Report to the profession from Justice Winkelmann, Chief High Court Judge and Justice Asher, Chair, Rules Committee - February 2015

High Court Rules: The effectiveness of the 2011 – 2012 reforms to discovery and case management

We write to report to the profession upon the effectiveness of the 2011 and 2012 discovery and case management reforms. The reforms were aimed at reducing the costs and increasing the speed of litigation. The Rules Committee was aware that the Jackson reforms in England were initially criticised as adding to costs, and the earlier Woolf reforms that changed the test for discovery were regarded as having been ineffectual. The Committee thought it was important to review the effectiveness of our own reforms.

In order to assess the effectiveness of the reforms, the Rules Committee requested the Ministry of Justice to analyse their performance. To do this the Ministry set up an online survey and published responses to the survey from lawyers. Responses to the survey were also sought from High Court Judges and High Court registry staff. The Ministry also analysed statistical data collected by the High Court registry relating to the progression of cases that had been collected by the Ministry. Although only 96 surveys were completed in all, the Ministry's review provided some useful information.

The results are positive. Contrary to the position in England, the majority of lawyers and Judges considered that the change from the *Peruvian Guano* test for discovery to an adverse documents test had led to a change in the way the profession approaches discovery. It is pleasing to note that the majority considered that counsel now actively engage each other in discussions about whether tailored discovery is appropriate, rather than simply agreeing on the default standard discovery test. It seems clear that there has been increased co-operation between parties on discovery issues since the new discovery regime took effect.

The survey also showed that the majority of lawyers and Judges surveyed agreed that initial disclosure has helped progress cases by assisting in the identification of issues and the settling of pleadings. While the majority of lawyers viewed initial disclosure as inefficient and said it increased their workload, Judges viewed initial disclosure positively, as assisting in identifying issues and settling pleadings.

The survey did not specifically address electronic discovery, although Associate Judges report anecdotally that discovery by way of electronically recorded lists and inspection by the provision of scanned documents are now the norm, and that tailored discovery is increasingly adopted. The drop in interlocutory hearings referred to later indicates that since the reforms there are considerably less defended discovery applications.

The survey results indicated that the majority of lawyers believe cases were being appropriately classified as ordinary or complex. The statistics showed that 67 per cent of defended general proceedings are classified as ordinary, and 31 per cent as complex. The high percentage of complex cases is likely to be due to the majority of defended Christchurch earthquake cases being so classified.

There has been a 14% improvement in the disposal time of general proceedings in that the average age of general proceedings disposed of by trial in the 12 months to 28 February 2012 (when the case management pilot was implemented) was 589 days. By 30 June 2014 it was down to 504 days. While it is not possible to attribute this improvement entirely to the case management and discovery reforms, the reduction is a further indication that the effect of the reforms is positive.

What is clearly encouraging is that statistics show that for general proceedings in the pre-pilot era (before March 2012), the average number of conferences was 2.56, while in the pilot period this dropped to 1.89, and since the new rules came into effect this has dropped further to 1.81. This is a significant improvement and indicates that the policy to stop conference "churn" has had some success. The average length of a case management conference for an ordinary proceeding was 28 minutes, and for a complex proceeding 38 minutes.

There has also been a decline in the average number of interlocutory hearings for general proceedings. During the pre-pilot period the average number of interlocutory hearings was 0.35, during the pilot period 0.20, and since the new case management rules have come into effect, this seems to have settled around 0.25. In the view of the Rules Committee this can be attributed to better co-operation between counsel in discovery, and more effective case management.

These excellent results and figures indicate that the goals of the reforms are being reached. The reforms can be expected to be reducing costs. Perhaps the most pleasing of all developments has been the improved co-operation between counsel that can now be inferred from the fact that there are fewer conferences and defended interlocutory applications. Much of the success of both the reforms can be attributed to the positive reception they have received from civil litigation lawyers. It is to be hoped that these reforms will maintain their momentum in the years to come.

The Rules Committee will continue to monitor the reforms. Any feedback or suggestions regarding the reforms is welcome. You can email the Committee at rulescommittee@justice.govt.nz or write to the Committee at PO Box 180, Wellington.