



# The Rules Committee

## Te Komiti mō ngā Tikanga Kooti

29 November 2021

Minutes 03/2021

### Circular 1 of 2022

#### Minutes of Meeting of 29 November 2021

*The meeting called by Agenda 03/21 (C 36 of 2021) convened at 10.04 am using the Microsoft Teams virtual meeting room facility due to COVID-19 restrictions being in effect in Auckland and it being difficult to accommodate an in-person meeting while observing social distancing requirements.*

#### *Present (Remotely)*

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand  
Hon Justice Kós, Special Purposes Appointee and President of the Court of Appeal  
Hon Justice Thomas, Chief High Court Judge  
Hon Justice Muir, Special Purposes Appointee and Judge of the High Court  
Hon Justice Cooke, Chair and Judge of the High Court  
Hon Judge Taumaunu, Chief District Court Judge  
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice  
Ms Alison Todd, Senior Crown Counsel as Incoming Representative of the Solicitor-General  
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association Past President  
Ms Laura O’Gorman QC, Special Purposes Appointee and Barrister  
Mr Jason McHerron, New Zealand Law Society Representative and Barrister  
Mr Daniel Kalderimis, New Zealand Law Society Representative and Barrister

#### *In Attendance (Remotely)*

Ms Cassie Nicholson, Chief Parliamentary Counsel  
Ms Christy Menzies, Parliamentary Counsel  
Ms Maddie Knight, Secretary to the Rules Committee and Policy Advisor in the Ministry of Justice  
Ms Julia Wiener, Clerk to the Rules Committee

#### *Apologies*

Hon David Parker MP, Attorney-General  
His Honour Judge Kellar, District Court Judge  
Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court

## 1. Formal Items

### *Apologies*

The apologies of the Attorney-General, the District Court Judge and Mr Kieron McCarron were received and noted.

### *Minutes of previous meeting*

The minutes of the previous meeting as provisionally circulated in **C 25 of 2021** were received and adopted. The Clerk is to publish these on the Committee's website.

### *Matters arising*

The Chair noted that Julia Wiener, the Clerk to the Committee, would be leaving at the end of 2021.

## 2. Improving Access to Civil Justice – Oral Update on Progress of Second Round

The Chair noted that the Committee had decided not to proceed with its original plan of spending its 29 November 2021 meeting engaging in a full-day discussion of the responses to the second round of its Access to Civil Justice Consultation. This was on the basis that the COVID-19 restrictions made an in-person discussion impossible.

It was therefore decided that at the current meeting the Committee would plan the process by which it would review the submissions and formulate its views, with a substantive discussion of the submissions reserved for a future time. The current meeting would also be an opportunity for Committee members to make preliminary observations on the substance of the matters raised in submissions.

### *Procedure for assessing submissions and formulating Committee's response*

The Chair suggested that the Committee devote its next meeting, scheduled for 28 March 2022, to a full-day discussion of the submissions and the Committee's views thereon. It had been suggested by the Chief Justice that that meeting be divided up by subject matter, with different members of the Committee leading the discussions on the proposals relating to the High Court, District Court, and Disputes Tribunal. The Chair noted that such a division of labour could follow through into the drafting of the report of the Committee's views in response to the submissions.

Ms Davenport QC expressed the view that the late paper **C 38 of 2021** from Janet Robertshawe, the Chief Disputes Tribunal Referee, had been very helpful. She said that the feedback that the Committee had received from the High Court Judges (summarised in **C 24 of 2021**) had also been helpful and queried whether it would be possible for the Committee to solicit more judicial input on the proposals from the District Court and High Court Judges. Chief High Court Judge Thomas offered to go back to the High Court Judges to ask them for more feedback.

The President of the Court of Appeal noted that the submissions could be divided into two parts, as the submissions on the District Court and Disputes tribunal often go together; the discussion is largely over the allocation of jurisdiction as between the two. Ms Davenport QC noted that it would be more

manageable to divide the subject matter by Court. The President noted that the members leading the discussion on the Disputes Tribunal and District Court would have to work together to ensure that the submissions are read as a whole.

The Committee agreed to invite Principal Disputes Referee Janet Robertshawe to the discussion of the submissions on the Disputes Tribunal.

Mr Chhana noted that given the substantial overlap in subject matter in the submissions on the District Court and Disputes Tribunal, it would be important to ensure that the discussions of each set of proposals are coordinated beforehand to make sure there was not too much jurisdictional overlap. Mr Chhana also brought to the Committee's attention the fact that the Ministry of Justice is also currently bringing in new judicial officers in the form of Family Court Associates and is reviewing the jurisdiction of Community Magistrates. He noted that the Ministry of Justice's experience in those areas may inform how the Committee could think about recorders in the Disputes Tribunal jurisdiction.

The Chair noted that it was unlikely that the Committee would reach a final view on all submissions in the space of one meeting and would likely work out the substance of its proposals after its March meeting had concluded.

After discussion it was agreed that Mr McHeron would lead the discussion in relation to the Disputes Tribunal with the assistance of the Principal Disputes Referee, that Judge Kellar would lead the discussion in relation to the District Court with the assistance of Ms Davenport QC, and that a High Court Judge would lead the discussion in relation to the High Court with assistance from Mr Kalderimis.

Mr Chhana noted that once the Committee settles on its proposals, it will be for the Ministry of Justice to report on their implementation, including how they fit with the other initiatives the Ministry will be implementing and budgeting for at the same time.

#### *Preliminary observations on substantive issues raised in submissions*

The Chief Justice noted that some of the issues raised in the submissions to the Second Round of the Access to Civil Justice Consultation could be solved with quick fixes and therefore should be referred to heads of bench before the longer discussion of the submissions as a whole. The Chief High Court Judge agreed that some immediate practical issues addressed in the submissions could be hived off from the larger reform process and addressed more immediately.

The Chief Justice referred to a common theme emerging from the submissions, regarding the loss of technical expertise in the District Court registries. This falls outside the purview of the Rules Committee, but it is an issue judicial leadership is aware of and focused upon.

The Chief High Court Judge suggested that the submissions relating to the common bundle were worth a separate discussion and needed to be addressed immediately. The necessary changes could be implemented fairly quickly. She said that in her experience counsel incur significant time and expense assembling a large common bundle of documents, only a limited number of which are actually referred to at the hearing itself. The suggestion, therefore, that documents be admissible as to their truth is a troubling one: judges would have to check through the entire common bundle, consuming much

judicial time and resource. The idea of an agreed statement of facts, by contrast, is a welcome one and could be implemented quickly.

The Chair noted that there may be different views in relation to how the common bundle proposal fits in with the other proposals relating to the High Court.

Ms O’Gorman QC noted that, while she understood the policy behind it, she did not see the agreed statement of facts proposal as a simple quick fix. In her experience, agreed statements of facts posed a significant challenge in litigation with difficult counterparties, and can cause as many problems as it solves. She also noted that the objective of parties only including in their bundles the documents on which they intended to rely during the hearings has long been pursued but is difficult to enforce, partly because of the unpredictable nature of witness trials and the intensity of late-stage trial preparation. In any event, an electronic common bundle does not impose the same cost and physical volume burdens as traditional physical bundles.

The Chair emphasized the importance of examining proposals in relation to the High Court together to in order to determine whether they will improve or worsen the issues they are aimed at solving.

Mr Kaldermis suggested that the proposals in relation to the high court may be subdivided into the three issues: reforming the rules around disclosure; simplifying the requirements of evidence and common bundles; and the rest of the process including the issues conference and proposed changes to interlocutory applications. He noted that while it would be difficult to separate these issues out, it would be a worthwhile exercise.

*Chair to write to the Chief High Court Judge soliciting further comments on the Committee’s Access to Civil Justice proposals, emphasizing that they will affect the working lives of judges, and that judges have unique knowledge and perspective from which to comment on the proposals. Chief Judge to circulate that correspondence with the summary of the judicial feedback received so far to the High Court Bench to solicit further comment.*

*Chair to invite Chief Disputes Referee Janet Robertshawe to 28 March 2022 meeting of the Committee.*

*Mr McHerron and Principal Disputes Referee to begin consideration of submissions relating to Disputes Tribunal. Judge Kellar to begin consideration of submissions relating to District Court. Mr Kaldermis to begin consideration of submissions relating to High Court. Chair, Chief Justice and Chief High Court Judge to designate a High Court Judge to assist Mr Kaldermis in leading the discussion of submissions relating to the High Court.*

*Clerk to publish submissions on Courts of New Zealand website.*

### **3. Preparedness for Future Emergencies – Definition of “Emergency” in the High Court Rules**

The Chair reminded the Committee of its recent work on amending the High Court Rules in relation to emergencies generally. He brought it to the Committee’s attention that, in the meantime, Parliament had amended the Epidemic Preparedness Act 2006, amending s 24 and inserting a new s 24A (**C 26 of 2021**), which contemplates heads of bench in various jurisdictions being able to modify the rules of court in a more general way. He noted that the deficiency in s 24 that the amendment addresses was

part of the reason why the Committee was reviewing the High Court Rules in relation to emergencies, and that therefore the amendment to the statute went some way to solving the issue the Committee was in the process of addressing. However, he considered that it was still appropriate for the Committee to review the proposed new High Court Rule 3.3B in relation to emergencies. The Chair noted that at the Committee's previous meeting, Mr McHerron had pointed out the need to clarify the circumstances in which the emergency rules would apply outside a state of emergency or where a pandemic notice had been issued, and that that observation had led to the current version of the proposed rule.

The Chair invited the Committee to comment on the redrafted rule 3.3B in the High Court Amendment Rules Package (**C 32 of 2021**), including whether it was necessary for the Committee to proceed with the amendment at all in light of the amendment to the Epidemic Preparedness Act 2006.

The Chief Justice noted that the proposed rule 3.3B covers not only epidemics but wider circumstances including civil emergencies, which is why the Committee initially contemplated it.

The Chair reminded the Committee that the rule was drafted for that reason and was further refined at the June 2021 meeting because Mr McHerron had pointed out that there would be emergencies that would not fall within a formal declaration of emergency but would nevertheless create a state of emergency. The rule as redrafted therefore contemplates the Chief High Court Judge issuing a notice where there are such situations giving rise to a need to use the alternative rules of service, filing, and relating to the closure of court registries. These alternative rules were listed in subsection 6 of the draft rule.

The Chief Justice sought clarification as to what the contemplated vires of such powers of declaration. Mr McHerron stated that the rule was merely an administrative one, and the Chair noted that the rules could not sub-delegate the entire ability to determine the rules of court during emergencies to the bench; such rules had to be stated in the High Court Rules themselves. The draft rule 3.3B as redrafted contemplates subsequent emergency powers which may be inserted into the rules. Subsection 6 of the draft rule lists the operative provisions that would come into force when the Chief High Court Judge issues a notice under that rule, namely rules 3.4, 3.4A, 5.1A(6), 5.1B(2)(d), 6.2A, and 9.73(4) to (6). Mr Kaldermis noted that these related to the filing and service of documents, the closing of registries, and the swearing of affidavits. The Chair noted that the rule changes triggered by a notice issued by the Chief High Court Judge would therefore be reasonably modest, apart from those contemplating the closing of registries; however, even the power to close registries is itself restrained by the High Court Rules.

The Chief Justice recommended that the new High Court Rule 3.3B should make it clear for access to law purposes that it does not displace the powers conferred by s 24A of the Epidemic Preparedness Act 2006.

The Committee agreed that the draft rule should progress to concurrence, with the addition of a reference to s 24A of the Epidemic Preparedness Act 2006.

*Parliamentary Counsel Office to amend draft HCR 3.3B to include a reference to s 24A of the Epidemic Preparedness Act 2006.*

#### 4. Electronic Filing in the High Court – Proposed Repeal of HCR 5.1A(5)

The Chair reminded the Committee of the rule being considered for repeal, which was part of a part of a package of rules passed under urgency at the beginning of the COVID-19 pandemic in 2020. The rule in question, r 5.1A(5), states that parties are not required to have regard to High Court Practice Note 2019/1 in relation to delivering a common bundle. He suggested that the rule should be repealed for a number of reasons.

First, because it was inappropriate for a High Court Rule to amend a practice note as a matter of the relationship between High Court Rules and High Court Practice Notes. Second, Practice Notes can themselves be amended as and when required, without the need for a formal High Court Rule. Finally, there will be some circumstances where it will be appropriate for a physical bundle to be filed, for example in longer cases.

The Chair invited the Committee's views on the matter.

Ms O'Gorman queried why rule 5.1A(1)(b) allows documents to be filed with the Court by fax, given that faxing is not routinely used in the Courts. Ms Davenport QC agreed with Ms O'Gorman QC, and noted that while most lawyers no longer use fax machines, self-represented litigants will sometimes fax documents to the Court from the public library which are often not received. She recommended that the provision therefore provide instead for an email address or some other form of electronic delivery that would avoid such concerns.

The Chair noted that it would be important to enquire whether fax was still being used before changing that provision in the rules. The Chief High Court Judge recommended that enquiries be made of Court registries and expressed her sympathy for dispensing with the reference to fax.

Ms Todd noted that some lawyers who Crown Law deal with do still use fax machines, as do some self-represented litigants. While she expressed that she was happy to remove the reference to faxing in the rules, she noted that doing so would potentially cause a larger issue as fax is still sometimes in use.

The Chair recommended that enquiries be made into how much faxing is used in the Courts before the Committee formally suggests that the reference to fax in HCR 5.1A be repealed.

The Committee agreed by acclamation to repeal subrule 5.1A(5).

*Parliamentary Counsel Office to draft a High Court Amendment Rule repealing Rule 5.1A(5), to be progressed through concurrence with the current set of amendment rules.*

*Clerk to enquire with Court registries as to whether they still use fax for the receipt of documents and report to Committee on feasibility of removing reference to faxing from HCR 5.1A.*

#### 5. Use of te reo Māori in the Courts

The Chair referred the Committee to **C 30 of 2021**, a submission from Te Hunga Rōia Māori o Aotearoa to the second round of the Committee's Access to Civil Justice Consultation. He said that while the submission did not quite fit with the Committee's proposed Civil Justice reforms, it raised a separate issue of the High Court Rules relating to the use of te reo Māori in the Courts which he considered it

was important for the Committee to address. The Chair also referred the Committee to **C 37 of 2021**, a memorandum from the Ministry of Justice to the Rules Committee informing the Committee of Judicial Review proceedings relating to the use of te reo Māori in the courts: *Te Pōari o Ngātiwai, Te Rūnanga o Ngāti Rēhia, Te Rūnanga ā Iwi o Ngāpuhi, & Te Reo o Ngāti Hine Charitable Trust v the Minister of Justice, the Secretary for Justice and the Attorney-General*.

After general discussion it was agreed that the Rules Committee should commence work on a review of the rules in relation to Te Reo Māori, and that there was no need to await the outcome of the litigation referred to in the memorandum from the Ministry of Justice to the Rules Committee before that work was undertaken. The Committee noted that there were complexities involved in some of the issues, but this did not prevent work being undertaken. It was agreed that the work should be commenced by a sub-committee, the members of which was discussed.

*Committee decided to form subcommittee including Mr McHerron, one member of the Ministry of Justice and one member of Te Hunga Rōia Māori o Aotearoa, to determine the Committee's response to the latter's submission on the use of te reo Māori in the Courts.*

*Chair to contact representative of Te Hunga Rōia Māori o Aotearoa to ask who they would like to nominate to join the subcommittee.*

*Mr Chhana to determine who will represent the Ministry of Justice on the subcommittee and communicate that determination to the Chair.*

## **6. Omnibus Amendment Rules**

The Chair then referred the Committee to the balance of the Omnibus Amendment Rules, starting with the Draft High Court Amendment Rules (**C 32 of 2021**).

*Draft High Court Rule 7.42A: power to strike out abusive interlocutory applications before service*

The Chair reminded the committee of the subject of the amendment, which was an ongoing discussion of whether judges should have the power to strike out plainly abusive interlocutory applications, in addition to their power to strike out plainly abusive proceedings under High Court Rules 5.35A and 5.35B. The Committee had decided to add such a power to the rules at its last meeting.

The Chair noted there were a number of issues with the formatting of draft rule 7.42A arising from its having been drafted along the framework of rules 5.35A and 5.35B, which he had discussed with the Parliamentary Counsel Office in the week preceding the meeting. The first of these issues related to draft rule 7.42A(5), which excludes associate judges from the jurisdiction. This was contrary to the Committee's aims as articulated at its last meetings, which was to include associate judges in the jurisdiction. The second issue related to rule 7.42A(3), which requires a Judge who exercises the power to include in their strike-out order a statement of the right of person whose interlocutory application has been struck out to appeal against the decision. The Chair noted that this may not be appropriate for two reasons. First, because there is no right of appeal against interlocutory applications, only a right to seek leave to appeal. Second, because advising a person of their appeal rights would be out of line with the normal procedure around interlocutory applications, where such a statement is not usually issued. Third, subsections 7.42A(2)(c) and (d) may not apply. Subsection (c), which allows a judge to

make a rule that documents be served by the court and not be served until a stay is lifted, is not applicable; interlocutory applications are filed with the court and served simultaneously. Subsection (d), which stipulates that a stay may not be lifted until the person who filed the abusive interlocutory application files further documents as specified in the order (for example, an amended statement of claim or particulars of claim), is also not applicable; the amended document here would be an interlocutory application, not a statement of claim. Even with that observation, however, subsection (d) may be superfluous. The Chair therefore suggested that subsections (c) and (d) be withdrawn.

The Chief Justice enquired as to whether the Committee had consulted with the profession about the plan to introduce this strike-out power. The Chair responded that there was no such consultation. The Chief Justice recalled that when the Committee introduced the r 5.35A-B power to strike out abusive proceedings before service, there was some anxiety from the profession that it would give too much power to the courts and would create an access to justice issue. She therefore enquired whether it would be worthwhile to consult with the profession before expanding that power to interlocutory applications.

Mr McHerron noted that he had been monitoring strike-out decisions under r 5.35A and 5.35B fairly closely. The results of this monitoring were that while more proceedings had been struck out under those rules than had been anticipated, all of those decisions seemed to be fairly obvious, and he was not aware of any that had been appealed. He suggested that the anxiety from the profession over the Committee expanding the power to interlocutory applications may therefore be lower than the anxiety expressed for the initial reform. The Chair added that in addition to that observation, the current proposed power is more modest than the initial power to strike out whole proceedings. Mr McHerron said that, because the current reform was less serious than the initial reform, he did not think consultation was required.

Mr Kaldermis offered two observations about the potential power.

1. First, the rule as drafted left open the possibility of a party applying to have an interlocutory application struck out. He enquired as to whether that was something to which rule 15.1 applies, and, if not, whether there is a process by which a party can apply for an interlocutory application be struck out if they believe it to be an abuse of process. He noted that, if this is the only rule in that territory, it raises a general question of whether it should only be for a judge to exercise, or whether it was a new type of general jurisdiction. He added that the same principle likely applies to paragraphs of statements of claim which are abusive or embarrassing.
2. Second, in response to the Chief Justice's query, Mr Kaldermis observed that this rule is likely clarifying that it is possible to have interlocutories struck out, and it is unlikely that the profession will be anxious about a judge exercising that power in the same way, as the rule does not really increase the ambit of judges' powers.

The Chair concurred that it was unnecessary for the Committee to consult with the profession on this rule, and suggested that, in response to Mr Kaldermis' first point, subsection 7.42A(2) be amended to read "on the Judge's own initiative *or on the application of any party.*"



Justice Muir said that he would hesitate to make such an addition, given the gatekeeping function of the proposed rule. Allowing parties to apply to have interlocutory applications struck out could incur a flood of applications, adding increasingly to parties' costs. The President concurred with Justice Muir, adding that it is possible to over-rationalise procedure. While he agreed that there might be doubt as to whether a judge has the power to strike out part of an application or proceeding, that has always been dealt with under judges' inherent power.

The Chair summarised the Committee's agreement that the following amendments should be made to draft rule 7.42(A): withdrawing subsection (5) so that Associate Judges would be included in the jurisdiction; removing subsection (3), and removing subsections (2)(c) and (d). He added that subsection (4) was also in need of redrafting. That rule requires that a strike-out decision under the rule be served on named parties to the proceeding, but this is superfluous since interlocutory applications are served on opposing parties at the same time that they are filed with the court.

The Chief High Court Judge raised the possibility of extending the 5.35A-B power to strike out abusive proceedings without notice to Associate Judges. The Chair enquired as to how frequently proceedings had been struck out under the rule. Mr McHerron responded that there was a limited number. In response to the question of the Chief High Court Judge, he responded that there may be a resourcing issue, but the exclusion of Associate Judges from the jurisdiction is a safeguard which was inserted to allay the anxieties of the profession at the time. He enquired whether it was a problem for High Court Judges to be dealing with orders under s 5.35A-B. The Chief High Court Judge responded that, particularly in the Auckland registry, some of the applications being filed are plainly an abuse of process.

Justice Muir observed that the practical implications of the provisions are quite significant and that his sense was that the provisions were working quite well and were a significant improvement over the position three to four years ago.

The Chief High Court Judge acknowledged Mr McHerron's point about allaying the profession's concerns about rules 5.35A and B when those rules were first introduced by excluding Associate Judges from the jurisdiction. She accepted that it was appropriate that they continue to be excluded from that jurisdiction but noted that they should be added to the r 7.42A jurisdiction to strike out abusive interlocutory applications.

Ms O'Gorman QC addressed the question of service raised by Chair noting although interlocutory applications should be served on parties at the same time as they are filed with the court, parties sometimes wait for the court to advise the fixture details to insert, so service might not have occurred, or a lay litigant may have overlooked service. The reason for requiring notification is that the other parties may need this information for seeking a prevention order under s 166 of the Senior Courts Act 2012 (re vexatious litigants). She therefore supported keeping subsection (4) of the draft rule.

The Committee agreed to dispense with subsection (3) of the draft rule. However, Mr Kaldermis noted that the first sentence of subsection (3) might be necessary, as otherwise the parties would be given a right to be heard before a judge makes a strike-out order under the rule. He therefore suggested that the first sentence of subsection (3) be retained, in order to confirm that rule 7.43(3) giving the parties the right to be heard does not apply. The Committee agreed.

The Committee agreed that subsections (2)(c) and (d) be withdrawn. It was also suggested that “or stayed on conditions” be added to the end of subsection (2)(b), to which the Committee agreed.

#### *Draft amendments to rule 8.11*

The Chair drew the Committee’s attention to **C 39 of 2021**, a late paper from Mr McHerron in which he proposed amendments to the wording of High Court Rules 8.5, 8.11, and 8.12 and invited Mr McHerron to speak to the paper.

The Committee agreed with Mr McHerron’s point that references to case management conferences should be removed from the rules governing discovery orders, since discovery orders have not been made at case management conferences by default since the Committee’s 2017 amendments to Part 7 of the High Court Rules and are instead often made by consent in the case management review process. The reference to case management conferences should be accordingly removed from the headings of rules 8.11 and 8.5 and from the text of rule 8.5(2) and 8.12(1).

The Chair then referred the Committee to the Draft Court of Appeal (Civil) Amendment Rules (**C 33 of 2021**). The President noted that the Court of Appeal (Civil) Amendment Rules had been considered by the Committee in its November 2020 meeting, and had not been substantively changed since that discussion. The Committee agreed that the rules could proceed to concurrence.

The Chair then referred the Committee to the Draft Supreme Court Amendment Rules (**C 34 of 2021**) and invited the Committee to speak to those rules. The Chief Justice noted that the package contained minor amendment rules bringing the Supreme Court into compliance with other procedural rules, including relating to electronic filing.

#### *Matariki Public Holiday Amendments*

Ms Davenport QC noted that the Matariki public holiday was not mentioned in the draft Court of Appeal (Civil) Amendment Rules. Ms Menzies updated the Committee on the progress of the Matariki amendments: the Te Pire mō te Hararei Tūmatanui o te Kāhui o Matariki/Te Kāhui o Matariki Public Holiday Bill was being considered by the Māori Affairs Select Committee, which is due to report back in March 2022. Ms Menzies reminded the Committee of the draft amendments to the rules which added Matariki as a public holiday which had been circulated for the Committee’s approval in September and noted that those amendments did not include the additional amendments currently being considered by the Select Committee. She noted that she had planned to check with the Committee that the change to the Court of Appeal holiday hours should be made after those amendments were approved in Parliament

The President enquired whether there would at that stage be a consolidated Bill. Ms Menzies responded that it was unclear as of yet, and the timing would become apparent later. The President observed that the matter would be covered by the draft Court of Appeal (Civil) rule 4A(2)(j), which designates as a Court holiday any day that in Wellington is a public holiday or a day observed by the Government as a holiday, and rule 4A(3) which states that the Holidays Act 2003 overrides the list of Court holidays in rule 4A(2).

Mr Chhana elaborated on the process through which the rules would be approved: they would move to concurrence, then the Ministry of Justice would present them for consideration by Cabinet legislation committees, most likely in February 2022.

#### *Electronic filing in the supreme court*

Ms Menzies raised a note about the draft Supreme Court Amendment Rules, namely the draft rule 35AAA which stipulates that the case on appeal in civil appeals must be filed electronically unless the Court directs otherwise. She noted that the Parliamentary Counsel Office had inserted that rule to align with changes that were being made to the Court of Appeal Rules, to let applicants know whether they needed to file either a) two paper copies and one electronic copy or b) six paper copies. She brought this amendment to the Committee's attention because it went further than what was indicated in the Ministry of Justice memorandum on the amendment rules package (**C 35 of 2021**), which referred only to how many court copies must be filed under rules 35 and 37 of the Supreme Court Rules. She noted that in practice the case is always filed electronically unless the Court directs otherwise; draft rule 35AAA confirmed this practice so that applicants will always be filing two paper copies and one electronic copy unless the Court directs otherwise.

The Chief Justice enquired whether that would be confusing for applicants. Ms Menzies clarified that the rule required electronic filing, and in addition the filing of two paper copies. Mr Kaldermis added that it will strike a good balance for the provision for civil appeals to be presumptively electronic, and that the profession will be able to understand how the two limbs of the filing requirement (draft rules 35AAA and 35(8)) work: if the case must be filed electronically, which civil appeals must be, then the applicant must file two paper copies with the Court.

Ms Davenport QC enquired whether the rules can require compliance with draft rule 35AAA. Ms Menzies confirmed that they can, since draft rule 35(8)(a), which defines the specified number of court copies, directs to draft rule 35AAA. The Chief Justice was satisfied with this explanation.

The Committee agreed to proceed the three sets of draft rules to concurrence with the amendments agreed.

*Parliamentary Counsel Office to amend Draft High Court Rule 7.42A, removing subsections 2(c) and 2(d), and adding "or stayed on conditions" to the end of subsection (2)(b), amending subsection (3) to leave only the first sentence of that subsection, and removing subsection (5) and draft rule 2.1(3)(c) excluding Associate Judges from the Jurisdiction; and incorporate comments from **C 39 of 2021** to remove references to case management conferences from High Court Rules 8.5, 8.11 and 8.12.*

*High Court Amendment Rules (No 2) 2021 (**C 32 of 2021**), Court of Appeal (Civil) Amendment Rules (No 2) 2021 (**C 33 of 2021**), and Supreme Court Amendment Rules (No 2) 2021 (**C 34 of 2021**) to proceed to concurrence, subject to amendments noted above.*

*The Chief Justice left the meeting at 11:33am.*

## **7. Representative Proceedings – Update on Law Commission Paper**

The Chair drew the Committee's attention to **C 29 of 2021**, a Supplementary Issues Paper on Class Actions and Litigation Funding published by the Law Commission, the submission window for which had now closed. He noted that the Committee had needed to change its invitations to the Law Commission as COVID-19 related developments had required the Committee to change the timeframe for its consideration of the submissions to the Access to Civil Justice consultation. He therefore asked the Committee for their views on its engagement with the Law Commission, bearing in mind that its 28 March 2022 meeting was now devoted to the Civil Justice reforms. He therefore suggested inviting them back to give the Committee an update at its June 2022 meeting.

The President agreed and enquired as to the Law Commission's views on collaborating with the Rules Committee.

Mr McHerron commented that the Issues Paper was very high quality and gives a number of clear indications about where the Commission is heading. He suggested that it may therefore be useful for the Committee to start think about rules it would like to create to back up the primary legislation that the Law Commission envisages passing.

The Chair agreed that that may be a useful exercise but noted that there will be some time before the Law Commission's proposals find their way into legislation, and the proposals may therefore change before the legislation is finalised.

Mr Kaldermis agreed that June would work for a more substantive update from the Law Commission on the progress of its work on Class Actions and Litigation Funding. He noted that it was likely that the Law Commission closed its submission window in November in order to make progress based on those submissions by April 2022. Therefore, it is likely that by June there will be a clearer picture of the direction the Law Commission will be taking.

The Chair suggested that he invite the Law Commission to send a representative to attend the Committee's June 2022 meeting to review its progress on Class Actions and Litigation Funding. The Committee agreed.

*Chair to write to Law Commission inviting them to June 2022 meeting to comment on progress of Class Actions and Litigation Funding project.*

*The meeting closed at 11.37 pm.*

*The next meeting of the Committee is scheduled to begin at 10.00 am on 28 March 2022.*

**Justice Francis Cooke**  
Chair