensation Corporation v Carey* [2021] NZHC 748.

11 At [69]–[85].

12 Conceptually, the approach adopted by the Judge differs from that advanced by the Committee in this paper, given the Judge clearly regarded the award of costs as a partial indemnity or reimbursement for out of pocket expenses: see at [92].

13 At [86]–[98].

to be reflected while avoiding scrutinising too closely the actual quality of the advocate's performance.[14]

23. The Committee invites submissions on what the new daily recovery rate should be. We record that, in the previous round of consultation, the Law Society suggested that an appropriate figure would be $750 per day. The Committee, at least for the purposes of this further consultation, envisages a figure of $500 per day as appropriate. This would be the same in both the District Court and High Court. This compares to the current daily recovery rates as follows:

	District Court	High Court
Category 1 Proceedings	$1,270	$1,590
Category 2 Proceedings	$1,910	$2,390
Category 3 Proceedings	$2,820	$3,350

Position of self-representing lawyers

24. The Committee has also decided that the exception to the current rule allowing self-representing lawyers to recover costs at the full rate prescribed is no longer justified, and has decided that lawyers should only recover on the proposed self-represented litigant rate.

25. The Committee agrees with all the submitters who addressed this issue, and the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow*,[15] that the exception is "an affront to the fundamental value of equality of all persons before the law". This because, in the Committee's assessment, none of the arguments put forward for this distinction justifies it being further maintained.

26. It has been argued that self-representing lawyers conduct the task more efficiently to the benefit of the parties and the systems overall. The Committee does not agree. A self-representing lawyer is not in a professional relationship when they appear on their own-behalf

[14] Should the proposals set out in this paper be implemented, the Committee envisages that ACC claimants represented by non-lawyer advocates will be entitled to recover costs on the same basis as other unrepresented litigants, whatever that ultimately proves to be. While the Committee acknowledges the force in Grice J's observation (at [84]–[85] and [98]–[100]) that there is a *sui generis* policy argument for encouraging "good" advocates to assist claimants and appellants in ACC matters, the Committee does not consider they should be placed on the same level as lawyers (as did Grice J at [90]–[91]), such that there is no basis for creating a further separate rate of recovery in respect of parties represented by such advocates.

[15] *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [1] per Kiefel CJ, and Bell, Keane, and Gordon JJ.

and is not required to exercise the independent professional judgement required when acting for a client.[16] The Committee also notes Dr Toy-Cronin's point that the first persons declared vexatious litigants in New Zealand and England were lawyers who had become involved in their own suits and unable to exercise well-informed judgement.[17] More generally, as noted by the High Court of Australia in *Bell Lawyers* encouraging self-representation is incongruous with the modern orthodoxy that self-representation is, as a matter of professional ethics, undesirable.[18] It is also to be noted that lawyers who appear for themselves are more likely to be making a choice to do so rather than retain counsel, which distinguishes their position from many self-represented litigants who cannot afford to retain counsel.

27. It has been argued that self-representing lawyers are nonetheless familiar with the practice of litigation and will thus be of greater assistance to the Court than would be other self-represented litigants, justifying some distinction being drawn. But lawyers that lack detachment are likely to be less able to exercise the same measure of skill and judgement appearing for themselves than they would if appearing for a client. Also, not every person holding a practising certificate can be assumed to be materially better at litigating than other members of the community. Lawyers have a wide variety of skills and not all are litigation specialists.

28. For these reasons, the Committee has decided that it is appropriate to repeal r 14.17 of the District Court Rules 2014, which provides expressly that the self-represented lawyer exception operates in that Court. The Committee may also introduce a provision into the Rules to make express the abrogation of the rule of practice first identified in *The London Scottish Benefit Society v Chorley*.[19]

29. The Committee has also determined that lawyers who are the sole principal or director of their firm are to be treated as appearing on their own behalf in terms of the costs regime when

[16] Compare Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, chs 3, 5, 6, 10, 11, and 13.

[17] See further Michael Taggart "Vexing the Establishment: Jack Wiseman of Murrays Bay" [2007] NZ L Rev 271; and Michael Taggart "Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896" (2004) 63 Cambridge L J 656.

[18] *Bell Lawyers Pty Ltd v Pentelow*, above n 15, at [19] per Kiefel CJ, Bell, Keane, and Gordon JJ.

[19] *The London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (EWCA) at 875, adopted *Hanna v Ranger* (1912) 31 NZLR 159 (SC) at 160.

appearing on behalf of their firm or incorporated firm, picking up on a point made in the High Court of Australia in *Bell Lawyers*.[20]

Position of in-house lawyers

30. One consequence of the Committee's decisions outlined above is that parties who appear in proceedings by way of their own in-house lawyers might now only be eligible for a cost award on the proposed self-represented litigant rate. Costs can presently be awarded in relation to in-house lawyers at the full rate as an aspect of the exception to the rule that self-represented litigants cannot recover costs.[21] The Committee seeks the views of submitters on whether costs should be awarded in relation to in-house lawyers:

    a. at the new self-represented litigant rate; or

    b. at a new rate to be prescribed for in-house lawyers; or

    c. at the full rates presently prescribed based on the cost of external counsel.

31. For the reasons already outlined above, the Committee has decided that the continuation of the self-represented lawyer exception can no longer be justified, and that self-represented lawyers should only recover costs at the new rates to be prescribed for self-represented litigants. But in-house lawyers may be in a different position. That is because they are undertaking a role of a lawyer in the litigation in a professional capacity, and in essentially the same way as external counsel. There is no reason to assume they will do so less completely or professionally than external counsel. It was considerations of this kind that led to the Courts recognising that they should be eligible for a costs award.[22]

32. But there may be reasons why such an award of costs might not be at the full rates currently prescribed by the Rules. That is because these rates are set by reference to the cost of external counsel. Expenditure of that level may not be incurred by the party who uses an in-house lawyer to conduct the litigation. Moreover, an in-house lawyer is in a different position from external counsel. An in-house lawyer has only one "client", and that person is the party to the

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[20] At [51]–[53] per Kiefel J, Bell, Keane, and Gordon JJ.
[21] *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [56].
[22] See *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23 per Cooke J.

litigation, and the lawyer has duties to that party as an employee. They are more closely aligned with the stance of the party than external counsel.

33. There may be legitimate economic and commercial reasons for parties choosing to appear by way of in-house lawyer. In-house lawyers are still lawyers, bound by professional obligations to their employer as their (generally) sole client,[23] and as officers of the court when appearing in litigation.[24] When an in-house lawyer appears for their employer in litigation, a regulated service is being provided. The in-house lawyer is obliged to act with independence in the conduct of the litigation in a way that a self-represented litigant (including a self-represented lawyer) is not.[25]

34. The submissions received during the last consultation round, particularly from governmental submitters also pointed to the advantages that bodies repeatedly involved in similar proceedings can obtain by maintaining institutional knowledge in-house. Employing in-house lawyers is generally less expensive than obtaining external representation. In the case of governmental bodies, this has advantages in terms of ensuring the efficient use of public resources. Submissions received during the previous consultation round argued that the use of in-house lawyers was consistent with the broader objective of the costs regime of promoting efficiency in litigation. There may nevertheless be a benefit in promoting parties being represented by external counsel authorised by their practising certificate to practise on their own account, and who have undertaken to observe additional requirements established by the Law Society to do so.[26]

35. The Committee has decided that it would be impracticable to provide for the Court to make a case-by-case assessment on whether it is appropriate for a party represented by in-house lawyers to recover as if represented by external counsel, having regard in making that assessment to the conduct of the litigation. While this would avoid many of the difficulties

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23 Lawyers and Conveyancers Act 2006, ss 9-10; Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 15.2.3 and 15.3. See also however r 15.1.5 (providing that in-house lawyers engaged on a part-time basis entitled to practice on their own account may do so outside the hours of their part-time engagement), and ss 10(4)-(5), which enable such lawyers, with the permission of their employer, to provide services under the auspices of the Community Law Centres and Citizens Advice Bureaux.

24 See r 15.3.

25 See rr 15.2.1-15.2.2 and 15.3.

26 As to which additional requirements, see the Lawyers and Conveyancers Act 2006, s 30; Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008, regs 12-15; and Trust Account Regulations 2008.

associated with making a global assessment, it would also represent a significant departure from the present schedular approach to awarding costs.

36. The Committee has also decided that, should in-house lawyers be eligible for costs at a higher rate than self-represented litigants, that this rate should not be available for firms of barristers and solicitors represented by in-house lawyers appearing on behalf of the firm in, say, a debt recovery action, as has been the case. The position of these lawyers is analogous to that of self-represented lawyers.

37. The Commission accordingly invites submissions on whether:

    a. parties represented by in-house lawyers should be entitled to costs at the same rate as other self-represented litigants, that is, at the new self-represented litigant daily recovery rate; or

    b. a new daily recovery rate somewhat below, but ultimately likely fairly close, to the daily recovery rate applicable to category 1 proceedings involving externally represented parties should apply for parties represented by in-house lawyers; or

    c. the daily recovery rate appropriate to the proceeding for the purposes of r 14.3, as if the party was represented by external counsel, should apply to such parties.

38. The Committee also invites comments on what the daily recovery rate for parties represented by in-house lawyers should be. Solely for the purposes of consultation a daily recovery rate of $1000 per day is suggested in both the High Court and District Court in all categories of proceedings. This is based on a rate higher than the proposed self-represented litigant daily recovery rate of $500 per day, and lower than the current category one rate for District Court proceedings of $1,270 per day, rather than any assessment of the internal costs of in-house lawyers.

39. As part of the submission the Committee would benefit from receiving information about the rates that organisations use to charge for their in-house lawyers’ services for accounting purposes, or any nominal invoicing rates employed. That would allow the Committee to

determine whether it is appropriate to institute a different daily recovery rate on the separate basis that doing so is fairer as between successful and unsuccessful parties.

Position of Crown Lawyers

40. The Committee also invites submissions on whether the position of Crown lawyers should be treated differently from other in-house lawyers.

41. The Committee wishes to consider whether Crown lawyers are in a different position from other in-house lawyers such that they should be eligible for a costs award at the current rates formulated by reference to the costs of external counsel rather than a new in-house lawyer rate. The basis for this view is that all Crown lawyers are ultimately overseen by the Solicitor-General, who has constitutional responsibility as a Law Officer to ensure the Crown's litigation is properly conducted, and to exercise this duty independent from political direction or influence. All Government lawyers are part of the Government Legal Network for which the Solicitor-General is the professional head.[27] She is responsible for all lawyers representing and advising the Crown. It can be argued that Crown lawyers are accordingly in a different position from other in-house lawyers. They are required to act in accordance with the expectations and values of the Law Officers in litigation.

42. The alternative view is that these further layers of behavioural expectation do not change the key reasons for determining that costs should only be awarded at the new self-represented litigant, or in-house lawyer rate. First, the Government Department or other Crown body will not be incurring the costs of external counsel that are the basis for the current allowances for costs set in the schedules. The costs may be significantly lower, and indirect. Secondly, for the reasons outlined above in relation to in-house lawyers, [28] there is a material difference between lawyers employed in-house by the Government Department or other Crown body and those conducting practice more broadly. Such lawyers have duties as an employee to their employer, and their employer is the party. They will also be more closely aligned with the interest of the party in the litigation itself. These features still exist even though the employer is the Crown.

[27] See Cabinet Manual 2020, paragraphs 2.2–4.7, and J McGrath QC "Principles for Sharing Law Officer Power: the Role of the New Zealand Solicitor-General" (1998) 18 New Zealand Universities Law Review 197 at 202.
[28] See [32] above.

43. A majority of the Committee was of the view, however, that parties represented by Crown Law should be entitled to an award of costs as if represented by external counsel (that is, at the present daily recovery rates). This is because Crown Law, under the leadership of the Solicitor-General, has the same ethical relationship, and degree of independence, from its client - the Government - as do independent counsel from their clients. All litigation undertaken by that office is supervised by the Solicitor-General, in accordance with the constitutional conventions governing her exercise of her functions as the Crown's law officer. Crown Law also charges government departments for its services. There would be no basis in terms of considerations of structural independence, or expenditure incurred, for distinguishing between these parties and those represented by external counsel.

Consistency with concept that costs are a contribution to actual legal expenditure

44. The Committee recognises that its proposed decisions described above are not consistent with the view that costs are a contribution to the actual legal expenditure of a party.

45. Some submitters argued that allowing self-represented litigants to obtain costs awards would undermine the conceptual integrity of the costs regime. These submitters focused on the fact that costs are awarded on the basis of a partial indemnity for out-of-pocket legal expenses. In their view, it would be unfair to confine represented parties to recovery on this basis while unrepresented parties would become able to recovery in respect of opportunity and other costs (as is the position in England, where the primary rule was abrogated in 1975).[29] The Committee considered this an important question, and received a detailed report from the Clerk to the Committee on the nature and operation of the contemporary costs regime in this context.[30]

46. In the Committee's view allowing self-represented litigants and in-house lawyers to recover costs in the way outlined in this consultation document reflects that there are "costs" incurred by a party when engaging in litigation other than external legal expenditure. These can be described as opportunity costs. They are reflected particularly in the time required by a party

[29] See Litigants in Person (Costs and Expenses) Act 1975 (UK); and Civil Procedure Rules (UK), r 46.
[30] See Sebastian Hartley, Clerk to the Rules Committee *A New Approach to Costs for Self-Represented Litigants: Advice to the Rules Committee* (Office of the Chief Justice, Wellington, 15 March 2021), especially at pts 1, 5, and 6. The paper is available at www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/lay-litigants- costs-consultation/.

to engage in the litigation, and the associated commitment that is necessary to properly conduct litigation before the Courts. The Committee has decided that, given the access to justice and equality considerations, it is necessary to recognise these costs through allowing an award of costs for self-represented litigants and in-house lawyers.

47. Given this position, the Committee seeks the views of submitters on whether the remaining references to actual legal expenditure be repealed, or whether they should be amended to accommodate the proposed decisions referred to above. The Committee proposes that r 14.2(1)(f), which outlines a principle that “an award of costs should not exceed the costs incurred by the party claiming costs”, be amended or repealed. Rule 14.2(1)(f) may be best understood as the expression of a free-standing rule of policy aimed at encouraging restraint and proportionality in litigation and avoiding the risk of an adverse costs award (even in cases of behaviour deserving sanction) from being too great a deterrent to parties taking cases with an element of merit through to hearing.[31]

48. An alternative approach is to retain r 14.2(1)(f), but for the rules to provide that the ability of self-represented litigants (and in-house lawyers) to recover in accordance with the new prescribed rates applies notwithstanding this rule. This would mean that r 14.2(1)(f) would operate solely in situations where a party retains external lawyers to conduct litigation. It may also need amending to make it clear it allows for costs to be awarded when lawyers act on a pro-bono basis.

49. It can be argued that r 14.2(1)(f) inappropriately penalises parties who are able to engage in litigation more efficiently by arranging legal representation that is less expensive than assumed by the costs regime. It also discourages lawyers who are able to provide rates less expensive than contemplated by the schedules. It can be argued that more efficient parties and lawyers should not be so penalised. Repealing the rule would remove that effect. Repealing would also address the anomalies created by the need to allow recovery in the case of contingency fee arrangements, or pro bono arrangements for legal representation. The self-represented lawyer and in-house lawyer exceptions are also existing anomalies.

[31] See *General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301 (CA) at 308 and 312; *Gundry v Sainsbury* [1910] 1 KB 645 (EWCA); *Suttie v Bridgecorp Ltd* HC Auckland, CIV-2006-404-3667, 8 December 2006 (HC) at [19]; *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd* (2008) 19 PRNZ 591 at [7]; and *Dunedin Catering Supplies v Mr Chips Ltd* [2013] NZHC 1815.

50. The other key principle underpinning the costs regime is that stated in r 14.2(1)(g), that the award of costs be predictable and expeditious. The authors of McGechan on Procedure suggest this assists in promoting settlement by allowing parties to accurately gauge their likely costs exposure. The authors also suggest it aids the successful parties in proceedings that go to judgment by reducing the scope for disputes regarding the quantum of costs, thereby facilitating the successful party's being out of pocket for a shorter period.[32] While the Committee is unsure as to whether this latter claim is borne out in practice, the Committee agrees that the current costs regime allows judges to resolve disputes as to costs expediently, but also justly, and in accordance with principle.

Partial Representation

51. A further issue arises in relation to situations where a litigant retains a lawyer for part of a proceeding. The Committee proposes that an award at the rates for external lawyers be available for the steps undertaken by that lawyer, with the self-representative rate applying otherwise.

Appellate proceedings

52. The above proposals are directed to both the High Court and District Court Rules. The Committee is also inviting submissions, not being an issue on which we have previously consulted, as to whether its amendments should be made to the Court of Appeal (Civil) Rules 2005 and Supreme Court Rules 2004 in a consequential way.

Summary of matters for submission

53. By way of summary the Committee is seeking submissions on the following questions:

    a. What the new daily recovery rate should be for self-represented litigants. For the purposes of submissions the Committee has proposed $500 per day.

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32 A C Beck and others *McGechan on Procedure* (online looseleaf, Thomson Reuters) at [HR14.02.01(7)].

b. Whether in-house lawyers should be eligible for an award of costs at the new rate for self-represented litigants, a new rate for in-house lawyers, or the current rates presently prescribed.

c. What the new rate should be if a in-house lawyer rate is established. For the purpose of submissions the Committee has proposed $1,000 per day.

d. Whether Crown lawyers should be treated on the same basis as other in-house lawyers.

e. Whether r 14.2(1)(f) should be repealed or amended to reflect the removal of reference to actual external legal expenditure in the award of costs, at least for the purposes of the awards of costs contemplated by these proposals.

54. There are other associated matters upon which the Committee has sought submissions as described in this paper.

55. The Committee does not consider it would be greatly assisted by further submissions on issues in respect of which determinations are stated to have already been made as described above. For example, the Committee is unlikely to benefit from submissions seeking to revisit its decision to allow costs awards to self-represented litigants.

Return of submissions

56. Submissions or comments should be directed to the Clerk to the Committee before 5 pm on 28 January 2022, using the details on the first page of this document. Inquiries regarding this document can, in the first instance, be directed to the Clerk.

57. Submitters are requested to please include their name, any firm or professional affiliation relevant to their submission, contact telephone or mobile number, and one of either their email address or postal address. We may contact submitters regarding their submissions.

58. Please be aware that all submissions received may, at the Committee's discretion, be posted on our website, may form part of our response to any request made under the Official Information Act 1982, and will form part of our records under the Public Records Act 2005 and might be subject to public inspection under that Act.

59. Please indicate in a letter or email covering your submission if you would prefer that confidentiality be maintained in respect of your submission or any part of your submission. It is the Committee's policy to remove all contact details not publicly listed from submissions published or released under the above enactments.

We would like to remind members of the profession and wider community that your feedback is a valuable way of ensuring that the rules of practice and procedure are working well.

If you have any concerns about any rule or its operation, please raise this with us by writing to the Clerk to the Committee at SX11199, Wellington or RulesCommittee@justice.govt.nz

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