The Rules Committee

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26 September 2019
Minutes 03/18

Circular 55 of 2019

Minutes of Meeting of 23 September 2019

The meeting called by Agenda 03/19 (C 34A of 2019) began at 10:00 am on Monday 23 September 2019 in the Conference Room at Supreme Court Complex, Wellington.

Present

The Right Honourable Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
The Honourable David Parker, Attorney-General (Until 10:35 am)
The Honourable Justice Venning, Chief High Court Judge
The Honourable Justice Dobson, Chair and Judge of the High Court
The Honourable Justice Cooke, Special Purposes Appointee and Judge of the High Court
His Honour Judge Kellar, Special Purposes Appointee and Judge of the District Court
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice (Representative for Mr Andrew Kibblewhite as Secretary of Justice)
Mr Andrew Beck, New Zealand Law Society (NZLS) Representative
Mr Jason McHerron, NZLS Representative
Ms Laura O'Gorman, Special Purposes Appointee
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association (NZBA) President

In Attendance

Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court
Ms Fiona Leonard, Chief Parliamentary Counsel in the Parliamentary Counsel Office (PCO)
Ms Alexandria Mark, Secretary to the Rules Committee
Mr Sebastian Hartley, Clerk to the Rules Committee
Ms Kate Peirse-O'Byrne, Private Secretary to the Attorney-General (until 10:35 am)
Ms Jo Dinsdale, Principal Advisor (Courts and Tribunals Policy) in the Ministry of Justice (Between 11:15 am and 12:05 pm)

Apologies

His Honour Judge Gibson, Judge of the District Court
Ms Jessica Gorman, Crown Law (Representative for Ms Una Jagose QC as the Solicitor-General)

1. Preliminary

Minutes of Previous Meeting

The minutes of the Committee's meeting of 18 March 2019 (C 34 of 2019) were confirmed.

Meeting Dates for 2020

A note setting out the Chair's proposed meeting dates for 2020 (C 35A of 2019) was circulated as part of the Committee's papers. No objection was expressed to the proposed dates of Monday 23 March, Monday 29 June, Monday 21 September, and Monday 30 November 2020.

2. Access to Justice

Items 2(a) – 2(e): Promoting Access to Civil Justice

Discussion

Justice Dobson began by welcoming the Attorney-General to his second meeting of the Committee. He invited members of the Committee associated with various current proposals and research papers related to Access to Justice to begin the discussion by briefly summarising those items.

Justice Venning, as a member of the Access to Justice Working Group, noted that the Working Group had discussed the various proposals and options for reform set out in several papers prepared by the Clerk (C 40 of 2019). The Judge noted that the papers raised issues at two levels. The first, the more "philosophical" level, involved wide-reaching questions as to what our system of civil justice sets out to achieve, the cultural assumptions underpinning our current civil procedure framework, and the comparative benefits and failings of adversarial and inquisitorial systems of justice. The second, more "concrete", level involved addressing the failings of our current system and the possibilities for reform within that system that arise from the New Zealand and overseas experience.

Justice Venning noted that there is no widespread support for a move to an inquisitorial system, and it would be beyond the Committee's competence. Considerable resourcing implications would arise with such a proposal requiring drastically increased numbers of judges and material changes to the way judges are appointed and educated. However, we do already operate in a "hybrid" inquisitorial/adversarial system as a product of 25 years of promoting more active case management. This means parties are no longer as in control of the presentation of their cases as they once were; at-least at the pre-hearing stage. However, this ends at the hearing stage, and there is a certain resultant "awkwardness" as a result. Further reforms addressing this "awkwardness" within the present hybrid system, drawing from initiatives overseas and aspects of procedure in civilian jurisdictions, are appropriate areas to explore.

There is no "one size fits all" or "silver bullet" approach for all proceedings but there is an important need to ensure that the procedure applicable to each proceeding is proportionate to the amount in dispute and the complexity of the dispute.

Justice Venning noted that there is a need for innovative thought as to how to make greater use of more active management of the conduct of litigation and hearings to ensure proportionality. This poses a challenge to both judges and lawyers to change the way in which they work; it is vitally important to encourage cultural change together with rules reform. To advance these goals, the Judge suggested that a pilot scheme should be launched in the District Court, the terms of which should be determined by further discussions in the Committee and Working Group, to provide a greater evidence base from

which to promote wide-reaching rules reforms to be adopted in both the High Court and the District Court.

Justice Cooke spoke to his paper regarding Sir Graham Panckhurst's short form approach to Christchurch earthquake claim determination (C 36 of 2019), which has so far been employed to resolve 24 claims; each of which would have been considered a substantial High Court proceeding. The approach involves a high degree of involvement by the adjudicator in aiding the parties to identify the issues and limit the scope of the dispute at an initial settlement stage. If a settlement cannot be achieved through this facilitated mediation, a short form adjudication process, without appeal rights, applies and the adjudicator provides a short set of reasons for his decision. The model has been successful and could readily be introduced as an optional procedure in the Courts. However, if it was to be introduced as a mandatory process for certain claims, appeal rights would need to be addressed. The Chief Justice expressed strong reservations regarding the introduction of a by agreement only process without rights of appeal, noting that any optional process will likely not, if the problem is indeed cultural, be embraced by the profession.

Ms Davenport QC summarised a proposal by a NZBA working group, chaired by Clive Elliott QC, for a short causes procedure for the High Court modelled on the system operating in some English business and property courts (C 39 of 2019). She described this as an "amplification" of the above proposal. A 12-month pilot in the Auckland registry of the High Court is proposed on an opt-in basis, underpinned by a single rule change authorising the establishment of pilots by way of practice notes. The proposed scheme would involve a single Judge (in a system of quasi-docketing) rapidly taking a case through the pleadings stage, discovery, interlocutories, and a strictly time-limited hearing; exercising significant control over the parties' presentation of their cases and enforcing restrictions on the number of interlocutory applications. The scheme would not apply to certain sorts of proceedings, such as those involving allegations of fraud.

Justice Cooke noted that historic materials located by the Clerk indicate that the profession has previously been resistant to procedural reform. Ms Davenport responded that the proposals indicate that the NZBA has taken the importance of promoting access to justice on board and is prepared to adopt a leadership role in this area.

Responding to the above summaries, and the Committee's other papers, the Attorney said that he was pleased at the quality of the work being done and the amount of effort being invested by the Committee in relation to access to justice issues. Noting his recent attendance at the NZBA's conference in Queenstown, he relayed his impression that many members of the profession do not enjoy the current approach to litigation practice, noting that many said it was 'sucking the joy' out of legal practice. He understood that practitioners do not enjoy billing and practising disproportionately.

On the Committee's specific proposals and discussions, the Attorney said he thought that minor rule changes currently before the Committee, such as allowing multiple applications for summary judgment (see item 13 below) and clarifying the role of those acting on limited retainers (see item 11 below), would make small but important contributions to addressing these issues. At the wider level, the Attorney noted the important relationship between the concept of proportionality and the idea of ensuring natural justice is done in litigation, as noted in the Clerk's papers. Doing justice in an adversarial framework, and achieving natural justice, does not require a disproportionate approach to

litigation. The Attorney agreed with Justice Venning's comment that we already have a "hybrid" system in New Zealand, and that we do not need to change the fundamentals of how we do civil justice to promote access to justice. The present challenge, he said, is to 'have a crack' at fixing the present system.

Available data suggests that there is very little civil work being done in the District Court at present, and accordingly there is nothing to lose in trialling new ways of doing civil justice in that court. This data, provided by Judge Kellar, suggests that there are 9500 civil proceedings presently before the District Court, of which 666 are defended. The District Court has proportionately 2.5 times as many applications for summary judgment as the High Court, the majority of which are debt collection proceedings. Only 8 per cent of the District Court's civil caseload is defended proceedings. Including undefended proceedings (which significantly distorts the figure), 70 per cent of District Court civil proceedings are resolved within one year. The Attorney noted that, per capita, this amounts to only one defended civil proceeding in a city the size of Dunedin each month.

The Attorney suggested that one initiative that may be beneficial in addressing these concerns might be allowing cases to be adjourned part-heard more easily. The present requirement for a plaintiff to completely present their case during trial makes a risk-adverse approach to litigation necessary, promoting disproportionate levels of preparation. One approach could be for many matters to be allocated between 30 and 90 minutes in sequence each day, with such progress as possible being made before an assessment as to future hearing time and case preparation requirements is made at the end of the hearing. Justice Dobson and Judge Kellar noted that for any such initiative to succeed, and most of the initiatives being considered by the Committee, additional judicial resourcing would be required. Greater judicial involvement would also be required in the management of parties' presentation and preparation of their cases, and judges would need to have sufficient time to be acquainted with the details of their files. The Chief Justice noted the potential for making greater use of Community Magistrates, many of whom are now legally trained, in the District Court.

The Chief Justice noted that the District Court Rules allow for several different approaches to be used. Judge Kellar noted that the disproportionality issue is one most acutely felt in the District Court, where the full 'belt and braces' approach to litigation is inappropriate in many cases. He noted a comment in the papers that a person cannot afford to go to Court, with a lawyer charging $500 an hour, where they earn $500 a week. The Attorney commented that if it is uneconomic to go to the District Court if less than $100,000 is in dispute, then it is unsurprising the District Court feels this problem acutely.

Judge Kellar said that the District Court Rules do provide the potential for overcoming much of this, requiring parties to give thought as to proportionality, and offering alternative models of procedure – such as the short form trial procedure already in place – if the parties commit themselves to adopting the most proportionate approach. The decision as to what track proceedings should use is made at case management conferences and judicial settlement conferences. These forms of expedited procedure are not used as widely as they could be; a product both of judges not having the time to properly assess the question of proportionality, and lawyers' shortcomings in that respect. Judge Kellar suggested many problems identified could be resolved by using the existing rules properly. Justice Venning concurred with this.

The Attorney suggested that, if there is an issue with the use of these existing procedures, it would be worth exploring whether District Court Judges should be given a quota. This could, for example, require 50 per cent of all defended trials to be set down under the short form procedure from the outset. The Judges would determine how to achieve this figure.

The Chief Justice observed that rules reform is an important aspect of addressing this "cultural challenge". Changes can be made to procedures such as discovery, so that there is a change in understanding as to the 'default' position. Adopting a "presumptive" approach that is less expensive and time-consuming than the current default approach avoids a perception on the part of lawyers and their clients that they are getting rough or more limited justice by adopting a more expedited form of procedure. An attitude should be encouraged that more burdensome orders will be made only where doing so is proportionate to the complexity of the dispute and the amount in issue.

Mr McHerron questioned the Attorney as to whether the government is planning to undertake any reforms in, say, the tribunals space, so that the Committee could ensure its proposals complement any such reforms. The Attorney indicated that he was not aware of any proposals for reform. More generally, the Attorney expressed scepticism as to the efficacy of institutional reform as a means of addressing this problem. He suggested that what is essential is instead changing the culture under which institutions operate.

The Attorney-General and Ms O'Byrne left the meeting at 10:35.

Mr Chhana, expanding on the Attorney's comments, noted the government perspective that significant structural changes, such as the major reforms introducing an integrated tribunal structure as were proposed by the Law Commission in the early 2000s, do not tend to offer value for money. While more limited reforms, such as the recent extension of the Disputes Tribunal's jurisdiction, are necessary to ensure the coherence of the court system as the value of money changes over time, they do not solve the problem. An aspect of this is the fact that the tribunals are best suited to some types of work, and it is appropriate for the District Court to remain the forum of choice for low-value disputes involving difficult questions of law and fact. The Chief Justice noted that the result of this is that there is a significant lacuna for claims of a low value ill-suited to being disposed of by the tribunals, and for all claims valued at between $50,000 and, say, $100,000 that are within the District Court's jurisdiction but are uneconomic to prosecute in that forum. There is a need for a coherent and integrated courts and tribunal system to avoid such lacunae.

The Chief Justice referred the Committee to an article by Mr Frederick Wilmot-Smith, a Fellow of All Souls College, Oxford, and London barrister, that was published in the 26 September 2019 *London Review of Books*. The Chief Justice noted the English experience of moving towards greater use of 'eJustice' in recent years, largely funded by the sale of courthouses, has involved both significant technical challenges and wider constitutional concerns about the "performative" aspect of justice; that is, the importance that justice be done and be seen, by members of the community, to be done in courthouses as the focus of the justice system. It is important that people recognise and feel confident that they have rights they can enforce; upholding the rule of law. Any perception that justice is unobtainable, and a sense that justice is not able to be seen to be done, is inimical to these values. Access to justice reforms, going beyond the Rules Committee and across judicial governance, need to ensure that members of the community feel they can go to court. Suggestions include having civil duty

solicitors available and housing community law centres inside courthouses. Judge Kellar, together with the Chief Justice, said that this would need to coincide with government-led initiatives such as increasing access to civil legal aid. Mr Chhana noted the importance, also, of ensuring people are educated as to their rights. Ms Davenport QC and the Chief Justice noted the prospects for more guides and resources on the Courts website and directing people towards the resources that are available.

Justice Dobson widened the discussion to include other papers before the Committee regarding simplification of discovery obligations (C 41 of 2019) and limiting or eliminating the use of written briefs of evidence (CC 37, 37A, and 37B of 2019). He noted the importance of addressing these aspects of litigation as a major impediment to ensuring proportionality in procedural obligations. An example of this is Western Australia's deferring discovery until after written briefs or, more commonly, "will-say" statements are exchanged. Trial by ambush must be avoided, and there needs to be recognition that there is no one size fits all approach capable of resolving all proportionately issues.

Mr Beck noted the importance of ensuring compliance with obligations for early disclosure of relevant documents, which is connected to effectively identifying the issues in dispute and, consequently, potentially constraining the procedural steps necessary to fairly dispose of the dispute. Justice Dobson noted that there is a need to ensure the "presumptive" approach in the early and comprehensive disclosure of all relevant documents and integrating that with changes to discovery obligations to reduce the need for discovery.

A diversity of views was expressed on the issue of briefs of evidence. Practitioner-members expressed concerns that eliminating briefs of evidence would increase the length and costliness of hearings. On the other hand, where cases turn largely on documentary evidence, this issue could be avoided by removing the presumption of oral evidence in favour of evidence being given by way of affidavit where there is no dispute as to credibility and no material clash on the documentary evidence. This could apply in many types of commercial disputes. Such a change was said to be desirable given the increasing recognition in the academic literature of the reduced usefulness of oral evidence in getting to the truth. On this approach, the role of oral evidence, and the related role of either witness briefs or will-say statements, could be much narrower than at present.

Having put all these papers before the Committee, Justice Dobson invited members to consider how best to proceed in evaluating which approach to adopt. The Chief Justice noted the success of Committee members going on a roadshow to consult with the profession and draw attention to potential procedural reforms. Justice Dobson noted that this was an important part of encouraging cultural change. Mr Chhana said that, from a Ministry perspective, support can be made available for implementing any significant reforms. A roadshow-type process would be useful also in talking to Ministry staff, particularly in court registries, and enlisting them as "local champions" of pro-proportionality reforms. Ms Davenport QC supported roadshows as part of a wider 'public relations' campaign promoting the values and need for cultural change in the profession. The Chief Justice and Mr Chhana noted that, given the need for broader outreach to the community by the Courts, any such consultation will also need to be pitched to sectors of society other than the profession, such as litigants and those who deal with the socio-economically vulnerable, such as community law centres, budgeting services, and city missions. A significant part of the consultation will also have to include an understanding of the lived experiences of both practitioners and these other important stakeholders, to ensure that the perceived inaccessibility of justice is confronted.

Judge Kellar, Justice Cooke and Mr Beck noted that the proposals before the Committee related to expedited forms of procedure do address these objectives. Justice Venning suggested the idea of starting all proceedings with an application for summary judgment. Justices Venning and Cooke noted that this procedure, while obviously unlikely to result in summary judgment being issued in most cases, may prove an effective means of triaging claims, resulting in the clear distillation of the issues and real points of difference between the parties, the identification of further discovery and evidence required, and the parties receiving an initial sense of judicial reactions to their cases, perhaps encouraging settlement. The Chief Justice, while acknowledging these potential practical benefits, expressed concern about the artificial use of the summary judgment procedure and, in general, an aversion to using procedures in an artificial manner in this way. Justices Cooke and Dobson noted that the Sir Graham Panckhurst model would achieve several similar beneficial outcomes without introducing that element of artificiality.

Drawing together the strands of the discussion, Justice Cooke identified two major areas of concern. First, the lack of commitment to proportionality in the use of the present rules causing the costs of litigation to be disproportionate; and, secondly, a consequential perception on the part of many in the community that they are not able to obtain access to justice. These are related concerns that need to be addressed simultaneously for reform to be effective.

The Chief Justice expressed a concern that the momentum behind the reform initiative may be lost if too many options are put forward for consultation, but also accepted the need to pursue all of the above strands at once and ensure that any consultation encompasses a better understanding of the perceptions of the civil justice system's failings. The Chief Justice suggested that the Committee initially distil four potential models to serve as the basis of consultation, the overall objective of which is to promote access to civil justice by reducing the costs to a level proportionate to the value and complexity of each claim while ensuring that justice is done.

Conclusions Reached and Action Points Agreed

Before the next meeting of the Committee, the Clerk is to distil four proposals for discussion by the Access to Justice Working Group, which is to be expanded to include Justice Cooke (who agreed to support the Clerk in this process). The Working Group will discuss these proposals, and offer further contributions and modifications, before the Committee's next meeting. Mr McHerron will, as part of these discussions, undertake very preliminary initial discussions with members of the profession. Subject to further discussion as the Committee's next meeting, these proposals will then form the basis of future consultation with the profession. Means and materials for consultation with other relevant stakeholders in the community are to be addressed later. The four proposals are to address:

- *the introduction of short form trial processes,* involving the introduction/alteration of the short form trial process in the District Court and the High Court involving:
    - alterations to the District Court short trial process as suggested by Judge Keller; and/or
    - the introduction of a short trial process in the High Court (such as, for example, one drawing on the features of that suggested by the NZBA);
- *the introduction of Panckhurst/Kós-type inquisitorial based determination procedures,* involving the four-stage process as outlined by Justice Cooke, including:
    - a process to be applied by agreement with no rights of appeal; and

    - a process to be applied without agreement with rights of appeal;
- *the introduction of a requirement for all proceedings to commence by way of application for summary judgment or equivalent application,* as suggested by Justice Venning; and
- *streamlining current trial processes* by implementing rule changes intended to reduce the complexity and length of civil proceedings, including by:
    - replacing briefs of evidence with "will say" statements;
    - providing, presumptively, for evidence to be given by way of submission of documents (rather than witnesses describing those documents);
    - changing rules about discovery to impose less costly obligations (including initial disclosure of crucial documents, and tailored discovery obligations after exchange of briefs/will say statements); and
    - rules requiring shorter hearings featuring greater judicial direction of proceedings.

Item 2(f): Hearing Fees Levels

Discussion

Justice Dobson noted that the Committee had received a letter from the Auckland District Law Society expressing concern at the impact of current hearing fee levels on access to justice (C 38 of 2019). The Judge noted that the setting of hearing fees levels is a matter for the Ministry of Justice, not the Committee, and the Committee has no jurisdiction to consider these matters. It was agreed that the matter should be referred to the Ministry of Justice's newly established Access to Justice Committee.

Conclusions Reached and Action Points Agreed

Justice Dobson to reply to the Auckland District Law Society acknowledging their correspondence and explaining that it has been referred to the Secretary of Justice. The Judge will copy Mr Chhana in to the correspondence.

To accommodate the attendance of Ms Jo Dinsdale, an advisor at the Ministry of Justice involved in the policy work attendant on the enactment of the Contempt of Court Act 2019, Justice Dobson proposed, and the Committee agreed, to next consider agenda item 4.

4. Contempt of Court Act 2019

Discussion

Mr Chhana referred the Committee to the Minister of Justice's letter inviting the Committee to consider rule changes to reflect the Contempt of Court Act 2019 (C 48A of 2019) and the Ministry's analysis of the necessary rules changes (C 48 of 2019). Mr Chhana explained that the Act would take effect, unless an Order-in-Council effecting a sooner commencement was made, on 27 August 2020, and that the relevant rules of court need to be made within that period. The Ministry of Justice had provided the Committee with a first draft of amendment rules to help expedite the rules making process. Ms Dinsdale explained the intention to keep the required changes to a minimum while addressing changes to the statutory provisions governing the courts' powers to address contempt. The Ministry's suggested approach is to closely follow the scheme of the Act and mainly rely on the use of cross-references to the relevant statutory provisions, rather than by making substantive amendments to the rules of court.

The Committee generally agreed that most of the recommended amendments are appropriate and reflect this approach. A noted exception was the proposed introduction of new forms into the High Court Rules (and potentially the Court of Appeal and Supreme Court Rules) for committal warrants and orders for fines and community work. Some members of the Committee considered that there is no need for these forms, which have been used in the District Court but not in the High Court previously. Others considered that because the relevant orders involve impositions on individuals' liberty and other quasi-criminal sanctions, it is appropriate to have a clear and consistent form in which those orders are made. The introduction of relevant forms into the rules would serve to achieve these objectives.

Ms Leonard suggested that the Committee ought more fully to consider this question, and (reflecting comments by other members) ensure that the rules are compatible with all other relevant aspects of procedure and statutory provisions before concurring in these rules being made (including the Criminal Procedure Act 2011 and the Criminal Procedure Rules, which have a tangential relationship to the Contempt of Court Act 2019). However, PCO should begin drafting amendment rules along the lines established by the Ministry's draft rules to advance progress in this area. The Committee agreed to this suggestion and resolved to reconsider the substantive question noted above when considering the PCO draft at the Committee's next meeting.

Conclusions Reached and Action Points Agreed

- PCO to draft amendment rules of court implementing the Contempt of Court Act 2019 based on the draft rules provided by the Ministry of Justice in C 48 of 2019.
- The Committee to assess the PCO draft rules and resolve whether to include forms providing for committal warrants and orders for fines and community work, at its next meeting.

The Committee thanked Ms Dinsdale for her attendance and she left the meeting at 12:05 pm.

3. Costs for Litigants-in-Person

Discussion

Justice Dobson referred the Committee to a paper that he and the Clerk had prepared setting out options for reforming the law regarding costs for litigants-in-person and establishing the Committee's jurisdiction to do so (C 42 of 2019). The Judge noted that the High Court of Australia had recently abrogated the *Chorley* exception in that jurisdiction, but that there were important differences in the relevant statutory and procedural schema meaning that a different answer may possibly be appropriate in New Zealand. The options for reform identified by the Committee based on the Clerk's paper are to (in increasing order of radicalism):

- maintain the status quo position following *McGuire* (which approach the Committee had rejected at its last meeting);
- abolish the self-represented lawyer (*Chorley*) exception but maintain the in-house counsel exception;
- allow lawyers-in-person and in-house counsel to apply for scale costs on a reduced basis only;
- abolish all exceptions to the "primary rule" in *McGuire*;
- allow all parties representing themselves to apply for scale costs on an arbitrarily reduced basis;
- allow all parties representing themselves to apply for scale costs on a reduced basis, having regard to the actual conduct of the litigation (the position in Canada), which approach found

little favour with the Committee given the likely access to justice implications of having to assess the efficiency of the parties' behaviour in each case;

- allow all parties to receive indemnity costs for the opportunity cost associated with preparing and presenting their case (the position in England).

The Chief Justice noted that the starting point must be that the present position at is invidious, raising a concern as to the equality of lawyer and non-lawyer lay-litigants. The Committee agreed that the position of self-represented lawyers and other parties appearing in person ought to be the same.

However, there was a greater diversity of views expressed as to the position of in-house counsel. Many members of the Committee accepted that the comparative lack of independence of in-house counsel, despite the commitment by most of these practitioners to ethical practice, called into question the appropriateness of affording their clients (who are essentially self-represented) special treatment under the costs regime. This would be consistent with an overall policy objective of promoting independence. However, the Committee accepted Mr McHerron's observation that the party primarily affected by these changes would be the Crown, with there being some ambiguity as to whether Crown Law solicitors appearing for the Solicitor-General on behalf of government departments would be affected. Inland Revenue would also be substantially affected by any change to the position of in-house counsel.

Conclusions Reached and Action Points Agreed

Clerk to prepare a draft consultation paper identifying four viable options for rules reform (namely the second, fourth, fifth, and seventh options listed above) for approval at the next meeting of the Committee, and circulation to the profession for consultation; subject also to pre-publication consultation with the Solicitor-General.

5. High Court Rules Amendments Related to the Seizure and Sale of Personal Property

Mr Chhana referred the Committee to C 49 of 2019, which contained proposals from the Ministry of Justice for implementing the Personal Property Securities Amendment Act 2011, which had previously been presented to the Committee for adoption but not implemented due to an apparent vires issue. He advised that issue had been cured by amendments to the Committee's rule-making power introduced as part of the Senior Courts Act 2016. Accordingly, the Committee was requested to instruct PCO to include the draft rules changes recommended in C 49 of 2019 in the next amendment of the High Court Rules 2016.

PCO to implement drafting instructions suggested by the Ministry of Justice in C 49 of 2019 into the draft High Court Amendment (No 2) Rules 2019.

6. Court of Appeal (Civil) Amendment Rules 2018

Discussion

Mr Chhana referred the Committee to CC 50 and 50A of 2019, which relate to a letter from the Regulations Review Committee of the House of Representatives to the Ministry of Justice noting the incorporation by reference of the Senior Courts Electronic Document Protocol into the Court of Appeal (Civil) Rules by the Court of Appeal (Civil) Amendment Rules 2018. This raises two concerns. The first is an apparent failure to gazette the protocol, which is of limited practical consequence to the efficacy of the Rules (due to a savings provision in the Legislation Act 2012). The second, more importantly, is that, under the terms of the Legislation Act 2012, each time the protocol is amended the rule incorporating the protocol by reference must also be amended.

Ms Leonard advised that these requirements of the Legislation Act 2012 are intended to avoid accessibility issues that otherwise arise if documents referred to by reference in regulations are not gazetted, and if new amendment rules are not implemented each time the incorporated document is amended (so as to avoid confusion around dating).

Mr Chhana asked the Committee to consider whether it would prefer to either:

- replace the protocol with a practice note, with an amendment rule requiring parties filing documents to have regard to that practice note, based on the example of the repealed former r 12A of the Court of Appeal (Civil) Rules 2005 which is not, the Ministry advised "incorporation by reference"; or
- continue with the protocol in its present form, making the required updated amendments to r 10A of the Court of Appeal (Civil) Rules 2005 each time the protocol is amended to incorporate by reference each updated protocol.

Conclusions Reached and Action Points Agreed

- A majority of the Committee, having considered the Ministry of Justice's advice, preferred the former option noted above, and instructed the PCO to draft rules amendments according to the terms of option (b) as set out in [14] of the memorandum contained in C 50 of 2019.
- Mr McHerron expressed reservations as to this approach, not accepting the analysis offered by the Ministry of Justice insofar as he thought the first approach set out above still incorporated the protocol into the Court of Appeal (Civil) Rules 2005 by reference. He preferred that the protocol be incorporated into the Rules, or that reference to the protocol be deleted altogether. He also noted that there are consultation obligations attendant on the incorporation of documents by reference, which he did not consider the Committee's processes fulfilled.
- Mr Chhana to ensure that the Ministry of Justice writes to the Regulations Review Committee of the House of representatives, advising them of the Committee's decision.

7. Consequential Amendments to the District Court Rules 2014

Mr Chhana referred the Committee to C 53 of 2019, a document presented to update the Committee as to the Ministry's progress in identifying amendments required to the District Court Rules 2014 to replace outdated references to the District Courts Act 1974 with references to the District Court Act 2016. The Committee noted the paper and thanked the Ministry for its assistance with this item. Judge

Kellar, Judge Gibson and Mr Beck remain available to assist the Ministry with resolving questions around several amendments; especially those identified by the Ministry as involving amendments other than the simple substitution of one cross-reference for another.

8. Process for Submitting Amendment Rules to the Executive Council

Mr Chhana referred the Committee to C 54 of 2019, a document presented to update the Committee as to the Ministry's processes for submitting amendment rules to the Executive Council after concurrence by the Committee. The simplified process reflected concerns expressed by the Committee at the overly elaborate nature of the process last presented to the Committee.

The Committee noted the paper, expressing some disappointment that the Committee has not been able to secure a blanket exception from Treasury's regulatory impact assessment requirements given the sui generis status of the Committee and its output. However, the Committee considered it positive that, based on C 54 of 2019, Treasury appears to have accepted that the Committee's pre-concurrence processes are equivalent to the completion of a regulatory impact assessment. The process noted in the present circular was considered, generally, more appropriate to the Committee and its work than that last referred to the Committee for noting.

9. Electronic Filing in the High Court

Justice Dobson referred the Committee to C 43 of 2019, a paper by the Clerk identifying various rules amendments designed to allow memoranda and submissions not attracting a filing fee to be accepted for filing electronically in the High Court.

The Committee reiterated its in principle support for allowing electronic filing to the greatest extent possible. This support is subject to the importance of addressing, in advance of implementation, any amendments that have certain practical implications. These included the points referred to at the previous meeting. An example is whether a central filing email should be used at each registry, or whether each individual case officer's email should be used as the filing address for each individual proceeding. At a more technical level, the Committee noted the importance, given present practical limitations, of ensuring that any amendments to the general filing rules do not inadvertently suggest that common bundles are able to be filed electronically except in accordance with the relevant protocol.

To address the Committee's concerns, it was agreed that Justice Venning will ensure that a summary of the proposed amendments (to be prepared by the Clerk) is provided to Auckland, Wellington, and Christchurch High Court managers and will report back on their suggestions and any concerns. Given that these reforms are not urgent, it was considered prudent to await the Court Managers' feedback before taking further steps.

10. Potentially Outdated Cross-Reference in r 19.2(l) of the High Court Rules 2016

Item tabled for consideration at the next meeting of the Committee.

11. Reforms Facilitating the Flexible Provision of Legal Services

Mr McHerron referred the Committee to C 46 of 2019, in which he identified a potential amendment to the High Court Rules to provide reassurance to solicitors acting under a limited retainer that they will not be required to take on obligations for a whole file if they act in relation to a potential part of a proceeding. This would confirm assurances already offered by Justice Venning to the profession.

The Chief Justice noted that Mr McHerron's proposed r 5.40(1A), as set out in C 46 of 2019, may (undesirably) suggest that there is no need to provide a notice of change of representation if there is a solicitor on the record and the party then proceeds to act in person. She suggested, and the Committee agreed, that the proposed r 5.40(1A) should be reworded to avoid that interpretation, such as by referring to "a party who has acted in person without a solicitor on the record".

PCO instructed to incorporate Mr McHerron's suggested amendments into the High Court Amendment (No 2) Rules 2019, subject to alterations addressing the Chief Justice's concern. Also, to change the way the examples given in Mr McHerron's proposed rules are given to conform to the PCO's ordinary means of giving examples.

12. Apparent Anomaly in r 14.12(1) of the High Court Rules 2016

Justice Dobson referred the Committee to C 45 of 2019, a memorandum by the Clerk demonstrating that the authors of *McGechan* are correct in saying that the definition of "relevant issue" appears in r 14.12(1) (but not in r 14.12), to allow a Court to refuse to award disbursements to a successful party who does not prevail on the issue in respect of which those disbursements were incurred.

The Committee resolved that the definition of "relevant issue" should be deleted from r 14.12(1) of the High Court Rules 2016 and instructed PCO accordingly. Jurisdiction to refuse disbursements incurred in respect of issues on which a party did not succeed does not flow clearly from the insertion of a definition not corresponding to the contents of a rule. In practice, the jurisdiction is unlikely to be utilised often (as disbursements are rarely incurred only in respect of a single item) and would not warrant amendments being made to the rule to clarify the power.

13. Second Applications for Summary Judgment

Ms O'Gorman and Ms Leonard advised that no process has been identified to amend the rules, to address the concerns noted at the previous meeting, which does not introduce ambiguities into the rules. Ms Leonard explained this as being a consequence of the approach in the Interpretation Act 1999 to treating the singular as inclusive of the plural and vice versa.

Given the Attorney's positive reference to this rule, the Committee resolved that the PCO should continue working on this matter to find a way to allow multiple applications for summary judgment to be brought without introducing additional ambiguities.

14. Timetabling Provisions Relating to Opposed Interlocutory Applications

Ms O'Gorman referred the Committee to C 47 of 2019, which sets out proposed amendments to the default timetabling provisions for opposed interlocutory applications in the High Court Rules 2016. The PCO was instructed to incorporate these suggested amendments into the High Court Amendment (No 2) Rules 2019. This is subject to one correction addressing the Chief Justice's concern that r 7.24(1)

should less ambiguously state that a respondent who intends to oppose an application must file and serve their notice of opposition before the end of the tenth working day after they are served with the application AND no less than three working days in advance of the date of the hearing.

15. Representative Proceedings

Justice Dobson noted the decision of Goddard J in the Court of Appeal in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431. He agreed that the effect of the decision is to substantially alter previous practice in managing representative proceedings by suggesting a presumption in favour of representation orders being made on an opt-out basis. Given that the Committee's objective in drafting the High Court Amendment (Representative Proceedings) Rules 2019 was to reflect current practice, not amend it, and also that the draft rules proceeded (if only implicitly) on the assumption that representation orders will ordinarily be made on an opt-in basis, the Committee agreed that it is necessary to pause and reconsider the contents of the amendment rules. The Committee further agreed that it is prudent to await any appeal by Southern Response to the Supreme Court.

Accordingly, it was resolved that:

- the PCO should suspend any work related to the High Court Amendment (Representative Proceedings) Rules 2019 pending further instructions; and
- the Clerk is to prepare a memorandum for noting by the Committee at its next meeting more fully analysing the decision in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431;
- the Committee will re-evaluate the contents of the draft High Court Amendment (Representative Proceedings) Rules 2019 at its next meeting if no appeal has been filed by then; and
- if a notice of appeal is lodged with the Supreme Court, and leave to appeal granted, the Committee will evaluate whether to await the substantive decision of the Supreme Court before amending the contents of the draft High Court Amendment (Representative Proceedings) Rules 2019.

16. Evidence-Based Approaches to Rules-Making

Discussion

The Chief Justice referred the Committee to C 52 of 2019, which contains a letter received by the Chief Justice from Dr Bridgette Toy-Cronin of the Otago Legal Issues Centre highlighting the desirability of the Committee taking steps to provide itself with a better evidential foundation in enacting future rules reform. The suggestion is that a standing subcommittee of the Committee be established with responsibility for assessing the performance of the Committee's rules reform initiatives over time.

The Committee, with the support of the Ministry of Justice, thought it most effective to go further and incorporate steps consistent with adopting a more evidence-based approach to rule-making into the Committee's business processes. An aspect of this will be, with Ministry of Justice support, identifying appropriate metrics as part of substantive (as opposed to minor and technical) rules reform initiatives by which the success or failure of those initiatives can be assessed. The Ministry will assist the Committee in taking a measurement of the value of those metrics at the time a rules reform proposal is implemented, to provide a "base state" against which changes in the value of those metrics, and thus the success or otherwise of the reform, can be evaluated over time. The identification of the appropriate metrics, the appropriate means of measurement, and the success/failure threshold, will be identified and discussed as part of the Committee's pre-concurrence drafting and consultation

procedures. Judge Kellar noted that incorporating this approach into the Committee's work on access to justice, as discussed in relation to item 2 above, would be desirable.

Mr Chhana noted that the Ministry may need to invest additional capacity into capturing and measuring more data related to civil proceedings to support this new approach to rule-making. The Ministry presently collects relatively little data on civil proceedings compared to criminal and family proceedings. This is important to addressing a concern, noted by Justice Venning, that the data measured and relied on needs to be accurate for this initiative to add value.

Conclusions Reached and Action Points Agreed

- The Committee, with Ministry of Justice support, agreed in principle to implement evidence-based approaches to rules-making by incorporating a metrics-based approach to assessing the success or failure of the Committee's initiatives into the Committee's business work processes, especially in relation to the Committee's pre-concurrence drafting and consultation procedures.
- Justice Dobson, as Chair, to invite Dr Bridgette Toy-Cronin to the Committee's next meeting to advise the Committee on how this evidence-based approach to rules-making might most effectively be implemented.

The meeting closed at 1:35 pm.

The next meeting of the Committee will begin at 10:00 am in the Conference Room at the Supreme Court Complex, Wellington, on Monday 25 November 2019.