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RULES COMMITTEE CONSULTATION PAPER

PROPOSALS FOR REFORM OF THE LAW REGARDING THE DUTY OF PARTIES TO CIVIL LITIGATION TO COMPLY WITH THE HIGH COURT RULES AND THE DUTY OF LAWYERS TO ASSIST

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Preliminary

1. The cost of bringing civil cases to a conclusion is a cause of widespread concern. So too are the delays between the commencement and completion of such cases. Questions are raised about the efficiency and fairness of civil litigation. Cost and delays in litigation can result in real issues as to access to justice by other litigants. Yet the fundamental proposition remains that litigants using a publicly-funded system of civil justice ought to be required to comply with the applicable rules.

2. During 2009 the Rules Committee (the Committee) has been considering the topic of the efficient use of judicial and administrative resources and possible reforms of the law regarding the obligations of parties (and their lawyers) to comply with the High Court Rules (the Rules). This consultation paper is the result of such deliberations. Comment is sought on whether there should be change to the law and the Rules governing these issues, and, if so, what form those changes should take. This consultation paper sets out the background and some proposals for reform: see Appendices 1 and 2.

3. Comments and suggestions are sought. Please return any comments to the Clerk to the Committee, Ms Sophie Klinger, by Friday, 7 May 2010 by post or email as per the details above. Please state if you would like your submission to remain confidential.

Introduction

4. The objectives currently set out in r 1.2 of the Rules are to secure the "just, speedy and inexpensive determination of any proceeding or interlocutory application in the High Court". This rule has been the governing yardstick by which the Rules are to be interpreted: see *Schmidt v BNZ Ltd* [1991] 2 NZLR 60 at 63. The ultimate aim of the Rules is to ensure that justice is done for the parties, even if that cannot be achieved by the quickest or cheapest means: see *Halsbury's Laws of England* (5th ed, 2009) vol 11 Civil Procedure at [3].

5. Anecdotal evidence and the increasing time required to determine civil litigation indicate that the incidence of parties and/or their counsel frustrating these key objectives is on the rise. The precise causes are difficult to determine but include the growing number of cases involving lay or unrepresented parties (often with ulterior motives), the taking of frivolous and vexatious cases and examples of counsel demonstrating incompetence or acting contrary to the purposes of the rules. The problems are such that the cost of civil litigation, and any inefficiency in its despatch, have an inevitable effect upon the rights of others seeking access to the civil processes of the Court.

6. At its meeting on 8 June 2009, the Rules Committee received a memorandum from the Attorney-General dealing with a possible reform of the Rules to require counsel to co-operate with the Court and with each other.[1] This led the Committee[2] to consider a draft rule incorporating such duty, although it was anticipated that such a rule would be expressed not as an obligation but rather as an expectation.

7. But such a rule (however expressed) would not meet all of the concerns which have been raised. First, as already noted, much High Court litigation is conducted by unrepresented litigants[3] in which case matters often take longer to hear and determine. Second, it would be an easy excuse for lawyers challenged over an alleged failure to co-operate to seek to blame the stance taken on the clients and so limit the lawyer's own responsibility. Further, there are sound policy reasons why those parties who seek to use the resources of the Courts to resolve their civil disputes should meet obligations to comply with the Rules. The purpose is to make the litigation process better for all participants who use the Courts, thereby enhancing access to civil justice.

8. Such factors led the Committee to consider the nature of the obligations on parties to High Court civil litigation. The Committee saw considerable merit in placing the key obligation on the parties as provided by proposed legislation in the Commonwealth of Australia: see Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, particularly s 37M dealing with the overarching purpose of civil practice and procedure provisions, s 37N dealing with parties acting consistently with the overarching purpose,

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[1] See also *Counsel's Duty to Co-operate – Achieving Efficiency and Fairness in Litigation*; Speech by Attorney to the New Zealand Bar Association, 12 September 2009; and the materials considered by the Committee at the meeting on 5 October 2009.

[2] At the meeting on 5 October 2009 (Circular 108 of 2009).

[3] The precise percentage is difficult to assess, but estimates from the Ministry of Justice suggest that in some registries lay participation in civil proceedings could be as high as 3%. Judges spoken to estimate that the percentage could be much higher, possibly as high as 6%.

and s 37P dealing with the power of the Court to give directions about practice and procedure.

9. Following discussion, a subcommittee was established[4] to consider the matter further and prepare a report, including possible draft rules, for the Committee. Following the consideration of a report from the subcommittee on the policy imperatives behind the need for reform and some proposals for reform, the Committee at its meeting on 30 November 2009 approved the issue of this consultation paper.

Obligations of parties

10. The Rules Committee supported the imposition of a duty on parties to a civil proceeding to conduct the proceeding in a manner that is consistent with the overall purposes of the Rules. The Committee considered the provisions of the Australian Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, noting that such reforms had been driven by similar policy factors as applied to civil litigation in New Zealand.

11. When he introduced the Bill at the second reading, the Commonwealth Attorney-General, Mr McClelland, referred to the importance of having "an effective and accessible system of justice where people are able to resolve their disputes quickly, efficiently and fairly". The Attorney also referred to the recent reforms in Australia which had granted extended powers that made it clear that the court, litigants and practitioners are expected to conduct litigation efficiently.

12. Addressing specific policy factors, the Attorney added:

> Parties to a proceeding will have a duty to comply with that overarching purpose and lawyers will need to assist parties to comply. Any conduct by parties or their lawyers that is inconsistent with the purpose can be taken into account by the court when awarding costs. … if a party pursued issues which were manifestly unreasonable, frivolous or vexatious, then the court can consider this conduct when awarding costs. The bill strengthens the court's existing power to award costs and indicates the type of behaviour which is expected from legal practitioners. As a result, these provisions will also have the effect of encouraging parties to resolve matters through those alternative dispute resolution mechanisms, potentially saving themselves and the taxpayer the expense of a full-blown hearing. *Significantly, if a party wishes to prolong litigation as a strategy to increase the costs of the other party to wear them down, as it were, the lawyer will be obliged to explain this behaviour as contrary to the overarching purpose and may have adverse consequences in terms of a cost order against their client*. …With the court, parties and their lawyers all working towards the same purpose, the government is confident there will be an improvement in the early resolution of disputes in the Federal Court. This will in turn free up resources in the court, allowing other matters to be dealt with more quickly and cost effectively. (emphasis added)

13. The reference to the "overarching purpose" is defined as: facilitating the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Section 37M(2) of the Bill expands on this overarching purpose as follows:

[4] As outlined in the minutes of meeting of Rules Committee dated 5 October 2009.

> Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
> (a) the just determination of all proceedings before the Court;
> (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
> (c) the efficient disposal of the Court's overall caseload;
> (d) the disposal of all proceedings in a timely manner;
> (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

14. The application of such goals is reinforced by a statutory requirement that the civil practice and procedure provisions must be interpreted and applied in a way that best promotes the overarching purpose: see s 37M(3). The centrepiece of the legislation is s 37N(1) which requires parties to a civil proceeding to conduct the proceeding in a way that is consistent with the overarching purpose. This includes negotiations for settlement of the dispute. There is a statutory requirement on the party's lawyer to take into account the duty imposed on the party by s 37N(1) and to assist the party to comply with the duty: see s 37N(2).

15. To enable a party to comply with the duty, a Court has power to require the party's lawyer to give an estimate of the likely duration of the proceeding and the likely amount of costs that a party will have to pay: see s 37N(3). Any failure to comply with the duties in s 37N(1) or (2) may be taken into account in the award of costs in a civil proceeding. Further, a Court may order a lawyer to bear an award of costs personally because of a failure to comply with his or her obligations. In such case, the lawyer is not able to recover the costs from the client.[5]

16. In terms of articulating the obligations of the parties, the Committee considered that an elaboration of the current objectives of the Rules would be desirable. Such elaboration would provide a greater degree of specificity and particularity as to the nature and scope of the obligations. This has been attempted in r 1.2(2) of the draft Rules: see Appendix 2. This rule provides:

> Without limiting the generality of subclause (1), the objective stated in that subclause includes the following goals:
> (a) The efficient use of the judicial and administrative resources available for the purposes of the court:
> (b) The efficient disposal of the court's overall caseload:
> (c) The disposal of all proceedings and interlocutory applications in a timely manner:
> (d) The resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

17. Such elaboration is also desirable because, if lawyers and counsel are to be required to take account of the duties imposed on parties and assist parties to comply with such duties (see r 1.2A(2)), greater clarity will assist compliance.

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[5] The Bill is the subject of a favourable report by the Legal and Constitutional Affairs legislation Committee of the Senate. The report refers (at para 3.74) to the key objective of the Bill being "to effect a cultural change in the conduct of litigation including improved access to the Federal Court..."

18. The proposed reforms are consistent with recent judicial observations in Australia. In *Aon Risk Services Australia Ltd v Australian National University* (2009) 258 ALR 14, the High Court of Australia referred to the objectives in r 21 of the ACT Rules. These include the "just resolution of the real issues in the proceedings". Thus, the discretion of a court in civil proceedings is not unfettered: it must take into account the objectives of the rules. As French CJ stated at [5]:

> In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to Aon could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system.

19. Accordingly, in the proposed Rules the duties on clients and lawyers are defined in an inclusive way by r 1.2A(5) as follows:

> The duty in subclause (1) includes the duties (which may be performed directly by each party or through that party's lawyer):
> (a) to define the issue or issues truly in dispute:
> (b) to confine the evidence adduced and submissions made to that issue or issues:
> (c) to co-operate on procedural arrangements with opposing lawyers and court staff:
> (d) to consider the possibility of resolving the proceeding or interlocutory application by negotiation or alternative dispute resolution process when practicable:
> (e) not to take any step with the sole or main purpose of causing delay in the determination of the proceeding or interlocutory application:
> (f) not to advance any submission or take any point which:
> (i) has no prospect of success; and
> (ii) causes delay.

Duties of lawyers

20. In addition to a duty on lawyers to assist parties to comply with their obligations, the Committee sees merit in seeking further clarification of the duties of lawyers acting in a proceeding or interlocutory application. The duty would require lawyers in their dealings with the Court, and as between other lawyers engaged in the proceeding, to act at all times in a manner consistent with the purposes of the Rules. Such a duty is not new.[6] The fundamental obligations of advocates were discussed by Lord Hobhouse in *Medcalf v Mardell & Ors* [2002] 3 All ER 721 (HL) at 739. Lord Hobhouse referred at [51] to the constitutional aspect and the public interest that the advocate's duties be performed. The content of the duties were described at [54] as follows:

[6] See the memorandum by Douglas White QC (as he then was) dated 23 July 2009, presented to the October 2009 meeting of the Rules Committee.

> The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time.

21. The common law obligations on litigation lawyers generally are imposed on barristers by s 117 of the Lawyers and Conveyancers Act 2006 and on all lawyers by ss 3 and 4 of the Act. But notwithstanding these provisions, the Committee considered that it was desirable to spell out with greater clarity in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the RCCC) the duty of lawyers to co-operate in civil litigation.[7]

22. The obligation of lawyers may be seen as part of a fundamental obligation to facilitate the administration of justice as part of the common law. Alternatively, the duty arises by necessary implication from such a fundamental obligation, as expressed in a number of decisions including *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 (HL) at [45] per Lord Hobhouse; *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC) at [55]; and *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC) at [26].

23. The obligations of lawyers are reinforced by a number of the specific requirements of the RCCC including the following:

    (a) Rule 2.3 – using legal processes only for proper purposes;

    (b) Rule 13.2 – not acting in a way that undermines the processes of the court;

    (c) Rule 13.4 – keeping clients advised of alternatives to litigation;

    (d) Rule 13.9 – ensuring that discovery obligations are fully complied with.

24. A proper exclusion from any such obligations would be any step "designed to protect or further the substantive interests of a party other than the lawyer's client". Such exclusion reflects the provisions of r 6 of the RCCC and a well established rule that a lawyer normally owes no duty to his or her client's opponent.

25. The Committee considered that it would be open to the New Zealand Law Society (NZLS) and the Minister of Justice to determine that, notwithstanding the existence of such obligations on litigation lawyers, it would be desirable for these obligations to be more specifically spelt out in the RCCC and that to do so would meet the criteria in s 101 of the Act.[8] The inclusion of such rules in the RCCC would be consistent with developments in Australia where professional conduct rules have been adopted. It was therefore decided to seek the assistance of the NZLS in preparing a suitable draft.

[7] As noted in the minutes of meeting of Rules Committee dated 5 October 2009.
[8] Confirmed in the minutes of meeting of the Rules Committee dated 5 October 2009.

Relevance of costs

26. As noted at 15 above, the Australian Bill makes provision for contravening conduct of both parties and their lawyers to be reflected in costs orders. Increased or indemnity costs form an exception to the normal costs regime: see rr 14.6(3) and 14.6(4). The powers of the Court regarding increased costs have recently been discussed by the Court of Appeal in *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400.

27. The High Court has jurisdiction to award costs against a barrister and solicitor personally "in appropriate cases": see *Harley v McDonald* [2002] 1 NZLR 1 (PC) at [47]. There have been a number of applications of this principle in recent times. Further, there are examples of cases where costs have been ordered jointly and severally against the party and the lawyer acting.

28. The Committee proposes that a new rule be inserted in the Rules to empower the court to order a party's lawyer who has breached the new express duty on lawyers to pay costs. The amount would be limited to "any costs which that breach has caused". Thus, the court making the order will need to be satisfied that it can estimate with some precision the additional cost incurred by the other party as a result of the breach. This is to do no more than state the present common law position: see *Harley v McDonald*. At [45] in its decision, the Privy Council referred to "the public interest that the procedures of the court to which litigants and others are subjected are conducted by its officers as economically and efficiently as possible". The inherent jurisdiction could be "invoked only in cases where there has been a serious dereliction" of the lawyer's duty to the court: [48]. Inquiring into instructions given, or advice tendered out of court, was "inconsistent with the summary nature of the jurisdiction": see [54].

29. The Committee believes that an order to pay costs lost or thrown away should only rarely be made against a lawyer personally. The question arises whether the court should exercise this jurisdiction only in obvious cases or whether criteria should be specified. There are potential issues about privilege if it is not waived by the client. Submissions on these points will be particularly welcome.

30. The proposed bill, echoed by proposed r 1.2A(7), would make it clear that no evidentiary privilege is affected. If the privilege is engaged, the client will be able to refuse to waive legal professional privilege.

31. The general question on which submissions are requested on the question of costs involves the need for, and the desirability of, the proposed new rule. There are also some subsidiary points on which submissions will be valuable:

    (a) Should the rule permit a lawyer, advised of the possibility of a costs order against him/her personally, to file an affidavit?

    (b) Should the court be permitted to act only in obvious cases which would not engage issues of privilege? If so, how should such a limitation be formally expressed?

    (c) Should criteria for any such order be specified?

(d) Should the lawyer's own client be entitled to ask the court to act? (Complaints under the RCCC are, of course, an entirely separate matter.)

(e) When a party instructs a solicitor who engages counsel, does the distinction between solicitor and counsel raise any complications?

(f) In the definition of "lawyer" (see r 1.2A(3)), is the inclusion of partners and employees inappropriate or potentially unjust?

Amendment to Judicature Act

32. The Committee accepts that an amendment to the Judicature Act is desirable. Such an amendment would give specific power to the Committee to make rules that require parties and their lawyers to assist in the due administration of justice.

33. Such amendment could also include specific power to include in the Rules cross-references to the obligations on lawyers and counsel to assist parties to comply with the objective of the Rules. While it is accepted that such power already exists under the Act and in the (to be expanded) RCCC, nevertheless it may be helpful to have at least a cross-reference to the RCCC rules.

34. A draft amendment to the Judicature Act has been prepared by PCO and is annexed as Appendix 1.

35. PCO has also prepared, as a basis for consultation, the draft High Court Amendment Rules already referred to. Such rules expand the objective to securing the "just, speedy and inexpensive determination of any proceeding or interlocutory application according to law". An inclusive definition describing the desired goals is provided in r 1.2(2).

36. The general obligation of parties and lawyers is spelled out in r 1.2A. A copy of the draft is annexed as Appendix 2.

Concluding observations

37. The Committee considers that there are compelling policy drivers supporting the proposed reforms.

38. Comments are now sought on the proposed reforms and whether the specific proposals and rules in this consultation paper should be adopted. Alternative suggestions are welcome.

39. Please note that changes to the RCCC will be dealt with under the Lawyers and Conveyancers Act and are the responsibility of the NZLS and the Ministry of Justice.