Te Tari Ture o te Karauna
Crown Law

24 February 2023

Chair of the Rules Committee
c/ Auckland High Court
Cnr Waterloo Quadrant and Parliament St
Auckland, 1010

Attention: Chair of the Rules Committee

By email: Rulescommittee@justice.govt.nz

Tēnā koe e Rangatira

Rules Committee Report on Improving Access to Civil Justice: response to recommendations re changes to High Court procedure

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1. We were grateful to receive a copy of the Rules Committee report on Improving Access to Civil Justice. The report tackles some significant issues and makes practical suggestions for change.

2. The Committee has provided a further opportunity to make submissions on the recommendations regarding changes to the procedures to be applied in the High Court. This submission represents the views of the Crown Law Office. It should not be taken as government policy.

3. Crown Law fully endorses the rationale behind the proposed changes to High Court procedure for general civil cases. In terms of the specific recommendations, we support an enhanced initial disclosure rule, and the sentiment that subsequent discovery may often not be needed. We agree that the evidence of witnesses should be directed to questions of disputed fact, and that this can be achieved through adopting witness statements that are closer in format to "will say" statements. We support there being greater judicial engagement in the identification and management of the core issues at a judicial issues conference. And we agree there should be changes to how evidence is received by the court at trial, through the core events being established by the documentary record evidenced by the documents in the agreed bundle and chronologies.

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4. But we have some concern with the proposed sequencing of some of the steps and, specifically, the proposal for witness statements to be served prior to discovery. Parties should not construct their evidence to fit the documents. However, documents are helpful for refreshing witnesses' recollection of events and are a key source of information, especially where the relevant events took place some years ago. If witness statements were to be prepared after initial disclosure but prior to discovery (if any), we consider there is a real prospect that supplementary statements will, at least in complex cases, routinely be required.

5. This concern could be mitigated by allowing extended periods of time before enhanced initial disclosure by the defendant is due (together with a statement of defence), and witness statements are served. If sufficient time were allowed for both stages, it is more likely that most of the key documents would be located before the deadlines for these steps have to be met. The documents would then either be disclosed as part of enhanced initial disclosure, or exchanged informally between the parties by consent (and so obviating the need for a discovery order).

6. The proposal regarding the sequencing of steps within a new structure - initial disclosure, then evidence, then discovery - is relatively untested, albeit we note the positive feedback from the experience of the Equity Division of the New South Wales Supreme Court. Indeed, it is very hard to predict whether the whole package of proposals will have the desired effect of reducing maximalism and facilitating access to justice. Given this, we support the idea of testing the concepts in a New Zealand context before introducing them more widely or fully.

7. We consider a geographical-based pilot would be difficult and resource-intensive for any organisation that has a national practice (such as Crown Law). But it may be possible to introduce the proposals in stages. For example, the Committee could make changes to the rules and practices regarding enhanced initial disclosure, the *nature* of witness statements (and their accompaniment with a chronology), and the nature of evidence at trial as the first stage. This would mean the existing rules regarding discovery would remain largely intact, but expectations around the need for discovery would hopefully change. If the first stage were successful, the Committee could look to whether to change the order of events, with witness statements coming at an earlier point. We raise this for consideration but are aware that further thought needs to be given to workability, including the timing of the judicial issues conference. We also acknowledge this approach disrupts the overall make-up of the revised structure, where each strand or step supports and complements the others, but still see some merit in a phased approach.

8. When new High Court procedures are introduced, we consider their success in terms of reducing maximalism should be measured. Given the cultural shift required, this may take some time.

9. We make two final, more procedural, comments:

    9.1 We suggest fact sheets (or similar) relating to initial disclosure should be made available so that self-represented litigants understand the extent of their obligations. Relatedly, there should be close monitoring of the

new rule to ensure parties receive the documents they ought to and so can progress to the next stage.

This is particularly relevant for the Crown. Before plaintiffs start litigation against the Crown, they can make requests for information under the Official Information Act and so obtain documents that might otherwise be discovered. There is no similar information gathering avenue for the Crown, so it relies on plaintiffs to meet their disclosure obligations fully and fairly.

9.2 We note that the continuing obligation to give discovery under r 8.18 is linked to there being a "discovery order". If formal discovery orders are likely to reduce, the scope of r 8.18 should perhaps be expanded to ensure the thrust of the rule is not lost.

10. For the avoidance of doubt, Crown Law continues to support the recommendations relating to the introduction of proportionality as a key principle, the presumption that interlocutories will be heard by remote means (with provision for them to be determined on the papers), the presumptions re expert evidence and the recommendation re ongoing use of technology for remote hearings.

Nāku noa, nā
Crown Law

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