



The Rules Committee  
Te Komiti Mō Ngā Tikanga Kooti

# A New Approach to Costs for Self- Represented Litigants

Advice to the Rules Committee  
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## 0. Introduction and Overview

- 0.1. At present in New Zealand, self-represented litigants are not entitled to receive an award of costs. However, lawyers representing themselves who currently hold practicing certificates, and corporate parties that are technically self-represented because they are being represented by in-house (employed) lawyers can obtain an award of costs.
- 0.2. In 2018, all members of the Supreme Court in *McGuire v Secretary for Justice* noted or made criticisms of the present position;<sup>1</sup> particularly the “invidious” lawyer-in-person exception.<sup>2</sup> The majority, while maintaining the status quo, encouraged this Committee to consider reform of the law in this area.<sup>3</sup>

### Background

- 0.3. Responding to this challenge, in 2020 the Rules Committee sought comment on potential amendments to pts 14 of the High Court Rules 2016 and the District Court Rules 2014. The Committee indicated it might resolve to abolish the “primary rule” preventing litigants-in-person who successfully bring or defend a claim from obtaining an award of costs, and a new mechanism for awarding costs to litigants in person instituted.<sup>4</sup> Alternatively, it was indicated, if the Committee resolved to maintain the “primary rule”, either or both of the exceptions noted above could be abrogated. Comment was sought from members of the legal profession, organisations that regularly use employed counsel to represent their organisation in court, and other court users.
- 0.4. Submissions closed on 30 October 2020.<sup>5</sup> Fifteen submissions were received. Submitters included the New Zealand Law Society, New Zealand Bar Association, Auckland District Law Society, other members of the legal profession, government departments, academics, and members of the wider community.

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<sup>1</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335, noted (2019) 25 Auckland U L Rev 263.

<sup>2</sup> Per William Young J, writing for the majority, at [82]-[84]. Ellen France J (dissenting) described the exception as “indefensible” and “irrational” at [91]. The lawyer-in-person exception was recently abrogated in Australia: *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555.

<sup>3</sup> At [88]. The Court noted the Rules Committee’s previous consideration of reform in this area in 2001-2002, on which occasion the Committee determined that reform ought to be accomplished by means of primary legislation: see at [86]. For the reasons addressed in this paper, particularly in the fourth section, I suggest that the Committee should no longer maintain that view.

<sup>4</sup> Rules Committee *Consultation Paper – Costs for Litigants-in-Person* (Office of the Chief Justice, Wellington, 5 May 2020).

<sup>5</sup> The initial 2 September 2020 deadline was extended to account for the disruption associated with the outbreak of COVID-19, following requests for such an extension.

- 0.5. The Committee reviewed the submissions received at its meeting of 30 November 2020, arriving at an initial treatment of some of the relevant issues.<sup>6</sup> During its discussions, the Committee noted that there was an even split of views among submitters to whether the primary rule precluding the award of costs to lay litigants should be abrogated, but almost unanimous support, assuming the rule is abrogated, for employing a modified scale approach to award lay litigants costs.
- 0.6. There was universal consensus that, if the primary rule is not abrogated, the lawyer-in-person exception should be abolished as invidious. Views were divided, however, on whether, if the primary rule is not abrogated, employed lawyers should remain eligible for an award of costs.
- 0.7. The Committee also noted that the differing views expressed as to whether the primary rule should be abrogated and which exceptions (if any) maintained stemmed, fundamentally, from differing views held by submitters as to the nature of "costs".
- 0.8. Generally, those who viewed costs as an indemnity or partial indemnity for out-of-pocket expenses paid for legal advice favoured maintaining the primary rule. Conversely, those who viewed costs as an award of an amount deemed to be reasonable for particular items of work done that was required to be done to allow a party to prevail in litigation tended to favour the abrogation of the primary rule. This tended to suggest, the Committee agreed, that any reform in this area will need to proceed from a clear recapitulation of the nature of "costs". Whether the primary rule survives will depend on which of these views prevails.
- 0.9. Given this lack of consensus, and the need to address this fundamental question as to the rationale for the costs regime, the Committee resolved to further address the question of reform at its 22 March 2021 meeting. This paper has been produced to assist the Committee in its discussions at that meeting.

### **Executive Summary**

- 0.10. In this paper, I recommend that the Committee:
  - a. clarify that costs are awarded in New Zealand to provide an award of an amount deemed by the Rules Committee to be reasonable for particular items of work done that were required to be done to allow a party to prevail in litigation, not as an indemnity or partial indemnity for out of pocket expenses.

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<sup>6</sup> See Hon Justice Francis Cooke, Chair of the Rules Committee *Minutes of the Rules Committee Meeting of 30 November 2020* (Office of the Chief Justice, Wellington, 14 December 2020).

- b. in accordance with that recapitulation for the award of costs, abolish r 14.2(1)(f) (which precludes the recovery of more money by way of a costs award than was actually expended), at least in respect of self-represented litigants.
- c. in accordance with that recapitulation for the award of costs, effect the abrogation of the “primary rule” preventing the award of costs to all self-represented litigants.
- d. introduce a new daily recovery rate for litigants-in-person, who will be able to recover at that rate according to the present scale.
- e. effect the abrogation of the lawyer-in-person exception, which class of self-represented litigants will now be treated the same as other litigants appearing on their own behalf.
- f. potentially introduce a distinction, in terms of the applicable recovery rate, between self-represented litigants who appear by way of an employed lawyer and other self-represented litigants.

0.11. Below, I also set out my assistance of why it is appropriate for the Committee to take the initiative in making these reforms rather than awaiting a legislative response. This, in summary, is that reform in this area is necessary, is not likely to result from legislative action in the near future, and effecting such reform is within the Committee’s competence and legislative remit.

0.12. In summary, these recommendations aim at promoting the costs regime’s conforming with the fundamental principle of equality before the law, as a manifestation of the rule of law. In this context, that requires each self-represented litigant to be treated the same as every other self-represented litigant, and all represented litigants in terms of the availability and measure of an award of costs, absent some justification for treating these groups differently.

0.13. Equally, I have identified forcible policy arguments for distinguishing between represented and self-represented litigants. These relate, primarily, to the desirability of incentivising those who can possibly obtain fully independent legal representation to do so, for both their own benefit and that of the justice system.

0.14. There is also an arguable case for drawing a distinction between self-represented litigants represented by in-house counsel and other self-represented litigants, given that, where in-house counsel are involved, counsel acting in accordance with professional ethical responsibilities are present before the Court. Whether these parties should be treated on the same footing as parties represented by external counsel is, however, a more contentious issue, in respect of which it is difficult to arrive at a recommendation.

0.15. There is however, in my assessment, no principled basis for favouring lawyers-in-person over other litigants-in-person. Absent the partial indemnity conceptualisation of costs,

that exception cannot be viewed as a corollary of the basis of costs awards generally. On policy grounds, the Committee does not accept that lawyers appearing in person necessarily better assist the Court in appearing on their own behalf than do other litigants-in-person. Affording lawyers-in-person special treatment is also inconsistent with the Courts' general preference for independent counsel to appear in proceedings.

### **Structure of this Paper**

- 0.16. In the first section of this paper, I document the current state of affairs with respect to the costs regime, with a particular focus on the position of self-represented litigants, including by noting the historical development of the costs regime.
- 0.17. In the second section, I note briefly the criticisms of the existing regime with respect to self-represented litigants' costs, which have prompted this reform process. Many of these are more fully further developed in the third section, having also been advanced in the submissions received.
- 0.18. In the third section, I outline the matters on which submissions were invited, and summarise the submissions received during the consultation process.
- 0.19. In the following sections, I outline my recommendations to the Committee, drawing on these submissions, my research, and my reflections on the existing regime and the criticisms of that regime. In particular:
  - a. in the fourth section, I set out my view of why it is appropriate for the Committee to exercise leadership in this area, rather than await primary legislative reform;
  - b. in the fifth section, I suggest a recapitulation of the rationale for the existing costs regime;
  - c. in the sixth section, I apply that recapitulation of the costs regime to argue why the Committee should abolish the "primary rule" preventing the award of costs to all self-represented litigants, and outline a means of awarding costs to litigants-in-person, being a new (lower) daily recovery rate for litigants-in-person;
  - d. in the seventh section, I record my rationale for recommending that the Committee promote amendments to the rules of court which ensure that lawyers-in-person also recover at that same new lower rate; and
  - e. in the eighth section, I outline the arguments for and against treating self-represented litigants who appear by way of an employed lawyer, on the same footing as parties represented by external counsel in terms of the availability of an award of costs.

# 1. Background to the Costs Regime and Primary Rule<sup>7</sup>

## What is a costs award?

- 1.1. A costs award is an order made by a Court where a party succeeds in a proceeding (including an appeal), or in respect of any interlocutory application within that appeal, providing that the losing party must pay a sum of money to the winning party, further to any damages or other relief for which that party is adjudged liable. The Committee addresses its view of the exact nature of such an award below. Generally however, the award is intended to off-set, at least partially, the expenses the successful party has incurred in preparing and presenting their claim or defence. This stems from a proposition, which can be described as an “adjunct to the rule of law”, that a party who has had “to remove to a court of law to have [their] rights vindicate ... should not thereby be out of pocket.”<sup>8</sup> This has found evocative expression in the proposition that “the loser, and only the loser, pays”,<sup>9</sup> or, more plainly, that costs follow the event.<sup>10</sup>
- 1.2. At present, the award of costs for this purpose is widely understood as an amount awarded in respect of the costs of engaging barristers and solicitors to take the steps, such as filing proceedings, marshalling evidence, preparing submissions, and appearing in Court necessary to successfully defend or prosecute a claim.<sup>11</sup>

## The purposes and objects of the costs regime

- 1.3. Traditionally, recovery in this sense was the primary objective of the costs regime. Today however, any accurate assessment of the purposes of the regime would identify other objects.
- 1.4. This emerges, perhaps most primarily, from the measure of costs now awarded in New Zealand. Unlike other jurisdictions, in which costs are not awarded (on the ground that this is an impediment to access to justice), or in which costs are awarded on a full indemnity basis as a distinct form of civil remedy, New Zealand has long fallen into a third

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<sup>7</sup> This section draws from *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55]-[67]; Rules Committee *Consultation Paper – Costs for Litigants-in-Person* (Office of the Chief Justice, Wellington, 5 May 2020); Sebastian Hartley, Clerk to the Rules Committee *Instruction for New Judges’ Clerks – Costs* (High Court, Auckland, 12 January 2021); and Andrew Beck and others *McGechan on Procedure* (online looseleaf, Thomson Reuters) at [HR pt 14].

<sup>8</sup> See Hon Justice Fisher “The new High Court costs regime” (1999) *LawTalk* 532 at 7. *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [8] per Hammond J.

<sup>9</sup> *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].

<sup>10</sup> See High Court Rules 2016, r 14.1(a); District Court Rules 2016, r 14.1(a).

<sup>11</sup> As was taken to its logical extension by the Court of Appeal in *Joint Action Funding v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70 in adopting the ‘invoice-required’ approach under which costs are unavailable where an invoice for professional services rendered has not been tendered, as overruled by the Supreme Court in *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.



category of allowing “the successful party a respectable allowance towards [their] costs, but not [full recovery].”<sup>12</sup> This policy, and the underlying conceptualisation of the purpose of costs it relates to, finds expression in the schedules of time allocations and daily recovery rates found in the High Court Rules and District Court Rules 2016.<sup>13</sup>

- 1.5. Since 2000, the word “respectable” has taken, in practical terms, the form of an award of costs in an amount that the Rules Committee has “deemed”<sup>14</sup> reasonable in respect of a proceeding or application of a given significance and complexity. The value of this award in any given case is calculated using the schedules just referred to. This is meant, in principle, to reflect two-thirds of the amount a barrister and solicitor should reasonably require for providing the relevant legal services.<sup>15</sup> This is subject to various qualifications and the potential for uplifts and reductions in costs.<sup>16</sup>
- 1.6. It is a commonplace that the extent of recovery, in practice, is much less than two-thirds of actual expenditure.<sup>17</sup> That recovery has not necessarily kept pace with the actual costs of legal services is in fact a manifestation of the various objects of the costs regime, which as noted go beyond attempted to avoid a successful party being left out of pocket for standing on their rights. As noted, other jurisdictions – most notably the United States – identify that the potential for an adverse costs award discourages parties from seeking to prosecute and defend claims. This can be thought of as an impediment to access to justice.<sup>18</sup> The Committee is, and in designing the current costs regime was, concerned to minimise such impediments to the greatest extent possible, having regard to countervailing policy concerns and the requirements of justice.
- 1.7. Thus, as the authors of *McGechan on Procedure* note,<sup>19</sup> the New Zealand policy of allowing less than full recovery attempts to balance the objectives of promoting access to justice and avoiding the successful party enduring up seriously out of pocket in terms of its litigation costs. The design of the costs regime – including the two-thirds recovery

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<sup>12</sup> *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [8] per Hammond J. See further Rachael Schmidt McCleave “Costs” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 763 at [21.2.1].

<sup>13</sup> High Court Rules 2016, schs 2-3; District Court Rules 2014, schs 4-5.

<sup>14</sup> The significance of this word is that the focus is on what the Committee has said are reasonable costs, not what the party or parties’ actual costs were, and nor on prevailing market rates: *Mansfield Drycleaners Ltd v Quinny’s Drycleaning Ltd* (2002) 16 PRNZ 662 (CA) at [27] and High Court Rules 2016 and District Court Rules 2014, r 14.(2)(e).

<sup>15</sup> High Court Rules 2016, r 14.2(1)(d). See also *Mansfield Drycleaners Ltd v Quinny’s Drycleaning Ltd* (2002) 16 PRNZ 662 (CA) at [28]-[29].

<sup>16</sup> High Court Rules 2016, rr 14.2, 14.6, 14.7, 14.11; District Court Rules 2016, rr 14.2, 14.6, 14.7, 14.11

<sup>17</sup> *In Re Gunn* [2019] NZHC 3413 at [11] fn 9.

<sup>18</sup> See, for example, Ontario Law Reform Commission *Class Actions* (Volume III, 1982) at 704–709 and 749.

<sup>19</sup> Andrew Beck and others *McGechan on Procedure* (online looseleaf, Thomson Reuters) at [HR14.2.01(4)], referring to *Green v Police* [2019] NZHC 1019 at [15].

principle – also, as has been recognised elsewhere,<sup>20</sup> furthers other public policy objects of incentivising settlement and alternative dispute resolution, disincentivising meritless litigation, and encouraging proportionality in litigation in terms of disincentivising the needless adoption of a “Rolls Royce”<sup>21</sup> approach to litigation. All of these objects are reflected in a policy of preventing full recovery (in most cases), while allowing for a generous and realistic contribution.

- 1.8. The other cases, in which recovery does not aim at this measure, include those in which it is necessary to sanction the conduct of either the winning or losing party, given, for example, the losing party’s failure to comply with procedural requirements or adoption of a meritless position,<sup>22</sup> or the successful party has likewise been delinquent.<sup>23</sup> Reduced and uplifted costs awards are also available where it is necessary to recognise the broader public importance of the litigation,<sup>24</sup> or that some cases are of such great or limited breadth, complexity, and/or private importance that applying the usual regime would lead to excessive or inadequate recovery.<sup>25</sup>
- 1.9. It is also a precept of the costs regime that no party should profit from the conduct of litigation by reason of the availability of a cost award. Therefore, no party may receive an award of costs that exceeds their actual expenditure, even if the schedules applicable under the Rules would otherwise provide for such recovery.<sup>26</sup> Relatedly, the “costs” for which an award of costs is sought must have in fact been incurred.<sup>27</sup> These principles, as is developed below, are historically interrelated with the disabilities presently faced by self-represented litigants.
- 1.10. Finally, it is also intended that the determination of costs should be predictable and expeditious. Thus, Courts will, in awarding costs, take a robust approach to the assessment of which party won and which party lost (that is, as to construing the “event” that costs follows).<sup>28</sup> This reduces transactional costs for parties, relieves the burden on the Court system that would otherwise arise, and assists parties in making rationale and

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<sup>20</sup> Rachael Schmidt McCleave “Costs” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 763 at 767.

<sup>21</sup> Andrew Beck and others *McGechan on Procedure* (online looseleaf, Thomson Reuters) at [HR14.2.01(4)], referring to *Green v Police* [2019] NZHC 1019 at [15].

<sup>22</sup> High Court Rules 2016, r 14.6(3); District Court Rules 2014, r 14.6(3).

<sup>23</sup> High Court Rules 2016, r 14.7; District Court Rules 2014, r 14.7.

<sup>24</sup> High Court Rules 2016, r 14.6(3)(c); District Court Rules 2014, r r 14.6(3)(c).

<sup>25</sup> High Court Rules 2016, rr 14.6(3)(a) and 14.7(a)-(c); District Court Rules 2014, rr 14.6(3)(a) and 14.7(a)-(c).

<sup>26</sup> High Court Rules 2016, r 14.2(1)(f); District Court Rules 2014, r 14.2(1)(f). This principle was applied, for example, in *Taunua v Attorney-General* (2004) 8 HRNZ 53 (HC) at [45].

<sup>27</sup> High Court Rules 2016, r 14.2(1)(e); District Court Rules, r 14.2(1)(e).

<sup>28</sup> See *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].

informed assessments in calculating their litigation risk and incentive to compromise.<sup>29</sup> The Committee considers it desirable that the award of costs remains as predictable and expeditious as possible following any reform with respect to the position of lay-litigants, while observing this goal is in tension with the other goals of the costs regime,<sup>30</sup> rather than being the paramount consideration.

1.11. In summary, the principles and purposes of the costs regime are that:

- a. costs follow the event (that is, the losing party will contribute to the winning party's costs);
- b. the measure of recovery, in the ordinary case, will nominally be two-thirds of an amount deemed by the Committee to be reasonable for a proceeding or application of the type in question, whatever the successful party's actual costs, so as to provide an incentive to parties to act proportionally in litigating, and to minimise to the extent possible (having regard to the other objects of the regime) the extent to which the risk of an adverse cost award serves as a barrier to accessing justice;
- c. the award of costs should, so far as is possible, be predictable and expeditious;
- d. nonetheless, in certain circumstances, recovery of more or less than this amount may be allowed, so as to give effect to the public policy purposes of the costs regime related to sanctioning improper conduct in litigation, identifying that some litigation is of wider importance than the party's private interests, and that some cases are more or less complex or important than is assumed by the usual schedule; and
- e. recovery will not, however, be allowed to exceed a party's actual expenditure on outlays of the sort cognisable by an award of costs, as no party should be permitted to profit from the conduct of litigation.

*The current position of self-represented litigants – overview*

1.12. As noted at the outset, (the increasingly large number of)<sup>31</sup> self-represented litigants appearing before the Courts are not entitled to an award of costs,<sup>32</sup> despite the fact they

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<sup>29</sup> Andrew Beck and others *McGechan on Procedure* (online looseleaf, Thomson Reuters) at [HR14.2.01(7)]; and Rachael Schmidt McCleave "Costs" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 763 at 767.

<sup>30</sup> As the present wording of r 14.2(1)(g) apprehends in referring to this object as one to be pursued "so far as possible".

<sup>31</sup> See Justice Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016), available at <https://www.courtsofnz.govt.nz/speechpapers/HJK2.pdf>, or (2016) 5 JCivLP 178 at [21].

<sup>32</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [88].

will have to have taken the same steps as a successful represented party where they prevail in litigation. This prohibition – which has been termed the “primary rule” precluding the award of costs to lay-litigants<sup>33</sup> – is nominally able to be departed from in “exceptional circumstances”.<sup>34</sup> So far as the Committee is aware however, this has not occurred to date. Such a litigant can receive an award of “reasonable disbursements” at the discretion of the Court, which discretion the Committee understands will now generally be exercised in a successful lay-litigants’ favour, including in making orders for the payment of sums in respect of fees paid to solicitors for help in preparing their case.<sup>35</sup>

1.13. The majority of the Supreme Court in *McGuire* affirmed two exceptions to this “primary rule” precluding the award of costs to lay litigants:

- a. the “lawyer-in-person exception” (also known as the *Chorley* exception, for the Victorian English case in which it arose)<sup>36</sup> that allows a person who currently holds a practicing certificate to recover costs in respect of all steps taken by them as if represented, except those steps made unnecessary by the fact they are representing themselves;<sup>37</sup> and
- b. the employed lawyer rule, which allows self-represented litigants who appear by way of in-house counsel to recover costs as if represented by external counsel.<sup>38</sup>

### **The development and foundations of the “primary rule” and the exceptions<sup>39</sup>**

1.14. The “primary rule” has, on the traditional interpretation, been a feature of the costs regime since awards of costs first became available. However, for the reasons that follow, the Committee does not consider the existence of the “primary rule”, or any of the exceptions from it, necessarily inheres in either the nature of a costs award or as a necessary implication to be derived from the rules of court. Rather, the “primary rule” is a longstanding rule of practice that has, through repetition, developed a free-standing existence as a rule of practice and law.

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<sup>33</sup> At [55].

<sup>34</sup> At [55] fn 42, referring to *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 441-442.

<sup>35</sup> *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA). See also *Knight v Veterinary Council of New Zealand* HC Wellington CIV-2007-485-1300, 31 July 2009 at [6].

<sup>36</sup> *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (EWCA).

<sup>37</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55].

<sup>38</sup> At [55].

<sup>39</sup> The following is derived substantively from the historical sketch given at [55]-[67].

- 1.15. The availability of a costs award (at common law)<sup>40</sup> has traditionally been traced to the Statute of Gloucester 1278.<sup>41</sup> That English statute, to the extent it continued to form part of the law of England as of 14 January 1840,<sup>42</sup> was part of the law of New Zealand from that date until, at the latest, 31 December 1988.<sup>43</sup>
- 1.16. The primary rule precluding the award of costs to self-represented litigants has traditionally been treated as a consequence of the framing of that statute, in accordance with the exposition of the statute given by the prominent Elizabethan and Jacobean English jurist Coke in his influential *Second Part of the Institutes of the Laws of England*.<sup>44</sup> There, Coke says the 1278 statute made provision for a successful part to receive all “the legall cost of the suit, but not to the costs and expences of his travel and losse of time”; apparently on the basis of Coke’s interpretation of the original Latin of the statute.
- 1.17. As the Supreme Court noted in *McGuire*, Coke’s articulation of the ambits of a costs can be traced through centuries of judicial development into the present “primary rule”.<sup>45</sup>
- 1.18. Prima facie, the rule can be treated, as it was by some submitters, as an application of the “indemnity principle” that parties should not profit from litigation; a venerable rule of law which can be seen as reflecting policy concerns of floodgates and avoiding incentivising meritless litigation.<sup>46</sup> That view derives from a notion that ‘as self-represented litigants have not incurred legal fees, they would be ‘profiting’ if they could receive an award of costs.’ Logically however, that proposition depends on a definition of “costs” including only “legall” expenses of the sort identified as recoverable by Coke, to the exclusion of the other incidental and opportunity “costs” (such as “losse of time”) referred to by Coke. The better view, then, is that the “primary rule” is a corollary of the traditional understanding of the ambit of costs traceable to Coke’s exegesis of the Statute of Gloucester 1278.
- 1.19. That observation remains useful in understanding the present position. As noted, the Statute of Gloucester is no longer part of the law of New Zealand. The power to award

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<sup>40</sup> Edelman J, in his separate concurrence in *Bell Lawyers Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [80]-[81] notes there was distinction historically in the position in chancery and equity, which indicates the Supreme Court’s survey of the position in *McGuire* was confined purely to the historic development of the position at common law. It does not appear that anything turns, for present purposes, on the historic distinction between the position at common law and equity.

<sup>41</sup> Statute of Gloucester 1278 (Eng) 6 Edw 1 c 1.

<sup>42</sup> English Laws Act 1858, s 1.

<sup>43</sup> Imperial Laws Application Act 1988, ss 1(2) and 4.

<sup>44</sup> Sir Edward Coke *The Second Part of the Institutes of the Laws of England* (E and R Brooke, London, 1797) at 288.

<sup>45</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [56].

<sup>46</sup> These are, one might broadly note, the same concerns that animate the now potentially vestigial torts of champerty and maintenance: see Law Commission *Class Actions and Litigation Funding* (NZLC IP 45, December 2020) at ch 18; and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [45]-[46].

costs in proceedings in the High Court is now found in s 162 of the Senior Courts Act 2016, which provides:<sup>47</sup>

### **162 Jurisdiction of court to award costs in all cases**

- (1) If any Act confers jurisdiction on the High Court or a Judge of the High Court for the purpose of any civil proceedings or any criminal proceedings or any appeal, without expressly conferring jurisdiction to award or otherwise deal with the costs of the proceedings or appeal, jurisdiction to award and deal with those costs and to make and enforce orders relating to costs must be treated as also having been conferred on the court or Judge.
- (2) Costs may be awarded or otherwise dealt with under subsection (1) at the discretion of the court or Judge, and may, if the court or Judge thinks fit, be ordered to be charged on or paid out of any fund or estate before the court.

1.20. As is plain from the wording of s 162 as reproduced above, there is no statutory direction as to how the general power to award costs is to be exercised.<sup>48</sup> In particular, there is no definition of “costs” provided. As Edelman J, addressing the largely identical position in Australia in *Bell Lawyers Ltd v Pentelow* noted, the relevant statute law has long been “expressed in such wide terms as to leave the circumstances for its application as a matter of judicial development.”<sup>49</sup>

1.21. Rather, the practice of the District and High Courts with respect to costs has always, in the modern era in New Zealand, been regulated by the rules of court for each court relating to the award of costs; now to be found in pts 14 of the High Court Rules 2016 and District Court Rules 2014. The underlying rationale and principles for the cost regime set out above find expression in those provisions, in accordance with which the Courts are to determine costs in each individual case absent some good reason to the contrary justifying exceptional reliance on the Court’s overriding discretion as to costs.<sup>50</sup> As the Court in *McGuire* noted, there is nothing in the rules of court that necessarily would require today the development of the primary rule or the exceptions to that rule (subject to the point noted in paragraph 1.23 below).

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<sup>47</sup> This replaced, without substantive change, the earlier s 51G of the Judicature Act 1908 (repealed). There is no corresponding general grant of jurisdiction under statute for the District Court to make awards of costs. However, the District Court Act 2016 contains a number of provisions that apprehend the making of costs awards in proceedings in that Court under the numerous statutes that confer jurisdiction (including as to costs) to that Court, and s 228(3)(j) of the District Court Act 2016 anticipates the making of rules of court for that Court governing the award of costs.

<sup>48</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [62].

<sup>49</sup> *Bell Lawyers Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [81].

<sup>50</sup> High Court Rules 2016, r 14.1(1), but see *Manukau Golf Club Inc v Shore Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7] and [16].

- 1.22. Nor, historically,<sup>51</sup> was the development or maintenance of the primary rule and the lawyer in person exception a response to a particular interpretation of the rules of court. Rather, the well-established conceptualisation of “costs” as embodying only Coke’s “legall” expenses – that is, as one embodying the primary rule, subject to the recognised exceptions – has guided interpretation of the rules of court in a manner perpetuating the rules and exceptions. As with other long-standing rules of law originally of English medieval statutory extraction that have become free-standing common law rules,<sup>52</sup> the Courts have proven reluctant to consider departing from this position, preferring to couch the issue as one of policy requiring legislative revision; even where that possibility was nominally open.<sup>53</sup>
- 1.23. As the Supreme Court in *McGuire* noted, this conceptualisation of “costs” (including the exception) has prevailed for so long that that, “unsurprisingly”, the party seeking costs being a party who seeks partial reimbursement in respect of fees paid to lawyers has become the “paradigm case”<sup>54</sup> held in mind by this Committee to date in crafting the various iterations of the rules of court. The District Court Rules 2016 in fact give expression in the rules to the lawyer-in-person exception, r 14.17 providing that “a solicitor who is a party to a proceeding and acts in person is entitled to solicitors’ costs”.<sup>55</sup>
- 1.24. All of this to say that the view expressed in the “primary rule” that out of pocket legal expenses are recoverable “costs”, but other expenses attendant on litigation alluded to by Coke are not, does not flow from a more fundamental aspect of the costs regime, or any particular aspect of that regime as now set out in the rules of court. Even r 14.17 of

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<sup>51</sup> With the exception of the Court of Appeal’s now-overruled decision in *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70: overruled *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [71]-[73], in which the majority of the Supreme Court (with whom Ellen France J agreed on this point) identified that the Court of Appeal’s reading of the High Court Rules 2016 as mandating a strict application of the primary rule was not an irresistible consequence of the framing of the rules of court.

<sup>52</sup> A topical example (in light of the Law Commission’s current review of the law regarding class actions and litigation funding) is the prohibition on champerty and maintenance: see *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [25]-[27].

<sup>53</sup> See *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335, both as such an example, and also for the reference at [56] fn 42 to such further examples as *Lysnar v National Bank of New Zealand Ltd (No 2)* [1935] NZLR 557 (CA); *Re GJ Mannix Ltd* (1983) 1 NZCLC ¶195-081 (HC); *McKaskell v Benseman* HC Christchurch CP 381/87, 28 June 1989; *Jagwar Holdings Ltd v Julian* (1992) 6 PRNZ 496 (HC) *Re Cameron* HC Dunedin A56/84, 8 March 1995; *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA); *Pell v Booth* CA259/94, 23 August 1999; *Hotham v Weir* CA228/05, 4 December 2006; *R v Meyrick* [2008] NZCA 45; *Knight v Veterinary Council of New Zealand* HC Wellington CIV-2007-485-1300, 19 May 2009; *The Dunes Café and Bar Ltd v 623 Rocks Road Ltd (in liq)* HC Nelson CIV-2006-442-481, 22 February 2010; *X v X* (2010) 20 PRNZ 803 (HC); *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500; and *Low Volume Vehicle Technical Assoc Inc v Brett* [2016] NZHC 467.

<sup>54</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [62].

<sup>55</sup> Similar provision is made in the Family Court Rules 2002, r 86(1) (for the making of which the Rules Committee is not responsible).

the District Court Rules 2014, while it would be rendered otiose in the absence of the primary rule, does not require the rule persist. While the “primary rule” could be treated as a derivation of the indemnity principle, the better view would appear to be, for the reasons given at paragraph 1.17 above, that the indemnity principle is a separate rule of law addressing other policy concerns. To the extent the indemnity principle is seen as requiring a “primary rule”, that is because of the quite separate insistence, in accordance with Coke’s *Commentaries*, that “costs” are only legal expenses.

- 1.25. Certainly, the lawyer-in-person exception, which has now persisted for over 150 years, is not reconcilable with the indemnity principle understood as it is in the context of self-represented litigants who are not lawyers. Rather, it is quite inconsistent with it. Yet, as the Court in *McGuire* noted, common law courts have identified that exception as persisting as a “long established rule of practice” even in the context of rules regimes that, far more clearly than New Zealand’s current rules, treated costs as a partial indemnity for money expended in respect of barristers and solicitors’ bills of costs and fees (as is done in respect of non-lawyer self-represented litigants).<sup>56</sup>
- 1.26. This incongruence might be made more coherent by regarding the lawyer-in-person exception as an application of, rather than an exception from, the primary rule. This is a view that the Committee understood as animating some of the submissions received, and is palpable in what the Court in *McGuire* termed “the leading case on the lawyer in person exception”<sup>57</sup> – *The London Scottish Benefit Society v Chorley*<sup>58</sup> - where Brett MR observed that a lawyer who represents themselves does the same work as would have the lawyer they might have had represent them. This has developed into the proposition that “it is exactly the same sort of work as would be properly the subject of an award of costs if carried out by a third-party lawyer.”<sup>59</sup> That is, on one view, the lawyer-in-person exception is consistent with, rather than contrary to, the primary rule. However, as is developed in the sixth section of this paper, that is no longer a compelling argument for maintaining the exception in an era where costs are awarded on the basis of a reasonable reward for specified work having been done, as opposed to as a partial indemnity.
- 1.27. On top of this conceptualisation has been scaffolded at least the first of the two additional “public policy justifications”<sup>60</sup> for the lawyer-in-person exception noted in *McGuire*. These are that “the mechanisms for assessing costs provided by rules of court are appropriate for the exercise” and that “where a lawyer in person can recover costs,

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<sup>56</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [63], referring to *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47.

<sup>57</sup> At [57].

<sup>58</sup> *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.

<sup>59</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [83] per William Young J for the majority.

<sup>60</sup> At [83].



the costs exposure of the other party will probably be lower than if a third-party lawyer is retained". The first of these, at least, is circular – as noted above, the rules of court are well-designed for awarding costs in respect of work done by lawyers because of the long-standing view that "costs" entails only such work.

- 1.28. The employed lawyer rule, which as the Supreme Court in *McGuire* noted has received comparatively little analysis in the courts,<sup>61</sup> has certainly been justified as an application of the primary rule. Cooke J, with the concurrence of Woodhouse P and Richardson J in *Henderson Borough Council v Auckland Regional Authority*,<sup>62</sup> and also a number of English and Australian courts,<sup>63</sup> have viewed this exception as commensurate with the indemnity principle.
- 1.29. This because, while no invoice has been issued, the time of a salaried employee has been occupied on ascertainable work of the same type that independent counsel would have been engaged to perform. As the High Court of Australia put it in *Bell v Pentelov Lawyers Ltd*, maintaining the employed lawyer exception while abrogating the lawyer-in-person exception as part of the common law of Australia, "such arrangements have been treated as being outside the general rule because it is accepted that the recovery of the professional costs of in-house solicitors inures by way of indemnity to the employer."<sup>64</sup>
- 1.30. That tends to reinforce the fact that the primary rule and exceptions to it are, ultimately, free-standing rules of law deriving from historical practice that have, over time, become part of the jurisprudential background against which the costs regime has been assumed to operate, rather than outgrowths of more fundamental principles of the regime, or of the drafting of the regime.<sup>65</sup> As Edelman J put it in Australia in *Bell Lawyers Ltd v Pentelov*, it is conventional to assume, where legislative language is re-enacted and amended on a "settled understanding", that understanding is intended to persist.<sup>66</sup> Here, the settled understanding is that "costs" has the narrow meaning which it was afforded by Coke. Had, historically, "costs" been given a definition encompassing

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<sup>61</sup> At [61].

<sup>62</sup> *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23.

<sup>63</sup> See, for example, *Bell v Pentelov Layers Ltd* [2019] HCA 29 at [47] and [68], referring to *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at [11]; *Ly v Jenkins* (2001) 114 FCR 237 at [160]; *In re Eastwood (dec'd)* [1975] Ch 112 (EWCA) at 132.

<sup>64</sup> At [47]. Though the relevant statute in question there included "remuneration" in an express definition of "costs", the Court's comments make it clear that did little more than give expression to the basis on which the Courts had in any event proceeded of equivalising the "sum recoverable by [a corporate employer of in-house counsel] and "the actual cost to the government or corporation of the legal services provided by its employed solicitor": at [47], see also at [50]. See also Gageler J's comments (concurring) at [68].

<sup>65</sup> The Committee does not consider this entirely irreconcilable with view of the majority in *McGuire*: see at [86]; and is the view that was expressed by Gageler J, concurring, in *Bell Lawyers Ltd v Pentelov* [2019] HCA 29, (2019) 372 ALR 555 at [59]-[63].

<sup>66</sup> *Bell Lawyers Ltd v Pentelov* [2019] HCA 29, (2019) 372 ALR 555 at [82] per Edelman J (concurring).

opportunity costs (that is, the opposite of Coke’s definition), which had gained equal currency, the received understanding of the costs regime would be to the contrary. To the extent that any features of the contemporary costs regime – which, as discussed in the fifth section of this paper below, has evolved well beyond simply being concerned with allowing recovery of out of pocket expenses – depends for coherence on this definition of “costs”, that is not, in itself, a principled reason for departing from that definition (though it may provide a forcible practical argument).

1.31. The significance of this, for present purposes, is threefold. First, if the Courts were to redefine costs as including the other costs referred to by Coke, as the Court in *McGuire* was invited to do, or a competent legislative body did so, the rule and exceptions could be abrogated without doing any particular violence to the rest of the costs regime. In turn, this has in turn implications, addressed in the fourth section below, as to the appropriateness of the Committee’s revising the costs regime to abrogate the rule. Thirdly, it also indicates that is necessary, in considering the position of self-represented litigants in relation to the costs regime, to readdress the nature and meaning of “costs”, as I do in the fifth section of this paper.

#### **“Partial indemnity” and “reasonable reward”**

1.32. Therefore, and finally in this section, it is important to expressly note the significant extent to which the current approach to self-represented litigants can be interrelated with a conceptualisation of costs as the award of a partial indemnity to the successful party for their “costs”, defined as including exclusively legally expenses. As was noted by the New Zealand Bar Association in its submissions both to the Committee and as intervenor in *McGuire*,<sup>67</sup> “if the basis for costs is indemnity then they are limited to out of pocket expenses”, and the primary rule must prevail.

1.33. However, as noted above, it is no longer controversial that indemnity “is not the whole purpose of costs regimes today.”<sup>68</sup> Moreover, as the Association noted, historically “English law [...] required full indemnity costs and the courts were concerned about the difficulty of quantifying the appropriate amount of time and labour spent by a lay litigant.”<sup>69</sup> As the Association noted, “that does not carry much weight now since the advent of scale costs and the irrelevance to costs awards of actual costs incurred by a party”,<sup>70</sup> as explained above. Rather, as noted above, the current costs regime is

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<sup>67</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at 341.

<sup>68</sup> At 341, Mr Foote QC as counsel for the New Zealand Bar Association as intervenor referring to AL Goodhart “Costs” (1929) 38 Yale LJ 849 and *Cabana v Newfoundland and Labrador* 401 DLR (4th) 113.

<sup>69</sup> At 341.

<sup>70</sup> At 341.

predicated on providing for recovery of an amount deemed to be reasonable in respect of work done.

- 1.34. The significance of this is to highlight that, whatever the historical genesis of the costs regime in the provision of an indemnity for what Coke termed exclusively “legall” expenses, the provision of partial or full indemnity for those expenses is no longer the whole ambit, or in fact even part, of the purposes of the costs regime. Similarly, while the longstanding primary rule of practice that only “legall” expenses are recoverable by way of costs persists, the purpose of the regime is now (as one of its several purposes) to provide a contribution in an amount deemed to be reasonable towards those costs only, without any regard to actual expenditure. The indemnity principle, so far as it still finds expression in today’s costs regime, serves other purposes of public policy aimed at deterring extravagance in litigation. It is to be interpreted purposively, in light of the overall objectives of civil procedure,<sup>71</sup> and the costs regime.
- 1.35. In both these respects, the costs regime can arguably now be better viewed as providing for a deemed reasonable reward to the successful party by the unsuccessful party, rather than as a partial indemnity for the winning party’s actual expenses. This, in essence, is the foundation of the recapitulation of the concept of “costs” set out in the fifth section of this paper. The most important implication of this, for present purposes, is that it removes the primary conceptual obstacle to awarding self-represented litigants costs.

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<sup>71</sup> Senior Courts Act 2016, s 146; High Court Rules 2016, r 1.2; District Court Rules 2014, r 1.3

## 2. Comparative Approaches to Self-Represented Litigants' Costs

- 2.1. As noted at the outset of this paper, New Zealand's current approach to the treatment of self-represented litigants with respect to costs has been the subject of extensive judicial comment, much of it adverse. Nonetheless, the primary rule has survived in Aotearoa New Zealand and Australia down to today as has also, at least in Aotearoa New Zealand, the lawyer-in-person exception on the basis of the perceived public policy advantages of these rules of practice.
- 2.2. Similar comments and criticisms have also been voiced in other jurisdictions – in particular Canada and England and Wales – whose costs regimes feature, or formerly featured, a similar approach to costs for self-represented litigants.
- 2.3. In this section, by way of further background to its decision to consult on reform in this area, I summarise these comments. This also serves to outline the approach that presently prevails in jurisdictions often thought comparable to Aotearoa New Zealand.
- 2.4. As will become clear from reading this and the following section, similar comments were made by a number of submitters to that consultation process (which submissions are summarised in the following section of this paper.) It might have been possible to combine this summary of judicial comments with my summary of the submissions received. However, given the wide-reaching nature of the proposed reform, and the need to transparently respond to the concerns expressed by submitters in promoting such reform, I thought it preferable to keep these separate, so as to allow for the clearest possible image of the balance of opinion from submitters. Accordingly, readers may find it useful to read this and the following section in conjunction.

### New Zealand

- 2.5. The majority of the Supreme Court in *McGuire v Secretary for Justice* upheld the primary rule and both exceptions to it.<sup>72</sup>
- 2.6. However, the survival of the lawyer-in-person exception in particular was more the result of the majority's view of the Courts' limited ability to undertake the law reform process necessary to successfully abolish that exception than a result of the Court seeing the exception as meritorious. At most, the majority did not consider the current position, both with regards to the primary rule and the exception, so "irrational" that its immediate abrogation was required.<sup>73</sup>
- 2.7. Certainly, the maintenance of the status quo was not a position contended for by any of the parties before the Court, with both the appellant and the New Zealand Bar

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<sup>72</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [86]-[94].

<sup>73</sup> At [82]-[84].

Association as intervenor seeking the abrogation of the primary rule, and all parties appearing to support the abrogation of the lawyer-in-person exception.<sup>74</sup>

- 2.8. The Court’s reasoning as to this point is illustrative of the reasons Courts have tended to advance for maintaining the primary rule and, until recently at least, the lawyer-in-person exception. As emerges clearly below, the reasoning deployed in support of the lawyer-in-person exception in *McGuire* is virtually identical to that given by the England and Wales Court of Appeal in recognising that exception in *Chorley* in 1884.<sup>75</sup> Articulating these public policy justifications, even while describing them as “distinctly contestable”<sup>76</sup> and of not “overwhelming weight”,<sup>77</sup> the majority said:

[82] [...] The practice of awarding costs against a losing party disincentivises potential litigants and thus inhibits access to the courts. Confining costs to those relating to the work carried out by lawyers limits that inhibiting effect. This provides a reasonable basis for not allowing represented litigants to recover costs in respect of their own time and trouble. Mechanisms for fixing costs are calibrated to the assessment of the work which lawyers carry out, as opposed to work carried out by, or the opportunity costs of, litigants in person.

[83] Assuming the primary rule remains, there are likewise public policy justifications for the lawyer in person exception. The work in respect of which costs are sought is of a legal character and carried out by a lawyer. It is exactly the same sort of work as would be properly the subject of an award of costs if carried out by a third-party lawyer. The mechanisms for assessing costs provided by rules of court are appropriate for the exercise. Where a lawyer in person can recover costs, the costs exposure of the other party will probably be lower than if a third-party lawyer is retained.

- 2.9. As the majority noted, the “primary countervailing consideration”, the merits of which they acknowledged can be seen as overwhelming the force of the above points, is the argument that the distinction drawn between lawyers and those represented by lawyers and others is invidious.<sup>78</sup> In particular, so far as the lawyer-in-person exception is concerned, as the majority noted, “litigants in person will also incur opportunity costs when conducting litigation instead of concentrating on their own business or professional affairs”<sup>79</sup>. On one view, that is also the basis on which lawyers-in-person are recovering costs.
- 2.10. As to the employed lawyer rule, the majority did not expressly address the perceived merits of that rule but appears to have accepted the perpetuation of that exception as desirable. That much follows from the majority’s expressed concern that, if the lawyer-

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<sup>74</sup> At [77]-[81].

<sup>75</sup> *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.

<sup>76</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [82].

<sup>77</sup> At [82].

<sup>78</sup> At [84].

<sup>79</sup> At [84] fn 83.

in-person exception was abrogated, it would be problematically inconsistent to maintain the employed lawyer exception, and the majority's treating this as a reason to maintain the lawyer-in-person exception pending legislative or rules reform.<sup>80</sup>

- 2.11. Ellen France J, while agreeing that reform of the primary rule should be accomplished by a law reform process allowing broader consultation,<sup>81</sup> dissented from the majority on the question of the lawyer-in-person exception. She took as her starting point the irrationality of distinguishing between self-represented litigants who happen to be lawyers and those who are not, noting that a lawyer incurs the same opportunity costs as does any other professional representing themselves. So, Her Honour considered, if that is the basis of lawyers-in-person being allowed an award of costs, all self-represented litigants should have access to the same award.<sup>82</sup>
- 2.12. Her Honour also appeared to depart from the majority's view that the lawyer-in-person exception must be maintained to given coherence to the law if the employed lawyer exception is to be maintained. That appears to follow from Her Honour's observation, referring to Cooke J's leading judgment in *Henderson Borough Council v Auckland Regional Authority* that "the time of a salaried employee has been occupied", such that a real (as opposed to opportunity) cost (albeit not one invoiced in a bill of costs) has been occupied.<sup>83</sup>
- 2.13. For these reasons, while agreeing that any reform of the primary rule should be achieved other than by the Courts, especially so that r 14.17 of the District Court Rules 2014 could also be repealed, the Judge landed in favour of either abandoning the "exception in favour of the general principle"<sup>84</sup> or abrogating the primary rule altogether.

## Australia

- 2.14. In its decision in *Bell Lawyers Pty Ltd v Pentelow*, the High Court of Australia took a very different approach, holding that the *Chorley* exception is "anomalous"<sup>85</sup> and is not part of the common law of Australia. Fundamentally, this was because an exception that allows "a self-represented litigant who happens to be a solicitor to recover his or her professional costs of acting in the litigation" while others cannot is "an affront to the fundamental value of equality of all persons before the law"<sup>86</sup> unable to be justified by the factors said to lend support to the distinction. Given the importance of this value,

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<sup>80</sup> At [85].

<sup>81</sup> At [90] per Ellen France J (dissenting).

<sup>82</sup> At [91] per Ellen France J (dissenting).

<sup>83</sup> At [93] fn 89 per Ellen France J (dissenting), citing *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23 per Cooke J.

<sup>84</sup> At [92] per Ellen France J (dissenting), citing *Cachia v Hanes* (1994) 179 CLR 403 at 412 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

<sup>85</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555.

<sup>86</sup> At [1] per Kiefel CJ, Bell, Keane, and Gordon JJ.

once those factors were found to be of inadequate weight to justify the distinction being drawn, the invidiousness argument tipped the balance.

2.15. In arriving at this conclusion, the plurality (Kiefel CJ, Bell, Keane, and Gordon JJ) began by noting the conventional justifications for the *Chorley* exception (drawing on Brett MR's judgment in that case, which, as noted, the New Zealand Supreme Court's comments in *McGuire* paralleled). Having reproduced the relevant extract from *Chorley*, their Honours dismissed each of the contentions conventionally raised in support of the lawyer-in-person exception. In particular, they said that:<sup>87</sup>

- a. it is not necessarily true that "it is somehow a benefit to the other party that a solicitor acts for himself or herself, because the expense to be borne by the losing party can be expected to be less than if an independent solicitor were engaged", as a self-interested lawyer-litigant may be less capable than they would be representing another party, resulting in greater costs being passed to the unsuccessful party;<sup>88</sup>
- b. it is inconsistent with "the modern orthodoxy that it is undesirable, as a matter of professional ethics, for a solicitor to act for himself or herself in litigation" to incentivise lawyers to represent themselves,<sup>89</sup> which further reflects a view that the Court is in such cases deprived of the advantages of independent counsel;
- c. if the primary rule is viewed as an outgrowth of the indemnity principle, as their Honours did,<sup>90</sup> then it follows that the primary rule that "a self-represented litigant may not obtain any recompense for his or her time spent on litigation is not based on a concern about the difficulty of valuing the appropriate amount of recompense"<sup>91</sup>, and thus it cannot be said the exception for lawyers is justified as the "private expenditure of labour and trouble by a layman cannot be measured" while that of a lawyer can;
- d. in any event, there is no reason in principle as to why the reasonable value of the time of a litigant-in-person cannot be measured, though there would doubtlessly be some practical difficulties that mean that legislative, rather than common law reform, of the primary rule is preferable;<sup>92</sup>

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<sup>87</sup> Their Honours also, at [40]-[45], rejected the submission the lawyer-in-person exception should be maintained as *Chorley* had not been rejected by any of the Australian legislatures, such that abrogation would undermine the various legislatures' intention, which turned on a question of legislative interpretation that does not arise in New Zealand.

<sup>88</sup> At [18] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>89</sup> At [19] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>90</sup> At [22] and [33] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>91</sup> At [22] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>92</sup> At [24] per Kiefel CJ, Bell, Keane, and Gordon JJ.

- e. it is distinctly arguable that a successful lawyer-in-person is profiting from engaging in litigation, despite that being seen (given the High Court’s view that the indemnity principle underpins the primary rule) as impermissible in the case of other litigants-in-person.<sup>93</sup>
- 2.16. As to the interaction of the lawyer-in-person and employed lawyer submissions, the plurality were not persuaded by the submission that the former exception needed to be maintained to support the latter, desirable, exception. This on the basis – essentially the same noted by Ellen France J in *McGuire* – that in Australia expenditure on the time of a salaried employment has been regarded, by the Courts and now in the relevant Australian statute, as a legal expense cognisable by a costs award.<sup>94</sup>
- 2.17. For these reasons, Kiefel CJ, Bell, Keane, and Gordon JJ did not consider there to be any compelling reason why the High Court could not abrogate the lawyer-in-person exception as part of the common law of Australia, and so they did.<sup>95</sup>
- 2.18. Interestingly, given the concerns around independence voiced by the New Zealand Supreme Court in *McGuire*, their Honours considered that the same view “should be taken in relation to a solicitor employed by an incorporated legal practice of which he or she is the sole director and shareholder stands in a different position”, given it is questionable “whether such a solicitor has sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the incorporated legal practice.”<sup>96</sup> Their Honours were not prepared to cognise such a vehicle being used to allow a person who, in substance, was appearing as a lawyer-in-person from receiving an award of costs at common law in Australia.<sup>97</sup>
- 2.19. Gageler J, in his separate concurrence, expressed some concern to reconcile the High Court’s decision with the New Zealand Supreme Court’s decision in *McGuire*.<sup>98</sup> His Honour did so by noting the majority in *McGuire’s Case’s* comments as to the Courts’ limited capacity for legislative reform of procedure and concerns about the breadth of submissions received in that particular case,<sup>99</sup> and the differing legislative and rules regimes in place in each jurisdiction.<sup>100</sup>
- 2.20. Nettle J, the only member of the Court to dissent, did not join the majority in abrogating the lawyer-in-person exception. He considered it to be a (long-standing) rule of practice

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<sup>93</sup> At [23] per Kiefel CJ, Bell, Keane, and Gordon JJ, citing *Cachia v Hanes* (1994) 179 CLR 403 at 412 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ at 389.

<sup>94</sup> At [46]-[50] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>95</sup> At [57] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>96</sup> At [51] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>97</sup> At [53] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>98</sup> At [66] per Gageler J (concurring).

<sup>99</sup> At [65]-[66] per Gageler J (concurring).

<sup>100</sup> At [67]-[69] per Gageler J (concurring).



that “has been widely acted upon by courts, the legal profession, governments and government departments, business and various legislatures and rules committees throughout Australasia.”<sup>101</sup> In particular, and citing the Court in *McGuire’s* comments in support of his view, Nettle J considered the fiscal implications of the abrogation at common law of the employed lower rule, which his Honour considered would have to be dispensed of together with the *Chorley* exception,<sup>102</sup> to be so significant as to require legislative, rather than judicial, reform. In this respect, Nettle J differed from the majority on their interpretation that this issue could be avoided by relying on the meaning of “costs” given the relevant statute.<sup>103</sup> At the very least, Nettle J considered, echoing the majority in *McGuire*, “the ramifications of abrogating the exception are potentially very wide, and, without this Court first hearing argument on behalf of the interests likely to be affected, to a large extent unknowable.”

2.21. Edelman J, while accepting that “great care” was required in abrogating a long standing rule of law, not least because of the risk of removing the foundation on which citizens have arranged their affairs and because of the risk to the coherence of the legal system as a whole,<sup>104</sup> did not agree with Nettle J that these concerns prevent the alteration of the lawyer-in-person rules. Moreover, if the primary rule was not to be reformed, Edelman J considered, then it was “impossible to justify an exception that recognises costs for expenditure of time in litigation by an unrepresented solicitor litigant who performs work on the case but not by any other unrepresented litigant.”<sup>105</sup> This on the bases, essentially, that a lawyer-in-person’s work cannot be assumed to be of better quality than any other self-represented litigant’s work, and the undesirability of a lawyer representing themselves.<sup>106</sup>

2.22. The appropriateness of the primary rule was not before the Court in *Bell Lawyers*. Nonetheless, as the comments noted at paragraph 2.15.d above make clear, Kiefel CJ, Bell, Keane, and Gordon JJ were clearly aware of the view that any challenge associated with valuing self-represented litigants’ time was not a principled barrier to reform, rather a procedural obstacle commending legislative reform.<sup>107</sup> Their Honours also noted, in a point highly relevant to the observations made at paragraphs 1.32 - 1.35 above, the High Court’s previous comment in *Cachia v Hanes* that “if costs were to be awarded otherwise

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<sup>101</sup> At [72] per Nettle J (dissenting).

<sup>102</sup> At [76] per Nettle J (dissenting).

<sup>103</sup> At [78] per Nettle J (dissenting).

<sup>104</sup> At [85]-[86] per Edelman J (concurring).

<sup>105</sup> At [91] per Edelman J (concurring).

<sup>106</sup> At [91]-[92] per Edelman J (concurring).

<sup>107</sup> At [24] and [37] per Kiefel CJ, Bell, Keane, and Gordon JJ.

than by way of indemnity, there would be no logical reason for denying compensation to a litigant who was represented.”<sup>108</sup>

2.23. This serves to reinforce the conclusion that, if the concept of “costs” is recapitulated to include things other than “legall” costs in the sense described by Coke, the abolition of the primary rule would not be inconsistent with the balance of the costs regime. I note that would be easier in New Zealand, where “costs” are not defined, than in say, New South Wales (the jurisdiction in question in *Bell Lawyers*), where the relevant civil procedure statute contained a definition of “costs” embodying a view of the award of costs as the provision of an indemnity for out-of-pocket legal expenses.

2.24. Edelman J, as noted, offered some brief comments as to the potential reform of the primary rule in his separate concurrence. While noting that these comments were strictly obiter, Edelman J noted there are good principled arguments:

[88] [...] Time is money. Expenditure of time, as a measure of true loss, might be valued by the opportunity cost, although if it is measured as a provision of something of independent value the award would more naturally be in the form of a fair remuneration for work of that nature as the common law and equity have done for centuries, including for claims based on contract and on unjust enrichment.

(Footnote omitted.)

2.25. The primary rule was however squarely in issue in the High Court’s earlier decision in *Cachia v Hanes*, where the proposition advanced by counsel was that the *Chorley* exception disproves the primary rule.<sup>109</sup> There, Mason CJ and Brennan, Deane, Dawson and McHugh JJ noted, essentially as a matter of statutory interpretation, and in accordance with the position outlined in the previous section, that:<sup>110</sup>

To use the rules to compensate a litigant in person for time lost would cut across their clear intent. Costs, within the meaning of the rules, are reimbursement for work done or expenses incurred by a practitioner or practitioner’s employee. Compensation for the loss of time of a litigant in person cannot be said to constitute costs within the meaning of the rules.

This is hardly surprising. It has not been doubted since 1278, when the Statute of Gloucester introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant. As Coke observed of the Statue of Gloucester, the costs which might be awarded to a litigant extended to the legal costs of the suit, “but not to the costs and expenses of his travel and losse of time”.

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<sup>108</sup> At [38] per Kiefel CJ, Bell, Keane, and Gordon JJ, citing *Cachia v Hanes* (1994) 179 CLR 403 at 412 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ at 564

<sup>109</sup> Paraphrasing here the expression of Kiefel CJ, Bell, Keane, and Gordon JJ at [38].

<sup>110</sup> *Cachia v Hanes* (1994) 179 CLR 403 (HCA) at 388-393.

A somewhat anomalous exception was introduced by *London Scottish Benefit Society v Chorley* [...]

If the explanations for allowing the costs of a solicitor acting for himself are unconvincing, the logical answer may be to abandon the exception in favour of the general principle rather than the other way round. However, it is not necessary to go so far for the purposes of the present case. It suffices to say that the existence of a limited and questionable exception provides no proper basis for overturning a general principle which has, as we have said, never been doubted and which has been affirmed in recent times.

[...]

Rather too much emphasis may have been given in the cases to costs which are awarded to a solicitor acting for himself. They are awarded upon an exceptional basis and not upon the basis upon which costs are ordinarily awarded, namely, as an indemnity for legal costs actually incurred. It is, we think, not possible to reason by way of the exception that litigants in person are treated unequally and then to conclude that the very basis upon which costs are ordinarily awarded should be abandoned so that the exception becomes the rule.

Not only is it false reasoning, but it is not a course which is available having regard, not only to the quite clear case law upon the subject, but also, more importantly, to the plain import of the rules which govern the jurisdiction of the court to make an order for costs and any subsequent taxation of costs. Taxation is to take place, not at large, but "on a party and party basis". Taxation on a party and party basis is required to be in accordance with the relevant table in Sch G and that makes no provision for the reimbursement of a litigant for time lost in the preparation or presentation of his case.

It does provide for solicitors' costs which have been incurred. That affords some basis (although insufficient in our respectful view) for an award of costs in favour of a solicitor acting for himself and so performing professional duties, but it affords no basis whatsoever for an award by way of recompense to a litigant for time lost in the preparation or presentation of his case. Even less do the rules provide for the substitution of an antithetical basis for the accepted basis upon which a taxation of party and party costs is conducted. We speak of antithesis because, as we have said, the accepted basis for an award of costs is that they are by way of indemnity. They are intended to reimburse a litigant for costs actually incurred; they are not intended to compensate for some other disadvantage or inconvenience suffered by the litigant.

*If costs were to be awarded otherwise than by way of indemnity, there would be no logical reason for denying compensation to a litigant who was represented. That would in some cases dramatically increase the costs awarded to a successful litigant.* In corporate litigation of complexity, for example, a litigant may expend considerable time and effort in preparing its case.

Whilst the restricted basis upon which party and party costs are awarded may be debated as a matter of policy, it is to be borne in mind that party and party costs have never been regarded as a total indemnity to a successful litigant for costs incurred, let alone total recompense for work done and time lost. Putting to one side the question posed by the relatively rare exception of a solicitor acting in person, there is no inequality involved: all litigants are treated

in the same manner. And if only litigants in person were recompensed for lost time and trouble, there would be real inequality between litigants in person and litigants who were represented, many of whom would have suffered considerable loss of time and trouble in addition to incurring professional costs. The partial indemnity which the law allows represents a compromise between the absence of any provision for costs (which prevails as a matter of policy in some jurisdictions) and full recompense. In these days of burgeoning costs, the risk of which is a real disincentive to litigation, the proper compromise is a matter of both difficulty and concern.

That choice has been made in New South Wales at least in the rules which govern the taxation of costs - rules which are in accordance with established law. *The Rule Committee may or may not be able to use its statutory powers to change the basis upon which costs are awarded so that they become, not costs in the accepted sense of the word, but compensation of a more comprehensive kind.* We express no view upon that. No doubt the Rule Committee, if it had such power, would wish to inform itself adequately of the reasons for and against such a change and no doubt it would be able to do so in a way in which a judge or court cannot.

(Footnotes omitted; emphasis added.)

- 2.26. With respect, their Honours might have equally simply said that abrogation of the primary rule would be inconsistent with the maintenance of a costs regime predicated, as their Honours thought was necessarily the case (given the common law and legislative background with which they were confronted), on the notion of partial indemnity. As their Honours recognised, the primary rule is a necessary corollary of that principle and is not required otherwise. That answer was, in my view, required in light of the definition of “costs” given in the New South Wales statute in question in *Cachia v Hanes*, as was also the case in *Bell Lawyers Pty Ltd v Pentelow*, which concerned the same statute (as amended in the interim). It is not however, for the reasons given in the previous section, my view of the position in New Zealand.
- 2.27. To that extent, I consider that the Court in *McGuire* could, had it seen fit to, have properly abrogated not only the lawyer-in-person exception, but also the primary rule. Regardless, as noted in the latter emphasised portion of that passage, a body such as the Committee would have the power to pursue reform even if that was the case, albeit a more cautious approach to reform would likely then be indicated for the reasons referred to at paragraph 2.21 above.
- 2.28. I also note the additional justification proffered for the primary rule by the majority in *Cachia v Hanes*. This is the argument that the presence of litigants-in-person in courts is not to be encouraged given the delays and lack of expertise, and commensurate burden for the Courts, that their presence brings – their “fundamental” right to appear in person, the contradiction between which and the primary rule the majority in *Cachia v Hanes* acknowledged, notwithstanding.<sup>111</sup>

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<sup>111</sup> At 391-392.

## Canada

2.29. The primary rule has, exceptionally, been abrogated judicially – rather than legislatively – in Canada. This is conventionally recognised to have first occurred in the 1995 decision of the British Columbia Court of Appeal in *Skidmore v Blackmore*,<sup>112</sup> and has been confirmed in a number of subsequent decisions.<sup>113</sup>

2.30. As Cumming JA, writing for the Court in *Skidmore v Blackmore* noted, the common law Canadian jurisdictions had inherited, like New Zealand, the common law of England, including the rule in *Chorley* and the cases referred to in *Chorley*;<sup>114</sup> against which background the Canadian courts had adopted the primary rule and exceptions to the same.<sup>115</sup> As Cumming JA noted, “none of the authorities ... examined in detail the question of whether self-represented lay litigants should be entitled to costs”, rather having simply assumed the existence of such a rule.<sup>116</sup> The Judge therefore set about examining the rationale for the rule, so as to assess whether it should remain part of the common law of British Columbia. As noted, he considered it should not:

[36] Under the indemnity approach, a successful self-represented lay litigant would be entitled to the cost of doing what a solicitor would do to prepare and present the case. It may be argued that a self-represented lay litigant will take much more time in preparing the case because he or she does not have the legal training of a solicitor. However, in this province, party and party costs are awarded under a tariff [...] Costs are assessed by the Registrar according to how much time ought to have been spent by the solicitor on the litigation. As well, party and party costs are only a portion of the fees and disbursements that the successful litigant may have to pay to his or her solicitor. This, of course, leads to the conclusion that costs are not intended purely as an indemnity. Indeed, they often fall far short of indemnity.

[37] A review of the Rules reveals that party and party costs serve several functions [...] They partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.

[38] Under the old English practice [...] the only justification found in the case law for denying costs to a successful self-represented lay litigant is because of the difficulty in valuing the efforts of that person in preparing the case.

[...]

[40] As previously mentioned, in this province costs are assessed under a tariff in Appendix B of the Rules. Thus, the difficulty in valuing the time and effort which a self-represented lay

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<sup>112</sup> *Skidmore v Blackmore* (1995) 122 DLR (4<sup>th</sup>) 330 (BCCA).

<sup>113</sup> See *C(LL) v C(AR)* (1999) 180 DLR (4<sup>th</sup>) 361 at 369 (Alberta QB); *KT v DCP* [2015] BCSC 1179; *Fong v Chan* (1999) 181 DLR (4<sup>th</sup>) 614 (Ontario CA); *Turner v Canada* [2003] FCA 173; *MLR v British Columbia Ministry of Education* [2018] BCSC 980.

<sup>114</sup> *Skidmore v Blackmore* (1995) 122 DLR (4<sup>th</sup>) 330 (BCCA) at [34].

<sup>115</sup> At [35].

<sup>116</sup> At [35].

litigant expends in the preparation of his or her case would be avoided by making an order that costs are to be assessed by the Registrar. The Registrar can then determine what those costs ought to be, as is done where the successful litigant is represented by counsel. The concern in the United Kingdom, that a self-represented lay litigant may be over-compensated, does not arise in this province because the tariff provides significantly less than the amount actually payable by a party to his or her solicitor. Also, the tariff is flexible enough to allow the Registrar to find a proper balance between the amount required to indemnify for solicitor's services and those things done by lay litigants. The tariff is flexible in providing for different scales of costs, and for minimum and maximum units. Also, the trial judge has an overall discretion to exercise which may permit a flexible measure.

[41] In conclusion, I am of the opinion that [the previous British Columbian authority Cumming JA was overturning] accepted an English practice that was unsound and unsupported by authority. I am further of the view that there are sound reasons for allowing costs to successful self-represented lay litigants, and no good reason why costs should be denied to such litigants.

- 2.31. This contemporary Canadian judicial rationale for departing from the primary rule – that doing so gives better effect to the numerous purposes the costs regime is now acknowledged as serving - was cogently later summarised by the Federal Court of Canada in *Sherman v Minister of National Revenue*:<sup>117</sup>

It is now generally accepted that an award of costs may perform more than one function. Costs under modern rules may serve to regulate, indemnify, and deter. They regulate by promoting early settlements and restraint. They deter impetuous, frivolous, and abusive behaviour and litigation. They seek to compensate, at least in part, the successful party who has incurred, sometimes, large expenses to vindicate [their] rights. These three legitimate purposes are compromised by a stern rule that self-represented litigants are not entitled to costs. A claimant is not adequately compensated for the time and effort devoted to prepare for the conduct of his litigation. Nor is he compensated for the cost of soliciting a lawyer's advice at the early stage or during the course of the proceedings. His opponent is not inclined to settle since he not only incurs no costs in case of a loss or a refusal of a reasonable settlement, but he recovers his full costs if he is successful.

- 2.32. The contemporary approach in Canada can be described as a pragmatic response to the practical difficulties identified in cases such as *McGuire* and *Bell Lawyers* with laying down a general rule enabling self-represented litigant to receive an award of costs. The approach, in essence, has to been avoiding laying down a general rule. The preferred approach is to make use of the flexible tariff and procedural of assessment of the reasonableness of costs by the registrar described in *Skidmore v Blackmore* in the extract reproduced at paragraph 2.30 above, which is in place across several Canadian jurisdictions. Thus, the question of a lay litigant's costs instead being referred to the

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<sup>117</sup> *Sherman v Minister of National Revenue* (2003) 226 DLR (4th) 46 at [46]. See also *Fong v Chan* (1999) 181 DLR (4th) 614 (Ontario CA) at 623.

registrar for determination of whether the claim is for a reasonable amount, as is also done in that jurisdiction where a successful litigant is legally represented.<sup>118</sup>

2.33. The concern is therefore to achieve “an equitable result between the parties” in the circumstances of each individual case “while balancing the various policy objectives of costs.”<sup>119</sup> What this measure requires will involve assessment of:<sup>120</sup>

- a. whether the matter was complicated;
- b. whether the work performed was of good quality (in the sense of whether it is sufficiently comparable in quality to that which would have been prepared by a competent lawyer);
- c. whether the litigant’s self-representation resulted in unnecessary delays;
- d. whether the self-represented lost time from work;
- e. what the self-represented would have earned if not required to represent themselves;
- f. whether the unsuccessful party took advantage of the fact that he or she was facing a self-represented;
- g. whether the unsuccessful party refused to entertain reasonable requests to discuss settlement; and
- h. the value, importance, and complexity of the issues involved.

2.34. A consequence of this approach is that the “fee portion” of costs attributable to the party’s opportunity costs will depend largely on the party’s income. That is, an ordinarily well-paid litigant will have incurred a greater opportunity cost than a poorer litigant in bringing their own matter to court. The Court of Appeal of Alberta has noted that this means that in many cases an unemployed person’s costs will be significantly lesser than an employed person’s costs.<sup>121</sup>

2.35. It also emerges that a fairly forensic inquiry as to the measure of opportunity costs may be required in some cases, which would represent a significant departure from current practice in New Zealand (far more so than was involved in Canada). For example, the opportunity costs of a company director or business owner is not just (in real terms) the loss of a salary or wage equivalent during a given period, but the cost of being able to advance their business’ enterprises during that time. While a remoteness-type measure

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<sup>118</sup> *Sherman v Minister of National Revenue* (2000) 226 DLR (4th) 46 at [46]; *Fong v Chan* (1999) 181 DLR (4th) 614 (Ontario CA) at 623-624.

<sup>119</sup> *Dechant v Law Society of Alberta* (2001) 203 DLR (4th) 157 (Alberta CA) at [18].

<sup>120</sup> At [21].

<sup>121</sup> At [19].

analogous to that employed in cases in tort,<sup>122</sup> would avoid the need to consider all possible losses stemming from involvement in litigation, this would remain considerably more burdensome than applying the objective current schedular approach.

## England and Wales

2.36. Finally, I note that the primary rule has in fact, in accordance with the possibility recognised by the final appellate courts of Australia and New Zealand, been abrogated in England and Wales through legislative reform. The English position is noted primarily out of a concern for completeness, given that, for the reason identified at paragraph 2.42 below, and as developed further in the fifth section of this paper, reference to the English position is not of particular assistance in considering how to best reform the costs regime in Aotearoa New Zealand.

2.37. Section 1(1) of the Litigants in Person (Costs and Expenses) Act 1975 (UK) provides:

Where, in any proceedings to which this subsection applies, any costs of a litigant in person are ordered to be paid by any other party to the proceedings or in any other way, there may, subject to rules of court, be allowed on the taxation or other determination of those costs sums in respect of any work done, and any expenses and losses incurred, by the litigation in or in connection with the proceedings to which the order relates.

2.38. Under the rules of court implementing this provision, self-represented litigants are entitled to receive an award of costs for:

- a. the same categories of work and disbursements that would have been allowed if the work had been done, or the disbursements made, by a legal representative on their behalf;<sup>123</sup>
- b. the payments reasonable made by them for legal services related to the conduct of the proceedings;<sup>124</sup> and
- c. the costs of obtaining expert assistance in assessing the costs claim.<sup>125</sup>

2.39. The amount of costs thereby made available is limited, by the relevant rules of court, to two thirds the amount the litigant could have achieved if they had been represented.<sup>126</sup> This can be seen as reflecting a policy of disincentivising litigants who could attain representation from not doing so by creating a costs sanction, while also recognising the tension between a policy of promoting representation and the fundamental right to

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<sup>122</sup> See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388 (PC).

<sup>123</sup> Civil Procedure Rules (Eng), r 46.5(3)(a).

<sup>124</sup> Rule 46.5(3)(b). See also *Uhbi v Kajla* [2002] EWCA Civ 628, [2002] All ER (D) 265.

<sup>125</sup> Rule 46.5(3)(c). The expert must be a barrister, solicitor, Fellow of the Institute of Legal Executives, Fellow of the Association of Costs Lawyers, law costs draftsmen who is a member of the Academy of Experts or a member of the Expert Witness Institute.

<sup>126</sup> Rule 46.5(2).



appear-in-person, and the fact some parties are obliged to do so (as recognised by the majority in *Cachia v Hanes*: see paragraph 2.28 above).

- 2.40. In *Cachia v Hanes*, the majority described this as an admirably straightforward approach to the issue, which avoids altogether the issues raised by the Canadian approach of treating “the loss in earnings of a litigant incurred in the course of the presentation or conduct of [their] case as a disbursement.”<sup>127</sup> This statement is somewhat inapt, as self-represented litigants in England and Wales can in fact obtain an award of costs in respect of financial loss incurred during the amount of time *reasonably* spent doing work connected with their case.<sup>128</sup> The burden of proving loss falls on the litigant-in-person making the claim.<sup>129</sup> Where the litigant cannot prove financial loss, they are entitled to the prescribed amount for each hour spent doing the work, provided that they will be entitled to receive pay for only as many hours as should have reasonably be spent on that work.<sup>130</sup>
- 2.41. The prescribed rate is presently GBP 19 per hour. This is as opposed to, for example, the guideline hourly rate for a trainee solicitor practicing in one of the lowest-cost areas in England and Wales of GBP 111 per hour used for summary assessments of costs in England and Wales.<sup>131</sup> Indicatively, it appears that self-represented litigants rarely obtain full recovery in respect of their time invested in litigation at this rate. In one case, for example, a litigant in person was allowed GBP 10,000 in costs in respect of 1200 hours of research work performed by them (effectively GBP 8.33 per hour).<sup>132</sup>
- 2.42. Again, as was the case in Canada, the introduction of this system was likely facilitated in England by the pre-existing regime there having been based, nominally, on an assessment of the party’s actual costs and the awarding of either a full or partial indemnity (so far as the costs incurred were reasonable and, in some cases, proportional).<sup>133</sup> Accordingly, unlike in Australia or New Zealand, and more like in Canada, the practical consequences of introducing reforms requiring a tailored assessment of the actual losses incurred by a lay litigant were not, comparatively, that significant.

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<sup>127</sup> *Cachia v Hanes* (1994) 179 CLR 403 (HCA) at 416-417.

<sup>128</sup> Civil Procedure Rules (Eng), r 46.5(4)(a).

<sup>129</sup> *Mainwaring v Goldtech Investments Ltd* [1997] 1 All ER 467 (EWCA).

<sup>130</sup> Civil Procedure Rules (UK) r 46.5(4)(b).

<sup>131</sup> Her Majesty’s Courts and Tribunal Service “Solicitors’ guideline hourly rates” (19 April 2010) <[www.gov.uk](http://www.gov.uk)>

<sup>132</sup> *R (ex parte Wulfsohn) v Legal Services Commission* [2002] EWCA Civ 250, [2002] All ER (D) 120.

<sup>133</sup> See Civil Procedure Rules (Eng), r 44.3

### 3. The Committee’s Consultation on this Issue

#### The Four Questions on Which the Committee Consulted

3.1. Having considered the background to this issue, as set out in the previous sections, the Committee released a consultation paper on 5 May 2020. During its consideration of the issues raised by the decision in *McGuire*, the Committee identified four questions as to the nature and purpose of the costs regime on which it was appropriate to consult at an early stage in the reform process. These were as to:

- a. Whether the concept of “costs” should be expanded beyond allowing partial recovery of amounts paid for legal services, thereby allowing self-represented litigants to receive an award of costs.
- b. If so, how the costs of self-represented litigants ought to be determined (that is, what the measure of the award of costs to self-represented litigants should be).
- c. If not, whether the concept of “costs” should be further narrowed, so that they must be out of pocket expenses, thereby preventing self-representing lawyers from recovering costs beyond disbursements.
- d. Whether an exception should nonetheless still be made for employed lawyers acting for a party, and, if so, on what basis should their costs be determined.

3.2. The paper was open for comment through to 30 October 2020. In total, fifteen submissions were received. Submissions were received from:

- a. the District Court judiciary;
- b. two members of the community with experience as self-represented litigants;<sup>134</sup>
- c. Dr Bridgette Toy-Cronin of the Otago Legal Issues Centre at the University of Otago;
- d. Ms Marian Hinde, barrister;
- e. the Auckland District Law Society;
- f. the New Zealand Bar Association;
- g. the Inland Revenue Department;
- h. the Department of Corrections;

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<sup>134</sup> One submitter did not record their name on their submission, from which the Committee inferred a wish for confidentiality, and the other expressed a desire for confidentiality to be maintained in respect of their submission.

- i. the New Zealand Law Society;
- j. the Crown Law Office;
- k. the New Zealand Customs Service;
- l. Wynn Williams, a firm of barristers and solicitors;
- m. Auckland Council; and
- n. Meredith Connell, the Office of the Auckland Crown Solicitor.

3.3. In this section, I summarise submitters' views of each of the above questions, before noting other comments made by submitters relevant to the issue of costs for self-represented litigants not directly relevant to the consultation questions.

**Submissions on Question One: Should the concept of "costs" should be expanded beyond allowing partial recovery of amounts paid for legal services, thereby allowing self-represented litigants to receive an award of costs?**

*Balance of opinion*

3.4. There was no consensus amongst submitters as to whether the concept of costs should be expanded in this manner. While a majority of submissions that expressed a view on this issue favoured widening the concept of costs, it is difficult to regard this as indicating majority support for the proposal, at least among practitioners. Rather, so far as the profession is concerned, at most there is an existence of a considerable body of opinion in favour of the possibility of such reform, with others more mixed or negative in their evaluation. The few responses received from the wider community indicated significant support for this reform, at least among those who have experience as self-represented litigants. In particular:

- a. seven submitters, including the District Court judiciary, the two members of the community who submitted, and the New Zealand Bar Association, expressed support for the expansion of the concept of costs beyond allowing partial recovery of amounts paid for legal services, thereby abrogating the primary rule;
- b. three submitters, all members of the legal profession, were opposed to the abrogation of the primary rule, at least at this point in time;
- c. one further submitter, the New Zealand Law Society, reported their impression that the legal profession was finely divided on this issue, and identified a number of arguments for and against the proposal; and
- d. the remaining four submitters, all government agencies, did not express an opinion on this policy issue.

*The New Zealand Law Society's analysis*

- 3.5. In its neutrally drafted submission reporting on the profession's divided views, the Law Society submitted that an ideal costs system would take the form of a series of provisions giving effect to a set of clearly defined overarching set of goals for the regime, with any proposal for reform ideally assessed in terms of the extent to which it achieves these goals. As to these goals, the Society identified the objectives of:
- a. achieving the promotion of access to justice, and removal of barriers to justice;
  - b. achieving fair and equitable treatment of litigants;
  - c. achieving fairness as between successful and unsuccessful parties;
  - d. avoiding the creation of perverse economic incentives;
  - e. protecting the integrity of the justice system by making provision for those whose conduct is unacceptable; and
  - f. recognising the fundamental right of any litigant to have full access to the courts without the need for legal representation.
- 3.6. The Law Society saw arguments for and against abrogation of the primary rule arising under each of these headings. Many of these also found expression in other submitters' expressions. The Law Society's analysis as to each of these points is outlined, together with those other submitters' views, in the following paragraphs.

*Submissions in favour of the abrogation of the primary rule*

- 3.7. Several submitters who were supportive of the possibility of reform noted that reform is would be consistent with the principles of equality before the law and improving access to justice, and the overall principles and purposes of the costs regime. These submissions were advanced, so far as I have understood them, on the footing that no cogent reason for distinguishing between represented and unrepresented litigants arises from these principles, such that no distinction can legitimately be maintained.
- a. The District Court Judges noted that the only possible reform superior to that discussed in the paper, in terms of promoting access to civil justice, would be "completely overcoming the disinhibiting effect of costs on access to justice" by adopting a "no costs" approach, like that presumptively applicable in the United States. However, in their view, that is undesirable for other reasons of public policy, leaving the abrogation of the primary rule the practicably available option most consistent with the fundamental importance of promoting access to justice.

- b. Moreover, as the Judges put it, the abrogation of the rule is consistent with the key rationale underpinning the indemnity principle that, as the District Court Judges put it, “a person who has incurred the cost of enforcing or defending their rights should not be left substantially out of pocket”, as a component of equality before the law and an adjunct to the rule of law.
- c. The New Zealand Bar Association submitted that none of the purposes of the costs regime (as they defined them) of indemnification, the efficient administration of justice, and equity between participants provide a principled basis on which to distinguish between represented litigants and litigants in person. While it was noted that the award of costs to self-represented litigants can be seen as inconsistent with the indemnity principle, it was submitted indemnification is not the only purpose of the costs regime, and that the other public policy objects of the regime are better advanced by abrogating the primary rule.
- d. The Law Society identified an argument in support of reform as being the fundamental importance of encouraging access to justice, or removing barriers to access to justice, and the potentially delirious impact of the primary rule in advancing these objectives. The lower the level of likely recovery available to a given litigant – such as the low level of recovery under the current costs regime<sup>135</sup> – the more acute this issue will be in their particular case.
- e. Also, the Law Society observed, the risk of an adverse cost award can itself act as a barrier to justice by deterring litigation, and self-represented litigants presently not having the countervailing incentive of the prospect of obtaining a costs award.
- f. The Law Society noted that the costs regime plays an important disciplining role in deterring parties from taking meritless points in a meritless and wanton manner, albeit one that is also subject to the indemnity principle, and in balancing conflicting interests (such as compensating one party for late procedural changes made at the behest of another). By this, I understood the Law Society to be observing these benefits could be better realised with respect to self-represented litigants by abrogating the primary rule.
- g. More generally in this connection, the Law Society emphasised:
  - i. the fundamental nature of the right of litigants to represent themselves in court proceedings should be recognised and encouraged by permitting them to recover costs where successful;

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<sup>135</sup> See Rules Committee *Minutes of the Meeting of 2 October 2017* (Judicial Office for Senior Courts, Wellington, 13 October 2017) at 3: “Asher J observed that the “two-thirds” rule is a fiction, as the rule more properly delivers about one-third. The costs regime has not kept up with actual costs. Even when it was initially set-up it did not achieve two-thirds.”

- ii. that the current costs regime has already departed significantly from the indemnity principle, by limiting costs recovered in many situations to a notional or nominal contribution against legal fees; and
- iii. the primary rule creates unsatisfactory distinctions in principle between represented and unrepresented lawyers, which creates perceptions of unfairness concerning the legal system in a manner deleterious to its legitimacy.

3.8. Submitters noted that an often-advanced rationale for the primary rule is avoiding encouraging self-represented litigants from appearing in ever-greater numbers before the Courts. Those in favour of reform considered this argument unconvincing.

- a. In her submission, Dr Toy-Cronin referred to overseas empirical research confirming concerns about the disruptive effect of self-represented litigants' participation in the Courts are widely prevalent amongst judges. As to this, she noted that this concern draws "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)", which she suggests cannot be true in all cases.
- b. More empirically, Dr Toy-Cronin further submitted that the evidence tends to suggest that abrogating the primary rule does not lead, in itself, to a significant increase in self-representation. She noted that in England and Wales, where the primary rule was legislatively abrogated in 1975, there was no significant growth in the number of self-represented litigants appearing in courts in that jurisdiction until legal aid became much less available in that jurisdiction in 2012. This suggested, in her view, that the main incentive for self-represented litigation is unavailability of legal representation, and that while the availability of a costs award is a theoretical incentive to self-represented litigants, it is less likely to change their behaviour in practice than assessing the incentives would seem to indicate.
- c. Similarly, Marian Hinde submitted that, in her experience, the primary driver of people seeking to self-represent is the increasing cost of representation and the unsatisfactory nature of out-of-court dispute resolution. In these circumstances, I understood her to be saying, it would be inappropriate for the legal profession to resist the abrogation of the primary rule.
- d. The New Zealand Bar Association submitted that "floodgates" concerns about any such reform causing more unjustified behaviour by litigants in person is misplaced, noting that self-represented litigants are far from the only unreasonable litigants,

and that there is no evidence to suggest self-represented litigants will be particularly incentivised to litigate by being made eligible to receive costs awards.

- e. Crown Law, while expressing neutrality as to the potential for reform, observed that one argument for reform is that people have a right to represent themselves and there should not be unreasonable barriers to the exercise of that right.
- f. The Law Society, noting Dr Toy-Cronin's research, identified the point that the reasons for parties to litigate in person are complex and overlapping, and are influenced by problems in the legal market and self-represented litigants' misperceptions about the legal system. Costs appear, the Law Society noted, to be a major factor in deciding to litigate in person, albeit not the only factor.
- g. The Law Society observed that while a certain class of self-represented litigants are unnecessarily persistent or querulous, consume vast resources, and cause unjustified costs and stress to others, this is certainly not true of all self-represented litigants. The Law Society identified the argument that it is more appropriate to rebuff these litigants using the vexatious litigant order regime, abuses of processes, and adverse costs orders (including for indemnity and increased costs) in such circumstances, than penalise all self-represented litigants because their reputation has been unfairly tainted by a handful of self-represented litigants.
- h. The members of the wider community said that, from their perspective as individuals with experience of self-representation, the abrogation of the primary rule is necessary to allow the very real "cost" to self-represented litigants of the time and effort invested in the litigation to be recompensed.
- i. Somewhat similarly, the Law Society noted the argument that, given inexperience and lack of independence already place many unrepresented litigants at a disadvantage, those who succeed in spite of this handicap should not be further penalised in determining their entitlement to costs

3.9. Submitters also noted that the current position is contrary to the Courts' established policy of encouraging parties to resolve their disputes.

- a. This follows from the fact that the primary rule, to a large extent, serves to "inoculate a litigant facing a self-represented party against any risk of an unfavourable costs award", as Dr Toy-Cronin put it. As she alternatively framed it, the current system "distorts the risk-reward calculation for represented parties". Dr Toy-Cronin observed that, as I have noted in the previous section, that one of the reasons why Canada abrogated the primary rule was to redress the bargaining inequality that results between represented and unrepresented litigants as a result of the operation of the primary rule. Dr Toy-Cronin referred to qualitative research

indicating that the experience of self-represented litigants in New Zealand has been that they are hamstrung by the primary rule in this regard.

- b. The New Zealand Bar Association made similar observations. In particular, the Bar Association observed, the primary rule precludes self-represented litigants from making use of the *Calderbank* process in their favour during settlement negotiations.
- c. The Law Society also observed that, at present, represented litigants can in some respects have an inequitable advantage over unrepresented litigants, and may discourage genuine attempts at early settlement.

*Submissions opposed to the abrogation of the primary rule*

3.10. Submitters opposed to reform considered the primary rule is a necessary incident of the underpinnings of the present costs regime. On one view, according to these submitters, maintaining this principle is consistent with equality before the rule of law, as all parties – represented and unrepresented – have the same entitlement to costs in respect of out-of-pocket legal expenses, and merely experience different outcomes in practice according to their factual position.

3.11. Most of these submitters proceeded on the basis that reform would allow self-represented litigants to receive an award of opportunity costs (similar to the English model outlined in the previous section), rather than, say, being allowed to receive an award of costs according to scale for doing the same steps counsel would take on part of a represented party.

- a. In its neutral submission outlining the arguments both for and against reform of the costs regime, the New Zealand Law Society noted that the costs regime is predicated on the indemnity principle, the corollary of which is that a court that orders a party to pay costs to a party who has not incurred any costs is giving a bonus to the party receiving them, contrary to the indemnity principle and the long-standing policy of the law.
- b. The Law Society identified that the indemnity principle continues to find expression in the New Zealand costs regime (see r 14.2(1)(f) of the High court Rules 2016), despite New Zealand's distinctive preference for awarding costs based on the estimated reasonable value of work undertaken in a case (subject to the indemnity principle), rather than by reference to actual expenses. This is, the Law Society noted, a partial indemnity model, which persists despite the fact that there have been some departures from the principle to date, such as witness allowances being provided for under the Witnesses and Interpreters Fees Regulations 1974, the payment as a disbursement of the costs of obtaining "unbundled" legal services, and the Court of Appeal allowing payments of costs to those represented pro bono.



Accordingly, costs are not intended to be a comprehensive compensation for any loss suffered by a litigant. The key justification for affording the indemnity principle this central role in the costs regime advanced is the need to remove any incentive to use litigation as a source of profit.

- c. As Wynn Williams put it in their submission, costs can be understood (best in their view) as “amounting to a type of disbursement that is governed by particular policy considerations arising from the supervisory jurisdiction the courts exercise over lawyers, and the inherent powers of a court to regulate its own procedures.”
- d. Any departure from the primary rule, Wynn Williams submitted, will require departure from this long-standing principle by recognising a lost opportunity cost for the work done, giving work an inherent value for the purposes of costs. This, they submitted, would be inequitable, as represented litigants have opportunity costs in addition to their out of pocket expenses for which no recompense would be available if (as they understood would be the case) represented parties would remain entitled only to an award of costs according to scale. The current position is preferable, Wynn Williams submitted, insofar as it is difficult to argue, at present, that it is unequal for one party to be entitled to reimbursement of actual costs incurred, but the other party is entitled to reimbursement of costs not incurred.
- e. Meredith Connell similarly submitted that there is a measure of equality in the current law insofar as, in accordance with the long-standing indemnity principle, the law does not compensate parties for their opportunity costs, regardless of whether the party is represented or not. This was submitted to justify the primary rule. It was submitted that it is important, in this respect, to distinguish between the different nature of the “costs” incurred by self-represented and legally represented litigants. Litigants with lawyers incur out-of-pocket costs in accounting terms; self-represented parties incur opportunity costs in an economic sense. It would be inconsistent and pernicious, Meredith Connell submitted, to allow unrepresented parties to recover their opportunity costs while successful represented parties are unable to recover most of their actual costs because of the low level of recovery. Undermining the indemnity principle in this way would, it was submitted, be unjustified unless the rules were modified to allow represented litigants to recover their opportunity costs incurred while preparing evidence, reviewing advice, attending settlements and hearings, and providing instruction to their counsel; all of which takes them away from their usual business.
- f. The clear effect of the Law Society’s (neutrally cast) analysis was that, if the primary rule is abrogated, the indemnity principle needs to be maintained where parties are represented, so as to avoid represented parties from seeking an award of scale or increased costs exceeding indemnity costs, collapsing the concept of costs into the concept of damages.

- g. The Law Society reported that those of its members who opposed reform expressed the view that the current rule can be seen as treating litigants fairly and equitably depending on the nature of the cost they have incurred, and that the costs rules are in fact in this sense applied fairly and consistently to all litigants.

3.12. Submitters also noted the risk of reform creating incoherence between the costs regime and other areas of the law, and within the costs regime.

- a. Wynn Williams noted that reform might create inconsistency between the costs regime and the common law prohibition on costs not being recoverable as damages, the legal aid regime, and the security for costs regime, and a degree of incoherence between the indemnity principle, as stated in the costs regime, and any provision allowing costs to self-represented litigants.
- b. Meredith Connell identified a potential for inconsistency with the entitlements of witnesses, who are allowed only notional remuneration for the opportunity cost of their time under the Witnesses and Interpreters Fees Regulations 1974, and also submitted reform would be inconsistent with the rules governing the award of damages.
- c. The Law Society also noted the risk of inconsistency with the position of witnesses. Witnesses, who often have no stake in a case and may be giving evidence under legal compulsion, can also face significant opportunity costs in giving evidence.

3.13. Submitters opposed to reform considered the primary rule justified by the desirability of encouraging parties to obtain representation in litigation. They suggested this policy is justified on the basis that lawyers are required to satisfy the standards imposed on them as officers of the court, and are required to be qualified and approved to practise law in New Zealand, that they have invested significantly in their legal education, and that they are constrained by ethical standards and duties, while litigants in person are not. Meredith Connell, in their submissions, made the correlated argument that incentivising the participation of self-represented litigants in proceedings may have deleterious consequences for opposing parties.

- a. As to the access to justice implications of this, ADLS submitted that it is “elementary” that lawyers have the right to charge for their professional services in acting for others as the only group with a right of audience before the Court, and that this recognises the burdens that lawyers face in complying with the serious obligations noted above, and their overheads in operating a business. ADLS’ submission is that litigants in person, not being subject to these duties, and representing only themselves, have no similar qualification or “right” to be paid.
- b. Crown Law, while expressing neutrality as to the potential for reform, similarly observed that an argument against reform is that there are policy reasons to

encourage people to use lawyers, in particular the obligations on lawyers as officers of the court to contribute to the expeditious and reasonable conduct of cases.

- c. Meredith Connell similarly submitted that there is good reason for restricting costs to work done by professionals in court and in connection with litigating, as self-represented litigants do a level of work comparable to an instructing lay person, rather than a lawyer. Fundamentally, it was submitted costs awards should reflect the value provided to the court by the lawyer. Self-represented litigants, it was further submitted, generally lack the skill or legal knowledge to identify the relevant issues for the court and put their case in a succinct way. The fact that self-represented litigants cannot participate effectively in this process means, Meredith Connell submitted, proceedings involving an unrepresented litigant tend to be longer, place greater demands on the court and cause the other party to incur additional costs. The lack of experience of unrepresented parties places a significant burden on court administration or on the court itself to ensure that the work necessary for the litigation is done. This inevitably, it was submitted, increases legal costs for the opposing party and the overall demand placed on court resources.
- d. For these reasons, it was Meredith Connell's submission that the time spent by a lay litigant in conducting litigation is not fairly comparable to the time spent by paid litigators in conducting a case. They would, at most, accept a discretion allowing recovery in exceptional circumstances where an unusually talented lay person does exceptional work, but consider those situations are so rare as to not justify the complexity of a rules regime which allows for it.
- e. The Law Society noted that, while many self-represented litigants are of the "can't pay" variety, some are of the "won't pay" variety, and Ministry of Justice research suggests that self-representation is influenced not only by cost and the unavailability of legal aid, but also by self-represented litigants' perceptions that their cases were too straightforward to need a lawyer or they could do a better job than a lawyer. These litigants, who may be encouraged to litigate by the availability of costs, may pose an additional burden for the Court system. In this connection, the Law Society referred to extrajudicial comments to the effect that Court systems are not designed to support unrepresented litigants, who place great and disproportionate pressure on the courts in resolving them, that representation for a party is central to the performance by a judge of his or her task; and, that Judges will often ask represented parties to assist unrepresented parties, despite the impropriety of that form of judicial involvement.
- f. The Law Society also noted the argument that the reform might give rise to perverse economic incentives. These may include (for example) an incentive to pursue judicial review of low-level executive decisions or relatively minor breaches of privacy or human rights. The Law Society expresses concern that, if the court

system makes it profitable for parties to identify and institute proceedings for such breaches, this could impose a significant burden on the court system at the expense of litigants who have suffered more substantial harm or damage. More generally, a concern was noted that reform could incentivise self-represented litigants to bring unmeritorious proceedings that they would not otherwise have brought, those litigants being poorly qualified to assess the merits of their claim. That would be a particularly perverse outcome if the Courts remained reluctant to make an order of increased costs against a well-intentioned but misguided lay litigant, such that the represented party, in fact, ends up bearing much of their own costs.

- g. Wynn Williams further submitted, more generally, that the legal system is built on the assumption parties are represented, and that it places a disproportionate burden that is placed on the represented party when their opponent is a litigant in-person, for which the represented party receives no recompense. The argument would appear to be, so far as the Committee understands it, that the burden on these parties should not be further increased.

3.14. ADLS also stressed that, in its view, further information, data, and empirical evidence is required to justify a shift from the status quo, whatever the Committee's view of the above issues. The present position, for the other reasons outlined in their submission (as summarised above), and the fact that self-represented litigants can at least obtain disbursements, meant that, in ADLS' submission, the current position is not so invidious that urgent reform is required in advance of that work being undertaken. For these reasons, ADLS additionally encouraged the Committee to defer to Parliament in pursuing reform, given the "potential ramifications for New Zealand society at large and the legal profession" that "may yet reverberate through New Zealand society" because of the "unexpected and unanticipated consequences" of any reform in this area.

3.15. Each of the submitters who opposed abrogating the primary rule identified the crucial importance of maintaining access to justice, and that the primary rule is inconsistent with that objective, but regarded the considerations underpinning their opposition to reform, as set out above, as justifying the imposition of some limitations.

- a. Indeed, Meredith Connell submitted, on the basis of their assertion that reform would incentivise self-representation, and that incentivising self-representation would encourage frivolous litigation, which they submit would crowd out other litigants' access to the courts, such that reform would therefore be contrary to promoting access to justice. Buttressing this line of reasoning, Meredith Connell identified that while, obviously, costs are awarded only where the litigant is successful, self-represented litigants are poorly suited to determining when their claims are meritorious, meaning that an incentive to litigate being provided "creates a significant economic incentive to identify and pursue perceived breaches of rights" of a nominal nature in an uneconomic manner, potentially putting

defendants to considerable expense if a “cottage industry” of litigation of this type is created. It is submitted this would also have “significant adverse impacts on an under-resourced judicial system.”

- b. The Law Society, in identifying the arguments against reform, agreed that avoiding exposing the court system and other participants to greater burdens is a desirable objective, the importance of which supersedes the high importance to be attributed to the right of litigants to appear in person, and the importance of promoting access to justice.
- c. Also, similarly to Meredith Connell’s analysis, the Law Society noted that the argument that right to access to justice is undermined where some parties do not accept their responsibility to conduct their litigation properly and in good faith, which builds on the Law Society’s observation that some, albeit certainly not all, unrepresented litigants are unnecessarily persistent or querulous, consume significant resources, and cause unjustified costs and stress to other court users.
- d. Finally, the Law Society noted, there are available arguments that reform of the primary rule may not in fact promote access to justice, rendering these countervailing considerations equivocal. As to this, the Law Society observed that:
  - i. The abrogation of the primary rule would increase the potential for adverse costs awards against represented parties in favour of litigants-in-person. If this increased risk were to disincentivise litigants (represented or otherwise) from pursuing or defending litigation against litigants-in-person, it may create a further barrier to justice.
  - ii. The abrogation of the primary rule would not impact on the recoverability of expenses of litigants (in person or represented). This factor is therefore, NZLS submitted, neutral.
  - iii. Litigants and the courts are generally better served when the parties have competent, independent legal advice and representation, and to the extent the reform encouraged parties to appear in person when they would otherwise have been represented, that would be undesirable, though, equally, it is important that the rules are not seen as self-serving by those outside the legal profession.
  - iv. Ultimately, the abrogation of the primary rule would not address the key contributor to the rising number of litigants-in-person, namely the unaffordability of legal services.

**Submissions on Question Two: If the concept of “costs” is expanded, how should the costs of litigants-in-person be determined?**

- 3.16. Twelve submitters responded to this question. Unlike with the previous question, there was a significant degree of consensus as to what to do if the primary rule is abrogated.
- 3.17. Of the twelve submitters, a clear majority of some nine submitters favoured the application of a modified form of the current schedular (scale) approach to the fixing of lay-litigants’ costs, with various suggestions as to precisely what modifications are required. These submitters all, to some extent, encouraged the Committee to attach considerable importance to ensuring the award of costs remains expeditious and predictable.
- 3.18. This would, it was submitted, achieve (as the District Court Judges put it) the “balancing the objective of treating represented and unrepresented parties equally against the practical difficulties of assessing litigants in person’s costs and awarding costs remaining predictable and expeditious.” This would not reward self-represented litigants merely for time spent, rather allowing for an award predicated on recognising the work done that would have otherwise been done by a lawyer: drafting pleadings, or arguments, conducting a hearing, preparing and delivering an argument, and so forth. As the Law Society cast it in its submission, this would ensure the award of costs remains objective.
- 3.19. Several of these submitters contended that the new daily recovery rate be indexed to the median full-time wage or at least set, whether expressly or implicitly, at a given percentage of the recovery rate for represented parties.
- 3.20. Adopting this position, the Inland Revenue Department, noting that the Commissioner is regularly involved in litigation with litigants-in-person, submitted that the daily recovery rate should be calibrated so not as to incentivise the prolonging of the proceedings and set to reflect the fact that the presence of a litigant-in-person is likely to increase the legal costs for the opposing party, such that more work will have been done by the unsuccessful opposing party’s counsel than would be expected where both parties were represented.
- 3.21. Auckland Council expressed the view that requiring self-represented litigants to set out their costs in this manner, as do counsel, would “provide a useful discipline in controlling claims for costs.”
- 3.22. The New Zealand Law Society, advancing this as an option for reform, identified as appropriate a daily recovery rate of \$750 (equivalent to a salary of \$180,000 per year), which the Law Society submits is generally consistent with the overall categorisation of proceedings which is based on skill and seniority of counsel. The Law Society acknowledged in its submission that this departs from the ordinary rule that costs are calculated based on the categorisation of the proceeding and could be perceived as

discriminating between represented and unrepresented litigants but, overall, considers it an equitable allowance balancing the need to incentives obtaining representation where that is at all possible.

- 3.23. Somewhat differently, the New Zealand Bar Association submitted that a modified version of the Canadian tariff system be applied, so that it is possible to award the full scale amount in some situations, but this will likely be the case. The percentage of the represented party scale amount awarded would be determined in each case, starting from an award on the basis of the existing scale, modified to recognise the extent to which the litigant was a model litigant, having regard to the complexity of the proceeding, the amount and quality of the work done by the self-represented litigant; the significance, monetary or otherwise, of the proceeding; the reasonableness of the self-represented litigants' position and conduct. While accepting that this is less expeditious and predictable than simply setting a daily recovery rate, the Bar Association submitted that is justified, so as to provide an incentive to be model litigants, and to allow for sanctioning of improper conducted. Wynn Williams advanced a similar proposal, which it termed as an "intrinsic value" approach.
- 3.24. The New Zealand Law Society put forward a similar proposal, as a potential alternative to the creation of a daily recovery rate. The Law Society regarded this as an application of the principle underpinning the existing r 14.7(e). However, the Society's view was that applying r 14.7(e) directly to self-represented litigants might be too harsh, given their likely inexperience, such that it might nonetheless be appropriate to exempt self-represented litigants from r 14.7(e) and have another rule, affording them some measure of appreciation.
- 3.25. The remaining submitter, one of the members of the community with experiences of self-representation, submitted that lay litigants be awarded costs on the basis of a flat hourly rate of, say, \$25 an hour, based on the number of hours they invested in litigating. This has similarities with the English position, as described in the previous section.
- 3.26. The Department of Corrections, while not advancing a view as to the measure of costs awards to self-represented litigants should, observed that people in the custody or under the supervision of the Department often incur few administration costs when conducting Court proceedings (which are met by the Department instead), can obtain reimbursement of costs such as the filing of proceedings and fees paid for advice obtained on an informal basis for lawyers from the Department, and that there is little likelihood of recovery of costs from those in custody. The Department recommended that the Committee should have regard to these considerations in deciding the measure of costs awards to self-represented litigants if it decides to abrogate the primary rule, and potentially distinguish between those in custody and others.

**Submissions on Question Three: If the first question is answered in the negative, should the concept of “costs” be narrowed further, so that they must be out of pocket expenses, thereby preventing self-representing lawyers from recovering costs beyond disbursements?**

3.27. Eight submitters responded to this question. All expressed support, or at-least no opposition, to the lawyer-in-person being abrogated if the primary rule is maintained. As to why this should occur, submitters said:

- a. the concept that it is possible to quantify costs where a lawyer in person carries out the work is, Dr Toy-Cronin submitted, “irrelevant” in current-day New Zealand where, unless indemnity costs are claimed, costs are calculated using the scale, not the actual amount spent;
- b. the notion that the unsuccessful opposing litigant will have a reduced bill of costs if the lawyer in person succeeds is not a public benefit, but a private benefit to the unsuccessful party, which also assumes the lawyer in person would always retain another solicitor if the exception does not exist – which assumption, Dr Toy-Cronin submits, there is no evidence to substantiate;
- c. lawyers have a range of skills, and only a small proportion of lawyers are likely to be guaranteed to be materially better at litigating effectively than other members of the community – as Dr Toy-Cronin put it, “while lawyers specialising in other areas of practice have general legal skills that might support their ability to run a High Court case, so too might lay people who could have skills ranging from legal executives to business people”;
- d. similarly, while the exception assumes all lawyers in person conduct litigation with a high degree of professionalism, Dr Toy-Cronin notes that it must be recalled that, in New Zealand and England, the first people to be declared vexatious were lawyers;
- e. relatedly, the District Court Judges, Crown Law Office, and Meredith Connell each noted, the lawyer in person is not in a lawyer-client relationship and is not required to exercise the independent professional judgement required when acting for a client, which deprives the Court of the benefit of independent counsel; incentivising lawyers to represent themselves is at odds, as has been noted by the New Zealand Supreme Court and High Court of Australia, with the prevailing modern orthodoxy that self-representation by lawyers is undesirable; and
- f. the distinction, which for the above reasons cannot be justified in principle and is thus invidious and contrary to the principle of equality before the law, risks undermining the legitimacy of the legal profession (a view expressed by submitters including the New Zealand Bar Association and the New Zealand Law Society).



**Submissions on Question Four: Should an exception nonetheless be made for employed lawyers acting for a party and, if so, on what basis should their costs be determined?**

*Balance of opinion*

3.28. Ten submitters addressed this question. It proved the second most divisive question after the first, with five submitters submitting that the employed lawyer exception should be maintained, four opposing the maintenance of the exception, and the tenth, the New Zealand Law Society, saying that its membership was unable to arrive at a consensus (except in respect of one sub-issue).

*Submissions opposing an exception being maintained*

3.29. Submitters who opposed the maintenance of the exception saw no good basis for distinguishing, if the primary rule and lawyer-in-person exceptions are abrogated, between in-house counsel and other self-represented parties. Two reasons were offered in support of this assessment:

- a. As the District Court Judges and Bar Association noted, in their view (as the Judges put it) “the employer is being compensated for the opportunity cost associated with having their employees engaged in the litigation as opposed to other work”. That is, they do not accept the view that “the time of a salaried employee is a real cost to a corporate party which has incurred the expense of engaging a lawyer in a manner hard to distinguish from a party who obtains external counsel”. This because employers of employed lawyers fundamentally maintain the opportunity to gain compensation for staff time spent on involvement in litigation that parties who retain external counsel do not. This was considered these submitters to be an unfair distinction.
- b. As the Law Society recorded, there is a concern that in-house counsel are not as independent as external counsel and, as a result, offer less value to the Court, all things being equal. The Law Society notes that many corporate lawyers assume multiple roles within an organisation and some hold key decision-making responsibilities, such that the extent to which they can be said to be independent is reduced. In particular, the Law Society noted a consensus view amongst its members that the exception should not extend to employed lawyers of law firms being used, as they report is commonly done, in debt recovery actions being brought by the firm.

*Submissions favouring an exception being maintained*

3.30. The maintenance of an exception for in-house counsel was favoured by the governmental submitters, and by a portion of the New Zealand Law Society membership, especially the Inhouse Lawyers Association of New Zealand (ILANZ) as a division of the

Law Society. This doubtlessly relates to the fact that the government is the largest employer of in-house counsel. As Crown Law reports, the Government is the single largest employer of in-house counsel in New Zealand, having at least 850 employed lawyers (and 1500 counting the wider public service). Any abrogation of the exception would, Crown Law informed the Committee, have a significant impact on Crown funding.

3.31. The Law Society, in its neutrally cast report on this issue, referred the Committee to a 2018 publication in which ILANZ offered the views that:

- a. In-house lawyers hold practising certificates like all other lawyers and are subject to the same regulatory oversight. While they do not offer their services to the public more widely, the regulatory approach is to treat their client employer as a single client, but a client, nonetheless. In acting for their employer in-house lawyers do not act for their own interest or profit, but rather for that of their client. This is not materially distinct from the position of external counsel.
- b. To differentiate between rules applied for in-house counsel in comparison with external counsel based only on their employment status is contrary to consistent rights and obligations across the profession. Not allowing recovery of any costs for the use of in-house lawyers appears to treat them as an inferior tier of lawyer.
- c. The use of in-house counsel is a legitimate economic choice for entities, and it seems unreasonable for the rules to be applied in a way that punishes entities for what is essentially a commercial decision relating to how they are represented in court, which would have an undesirable effect of reducing competition in the market.

3.32. The Crown Law Office, New Zealand Customs Service, Auckland Council, and Inland Revenue Department all also expressed the view that a party represented by an employed lawyer is in a different category to the self-represented litigant because, pursuant to the Rules of Client Care and Conduct, the employed lawyer is in a lawyer-client relationship and is representing, not their own interests or case, but that of their client, and is subject to the ethical obligations of counsel. Additionally, when an in-house lawyer appears for their employer in litigation, a regulated service is being provided and the in-house lawyer is obliged to provide independence in the conduct of the litigation, being of counsel in a way that a self-represented litigant is not.

3.33. These submitters also considered that the costs of in-house counsel incurred by organisations are actual costs, not notional or opportunity costs. As Crown Law put it, litigation related costs of in-house counsel are in addition to other lost staff time that organisations with and without in-house counsel incur (and which are not provided for in the costs scale). The Customs Service, endorsing this view, added that, in its submission, the employed lawyer exception does not, on an accurate assessment, allow

organisations to obtain compensation for the opportunity cost of having staff engaged in litigation related work that organisations that use external counsel cannot recover, as costs are only awarded to a successful party in relation to steps in litigation that have actually been carried out by its lawyers, not these broader costs.

- 3.34. Meredith Connell also expressed the view that the costs associated with using employed lawyers in litigation are tangible costs, albeit these are less palpable than costs directly recorded in an invoice, with the cost being compensated the actual cost of the lawyer's salary, which is admissible of calculation on the basis of an effectively hourly rate for the time spent on the case by the employed lawyer, allowing for an award of costs on a partial indemnity basis according to scale, subject to the ordinary costs regime.
- 3.35. Submitters who favoured maintaining the exception gave examples of the greater economic efficiency that can be realised through the use of in-house counsel in some instances:
- a. For example, the Customs Service noted that most litigation involving the New Zealand Customs Service is before the Customs Appeal Authority (CAA), and relates to the application and interpretation of the Customs and Excise Act 2018. Simple matters before the CAA can be more efficiently conducted by in-house counsel than external counsel, the Service submits, noting that in-house counsel best understand the business needs and environment of the New Zealand Customs Service.
  - b. Auckland Council made very similar observations in respect of its 60-strong in-house legal team.
  - c. Crown Law stated that the use of in-house counsel "enables the efficient allocation of publicly funded resources through retention of institutional knowledge, allocation of counsel with appropriate expertise and understanding of the business needs of the particular agency, reduction in expenses (including travel) and ability to ensure a consistent standard of representation in and assistance to the Court."

*Measure of the award of costs for representation by in-house counsel*

- 3.36. As to the basis on which costs should be awarded to parties represented by in-house counsel if the exception is maintained:
- a. the District Court Judges considered a modified scale approach should apply to employed lawyers, with parties represented by in-house counsel recovering at a lower rate than those represented by external counsel, to recognise that these awards of costs set-off (to an extent) the employer's opportunity costs;
  - b. Auckland Council supported costs being made according to cost on the existing scale, potentially (but not necessarily) with some reduction, noting the Council currently seeks awards on a category 1A or 2A basis to reflect the Council's low

actual costs, with legal staff time being “charged out” internally at a rate of \$206.40 per hour, such that the Committee might consider a lower daily recovery rate is appropriate to reflect in-house counsel’s lower real cost; while

- c. the Law Society, Crown Law Society, Custom Service, Meredith Connell, and Inland Revenue Department submitted that, should the exception be maintained, costs should be recoverable as where external counsel are engaged.

### Other Submissions

- 3.37. Dr Toy-Cronin submitted that the Committee should (if the primary rule is not abrogated) clarify that fees incurred by self-represented litigants in respect of advice and assistance obtained on other aspects of their case pursuant to a limited retainer are recoverable, suggesting clarification in this regard might incentivise self-represented litigants to seek professional assistance where possible.<sup>136</sup>
- 3.38. Meredith Connell submitted that costs should be claimable by lawyers working pro bono or who have agreed to reduce or limit their fees to any costs award in favour of their client. The firm suggested this measure could be effective in better enabling people to obtain access to legal representation, which is an important means of promoting access to justice, and also in partially addressing the barriers arising from the cost of legal representation by increasing the likelihood of lawyers being able to act pro bono.<sup>137</sup>

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<sup>136</sup> I do not further address this submission, given that, in my assessment, the current rule of practice allowing for litigants-in-person to obtain disbursements in respect of such expenses is tolerably clear. In any event, I recommend that the primary rule be abrogated, in which event this rule of practice would become redundant.

<sup>137</sup> I do not further address this submission, considering that the present wording of r 14.2(2) ensures that fees charged on a contingency basis are recoverable under the existing costs regime. This is capable of accommodating fees notionally charged to a client for whom a lawyer acts pro-bono, or where the fees chargeable are capped by the extent of the client’s recovery, so long as the invoice is tendered on the basis that the amounts invoiced are clearly charged on a contingency fee basis. That would be best practice, in any event, and I do not consider there is sufficient evidence available that amendment of the rules in the manner suggested would be likely, in itself, to materially influence any practitioners’ decisions whether to provide services pro bono

## 4. The Committee is Competent to Promote Reform

### The Question of Competence

- 4.1. As noted in the preceding sections, while the High Court of Australia in *Bell Lawyers v Pentelow* determined it was appropriate for that Court to abrogate the lawyer-in-person exception, our Supreme Court in *McGuire* expressed the view it is for either the legislature or a body such as this Committee, rather than the Courts, to enact broad reforms of the cost regime with respect to self-represented litigants.<sup>138</sup> The abrogation of the primary rule was in fact, as has been discussed in section two above, achieved legislatively in England and Wales,<sup>139</sup> and Canada is unique in that step having been taken by the Courts.<sup>140</sup>
- 4.2. The Rules Committee is not subject to the same limitations, in terms of its ability to conduct a legitimate and effective law reform process, as a common law court. Unlike the Supreme Court in *McGuire*, which identified those points that had not been canvassed in submissions, which it was therefore unable to consider, the Committee is free to commission research and invite submissions of its own initiative. Moreover, the Committee is specifically empowered and required to develop rules of practice and procedure that facilitate the just, speedy, and inexpensive dispatch of the business of the Courts, and the administration of justice.<sup>141</sup> The Committee's membership brings together judicial, legal, and governmental officials possessed of significant technical expertise,<sup>142</sup> and benefits from the specialist support and advice of the Ministry of Justice and Parliamentary Counsel Office.
- 4.3. Equally, I am mindful of the limitations of the Committee's institutional capacity. Compared to Parliament, which is supported by the significant policy edifice of the Executive in terms of the shaping of draft legislation prior to its introduction to the House of Representatives by Ministers, the Committee has no full-time policy staff, and its members serve in a part-time capacity. The Committee meets infrequently and is dependent for feedback and consultation on the contributions of the legal profession, government, and wider community. While the Committee is successful in engaging with a certain cross-section of submitters, as is clear from the previous section, a comparatively small number of submissions are generally received (compared to, say,

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<sup>138</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [90]; *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [65]-[66], [72]; *Cachia v Hanes* (1994) 179 CLR 403 (HCA) at 393.

<sup>139</sup> Litigants in Person (Costs and Expenses) Act 1975 (UK).

<sup>140</sup> See *Skidmore v Blackmore* (1995) 122 DLR (4<sup>th</sup>) 330 (BCCA).

<sup>141</sup> Senior Courts Act 2016, s 145; District Court Act 2016, s 228.

<sup>142</sup> See Senior Courts Act 2016, s 155 for a description of the Committee's membership.

the average draft bill before Parliament), and there is limited engagement with the wider community.

- 4.4. As follows, to the extent that reforming the costs regime in the manner contemplated in the consultation paper involves what Nettle J in *Bell Lawyers*, using language not dissimilar to that adopted by the Auckland District Law Society in its submission, termed “very wide” “ramifications”,<sup>143</sup> there is a question whether the Committee, as opposed to Parliament, is the most competent body to promote reform. This not only relates to the Committee’s institutional capability to pursue such reforms, but also the legitimacy of enacting significant changes to the law without receiving a clearer mandate from the relevant members of the wider New Zealand community.

### **My Answer – Overview**

- 4.5. Nonetheless, I would suggest that the Committee is competent to promote reform in this area, for the following reasons.
- 4.6. Firstly, for the reasons developed in the following sections, there is a clear principled argument, and need, for reform of the costs regime with respect to the position of lay-litigants.
- 4.7. Secondly, also for the reasons developed in the following sections, it is not a tolerable course of action, in light of these considerations, to allow the current position – especially so far as the lawyer-in-person exception is concerned – to persist any longer. Rather, the lawyer-in-person exception is particularly invidious, and corrosive of the legitimacy of the legal system and the legal profession, and the distinction between self-represented litigants and represented litigants, in its current form, unjustifiably discriminatory. These concerns assume a particular urgency in light of the increasing rate of self-representation in New Zealand’s courts.<sup>144</sup> Reform is therefore required sooner rather than later.
- 4.8. Thirdly, the Committee has been advised by the Ministry of Justice that it is unlikely that legislative reform in this area could be accomplished in the short-to-medium term, given the unlikelihood of legislative time being found within that period, having regard to the government’s other legislative priorities. In contrast, reform of the High Court Rules 2016 and District Court Rules 2014 is a comparatively expeditious process,<sup>145</sup> and promotion of these reforms would be a high priority for the Committee (being a major reform project of which it is currently seized), allowing for a far speedier response.

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<sup>143</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [78].

<sup>144</sup> See Justice Stephen Kós “Civil Justice: Haves, Have-Nots, and What to Do About Them” (Arbitrators’ & Mediators’ Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016), available at <https://www.courtsofnz.govt.nz/speechpapers/HJK2.pdf>, or (2016) 5 JCivLP 178 at [21].

<sup>145</sup> See Senior Courts Act 2016, ss 146-149; District Court Act 2016, s 228.

- 4.9. Fourth, again for reasons developed in the following sections, it is my advice that abrogating of the primary rule (and with it the lawyer-in-person exception, insofar as lawyers representing themselves are to be treated like all self-represented litigants) will not have ramifications as broad as those envisaged by the Auckland District Law Society in its submission or Nettle J in his dissent.
- 4.10. In particular, as developed in the following section, my advice is that, given its development in recent decades, the costs regime is no longer solely predicated on the indemnity principle. Rather, the concept of “costs” now refers to an objectively calculated reasonable award for work done in ordinary cases, which better captures the various public policy purposes of the cost regime. As the award of costs to self-represented litigants on the basis of a modified scale approach, such as I recommend, will not infringe on that principle, and will allow costs to be awarded broadly as expeditiously as is currently the case for represented parties, in a manner not cutting across any other parts of the costs regime. For these reasons, I would suggest the changes involved in promoting the reforms recommended in this paper would be minor in real terms.
- 4.11. Nor do I predict, for the reasons given in section six of this paper, that these reforms will lead to a significant increase in rates of self-representation in New Zealand’s courts. Rather it is my assessment, having considered the submissions set out in the previous section, that self-representation is more primarily attributable to the unavailability of civil legal aid and the high costs of obtaining representation and that, while allowing an award of costs to self-represented litigants could conceptually increase the incentive to self-represent, that is unlikely to eventuate in practice. Accordingly, I do not believe that the proposed reform would have public revenue implications such that Parliament would be the more appropriate body to promote reforms.
- 4.12. The position may be somewhat different, I acknowledge on the basis of the governmental submissions, and particularly Crown Law’s submission, in respect of the abrogation of the lawyer-in-person exception. In particular, I acknowledge that reform in that area could have potentially significant revenue implications for the Crown and significant economic implications for the structure of the legal profession. However, as noted at the outset of this paper, there is a compelling, in my evaluation, argument that the costs regime ought to continue to treat those represented by self-represented litigants more like represented litigants for the purpose of costs than not (even if not on exactly the same basis). If this course of action is adopted, the economic and revenue implications will likely be minimal.
- 4.13. For these reasons, it is my advice that the detailed consideration the Committee has already given and will continue to give to the questions of principle, policy, and practice outlined in this report and elsewhere; the consultation that has been undertaken already; and the future consultation likely necessary to address the contentious issues

outlined in this report, have and will provide an appropriately comprehensive and legitimate reform process proportional to the significance and importance of the changes recommended in this paper.

4.14. Fifth, and finally, it is significant that this is the sort of technical issue related to the practice and procedure of the Courts in respect of which Parliament has empowered, and thus expects, the Rules Committee to act.<sup>146</sup> As noted in the first section of this report, while the jurisdiction to award costs is ultimately statutory in its basis (historically the Statute of Gloucester 1278 (Imp) and, now, s 162 of the Senior Courts Act 2016), the real source of the law concerning the award of costs is found, as was said in *McGuire*,<sup>147</sup> in the judge-made common law and rules of court. It is therefore appropriate for the Committee to Act to change such “rules of practice”, even very long-standing ones.

### **The Committee’s Jurisdiction to Act**

4.15. In arriving at this view, I have been careful to confirm my instinctive impression that the modification of the rules of court in accordance with its preferred position would be within the Committee’s grant of competence under statute. In the interests of transparency, and especially given the significant (albeit not, for the reasons just noted, particularly drastic), scope of the reforms being advanced, this analysis is set out below.

4.16. The Committee’s rule-making power is, so far as the High Court, Court of Appeal, and Supreme Court is concerned, situated in s 148 of the Senior Courts Act 2016 (which s 228 of the District Court Act 2016 parallels in materially similar terms).

4.17. Section 148 derives from cl 145 of the Judicature Modernisation Bill 2013 (178-1), parts of which eventually became the Senior Courts Act 2016, which re-enacted without substantial modification s 51C of the Judicature Act 1908. In the case of both statutes, the Governor-General in Council, with the concurrence of the Chief Justice and any two or more Rules Committee members, was given the power to make “rules of practice and procedure” to “facilitate the just, speedy, and inexpensive dispatch of the business” of the Senior Courts and “the administration of justice” (the wording of s 145 referenced in s 148(1)). This has been the guiding principle for the administration of civil justice in New Zealand since that wording was devised by the 1969 Revision Committee, the work of which Committee eventually gave rise to the High Court Rules 1985.

4.18. As noted, identical arrangements are in place in respect of the District Court pursuant to s 228 of the District Court Act 2016 (which corresponds to cl 411 of the 2013 Bill and s 122 of the District Court Act 1947); which provision refers to, and parallels, the provisions

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<sup>146</sup> Senior Courts Act 2016, s 145; District Court Act 2016, s 228.

<sup>147</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [63], referring to *Guss v Veenhuizen* (No 2) (1976) 136 CLR 47. See also *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [72] per Nettle J (dissenting).



of the Senior Courts Act 2016. There are several other pieces of legislation under which rules making powers are for the Rules Committee are provided for, which rules are made using the powers under ss 148 and 228.<sup>148</sup>

- 4.19. Sections 149 and following of the Senior Courts Act 2016 provide that the Committee can, further to these general powers, make rules in respect of assorted particular matters for the High Court, Court of Appeal, and Supreme Court. Section 147 of the Act provides, unusually, and uniquely as amongst the rules of court, that the High Court Rules 2016 are part of the Senior Courts Act 2016, and thus have the status of primary legislation, despite being published separately.
- 4.20. These provisions were inserted to ensure that the Committee had power to make rules of practice and procedure in respect of certain matters that the Law Commission had identified as being potentially beyond “rules of practice and procedure” in its issues paper on the review of the Judicature Act 1908.<sup>149</sup> As recorded in the Commission’s final report on the judicature modernisation legislation, these issues were of significant concern as the Commission was initially averse to the practice of the enacting the High Court Rules as a schedule to a statute, as opposed to in the form of a regulation.<sup>150</sup> This would therefore have opened any rules made by the Committee to challenge by way of judicial review, or disallowance as ultra vires as part of the regulations review procedure.
- 4.21. Ultimately however, the Committee’s preferred view that the High Court Rules should be given the statute of primary legislation, prevailed. This was seen to appropriately recognise the independence of the judiciary. This independence being expressed through the Courts’ making their own rules of practice and procedure is an aspect of the Westminster constitutional system of considerable antiquity:<sup>151</sup>

the methods and proceedings of the King’s justices were not, in the beginning, matters for supervision by Parliament. First by decisions and directions given in particular cases, and later by rules and orders formulated for general use, the judges of each of the superior courts gradually built up a procedure suited to the character of the issues that came before them at

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<sup>148</sup> These relevant provisions are s 442 of the Insolvency Act 2006; s 26 of the Courts Martial Appeals Act 1953; s 146 of the Care of Children Act 2004; s 199 of the Evidence Act 2006; s 59 of the Administration Act 1969; s 20 of the Habeas Corpus Act 2001; s 108 of the Marine and Coastal Area (Takutai Moana) Act 2011; s 111 of the Protection of Personal and Property Rights Act 1988; s 448 of the Oranga Tamariki Act 1989; s 5 of the Reciprocal Enforcement of Judgments Act 1934; s 28A of the Adoption Act 1955; s 14 of the Commissions of Inquiry Act 1908 (for scale of costs); s 31(3)(b) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004; s 16 of the United Nations Convention on the Law of the Sea Act 1996; s 16 of the Arbitration Act 1996; s 9 of the Insolvency (Cross-Border) Act 2006; and s 9A of the Domestic Actions Act 1975.

<sup>149</sup> Law Commission *Review of the Judicature Act 1908 – Towards a Consolidated Courts Act* (NZLC IP 25, February 2012) at [8.4]-[8.5].

<sup>150</sup> At [8.6]-[8.21].

<sup>151</sup> Samuel Rosenbaum *The Rule-Making Authority in the English Supreme Court* (Boston Book Company, Boston, 1917) at 4 – 5.

trial. So well recognised was this form of authority when Parliament set out upon its career as law reformer about the middle of the nineteenth century, that rather than upset a useful and established custom, it clothed the custom with its sanction and elevated it into the dignitary of statute law. Such is the character of the Rule Committee as constituted under the Judicature Acts.

- 4.22. This, it will be observed, is the process by which the current costs regime has evolved, as traced in the first section of this report.
- 4.23. Adopting the practice of clothing the Court's ability to regulate its practice and procedure with "the dignity of statute law" in the 2016 Act emulated the position that had prevailed since 1985, when the High Court Rules 1985 were enacted under the Judicature Amendment Act (No 2) 1985.<sup>152</sup> The practical effect of this is that the High Court Rules, once made, are likely not reviewable.<sup>153</sup> It remains arguable, however, that the Committee's decision to use its power to amend the Rules might be reviewable (at-least so long as the amendments have not been formally promulgated) if they are ultra vires the grant of rules-making power.<sup>154</sup>
- 4.24. This much follows from the fact of the precise wording of s 147(1) of the Senior Courts Act 2016, which provides that the High Court Rules, as they were as sch 2 to the Judicature Act 1908 as of the changeover from the Senior Courts Act 2016, and as those rules are altered, amended, added to, and revoked under s 148, are deemed to be part of the Act. As the power under s 148 is a power to make rules of practice and procedure for the purposes noted at [15] above, it follows that any rules purportedly made under s 148 that do not conform to that power are not actually part of the High Court Rules 2016 as they are not deemed, under this formula, to be part of the Act. A declaratory judgment to that effect would likely issue, together with judicial review of that exercise.
- 4.25. Also, rules made for the District Court, Court of Appeal, and Supreme Court are not immunised by enactment as primary legislation. Obviously, any purported exercise of rule-making ability in respect of these Courts that was ultra-vires the rules-making power would be vulnerable to judicial review as ultra vires the grant of statutory power.
- 4.26. For this reason, it was necessary for ss 149 and following of the Act to be inserted to clarify that the Committee had the power to make rules of court in respect of certain matters that are not unambiguously matters of "practice and procedure" that it was considered desirable for the Committee to be able to address, and for the Committee to be mindful of the scope of its grant of rules-making power.

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<sup>152</sup> Though it appears Parliamentary Counsel's actual concern was to immunise the High Court Rules from judicial challenge: see Nigel Wilson "The Evolution of the High Court Rules" (1988) 14 NZ Recent Law 203 at 213.

<sup>153</sup> Andrew Beck *Principles of Civil Procedure* (3rd ed, Brookers, Wellington, 2012) at 7–8.

<sup>154</sup> See at 7-8. See also Enid Campbell *Rules of Court* (The Law Book Company Ltd, 1985) at 60.

4.27. The basic touchstone is that the rules made must be “rules of practice and procedure” made “for the purposes of facilitating the expeditious, inexpensive, and just dispatch of the business of the court, or of otherwise assisting in the due administration of justice.” This is also the position under the corresponding (materially similar) provisions in England, in respect of which the High Court of New Zealand has observed, adopting a passage from *Halsbury’s Laws of England*:<sup>155</sup>

The Rules of the Supreme Court are, a form of delegated or subordinate legislation, and the Supreme Court Rule Committee is empowered to make rules only within the strict limits defined by statute, whether contained in the Supreme Court Act 1981 or any other Act. The overriding limitation on the powers of the rule committee to make rules is that they must be confined to regulating and prescribing the practice and procedure to be followed in the Supreme Court, and they must not therefore extend into the area of substantive law. There is thus at the outset a vital and essential distinction between substantive law, and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. Everyone is entitled to enjoy such legal rights or status but equally is liable to perform or comply with his legal duties. The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a Court of law or other recognised or properly constituted tribunal. Perhaps the term ‘practice’ is narrower than the term ‘procedure’, since practice may be limited to the habitual, repetitive or continuous use of practical methods or modes of proceeding, whereas ‘procedure’ refers to the mode or form of conducting judicial proceedings, whether they be to the whole or part of the suit. The distinction may rarely be invoked, since the terms are almost invariably used in conjunction.

At any rate, the Rules of the Supreme Court are mere rules of practice and procedure, and their function is to regulate the machinery of litigation; they cannot confer or take away or alter or diminish any existing jurisdiction or any existing rights or duties. Since they are procedural in character and effect, they cannot enable an action to be brought which could not otherwise have been brought.

4.28. More generally, in terms of the distinction between substantive and procedural law, substantive law “define[s], create[s] or confer[s] substantive legal rights or legal status or [imposes] and define[s] the nature and extent of legal duties”,<sup>156</sup> whereas procedural law on the other hand provides “the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a court of law or other recognised or properly constituted tribunal.”<sup>157</sup> That said, “practice and procedure” is

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<sup>155</sup> *Kenton v Rabaul Stevedores Ltd* (1990) 2 PRNZ 156 (HC) at 162, citing *Halsbury’s Laws of England* (4th ed, 1987) vol 37 at [10].

<sup>156</sup> *Halsbury’s Laws of England* (5th ed, 2009, online ed) vol 11 Civil Procedure at [1] and [4]; Adrian Zuckerman “Rule Making and Precedent Under the Civil Procedure Rules 1998 — Still an Unsettled Field” (2010) 29 CJQ 1 at 3.

<sup>157</sup> *Black v Dawson* [1895] 1 QB 848 (EWCA); *Watson v Petts* [1899] 1 QB 54 (EWCA).

not confined to the steps in the action itself, but extends to matters that are connected with the proceeding.<sup>158</sup>

- 4.29. So far as the costs reforms in issue are concerned, the question is whether the proposed reforms touch on a matter of practice and/or procedure in procedural law, as opposed to affecting substantive vested rights. As will be clear from the history of the regime set out in the first section of that report alone, that is plainly the case, as set out by William Young J in his decision for the majority in *McGuire* as summarised in section two of this paper, where the Judge noted that, while the power to award costs is statutory,<sup>159</sup> the manner of the award of costs is a matter of practice that has evolved through a number of judicial decisions into a number of long-established rules of practice. These rules now find expression, save as modified by the Rules Committee, in the High Court Rules 2016.
- 4.30. This can usefully be distinguished, in terms of the procedural/substantive distinction referred to above, from the situation in the case referenced above. There, shortly before the trial of his claim for breach of contract, the plaintiff had accepted the payment into Court by a defendant of a sum not specifically stated to include interest. The plaintiff claimed for an award of interest. There being no right at equity or common law, or under statute, for the award of interest in those circumstances, Chilwell J refused to award him interest. On the strength of the passage from *Halsbury's Laws of England* noted above, and similar observations made by Quilliam J elsewhere,<sup>160</sup> Chilwell J held that the Court's inherent jurisdiction or power to regulate matters of practice and procedure (being that power which the Rules Committee's statutory power emulates) did not extend to a power to create a substantive entitlement to the award of interest at the expense of the other party.<sup>161</sup>
- 4.31. Put simply, in distinction to the position in relation to the award of interest in that case, the substantive "power" to make an award of costs is to be found in s 162 of the Senior Courts Act 2016. The exercise of that power is, in general, subject to, and regulated by, pt 14 of the High Court Rules 2016 and District Court Rules 2014 (the power to make rules in respect of the District Court being situated in s 228(3)(j) of the District Court Act 2016). However, no person has any substantive entitlement to the receipt of an award

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<sup>158</sup> RI Carter (ed) *Burrows and Carter Statute Law in New Zealand* (LexisNexis, Wellington, 2015) at 625, citing *Maxwell on the Interpretation of Statutes* (12th ed, Sweet & Maxwell, London, 1969) at 218 and 222; *Maxwell v Murphy* (1957) 96 CLR 261 at 267; and *Inspector of Awards v Malcom Forlong Ltd* [1977] 1 NZLR 36 (CA).

<sup>159</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [63], referring to *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47. See also *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [72] per Nettle J (dissenting).

<sup>160</sup> *Kenton v Rabaul Stevedores Ltd* (1990) 2 PRNZ 156 (HC).

<sup>161</sup> At 163-164, citing *Re St George* HC Wellington P29/86, 7 February 1986.

of costs except as arising from the application of the practices prescribed by those provisions.<sup>162</sup>

4.32. Accordingly, in terms of the foregoing procedural/substantive distinction, the making of rules of court modifying the entitlement, generally, of various classes of litigants to an award of costs does not amount to the affecting of substantive, vested, rights and entitlements. No person, generally speaking, has a right to have their substantive determined in accordance with any particular form of procedure, only, rather, a right to have their claim determined in accordance with the procedural law prevailing from time to time.<sup>163</sup>

4.33. As follows, the costs regime, including the availability of costs to self-represented litigants, is a matter of procedure in respect of which the Committee can decide to act.

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<sup>162</sup> Subject to the possibility, as discussed in the following section, of parties privately agreeing that indemnity costs are payable as between them in the event of a breach of a contract or deed on the successful contracting party's enforcement of their rights under the deed, which might be thought of as a substantive right. This is, however, of no issue at present, as the amendments proposed in this paper would only seek to broaden, not abrogate, the availability of costs awards, meaning that any subsisting rights under any such deed or agreement would not be affected.

<sup>163</sup> RI Carter (ed) *Burrows and Carter Statute Law in New Zealand* (LexisNexis, Wellington, 2015) at 625, citing *Maxwell on the Interpretation of Statutes* (12th ed, Sweet & Maxwell, London, 1969) at 218 and 222; *Maxwell v Murphy* (1957) 96 CLR 261 at 267; and *Inspector of Awards v Malcom Forlong Ltd* [1977] 1 NZLR 36 (CA).

## An Implication as to Transitional Arrangements

- 4.34. The foregoing does indicate, however, the desirability of some regard being paid to transitional arrangements for any reform of the costs regime.
- 4.35. While considerations of administrative efficiency have given rise to the principle that the presumption against retrospectivity does not apply to purely procedural statutes, such as the costs regime as part of the High Court Rules 2016,<sup>164</sup> it has been the practice of the Committee to not give amendments to the costs regime altering the daily recovery rates retrospective effect. The Courts have given effect to this intention, even though recent amendments to the costs regime have not, in accordance with contemporary drafting practice, expressly included transitional provisions to that effect.<sup>165</sup>
- 4.36. This reflects a “sui generis” policy with respect to these occasional updates to the costs regime that “it made good sense for parties to be awarded costs on the basis of [procedural] entitlements in place at the time the work for which costs are sought was undertaken”,<sup>166</sup> rather than the application of any broader principles around the presumption against retrospectivity. Indicatively, the same policy perhaps ought to apply with any modifications to the costs regime altering the availability of costs for self-represented litigants, so far as proceedings underway at the time the changes are introduced are concerned, for the same reasons as that policy has been adopted in respect of changes to daily recovery rates. This is not necessary as a matter of law. However, there is an attraction to emulating the practice described above in effectively increasing the daily recovery rate for self-represented litigants from nil to something other than nil; if only to meet the established expectations of the profession and community as to the effect of changes to the costs regime.
- 4.37. Adopting that policy would also, I note, foreclose any possibility of the costs regimes reforms being challenged on the basis that a party’s vested substantive interest in the award of costs according to the prevailing procedure was being affected, rendering the statute substantive rather than procedural, as has been accepted as being a possibility with the retrospective amendment of ostensibly procedural statutes.<sup>167</sup>

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<sup>164</sup> *Bairstow v Queens Moat Houses PLC* [1998] 1 All ER 343 (EWCA) at 351.

<sup>165</sup> See *Delegat v Norman* [2014] NZHC 1099 at [31]; *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [30]-[38], citing *Todd Pohokura Ltd v Shell Exploration NZ Ltd* (2008) 18 PRNZ 1026 (HC) at [84]-[89], *Securities Commission v Midavia Rail Investments BVBA* [2005] 3 NZLR 433 at [55], *Gibbs v Crest Commercial Cleaning* (2005) 7 NZELC 97,891 (EmpC), *R v Secretary of State for Home Department* [2006] EWCA Civ 532; and *EA v Rennie Cox Lawyers* [2020] NZHC 1372.

<sup>166</sup> *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [32]-[39].

<sup>167</sup> As to which, generally, see RI Carter (ed) *Burrows and Carter Statute Law in New Zealand* (LexisNexis, Wellington, 2015) at 625-632.

4.38. As the amended rules would not be presumptively construed to have retrospective effect, as part of legislation, it will likely be unnecessary to include transitional provisions to give effect to this intention, given the existing practice and authorities noted above.

## 5. Recapitulating “Costs”

### Background and Overview

- 5.1. In drawing up the initial consultation paper, the Committee identified that allowing self-represented litigants to receive an award of costs would be incompatible with a conception of costs as a means of allowing recovery only for out of pocket legal expenses. For this reason, the Committee took the decision, in framing the consultation paper, to canvas views as to whether the concept of “costs” should be expanded to allow such recovery. This presupposed that was, for the reasons noted, incompatible with the making of such awards. It also recognised that a higher level reconceptualisation of the nature of costs would, logically, need to precede consideration of any new approach to costs for self-represented litigants.
- 5.2. This reasoning was borne out by the submissions received in response to the first question in the consultation paper. As noted in the third section of the paper, the submitters who expressed or recorded reasons for opposition to costs being available to self-represented litigants considered such an award being made available incompatible with the underpinnings of the costs regime. These underpinnings were described by these submitters in terms of the indemnity principle, or the notion that the purpose of costs is to allow recovery of out-of-pocket legal expenses (expressing something like the notion of a partial indemnity). Many of these submitters expressed concern that it would be unfair, and in fact invidious, to allow unrepresented litigants to recover costs for something other than out-of-pocket legal expenses – it was generally assumed on an opportunity-cost-recognition basis or similar – while represented litigants could recover only on the basis of a partial indemnity for out-of-pocket legal expenses.
- 5.3. As foreshadowed in the first section of this paper (at paragraphs 1.32 - 1.35), these submissions have prompted me to further consider the nature of the costs regime. Having done so, my advice is that it is not necessarily the case that the current underpinnings of the costs regime are inconsistent with the award of costs to self-represented litigants, such that the meaning of costs needs to be revised to allow litigants-in-person to receive costs awards.
- 5.4. Rather, it is my advice that, since the High Court Rules 1985 were introduced, and at least since the current costs regime was introduced in the High Court in 2000, the most apt description of the costs regime is not as a means of allowing recovery for out-of-pocket legal expenses. While that is a long-standing, venerable, paradigm, and I accept that was the paradigm the Committee had in mind when the costs regime was drafted,

and it is still a widely held view as to the meaning of cost (as reflected in the submissions), that perspective no longer aligns with the actual manner in which costs are awarded under the Rules, nor encapsulates all of the objectives of the costs regime.

- 5.5. Rather, the better view is that “costs” are the allowance of a reasonable reward in recognition of the work done towards successful litigation at a rate that the Rules Committee has determined to be appropriate, having regard to the complexity and importance of the matter in issue, subject to, in certain cases, the need to:
  - a. avoid excessive or inadequate recovery in cases of particularly great or minimal significance; and
  - b. give expression to the other public policy objectives that the costs regime is intended to advance, such as encouraging proportionality in litigation, sanctioning misconduct and misfeasance in litigation, promoting settlement, producing fairness as between successful and unsuccessful parties, and incentivising parties to obtain the services of independent, objective, counsel.
- 5.6. In this section, I explain my analysis; demonstrating, by reference to the features of the regime now found in the High Court Rules 2016 and District Court Rules 2014 that the above is an apt explanation of the meaning of “costs” today.
- 5.7. In doing so, I do not intend to suggest the meaning of “costs” derives from the statutory scheme, or any particular formulation of statutory or rules language. I recognise, as developed in the first section of this paper, that the meaning of “costs” and the ambit of costs awards have always been a matter of procedure and practice, developing as a result of judicial reasoning. It is not proposed that the Committee depart from that well-established highly discretionary approach. However, it is necessary to recognise that discretion is now bounded, and in most cases must conform to, the provisions of the statutory regime.
- 5.8. As will be apparent, and as set out in the previous section, I do not consider this represents a significant departure from the existing costs regime. Rather, I consider this amounts to a recapitulation of existing practice.

### **The Courts’ discretion as to costs is now largely bounded by the statutory regime**

- 5.9. The starting point must be the courts’ overriding discretion as to all matters that relate to costs of, incidental to, and of a step in a proceeding, subject to any contrary provisions of any enactment (such, most notably, the Legal Services Act 2011, which governs the availability of costs for and against legally aided persons). This formulation reflects the necessarily broad nature of the courts’ plenary grant of power to award costs in all costs, and, as noted in sections one and two of the paper, has long been understood as a signal



that the development of the costs regime should be spearheaded by the courts in accordance with their usual methods of common law reasoning.

5.10. Nonetheless, it is now well-established that the existence of the statutory costs regime carries with a clear indication that recourse to the Court's overriding jurisdiction (to depart from the position that ought to prevail under the statutory regime) is appropriate only in exceptional cases.<sup>168</sup> A judge departing from the regime without good reason and clear justification risks intense appellate scrutiny, the discretionary basis of the award of costs notwithstanding. As follows, while the nature and operation of the costs regime remains nominally a discretionary matter of practice, for at least two decades that practice has followed the contemporary statutory regime. Today at least it is therefore meaningful, despite the recognition in section one of this paper that historically the concept of "costs" has shaped the regime rather than the regime having birthed the concept of "costs", and the Court's overriding discretion as to costs, to assess the meaning and operation of the costs regime in terms of the statutory provisions.

### **The expressly stated objectives and principle underpinnings of the regime**

5.11. It is clear that this statutory regime aims at several objectives and has a number of principled underpinnings. These emerge most primarily from the stated principles applying to the determination of costs, as set out in r 14.2(1) of the High Court Rules 2016 and District Court Rules 2014, being that:

- a. the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
- b. an award of costs should reflect the complexity and significance of the proceeding:
- c. costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
- d. an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
- e. what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
- f. an award of costs should not exceed the costs incurred by the party claiming costs:

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<sup>168</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [HR14.1.01(1)], citing *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7] and [16]; *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [21]-[24] and [28]; and *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 (CA) at [27].

g. so far as possible the determination of costs should be predictable and expeditious.

5.12. More generally, all of the provisions of Part 14 of the District Court Rules 2014 and High Court Rules 2016 in some way reflect the objectives and principled underpinnings of the costs regime. Some, such as r 14.3, give effect to the principles articulated in r 14.2.<sup>169</sup> Others, such as the provisions of r 14.10 related to the effect of offers without prejudice except as to costs (*Calderbank* offers), create exceptions to and deviations from this principle to give effect to other objectives.

5.13. As this recognises, the costs regimes aims at several objectives and to give effect to several principles, some of which are in tension. These are articulated in the following paragraphs.

5.14. In giving this articulation, I have drawn on the commentary offered by the learned authors of *McGechan on Procedure* to the High Court Rules 2016, and also the decisions of the Canadian courts referred to in the second section of this work (see paragraphs 2.29 - 2.35 above).<sup>170</sup> These are developed in the following paragraphs.

#### **The measure of costs in ordinary cases**

5.15. The costs regime aims at allowing a successful party a reasonable reward for work done in prevailing in litigation, at the expense of the unsuccessful party. As with each of the high-level propositions listed in this and the following paragraphs, this embodies a number of sub-objectives, and reflects a number of principled concerns.

5.16. One of these is the principle that costs follow the event, as articulated in the provision of r 14.2(1)(a) that “the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds”. This has been summarised in the proposition that “the loser, and only the loser, pays”.

5.17. Viewed in light of this principle, one goal of allowing a reasonable award for work done towards success is to promote access to justice by ensuring that successful parties are not left more out of pocket than is necessary having regard to the consideration that allowing excessive recovery in the form of adverse costs rewards can itself amount to a barrier to access to justice and the other objectives of the regime. As this reflects, more broadly, the costs regime is intended to operate in a manner consistent with fundamental importance of maintaining access to civil justice.

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<sup>169</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [HR14.2.01].

<sup>170</sup> See, in particular, *Skidmore v Blackmore* (1995) 122 DLR (4<sup>th</sup>) 330 (BCCA); and *Sherman v Minister of National Revenue* (2003) 226 DLR (4<sup>th</sup>) 46 at [46]. See also *Fong v Chan* (1999) 181 DLR (4<sup>th</sup>) 614 (Ontario CA) at 623.

- 5.18. That these awards are borne by the unsuccessful party serves as an incentive to settle proceedings in accordance with the Courts' general policy of promoting settlement,<sup>171</sup> which is also an objective of the costs regime, as discussed below. It can also be understood as an incentive to not engaging in wrongdoing, as it effectively shifts the plaintiff's or plaintiffs' transaction costs in achieving recompense (in part) onto wrongdoers (against whom action is able to be taken).<sup>172</sup>
- 5.19. This is as distinct to the position that prevails in many matters in the United States, where no costs are available, or there is at-least (subject to the Court's discretion to make a "costs-shifting" order) a presumptive lack of costs.<sup>173</sup> That practice represents a determination that the availability of an adverse costs order is too great an impediment to access to justice, because of its potential effect in deterring litigation,<sup>174</sup> to be justified. This can also be seen as incentivising wrongdoing, or at least removing an incentive to wrongdoing. In saying this, it is important to note that, on a holistic evaluation of that legal system, the availability of aggravated and punitive damages in that jurisdiction, and the role of juries in awarding damages, provides other disincentives to wrongdoing not available in New Zealand,<sup>175</sup> the lesser consequences resulting from a finding of liability here arguably increasing the importance of ensuring wrongs can be remedied. Similarly, the greater availability of contingency fee arrangements elsewhere can also serve to facilitate plaintiffs meeting their transaction costs in coming to court more readily (albeit while sacrificing some part of their recovery) than is possible in this jurisdiction.<sup>176</sup>
- 5.20. Also, as noted, costs-shifting is still possible in the United States, where provided for in statute, or where there has been unreasonable conduct in litigation;<sup>177</sup> recognising that, in particular cases, access to justice concerns must be subordinated to the Courts' interest in maintaining standards in litigation. In fact, one can argue (and submitters did) that, in a global sense, it is necessary to ensure that parties in one proceeding make

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<sup>171</sup> See *Wairarapa District Health Board v Shirley* (2005) 18 PRNZ 34 (CA) at [103]; *Auckland City Council v Auckland City Council* [2008] 1 NZLR 838 (HC) at [17]; *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [172]; and *Crummer v Benchmark Building Supplies Ltd* EC Wellington WC28/00, 15 May 2000.

<sup>172</sup> See *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260.

<sup>173</sup> See, for example, *Alyeska Pipeline Service Co v Wilderness Society* (1975) 421 US 240.

<sup>174</sup> As to which, see, for example, Ontario Law Reform Commission *Class Actions* (Volume III, 1982) at 704–709 and 749

<sup>175</sup> See Law Commission *Class Actions and Litigation Funding* (NZLC IP 45, December 2020) at [2.46], [5.59], [6.24], and [6.27].

<sup>176</sup> Though this is far from unrestricted - see the American Bar Association's *Model Rules of Professional Conduct* at r 1.5(c) - the position is much more permissive than in New Zealand: compare *Lawyers and Conveyancers Act 2006*, ss 333-336; *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, rr 9.8-9.10.

<sup>177</sup> See further Henry Cohen and Mary V Capisio (eds) *Awards of Attorney Fees by Federal Courts, Federal Agencies, and Selected Administrative Bodies* (Nova Publishers, New York, 2002).

efficient and proper use of the court's resources to avoid crowding out other claimants, as many submitters noted in opposing the availability of costs awards to self-represented litigants. Similar concerns underpin the availability of indemnity, increased, and reduced costs orders in New Zealand, as developed below.

- 5.21. The New Zealand position is also quite different to the model as formerly prevailed, and still prevails in some cases, in the United Kingdom, in which costs are available on a full indemnity measure.<sup>178</sup> This is, plainly, is the converse of the United States position, and represents a determination, speaking at a high level, that where an award on an indemnity basis is appropriate, that it is inappropriate to allow a successful party to have to bear any part of their expenses (subject to an overriding assessment of reasonableness).
- 5.22. New Zealand's regime represents a balancing of these various considerations.<sup>179</sup> This balance is struck, in part, by the provisions of r 14.2(1)(b)-(e), as reproduced at paragraph 5.11 above. In summary, these provide that, in the case of a represented party at present, parties are rewarded for having done particular items of work necessary for them to prevail in litigation at a rate of two-thirds of what, in the Rules Committee's estimation, ought to have been expended on professional legal services in a matter of the complexity and importance of the matter in question in respect of retaining counsel of a level of skill appropriate for the matter in question.
- 5.23. These provisions achieve the additional goals of avoiding extravagant expenditure in litigation by incentivising efficiency, the retention of appropriate counsel, and proportionality in the resources employed in litigation.<sup>180</sup> These goals can, in turn, be thought of as promoting access to justice by aiming at maintaining proportionality in the costs of litigating (including by avoiding arms-races between parties).
- 5.24. It follows that the measure of costs awarded is not, primarily, related to a party's actual expenditure on a matter in question. In fact, reference to a party's actual costs, except in the circumstances noted below, is inapt.<sup>181</sup> The focus is on allowing a reasonable award in an "objective" sense according to the formulation approved by the Committee.
- 5.25. These provisions are, as the authors of *McGechan on Procedure* put it, given "working detail" by the following provisions of Part 14, which set out the measure of reward as

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<sup>178</sup> See Rules of Civil Procedure 2005 (Eng), pt 44.

<sup>179</sup> Rachael Schmidt-McCleave "Costs" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 763 at [21.2.1].

<sup>180</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [HR14.2.01(4)], citing *Green v Police* [2019] NZHC 1019 at [15].

<sup>181</sup> *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) at [33]–[34], approved *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [66] fn 65.

follows.<sup>182</sup> The operation of these provisions will be familiar to practitioners. However, emphasising these provisions' precise operation usefully illustrates the foregoing points. In particular, it accentuates that the extent to which the measure of award is divorced almost completely in the ordinary case from any given party's actual legal expenses. Also, importantly for the question of self-represented litigants, it emphasises the extent to which the award of costs has become almost completely, despite the historical underpinnings of the regime, divorced from the notion of allowing an indemnity for expenditure on legal services.

5.26. First, pursuant to r 14.3(1), for the purposes of r 14.2(b), proceedings (as a whole) are classified as either category 1, 2, or 3 proceedings, based on whether the proceeding is straightforward, or of average complexity, or is particularly complex, so as to require either counsel considered junior, average, or of special skill and experience, respectively. This is separate from the discretion to make an allowance for second counsel.<sup>183</sup> To give effect to the objective that the award of costs should be predictable and expeditious, as noted below, this categorisation ought to be made as early in the proceeding as practicable,<sup>184</sup> and while it can be revisited to avoid gross injustice, ought not to be revisited if the parties have proceeded on a particular footing.<sup>185</sup>

5.27. This categorisation is used, pursuant to r 14.4, for the purposes of r 14.2(1)(c), to identify the appropriate daily recovery rate for the proceeding in question. These rates are intended, broadly, to be approximately two-third of the rates charged by New Zealand legal practitioners in the relevant categories, based on this Committee's consultation with the New Zealand Law Society, Bar Association, Ministry of Justice, and other stakeholders,<sup>186</sup> with the rates thus derived from market surveys adjusted on occasion to reflect inflation.<sup>187</sup> These rates (which differ in the High Court and District Court, with the District Court rate set at about 80 per cent of the level for the High Court,<sup>188</sup> reflecting the different levels of experience and skill prevailing among counsel regularly appearing in each court, and the different values of the proceedings heard in each) are set out in

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<sup>182</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [HR14.2.01(2)-(3)].

<sup>183</sup> High Court Rules 2016, sch 3 item 27; and District Court Rules 2014, sch 4 item 10.5. See further *Nomoi Holdings Ltd v Eden Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC).

<sup>184</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [14.3.01(c)].

<sup>185</sup> At [14.3.01(e)], citing *Body Corporate No 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 2 October 2008 and the cases cited therein; and *J v J* [2013] NZHC 1822 at [10]-[11].

<sup>186</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [14.4.01].

<sup>187</sup> See, for example, Hon Justice Patricia Courtney *Minutes of the Meeting of the Rules Committee of 11 June 2018* (Judicial Office for Senior Courts, Wellington, 25 June 2018) at 5.

<sup>188</sup> See Hon Justice Patricia Courtney *Minutes of the Meeting of the Rules Committee of 27 August 2018* (Judicial Office for Senior Courts, Wellington, 5 September 2018) at 7.

sch 5 to the District Court Rules 2014, and sch 2 to the High Court Rules 2016. At the time of writing, the daily recovery rates were 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

5.28. Therefore, the rate of recovery in any particular proceeding is, despite its description as a “recovery rate” not in fact based on an assessment of whether the party’s actual rate of expenditure or some part of the same was reasonable (unlike, say, the tariff taxation model applicable in Canada, as detailed at paragraphs 2.29 - 2.35 above). Rather, it is a wholly objective measure.

5.29. The amount of the costs award, subject to the potential for the refusal, reduction, or increase of costs, or the making of an indemnity costs award, is then determined, pursuant to r 14.5 and in accordance with r 14.2(c), by identifying all of the steps taken by the successful party or parties, and determining how long should reasonably have been taken on that step. As a matter of principle, this determination must be made in respect of each individual step in the proceeding, unless the case is so average as to require an average amount of time for each and every step.<sup>189</sup> The focus, especially with interlocutory applications, is on the complexity of the issues and the time reasonably required to process the law and factual material in question.

5.30. That determination is made, in an ordinary case, by reference to the bands provided for the steps set out in sch 4 to the District Court Rules 2014 and sch 3 to the High Court Rules 2016. Each schedule lists three ‘bands’ against each step. Band A is to be used, pursuant to r 14.5(2), where a comparatively small amount of time would be reasonable for that step; band B where a normal amount of time should be used; and band C if a comparatively large amount of time would be appropriate.

5.31. The amounts of “time” are stated in decimal portions of nominal “days”. While no conversion to actual hours and minutes is possible, or necessary, the fact that recovery is allowed for attendance at hearings by “the time occupied by the hearing, measured in quarter days” invites reference to the typical length of a full-day sitting of the Court in trial of about five hours and fifteen minutes.<sup>190</sup> This generally accords, the Committee

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<sup>189</sup> *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NTZ 24,500 at [161].

<sup>190</sup> See *Re Gunn* [2019] NZHC 3413 at [12] fn 11.

notes, with the number of “billable” hours many firms of barristers and solicitors require staff solicitors to record to record, on average, each working day.<sup>191</sup>

- 5.32. Where a step in respect of which a claim is made in a proceeding is not described in sch 3 or sch 4 of the appropriate rules, a reasonable amount of time for the taking of that step is to be determined by analogy to a step described in the schedule or, if no analogy can usefully be made, the Court’s assessment of a reasonable amount of time.<sup>192</sup>
- 5.33. The “scale” costs award, as it is typically known, is then made by multiplying (subject to the indemnity principle discussed below) the total number of notional “days” that ought to have been spent on the proceeding by the successful party by the appropriate daily recovery rate for the proceeding, producing an award of costs. This, in the great majority of cases, will result in an award “on a 2B basis” in respect of all steps, reflecting that most cases are, by definition, of average complexity and require an average amount of time.
- 5.34. As this reflects, in almost all cases (subject to the exceptions noted below), the focus is wholly on an objective assessment, either generally by the Committee or by the Court in the particular case, of what a reasonable amount of time for work of the type involved in a particular proceeding would be, not how long was actually taken, or how much was spent, by the particular parties in question.<sup>193</sup> That is to say, subject to the indemnity principle discussed below, the present costs regime is predicated on the making of an award of work in respect of a nominal amount of work that, in the Committee’s assessment generally and the Court’s assessment in the particular case, ought to have been done in respect of a proceeding. It is not predicated, as such, on the ordering of a contribution to be made towards a party’s actual costs (though that is its effect), nor as an indemnity nor reimbursement of such expenditure. In this sense, there is a considerable ‘ectopia’, as it has been termed elsewhere,<sup>194</sup> between the economic reality of expenditure on litigation and the legal consequences of that expenditure in terms of producing an entitlement under the costs regime, subject to the courts’ overriding discretion and those matters noted below, to an award of costs.
- 5.35. For the same reasons, on a precise articulation, it follows that costs are no longer being awarded on the basis of allowing recovery of out-of-pocket legal expenses. Rather, they are being awarded on the basis of an award for a notional amount of work done by a person of a notional level of skill and experience, appropriate in both cases to the complexity and skill of the proceeding in question. The work that has been done in

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<sup>191</sup> Aotearoa Legal Workers’ Union *Employment Information Report 2020* (Wellington, March 2021) at 14-15.

<sup>192</sup> High Court Rules 2016, r 14.5; District Court Rules 2014, r 14.5. See further *Body Corporate Administration Ltd v Mehta* [2015] NZHC 316.

<sup>193</sup> *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) at [33]–[34], approved *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [66] fn 65.

<sup>194</sup> John Prebble “Ectopia, Tax Law and International Taxation” (1997) 5 *British Tax Review* 383.

respect of which award has been will as a matter of practice be work that was done by counsel, a lawyer-in-person, or in-house counsel (given the existence of the primary rule affirmed in *McGuire*). Also, the amount of the award will derive ultimately, given the manner in which the daily recovery rates are calculated, from the market rate for legal services being provided for the number of notional days in question (as articulated at paragraph 5.27 above). For these two reasons, there remains some connection between the award of costs according to scale in an ordinary case and the actual work done justifying that award of costs. However, neither of these observations defeat the observation that, whatever the historical genesis of costs, under the contemporary regime the measure of recovery in an ordinary case is an objectively assessed reasonable award for a notional amount of work done in succeeding in litigation.

5.36. This has significant implications, developed in the following section of this paper, in terms of the availability of an award of costs for self-represented litigants. In particular, it suggests, contrary to the submissions opposing the availability of costs awards to such litigants, that both self-represented litigants and represented litigants would be being awarded costs on the same basis. That is, as a reasonable award, determined objectively, for work done in respect of their success in prosecuting or defending a claim. This is equally applicable whether the work is done by a party themselves or by their counsel. This is to recognise that not only is it the case that, if a conventionally understood indemnity principle animates the costs regime, then self-represented litigants cannot receive an award of costs, but it is also the case that, if that principle does not underpin the regime, it is hard in principle oppose such awards, having regard to the importance of treating like cases alike from a rule of law perspective.<sup>195</sup>

5.37. The notion of recovery is more apposite in respect of disbursements, recovery of which in addition to costs is also permitted, even in the case of self-represented litigants. These can be thought of as being recovered as an indemnity insofar as, in many cases, the whole amount expended on such amounts is recovered, not only two-thirds of the amount (as on the nominal costs measure).<sup>196</sup> I am aware of cases in which parties in High Court proceedings have, erroneously, submitted that recovery of disbursements

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<sup>195</sup> Which is arguably an element of which conception of the nature of law, or of the rule of law, one adopts. See, for example, Lon L Fuller *The Morality of Law: Revised Edition* (Yale University Press, New Haven, 1969) at 33-38; Kenneth I Winston "On Treating Like Cases Alike" (1974) 62 California Law Review 1 at 3; A V Dicey *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1898) at 188, 193, and 195. For local judicial recognition of the importance of this precept of common law legal method, understood as a manifestation of rational behaviour, to the preservation of the rule of law, see *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [95]; and *Michael Hill Finance (NZ) Ltd v Commissioner of Inland Revenue* [2016] 2 NZLR 665 (HC) at [23] fn 5, adopting Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 956.

<sup>196</sup> *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260 at [12]-[16].



should be subject to the principles applicable to the award of indemnity costs. Such a notion is however, not strictly correct, on the actual wording of rr 14.12(1)-(3), which authorise (together with the presently less material provisions of rr 14.12(4)-(8)) the recovery of disbursements:

#### 14.12 Disbursements

(1) In this rule,—

**disbursement**, in relation to a proceeding,—

- (a) means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs; and
- (b) includes—
  - (i) fees of court for the proceeding;
  - (ii) expenses of serving documents for the purposes of the proceeding;
  - (iii) expenses of photocopying documents required by these rules or by a direction of the court;
  - (iv) expenses of conducting a conference by telephone or video link; but
- (c) does not include counsel's fee.

(2) A disbursement must, if claimed and verified, be included in the costs awarded for a proceeding to the extent that it is—

- (a) of a class that is either—
  - (i) approved by the court for the purposes of the proceeding; or
  - (ii) specified in paragraph (b) of subclause (1); and
- (b) specific to the conduct of the proceeding; and
- (c) reasonably necessary for the conduct of the proceeding; and
- (d) reasonable in amount.

(3) Despite subclause (2), a disbursement may be disallowed or reduced if it is disproportionate in the circumstances of the proceeding.

5.38. As is clear, an expense answering to the nature of a disbursement is not recoverable as of right. As well as needing, pursuant to r 14.12(2)(a), to answer to the definition of a disbursement given in r 14.12(1)(a), it must also fulfil the criteria stated in rr 14.12(2)(c) and (d) of being reasonable in amount and reasonably necessary for the conduct of the proceeding. Also, it must survive assessment against the overriding proportionality criterion stated in r 14.12(3). Therefore, while an award of disbursements is, unlike costs,

an order in the nature of an order granting an indemnity or reimbursement of the party's actual expenditure, it is, at most, a partial indemnity of recovery of such expenditure to the extent that is reasonable in amount, reasonably necessary, and proportionate to the circumstances of the proceeding.

- 5.39. The imposition of these reasonableness and proportionality concerns indicates the Committee's concern, despite the different conceptual basis of an award of disbursements compared to costs, to achieve the same broader policy objectives that have led to the restricted measure of the award of costs. These concerns, of minimising the extent to which the risk of an adverse costs award serves as an impediment to an access to justice, while also ensuring successful parties are not left wholly out of pocket, and incentivising efficiency and proportionality in litigation, are perhaps even more clearly reflected in the requirements of r 14.12 than the scheme of rr 14.2-14.5.
- 5.40. For completeness, I note that the observation that the different basis of the award of disbursements, as opposed to costs, does not detract from my assessment noted at paragraph 5.36 above that allowing self-represented litigants to receive an award of costs is not inconsistent with the underpinnings of the costs regime. Self-represented litigants are already able to recover disbursements,<sup>197</sup> and will do so, if the primary rule is abrogated, on the same basis as represented parties.

#### **Increased, decreased, and refused costs awards, and indemnity costs**

- 5.41. Despite the scheme of rr 14.2-14.5 noted above, pursuant to rr 14.6 and 14.7, the court may:
- a. make an order increasing the costs otherwise payable under rr 14.2-14.5 (an increased costs order);
  - b. make an order directing that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (an indemnity costs order);
  - c. make an order reducing the costs otherwise payable under the Rules (an order for decreased costs); or
  - d. refuse to make an order for costs.
- 5.42. Movements from scale in this manner are available at any stage of the proceeding, and in respect of any step in a proceeding.<sup>198</sup> In summary, there are three primary categories where departure from scale is envisaged under the rule.

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<sup>197</sup> *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA). See also *Knight v Veterinary Council of New Zealand* HC Wellington CIV-2007-485-1300, 31 July 2009 at [6].

<sup>198</sup> *Holdfast Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA).

5.43. First, departure is appropriate where that is necessary recognise that recovery according to scale would be entirely disproportionate to the actual value, importance, or complexity of the proceeding. In particular, non-exhaustively:

- a. increased costs may be ordered in respect of a proceeding, or any particular step or steps in the proceeding, is of a nature such that the time reasonably required by the party claiming costs would substantially exceed the time allocated by application of band C;<sup>199</sup>
- b. increased costs may be ordered where a proceeding is of general importance to persons other than just the parties, and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected;<sup>200</sup>
- c. costs may be reduced or refused where the nature of the proceeding is such that the time required by the party claiming costs would be substantially less than the time allocated under band A;<sup>201</sup>
- d. costs may be reduced or refused where the property, interests, or issues at stake were of exceptionally low value or little significance;<sup>202</sup> and
- e. costs may be reduced or refused where the proceeding concerned a matter of public interest, and the party opposing costs acted reasonably in the conduct of the proceeding.<sup>203</sup>

5.44. The common thread between these bases for departure from scale is that the assessment made by the Rules Committee as to what is a reasonable amount of time, and thus funds, to be expended in respect of a proceeding is based on four necessarily broad assumptions and where those assumptions are inapt in a particular case departure from scale is therefore warranted.

5.45. The first is that it is assumed that claims being brought in the District Court and High Court will involve issues that are of such financial value or other importance to the parties as to render the costs inherent to litigation at least broadly proportionate, and the making of an adverse costs order justifiable, having regard to access to justice considerations. Where a claim that is legally meritorious but of exceptionally low value and involves no important point of principle or vindication of rights, such that the claim is not vexatious but its being brought was, in a sense, spurious, it would be similar to condoning an abuse of legal process to allow a recovery of costs.

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<sup>199</sup> High Court Rules 2016, r 14.6(3)(a); District Court Rules 2016, r 14.6(3)(a).

<sup>200</sup> Rule 14.6(3)(c).

<sup>201</sup> Rule 14.7(a).

<sup>202</sup> Rule 14.7(b)-(c).

<sup>203</sup> Rule 14.7(e).

- 5.46. This rationale for departing from scale here reflects the broader objects of the costs regime related to the Courts' wider concerns to avoid abuse of their processes.<sup>204</sup> While proceedings that would attract this treatment are not strictly abusive, the same reasons why departures from scale occur in cases where it is necessary to sanction misconduct (deliberate or otherwise) in litigation apply to justify departure in these cases. The interests of access to justice do not require that successful claimants in this case not be left out of pocket, access to justice not being an absolute principle.
- 5.47. The second is that it is assumed that claims will, generally, touch only on issues of significance to the particular parties involved, who will adopt partisan positions in respect of the issues in dispute. Where however a case is brought in the public interest or to determine an issue of public importance, especially where the party bringing the proceeding had itself no greater interest than the rest of the public in the outcome, it is appropriate that the public make a significant contribution where they succeed (against, generally, a public body) or that they are immunised from an adverse costs award.<sup>205</sup> Equally however, it may be appropriate for a public body that has acted unlawfully, or supported the losing position, but reasonably in the conduct of the litigation, to be immunised from an award of costs.<sup>206</sup> Unsuccessful bodies performing a statutory duty or abiding the outcome, and therefore not multiplying the successful plaintiff or applicant's costs, can also be immunised from having to pay out a costs award.<sup>207</sup>
- 5.48. Departures from scale on this basis recognise that the adverse costs principle is less apt where neither party has necessarily acted wrongfully towards the other in the sense present in the paradigm case in respect of which the costs regime was drafted (such as a 'classic' case of breach of contract or tort).<sup>208</sup>

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<sup>204</sup> See *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [56] for a description of the ambit of abuse of judicial process, including cases that are manifestly groundless, that serve no useful purpose, and those that are vexatious and oppressive. For a cogent statement as to the powers of all courts of record to act to prevent abuse of their processes, and the importance of their doing so, see *Alim v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 77 at [41]-[47] and the cases there cited.

<sup>205</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [HR14.07.01(c)], citing *New Zealand Maori Council v Attorney-General (No 3)* HC Wellington CP942/88, 28 April 1995 at 4.

<sup>206</sup> The authors citing *Taylor v District Court at North Shore (No 2)* HC Auckland CIV-2009-404-2350, 13 October 2010 at [9], approved *New Zealand Climate Science Education Trust v National Institute of Water and Atmosphere Research Ltd* [2013] NZCA 555 at [11].

<sup>207</sup> The authors referring to *Hotchin v KA No 4 Trustee Ltd* [2014] NZHC 978 at [24] and [26].

<sup>208</sup> See, for example, *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13], citing *A L Barnes Ltd v Time Talk UK Ltd* [2003] EWCA Civ 402, [2003] All ER (D) 391 at [28], affirmed *Midgen Enterprises Ltd v UV Water Systems Ltd* [2017] NZSC 68 at [7]. See further *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [20], limiting to its facts *Packing In Ltd (in liq) v Chilcott* (2003) 16 PRNZ 869 (CA).

- 5.49. The third is that it is assumed that the time allocations envisaged in bands A, B, to C will satisfactorily cover the ground by allowing an amount of recovery that balances the competing access to concerns noted at paragraph 5.22 above by not rendering an adverse costs award overly punitive and thus a chilling disincentive while also not leaving the successful party so out of pocket that vindicating their rights was not worthwhile. Where however a matter is particularly complex, notional two-thirds recovery on a band C basis will leave the successful party too out of pocket. Similarly, where a matter is particularly straightforward, notional two-thirds recovery on a band A basis would be overly generous to the successful party to the detriment of the unsuccessful party.
- 5.50. Significantly, while some reference to the party's actual costs may be made in assessing the measure of uplift or reduction, conceptually an order of this type is not predicated on a notion of partial indemnity. Rather, it is a call for an individuated bespoke assessment of what is a reasonable award in the "objective" sense described at paragraph 5.24 above.
- 5.51. Fourth, the adverse costs principle presumes that, in the great majority of cases, one party will have clearly substantially succeeded, and the other(s) failed, on an overall assessment (even if a fairly robust assessment),<sup>209</sup> such that the interests of justice require that the party that has succeeded in a global sense not be left out of pocket as to the proceeding as a whole. (The fairly robust approach adopted in respect of this issue can be seen as reflecting the importance of expedition in the award of costs.) This assumption is inappropriate, however, where the party claiming costs (that is, the overall victor) has nonetheless failed in relation to a cause or action or issue which significantly increased the other costs' parties, such that it would be unfair to the losing party to require them to both bear their own costs on that issue and assuage the costs burden of the successful party.<sup>210</sup> Arguably, this can be viewed as an application of the principle that costs follow the event in a more granular fashion, effectively "netting" off the parties' costs, though it is treated as a departure from scale and the adverse costs order regime in terms of the actual provisions of the Rules.
- 5.52. Secondly, a departure can be made from the scale where required, as alluded to at paragraph 5.46 above, to sanction misconduct (deliberate or otherwise) in litigation or the taking of unwarranted positions, so as to avoid abuse of the court's processes, deter and sanction contemuous behaviour, and to ensure the efficient conduct of litigation.
- 5.53. This can also be viewed in terms of promoting access to justice, as one party's failing to observe their civil procedural obligations, or taking an unwarranted position, crowds out other litigants' access to the courts (given the finite availability of judicial and other court

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<sup>209</sup> *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].

<sup>210</sup> See, for example, *Taylor v Roper* [2019] NZHC 16 at [17], where a 50 per cent reduction resulted by reason of application of r 14.7 of the High Court Rules 2016 for this reason.

time), which impinges on those parties' accessing civil justice. As this makes clear, the costs regime has purposes completely unrelated to allowing a reasonable award to be made in respect of work done in prevailing in litigation.

5.54. Departure from scale can take the form of either increasing a successful party's costs to respond to misconduct during the course of litigation (but not before) by the unsuccessful party, reducing a successful party's costs or refusing them an award of costs in consequence of their misconduct or less than complete success, or making an award of indemnity costs to a successful party to sanction the unsuccessful party's misconduct or adoption of a completely unmeritorious position. In particular, non-exhaustively (excluding for present purposes the provisions of r 14.6(3)(b)(v) related to failing to accept a settlement offer next addressed):

- a. a party may be ordered to pay increased costs if they have contributed unnecessarily to the time or expense of the proceeding or a step in it by failing to comply with the Rules or a court direction, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under the Rules;<sup>211</sup>
- b. a party may be ordered to pay increased costs if they have contributed unnecessarily to the time or expense of the proceeding or a step in it by taking or pursuing an unnecessary step or argument that lack merits, or failing without reasonable justification to admit facts, evidence, documents, or accept a legal argument;<sup>212</sup>
- c. a party may be ordered to pay indemnity costs if the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or step in a proceeding;<sup>213</sup> and
- d. a party may be ordered to pay indemnity costs if the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party.<sup>214</sup>

5.55. Related to this is the proposition that, generally, the costs of a party who obtains an indulgence from the Court,<sup>215</sup> such as in the grant of an extension for filing out of time, does so at their own expense, whatever the ultimate outcome of the litigation. This reflects the fact that the party has failed to comply with their obligations, and that, while justice may require that their non-compliance be cured with the grant of an indulgence, it is important that parties be disincentivised from needing to rely on an indulgence by

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<sup>211</sup> High Court Rules 2016, rr 14.6(3)(b)(i) and (iv); District Court Rules 2014, rr 14.6(3)(b)(i) and (iv).

<sup>212</sup> Rule 14.6(3)(b)(ii)-(iii).

<sup>213</sup> Rule 14.6(4)(a).

<sup>214</sup> Rule 14.6(4)(b).

<sup>215</sup> *Cunningham v Butterfield* [2014] NZCA 213, (2014) 22 PRNZ 521 at [52].

the imposition of costs consequences. This promotes compliance with procedural obligations, to the benefit of all parties, allowing justice to be administered more efficiently and improving access to justice for all court users.

- 5.56. It is my assessment that, even though this sanction takes the form of an order for payment of the successful party's actual reasonable costs incurred, this does not require a view that the costs regime remains predicated on a notion of indemnity for actual expenditure, even in these extraordinary cases. My reasons for this view are set out at paragraphs 5.67-5.70 below (in connection with my analysis of r 14.2(1)(f)). In summary, my assessment is that a costs award is limited to actual expenditure in these circumstances on the separate ground of upholding the prohibition on parties profiting from litigation, which has similar public policy justifications as a free-standing rule, rather than because of a corollary or derivation from the nature of an award of costs.
- 5.57. Also relevantly in this respect, the award of indemnity costs remains subject to an overriding assessment of the reasonableness of the costs claimed, again, similarly to the costs rules applicable in ordinary cases (which do not apply in cases of the award of indemnity costs), on an objective assessment (which has been described as a "reasonable allocation of actual costs",<sup>216</sup> having regard to the nature and complexity of the work and a median hour rate reasonably applicable to work of that sort).<sup>217</sup> As follows, albeit to a much lesser extent than in the case of scale costs, the entitlement of a party receiving an award of indemnity costs is not to their actual costs, but to an amount of costs representing a complete award (as opposed to the reasonable award applicable under the scale) for the work done in prevailing in litigation. The purpose of that award being made is not, in any event, to avoid the successful party being left out of pocket, but to sanction the party paying costs, so as to deter and punish such behaviour.
- 5.58. Thirdly, an award of indemnity costs is available, as is recognised under r 14.6(4)(e), where the party claiming indemnity costs is entitled to such under a contract or deed,<sup>218</sup> provided that entitlement is unambiguously expressed.<sup>219</sup> This entitlement does not arise from any broader principled concern or objective of the costs regime, but rather from the party's private treaty.<sup>220</sup> The scope of the indemnity will remain limited by an assessment by the Court (much more robust than that described in the previous

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<sup>216</sup> *Bradbury v Westpac Banking Corp* (2009) 18 PRNZ 859 (HC) at [204] and [209].

<sup>217</sup> *Edel Metals Group Ltd v Geier Ltd* [2018] NZCA 494 at [63]-[67].

<sup>218</sup> See generally *Black v ASB Bank Ltd* [2012] NZCA 384 at [77]-[99].

<sup>219</sup> *Re Adelphi Hotel (Brighton) Ltd* [1953] 1 WLR 955 (Ch) at 961; *Newfoundworld Site 2 (Hotel) Ltd v Air New Zealand Ltd* [2018] NZCA 261, [2018] NZCCLR 22 at [84].

<sup>220</sup> *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA) at 566, though see Somers J (dissenting) at 568-569.

paragraph)<sup>221</sup> of whether the costs incurred were reasonable, in an objective sense, but the scope of the indemnity is primarily a matter of contractual interpretation of the exact terms of the indemnity agreed as between the parties.

5.59. As follows, the availability of an indemnity in respect of (nearly) the successful party's actual costs under such deeds and contracts illustrates little about the wider costs regime, and in particular the nature of "costs" in such a regime. To the extent that an award of indemnity costs is available by way of a full or near full indemnity payable by the unsuccessful party to the successful party, that is a consequence of the parties having adopted between themselves a private definition of the word "costs" predicated on the notion of 'full solicitor/client costs',<sup>222</sup> to which the Court is required to give effect pursuant to r 14.6(4)(e).

5.60. This, I would accept, considerably glosses the use of the unvarnished word "costs" in r 14.6(4)(e). It is accepted that this is likely the clearest example of the word "costs" being employed in the Rules in a manner that supports "costs" being understood as referring to the award of a partial indemnity. However, given the coherent and clear contrary meaning of that word in most every other case, particularly as appears from the scheme in rr 14.2-14.5, I consider that the context of the word as it appears in r 14.6(4)(e), and the differing rationale for the award of indemnity costs in such cases, does not suggest the alternative reading of the meaning of "costs" ought not to prevail elsewhere.

#### **Calderbank and other settlement offers**

5.61. Departure from scale can also appropriate in a case of a failure to accept a reasonable settlement offer. Under r 14.7(f)(v), a successful party's failing without reasonable justification to accept an offer of settlement in whatever form is grounds for the award of reduced or no costs if that is found to have unjustifiably prolonged the proceeding. The converse of this is found in r 14.6(3)(b)(v), which provides that an unsuccessful party may be ordered to pay increased costs if they have failed without reasonable justification to accept a settlement offer, thereby prolonging the proceeding.

5.62. This provision interacts with, but is distinct from,<sup>223</sup> the regime found in rr 14.10 and 14.11 of the High Court Rules 2016 and District Court Rules 2014. As rr 14.6(3)(b)(v) and 14.7(f)(v) make, a party's failure to accept any reasonable offer to settle or dispose of a proceeding, whether it is an offer engaging this procedure or not, can result in an increased, reduced, or nil award of costs being made (as the circumstances may be).

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<sup>221</sup> *Beecher v Mills* [1993] MCLR 19 (CA); and *ANZ Banking Group (NZ) Ltd v Hitson* [1986] 1 NZLR 556 (CA); *Frater Williams & Co Ltd v Australian Guarantee Corp (NZ) Ltd* (1994) 2 NZ ConvC 191,873 (CA) at 191,887.

<sup>222</sup> See *Newfoundland Site 2 (Hotel) Ltd v Air New Zealand Ltd* [2018] NZCA 261, [2018] NZCCLR 22 at [84].

<sup>223</sup> *Aldrie Holdings Ltd v Clover Bay Park Ltd (No 2)* [2016] NZHC 1482 at [38].



5.63. Under r 14.10, a party make what is often termed a *Calderbank*<sup>224</sup> offer to another party in the proceeding. This, as defined in r 14.10(1), is a written offer made to another party at any time that is expressly stated to be without prejudice except as to costs that relates to an issue or issues in the proceeding. This offer, which must clearly be marked as “without prejudice *except as to costs*” to come within the ambit of r 14.10,<sup>225</sup> can be adduced in evidence when the issue of costs arises.<sup>226</sup> Rule 14.11(3) provides that, subject (as ever) to the overriding discretion of the Court, where such an offer is made by party A, and refused by party B, party A is entitled to costs taken by it in the proceeding after the offer if party B fails to beat A’s offer (whether by obtaining a lesser judgment sum or otherwise less beneficial outcome). Rule 14.11(4) provides that, even where these conditions are not satisfied, the Court may take into account the making of the offer for costs purposes if party B only narrowly fails to beat the offer.

5.64. As r 14.11(2)(b) makes clear, the fact that a *Calderbank* offer has been made, refused, and not bested does not produce any automatic entitlement to costs. It is a completely separate mechanism to that leading to an increased costs award under r 14.7(f)(v), and a separate test applies. However, as a matter of policy, the objectives for both procedures are the same. These are, as the Court of Appeal put it in *Moore v McNabb*, discussing the *Calderbank* offer regime, to provide:<sup>227</sup>

litigants – particularly defendants [for whom, in practice,<sup>228</sup> rr 14.10 and 14.11 are drawn] – [...] some economic means of limiting their exposure to the risk of costs; and secondly the Court itself must ensure that a procedure of this character operates as an effective encouragement to settle.

5.65. Accordingly, in practice, in the circumstances described above, party A might be thought presumptively entitled to an award of costs against party B, the overriding discretion of the court as to the effect of the offer notwithstanding.<sup>229</sup> On a purposive interpretation, the emphasis placed on the court’s overriding discretion can be understood as reinforcing to the parties the fact the court will consider the full circumstances of the making of any offer of settlement in assessing its effect as to costs.<sup>230</sup> Particularly in

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<sup>224</sup> Named for *Calderbank v Calderbank* [1975] 3 All ER 333 (EWCA), following which decision the concept of a *Calderbank* offer attained widespread recognition in England and Wales.

<sup>225</sup> *Blakesfield v Foote* [2016] NZHC 1354, [2016] NZAR 1112 at [20]; *Health Waikato Ltd v Van der Sluis* (1997) 10 PRNZ 514 (CA) at 522.

<sup>226</sup> *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 (HL) at 1299.

<sup>227</sup> *Moore v McNabb* (2005) 18 PRNZ 127 (CA) at [58]. See also, in respect of proceedings originating in the District Court that go on appeal to the High Court, *Tournament Parking Ltd v The Wellington Co Ltd* HC Wellington CIV-2009-485-2508, 19 October 2010.

<sup>228</sup> Though plaintiffs can also benefit from the regime: *Warren Metals Ltd v Grant* [2015] NZHC 2462 at [32]-[33].

<sup>229</sup> Andrew Beck and others *McGechan on Civil Procedure* (online looseleaf, Thomson Reuters) at [14.11.01(2)].

<sup>230</sup> *Warren Metals Ltd v Grant* [2015] NZHC 2462 at [42]; *Gauld v Waimakariri District Council* [2014] NZHC 956 at [24]-[28]. See, for examples of such assessments, *Strachan v Denbigh Property Ltd HC*

terms of an application for increased or reduced or nil costs under rr 14.6(3)(b)(v) and 14.7(f)(v), the court will scrutinise the reasonableness of the offer made, both in terms of the amount offered and the circumstances in which the offer was made, as prevailing at the time of the making of the offer, having regard to the stage of the proceeding, the reasonable expectations of the parties at the time, and the recipient's ability to assess the strengths of their case.<sup>231</sup>

5.66. As this represents, while the provisions of rr 14.6(3)(b)(v), 14.7(f)(v), and 14.10-14.11 clearly embody, in providing for these two procedures, a policy of promoting settlement, and allowing parties to achieve a degree of certainty as to costs consequences, the court remains concerned to ensure parties are not unfairly penalised for standing on their rights, absent unreasonableness. This reflects an access to justice and fairness concern in tension with the desire to promote efficiency in the administration of justice – another example of the sometimes contradictory broader objects of the costs regime.

### The indemnity principle

5.67. All of the above is subject to the indemnity principle embodied in r 14.2(1)(f). More precisely, r 14.2(1)(f) provides that “an award of costs should not exceed the costs incurred by the party claiming costs”. It is on the basis of this rule that:

- a. the greatest possible measure of recovery is a party's actual expenditure on the litigation (subject, as noted, to an overriding reasonableness limitation);
- b. an increased costs award will not exceed 150 per cent of scale generally (150 per cent of two-thirds being one whole);<sup>232</sup> and
- c. a scale costs award exceeding a party's actual costs will be reduced to their actual expenditure.<sup>233</sup>

5.68. This reflects a principle that parties should not profit from the conduct of litigation, which can be understood as an expression of the same principles underpinning the common law's long-standing aversion to allowing profitable trafficking in litigation,<sup>234</sup> and also the

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*Palmerston North CIV-2010-454-232*, 3 June 2011 at [21]; *Health Waikato Ltd v Van der Sluis* (1997) 10 PRNZ 514, [1997] ERNZ 236 (CA); *Craig v Donaldson* [2014] NZHC 3100.

<sup>231</sup> *Loktronic Industries Ltd v Diver* [2014] NZHC 1189 at [14]; *Aldrie Holdings Ltd v Clover Bay Park Ltd (No 2)* [2016] NZHC 1482 at [37]; *New Zealand Sports Merchandising Ltd v DSL Logistics Ltd* HC Auckland CIV-200-404-5548, 19 August 2010 at [36]; *Samson v Mourant* [2016] NZHC 1119 at [44]; *Weaver v HML Nominees Ltd* [2016] NZHC 473 at [30].

<sup>232</sup> *Holdfast NZ Ltd v Selley's Pty Ltd* (2005) 17 PRNZ 897 (CA).

<sup>233</sup> See, for example, *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC) at [45].

<sup>234</sup> See, as to what policy matter, *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [56]-[59]; and *PricewaterhouseCoopers v Walker* [2017] NZSC 151, [2018] 1 NZLR 735 at [94]-[94] and [134]. As to the indemnity principle being an expression of those same concerns, see *General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301 (CA) at 308 and 312; and *Gundry v Sainsbury* [1910] 1 KB 645 (EWCA).

wider access to justice related objectives of ensuring efficiency and avoiding excess and disproportionality in litigation.<sup>235</sup>

- 5.69. This rule can be seen, as it was by the Court in *McGuire*, and also as it is seen by the authors of *McGechan on Procedure* in their commentary on the rule, as also embodying the primary rule preventing an award of costs to self-represented litigants. This on the basis that such litigants have not “incurred” any costs.<sup>236</sup> However, for the reasons outlined in the first section of this paper (and particularly at paragraph 1.18), it cannot be said that the primary rule derives from this principle. This is because a rule preventing recovery of costs in excess of the costs in fact occurred precludes recovery of costs by a self-represented litigants only if, separately, costs is defined (as it has been, as a matter of practice) in a manner referring only to out of pocket legal expenses, as opposed to other expenses that could be termed as costs (such as opportunity costs). That is to say, again, that there is nothing in the costs regime at present that requires that the primary rule be maintained, or that leads to a definition of costs as only “legal” costs (see further paragraphs 1.18-1.35).
- 5.70. That means that r 14.12(1)(f) does not depend for coherence, nor does it require, that costs be understood in terms of a partial indemnity. As is well established, the award of costs on an indemnity basis, and the indemnity principle, are quite distinct. The principle embodied in r 14.12(1)(f) is better understood as a free-standing policy measure 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. This is as opposed to the rule representing a derivation, or inference from, the rationale for the award of costs. It follows that it may not be necessary to repeal r 14.2(1)(f) to abrogate the primary rule. Doing so may nonetheless be desirable, at least so far as it applies to self-represented litigants, for the avoidance of doubt.

### **Predictability and expedition**

- 5.71. Finally, as r 14.2(1)(g) plainly states, it is intended that the determination of costs be predictable and expeditious.
- 5.72. As the authors of *McGechan on Procedure* note,<sup>237</sup> this furthers two other objectives of the costs regime. First, it helps parties in settlement negotiations, promoting settlement, by allowing a reliable estimation of their likely exposure to costs. This is given clear

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<sup>235</sup> *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.

<sup>236</sup> Andrew Beck and others *McGechan on Procedure* (online looseleaf, Thomson Reuters) at [14.02.01(5)-(6)].

<sup>237</sup> At [HR14.02.01(7)].

expression in the provisions concerning settlement offers, as noted at paragraphs 5.61-5.66 above, and also, most primarily, in the clear expectation noted at paragraphs 5.9-5.10 above that costs will be determined in accordance with the statutory regime absent some good reason to the contrary. Secondly, it means that, ideally, all a judge awarding costs is obliged to do is confirm that a party has calculated their entitlement as to costs correctly, and deal with any applications under rr 14.6-14.7 for increased or reduced costs, including the consequences of any rejected offers for settlement. This has the benefit, the authors note, of ensuring that the party who has succeeded receives an award in respect of the work done in succeeding as soon as possible, and with minimal further delay and argument.

5.73. It is for this reason, I surmise, that there is an emergent practice in the High Court of judges imposing page limits (usually not exceeding five pages) on submissions as to costs. This concern also likely at the root of the courts' practice in not awarding "costs on costs" in most cases (so as to provide no incentive to the parties to engage in a protracted argument as to costs),<sup>238</sup> and for the clear appellate support for the adoption of a robust approach in determining success and failure for the purposes of costs awards.<sup>239</sup>

#### **The objectives and principled underpinnings of the regime – a recapitulation**

5.74. As emerges clearly from the foregoing discussion, the costs regime serves a number of objectives, and reflects a balancing a number of countervailing policy concerns. That is, it is inapt to say that the primary objective of the costs regime is allowing a partial, or in some cases full, indemnity to the successful party in respect of their out-of-pocket legal expenses. This is one of several objectives that the regime seeks to pursue. In this, I agree with the assessment of Cumming JA in the British Columbia Court of Appeal in *Blackmore v Skidmore*:<sup>240</sup>

[37] A review of the Rules reveals that party and party costs serve several functions [...] They partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.

5.75. While, for the reasons given above, reference to indemnification is less appropriate in New Zealand, I also agree with the similar comments of the Federal Court of Canada in *Sherman v Minister of National Revenue*:<sup>241</sup>

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<sup>238</sup> See, for example, *Strata Title Administration Ltd v Body Corporate Administration Ltd* [2014] NZCA 96 at [10]-[14].

<sup>239</sup> *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ at [20]; *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13], affirmed [2017] NZSC 68 at [7].

<sup>240</sup> *Skidmore v Blackmore* (1995) 122 DLR (4<sup>th</sup>) 330 (BCCA).

<sup>241</sup> *Sherman v Minister of National Revenue* (2003) 226 DLR (4<sup>th</sup>) 46 at [46]. See also *Fong v Chan* (1999) 181 DLR (4<sup>th</sup>) 614 (Ontario CA) at 623.

It is now generally accepted that an award of costs may perform more than one function. Costs under modern rules may serve to regulate, indemnify, and deter. They regulate by promoting early settlements and restraint. They deter impetuous, frivolous, and abusive behaviour and litigation. They seek to compensate, at least in part, the successful party who has incurred, sometimes, large expenses to vindicate [their] rights. These three legitimate purposes [...]

5.76. Taking these observations as to the purposes of contemporary costs regimes generally, together with the observations made by the authors of *McGechan*, the Law Society's submission, and my own assessment as to the contemporary functioning of the New Zealand costs regime set out above, my advice is that the Committee ought to embrace the following recapitulation of the principles, objectives, and operation of the contemporary New Zealand costs regime:

- a. The purpose of the costs regime is to allow a successful party to receive a reasonable award for the work done in prevailing in litigation, at the expense of the unsuccessful party. This helps promote access to justice by allowing the successful party, in the ordinary case, to partially defray their expenses for doing the work necessary to succeed in litigation.
- b. This award is not however in the nature of a partial indemnity in respect of the successful party's out of pocket legal expenses. The successful party's legal expenses, except in the case of an award of indemnity costs, and for the purposes of the non-profit rule noted below, are irrelevant to the measure of a costs award.
- c. Rather, the award is based on an objective assessment – whether generally by the Committee in terms of the provisions of rr 14.2-14.5 and the supporting schedules, or the Judge in particular cases not therein provided for – of the amount of work that ought reasonably to have been done to succeed, and the level of skill that ought reasonably to have been applied to that work, having regard to the complexity and importance of the issues in dispute.
- d. In the ordinary case, the amount of an award of costs should be two-thirds of the amount that the Committee has assessed that, based on its review of the market for legal services in New Zealand, counsel of the requisite skill ought to have charged for doing that amount of work. That is the most readily available means of quantifying the value of the work that has been done in monetary terms.
- e. While this imports some connection between the provision of professional legal services and the assessment of the amount of a costs award, it is nonetheless the case, in the ordinary run of things, that a party is not being indemnified in part for their expenditure on professional legal services in respect of the conduct of the litigation, but is rather being awarded a sum in respect of a notional amount of work that it was accepted had to be done for the successful party to prevail. The often-made observation that the Committee's adoption of recovery of two-thirds of an

amount thought to be reasonable will not produce anywhere near two-thirds recovery in fact reflects this distinction.

- f. The selection of a notional two-thirds figure reflects an assessment that, in an ordinary case, the interests of justice in terms of promoting access to justice are best served by allowing a generous but far from complete contribution being ordered to be made towards the losing party's actual costs. This mitigates the risk of an adverse costs award becoming a chilling barrier to access to justice in itself.
- g. The objective nature of the measure serves, together with the figure of two-thirds recovery, as a means of deterring extravagance and promoting proportionality in litigation. While parties remain free to choose their counsel and litigate in a "Rolls Royce"<sup>242</sup> manner if they see fit, they will not be entitled to recover in respect of the additional costs they incur in litigating in this manner.
- h. Recovery is allowed, on something more akin to an indemnity basis, of disbursements incurred in respect of the litigation. However, the same objectives of ensuring restraint and promoting proportionality in litigation are maintained in respect of disbursements, despite this differing basis for the award of disbursements, insofar as disbursements that are not reasonably necessary and that are not reasonable in amount are irrecoverable.
- i. Departure from the schedular approach to an award of costs is justifiable where necessary to ensure that these objectives and concerns are achieved in a case of particularly great or little value, complexity, or significance.
- j. Departure from the schedular approach to an award of costs is also appropriate where the case does not answer to the description of the paradigm case of two private parties litigating private wrongdoing (such as where the case is public interest litigation or involves a public actor).
- k. Departure from the schedular approach to an award of costs is justifiable where necessary to sanction misconduct in litigation or other contemuous conduct in proceedings, or to provide general deterrence and sanction for parties adopting wholly unmeritorious proceedings. This aids in the efficient administration of justice and helps promote access to justice by avoiding the 'crowding out' of other parties' claims (having regard to the finite availability of court time) by parties who fail to comply with procedural requirements.

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<sup>242</sup> See, for examples of the Courts assessing costs awards where the successful party had adopted such an approach (which was described as such), both where that has been found to have been warranted and unwarranted by the Court, *Yang v Chen* HC Auckland, CIV-2007-404-1751, 13 May 2010 at [199]; *Lee v Gao* [2018] NZHC 1345 at [6]; *Stonehill Trustee Ltd v New Zealand Industrial Park Ltd* [2019] NZHC 2406 at [14].

- l. Departure from scale is justified where a party fails, unreasonably, to accept an offer of settlement. This promotes the Courts' policy of promoting settlement, which furthers in turn the same broader policy objectives of ensuring efficient use of court time as the use of the costs regime for purposes of sanction and deterrence. However, justice requires that the reasonableness or otherwise of a refusal to accept a settlement offer be carefully scrutinised, so that these goals are not in fact subverted. Separately, the attaching of autonomous schedular costs consequences to the refusal of settlement offers serves similar objectives, especially in terms of allowing parties to reliably predict costs outcomes.
- m. However, an award of costs is never allowed to exceed a party's actual costs in respect of the proceeding. While this may theoretically incentivise extravagance and, arguably, punish efficiency – arguably perversely – in a small number of cases, in most cases this will not impact a party's actual recovery. Overall, this non-profit rule (also known as the indemnity principle) coheres with the Courts' aversion to allowing individuals to profit from litigating, so as to deter trade in litigation and prevent abuse of process, ensuring that the Courts are used for the vindication of rights and compensation of breaches of rights. This is a free-standing rule of policy that now has substance separate from the historic genesis of the costs regime. As, even where indemnity costs are awarded, no more than a reasonable amount of costs can be awarded, the courts are even here engaged in an assessment of the reasonableness of the conduct of the litigation (albeit to a much lesser extent than where an award of costs according to scale is made).
- n. The award of costs should be as predictable and expeditious as possible. This helps promote settlement by allowing parties to make an accurate and realistic assessment of their risk, and to shorten the length of time for which successful parties are left fully out of pocket. It also serves to promote the efficient administration of justice more primarily.
- o. In a deviation from the above principles, an award on a partial or full indemnity basis is available where the parties to the litigation have clearly agreed by deed or contract to those consequences resulting as between themselves. This result does not derive from the general principles or operation of the costs regime generally, but rather from the Courts' giving sanction to these private agreements, where the basis for an indemnity is instead the parties' private agreement to indemnify the successful party in the event of a dispute.

5.77. At a very high level of generality then, the costs regime can be understood as a tool of policy aimed at promoting, as with all tools of civil procedure:

- a. increased access to civil justice through reduction to an extent of the costs and potential liabilities associated with coming to court; and

- b. the expeditious, inexpensive, and speedy but fair administration of justice through encouraging parties to ensure they make efficient use of scant judicial time by incentivising compliance with procedural obligations and settlement.

5.78. I consider the Committee's embracing this recapitulation of the nature of costs would better allow for the objectives of the costs regime than continuing to view costs as an indemnity. This because, for the reasons given in the following section, that allowing litigants-in-person to receive an award of costs better promotes these objects and give effect to the above principles. Embracing this recapitulation of the nature of costs helps make such awards possible by obviating the conceptual difficulties associated with abrogating the primary rule if costs are regarded as a partial indemnity for out-of-pocket legal expenses. It is therefore, in my assessment, to be preferred as more consistent with the overall objectives of civil procedure in a greater number of cases compared to the current regime, which furthers these objectives less well in the ever-growing proportion of cases involving litigants-in-person.<sup>243</sup>

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<sup>243</sup> See Justice Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016), available at <https://www.courtsofnz.govt.nz/speechpapers/HJK2.pdf>, or (2016) 5 JCivLP 178 at [21].



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## 6. Abrogating the Primary Rule

### Introduction and Overview

- 6.1. My advice is that the abrogation of the primary rule would not impair the realisation of the objectives of the costs regime. Nor would that reform be incompatible with the principled underpinnings of the costs regime.
- 6.2. For these reasons alone, my advice is that the primary rule is an unjustified form of discrimination between categories of litigants on the basis of representation. The distinction should, on that basis alone, be abrogated, as the status quo is inconsistent with the principle of equality before the law. The legitimate policy objects of the regime that have often been said to justify the primary rule support some distinction between drawn between self-represented litigants and represented litigants in the amount of recovery. They do not justify a prohibition on recovery by self-represented litigants.
- 6.3. Moreover, my advice is, as foreshadowed in the conclusion of the previous section, that the objects of the costs regime will be better accomplished, in cases where one or both of the parties are self-represented, by the abrogation of the primary rule than maintaining the status quo. This will also give better effect in such cases to the principled underpinnings of the costs regime.
- 6.4. In this section, I outline my recommended responses to the justifications for the primary rule proffered in the submissions to its consultation (as summarised previously at paragraphs 3.10-3.15). These submissions usefully gathered together all of the arguments in favour of the primary rule of which I am aware. None of these, in my assessment, provide a compelling justification for maintaining the primary rule.
- 6.5. I then sets out my reasons for assessing the abrogation of the primary rule as better giving effect to the objects and principles of the contemporary costs regime.

### There is No Compelling Justification for the Primary Rule

*Allowing self-represented litigants costs is not inconsistent with the basis on which costs are awarded, nor would it produce inequity as between represented and unrepresented parties*

- 6.6. As noted in the summary of the submissions in favour of the status quo at paragraphs 3.10-3.15 above, one of the primary objections to abrogation of the primary rule advanced by submitters was that allowing self-represented litigants to obtain a costs award would be inconsistent with the basis on which costs are awarded. These submitters took the view, understandably given the venerable pedigree of that view (see the first section of this paper, especially at paragraphs 1.14-1.35), that the basis of an award of costs is a partial indemnity for out-of-pocket legal expenses.

- 6.7. I recognise, as has also been acknowledged in the High Court of Australia,<sup>244</sup> that if that is the basis on which costs are awarded, then it is in fact consistent with equality before the rule of law for the primary rule to prevail. This because, in that event, all parties – represented or unrepresented – are equally entitled to costs in respect of out-of-pocket legal expenses, and also to costs for other non-“legal” expenses. It is simply the differing factual position of the parties that determines their different ability to receive a costs award. On this view, the primary rule is nothing more than a manifestation of the basis on which costs are awarded.
- 6.8. It would in fact be a source of inequality before the law, these submitters noted, to allow self-represented litigants to obtain a costs award, as they would be obtaining compensation in respect of opportunity costs, whereas represented litigants would remain confined to an award of costs in respect of out-of-pocket legal expenses.
- 6.9. However, for the reasons developed in the previous section, that is not my view of the basis of costs awards. Rather, my advice (as set out at paragraph 5.35 above) is that the basis of the contemporary costs regime is not the grant of a partial indemnity, but rather the grant of a reasonable allowance. In particular, my assessment is that costs are today awarded on the basis of an award for a notional amount of work done by a person of a notional level of skill and experience, the amount of work and experience being that appropriate to the complexity and importance of the proceeding in question.
- 6.10. That is to say, the contemporary costs regime, in the ordinary case the measure of recovery is an objectively assessed reasonable allowance for work done in succeeding in litigation. While that work will still often have been done by a lawyer engaged on behalf of a lawyer, is the type of work for which lawyers are retained, and the valuation of that work (being the work for which lawyers are typically retained) is appropriately undertaken on the basis of the market for legal services, the award is not in fact a reimbursement or indemnity for outlay on the actual work done by a particular lawyer for that particular party.
- 6.11. It follows that allowing self-represented litigants to obtain an award of costs would not be recompensing them for their opportunity costs in litigating while allowing represented parties no such recompense. Rather, both classes of parties would be being given an objectively assessed award in respect of a nominal amount of work done in prevailing in litigation, regardless of whether that was done by the party themselves, or by a lawyer retained by the party to do that work on their behalf.
- 6.12. As this foreshadows, at the end of this section, I outline my recommendation that the Committee award costs to self-represented litigants on the basis of the current scale,

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<sup>244</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [38] per Kiefel CJ, Bell, Keane, and Gordon JJ, citing *Cachia v Hanes* (1994) 179 CLR 403 at 412 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ at 564. See further paragraph 2.22 above.

subject to the imposition of a different daily recovery rate recognising the likely lesser skill of most self-represented litigants.<sup>245</sup> This as opposed to allowing recovery, as one submitter suggested, on the basis of a flat rate for hours worked (as is the position in England, see paragraphs 2.36-3.35 above). It is my advice that this largely obviates any concerns as to the abrogation of the primary rule producing unfairness as between represented and unrepresented parties. I note, in saying this, that many submitters who objected to the award of costs to self-represented litigants did so on the assumption that the model adopted, similarly to the English approach, would be primarily directed at allowing parties to obtain compensation for their opportunity costs incurred in connection with the litigation.

6.13. In tendering this advice, I acknowledge the ‘difficulty’ with adopting this position posed by the current wording of r 14.2(1)(f), which submitters opposed to abrogation of the primary rule viewed as indicating that costs are awarded on a partial indemnity basis. However, as I have noted at paragraphs 5.67-5.70 above, I consider that the indemnity principle stated in r 14.2(1)(f) is better understood today as the expression of a free-standing rule of policy addressing concerns about profiting from litigation generally, which also has some role in encouraging restraint in litigation. It is not, in my view, a lynchpin for the costs regime in regulating the measure of costs awards. Rather, that is the objective measure set out in rr 14.2-14.5 that applies in all ordinary cases.

6.14. Nonetheless, if only for the avoidance of doubt, my advice is that it is desirable to repeal r 14.2(1)(f) so far as self-represented litigants are concerned, as noted at paragraph 5.70 above. However, the Committee might consider preserving a modified version of that rule so far as represented parties are concerned, so as to emphasise the inappropriateness of excessive recovery and encourage restraint in litigation.

*The award of costs to self-represented litigants would not create incoherence with other areas of the law, or within the costs regime*

6.15. As just noted, my advice is that allowing self-represented litigants to receive an award of costs would not create incoherency within the costs regime. Nor, in my evaluation, and contrary to the views of some submitters, would allowing self-represented litigants to receive costs awards would create incoherence between the costs regime and other areas of the law.

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<sup>245</sup> I acknowledge that, prima facie, this would appear to depart from the basis for the categorisation of proceedings under r 14.3 generally, which usually proceeds on an “objective” assessment of the complexity of the proceeding, not by assessment of the skill of counsel actually involved. However, given that costs will be awarded to the self-represented litigant only where they have succeeded, and therefore it will be the case that, as their success demonstrates, that a self-represented litigant (who is to be assumed less capable than trained counsel, all things being equal), it is arguable that their success reflects the appropriate “objective” classification for the proceeding was somewhere less than category one, given that they could not have otherwise succeeded.

- 6.16. One submitter noted the possibility that allowing an award of damages to self-represented litigants would allow for the recovery of costs as damages, contrary to long-standing principle.<sup>246</sup> But the award of costs would not amount to awarding costs as damages. It would still be confined to an award by the Court under the costs jurisdiction in the same way as with any other costs awarded. That is to say, the costs award would not be in the nature of an award of damages in respect of consequential economic losses attributable to the opportunity costs incurred in conducting litigation. Rather, it would be an objectively measured award for succeeding in litigation, the amount of which is computed according to a notional assessment of what work ought to have been done.
- 6.17. Some submitters noted the risk of incoherence emerging between the costs regime and the security for costs and legal aid regimes. I have been unable, on my review, to identify any necessary inconsistency between the abrogation of the primary rule and this other aspect of the rules of court.
- 6.18. In particular, so far as legal aid is concerned, while the definition of “costs” given in s 4(1) of the Legal Services Act 2011 does refer to “costs” in a way more clearly predicated on out-of-pocket expenditure for legal services,<sup>247</sup> that is unsurprising, given that Act is concerned with the State’s enabling the indigent to access to legal services they otherwise could not and providing a mechanism for the payment and recovery of those amounts. There is nothing inconsistent between “costs” bearing the broader meaning given in the previous section for the purposes of the costs regime, and a narrower meaning for the purposes of the Act, given that Act is necessarily concerned only with represented parties. I infer the Act was drafted with the position of represented parties as to costs under the current regime in mind, which the above suggested recapitulation of the meaning of costs does not affect.
- 6.19. This submission does point, however, to the need for care on its part when framing any amendments to give effect to this position paper. This should involve, in particular, close consideration the interaction of the security for costs regime and the legal aid regime with the costs regime, given the obvious need for coherence in the legal system.
- 6.20. Three submitters identified the possibility for inconsistency, practically speaking, between the potential level of recovery by self-represented litigants should the primary rule be abrogated and the presently extremely modest entitlements of witnesses under the Witnesses and Interpreters Fees Regulations 1974. This insofar as witnesses can face

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<sup>246</sup> As to which, see *Chick v Blackwell* [2013] NZHC 1525 at [152] and [153]; *Simpson v Walker* [2012] NZCA 191 at [75]; A G Guest (general ed) *Chitty on Contracts* (27th ed, Sweet & Maxwell, London, 1994) at [26-015], cited with approval in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington 2011) at [1.8.1(2)]; *Peters v Peters* [2013] NZHC 1061, (2013) 3 NZTR 23-004; *Trizenberg v Mason* [2019] NZHC 2125 at [43], citing *Beecher v Mills* [1993] MCLR 19; *Lloyd v Pangani Properties Limited* [2019] NZCA 314.

<sup>247</sup> Legal Services Act 2011, s 4(1) definition of “costs”.

significant opportunity costs in giving evidence, which they often do under compulsion, while receiving only a nominal sum in recognition of that expense (as set out in schedule A to the Regulations) while, it was anticipated, self-represented litigants would obtain a much more generous measure of recovery.

- 6.21. Again, this is not a conceptual or mechanical inconsistency of the type that would mean the abrogation of the primary rule would produce an unacceptable ambiguity in the operation of the law, viewed as a system of rules. It is at most a demonstration that the rates prescribed under those Regulations have become, in the 47 years since promulgation, far from an apt reflection of the likely opportunity cost to witnesses required to give evidence.
- 6.22. In particular, given, as is already well-established, that self-represented parties are not being afforded recompense for opportunity costs with the abrogation of the primary rule, there is no inconsistency between the proposed abrogation of the primary rule and the position under those Regulations in that respect. The conceptual basis for the amounts being paid out in each circumstance are quite different. The costs award would be on the basis of an objectively computed award in respect of a nominal amount of work done to prevail in litigation, whereas the payment to the witness is in fact made in respect of their opportunity costs, on the basis that the State ought to avoid witnesses being left out-of-pocket when required to absent themselves from their occupation to comply with their obligations to attend as a witness. That is clearly distinct from the position of the self-represented litigant, who elects to litigate.

*Floodgates concerns are not engaged, or at-least not to an extent justifying the primary rule*

- 6.23. The other primary objection raised by submitters was that the abrogation of the primary rule would be inconsistent with a policy of encouraging parties to obtain representation in litigation. This is self-evidently true, insofar as the current position provides obvious incentives to parties able to obtain representation to do so, insofar as it possibly makes available a costs award (as opposed to self-represented parties left largely out of pocket for any related or consequential costs or expenditure at the moment, subject to their ability to recover disbursements).
- 6.24. I agree with submitters that it is desirable that parties who are able to obtain legal representation do so, and that as a matter of policy they should be incentivised to do so. I also agree with submitters that it is desirable that, in all cases, so far as parties' means allow, that the Courts receive the benefit of the appearance of independent counsel, trained and qualified to practice law in New Zealand that have invested significantly in their professional training and development, that have relevant experience in practice, and who are officers of the Court and subject to ethical obligations.<sup>248</sup> I acknowledge the

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<sup>248</sup> See Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, especially chs 3, 5, 6, 10, 11, and 13.

additional time and effort that represented parties opposing unrepresented parties incur, both because of the generally, it is accepted, less efficient and helpful (to the Court) manner in which unrepresented parties proceed,<sup>249</sup> and the additional burdens and ethical obligations foisted on counsel for the represented party in such circumstances.<sup>250</sup> The Courts incur a similar burden, being obliged to take especial care to ensure that unrepresented parties are fully heard and are making informed choices in proceeding in litigation.<sup>251</sup>

- 6.25. More broadly, I would also accept that the additional time and resources that the Courts and opposing parties are typically required to expend where dealing with a self-represented litigant represents a burden on the justice system overall, which would, logically, imperil other parties' access to the Courts by depleting the ultimately finite amount of judicial time and other resources available to deal with cases.
- 6.26. However, I do not consider any of the above it represents a compelling justification for the maintenance of the primary rule. It is not necessary, for achieving the legitimate purpose of incentivising parties able to seek representation to do so, to in effect punish those who are unable to do so. Put another way, it is not necessary to completely prohibit self-represented parties from obtaining an award of costs to give effect to this legitimate objective. As is developed further in the final part of this section, all that is required is provide for lesser recovery by self-represented litigants, so as to provide a suitable incentive.
- 6.27. Admittedly, it is clear on the basis of the empirical research referred to by Dr Toy-Cronin in her submission, to which the Law Society also referred, that cost of legal

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<sup>249</sup> 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 Emiliios 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].

<sup>250</sup> 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).

<sup>251</sup> 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].

representation is not the only barrier to parties seeking representation. As well as those who would obtain representation but cannot afford to do so themselves or obtain legal aid (the “can’t pay” variety), there are also those of the “won’t pay variety”.<sup>252</sup> As recorded in my summary of the submissions in the third section of this paper (and in particular at paragraph 3.13), Dr Toy-Cronin’s research and Ministry of Justice research suggests that self-representation is influenced not only by cost and the unavailability of legal aid, but also by self-represented litigants’ perceptions that their cases were too straightforward to need a lawyer or they could do a better job than a lawyer. These litigants, who may be encouraged to litigate by the availability of costs, may pose, as the Law Society identifies in its submission, an additional burden for the Court system if incentivised to litigate. As Meredith Connell and the Law Society put it in their submissions, the right to access to justice is undermined where some parties do not accept their responsibility to conduct their litigation properly and in good faith.

6.28. I also agree, at least in theory, there is a risk that the increased availability of costs will create perverse economic incentives of the type identified by the Law Society in its submission. This is to the effect that reform might incentivise more self-represented litigants to bring proceedings such as judicial review proceedings of low-level executive decisions or relatively minor breaches of privacy or human rights. Whether meritorious or unmeritorious, it is submitted that the increased number of claims that this reform might incentivise being brought would burden the Courts, to the expense of other litigants, including those who have suffered more acute harm and damage. It is observed that there is a risk of such litigants feeling motivated to profit from litigating these claims. This concern is particularly acute, obviously, so far as the risk of self-represented litigants deciding to ‘chance’ pushing an unmeritorious claim.

6.29. This does not however justify prohibiting recovery in any amount by those of the “can’t pay” variety, which is, Dr Toy-Cronin’s research suggests, the larger group, with inability to access legal services apparently a much greater driver of self-representation than any refusal to do so. That is entirely contrary to the fundamental – though as will be clear from my proposed recapitulation of the costs regime in the previous section (especially at paragraphs 5.22 and following) not absolute – importance of promoting access to justice for parties with meritorious claims to litigate. It is unfortunately not possible, though this would arguably be the ideal response, to distinguish in practice on the basis of information actually available to Courts between a “can’t pay” and “won’t pay” self-represented litigants with respect to cost for these purposes.

6.30. The experience in England and Wales, where the primary rule has already been suggests that abrogation of the primary rule does not lead in itself to a significant increase in self-representation. As Dr Toy-Cronin noted in her submission, in that jurisdiction, there was

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<sup>252</sup> Bridgette Toy-Cronin "I Ain't No Fool: Deciding to Litigate in Person in the Civil Courts" (2016) 4 New Zealand Law Review 723.



no significant growth in the number of self-represented litigants appearing in courts after the primary rule was abrogated in 1975, at least until legal aid became greatly restricted in its availability in that jurisdiction in 2012.<sup>253</sup> I agree with Dy Toy-Cronin's assessment that this tends to reinforce that the primary, albeit not only, incentive for self-represented litigation is unavailability of legal representation. As follows, while the availability of a costs award is theoretically an incentive to self-represented litigants to behave in the manner identified by opponents of reform, the English experience suggests this is unlikely to change their behaviour in practice to the extent opponents of reform feared. This much is consistent with the growing tide of self-representation seen in this country in recent years,<sup>254</sup> even while the primary rule has prevailed. For all these reasons, my advice is that floodgates concerns are not engaged; at-least not to an extent warranting preservation of the primary rule.

6.31. Moreover, I would agree with Dr Toy-Cronin that it is important not to proceed on the footing of what Dr Toy-Cronin described in her submission as "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)". As Dr Toy-Cronin noted in her submission, this simply cannot be true in all cases. In particular, as she noted, the first persons declared vexatious litigants in both New Zealand and England were in fact themselves lawyers.<sup>255</sup> The Law Society made a similar observation in its submission.

6.32. More generally, while it is certainly true that a certain category of self-represented litigants are, as the Law Society observed, unnecessarily persistent or querulous, consume significant resources, and cause unjustified costs and stress to others, I would agree that is certainly not true of all self-represented litigants. Those who fall into the "can't pay" as opposed to "won't pay" would seem by definition most likely do so, but nor can that be assumed to be the case. Some litigants of that type might be well-intentioned and fundamentally appropriate in their conduct of litigation, but simply misguided. Litigants in this category might well be better understood an expression of the apparently wide-spread lack of understanding as to the Courts and their processes among the wider community reported by the Community Law Centres in their

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<sup>253</sup> 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).

<sup>254</sup> See Justice Stephen Kós "Civil Justice: Haves, Have-Nots, and What to Do About Them" (Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016), available at <https://www.courtsofnz.govt.nz/speechpapers/HJK2.pdf>, or (2016) 5 JCivLP 178 at [21].

<sup>255</sup> 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 LJ 656.

submissions to the Committee’s separate recent consultation on Improving Access to Civil Justice.<sup>256</sup>

- 6.33. Also, as the Bar Association noted, it is also true that self-represented litigants are far from the only unreasonable litigants. It is in fact a primary concern of this Committee in its separate work on Improving Access to Civil Justice to avoid well-resourced represented highly litigious parties from using, for example, procedural devices and interlocutory objections to gain collateral advantages in a manner contrary to the objectives of civil procedure.<sup>257</sup>
- 6.34. Rather, my recommendation is that the Committee agree with the Law Society’s observation that such problematic self-represented litigants can be appropriately dealt with using the vexatious litigant order regime, the Courts’ power under the Rules and their inherent jurisdiction and power to prevent abuse of their processes,<sup>258</sup> and by being ordered to pay indemnity or increased costs or being made to pay reduced costs where they do prevail.
- 6.35. Finally, and more generally, it is not, in my assessment, a compelling argument to say that it is undesirable to incentivise self-represented litigants to litigate meritorious claims because this might overburden an already strained justice system. If the Court system is inadequately resourced to allow all meritorious claims to be litigated in a just and tolerably quick manner, that is an argument for the Executive and Parliament to better fund the Courts. It is inconsistent with the rule of law to suggest that access to the courts ought to be preferentially rationed to those able to afford legal representation, or even to those who have suffered more acute harms, which is the effect of that argument. All wrongs require remedy.
- 6.36. The best possible response is instead to set the rate of “recovery” by self-represented litigants somewhere lower than the represented litigants’ rate of “recovery” as applies at present, as I go on to recommend at the end of this section. This represents the best balance of the various relevant incentives and concerns outlined in the preceding paragraphs while still maintaining a tolerably expeditious and predictable approach to the award of costs.

*Conclusions as to the proffered justifications for the primary rule*

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<sup>256</sup> Which are available at Courts of New Zealand “Improving access to civil justice” (25 January 2021) <courtsfnz.govt.nz>.

<sup>257</sup> See further Rules Committee *Improving Access to Civil Justice – Initial Consultation with the Legal Profession* (Judicial Office for Senior Courts, Wellington, 11 December 2019).

<sup>258</sup> 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 further above, n 204.

- 6.37. As follows from the above, my advice is that there is no, on a proper evaluation of the nature of costs and the operation of the contemporary costs regime, necessary inconsistency between the abrogation of the primary rule and the continued operation of the rest of the present costs regime. Nor, in my evaluation, would the abrogation of the costs regime would produce inconsistency between the costs regime and the rest of the rules of court or wider legal system law.
- 6.38. The Committee should however, in my assessment, be more sympathetic to the concerns expressed by submitters as to the potential impacts of abrogating the primary rule of the administration of justice and other parties' access to the courts' finite resources. In my view, is the most compelling argument in favour of maintaining the primary rule advanced in submissions. However, it does not appear, on what empirical evidence is available, nor on a close assessment of the various incentives and concerns engaged, that these concerns justify the maintenance of the primary rule. At most, they appear to justify allowing a lower rate of "recovery" by unrepresented parties than that presently applicable to represented parties.

#### **Absence of Justification is a Good Reason for Abrogation**

- 6.39. That is in itself a good reason to abrogate the primary rule. This insofar as it is inherently undesirable to draw distinctions between different categories of litigants, particularly on the basis – as the operation of the primary rule mostly appears to – between those who can afford legal representation in seeking redress and those who cannot. More generally, it is generally desirable to avoid such horizontal inequalities within the legal system without justification, so as to avoid generating an incentive for parties to engage in disputes over which side of the 'line' a given case falls. Absent some good reason for the distinction, which justifies the time and expenditure consumed by such disputes, such disputes needlessly produce inefficiency and additional expenditure, contrary to the overriding objective of civil procedure.
- 6.40. At the most fundamental level, it is therefore necessary to identify a compelling justification for maintaining a rule that maintains such a distinction, rather than to identify a reason for departing from the status quo. More specifically, my advice is that the Committee examine the issue on the basis that it is necessary to establish a good reason for imposing an impediment, which the primary rule undoubtedly is in practical terms, on the fundamental right of parties to represent themselves, rather than approaching the matter on the basis that it is necessary to justify removing that impediment.

#### **Abrogation Better Achieves the Objectives of the Costs Regime**

- 6.41. Moreover, my advice is that the objectives and principled underpinning of the costs regime would be better achieved, so far as cases in which self-represented parties are

concerned at least, by the abrogation of the primary rule. My recommended view of the costs regime's objectives and principled underpinnings generally has been set out in length in the previous section at length, and in summary at paragraph 5.76. As noted, that summary drew in part of the assessment made by the Law Society in its submissions of the objectives of the costs regime

6.42. In particular, the Law Society, in its submission, identified seven objectives and principled regimes of the costs regime so far as the position of self-represented litigants are concerned. Some of these reflect the broader concerns of the costs regime more generally, as noted in the previous section. Others emerge more clearly in the context of the issue of self-represented litigants' costs. The Law Society's list of such principles, which I would commend to the Committee, is as follows:

- a. achieving the promotion of access to justice, or removal of barriers to justice;
- b. achieving fair and equitable treatment of litigants;
- c. achieving fairness as between successful and unsuccessful parties;
- d. avoiding the creation of perverse economic incentives;
- e. protecting the integrity of the justice system by making provision for those whose conduct is unacceptable; and
- f. recognising the fundamental right of any litigant to have full access to the courts without the need for legal representation.

6.43. The Bar Association identified the purposes of the costs regime in similar terms, noting concerns of allowing reasonable recovery, promoting the efficient administration of justice, and ensuring equity between all participants in Court processes.

6.44. It is my advice, for the reasons set below, that the abrogation of the primary rule better gives effect to all of these objectives than the status quo.

6.45. As developed in the previous section of this work, and as explained again at paragraphs 6.6-6.14 above, it is my advice that abrogation of the primary rule will promote the fair and equitable treatment of all classes of litigants than does the status quo. This because reform will better allow all litigants to recover for costs on the same basis, in accordance with the contemporary basis for the award of costs. The effect of the law at present is that, despite the costs regime no longer proceeding on the basis of partial indemnification in respect of represented parties (and that is far from the only objective of the costs regime), self-represented litigants are prohibited from obtaining costs awards because they are unable to be indemnified for their opportunity costs. They are not being given the same reward for having done the same notional amount of work necessary to have prevailed – and it is important to recall that the Committee is

necessarily concerned here with *successful* self-represented litigants only – as would a represented party.

- 6.46. The reform is consistent with recognising the fundamental right of any (natural person)<sup>259</sup> litigant to have full access to the courts without the need for legal representation,<sup>260</sup> and to promoting access to justice and removing barriers to justice. While the inability of self-represented parties to obtain any award of costs does not strictly prohibit them from coming to Court, provided they are able to pay (or obtain a waiver of) filing fees, this does not recognise the very real investment of energy and resources these parties make. While I do not recommend that the Committee in fact enable self-represented litigants to obtain an award to fully compensate them for that effort, it is inconsistent to the promotion of access to justice to hold them to nil recovery. Moreover, as the Law Society highlighted, it is inconsistent to suggest – as is suggested<sup>261</sup> – that the low level of recovery in practice that prevails for represented parties at present can act as a barrier to access to justice, and then not abrogate the primary rule.
- 6.47. For the reasons given at 6.23-6.36 above, my advice is that the abrogation of the primary rule would not give rise to perverse economic incentives or other “floodgates” concerns. Nor is it satisfied that it is necessary, for the purposes of preserving the integrity of the justice system against bad behaviour by litigants in person, to maintain the primary rule.
- 6.48. Rather, my advice is that the abrogation of the primary rule will produce more rational and economic behaviour in respect of litigation, produce greater equity between represented and unrepresented litigants, and fairness between successful and unsuccessful parties. This for the reasons developed in the following paragraphs, which are essentially the same reasons why the Canadian Courts abrogated the primary rule in that jurisdiction (see paragraphs 2.29-2.33 above).
- 6.49. This follows from the fact, noted by submitters, that the practical effect of the rule is to, to a large extent, “inoculate a litigant facing a self-represented party against any risk of an unfavourable costs award”, as Dr Toy-Cronin put it. I commend to the Committee her assessment that this “distorts the risk-reward calculation for represented parties”, effectively incentivising the represented party to not settle in circumstances where, facing a represented party, that would be the rational course of action, or otherwise pursue claims against self-represented parties in a more bloody-minded manner. Dr Toy-Cronin referred the Committee to qualitative research indicating that self-represented

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<sup>259</sup> *Re GJ Mannix Ltd* [1984] 1 NZLR 309 (CA).

<sup>260</sup> Compare the position of companies as corporate entities, which enjoy no such right, and which must obtain representation to appear as a party in Court proceedings: see, for example, *Emborion International Ltd v Commissioner of Inland Revenue* [2018] NZHC 178, applying *Re GJ Mannix Ltd* [1984] 1 NZLR 309 (CA) at 312.

<sup>261</sup> See, for example, Hon Justice Patricia Courtney *Minutes of the Meeting of the Rules Committee of 11 June 2018* (Judicial Office for Senior Courts, Wellington, 25 June 2018) at 5.

litigants in New Zealand feel as if that incentive has served to disadvantage them in practice, for much these reasons.<sup>262</sup>

- 6.50. One particular manifestation of this, as noted by the Bar Association in its submission, is that the primary rule precludes self-represented litigants from making use of the *Calderbank* process (explained at paragraphs 5.62-5.64 above) in their favour during settlement negotiations.
- 6.51. All of this is contrary to the courts' established general policy of promoting settlement as a means of helping promote the efficient administration of justice (as discussed at paragraphs 5.18, 5.64, and 5.66 above). Given that the abrogation of the primary rule will avoid these objectives being confounded in the case of self-represented litigants, as they are at present, it is my advice that the abrogation of the primary rule will better promote the efficient administration of justice, and will produce greater equity between represented and unrepresented litigants in the litigation process.
- 6.52. Finally, it is my assessment that the efficient administration of justice, and also the achieving of fairness between represented and unrepresented parties, is better achieved through rendering parties unsuccessful in opposing an unrepresented party liable for costs in the ordinary way.
- 6.53. As noted at paragraphs 5.52-5.56 above, one function of the costs regime is to sanction unreasonable conduct in litigation. Where a party facing an unrepresented party is not liable to pay any costs to that party where they succeed, the threat of having to meet an increased or indemnity costs award for failing to proceed in a reasonable manner or if they fail to meet their procedural obligation is not present. This undermines the conditioning effect of the availability of sanctions under the costs regime for parties in that position in that category of cases.
- 6.54. Equally, the fact that the unrepresented party cannot, however exemplary their conduct, receive a costs award removes an incentive for good behaviour on their part. In particular, the inability to reduce a nil costs award removes an incentive to proceed reasonably and proportionally that is incumbent upon all represented parties because of the objective basis of the award of costs.
- 6.55. These concerns bear on both the ability of the costs regime to promote the efficient administration of justice where self-represented litigants are concerned, and also on fairness as between successful and unsuccessful parties (one objective for the ability to depart from scale under rr 4.6-4.7 being to recognise the additional notional work

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<sup>262</sup> See Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis, University of Otago, 2015), in particular at 218. A similar observation was made in the Saskatchewan Supreme Court in *Hope v Pylypow* [2015] SKSC 26 at [56]-[57].

reasonably required to be done where the opposing party, despite having succeeded or not succeeded, has failed to act reasonably or otherwise has acted inappropriately).

## **A Principled Measure for Costs Awards to Self-Represented Litigants**

### *Overview*

6.56. As will have been clearly foreshadowed above, my advice is that the Committee ought to agree with the three quarters of respondents (to question two in the consultation paper) who submitted that, should the primary should be abrogated, self-represented litigants ought to receive a costs award on a modified scale approach.

6.57. Of these three-quarters of submitters, all but one suggested that a new daily recovery rate be inserted into sch 2 of the High Court Rules 2016 and sch 5 of the District Court Rules 2014, in accordance with which self-represented litigants who succeed in litigation can be awarded costs, in accordance with the current scale costs. My understanding was that these submitters envisaged this rate being set somewhere below the recovery rate applicable to category one proceedings. I recommend that the Committee should agree.

6.58. In the following paragraphs, I identify why, in my assessment, the Committee ought to prefer the use of a modified scale approach to the alternative possibilities of taxation according to a tariff (such as done in Canada) or the awarding of self-represented litigants an amount in respect of hours spent on litigation according to a flat hourly rate (such as done in England and Wales). These were the other approaches outlined in submissions.

6.59. I then give my reasons for recommending that this rate should be set below the category one proceeding rate; which reasons have already been foreshadowed earlier in this section. In doing this, I outline my assessment as to why it is justifiable in principle to continue to distinguish between represented and unrepresented litigants with respect to the availability of a costs award in this less stark manner.

*A modified scale approach is the most practicable and practically consistent means of awarding costs to self-represented litigants*

6.60. Perhaps most primarily, in my assessment the District Court Judges were correct to say in their submission that the use of a modified scale approach is an appropriate way of “balancing the objective of treating represented and unrepresented parties equally against the practical difficulties of assessing litigants in person’s costs and awarding costs remaining predictable and expeditious.”

6.61. As noted in sections one and two of this paper, the perceived difficulties associated with measuring the efforts of self-represented litigants has been a reason given for not abrogating the primary rule in the past. This was related to the notion that costs are awarded on a partial indemnity basis for out-of-pocket legal expenses, which were readily assessed on the basis of the solicitor’s bill of costs. In contrast, it was perceived

that allowing an award of costs to self-represented litigants would require something analogous to what occurs in Canada. That is, a comparatively (compared to the highly mechanical schedular approach that prevails in New Zealand under rr 14.2-14.5) laborious process of establishing a successful self-represented litigant's actual expenditure of time and effort with respect to the proceeding, an assessment of the losses associated with that, before then, to avoid excessive recovery and to incentivise efficiency in litigation, then making an adjustment based on a comparison of the quality of their efforts with the quality of the work of notional counsel.

- 6.62. Adopting an approach like that, which was the preferred course of action for two submitters, does have certain attraction. In particular, it would avoid making any assumptions as to the inherent quality of the work being done by litigants-in-person. It would be possible to award the full scale amount where the work done was thought to warrant that recompense and the extent to which the litigant-in-person was a model litigant, having regard to the complexity of the proceeding, the amount and quality of the work done by the self-represented litigant; the significance, monetary or otherwise, of the proceeding; the reasonableness of the self-represented litigants' position and conduct. While, in practice, the full amount could well seldom be awarded, the adoption of an evaluative framework allowing a case-by-case assessment would avoid making a discriminatory assumption that all self-represented litigants are less competent than are junior counsel (to which the category one proceeding rate refers).
- 6.63. Ultimately however, my assessment is that preserving the predictability and expediency of the award of costs on the objective basis that prevails under rr 14.2-14.5, subject to rr 14.6-14.7 and the Court's rarely employed overriding discretion, is preferable as a matter of policy. This aligns with the concern, as noted at paragraphs 6.50-6.51, to ensure that the role of the costs regime in promoting the efficient administration of justice by promoting settlement can be extended to cases involving self-represented litigants. That would be undermined by adopting a comparatively uncertain approach to the award of costs in cases involving self-represented litigants insofar as it would be harder for parties to reliably predict their prospective costs if advance of litigating. It would also significantly burden the courts considerably, given that the New Zealand Courts, unlike the Canadian Courts, are not regularly engaged in the practice of taxing costs according to tariff in all cases (despite the existence of the rarely-utilised possibility of appointing a Registrar to tax costs under subpart 2 of Part 14).
- 6.64. While adopting of such an approach would have clear advantages in terms of sanctioning improper conduct and incentivising efficiency on the part of litigants in person, my assessment is that the existence of the courts' ability to modify costs awards according to the current scale for or against litigants-in-person under rr 14.6-14.7 adequately addresses that concern, while delivering far greater advantages in terms of expedition and predictability.



- 6.65. In saying this, I acknowledge the force of the New Zealand Law Society’s submission that the application of r 14.7(e) to self-represented litigants on the same footing as it is applied with respect to represented litigants might be too harsh, given their likely inexperience. Rather, however, than following the Law Society’s suggestion to exempt self-represented litigants from r 14.7(e) and have a parallel rule affording them some greater measure of appreciation, it is, in my assessment, preferable to have a single standard applicable to all parties, in the expectation that the Court will likely afford a certain measure of indulgence be afforded to self-represented litigants who fail, despite their best good faith efforts, to attain the standard of counsel. The reference to unreasonableness in r 14.7 indicates there is scope for the Court to properly consider the lesser experience of even well-intentioned self-represented litigants in determining whether to apply its discretion under r 14.7.
- 6.66. I also assess a modified scale approach to be desirable because it will ensure that all parties, represented or otherwise, receive an award of costs on the same footing and pursuant to the same conceptual framework. That is, a reasonable award for an amount of notional work reasonably required to be completed for the purposes of prevailing in the litigation in question, having regard to its complexity and importance. This will assist in maintaining fairness as between represented and unrepresented parties, and the conceptual integrity of the costs regime. More practically, it has the same effect of the Canadian taxation-based approach of avoiding excessive recovery in respect of large numbers of hours of low-quality work while incentivising efficiency in litigation. It is less advantageous only, as accepted above, in terms of sanctioning misconduct.
- 6.67. More generally, maintaining a wholly “objective” approach almost completely avoids all of the practical difficulties associated with adopting any of the more “subjective” approaches based on an assessment of a successful self-represented litigant’s efforts, as is required under either the English or Canadian approaches.
- 6.68. Conversely, embracing the proposition, advanced by a single submitter, that successful self-represented litigants be able to recover at a set hourly rate for the number of hours expended on the litigation, would realise none of the advantages of either the modified scaled approach or the Canadian approach – rather the opposite – and lead to all of the disadvantages of a “subjective approach”. It would also:
- a. be inconsistent with the conceptual basis of the contemporary costs regime;
  - b. produce inequality between self-represented litigants and represented litigants (greatly to self-represented litigants’ favour by allowing them effectively full recovery);
  - c. abrogate the distinction between costs and one species of consequential loss-type damages; and

- d. burden the Courts by requiring a detailed assessment be undertaken in each case as to whether the number of hours in respect of which a claim was made were actually consumed by activities related to the litigation.

6.69. The same would be even more true if New Zealand was to adopt the English approach of allowing recovery either according to proof of a self-represented party's actual losses in respect of the time spent on the litigation (their actual opportunity costs), or, in default of such proof, a fixed hourly rate.

*Fixing the new daily recovery rate*

6.70. It is my advice that, in applying the modified scale approach to award of costs to self-represented litigants, the Committee ought to insert a new appropriate daily rate for such litigants into sch 2 of the High Court Rules 2016 and sch 5 of the District Court Rules 2014. In making this recommendation, I envisage that this rate will be lower than the rate applicable to category one proceedings under r 14.3.

6.71. It is also envisaged that a single rate ought to apply to all categories of self-represented litigants, rather than a range of new rates responsive to the three categories of proceedings. I acknowledge that, prima facie, this would appear to depart from the basis for the categorisation of proceedings under r 14.3 generally, which usually proceeds on an "objective" assessment of the complexity of the proceeding, not by assessment of the skill of counsel actually involved. However, given that costs will be awarded to the self-represented litigant only where they have succeeded, and therefore it will be the case that, as their success demonstrates, that a self-represented litigant (who is to be assumed less capable than trained counsel, all things being equal), it is arguable that their success reflects the appropriate "objective" classification for the proceeding was somewhere less than category one, given that they could not have otherwise succeeded.

6.72. I have been unable to arrive at a conclusive recommendation as to what an appropriate figure for the new daily recovery rate for litigants-in-person is, beyond having determined that it will allow for self-represented litigants to recover less than represented litigants.

6.73. I note the submission of the Law Society that an appropriate daily recovery rate could be \$750/day, which equates to an annualised gross salary of \$180,000. This as opposed to the category rates for represented parties set out at paragraph 5.27 above, the lowest of which is \$1,270 in the District Court (an annualised gross salary of \$304,800) and \$1,590 in the High Court (an annualised salary of \$381,600). That figure would, the Law Society submits, be consistent with an assumption (apparently made by the Society) that any given litigant-in-person is likely to be materially less skilled than junior counsel appearing in the District Court or High Court (to whom r 14.3 explains the daily recovery

rates for category one proceedings relate). While, the Society acknowledges, this is unlikely to be true in every case, and can be regarded as somewhat discriminatory, it contends this represents the most practicable option.

- 6.74. I recommend the Committee agrees. In my assessment, is the greatest distinction between represented and unrepresented parties that can be justified, and that this distinction is also necessary. As already discussed at paragraphs 6.24 and following above, I agree with those submitters who emphasised that it is strongly desirable that all litigants who can obtain legal representation be incentivised to do so. Having parties represented by independent counsel, as I have noted above, is strongly advantageous in ensuring the efficient dispatch and administration of justice, with the presence of skilled, independent, counsel of considerable advantage to the Courts and, by extension, insofar as it allows for the more efficient use of scantily available judicial time, all court users. It would therefore be highly undesirable to have self-represented litigants be able to recover at the same rate as represented litigants, as that would produce a disincentive to seeking representation.
- 6.75. It would also raise the spectre, at least in theory, of parties being incentivised to litigate as a form of employment. While that concern may well have been overstated in some submissions, I am mindful that avoiding promoting the further growth of the ‘secondary industry’ of ‘professional’ *McKenzie* friends is highly desirable, given the potential issues with the presence of such persons in court proceedings.<sup>263</sup>
- 6.76. In saying this, I am cognisant that more self-representation is attributable to an inability to afford representation than a refusal to do so, and that the incentivising of representation through the costs regime is really only necessary in the respect of the “won’t pay” category of unrepresented litigants, rather than the “can’t pay” category. However, it would be too difficult, in practice, and the source of too much uncertainty for parties, to attempt to distinguish between these two categories of self-represented litigants for costs purposes. Also, based on the research referred to above, it may well be impossible to neatly categorise actual litigants in this way in practice. It is therefore necessary to set a single daily recovery rate in respect of all self-represented litigants and set this at a level that disincentivises self-representation.
- 6.77. I acknowledge the deleterious impact of this decision on those who would obtain representation if they were able to, and the fact that it maintains a distinction between self-represented and unrepresented litigants that may not necessarily be justified in the particular case. It is for this reason that I recommend the Committee be sensitive to the need to fix the self-represented litigants daily recovery rate at a level reasonably close to the daily recovery rate applicable to junior counsel (as does the Law Society in its

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<sup>263</sup> See New Zealand Law Society “McKenzie friends: there’s more of them, but what do they actually do?” (2018) 923 *LawTalk* (online ed, New Zealand) for a brief discussion of these issues.

submission), so as to minimise the impact in those cases where the assumptions underpinning the proposed distinction do not hold true. (That is, where the level of skill demonstrated is in fact comparable to that of counsel). However, it is my assessment that, in most cases, incentivising representation in this manner is nonetheless appropriate, having regard to broader concerns of promoting the efficient administration of justice and, in that sense, ensuring all court users have access to justice.

6.78. The same logic animates my recommendation that Committee's ought not to attempt to distinguish between self-represented litigants who, in actuality, demonstrate greater skill and ability than would junior counsel, and those who do. This for essentially the same reasons that, in my assessment, the Committee ought not to adopt the Canadian approach noted at 6.62-6.67 – it would be overly burdensome, insufficiently expeditious, too unpredictable, and inconsistent in principle with the basis on which costs are awarded. Again, it is my assessment that, any objections to this distinction can be minimised, in practice, by ensuring that the daily recovery rate for self-represented litigants is not set too far below that applicable to junior counsel.

6.79. It would be inappropriate, in responding for the Committee's request for advice on these issues, for me to recommend any particular daily recovery rate for self-represented litigants. The rate selected needs to balance the various concerns set out above. A range of figures, each representing a different balance, are reasonably justifiable as a matter of policy, and it is for the Committee to make a choice as to which figure it considers most appropriate. At most, I can advise that, in my assessment, the range of reasonably justifiable figures likely sits somewhere closer to the category one rates than 'nil'.

#### *Miscellany*

6.80. I have identified that two further matters of detail arise out of this reform, which may require two further amendments be made to the costs regime.

6.81. First, it is envisaged that, as is done at present, the Courts would continue to distinguish between those portions of a proceeding in which the successful party was represented and those portions during which it was unrepresented for the purposes of awarding costs. The primary difference, obviously, would be that rather than the successful party only be entitled to costs during the period it was represented, it would be entitled to costs throughout the proceeding, but at the lower recovery rate applicable to self-represented litigants only. Strictly, this will require some departure from the emphasis under r 14.3 on the proceeding being categorised only once, ideally, and early on. However, the concerns as to unpredictable effects on costs this produces would be no worse, and in fact lesser, than the present position where a proceeding requires recategorization at present.

- 6.82. It may be necessary, having regard to this consideration, to amend r 14.3 to clarify, and perhaps also to clearly signal to Court users, that such recategorisations will be necessary where a party becomes represented, or ceases to be represented, during the course of a proceeding. This may extend, potentially, to requiring notice of this being given to other parties to a proceeding where a party is required to file and serve a notice of representation, so as to ensure parties are placed on notice of this consideration.
- 6.83. Secondly, it is my advice that it would be inappropriate to allow self-represented litigants to continue to be eligible for an award of disbursements in respect of legal advice sought from lawyers, and assistance obtained, in respect of individual steps in the proceeding pursuant to a limited retainer without that solicitor going on the record. If allowed an award of costs, that could produce double-recovery, or at least an award in excess of scale, and for that reason would be less effective at producing efficiency and proportionality in litigation than awarding costs in accordance with scale in respect of the steps to which that advice or assistance relates.
- 6.84. For these reasons, it might be desirable to insert a provision into the disbursements rule currently found in r 14.12 to clarify, the current rule of practice to the contrary notwithstanding, that self-represented persons are not entitled to claim disbursements in respect of assistance obtained by them in respect of the proceeding where that assistance is recoverable by them as a cost in or related to the proceeding.

## 7. Ending Invidiously Preferential Treatment of Lawyers-in-Person

### Introduction and Overview

- 7.1. It is a necessary consequence of the abrogation of the primary rule that both the exceptions for lawyers-in-person and parties represented by employed lawyers are also abrogated, insofar as, without a rule, there can by definition be no exceptions.
- 7.2. Therefore, practically speaking, is not necessary for the Committee, having resolved to abrogate the primary rule, to consider the fate of the lawyer-in-person exception.
- 7.3. However, given that, in my assessment (and that of all eight submitters who addressed this issue) the exception is odious and irrational, and thus an affront to equality before the rule of law, I recommend that ought to ensure that lawyers-in-person are treated in future like other self-represented litigants (except, as stated below, those represented by in-house counsel).
- 7.4. In particular, I recommend that the Committee ought to promote amendments to the costs regime foreclosing on any potential argument that it did not, as a matter of legislative intent, intend to abrogate the *Chorley* exception in making these reforms which would be available if the position is not expressly addressed.
- 7.5. To that end, r 14.17 of the District Court Rules 2016, which gives effect to the *Chorley* exception so far as solicitors acting in person in that Court are concerned, should be repealed. Moreover, I recommend that language should be inserted into r 14.3 of both sets of Rules clarifying that, despite any contrary rule of practice to that effect, solicitors and barristers appearing on their own behalf are to recover at the new daily recovery rate applicable to self-represented litigants.
- 7.6. I recommend that this language should also clarify, picking up on a point raised by the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow*, that it will not be permissible for lawyers to attempt to circumvent this provision by appearing on behalf of a firm (incorporated or otherwise) of which they are the sole director or principal. This for the reason, as it was put by Kiefel CJ, Bell, Keane, and Gordon JJ in their plurality judgment, that it is seriously doubtful “whether such a solicitor has sufficient professional detachment to be characterised as acting in a professional legal capacity when doing work for the incorporated legal practice.”
- 7.7. In this section, I outline the reasons for these recommendations. It is appropriate to do so in a fair degree of detail, despite the complete lack of support in submissions for the exception being maintained given the statements of the majority in *McGuire v Secretary for Justice* (see at paragraphs 2.8-2.13 above). I note that my reasons are essentially those set out in the submissions received, as briefly summarised at paragraph 3.27 above, and those given by the majority of the High Court of Australia in abrogating the

exception in *Bell Lawyers Pty Ltd v Pentelow* (see paragraphs 2.14-2.21 above). In particular, in adopting this perspective, I align myself with the comments of the majority of the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow* in describing an exception that allows “a self-represented litigant who happens to be a solicitor to recover his or her professional costs of acting in the litigation” as “an affront to the fundamental value of equality of all persons before the law”.<sup>264</sup>

7.8. As with the previous issue, as set out at paragraphs 6.39-6.40, it is my advice that the Committee ought to approach this issue on the footing that it is necessary to identify a compelling reason for the preservation of the primary rule, rather than regarding it as identify a reason to depart from the status quo. This because, in my assessment, drawing a distinction between self-represented lawyers and other self-represented litigants is inherently suspect and undesirable, having regard to the importance of equality before the law and the rule of law in the sense of treating like cases alike, absent a good reason to distinguish between those cases being identified.

### **The *Chorley* Rationale is Now Irrelevant**

7.9. One justification commonly advanced for the preservation of the *Chorley* exception, which has been carried forward essentially unchanged from the decision in that case,<sup>265</sup> including in *McGuire v Secretary for Justice*,<sup>266</sup> is that the work done by a solicitor who represents his or herself in litigation successfully is doing precisely the same kind of work that an award of costs represent. It is therefore, the justification goes, a trivial task, practically speaking, to value and order a contribution be made in respect of that work, but difficult to value the work of a litigant-in-person, making this exception practicably workable, and consistent with the principled basis of an award of costs.

7.10. That justification is now, as Dr Toy-Cronin put it in her submission, “irrelevant”. The Committee has assessed the objective basis on which costs are awarded in New Zealand today in the first, fifth, and sixth sections of this paper. As stated at paragraph 5.35, costs are today awarded on the basis of an award for a notional amount of work done by a person of a notional level of skill and experience, appropriate in both cases to the complexity and skill of the proceeding in question. It is not an award of an indemnity or a partial indemnity in respect of the successful party’s expenditure on professional legal services in respect of the work actually done.

7.11. It is therefore irrelevant to this objective basis for awarding costs whether the actual work done in respect of the proceeding is done by a self-represented person who is a

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<sup>264</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [1] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>265</sup> *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

<sup>266</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [57].

lawyer or a self-represented person who is not a lawyer. Unlike the position under the approach to taxation of costs that prevailed in England at the time *Chorley* was decided in 1884, in Aotearoa New Zealand in 2021, it is no easier to adapt the mechanisms for fixing costs to the assessment of the work done by a lawyer than it is to working out the costs of other litigants-in-person. The notional work each class of litigant is attributed with having done under the current objective costs regime is the same, and equally susceptible of measure and reward according to scale.

- 7.12. In this respect, I agree with the majority of the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow* that this is a practical issue requiring resolution by a competent body other than a Court – such as this Committee – rather than a principled justification for the lawyer-in-person exception.<sup>267</sup>
- 7.13. Relatedly, it is also often stated that an opposing party who is liable for costs to a self-represented lawyer will face a lower bill of costs because the lawyer, incentivised to represent themselves will do so, and will be able to do so in less time than any lawyer they could get to represent them, which would be the alternative. The justification that is said to emerge from that is that it is a saving to the opposing party to face a lower bill of costs than would have resulted if lawyers were not incentivised to represent themselves and thus obtained representation.
- 7.14. In her submission, Dr Toy-Cronin submits that there is a lack of evidence to substantiate this incentive translating to actual private benefits to opposing parties in practice. At a more principled level, the Committee accepts that the bill of costs generated by a self-represented lawyer might be lower than that which would result from their achieving representation; if only because, in terms of the *Chorley* incentive, they are not entitled to recover in respect of certain matters (it being impossible, for example, for a lawyer to attend on his or herself for the purposes of taking instructions).<sup>268</sup> Even more fundamentally however, this point is irrelevant in the context of the contemporary objective costs regime. The steps in respect of which a lawyer-in-person can claim are the same as for a represented party, and their actual bill of costs is irrelevant to the award of costs.
- 7.15. For completeness, I record my agreement with the observation that the lawyer-in-person exception is inconsistent with the view of costs as the award of a partial indemnity. This on the basis that lawyers-in-person were essentially being awarded costs in respect of opportunity costs, while other self-represented litigants were ineligible for such awards. As I have argued above, the concept of partial indemnity is no longer its view of the rationale for the award of costs under the contemporary New Zealand costs regime. This

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<sup>267</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [24] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>268</sup> *The London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (EWCA) at 875.



concern is therefore, looking forward, equivocal, as while self-represented litigants would, if my recommendations were adopted, be able to receive costs awards, they would not be being compensated in respect of any actual work done or costs incurred by them. However, I would respectfully record my agreement with Ellen France J's assessment,<sup>269</sup> and that of the majority of the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow*,<sup>270</sup> that the *Chorley* principle is incongruous with the basis of the costs regime when costs are understood as an indemnity or partial indemnity.

### **Promoting Self-Representation by Lawyers is Poor Policy**

7.16. As the District Court Judges, Crown Law Office, and Meredith Connell each noted in their submissions, a lawyer-in-person is not in a professional relationship when they appear on their own-behalf and is not required to exercise the independent professional judgement required when acting for a client.<sup>271</sup> This has the effect, essentially, of depriving the Court of the advantages associated, as set out previously at paragraph 6.24 and following, with the presence of independent counsel.

7.17. As set out in the previous section (see paragraph 6.74 and following), it is my advice that it is appropriate to employ the costs regime to incentivise the presence of independent counsel before the Court in all matters where that is possible. That, fundamentally, underpins my recommended new approach to costs for self-represented litigants generally. It would be inconsistent with that objective to continue to incentivise lawyers to represent themselves.

7.18. That would also be incongruous with the modern orthodoxy that self-representation by lawyers is, as a matter of professional ethics, undesirable, as was noted by the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow*.<sup>272</sup>

### **Lawyers-in-Person Cannot be Assumed to Have Skill Comparable to Independent Counsel**

7.19. It has been argued that, even if not fully independent, lawyers-in-person are nonetheless familiar with the practice of litigation and will thus be of more assistance to the Court than would another self-represented litigant, justifying some distinction being drawn. Again, that is inconsistent with the rationale for the award of costs under the current regime, and is also not, in my assessment, persuasive in its own terms. A significant part of the benefit that the Courts derive from the appearance of counsel relates to their

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<sup>269</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [89] per Ellen France J (dissenting).

<sup>270</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [22]-[33] per Kiefel CJ, Bell, Keane, and Gordon JJ.

<sup>271</sup> Compare Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, chs 3, 5, 6, 10, 11, and 13.

<sup>272</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [19] per Kiefel CJ, Bell, Keane, and Gordon JJ.

professionally detached exercise of judgment. Lawyers lacking such detachment, all things being equal, are likely to be less able to exercise the same measure of skill and judgment appearing for themselves than they would if appearing for a client. In this respect, the Committee again notes Dr Toy-Cronin’s observation that, in both New Zealand and England, the first people to be declared vexatious were lawyers. This was also the assessment of skill to be expected from lawyers engaged in self-represented given by the majority of the High Court of Australia in *Bell Lawyers Pty Ltd v Pentelow*.<sup>273</sup>

7.20. Also, as Dr Toy-Cronin notes, not every person with a law degree who holds a practicing certificate (being the ambit of the *Chorley* exception) can be assumed to be materially better at litigating than other members of the community. As she put it in her submission, “while lawyers specialising in other areas of practice have general legal skills that might support their ability to run a High Court case, so too might lay people who could have skills ranging from legal executives to businesspeople”. The District Court Judges made a similar observation in their submission.

7.21. I would agree, considering it entirely plausible, as did Ellen France J in her dissent in *McGuire v Secretary for Justice*,<sup>274</sup> that a, say, chartered accountant as a capable professional person might acquit themselves just as well as a lawyer with no litigation expertise appearing in person. In contrast, the logic of the operation of the market for legal services suggests that it is only those counsel with some experience of litigation appear regularly before the Courts as independent counsel.

### **Distinguishing the Position of Employed Lawyers**

7.22. The majority of the Supreme Court in *McGuire v Secretary for Justice* considered that the lawyer-in-person exception was needed, if the primary rule was maintained, to give coherency to the employed lawyer exception. As the primary rule is to be abrogated, this concern no longer arises.

7.23. More generally, as is developed in the following section, maintaining the *Chorley* exception is not necessary to afford self-represented lawyers treatment distinct from that afforded to other self-represented litigants. This is because they are in a position different from that of self-represented lawyers. In particular, there is, in my assessment, force in the argument that many in-house counsel are, in a material sense, independent from their employer in the same manner as are external counsel, and in all cases exercise professional ethical duties to the Court.

7.24. For completeness, I would records its agreement with Ellen France J’s dissenting view in *McGuire* that, even on a conception of costs as a partial indemnity, the employed lawyer

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<sup>273</sup> At [18].

<sup>274</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [91] per Ellen France J (dissenting).

exception is arguably sustainable on the basis that in such cases “the time of a salaried employee has been occupied”,<sup>275</sup> such that a real (as opposed to opportunity) cost (albeit not one invoiced in a bill of costs) has been occupied. This view, I note, found favour with the plurality in *Bell Lawyers Ltd v Pentelow*.<sup>276</sup>

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<sup>275</sup> At [93] fn 89 per Ellen France J (dissenting), citing *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23 per Cooke J.

<sup>276</sup> *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29, (2019) 372 ALR 555 at [46]-[50].

## 8. The Position of Employed Lawyers

### Introduction and Overview

- 8.1. The second most divisive of the four questions on which the Committee consulted was the fourth, as to whether an exception ought to be nonetheless be made for employed lawyers if the primary rule was maintained. As summarised at paragraphs 3.28-3.36 above, five submitters favoured maintaining the exception, four said that it ought to be abrogated, and the New Zealand Law Society said its membership was unable to arrive at a consensus view on this issue.
- 8.2. This also proved the most contentious issue during the Committee's discussion of what approach to adopt in respect of costs for self-represented litigants at its meeting of 30 November 2020.
- 8.3. If the Committee, as is recommended above, abrogates the primary rule, then the particular issue on which the Committee consulted would no longer arise. Instead, if the Committee was to adopt the recommendations set out above, the issue for the Committee will be whether those parties represented by in-house counsel are to receive costs awards on the basis of:
  - a. the new daily recovery rate that will apply to self-represented litigants;
  - b. the rate applicable to represented parties (on the basis that they are, on a realistic assessment, in a similar position); or
  - c. a further new rate applicable specifically to parties represented by in-house counsel, presumably at a level intermediate between the rates applicable to the previous two categories.
- 8.4. I have been unable to arrive at a conclusive recommendation to the Committee on this issue. As with the question of what precisely the daily recovery rate applicable to self-represented litigants should be, the rate selected needs to balance various principled and policy concerns. A range of figures, each representing a different balance, are reasonably justifiable as a matter of policy, and it is for the Committee to make a choice as to which figure it considers most appropriate.
- 8.5. There is force in the argument that the Committee ought to distinguish between self-represented litigants generally and those represented by employed counsel, given the greater degree of objectivity associated with the presence of in-house counsel before the Court. This also justifies distinguishing between parties represented by in-house counsel and lawyers appearing in person. However, I cannot reliably advise, on the basis of the available information and the submissions so far received, that in-house counsel will in all cases necessarily possess the same degree of independence sufficiently close

to that provided by independent counsel to justify these parties inevitably being entitled to costs on the same basis as represented parties.

- 8.6. I can advise, however, that the Committee ought to exclude from the scope of any distinction drawn between self-represented litigants and those represented by employed lawyers the situation identified in the Law Society's submission in which a firm makes use of solicitors in its employ to act on the firms' behalf by, for example, recovering debts owing to the firm. This is one matter, I note, on which the members of the the Law Society were able to arrive at a consensus view. My assessment is that, for basically the same reasons why lawyers-in-person ought not to be treated more favourably than non-lawyer self-represented litigants, extending special treatment in this case is not justified, as there is no plausible argument that an ethical or economic relationship similar to that extant between independent counsel and client exists as between a firm and a staff solicitor acting on its behalf.
- 8.7. It is also my recommendation that the Committee ought to introduce a provision expressly providing that government agencies and other governmental actors represented by Crown Counsel employed by the Crown Law Office are entitled to an award of costs as if represented by independent counsel (that is, at the present daily recovery rate). This is because, in my assessment, the Crown Law Office exists as an independent law firm within the government, having the same economic and ethical relationship, and degree of independence, from its clients within the government as do independent counsel from their clients.
- 8.8. In this section, I outline the arguments for and against the three possible courses of action open to the Committee should it adopt the recommendations made in the previous sections of the paper, as set out at paragraph 8.3 above, together with my assessment of these arguments where I was able to identify a persuasive response. I then identify how the Committee might proceed to deciding in respect of these issues.
- 8.9. In outlining the relevant arguments, I address the two primary areas of disagreement between submitters on this issue. These were:
  - a. first, as to whether the employers of in-house counsel engaged in litigation incur a "real", as opposed to notional or opportunity cost; and
  - b. secondly, the extent to which employed counsel are sufficiently independent from their employer to be analogous to independent counsel.
- 8.10. Submitters who favoured parties represented by employed lawyers being eligible for costs awards also contended that employing lawyers and making use of them in litigation is a legitimate economic choice for both private and public sector corporate entities, and is one that has already been widely taken-up by such entities, and that the Committee ought to be reluctant to amend the rules in a manner that would render that decision

uneconomic or less economic. I also outline these points, which opponents of parties represented by in-house counsel did not engage with in their submissions, below.

### **If the Primary Rule is Abrogated, it Would be Irrelevant Whether Retaining Counsel is a “Real” or Opportunity Cost**

- 8.11. Submitters who opposed parties represented by in-house lawyers being treated differently from other self-represented litigants were of the view that, if costs are able to be awarded in such cases, as the District Court Judges put it, “the employer is being compensated for the opportunity cost associated with having their employees engaged in the litigation as opposed to other work”. That is, they did not accept the view, given by Ellen France J in her dissent in *McGuire v Secretary for Justice*, that “the time of a salaried employee is a real cost to a corporate party which has incurred the expense of engaging a lawyer in a manner hard to distinguish from a party who obtains external counsel”.<sup>277</sup>
- 8.12. Conversely, those who favoured a distinction being made contended that the costs associated with using employed lawyers in litigation is a tangible one. As Meredith Connell put it, the cost being compensated is the actual cost of the lawyer’s salary, which could be calculated on basis of an effective hourly rate. Making a similar point, Crown Law added that the costs associated with the employee’s salary during the time taken for the steps in the costs schedules are not the only costs incurred in respect of the litigation but are the only costs in respect of which a claim for costs are made. No claim is made for the types of opportunity costs all organisations incur, such as, the Customs Services noted in its submission, the costs of having non legal-staff instruct in-house counsel, find documents, attend on in-house counsel to agree witness statements, etc.
- 8.13. Should the Committee decide to abrogate the primary rule, it will no longer relevant whether the costs incurred by the employers of in-house counsel are “real” out-of-pocket, as opposed to notional or opportunity, costs. This because no party will be indemnified in respect of its out-of-pocket expenditure on legal services in receiving a costs award. Rather, as set out at paragraph 5.35 above, all litigants, whether represented or not, are and will be awarded costs on an objective basis in respect of a notional amount of work done by a person of a notional level of skill and experience, appropriate in both cases to the complexity and skill of the proceeding in question.

### **Debate as to the Independence of In-House Counsel**

- 8.14. Some submitters questioned the extent to which in-house counsel in appearing in Court provide the same benefit to the Courts, in terms of the provision of advocacy for a client in a professionally detached and independent manner, as do independent counsel who

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<sup>277</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [91] per Ellen France J (dissenting).

appear on behalf of represented parties. The Law Society, noting the views of some of its members, noted that many corporate lawyers assume multiple roles within an organisation and some hold key decision-making responsibilities, such that the extent to which they can be said to be being of counsel in the same way as external counsel is reduced.

- 8.15. The Law Society did note, however, that it was widely accepted among its members that, at least in some instances, in-house legal teams operate independently from other parts of the business (such as Crown Law, which operates independently from the rest of the government).
- 8.16. The In-House Lawyers' Association of New Zealand, as a division of the Law Society, put forward the observations that in-house lawyers hold practising certificates like all other lawyers and are subject to the same regulatory oversight. While, the Association accepts, they do not offer their services to the public more widely, it notes that, from a regulatory standpoint, they serve their employer as any other client. A single client, but a client, nonetheless.<sup>278</sup> In this sense, unlike lawyers-in-person, in acting for their employer in-house lawyers do not act for their own interest or profit, but rather for that of their client. This is not materially distinct from the position of external counsel.
- 8.17. For this reason, in the view of the Association, to differentiate between rules applied for in-house counsel in comparison with external counsel based only on their employment status is contrary to their status as full members of the legal profession and would be to baselessly treat them as an inferior tier of lawyer.
- 8.18. The Crown Law Office, New Zealand Customs Service, Auckland Council, and Inland Revenue Department all also expressed the view that an employed lawyer is in a different category to the self-represented litigant because, pursuant to the Rules of Client Care and Conduct, the employed lawyer is in a lawyer-client relationship and is representing, not their own interests or case, but that of their client, and is subject to the ethical obligations of counsel.<sup>279</sup> Additionally, when an in-house lawyer appears for their employer in litigation, a regulated service is being provided and the in-house lawyer is obligated by the Rules to provide independence in the conduct of the litigation, being of counsel in a way that a self-represented litigant is not.
- 8.19. A similar division of views was present among the members of the Committee in its initial discussion of this issue at its meeting of 30 November 2020. Judicial members of the Committee, as well as members of the legal profession speaking from their own perspective, considered that some distinction should be drawn between parties represented by independent counsel and those represented by employed solicitors.

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<sup>278</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 15.

<sup>279</sup> See especially at chs 3, 5, 6, 10, 11, and 13.

- 8.20. I have already noted my assessment that, as a general matter of policy, the presence before the Courts of counsel who appear above all as officers of the Court, able to litigate with professional detachment and independence, and subject to professional ethical obligations, is to be encouraged. I have also noted my advice that it is legitimate to distinguish between self-represented litigants generally and those represented by counsel to the extent that a lower recovery rate only should be available to self-represented litigants, so as to incentivise those who can obtain representation to do so (see paragraphs 6.24 and following and 6.74 and following).
- 8.21. It was essentially on the bases of these concerns that some members of the Committee considered it appropriate that parties represented by in-house counsel should recover at a lower rate than those represented by external counsel. This would serve to incentivise parties to seek independent representation, who, these members felt, would be more objective than in-house counsel, being more independent of the party.
- 8.22. However, these members still considered that rate ought to be higher than that applicable to self-represented lay litigants, recognising that the professional skill and ability of a lawyer will be being employed, and the lawyer is subject to professional ethical obligations. These members referred to the point, noted by the Law Society in its submission, that (senior, at-least) corporate counsel are often closely involved in the broader management and governance of their employer, identifying that this means they will often have some greater identity with the decisions being taken by the corporate than independent counsel as a result. This, it was felt, engaged similar concerns as to loss of professional detachment and independence as I have observed arise with lawyers-in-person (as noted at paragraphs 7.19-7.20 above), albeit, admittedly, to a lesser extent. It was also noted that lawyers in this position are more closely economically related to their employer, as their sole client, than independent counsel; producing an incentive, whether realised or not, to be less independent in litigating on their behalf.
- 8.23. Other members of the Committee took the contrary view, essentially differing in their evaluation as to the extent to which in-house counsel are independent of their employers. These members thought it appropriate to allow parties represented by in-house counsel to recover on the same basis as parties represented by external counsel. These members referred primarily to the status of in-house counsel as lawyers subject to the same professional ethical obligations, including as officers of the court, as external counsel, and noted a lack of evidence before the Court to suggest that the concerns raised by those of the contrary view actually manifest in practice.
- 8.24. It was however agreed across all members of the Committee that, whatever decision is taken generally, government sector actors and agencies represented by Crown Law Office employees ought to recover on the same basis as parties represented by independent counsel. This is because, it was universally agreed, Crown Law exists as an independent law firm within the government, having the same economic and ethical



relationship, and degree of independence, from its clients within government as independent counsel. That is, no principled basis on which to incentivise those who could benefit from Crown Law representation to seek external counsel was located.

### **The Economic and Fiscal Implications**

- 8.25. The governmental submitters, as Crown Law advised, represent the largest employers of in-house counsel in the country. As Crown Law explained in its submission, the Government is the single largest employer of in-house counsel in New Zealand, having at least 850 employed lawyers (and 1500 counting the wider public service), with the result that any abrogation of the exception “would have a significant impact on Crown funding”.
- 8.26. That the government makes such extensive use of employed solicitors is doubtlessly related to the governmental submitter’s view that real economies can be achieved by employing in-house counsel.
- 8.27. For example, the New Zealand Customs Service noted that most of the litigation in which it is involved takes place before the Customs Appeal Authority (CAA), and relates to the application and interpretation of the Customs and Excise Act 2018. Simple matters before the CAA can be more efficiently conducted by in house counsel than external counsel, the Service submits, noting that in-house counsel best understand the business needs and environment of the New Zealand Customs Service.
- 8.28. Auckland Council made very similar observations in respect of its 60-strong in-house legal team. Auckland Council noted that, where it seeks costs pursuant to the employed lawyer exception, it seeks costs on a category 1A or 2A basis in most instances, reflecting its low actual costs in using in-house counsel. It advises that its legal staff’s time is “charged out” internally for accounting purposes at a rate of \$206.40 per hour. This reflects, the Committee notes, a significant saving for the counsel compared to sourcing appropriate legal expertise in the wider market. On this basis, the Council accepted the force in the Committee’s considering adopting a lower daily recovery rate for parties appearing by way of in-house lawyer to reflect in-house counsel’s lower real cost
- 8.29. Similarly, Crown Law stated that the use of in-house counsel “enables the efficient allocation of publicly funded resources through retention of institutional knowledge, allocation of counsel with appropriate expertise and understanding of the business needs of the particular agency, reduction in expenses (including travel) and ability to ensure a consistent standard of representation in and assistance to the Court.”
- 8.30. The In-House Lawyers Association, referring to examples such as those provided by the governmental submitters in their submissions, is of the view that the use of in-house counsel is a legitimate economic choice for entities capable of realising real savings. The Association’s view it seems unreasonable for the Rules to be reformed in way that would

effectively punish entities for making what is essentially a commercial decision relating to how they are represented in court. Moreover, the Association submitted, any reform rendering the use of in-house counsel uneconomic, or less economic than seeking external counsel, would deleteriously reduce competition in the market.

- 8.31. It appears clear, in my assessment, that real savings are available to employers who retain in-house counsel, being able to obtain services of lawyers broadly analogous to those available in the wider market at lower rates, while preserving in-house knowledge related to specialist and oft-litigated areas.
- 8.32. The Committee's initial inclination, expressed at its meeting of 30 November 2020, to not to treat parties represented by in-house counsel on the same footing as self-represented litigants more generally, appears (in my assessment) to embody a consensus view that whatever the desirability in the abstract of parties structuring their affairs in this way in terms of the Courts having the benefit of independent counsel, the use of in-house counsel is already widely established, and has a rationale economic foundation. That this state of affairs prevails would appear to support the assessment that there are legitimate commercial and economic reasons to employ in-house counsel.
- 8.33. Some submitters raised concerns that preventing recovery for in-house counsel would have fiscal consequences for the Crown and would inappropriately disincentivise other corporate entities from retaining in-house counsel. However, in my assessment, these concerns do not arise to a particularly material level if the level of recovery for parties represented by in-house counsel was set at a level intermediate between the current rates for externally represented parties and the new self-represented litigant rate. As identified by the governmental submitters, the costs associated with the use of such counsel are relatively low. I surmise that allowing these parties to recover at a rate lower than externally represented parties would therefore be unlikely, in practice, to affect the economic viability of such representation where other economic advantages to that structure are present. These include those noted at paragraphs 8.26-8.29 above. Equally, allowing recovery at less than the rate applicable to externally represented parties could have the effect of incentivising corporate entities to seek external counsel where, on a robust evaluation of their position, employing in-house counsel has insufficient economic and commercial advantages to justify receiving a slightly lower costs award. On the other hand still, for these same reasons, it might be that incentive might prove of limited persuasive value in practice.
- 8.34. Alternatively, the fact that employing in-house counsel is considerably cheaper, on the available evidence, than sourcing equivalent services in the wider market might in itself justify the adoption of a lower daily recovery rate in respect of these litigants than those represented by external counsel.

8.35. I acknowledge that this suggestion might appear inconsistent with the objective approach to the award of costs now prevailing in New Zealand (as has now been explained repeatedly in this paper and most recently referred to at paragraphs 8.13 and following above). Equally however, as has been set out at paragraphs 5.44-5.51 above, that it is already accepted that departure from scale is appropriate in cases where recovery according to scale would not lead, on an objective assessment, to a reasonable contribution because an assumption on which the scale is based is not applicable in a particular case. This includes where, essentially, allowing recovery according to scale would be excessively or inadequately generous to the party who succeeds. Fairness between successful and unsuccessful parties, as noted at paragraphs 5.76.g, 5.77.a, and c above, is an objective of the costs regime, including in respect to limiting the extent to which the successful party is out of pocket as a consequence of having sought to vindicate their rights to the greatest amount consistent with avoiding preserving the losing party's access to justice rights. These considerations might militate in favour, effectively, of 'departing from scale' – the scale for represented parties – in the case of unrepresented parties by establishing a new, lower, daily recovery rate that reflects the lesser extent to which these parties are typically kept out of pocket by litigating using in-house, as opposed to external, counsel.

### **Ways Forward**

8.36. The difficulty that the Committee experienced in arriving at a clear initial view of these issues at its meeting of 30 November 2020, and that I have experienced in providing more detailed advice to the Committee on the basis of the available material, is attributable in part to the fact the Committee did not receive submissions directed at the particular issue I considered. In particular, the submissions received were addressed at the question posed in the consultation paper as to whether, essentially, parties represented by in-house counsel should be able to recover costs at all. The submissions did not address the question as to whether (being in my assessment, the two possibilities between which the Committee can reasonably elect):

- a. 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 counsel; or
- b. 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.

8.37. I recommend that further inquiries, likely involving further consultation, be undertaken to allow the Committee to more satisfactorily address the outstanding questions arising under this heading.

- 8.38. In particular, the Committee would benefit from more information as to the extent to which it is fair to say that, despite being subject to the same ethical obligations as external counsel, in-house counsel are in fact less independent, owing to their other duties and relationship to their employers, than external counsel. The division between Committee members on this point at the Committee's meeting of 30 November 2020 was primarily a result of Committee members' differing assessments as to the extent which, all things being equal, in-house counsel are less independent than external counsel. While the Committee is able, on the available information, to identify the relevant incentives that might lead to there being a sufficient distinction in this respect to justify incentivising the use of external counsel over in-house counsel, whether those incentives would result in practice in a state of affairs justifying that distinction being drawn is largely a factual question. It could therefore be advantageous for the Committee to obtain further information, whether through further research, based on information from New Zealand or analogous jurisdictions, or by inviting further submissions from those parties who use in-house counsel, and who regularly litigate against them,.
- 8.39. The Committee could also benefit, in setting any such new rate, from further information about the rates that organisations use to charge for their in-house lawyers' services for accounting purposes, or any nominal invoicing rates employed (for organisations using an internal nominal invoicing and time recording system like that employed by Crown Law). Even more useful would be any assessments any organisations have undertaken as to how much it would cost them to obtain the services they obtain from their in-house lawyers in the wider marketplace. That would allow the Committee to determine whether it is appropriate to institute a lower daily recovery rate on the separate basis that doing so is fairer as between successful and unsuccessful parties.
- 8.40. If the Committee is unable to obtain further information, an alternative possibility is for the Committee to provide for a new daily recovery rate for parties represented by in-house counsel, while directing that parties so represented are entitled to recover as if represented by external counsel if the Court is satisfied, having regard to the conduct of the litigation and all available information, that counsel has been of as much assistance as would have external counsel. The standard of advocacy the Committee accepts Crown Law as consistently providing would be the paradigmatic case where recovery according to scale would be appropriate. This would avoid many of the difficulties associated with making a global assessment as to how independent in-house counsel are on the whole. That is, as the Committee notes above, a difficult and far-reaching assessment that implicates the professionalism of a whole sector of the legal profession. On the other hand, the Committee is reluctant to depart from a strictly schedular approach to awarding costs, given the importance of promoting expedition and predictability.

## 9. Recommendations

9.1. For the reasons outlined in this paper, I recommend that the Committee:

- a. accept it has jurisdiction and is institutionally competent to promote reform.
- b. agree with the recapitulation of the nature of costs as an allowance or award for an objectively determined notional amount of work done by a person of a notional level of skill and experience, appropriate in both cases to the complexity and skill of the proceeding in question, at a rate objectively assessed as reasonable by the Committee in general or the court in the particular case, rather than as an indemnity or partial indemnity allowing recovery of out-of-pocket legal expenses.
- c. in accordance with that recapitulation of the nature of costs, confirm that self-represented litigants are to be eligible for costs under the existing scales, on the basis of a new daily rate to be determined by the Committee.
- d. consider introducing a definition of “costs” into the rules to communicate this change to judges and parties.
- e. determine whether a single non-category-responsive rate is to be applied, or a range of category-responsive rates. My advice is that a single non-category-responsive rate be applied.
- f. determine, if a single rate is to be applied, what that rate is to be. The Law Society’s submission suggested \$750 per day. An alternative noted in discussions at the Committee’s meeting of 30 November 2020 was \$500 per day. It is my advice that the rate should not be set too far below that applicable to category one proceedings.
- g. consider whether a different rate should apply in the District Court, as compared to the High Court, may need to be considered, given the recovery rates for represented parties in the District Court are presently set at about 80 per cent of those applicable to represented parties in the High Court.
- h. determine whether to keep, amend, or repeal r 14.2(1)(f). In my assessment, the rule ought to be repealed so far as it relates to self-represented litigants, but perhaps ought to be retained for represented parties so as to help encourage restraint in litigation.
- i. confirm that, if the primary rule is to be abrogated, litigants-in-person are no longer to be able to claim disbursements in respect of advice taken or assistance received by them in relation to a proceeding under a limited retainer or similar, as they are at present, but will rather recover in respect of any such outlay according to the ordinary scale.

- j. confirm that, where a party is represented for part of a proceeding and unrepresented for other parts of the proceeding, the new daily recovery rate for litigants-in-person will apply for those parts of the proceeding where they were unrepresented and the current rates will apply for those portions where they were represented, paralleling the current situation.
- k. confirm that, lawyers appearing on their own behalf are to be treated as are lay-litigants (that is, that they will recover at the new lower rate), thereby abrogating any remnant of the *Chorley* exception, which will entail repealing r 14.17 of the District Court Rules 2014, and perhaps making other amendments to the Rules.
- l. determine whether to establish a new daily rate for in-house solicitors above the litigant in person rate, but below the existing rate (say, for the purposes of argument, as was advanced at the Committee's meeting of 30 November 2020, at \$1,000 per day), noting that, at its last meeting, the Committee was divided as to whether parties represented by in-house counsel ought to recover at the rate applicable to in-house counsel, or at a new rate.
- m. confirm that lawyers who are the sole principal or director of their firm are also to be treated as appearing on their own behalf in terms of the costs regime, even where nominally appearing on behalf of their firm or incorporated firm.
- n. confirm that any distinction to be drawn in favour of in-house counsel does not extend to the position of firms of barristers and solicitors represented by employed solicitors appearing on behalf of the firm in, say, a debt recovery action, as has been the case.
- o. confirm, even if some distinction is made between externally represented parties and parties represented by in-house counsel, that the position of parties represented by the Crown Law Office is to be assessed on the normal scale rates, and not the rate prescribed for employed solicitors.
- p. consider whether, given the significance of this change, express transitional provisions ought to be included in any amendment rules giving effect to these changes, so as to provide certainty to Court users, despite that not being the Committee's usual practice when amending the costs regime.

9.2. I recommend that the Committee undertake further consideration in respect of the particularly contentious issues set out at d and j above, and on any other issues arising from this paper in respect of which the Committee considers further consultation will allow it to make a more informed policy decision, or otherwise make it more legitimate for the Committee to promote reform.

9.3. I also recommend that the Committee assess whether any changes to the Court of Appeal (Civil) Rules 2005 and Supreme Court Rules 2004 are required, should the above reforms

be undertaken in the District Court and High Court, noting that it might be appropriate to attach different weighting to the various considerations relevant to this issue in the context of appellate proceedings (particularly second appellate proceedings) in those courts than it is in the trial courts. In particular, the role of appellate proceedings in these courts in shaping the development of the common law, in which task objective independent counsel are particularly suited to assist, might justify further incentivising parties to seek external representation when undertaking proceedings in these bodies compared to in the trial courts. This, in turn, might suggest it is appropriate to be more restrictive in allowing self-represented litigants, and those represented by employed counsel, costs awards in appellate proceedings than in first instance proceedings. As this is not a point on which consultation has taken place to date, it might be appropriate to include this as a topic in any further consultation papers.

Yours most sincerely –

Sebastian Hartley  
Clerk to the Rules Committee

15 March 2021

