The Rules Committee
Te Komiti mō ngā Tikanga Kooti

Submissions on proposed amendments to the High Court Rules in Access to Civil Justice initiative

p +64 9 354 1416
m +64 21 744 575
e ab@shortlandchambers.co.nz
w shortlandchambers.co.nz/ab

Andrew Barker KC
Barrister
BA / LLB (Hons), LLM (Tor)

26 August 2024

Rules Committee

Attention: Georgia Barkley

Dear Georgia

Introduction

1. I refer to your letter of 9 August 2024, asking for comment on the proposed changes to the High Court Rules.

2. This is an important initiative by the Court, and the proposals are going to significantly alter current practice. While work commitments have prevented me spending the time I would have liked to have spent on this, I thought it was important that I at least provide some feedback.

General comments

3. As a general comment, I think that the proposed Rules are a careful and well thought out response to the broader policy decisions that have been made by the Committee. Subject to a few reservations I have noted below, I think that the Rules will put in place a significantly more efficient and mature approach to the process of dispute resolution.

4. I doubt they will do anything to reduce costs. They clearly front-end load costs and I am not sure that will necessarily be matched by a reduction in costs later in the proceedings. From my part, I am reasonably sanguine on that point. If the result is that cases are resolved more rapidly, or without the need for trial, then maybe I will be proved wrong on the issue of costs reduction. We will have to see.

5. The real focus of these Rules is to ensure a more efficient Court intervention, either through the issues conference or at trial. That is for the good. However, I do not think we can ignore the "elephant in the room" in our civil justice system at the moment, namely the time taken for the allocation of hearing dates, and the time taken to deliver judgments. If these changes are not in some way linked to a shortening of those time periods, then I am not sure what real difference they will make to the overall justice process.

6. While I realise that the Committee has moved on from these issues, I would refer again to my original submission to the Committee when it first started this project (dated 8 July 2021). The focus of that submission was on freeing up time for Judges to hear cases, so that they can be resolved more promptly.

7. There are two other general observations I had. The first is the idea of co-operation between Counsel. It is a noble goal, and I am fortunate that often in cases I am involved in, I am engaging with other Senior Counsel who are confident enough to approach trial issues on a pragmatic and realistic basis. However, I find that to be the exception rather

than the rule. The reality is that we operate in an adversarial environment, and lawyers tend to be prepared to concede very little. The process of "co-operation" can be expensive, as the parties end up spending a lot of time exchanging drafts, redrafts and other amendments of the documents.

8. The other point relates to discovery. I have submitted to the Rules Committee previously on the issue of discovery. I do think the concerns over the cost and expense of the discovery process are exaggerated. Discovery is clearly an issue in large scale litigation, but that is not the litigation that makes up most of the work of the High Court. It is the exception. I do not think that the Rules themselves should be based on unusual applications of its procedures. In most cases, in my experience, discovery is relatively easily and efficiently dealt with.

9. The concern I have always had with eroding anything to do with the discovery obligations, is that in the modern litigation / commercial world, documents are everything. The importance of a common bundle, and the fact that most witness statements are simply a device to produce documents, emphasise the importance of documents. A robust process for ensuring that all relevant documents are disclosed is in my view essential.

10. I realise that I am fighting a losing battle on this front, as the tide seems to have turned against full documentary disclosure. I have always been concerned that a process for disclosure that simply relies on documents that a party sees as helpful to its case, and those that may harm its case, is in itself a potentially dangerous standard. Concerns with the adequacy of this process will be exacerbated by a disclosure process that occurs relatively early in the case, and likely without the full review of documents that would usually be undertaken.

11. My specific comments on particular rules are below.

Rule 7.4

12. The timelines do seem tight, particularly for the service of witness statements, a chronology and what is effectively the parties' disclosure in the proceedings. That is a lot to do. While I do not feel strongly about this, I would be inclined to extend those periods slightly.

13. I am also unclear as to the status of factual witness statements which are filed at this stage of the proceeding and can be amended. The Rules still talk later about the exchange of witness statements for trial (R 9.1A). It is not clear if these are meant to be different to the initial factual witness statement provided. The Rules now appear to be talking about two separate versions of witness statements.

14. The requirements for witness statements for trial are strict, in terms of admissibility and relevance issues; see R 9.7. Will those same standards apply to witness statements in the initial exchange of information? How complete are they meant to be? Would "will say" statements, such as those often prepared for a mediation or a Judicial Settlement Conference be sufficient, or are they intended to be more complete than that?

15. Moreover, are the initial factual witness statements subject to cross examination? A party can, of course, be cross examined on the content of prior briefs of evidence that have been filed and served, as they can on any other prior statement. Will the same apply to these witness statements provided in the initial disclosure and exchange? It is not even clear if these initial statements are to be signed.

16. I note their concerns because these initial witness statements, particularly for a plaintiff, are being prepared at a early stage of the proceedings. They may well require amendment as further facts develop. There is a risk of real prejudice to a party in having to account for a factual narrative when all of the relevant facts may not be clear.

Rule 9.5 - Bundle

17. I note that R 9.5 largely replicates the existing Rules as to the common bundle, albeit with a more pragmatic approach to dealing with objections. However, the Committee has not gone as far as holding that inclusion of documents within the bundle is also evidence as to the truth of the content of that document.

18. I think that is disappointing. I assume there was no legislative support for changes to the Evidence Act. For what it is worth, I add my strong support for an amendment to the basic hearsay rule to allow for a more pragmatic approach to documentary evidence.

Rule 9.15 – Cross examination duties

19. In my earlier submission to the Rules Committee, I noted the difficulty created by the Rule in *Brown & Dunn,* and the obligation for a party to "put their case". In most civil cases, I think the rule is entirely artificial. Parties know the case of the other party and get the opportunity to reply through their briefs of evidence. There does not seem to any real benefit in requiring Counsel to laboriously put the case to every witness through cross examination.

20. In my experience, and I realise I am dealing here with cases involving reasonably experienced lawyers on each side, lawyers tend to ignore the precise requirements of the obligation, and simply put the main points of their case to the witness.

21. I apprehend that this Rule is directed to that concern, and whether the obligation to put the case can be met in other ways. However, the Rule is cryptic as to what is meant. I wonder whether some statement could be added to the effect that the obligation is met if a party has had the opportunity to prepare a brief in response to the brief of the other witness, or something to that effect. At the very least, some direction as to what the Rule is suggesting as sufficient to discharge the obligation may be of assistance.

Issues conference

22. I do think that the issues conference is a good development. However, I wonder whether it goes far enough in terms of working through the nature of the trial. The overriding intention should be to allocate the trial date at that issues conference, accepting that the there may be reasons not to do so. On that basis, parties will have to make an estimate of trial length.

23. Given the extent to which the issues between the parties will be identified by the time of the issues conference, I cannot see why parties should not be required to provide draft timetables for the trial, addressing issues such as what evidence would be read, how expert evidence would be adduced, reading time for the Court etc. It would only be draft, and subject to modification. However, in seeking a trial of a certain length of time, the parties are already taking a position as to how they think the trial will unfold. I do not see the harm in them being required to commit to that estimate, at some level at least.

24. I think it also allows the Court to exercise some discipline over parties' estimates of trial lengths. For example, if the dispute is over interpretation of a document, and fact evidence is to be taken as read, a Court may well form the view that a full day for cross examination of a specific witness is excessive and unnecessary.

25. These concerns were a focus of my first submission to the Rules Committee as its initial consultation paper. As I explained there, I do think there is a strong case for the Courts to take more control of the conduct of the trial.

Conclusion

26. I would be happy to meet with any member of the Committee to discuss these comments if that would be of assistance.

Yours sincerely

Andrew Barker KC

Te Tari Ture o te Karauna
Crown Law

4 September 2024

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

Attention: Georgia Barclay

By email: georgia.barclay@courts.govt.nz / rulescommittee@justice.govt.nz

Tēnā koe Georgia

Implementation of proposed amendments to High Court Rules and flowchart
Our Ref: SOL115/1180

1. Thank you for the opportunity to comment on the implementation of the proposed amendments to the High Court Rules 2016 and the explanatory/accompanying flowchart.

2. Our comments represent the views of the Crown Law Office.

Substantive amendments to High Court Rules

Clause 5 – rule 1.3(1) ordinary proceedings

3. Clause 5 proposes to amend rule 1.3 (Interpretation) by inserting into rule 1.3(1) a new defined term i.e., *ordinary proceeding*. We suggest a small tweak for consistency with other rules:

> **ordinary proceeding** means a proceeding commenced in accordance with Part 5 of the rules, but excluding an application for judicial review.

Clause 6 – revocation of rules 7.1AA and 7.1

4. Clause 6 proposes to revoke rules 7.1AA to 7.3A.

5. Rules 7.1AA and 7.1 currently provide useful guidance and clarification as to the procedures in Part 7. This includes an outline of the rules, their application to different types of proceeding (as well as what proceedings they do not apply to), the purpose of case management, and the key definitions of a *complex* defended proceeding and an *ordinary* defended proceeding.

6. No equivalent introduction is proposed. Instead, Part 7, subpart 1 is proposed to commence with r 7.4 *Standard directions prior to judicial issues conference for ordinary proceedings*.

7. We would recommend replacing rules 7.1AA and 7.1 with a rule providing similar guidance, which would assist with promoting the overriding objective in r 1.2.

8. Absent some form of signposting, the proposed amendments to Part 7 may make it difficult for users to navigate, particularly as the amendments mean that the new procedure is not always set out chronologically, and reference to new phrases/concepts sometimes occurs prior to the relevant rule. For example, the terms "ordinary proceedings" and "judicial issues conference" appear in the subheading to proposed r 7.4, but these terms are new and will require users to cross reference to r 1.3 and r 7.5.

9. An introductory rule could reflect the overriding objective and duty to cooperate, and the purpose of Part 7 rules. This could include the purposes of the judicial issues conference in rule 7.5(3) for ordinary proceedings. It could also include the purpose of case management (or a case management conference) for those proceedings to which case management will continue to apply i.e., an application for leave to appeal, or an appeal, under Part 20, Part 21 and Part 26 (see rules 7.14 and 7.15), an application for judicial review (see rule 7.17) and also, to a limited extent, a proceeding commenced by origination application (sees rules 19.11 and 7.43A). We return several times in this letter to the fact that case management will remain for certain types of proceedings. An introductory rule could signpost which rules apply for what purpose, as well as identifying or defining key terms - especially new ones such as an ordinary proceeding, disclosure obligation, position paper, and judicial issues conference.

10. It may be helpful to incorporate the flowchart in Part 7.

Clause 7 – replacement of rule 7.4

11. Clause 7 proposes to replace r 7.4 *First case management conference*.

12. The structure and content of proposed r 7.4 is not easy to navigate. Subclause (1), for example:

    12.1 Commences with a qualifier "Subject to subclause (7)".

    12.2 Uses the term "standard directions", which is not a defined term. We think the reference to standard directions in the proposed heading is helpful as it describes what follows in the text of the rules but suggest defining standard directions (as directions that apply unless the court [a Judge] makes alternative directions [directs otherwise]) *if* the term is to be used in the text of rules. Alternatively, the word "standard" could be removed from subclause (1).

12.3 Refers to "ordinary proceedings", requiring the user to search for a meaning, which is in proposed r 1.3(1).

12.4 Paragraph (a) introduces what happens where a party wishes to make an application for any of the matters listed in subclause (5). This requires the user to jump ahead to that subclause to determine what "matters" mean. We would recommend a more descriptive reference to the matters in subclause (5) i.e.,

> (a) if a party wishes to make an interlocutory application or apply for another matter listed in subclause (5), -

12.5 If an application is intended, paragraph (a)(i) requires the party to give notice no later than 10 working days from the date in paragraph (a)(i)(A) or (B) that applies. If no notice or application is made, the dates in paragraphs (a)(i)(A) and (B) also apply to determine when a plaintiff must serve factual witness statements, a draft chronology and copies of any documents not disclosed in initial disclosure. There is much packed into that paragraph, which could perhaps be un-packed.

13. We suggest a redraft of proposed r 7.4 to make it more user friendly. As a suggestion, for example, subclause (1) could start with:

> (1) Unless a Judge makes alternative directions under subclause (X), the following directions apply in an ordinary proceeding.
>
> (2) The directions apply to steps after:
>
> a. The date of service of the pleading by the defendant or, if there is more than one defendant, the last pleading by a defendant; or
>
> b. If an affirmative defence is pleaded or a counterclaim is made, the date of service of the pleading responding to it or, if more than one party is the subject of the affirmative defence or counterclaim, the last pleading by a party responding to it.
>
> (3) If a party wishes to make an interlocutory application or apply for another matter listed in subclause (Y) they must –
>
> a. Give notice to the other party or parties and the court that they intend to do so no later than 10 working days from the applicable date in subclause (2).
>
> b. File the application no later than 15 working days from the date notice is given.
>
> (4) If no notice is given or application is filed under subclause (3) –

a. The plaintiff must serve the following on the defendant no later than 25 working days from the applicable date in subclause (2):

i. etc

Proposed rule7.4(1)(b)

14. Proposed r 7.4(1)(b) applies where either no notice of interlocutory application is given within 10 working days, or no application is filed within 15 working days of that notice being given.

15. However, proposed paragraph (b) does not address what happens when notice is given by a party, but no application is then filed within 15 working days of notice being given. We would recommend clarifying this.

Proposed rule 7.4(8) - scheduling of judicial issues conference

16. Subclause (8) provides that the Registrar must schedule a judicial issues conference upon advice from the plaintiff that all evidence and chronologies have been served by the parties.

17. While proposed r 7.4(8) makes it clear what must happen before the conference can be scheduled, it does not specify a minimum period within which the conference *cannot* be scheduled. Accordingly, there is a risk that conferences will be scheduled too close to the dates for filing and service of position papers and bundles of key materials: proposed r 7.5B requires the plaintiff and other parties to file and serve at least 10 and 5 working days (respectively) before the scheduled conference.

18. We would recommend that proposed r 7.4(8) includes a minimum working day period that must pass before the judicial issues conference is held e.g., not before 25 working days after the plaintiff's advice to the Registrar that all evidence and chronologies have been served by the parties. This would provide guidance for Registry staff and the parties as well as ensuring sufficient time is available to the parties to prepare position papers and bundles of key materials (i.e., at least 10 working days and 15 working days).

19. This could be achieved by an addition to the last sentence in proposed r 7.4(8), i.e.,

> …The Registrar must then schedule a judicial issues conference [for/ on] a date no earlier than 25 working days after the advice is received from the plaintiff.

Clause 8 – replacing rule 7.5

20. Clause 8 proposes to replace rule 7.5 *Issues conferences* with proposed rules 7.5, 7.5A, and 7.5B.

Rule 7.5

21. Proposed r 7.5 deals with the requirement for and purposes of the judicial issues conference.

22. Subclause (1) envisages a Judge determining that the otherwise mandatory judicial issues conference is "not required". It is not indicated when the determination may be made by a Judge. Unless an interlocutory application has been made, it is unclear when a Judge would have the opportunity to make any such determination before receipt of the documents required to be filed in advance of a scheduled judicial issues conference by r 7.5B.

23. Subclause (5) of the proposed rule provides –

> **At a judicial issues conference**, a Judge may give any directions they consider appropriate for the proceedings that will best achieve the overriding objective in rule 1.2. [emphasis added]

24. The proposed rule does not contain an equivalent provision for the situation where a Judge determines a conference is not required.

25. We would recommend amending proposed r 7.5 to clarify:

    25.1 At what stage(s) a Judge should give consideration as to whether the conference is required; and

    25.2 That the Judge can make appropriate directions that will best achieve the overriding objective in rule 1.2 when a determination is made that the conference is not required.

Rules 7.5A and 7.5B

26. Proposed r 7.5A sets out the agenda for a judicial issues conference, which will apply unless the Judge directs otherwise.

27. Proposed r 7.5B directs what must be filed and served before the judicial issues conference, which applies unless the Judge directs otherwise.

28. Subclause (1) of proposed r 7.5B provides that, unless directed otherwise, the parties must each file and serve position papers and bundles of key materials, no later than 10 and 5 working days in advance of the judicial issues conference.

29. It may be that a "direction otherwise" would only relate to the timeframes. But if not, there is no guidance as to the circumstances where a Judge would direct that parties are not required to file and serve position papers and bundles of key materials for the conference.

30. Subclause (2) of proposed r 7.5B requires the position paper to explain:

    30.1 The party's case; and,

30.2 What is required to fairly address the party's case.

31. It is not clear whether parties are required to address the r 7.5A agenda items in their position papers.

32. We would recommend (consistent with the duty to cooperate and the overriding objective) amending proposed r 7.5B(2) to make it explicit that the parties are required to address the agenda items in their position papers.

33. Another recommendation/option would be to replace Schedule 5 (currently proposed to be revoked) with a new schedule "Matters for consideration at judicial issues conference". The schedule could list the standard directions requirements. We would otherwise envisage the notice of the judicial issues conference referencing standard directions.

Clause 9 - proposed r 7.34 Mode of hearing

34. Proposed r 7.34 confirms that certain interlocutory applications will be heard in-person, but others may be heard remotely. Proposed r 7.34(2) provides:

> However, for any interlocutory application referred to in rule 7.33 for which a mode of hearing has been set, if the parties agree on an alternative mode of hearing they may apply to the court within 5 working days of the allocated hearing date for a Judge to approve that alternative mode of hearing.

35. Our view is that remote hearings can be a valuable way of facilitating access to justice and limiting costs to parties, including the public (in cases to which the Crown is a party). Also, they reduce carbon emissions by reducing travel to Court. We therefore welcome changes that may facilitate remote hearings in appropriate cases, whilst recognising that mode of hearing should ultimately be a decision for the Judge - taking into account all relevant matters and the fact some hearings cannot appropriately be heard remotely.

36. To enhance these principles, we recommend amending proposed r 7.34(2) so that the ability to seek an alternative mode of hearing, namely a remote hearing, should not be dependent on the agreement of the other parties - because a party might unreasonably disagree or decline to engage in discussion. Rather, the application could be made by a party alone, and considered in accordance with the criteria in the Court (Remote Participation) Act 2010, with the views of all parties being taken into account. This could be achieved by removing the words "if the parties agree on an alternative mode of hearing they may" and replacing them with "a party may".

37. We also consider it would be helpful for the registry to inform the parties of their right to apply for a change in the mode of hearing when notice of the hearing is sent out. Proposed r 7.33(3) anticipates that the court will initially determine the

mode of hearing, potentially without hearing from the parties, so the ability to seek to alter the mode of hearing will be important.

Clause 10 – rule 7.48(1)

38. Clause 10 proposes to replace r 7.48(1). Rule 7.48 currently applies to proceedings subject to case management under subpart 1 of Part 7. Those proceedings are currently listed at r 7.1(1)(a) to (c).

39. Under the proposed amendments, appeals under Part 20 (Appeals), Part 21 (Cases stated) or Part 26 (Arbitration Act 1996) and proceedings under Part 30 remain subject to case management (compare proposed definition of ordinary proceedings and rules 7.1, 71AA, 7.14, 7.15 and 7.17). A proceeding commenced by originating application is also subject to case management through the ability of the parties to seek directions (see rules 7.1, 7.1AA, 19.11 and 7.43A).

40. The proposed subclause (1) would remove the application of r 7.48 where a party fails to comply with any interlocutory order or any requirement imposed by or under subpart 1 of Part 7 in those proceedings that remain subject to case management.

41. To cover any orders or requirements made under subpart 1 of Part 7 in proceedings that remain subject to case management[1], we would recommend the proposed subclause reads as follows –

> (1) If a party (the **party in default**) fails to comply with an order or a requirement imposed by or under subpart 1 of Part 7 or Part 8 (disclosure and interrogatories), the Judge may, subject to any express provision of these rules, make any order the Judge thinks just.

Or,

> (1) If a party (the **party in default**) fails to comply with an order or a requirement imposed by or under subpart 1 of Part 7 (in ordinary proceedings or proceedings subject to case management) or Part 8 (disclosure and interrogatories), the Judge may, subject to any express provision of these rules, make any order the Judge thinks just.

Clause 12 – rule 8.4 Initial disclosure

42. Clause 12 proposes to replace rules 8.4(1) to (3). The amendments will mean there is an enhanced initial disclosure process requiring verification by affidavit, which will largely replace the discovery procedures in proceedings to which Schedule 5 currently applies.

---

[1] An application for leave to appeal, or an appeal, under Part 20 (Appeals), Part 21 (Cases stated) and Part 26 (Arbitration Act 1996), a proceeding under Part 30, and to a limited extent, a proceeding commenced by origination application.

43. A consequence of the proposed amendment of r 8.4 is that Part 30 proceedings will be subject to the same disclosure requirements as ordinary proceedings. This is because initial disclosure in accordance with r 8.4 is required by Schedule 10. We note this consequence simply because we are unsure whether it is intended.

Clause 13 - rule 8.4A

44. Clause 13 proposes insertion of a new rule after rule 8.4, i.e., proposed rule 8.4A **Further disclosure**. At subclause (5) the proposed rule states -

> (5) If further disclosure is ordered, the Judge may also order that an affidavit verifying that disclosure be provided in a form directed by the Judge.

45. We suggest that where a party (or parties) is ordered to make further disclosure, they are required by the rules to verify that disclosure by affidavit. See also the point made in the following paragraph.

Clause 15 – rule 8.16 (1AAA)

46. Clause 15 proposes to insert a new subclause before r 8.16(1) i.e., subclause (1AAA). That is:

> (1AAA) If a Judge makes an order for further or particular disclosure,—
>
> (a) the affidavit must list the documents to be disclosed under the order only, unless the Judge orders otherwise:
>
> (b) the Judge may also order that the affidavit verifying the disclosure contain a schedule that complies with all or part of this rule.

47. This suggests that where a Judge orders further disclosure under proposed r 8.4A(4), an affidavit for disclosure would be required. This does not seem consistent with proposed rule 8.4A(5), set out above.

48. Subclause (1AAA) references an order for particular disclosure, the relevant rules being rules 8.19 to 8.21 (see also proposed r 8.15(1)(b)). It might be helpful, given that these rules come later than proposed rules 8.15 and 8.16, for either r 8.16(1AAA) or rule 8.15(1) to reference the rules under which particular disclosure orders are made.

Clause 19 – rule 9.1A

49. Clause 19 inserts a new proposed r 9.1A concerning exchange of evidence. Subclause (2) deals with factual evidence and subclause (3) with expert evidence.

50. Both subclauses use "by the time" when referring to service of evidence:

50.1 Factual evidence must be served *by the time* determined by rule 7.4 "unless further time" is allowed.

50.2 Expert evidence must be served *by the time* and in accordance with directions given at the judicial issues conference or at another time directed by a Judge.

51. We think the use of "by the time" could be replaced with "by the date" consistent with other rules (see for example proposed rule 9.2(1)).

52. We were confused by the reference in subclause (3) to "*at* another time directed by a Judge". The use of "at" appears to reference *when* the direction is given by a Judge, but the use of "another time" could be referring to the time *by* which service is directed. The two ways to read the draft are:

52.1 Expert witness statements must either be served by the date and in accordance with directions given at the judicial issues conference, or by the date and in accordance with directions a Judge gives at a time other than the time of the judicial issues conference; or

52.2 The date for service directed by a Judge may be different from the date that was given *at* the judicial issues conference [in which case the subclause should read "*by* another *date given* by a Judge"].

53. We would recommend amending the drafting to clarify what is meant.

Clause 23 – Rule 9.7 Requirements for witness statements of factual evidence

54. Clause 23 proposes to replace r 9.7 *Requirements in relation to briefs*.

55. The current r 9.7 applies to any written evidence proposed to be given by a witness, i.e., whether factual or expert evidence. Proposed r 9.7 purports from the heading "Requirements for witness statements of factual evidence" to apply only to factual evidence from a fact witness. This is reinforced by proposed subclause (1), which states -

> (1) Whether or not some evidence is directed to be led orally, a witness statement of **factual evidence** is a statement from **a fact witness** that contains the testimony intended to be taken from them. [emphasis added]

56. Subclause (1) does not purport to exclude the application of subclauses (2) to (6) to a witness statement of expert evidence. But, in combination with the heading, the inference is that the words "a witness statement" in the rule means a witness statement of factual evidence.

57. On the other hand, there are indications the rule applies to all statements – factual and expert. In proposed subclause (2)(h) there is a fact witness specific requirement, suggesting the rule is otherwise intended to apply to expert witness statements. Proposed subclause (2)(h) states -

> (2) A witness statement must
>
> …
>
> (h) be confined to the matters in issue and, **in the case of a fact witness**, matters on which the witness can assist the court by giving evidence on the basis of their personal knowledge: [emphasis added]

58. Also, r 9.45 *Status of joint witness statement by expert witness* provides that rules 9.4 to 9.11 apply to a joint witness statement prepared by expert witnesses with any necessary modifications.

59. Because there is no proposed rule equivalent to proposed r 9.7 setting out the requirements for expert witness statements (noting that these matters are not covered in the Code of Conduct), we would recommend clarifying that proposed r 9.7 is applicable to all witness statements.

Clause 28 – proposed rule 9.36AAA Calling of party-appointed expert witness

60. Clause 28 proposes to insert a new rule (9.36AAA), which will (subject to a direction of a Judge) restrict parties to one expert witness per topic. Subclause (1) as proposed provides –

> (1) Unless a Judge otherwise directs, at or after the judicial issues conference, each party may call only 1 expert witness on each particular topic identified at the conference.

61. As currently drafted, the proposed rule will only apply to ordinary proceedings. We see merit in including a similar rule in respect of Part 30 proceedings (noting there is no equivalent to proposed r 7.5A((h) requiring parties to identify "particular topics" on which expert evidence will be directed for Part 30 proceedings).

Schedule 2: Additional Consequential amendments

Rule 1.3(1) - revocation of case management conference definition

62. The definition of *case management conference* in rule 3.1(1) is proposed to be revoked. The definition is:

> **case management conference** means a conference conducted under subpart 1 of Part 7

63. We would recommend retaining the definition of case management conference with slight amendment because case management conferences may still be conducted under subpart 1 of Part 7 (see comments above at paragraphs [9], [39] and [41]) .

64. This could be addressed by amending the definition as follows -

> **case management conference** means a conference conducted under subpart 1 of Part 7 in accordance with rule 7.14 or 7.17 [or rules 7.43A and 19.11].

65. We would also suggest inserting into r 1.3(1) a definition of *judicial issues conference* as follows –

> **judicial issues conference** means a conference conducted under subpart 1 of Part 7 in accordance with rule 7.5.

Rule 1.13 – proposed amendment rule 1.13

66. A consequential amendment is proposed to r 1.13 and r 1.13(a) to replace the words "a case management" with "the judicial issues".

67. As there may still be case management conferences (discussed above), and to achieve consistency with rule 1.16(3)(b), we would recommend that the proposed amendment in rule 1.13 simply deletes "case management" rather than replacing it with "judicial issues".

Part 7 - Headings

68. It is proposed to replace *case management* in the Part 7 and subpart 1 headings with *judicial issues conference(s)*. As above, we would recommend retaining case management in the headings and inserting/adding "judicial issues" or "judicial issues conference".

Rule 7.38(2)

69. It is proposed to replace "a case management" with the "the judicial issues" in r 7.38(2). However, this would mean subclause (2) no longer applies to proceedings subject to case management under Part 7. There may be circumstances where an interlocutory application is set down for the date when a case management conference is to be held. For example, a party to an appeal might make an interlocutory application to adduce further evidence on appeal in accordance with r 20.16, and that unopposed application is to be dealt with at a case management conference for that appeal.

70. Given the potential for applications to be dealt with at a case management conference for proceedings that remain subject to case management, it may be that "a case management conference" should be retained rather than replaced, and a reference to "judicial issues conference" is inserted/added, i.e., "…, a case management conference or the judicial issues conference is also due to be held".

71. In a similar vein, it is proposed to replace "a case management" with the "the judicial issues" in r 7.41(1)(c) – this is where an order has been sought in a memorandum filed for a case management conference. We make the same recommendation as above.

Rule 8.4(4)

72. It is proposed to amend r 8.4(4) to delete "or (3)". This is a consequence of clause 12 proposing to replace r 8.4(1) to (3) with a new rule 8.4(1) to (1C). The amendments to rule 8.4(4) could also include reference to the new subclause (1C) because it imposes the obligation on a party to take reasonable steps to check for known adverse documents.

Form G2

73. It is proposed to amend form G2 by replacing the second paragraph after the first signature block, "will be notified of the date and time of the first case management conference." with "must then follow the standard directions in r 7.4. You will then be notified of the date of the judicial issues conference (*see* rules 7.5 to 7.5B).".

74. We would recommend deleting "standard" from the proposed replacement wording, given the Judge may make other directions in accordance with proposed r 7.4(7).

Form G37

75. The proposed amendments to Form G37 replace paragraph 5 with new paragraphs 5A and 5B. Proposed paragraph 5A references disclosure obligations under proposed r 8.4 and at paragraph 5A(i) uses the words "the pleading". The pleading is "the first substantive pleading" served in proposed r 8.4(1). We suggest specifying "the first substantive pleading served" in the first bullet point in proposed paragraph 5A(i).

Schedule 3 Time allocations

76. Consistent with earlier comments regarding case management being retained for certain proceedings, case management steps for will need to be retained for those proceedings in Schedule 3.

77. The proposals in respect of Schedule 3 include removal of time allocations that may be applicable in proceedings that will remain subject to case management. See –

    77.1 Above item 10, replacement of "*Case management*" with "*Judicial issues conference*".

    77.2 Item 10, replacement of the words in the second column with "Preparation for judicial issues conference (and any additional judicial issues conference)".

    77.3 Item 11, replacement of "memorandum" with "position paper and bundle of key evidence and documents".

77.4 Items 11 and 13, replacement of "first or subsequent case management conference" with "judicial issues conference (and any additional judicial issues conference)".

78. The proposed replacements at items 39 and 54, i.e., replacing "Case management" with "Judicial issues conference" do not appear appropriate for originating applications or appeals (not being subject to a judicial issues conference or the same steps as for ordinary proceedings).

79. More detailed consideration as to what steps and the best way to group those steps may be required for the Schedule 3 Time allocations.

Schedule 3: Revocations

80. The revocations in schedule 3 include rules 7.11 to 7.13, which place on Registrars certain obligations and functions. Other than r 7.11(a), which would be redundant under the amended rules, rules 7.11(1)(b) – (c), 7.12, 7.13 remain important for the efficient administration of proceedings.

81. These obligations are pertinent to a judicial issues conference and also more widely. We query whether revocation is appropriate.

Miscellaneous

Rules concerning inclusion of documents

82. There are a number of rules (proposed and current) that impact production of a document as evidence at the hearing. These rules include –

82.1 Rule 8.4(7) provides -

> (6) Despite subclause (1), a party does not need to include in a bundle served by that party any document contained in a bundle already served by any party or any document attached to an affidavit already filed in court.

82.2 Proposed rule 8.16(5) provides -

> (5) The schedule need not include—
>
> (a) documents filed in court; or
>
> (b) any documents that may reasonably be assumed to be in the possession of all parties.

82.3 Proposed rule 8.31 provides -

> **8.31 Effect of failure to include document**
>
> A document that should have been included in a party's affidavit for disclosure may be produced in evidence at the hearing only with the consent of the other party or parties or the leave of the court.

82.4 Proposed rule 9.2(2) provides -

> (2) If the index refers to a document not previously disclosed, the party must—
>
> (a) include a copy of the document with the index; and
>
> (b) seek the leave of the court for it to be included in the common bundle (and see rule 9.4(5)(d) that requires the document to be identified in the bundle index as requiring leave to be included).

83. When these rules considered together, it is not clear whether a document that is not required to be included in the initial disclosure bundle (in accordance with r 8.4(7)) is still required to be included in the schedule to the affidavit for disclosure accompanying the bundle. Nor is it clear, given r 8.31, whether a document that is not required to be included in the schedule to an affidavit for disclosure, which should otherwise have been disclosed under initial disclosure (i.e., a document disclosed without a verifying affidavit in accordance with rule 8.4A) can be produced in evidence at the hearing without consent or leave (although it should follow).

84. It may be helpful to amend r 8.4(7) to clarify that a verifying affidavit need not list documents that are not required to be included in the initial disclosure bundle. This would also remove any potential inconsistency as between r 8.31 and proposed r 9.2(2). For example,

> (7) Despite subclause (1), a party does not need to include in a bundle or schedule appended to the affidavit for disclosure served by that party any document -
>
> (a) contained in a bundle already served by any party; or
>
> (b) attached to an affidavit already filed in court; or
>
> (c) to which rule 8.16(5) applies.

85. And/or rule 8.31 could be amended so as not to exclude documents disclosed under further disclosure that have not been included in a schedule as follows -

> **8.31 Effect of failure to disclose document**
>
> A document that should have been disclosed by a party may be produced in evidence at the hearing by that party only with the consent of the other party or parties or the leave of the court.

Rule 8.16(4)

86. Rule 8.16 of the rules provides -

> (4) The schedule must include documents that have previously been disclosed under rule 8.4.

87. The requirement in subclause (4) (consistent with r 8.31) reflects the fact that initial disclosure under the current rules is not accompanied by an affidavit of documents. Under the current rules, a party is only required to file and serve an affidavit of documents where a discovery order has been made under r 8.5.

88. However, the draft amendment rules do not propose to revoke subclause (4). Given the initial affidavit for disclosure will now list the documents disclosed under rule 8.4, the subclause seems redundant and also inconsistent with further disclosure or particular disclosure orders requiring the affidavit to "only" list documents to be disclosed under those orders – see proposed subclause (1AAA)(a).

89. We would recommend revoking rule 8.16(4).

Form G41

90. Clause 33 proposes to insert form G41 into Schedule 1. The index to Schedule 1 will need to be amended to include form G41.

91. Thank you again for the opportunity to comment. Please do not hesitate to contact the authors if you have any queries.

Nā māua noa, nā
Crown Law

Alison Todd
Senior Crown Counsel

E Jane Norris
Senior Crown Counsel

Rules Committee
c/- Wellington High Court
2 Molesworth Street
Wellington 6140

6 September 2024

Submission on proposed High Court Rules amendments

1 We refer to the draft amendments to the High Court Rules (the **Draft Amendments**) recently publicised by te Komiti mō ngā Tikanga Kooti in relation to the Improving Access to Civil Justice Project. We appreciate the opportunity to comment on the Draft Amendments.

2 On the whole, we view the changes proposed by the Draft Amendments as positive. We do have some suggestions in relation to the specifics of implementation.

3 Our comments are focused on two primary areas:

a Suggestions for further strengthening the effectiveness of the Judicial Issues Conference by amending the questions in the agenda to require parties to more comprehensively and meaningfully consider settlement as an option at that stage of proceedings.

b Support for the changes to initial disclosure and discovery, provided careful consideration is given to whether it is right to require the parties to serve factual witness statements and position papers prior to the completion of the discovery / disclosure process.

Alternative Dispute Resolution

Overview

4 The report prepared by the Rules Committee, Improving Access to Civil Justice (the **Report**) did not focus on alternative dispute resolution (**ADR**) and the role it might play in improving access to justice.

5 The majority of civil disputes in New Zealand are resolved by mediation. Exact figures are not available but research conducted by Dr Grant Morris in 2019 suggested that around 1,000 commercial mediations are held every year.[1] When this figure is compared to the approximately 1800 to 2000 originating applications in the High Court in any given year,[2] the role mediation plays is clearly significant.

6 The Report noted that 'litigation culture needs to change'. We strongly agree, and consider that mediation could be part of the solution.

7 How this might be achieved was discussed in a paper we presented to the Arbitrators' and Mediators' Institute of New Zealand and the Bar Association in 2023.[3] In our paper, we proposed the following:

a The case management conference memorandum (Schedule 5) be amended to include further prompts to help the parties consider alternative dispute resolution (i.e. is this matter suitable for alternative dispute resolution? If not why not?, what forms of alternative dispute resolution have

[1] Grant Morris "Mediators resolve 80 percent of disputes (December 2019).
[2] Annual Statistics – High Court.
[3] Hayden Wilson and Madison Dobie "Does compromise, compromise justice? The Role of Mediation in Access to Justice".

been considered?, if alternative dispute resolution is not appropriate now, what needs to occur to facilitate it?).

b Amend r 9.44 of the High Court Rules to create a presumption that there will be an expert conferral facilitated by an independent facilitator and the experts will prepare a joint report in a standardised form set out in a new Schedule 4A.

c The use of what we termed 'Issue Specific Mediation' where the parties would not attempt to resolve the underlying dispute but would aim to agree on preliminary matters which could include an agreed statement of facts, an agreed list of issues, and/or matters to streamline discovery.

8 Ultimately, these proposed changes were targeted at amalgamating the ADR process and the Court process. It need not be a choice of mediation vs litigation, there are significant opportunities to utilise mediation as a tool to streamline litigation.

9 We are encouraged by the Draft Amendments, which seem to be aimed at addressing some of the matters we raised in our paper. We have addressed each of the main changes below.

Removal of the 'Case Management Conference' process

10 The Draft Amendments have removed the Case Management Conference (**CMC**) process, which has been replaced by the Judicial Issues Conference. The removal of the CMC process is a positive change. CMCs, as the Report acknowledges, have 'largely not operated as fully effective judicial issues conferences in the way contemplated'. This is possibly because of divergent views among the judiciary on how 'active' their role should be in encouraging settlement and driving the process. It is often the case that the CMC process, particularly the question of 'is this case suitable for alternative dispute resolution', is treated as nothing more than a tick box exercise.

11 This misses a significant opportunity for early resolution (or at the very least early streamlining of issues). We expressed a concern in our paper that the Judicial Issues Conference would effectively become a CMC by another name. However, the particular amendments proposed go some way to ameliorate that concern (discussed below).

12 While the Draft Amendments provide the tool, the key determiner of the Judicial Issues Conference effectiveness is the attitude of the judiciary. This is ultimately a cultural issue rather than a legislative one. There are divergent views on how 'hands on' a judge should be and there are legitimate concerns about the role of the judge in encouraging settlement. However, the concerns that arise in the context of, for example, Judicial Settlement Conferences (i.e. undermining the perception of independence, the effect of the 'weight' of judicial authority in the settlement room, and so forth) should not arise in the context of a Judicial Issues Conference. The judge can quite legitimately pose the questions that prompt the parties to consider settlement without running afoul of their role as independent arbiter of disputes. To that end, the questions that are asked are critical as is the messaging to the judiciary about these conferences and how they should be conducted. We would encourage the use of practice notes and guidance for the judges on these conferences to avoid the Judicial Issues Conferences suffering the same fate as the CMC.

Judicial Issues Conference Agenda – Rule 7.5A

13 The items put forward in r 7.5A as forming part of the agenda are useful. Where the CMC only had one question (is this case suitable for ADR?), the Judicial Issues Conference asks:

> (b) whether any steps should be taken to consider settlement by means of mediation or otherwise;
>
> (c) whether there are steps that can be taken to minimise the matters in dispute through facilitations, mediations or otherwise;
>
> (d) the nature of any significant facts that are disputed between the parties.

(h) whether any expert evidence is to be relied upon and, if so, identifying the particular topics on which that evidence will be directed, timetabling of expert witness statements, setting a date for an experts conference, timetabling of joint expert statements, and the sequencing of the evidence at trial.

14 We recommend that agenda items (b) and (c) above be amended to read:

(b) whether any steps should be taken to settle the dispute by means of facilitation, mediation or otherwise, and, if not:

(i) why that is the case; and

(ii) whether there are any steps that can be taken to maximise the chances the dispute might be able to be settled by means of facilitation, mediation or otherwise prior to trial; and

(iii) whether any steps should be taken to minimise the matters in dispute through facilitation, mediation, or otherwise.

Whether any steps should be taken to consider settlement

15 Rule 7.5A(b) is phrased well because it implicitly encourages the parties to consider what steps could be taken to consider settlement, rather than simply asking whether the case is suitable for ADR. The former is more likely to encourage genuine consideration of what needs to happen to make mediation a possibility.

16 However, in our view, this question could benefit from an additional question, being 'if not, then why not?'. The need for parties to turn their minds to justifying their position that no steps should be taken will encourage a deeper and more genuine consideration of the worthiness of mediation in the particular case. It is that second question that goes a long way to mitigate against the risk of a 'tick box' exercise.

Whether steps can be taken to minimise the issues in dispute / disputed facts

17 Rule 7.5A(c) and (d) are also positive developments because they appear to be targeting what we proposed above in our Issues Specific Mediation proposal. They direct the parties to consider what are the significant facts disputed between the parties, effectively what is the 'crux' of the issue? Rule 7.5A(c) appears to implicitly encourage the parties to consider narrowing the issues through something like the Issues Specific Mediation we proposed.

18 We would prefer to see this made slightly more express, for example, amending (d) to read:

an agreed list of significant facts that are disputed between the parties.

19 There should be no reason that the parties cannot, when directed appropriately, agree a list of significant facts in dispute. This could either be agreed in advance, or agreed at the Judicial Issues Conference.

Expert witnesses

20 We are encouraged to see that 7.5A(h) implicitly presumes that an expert conference will take place, i.e. it does not give the parties the option of whether to hold one, the assumption is that it will be set down for a particular date. This is in line with the suggestion in our paper. We agree that such a presumption is appropriate.

21 We would reiterate, however, two of our suggestions that have not been incorporated:

a provision for an independent facilitator to be used in the experts conference; and,

b the use of a standard form joint expert's report.

22 The suggestions would not necessarily require a specific amendment to the High Court Rules.

23 For example, the judges could suggest the use of such facilitators and underline their benefit to the parties. We have seen in the Christchurch earthquake context (particularly in the New Zealand Claims Resolution Service) that facilitators are particularly useful in helping experts evaluate their own conclusions and engage in productive discussions that do not devolve into overly positional exchanges. Facilitators help experts to focus on the key issues and the focus is less so on encouraging one expert to abandon their position and adopt the other expert's view, it is instead on identifying **why** the experts disagree. Where experts are left to their own devices, this nuance is not always captured.

24 Even where a facilitator is not used, the use of a standard form joint report provides an equally useful 'checklist' for the experts to keep them on track in their discussions and to ensure the parties have a deliverable that is useful for their purposes. We would encourage the Rules Committee to consider whether these two suggestions could be incorporated into the Judicial Issues Conference, whether by way of further amendments or by way of cultural practice.

Use of position papers

25 Rule 7.5B also requires that the parties prepare position papers which may not exceed 10 pages.

26 This change is, in our view, one of the key things that is likely to result in the Judicial Issues Conference being used more meaningfully than the CMC and we are supportive of such a change. This will encourage the parties to genuinely consider the strengths and weaknesses of their case and put pen to paper at an early stage.

27 The length requirement is critical. Without parameters on length, parties will often use this as an opportunity to present their full submissions which is not helpful in this forum. We believe this early preparation of position papers, even where the parties are not yet considering mediation, will have a significant impact on facilitating the early resolution of disputes.

28 On the whole, we are supportive of the changes put forward by the Rules Committee with respect to the use of alternative dispute resolution and we see this as a step in the right direction towards the further amalgamation of alternative dispute resolution and the court process.

Initial Disclosure and Discovery

29 On balance, we consider that the proposed amendments to initial disclosure and discovery are significant and positive.

30 The Draft Amendments would replace the rules relating to standard and tailored discovery with:

a more extensive initial disclosure under rule 8.4, including a requirement to disclose known adverse documents;

b a requirement to disclose copies of any documents referred to in a witness statement or the draft chronology (that were not disclosed in initial disclosure), which must be served by each party prior to the Judicial Issues Conference; and,

c a general rule enabling further disclosure of specified documents at the request of the parties or by order of the Judge, with the matter being an agenda item for the Judicial Issues Conference.

31 The importance of discovery / disclosure to determining the outcome of the proceeding depends on the nature and subject matter of the proceeding. In some cases, the relevant documents will already be possession of the parties. In other cases, the discovery / disclosure process is critical, and it may be difficult to truly understand the case before discovery / disclosure is completed.

32 As noted above, we consider it beneficial to require the parties and their respective counsel to genuinely consider the strengths and weaknesses of their case and put pen to paper at an earlier

stage of the proceedings. Similarly, we consider it beneficial to require the parties and their counsel to identify truly relevant documents prior to or early in the proceedings.

33 It is good that there is no requirement for expert reports to be served prior to completion of disclosure. Sometimes experts drive requests for further disclosure on the basis that certain documents / data are required before they can provide their opinion. In such cases, the Draft Amendments allow a Judge to build time into the directions timetable for further disclosure prior to exchange of expert reports.

34 Careful consideration needs to be given to whether it is right to require the parties to serve factual witness statements and position papers prior to the completion of the discovery / disclosure process. Consider the situation where a party does not identify / disclose relevant documents prior to the time for serving witness statements and position papers. Those documents are subsequently disclosed, either voluntarily or following a contested interlocutory application for further disclosure. Review of those documents may be necessary before a party's expert can provide their substantive opinion. Consequently, one or both of the parties may adopt a position in the witness statements and/or position papers that becomes obsolete and/or inconsistent with the position adopted at the trial or hearing, once both parties and their experts have the benefit of all relevant information.

35 We consider this to be less of an issue with respect to the requirement to serve factual witness statements prior to completion of disclosure / discovery. Factual witness statements should not generally need to address documents that are not within their own party's possession and control. If a party considers it necessary for a factual witness to address a document that is disclosed late, then leave can be sought for further time under rule 7.4(7).

36 The risk of preparing a position paper that is later contradicted by further disclosure could be minimised by a party identifying early the gaps in disclosure and drafting the position paper with those limitations in mind (although this would limit the intended benefit of preparing position papers prior to the Judicial Issues Conference). Alternatively, the concerned party could seek alternative directions to those provided in rule 7.4, pursuant to rule 7.4(7).

37 On balance, we consider that the Draft Amendments strike the right balance.

Hayden Willson, Chair
Dentons New Zealand | Global Vice Chair, Dentons

Madison Dobie
Senior Associate

Jeremy Bell-Connell
Senior Associate

Mothla Majeed
Senior Associate

Submissions of Grace Haden

1. In general, our laws work but the one thing that is missing is accountability to the rule of law in particular by lawyers
2. Strategy plays a big part in civil proceedings, the experience which I have had with civil prosecution is
    a. the lack of evidence to verify the allegations
    b. creation of false documents
    c. withholding vital documents
    d. tactics to avoid compliance with the rules
    e. non transparent communications
    f. strategy to force up costs for a party to take them out of the game.
    g. Lawyers not being held accountable to the rule of law.
3. Civil proceedings are also used to buy time so that criminal proceedings are avoided and fall out of time due to limitations
4. They are also used for censorship such as harassment and defamation . and simply for bullying
5. I have seen the civil jurisdiction used to prevent criminal proceedings by attacking the whistleblower first, the objective is bankruptcy

the lack of evidence to verify the allegations

6. A statement of claim which is not supported by enough evidence for a prima facie claim has to have the ability to be rejected for filing and a provision similar to that of section 26 of the criminal procedure act should be included .
7. If a defendant responds to a statement of claim and presents a defence by pointing out the fact that the claim Is not provable then the plaintiff has the ability to amend the claim to consider, the defence so as to negate it
8. Case in point a complaint was made to a third party for defamation , I presented evidence of truth of the statements which included an LCRO decision

and a law Society decision . false documents were produced to challenge the true statements.

creation of false documents

9. The plaintiff a lawyer had an officer of the law Society produce two letters to nullify these documents and thereby allege defamation which succeeded in court based on false documents netting here $75,000 in the civil jurisdiction this would be a criminal offence

10. N other proceedings I have seen trust documents produced and despite the fact that the court sees two conflicting versions the court does not question the veracity.

withholding vital documents

11. The law society wrote to the plaintiff some 10 months after the documents were created and advised her that the letters were incorrect, the plaintiff continued to use the documents and withheld this vital document from disclosure for 2 more years

tactics to avoid compliance with the rules

12. I note that there is a requirement for cooperation , this requirement is overcome by false allegations of harassment .

13. When I pointed out to the plaintiff that she had provided a document in disclosure which proved my defence of truth she alleged Harassment and avoided settlement conference.

14. The party alleging harassment does so to prevent communication or the provision of documents which point out the flaws in that parties case.

15. A request is made to the court for no correspondence to be by email between the parties making it difficult to provide documentation and incurring a postage and printing cost.

16. This also creates delay into the proceedings, and I have even seen documents sent by track and trace go missing.

17. Documents were sent by plaintiff which are

    a. only printed on one side with all the side two missing.

    b. the documents sent to the other party are not the same as the documents sent to court.

    c. pages missing and out of order

    d. Not numbered

18. To uncover documents for my defence I used the privacy act and requested documents from the law Society , I was provided with highly redacted documents but through one email managed to locate a third party and uncovered the vital documents which had been deliberately withheld.

19. This document proved conclusively the falsehoods in the original statement of claim

20. The plaintiff in anticipation of my search for evidence had filed harassment proceedings . as soon as I uncovered the vital withheld documents the court issued a restraining order without a hearing . this was eventually overturned but not until it had ben used for police charges alleging that I had breached it due to serving documents by email during lock down.

21. At the high court appeal the other party provided the court with a bundle of documents but failed to provide me with one and she did not contribute to a common bundle , my bundle seemingly disappeared .

Perjury

22. The vital document which showed that the documents which the claim relied on was l not disclosed by the plaintiff for a further 18 months .

23. She had affirmed the original statement of claim as true just three months after being told that the documents that the claim relied on were false.

24. A request for help from the courts fell on deaf ears and the police refused to charge the plaintiff due to the claims being harassment and defamation.

non transparent communications

25. I was to find that the plaintiff had been communicating with the court by email casting all sorts of aspersions on my character to the extent that the judge who had suggested to her that she take harassment proceedings was the one who took charge of the file and issued two restraining orders without a hearing.

strategy to force up costs for a party to take them out of the game.

26. The matters were kept in court and there are many instances in the proceedings which suggest that the court had a bias in favour of the lawyer who was self-represented.
27. I had to come up with security for costs which ties up some 5,000 for two years before it was refunded this is a sizable chunk on a pension .
28. I have in the past had my defence stuck out for not being able to pay a massive sum due in a very short period of time
29. The statement of claim was simply proved by affirming it as true .

Lawyers not being held accountable to the rule of law.

30. The complaints to the law society about this lawyer's conduct was condoned and the complaints became more allegations of " harassment "
31. It appears that it is impossible to have lawyers held accountable to the rule of law and judges accountable to the rules of fairness.
32. In particular judges who are returning to the bench in part time capacity at the end of their careers who do not hesitate to act without jurisdiction and who appear to have colluded with the plaintiff .

Suggestions

1. legislation to deter false , vexatious or malicious claims. E.g. penalties referral to the police for investigation under criminal legislation
2. liaison with police for perjury
3. There appears to be no ' safeguard " equivalent to section 26 criminal procedure act

a. If claim is not support by sufficient evidence to prove the claim the defendant should be able to make an application to the court for review to have the claim assessed without providing a defence first

    i. This is so that the plaintiff cannot amend their claim based on knowing what the defence has so as to overcome that obstacle.

b. Where action is taken through a legal representative the legal representative must certify that the claim is supported by evidence

4. There is very much an issue with this if both parties are self-represented . There needs to some safeguard if the plaintiff refuses to negotiate settlement or attempt resolution due to the fact that the action is malicious and or strategic

5. Penalties for noncompliance with the rules , misleading the court and in the case of lawyers lack of compliance with the rule of law.

6. All documents are kept on electronic files compiled by the registrar, documents in PDF form are sent to the registrar for filing and each is added on to the respective parties court file .

    a. This ensures that all parties have the same documents, and it prevents repetition of production of documents

    b. The documents are indexed and accessed through hyperlinks

    c. The index forms a chronology

    d. The pdf documents are word searchable

    e. Noting on this file can be amended or removed

    f. This file travels through successive courts to make the documents available for higher courts and are each refenced by their own unique number or hyperlink

    g. This file is not accessible to third parties and requires a log in to access it .

7. All communications are through the registrar and a separate file is kept for email communications so that all parties can see what is being communicated

Grace Haden

LeeSalmonLong
Barristers and Solicitors

OUR REF Michael Heard / Bella Rollinson
DDI 64 9 912 7117 / 64 9 912 7102
EMAIL michael.heard@lsl.co.nz / bella.rollinson@lsl.co.nz

LEVEL 34 VERO CENTRE 48 SHORTLAND STREET
PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND
TELEPHONE 64 9 912 7100

6 September 2024

Clerk to the Rules Committee

By email: georgia.barclay@courts.govt.nz /
rulescommittee@justice.govt.nz

Submission on Rules Committee's Improving Access to Civil Justice project: proposed amendments and flowchart

Tēnā koe,

While did not submit on the proposed changes to the High Court Rules we have some brief comments on the proposed amendments and the associated flowchart.

In case those are of assistance they are set out in in the **schedule** to this letter.

Kind regards

[sgd:Michael Heard/Bella Rollinson]

Michael Heard / Bella Rollinson
Partner / Solicitor

Schedule – Submissions on amendments and flow chart

Reference	Comment
Rule 7.4	The process for exchanging witness statements, draft chronologies and other documents not previously disclosed is clear to follow. It would be useful to clarify that parties are not required to serve documents that were served as part of another's party's exchange, to avoid duplication of key documents. The proposed rule 7.4(1)(a) usefully requires parties to notify of key interlocutory applications early in the proceedings. Adding and removing parties is identified as one of these applications in rule 7.4(5). This application is, in practice, often made informally at case management hearings and resolved at the same time, which is a desirable and efficient practice where appropriate. Rules 7.4(7) and 7.5A(f) are well suited to allow for this practice to continue. However, rule 7.33(1) appears to require the Registrar to set down an in-person hearing and counsel to make a further application under 7.34(2) to hear it by an alternative mode, where parties are in agreement. This may not always be appropriate where the application to add or remove parties is non-contentious.
Rule 8.4	Documents may be known to exist and therefore referred to in the pleading but be out of the party's control (e.g., in the sole control of the other party). Similarly, adverse documents may be known to exist that are outside a party's control. Present rule 8.4(2) would require a certificate to be provided explaining why documents referred to in a pleading cannot be disclosed. The proposed rule 8.4(1)(b) qualifies the obligation to provide principal documents to those documents "in the party's control". That is a useful qualification that could be adopted for proposed rules 8.1(a) and (c), along with a requirement that the affidavit of initial disclosure required by rule 8.15 include a list of documents that are outside a party's control but that otherwise meet the requirements of rules 8.4(1)(a) – (c). There is no definition of "principal document" in the present rules or the proposed rules. The phrase has not attracted much attention in light of the expectation that fuller discovery of documents would be made later (see *Panckhurst v Cullinane* [2016] NZHC 2774). In the proposed rules, initial disclosure has a more significant role and providing a definition for "principal document" may be more advantageous than the definition arising from practice or with reference to the limited existing case law. As with Rule 7.4, it would be useful to clarify that parties are not required to disclose documents that have already been disclosed as part of another party's pleadings.
Rule 8.18	The proposed rules include at proposed rule 8.4(1A) and (1B) a useful definition of knowledge for the purposes of initial disclosure obligations. Proposed rule 8.18 defines continuing disclosure obligations by reference to documents parties "become aware of." If the definition of "Knowledge" in proposed rule 8.4(1B) were to apply to rule 8.18 then the words "become aware of" could be replaced with "that comes into their knowledge".

	It would be useful to clarify whether there is an obligation to disclose that the document exists or may exist when it is out of the party's control.
Rule 9.2(2)	Given the continuous disclosure obligation in proposed rule 8.18, it would be useful to clarify at what point rule 9.2(2) is engaged. For example, whether it applies to documents disclosed after exchange of witness statements under proposed rule 9.1A, or to any document not previously disclosed under any of the disclosure rules including proposed rule 8.18.
Rule 9.7(4)(b)(iii)	It is appropriate that a party provide reasons, if known, for a witness not providing a statement. Sometimes a party will not know those reasons, and the rule might usefully reflect that rather than risk a party speculating. Wording such as, "if the intended witness has given a reason for not providing a witness statement, what that reason was," may be appropriate.
Flowchart generally	The flowchart is helpful. While there are obviously potential complications in including it as a formal part of the Rules it is a useful guide to their intended effect and could be included as a companion publication on their promulgation, or a in a non-binding schedule to the High Court Rules.
Flowchart: 7.4(1)(c) and (d)	These rules state that *documents referred to in the draft chronology* must be served; the flowchart refers to "documents referred to in evidence" which does not make clear that documents referred to in the chronology must be disclosed at this time. The flowchart could be clarified to state this includes documents referred to in the draft chronology.
Flowchart: 7.4(1)(e)	The flowchart could usefully show subrule (e), relating to the filing of evidence responsive to an affirmative defence or counterclaim.

4 September 2024

Georgia Barclay
Clerk to the Rules Committee
High Court of New Zealand | Te Kōti Matua o Aotearoa

By Email: georgia.barclay@courts.govt.nz

Tēnā koe Georgia

Improving Access to Civil Justice - Recommended changes to the High Court Rules 2016

Thank you for the opportunity to comment on the implementation of the recommended amendments to the High Court Rules.

We consider the draft rules accord with the policy objectives of the changes. The Association supports the important aim of the new rules and would welcome the opportunity to help in their introduction

Nāku noa, nā

Paul David KC
President-Elect
T: +64 21 421 423
E: paul@pauldavid.co.nz

Cc: T. Mijatov, Y. Mortimer-Wang, Co-Chairs, Advocacy Committee

12 September 2024

Georgia Barclay
Clerk to the Rules Committee | te Komiti mō ngā Tikanga Kooti

By email: RulesCommittee@justice.govt.nz

Feedback on draft High Court (Improved Access to Civil Justice) Amendment Rules

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the draft High Court (Improved Access to Civil Justice) Amendment Rules (**draft Rules**), which amend the High Court Rules 2016 (**principal Rules**).

1.2 In providing this feedback, the Law Society acknowledges the significant work undertaken by the Rules Committee since 2019, which has culminated in its *Improving Access to Civil Justice* report,[1] and these proposed amendments to the principal Rules.

1.3 This submission has been prepared with feedback from members of the Law Society's Civil Litigation & Tribunals Committee, as well as the wider profession:

(a) Section 2 of the submission provides feedback regarding necessary amendments to the costs regime;

(b) Section 3 sets out the Law Society's views on using costs consequences as incentives for completing relevant steps in a proceeding in a timely manner;

(c) Section 4 addresses the desirability of providing timeframes for completing steps in the new process, which are triggered by the completion of a previous step; and

(d) The Appendix contains feedback on the drafting of specific rules.

2 Amendments to the costs regime

2.1 The draft Rules will not amend the costs regime in order to give effect to the proposed changes,[2] and in particular, the significantly different 'weighting' of where time will need to be spent by counsel in order to act in accordance with the proposed scheme.

2.2 In weighting the proposed amendments, we presume the allocation of time will need to be significantly more front-loaded than it is at present, and recognise that the precise

1 Rules Committee | te Komiti mō ngā Tikanga Kooti *Improving Access to Civil Justice* (November 2022).

2 The minutes of the Rules Committee's meeting of 27 November 2023 note (at page 4) the Committee agreed it would be "appropriate to review the costs schedules to reflect the proposed changes".

weighting of different steps will be a matter of some detail, on which reasonable minds can differ.

2.3 We invite the Rules Committee to progress any amendments to the costs regime in advance of the proposed reforms coming into force, so parties receive an appropriate contribution to the costs incurred in complying with the new front-loaded obligations.

3 Consequences for non-compliance

3.1 Some members of the profession believe it could be desirable for the Rules Committee to consider whether costs consequences should be used to incentivise parties to complete required steps in the proceeding in a timely manner as expected under the amendments, whether by amending rule 9.5A(2)(c) (which produces costs consequence for objecting to the admissibility of documents in a manner contrary to the objectives of the amendments), rule 7.48(2) (enforcement of interlocutory orders) or otherwise. Others thought it unnecessary as these consequences are already provided by existing case law or the general rules on costs in Part 14.

3.2 It appears desirable for the Rules Committee to consider the extent to which reference to costs consequences is considered necessary or helpful for the purposes of promoting changes in behaviour by parties and counsel, and giving judges the confidence to take a more robust approach to enforcing the ethos of the new scheme.

3.3 In addition to costs consequences, the Rules Committee could also consider amending rule 7.48(2) to explicitly allow for the making of 'unless orders', which would allow the Court to strike out a party's claim or defence, or disallow other steps in the litigation, unless the party complies with an order by a given date. This would provide an additional mechanism for enforcing, and incentivising parties to comply with, the new Rules. While such orders would necessarily be a last resort, it would formalise the position in *SM v LFDB*.[3]

4 Timeframes for completing steps in the new process

4.1 The draft Rules set out some timeframes for the completion of particular steps in the new process following completion of the Judicial Issues Conference (**JIC**), by working backwards from the trial or hearing date (with steps prior to the JIC provided for in the new rule 7.4, working forward from the date of issue of the statement of claim). As a result, there are likely to be gaps in the new process which would allow (as happens now) timetables to be extended at the request of the parties, and erode any time savings which could be gained by the new Rules.

4.2 We would recommend all steps after the JIC also work forward, and for the draft Rules to include presumptive timeframes for all steps after the JIC (noting, for instance, there is currently no default expectation as to when expert reports would be filed).

4.3 The Rules Committee could therefore consider amending the Rules by extending the timeframes in new rule 7.4 to each step of the new process after the JIC, with each step being triggered by the completion of a previous step in the process. This approach would:

3 *SM v LFDB* [2014] 3 NZLR 494.

(a) enable parties to more easily demonstrate whether any delays were unreasonably caused by the other party to the proceeding;

(b) allow for those delays to be factored into costs awards (by reducing costs for the successful party, or increasing them for the unsuccessful party);

(c) encourage the progression of cases before a hearing date is allocated, and avoid cases from falling into abeyance in that time; and

(d) increase the likelihood of cases settling before the hearing date, or becoming ready to be heard if a backup fixture becomes available.

4.4 If the draft Rules are to be revised as recommended, the Registry could also be empowered to update relevant timeframes as the case continues, so parties have the opportunity to get back on track even where exceptions are made to certain timeframes.

5 Next steps

5.1 We would be happy to answer any questions, or to discuss this feedback further. Please feel free to get in touch with us via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā

David Campbell
Vice-President

Appendix – feedback on draft Rules

Rule	Comments
New rule 1.2	New rule 1.2 states "the overriding objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application by proportionate means". The "just, speedy, and inexpensive" formula risks setting up three conflicting objectives, and in the event of any conflict between the three, justice must prevail.[4] 'Justice' has been interpreted as avoiding the possibility of error by ensuring every procedural avenue is available to the parties to put all relevant material before the trial court.[5] This interpretation creates tension between 'justice' as a matter of maximalism in litigation, and 'speed' and 'inexpensiveness' as favouring minimalism. The reference in new rule 1.2 to achieving these three objectives 'by proportionate means' does not negate that view. It in fact tends to suggest there is such a tension, with proportionality being how the balance is struck. It would be more appropriate, for the purpose of giving effect to the spirit of these reforms, to view inexpensiveness and speediness (access to justice) as an ingredient of justice, together with facilitating the determination of claims according to law by a tribunal of fact seized of relevant evidence.[6] We therefore suggest amending new rule 1.2 to state "the overriding objective of these rules is to secure the just determination of any proceeding or interlocutory application by proportionate means, including by securing its speedy and inexpensive determination". This reformulation clarifies there is no tension between 'justice' and 'inexpensiveness' and 'speedy determination', but rather, that these are facets of enabling access to 'justice' that are – to a degree – in tension. While new rule 1.2(2) clarifies that the concept of justice should be read in this manner, a reframing of the overriding objective in rule 1.2(1), which more clearly spells out the change in ethos sought by these reforms, and which more expressly dovetails with rule 1.2(2) is desirable (particularly given the Rules now contain more extensive references to the "overriding objective in rule 1.2").

4 See Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters, New Zealand) at HR1.2.02.
5 *McGechan on Procedure* at HR1.2.02, citing *Halsbury's Laws of England* (4th ed, 1998) vol 37 Civil Ligation at [3].
6 This was a view present in earlier work by the Rules Committee on these Access to Justice reforms: see Clerk to the Rules Committee "Alternative Models of Civil Justice" (Access to Justice Working Group, Wellington, 29 August 2019) at [3]-[17].

Rule	Comments
Revocation of rule 7.1AA	The revocation of rule 7.1AA, which provides a useful statement of what case management does and does not apply to, could be seen as a backwards step in promoting the accessibility of the Rules (particularly for self-represented litigants). It could also lead to arguments by implication that these reforms intended for case management under Part 7 of the Rules to apply more broadly than it does presently. An amendment to rule 7.1AA to reflect the changes to the Rules is therefore preferable from an accessibility perspective.
New rules 7.4(3) and 7.5B(6)	New rules 7.4(3) and 7.5B(6) state that if there are "1 or more third or other parties" involved in a proceeding, the references to the "defendant" in subclause (1) of those rules apply to each additional party. However, it is unclear whether the timeframes in new rules 7.4(1) and 7.5B(1) would be suitable for third or other party claimants, as well as parties to representative proceedings. For example, a third party would need to see a defendant's pleadings and evidence before filing its own, and a third party plaintiff would want to see the pleadings and evidence of the primary plaintiff before filing theirs. We therefore invite the Rules Committee to give further thought to whether these timeframes should be revised in relation to third or other party claimants, and for representative proceedings.
New rule 7.4(5)	New rule 7.4 allows parties to apply for any of the matters listed in subclause (5) between the filing of pleadings and the scheduling of the JIC. However, we note the matters in subclause (5) would typically need to be determined before a statement of defence (**SOD**) is filed (for example, a Protest to Jurisdiction would typically be filed in lieu of a SOD, rather than after the SOD is filed). We therefore recommend amending new rule 7.4 to allow for the matters listed in subclause (5) to be determined before requiring a SOD to be filed.
New rule 7.5(6)	The Law Society supports the ability to have a JIC at the parties' request, or if the Court considers it desirable (as allowed under rule 7.2), and considers it would be preferable to amend rule 7.5(6) to ensure it is more closely aligned with existing rules 7.2(1)-(2).

Rule	Comments
New rule 7.5A	The Law Society supports the requirement in new rule 7.5A for the Court and the parties to consider settlement, or to minimise the issues in dispute through facilitation or mediation, noting the United Kingdom has also recently taken a significant step towards judicial encouragement of mediation and other forms of out-of-court dispute resolution.[7] However, it is unclear why the language in rules 7.5A(b) and (c) is inconsistent. We suggest amending these rules as follows: (b) whether any steps should be taken to settle the dispute ~~consider settlement~~ by means of facilitation, mediation or otherwise: (c) whether ~~there are~~ any steps ~~that can~~ should be taken to minimise the matters in dispute through facilitation, mediation, or otherwise:
Rule 8.4	We suggest amending the draft Rules in order to provide a mechanism for the Court to resolve challenges to claims to privilege or confidentiality in the context of initial disclosure, which would otherwise be dealt with under the Court's inherent jurisdiction.[8] Such an amendment could build in adequate time to resolve such challenges before witness statements are filed, and allow for matters to be heard on the papers by default. A document similar to a Scott Schedule could be used to reference any evidential disputes.
New rule 8.4(1A)	It would be helpful to clarify whether an objective test applies when determining whether a document is a "known adverse document", in order to capture documents on which reasonable minds may differ.
New rule 8.4(1C)	We understand the Rules Committee has previously considered whether the definition of "known adverse documents" should include a sentence which clarifies a party "is not required to engage in a general search for documentation". The Rules Committee ultimately decided to exclude this phrase from the definition because of concerns such a change will impose quasi-discovery obligations on parties at the beginning of a proceeding.[9] The Law Society nevertheless queries

7 These reforms are discussed in: Tony Allen "Amending the CPR to Accommodate the Impact of Churchill" (8 August 2024), available at https://learn.cedr.com/blogs/amending-the-cpr-to-accomodate-the-impact-of-churchill.

8 See *McGechan on Procedure* at HR8.4.04 and *Drive NZ Classic v LVVTA* [2020] NZHC 396, (2020) 25 PRNZ 289.

9 See the minutes of the Rules Committee's meeting of 9 October 2023, at pages 6-7.

Rule	Comments
	whether a qualification along these lines could assist in reducing the time and cost associated with disclosure. Without such a qualification, there is a risk that parties may revert to current discovery practices, contrary to the intention of the new scheme.
New rule 8.4A	As currently drafted, there is a likelihood that rules 8.4(1A)-(1C) and 8.4A(2) (and in particular, the reference to "specific documents") could completely foreclose wider searches for documents which are not likely to be within the knowledge of either party (as defined in the new rule 8.4). In this regard, we note the current discovery regime plays an important role in cases (such as complex fraud cases) where the plaintiff is required to prove an omission or absence of something, by helping to create a full picture of the relevant dealings between the parties. We therefore query whether rule 8.4A(4) should be amended to clarify that, despite the wording of rule 8.4A(2), the Judge may order further disclosure of any particular documents, including a category of documents, where it is necessary to enable the fair disposal of the issues before the Court. Such an exception could help ensure the Rules remain appropriate in the small category of cases (such as fraud cases) where it is necessary to cast a reasonably wide net. However, in providing for such an exception, a careful balance would need to be struck in order to avoid further disclosure orders becoming the norm, rather than the exception.
New rule 8.4A(2)	It would be helpful to clarify whether the 'good reason to believe' test in new rule 8.4A(2) is intended to be separate from the 'grounds for believing' test in rule 8.19.
New rule 8.15	The Law Society agrees with new rule 8.15. However, it is worth noting the early filing of an affidavit for disclosure will impose a significant burden upfront – this may prove to be challenging in cases filed under urgency (such as cases with pending limitation deadlines).
-	Consideration should be given to the interaction between the reformed disclosure regime and interrogatories. In the Law Society's view, the Rules should discourage the use of interrogatories as a means of obtaining the disclosure of documents or their contents in a more directed manner (as is done under the current Rules).

Rule	Comments
	The Rules Committee could consider amending the rules regarding interrogatories to: (a) Clarify that an interrogatory in the nature of a request for further disclosure is to be treated as a request for further disclosure, and need not be answered; or (b) To prohibit the use of interrogatories to obtain statements as to the contents of documents, and to clarify there is no requirement to respond to such interrogatories on the basis that they are vexatious or oppressive in terms of rule 8.40(1)(b).[10]
New rule 8.15(2)(d)	New rule 8.15(2)(d) should enable bulk listing by referring to a "class of document". This will allow parties to bulk list, for example, privileged legal files, which will significantly reduce costs.
New rule 8.15	It is important to have common numbering conventions in view of the need to file chronologies early in the proceeding. It would be helpful for the Rules to provide guidance about listing documents which clarifies, for example, whether the numbering conventions in the listing and exchange protocol of the High Court Rules apply,[11] or whether a convention similar to the Senior Courts Civil Electronic Document Protocol 2019 should be applied.[12]
New rule 9.5A(2)(a)	We presume new rule 9.5A(2)(a) seeks to address evidence which may be subject to some dispute as to its admissibility, but is not clearly inadmissible (rather than to suggest that evidence contrary to the Evidence Act 2006 could be admitted). If so, rule 9.5A(2)(a) could be reframed as requiring the parties to give serious thought to the use of section 9 of the Evidence Act as a means of admitting evidence and avoiding admissibility arguments, while reserving the right to submit on weight. The Rules Committee could also consider whether the Rules should assume some evidential objections as a trade-off for the efficiency gains in having a common bundle. If so, we would recommend a streamlined process for dealing with

10 We acknowledge this is already confirmed in case law (*Hirschfield v Clarke* (1856) 11 Exch 712), but we recommend expressly clarifying this point in the Rules in order to improve the clarity of the Rules.

11 In Schedule 9 of the High Court Rules 2016.

12 Senior Courts Civil Electronic Document Protocol 2019 (16 September 2021). While this Protocol would not apply to the requirements of the new scheme in its current form, we consider it provides a useful starting point.

Rule	Comments
	objections, for instance, by having all evidential arguments heard together and requiring the parties use a document akin to a Scott Schedule to list each objection with accompanying reasons/responses. Time should also be allocated to address any such objections before the hearing.
New rule 9.15	It could be useful to clarify the principles the Court should bear in mind when providing guidance under new rule 9.15 (which should include the overriding objective of the Rules, and the narrowing of the issues in dispute through the JIC, briefing, and chronology procedures).
New rule 9.36AAA(1)	New rule 9.36AAA(1) provides that a party may call only one expert witness on each particular topic identified at the conference. We assume this rule seeks to avoid a 'battle of the experts' (particularly where well-resourced parties are able to call multiple exert witnesses against a party with less resources). We nevertheless query whether expert witnesses should be limited by discipline, rather than by topic, as some cases could involve more than one discipline of experts opining on a particular topic, depending on how the 'topic' is formulated.
New rule 9.44	New rule 9.44 provides the Court "must" direct expert witnesses to confer (unless it considers the overriding objective in rule 1.2 is best achieved by a different direction). We suggest amending this draft Rule to provide the Court "may" make such a direction, so it is not required to do so in circumstances where conferral is unlikely to be helpful. It may be best to assess whether conferral could be helpful on a case-by-case basis, without a presumption in favour of requiring conferral.
New rule 18.4A	It is unclear why Part 18 proceedings should not be subject to case management in accordance with the proposed amendments to Part 7 (with necessary modifications to reflect the particular characteristics of Part 18 proceedings).[13] We acknowledge some types of Part 18 proceedings are closer to originating applications (i.e., in terms of the issues being well-defined and the proceeding being susceptible to summary case management). However, the fact that Part 18 applies to a wide range of cases, with a variety of procedural requirements, means it is difficult to assume a significantly different procedure should apply by default. Given Part 18 proceedings will, under these reforms, look similar to other proceedings

[13] We note the materials referred to in the 9 August 2024 letter from the Clerk to the Rules Committee do not specifically deal with Part 18.

Rule	Comments
	(given the emphasis on early identification of issues, and de-emphasis on oral evidence present in Part 18 proceedings), it could be argued that Part 18 proceedings should be treated in a similar manner to Part 5 proceedings. We invite the Rules Committee to give further thought to this point, and to consider whether Part 18 proceedings should in fact be subject to case management (via a JIC).
Schedule 1AA, new Part 2	Clause 3(2) of Schedule 1AA states the court may direct that 1 or more, or all, of the amendment rules apply in particular proceedings commenced before these new Rules come into force. We query whether this provision would then allow the Court to make such directions without the consent of the parties. In our view, there should be, at the very least, a clearer presumption in favour of the new rules applying only to cases filed after the commencement date. The Law Society is mindful parties may have commenced litigation (and may have budgeted and agreed on fee arrangements) on the assumption that one form of procedure applies. In such circumstances, the litigation strategies and any arrangements made by the parties could be undermined if the revised Rules are to apply partway through the proceeding. We do acknowledge this concern may not be so significant in practice – i.e., if a proceeding has commenced at the time the amendments come into force, it is unlikely the parties would suddenly be subject to the significant front-loading of obligations under the amendments. However, if there is to be an education campaign about the changes, and a lengthy lead in period, parties could be expected to make a choice about bringing their cases under the new or old procedure. It is also possible that some of the new duties arising from the amendments may not sit well with proceedings which are well-advanced at the date the amendments come into force. While Judges can be trusted to consider these issues sensibly and fairly, and the suggested wording directs attention to these considerations, a clearer presumptive steer is desirable. Thought should also be given to cases which are decided partly under a new costs regime, and partly under the existing costs regime. While costs should be decided based on the steps taken in the proceeding, it would be helpful to have more express guidance on this by way of transitional provisions.

Reflective Construction Law

30 August 2024

Clerk to the Rules Committee
2 Molesworth Street
Wellington

By email:
RulesCommittee@justice.govt.nz

Attention: Georgia Barclay, Clerk to the Rules Committee

Submission: Proposed changes in Access to Justice initiative

1 We are pleased to make this submission as part of the consultation being carried out by the Rules Committee on the proposed amendments to the High Court Rules 2016. We support the proposed amendments made by the Committee.

2 This submission provides specific comments, which are focussed on aspects that will help make the changes work in practice and to highlight practical considerations that should be addressed as part of implementing these changes. We submit on the following three areas of the proposal:

a. Rule 7.4 Standard directions prior to judicial issues conference for ordinary proceedings;

b. Rule 8.18 Continuing obligations; and

c. Details of the flowchart.

7.4 Standard directions prior to judicial issues conference for ordinary proceedings

3 We are concerned that the required timeframes for the plaintiff and the defendant to serve the documents described in r 7.4(c)(i) to (iii) may not be sufficient and will often be asked to be extended by parties.

4 We suggest a sub-clause should be included identifying the circumstances which justify when a party may apply to court to request an extension of time. This guidance would provide clarity in the process and expand on r 7.4(7), which allows a party to apply to the court to request alternative directions to those provided in r 7.4.

8.18 Continuing obligations

5 In practice, the requirement for a party to take reasonable steps to check for known adverse documents at initial disclosure per r 8.4(1C) may not allow all known adverse documents to be identified. We consider that adverse documents are also likely to be discovered at a later stage of the proceeding, such as when the defence is discovered, or when evidence is filed.

6 We suggest that it would be helpful to include a sub-clause in r 8.18 expressly identifying a continuing obligation on parties to take reasonable steps to check for adverse documents as the proceedings continue to develop. We consider that such obligation would complement the

continuing obligation for a party to disclose any adverse document they become aware of as described in r 8.18.

Details of the flowchart

7 We generally view the flowchart as being useful for outlining how the proposed rules operate in a proceeding. However, the flowchart does not contemplate at what stage a Judge may convene a settlement conference pursuant to r 7.79.

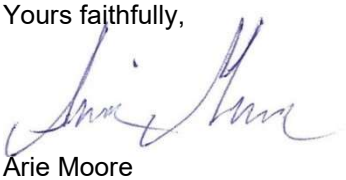
8 We suggest it would be helpful for the flowchart to detail where r 7.79 applies in light of the proposed amendments.

Conclusion

9 We would like to reiterate that we are generally supportive of the proposed amendments and consider the above suggestions could result in further improvements.

10 We would be happy to provide any further information or speak to our submission in person if that was useful.

Yours faithfully,



Arie Moore

Reflective Construction Law Limited
e: arie@reflectivelaw.co.nz
m: 027 457 9203

The Rules Committee
Te Komiti mō ngā Tikanga Kooti

Improving Access to Civil Justice

Submission by Simpson Grierson on the implementation of the proposed High Court (Improved Access to Civil Justice) Amendment Rules

6 September 2024

Introduction

1. Simpson Grierson welcomes the opportunity to make a further submission[1] to The Rules Committee | Te Komiti mō ngā Tikanga Kooti (**Committee**) on its Improving Access to Civil Justice project addressing the implementation of the proposed High Court (Improved Access to Civil Justice) Amendment Rules (**Proposed Amendments**).

2. We have considered the Proposed Amendments alongside the Committee's Drafting Instructions for changes to the High Court Rules dated 9 February 2024.

3. We are one of New Zealand's leading commercial law firms. We have a broad national litigation practice and act for clients on a wide range of disputes, including those involving breach of contract, company law, competition and regulatory issues, financial services, public law, insurance, construction, property, insolvency, media law and defamation, intellectual property, class actions and litigation funding, resource management and environment, product liability, securities enforcement and banking, privacy, trust law and tax. Our clients are a mix of corporate, government, charitable and international entities.

4. We remain in full support of improving access to civil justice within New Zealand. The ability of parties to enforce or defend their legal rights in our court system is fundamental, and inherently requires the system to be accessible to them.

5. We understand the Committee has reached its decision on the broad policy, and our submissions have therefore been limited to the implementation and details of the Proposed Amendments.

6. This submission represents the views of Simpson Grierson, and not those of any of our clients.

Nina Blomfield
Partner
+64 9 977 5111
nina.blomfield@simpsongrierson.com

Julia Learner
Litigation Projects Lawyer
+64 9 977 5371
Julia.learner@simpsongrierson.com

1 On 2 July 2021, Simpson Grierson made a submission on the Further Consultation Paper released by the Committee on 14 May 2021 in relation to its Improving Access to Civil Justice project.

Overriding objective

Reformulates the objective of the rules as set out in r 1.2, in a way that introduces proportionality as a guiding principle.

7. We support the introduction of proportionality as a guiding principle and its express inclusion in the overriding objective in r 1.2. We also agree with the Committee's decision not to incorporate the more detailed requirements of r 1.1 of the English and Welsh Civil Procedure Rules, which we consider may result in the rule becoming overly prescriptive.

8. Giving effect to this principle of proportionality will necessarily require the rules to be applied flexibly but in a way that still offers reasonable certainty to parties to litigation.

9. With respect to the proposed inclusion of r 1.2(2)(c) we acknowledge the need to share the court's resources fairly across the court's caseload. As with all aspects reflected in r 1.2, we anticipate each proceeding will require a careful balance between potentially competing factors to ensure its just, speedy, and inexpensive determination.

General duty of cooperation

Establishes a new rule requiring the parties and their solicitors and counsel to cooperate in relation to the procedural steps required for a proceeding.

10. We support the incorporation of a general duty of cooperation between parties, and their solicitors and counsel. We note that the Proposed Amendments place significant reliance on this duty to achieve more efficient outcomes.

11. In our experience, however, this level of cooperation is unfortunately not always readily found between parties, especially where parties are self-represented. Given the proposed removal of the current case management function, it is not clear how parties will be expected to seek assistance from the Court prior to the judicial issues conference if roadblocks arise, or in the event of material non-compliance with the rules. In particular, while it is proposed that r 7.48 is amended to address a situation where parties fail to cooperate under subpart 1 of part 7, or part 8, there is currently no express mechanism for parties to seek the Court's assistance in the event the duty of cooperation in r 1.2A is not complied with.

12. We therefore support the inclusion of appropriate avenues for parties to resolve roadblocks efficiently, including through judicial intervention.

Standard directions prior to judicial issues conference

Establishes standard directions to apply unless otherwise directed by the Court prior to the judicial issues conference and repeals most of the existing case management rules.

13. The new standard directions for ordinary proceedings proposed in r 7.4 will be pivotal to progressing matters in the High Court.

14. A number of steps are to be calculated by reference to the date of service of "the pleading by the defendant" or "the last pleading by a defendant". This appears straightforward to calculate in a proceeding involving a single statement of claim and statement of defence (and assuming any reply is filed on time). However, we query whether this wording may create ambiguity in proceedings involving counterclaims, crossclaims and/or amended pleadings filed after a statement of defence but before the documents required by r 7.4(1)(c).[2]

15. It is also unclear if there are any circumstances in which it would be permissible for the interlocutory applications identified in r 7.4(5) to be filed after the date contemplated in r 7.4(1)(a). For example, it may be that circumstances justifying an application for security for costs do not arise or become known to a defendant until sometime after that date. Or alternatively, it may only become apparent from further disclosure that a third party needs to be joined.

16. It may be the Committee's intention is for parties to seek alternative directions under r 7.4(7) in any of those circumstances, but even if that is the case it would still be helpful to have more clarity around the meaning of "the pleading by the defendant" or "the last pleading by a defendant".

17. Further, we assume the parties to a proceeding could agree between them to vary the standard directions proposed in r 7.4, and that they should file a memorandum of counsel to update the Court (or otherwise update the registry) in those circumstances.

18. We acknowledge and agree with the Committee's intention to address any consequential changes required to the costs schedules in due course.

19. Finally, improving access to justice necessarily requires legislation that is accessible to and easily understood by self-represented litigants. This is especially true given the significance of r 7.4. We recognise r 7.4 will now do much of the heavy lifting for case management and therefore necessarily includes a lot of technical detail. We therefore support any further steps that can be taken to simplify the drafting in r 7.4, including potentially using sub-headings or separate rules, and/or adding a flowchart in a practice direction to assist readers to understand the sequencing and timing requirements.

2 We note there is no proposal to alter the rules defining the close of pleadings date (rr 7.6(4), 7.6(4A), 7.7 and 7.77).

Initial and further disclosure

Expanding initial disclosure to encompass "known adverse documents" with any further discovery (now renamed disclosure) by agreement, or as ordered at the new judicial issues conference, and abolishing the existing rules for standard and tailored discovery as a consequence.

20. With respect to the changes to initial disclosure, and expanding this to include "all known adverse documents" and to file an affidavit for disclosure, we make the following comments:

    (a) Known adverse documents are defined as "documents known to a party" that, in effect, contain adverse information. However, where the party is not an individual, it is unclear whose knowledge will be relevant. For example, is it anyone within the entity, or is it any director or executive officer, or is it only the person providing the affidavit. It would be helpful to clarify this.

    (b) The current r 8.4 allows some flexibility around the timing of providing initial disclosure where "the circumstances make it impossible or impracticable to comply". The most obvious examples that might arise are where there is an imminent statutory limitation date or if urgent injunctive relief is being sought. The proposed new r 8.4 increases the disclosure requirements a party must meet when filing a pleading but does not offer a similar degree of flexibility around timing. We note there is provision to seek an alternative direction from the Court, although this may not always be practicable.

    (c) We assume that where a pleading is amended, the party amending its pleading would need to provide further initial disclosure (and a supplementary affidavit for disclosure) to the extent the change in pleading requires the disclosure of additional documents.

21. With respect to the proposals for further disclosure, they contemplate the parties attempting to agree the parameters for any further disclosure and otherwise the Court may make directions for it. We make the following observations (noting that to the extent any of our assumptions are incorrect it would be helpful to clarify these points in the Proposed Amendments):

    (a) We assume the intention is for requests for further disclosure to be made at any stage from the time the proceeding is filed (and that the existing mechanism allowing applications for pre-commencement disclosure will remain).

    (b) In practice, the process of further disclosure is likely to be iterative, including because the primary disclosure is occurring prior to defences (including affirmative defences) being pleaded. For that reason, there may well be a need to update and/or supplement factual witness statements already served under new r 7.4(1)(c)(i) to address evidence not available at the time the statement was prepared. We comment on this further below.

    (c) We assume that for a party to seek an order for further disclosure, which a Judge would have the power to make under new r 8.4A(4), it would need to make an interlocutory application and have that determined in the usual way (and that the same applies for applications for non-party disclosure).

Witness statements

Replacing briefs of evidence with "witness statements" to be filed near the outset of a proceeding under standard directions (unless the Court directs otherwise).

22. As noted above, given the more limited scope of disclosure of documents as well as the iterative nature of the disclosure process, there is a real likelihood that factual witness statements served early in the proceeding will need to be amended or supplemented because of further documentary evidence that becomes available during the proceeding. This may be particularly acute in some cases – for example, when a former director is sued but has no independent access to the records of the company.

23. The alternative would be to allow more extensive oral evidence to be led during examination in chief at trial to supplement the witness statement, although we consider that is likely to be counter-productive from an efficiency perspective.

24. As such, we propose that parties are expressly permitted to serve amended or supplementary witness statements in advance of trial to address further disclosure. This approach is already contemplated in other circumstances, such as if it is required to respond to an affirmative defence or counterclaim (see r 7.4(2)), but we consider should be expanded to include further disclosure.

Interlocutory applications

Amending the rules to enable interlocutories to be determined on the papers, and otherwise potentially by remote means, with time limits. The exception to this will be a presumption that specified interlocutory applications of greater importance will be heard in person, because they are potentially dispositive (such as summary judgment and strike outs).

25. As foreshadowed above, our principal comments on the Proposed Amendments for interlocutory applications concern the timing for bringing applications:

    (a) First, r 7.4(1)(a) would require certain interlocutory applications to be brought early in the proceeding. We do not propose any change to that requirement, but rather note there are likely to be circumstances that mean a party should have the ability to bring any of those applications later in time. For example, in some types of claims (such as construction disputes) a defendant may only be in a position to apply to join third parties after further disclosure has been provided. Similarly, an application for security for costs might only arise later due to events or circumstances that develop during the proceeding. In addition to this, an application for strike out might only arise following the filing of an amended pleading (although that may then turn on the interpretation of "the pleading" in r 7.4). For these reasons, we support including an express provision to enable these potentially dispositive applications to be filed at a later date (perhaps with leave).

    (b) Second, and as previously noted, we assume interlocutory applications will be required to seek orders for further disclosure and that these can be filed at any stage (prior to the close of pleadings date, or with leave after that date).

26. Separately, and acknowledging the provisions that would deal with hearing time for applications and mode of hearing, we anticipate there will be situations where further time is needed to file notices of opposition, affidavits in reply, and/or synopses of submissions than that currently set out in the default provisions. In many cases that can be agreed between the parties, who can update the court by memorandum. However, there will also no doubt be situations where agreement cannot be reached, and we assume in those circumstances the Court is amenable to a party seeking amended timetable directions by memorandum.

Judicial issues conference

Establishing the requirement for the judicial issues conference, and the standard agenda for that conference

27. We anticipate the judicial issues conference, which replaces the existing case management processes, will be a significant juncture for the parties in a proceeding. While we understand and support the rationale for this, we note there are likely to be some proceedings (particularly complex ones) where the parties require more regular interaction with the Court between the date of filing and trial. It would be helpful to understand whether it is anticipated that there will still be opportunities for telephone conferences with the Court to manage areas of dispute along the way.

28. With respect to the agenda for judicial issues conferences, it is contemplated that the Judge will consider "whether any steps should be taken to consider settlement by means of mediation or otherwise" (r 7.5A(b)). This appears to stop short of enabling the Judge to direct the parties to attend mediation, although if that is not the case then it would be useful to clarify this.

Experts

Making an experts' conference compulsory, allowing such a conference to be convened by a non-expert, and introducing a presumption of one expert per topic.

29. We have no comment on the proposed changes to expert conferences and the presumption of one expert per topic.

30. However, we do observe that the change in timing to require service of factual witness statements early in the proceeding means that as matters develop (including through the provision of further disclosure) there is likely to be a need for additional factual evidence to ensure there is an appropriate factual foundation for expert evidence. This reinforces the need for the rules to expressly contemplate supplementary factual witness statements.

Submission to the Rules Committee

1. My name is Stephen Trevella. I am a senior associate at Bell Gully, Auckland. I make this submission in order to briefly address one matter pertaining to the proposed amendments to the High Court Rules (**Proposed Rules**), in particular, the timing of the proposed obligation on parties to check for adverse documents.

2. Under the Proposed Rules, the obligation to check for adverse documents arises at the time a party submits their first pleading in court. Relevantly:

    a. parties will be required to conduct a check for adverse documents in circumstances where the other parties' pleadings may have not been filed in whole or in part, and where the issues in dispute may not be fully known or understood; and

    b. although the wording of new rule 8.4(1C) is not entirely clear-cut, it appears that parties will not be obliged to re-check for adverse documents when other pleadings are filed or significant changes are made to the parties' pleadings.

3. These limitations give rise to a question of whether parties to civil litigation ought to conduct their check for adverse documents at another stage of the proceedings in addition or in alternative to the time they file their first substantive pleading.

4. Justice Stuart-Smith in *Castle Water Ltd v Thames Water Utilities Ltd* [2020] EWHC 1374 (TCC) noted that there could be a change in circumstances "*which could raise the need for the other party to review whether it has documents that were not previously known adverse documents but now are*". However, he noted that:

    a. this was not a formal requirement of the Practice Direction 57AD; and

    b. a continuing duty to check for adverse documents "would be unduly onerous".

5. Justice Stuart-Smith's comments were made in the context of the UK disclosure regime where adverse documents that are not picked up in initial disclosure would be expected to be disclosed as part of the disclosure required under the Practice Direction. However, there is a material difference under the Proposed Rules, namely that there is no right to disclosure unless it is ordered by the court under the new 8.4A. It is therefore possible a proceeding which has (for example) materially altered in scope since the parties' submitted their first pleading could reach trial in the High Court without the parties having conducted a proper check for material adverse documents.

6. I agree with Justice Stuart-Smith that it would be burdensome on parties to be required to continuously 're-check' for adverse documents, and to file further affidavits attesting to that if required. It is preferable from a cost and practicality perspective for parties to litigation to

conduct one check for adverse documents (with further checks perhaps being volunteered pursuant to the duty to co-operate under new rule 8.2 or ordered pursuant to new rule 8.4A(4)).

7. However, given the heightened importance that the checking process may have under the Proposed Rules, and the benefits of having that process be informed by a full set of the parties' pleadings, I consider there may be merit in shifting the timing of the check for adverse documents to at or near the time of the last pleading or the resolution of any interlocutories, or at some other time once all the parties' pleadings have been filed. That could also provide the parties with a chance to liaise and co-operate with respect to what kind of documents it may be appropriate to conduct checks for and how those checks should be conducted. This may reduce costs and increase the parties' confidence that their counterparty has undertaken a proper check.

8. A shift in timing of the check would not detract from the parties' continuing obligation to disclose known adverse documents, which would continue to apply at all times including at the time the parties serve their first substantive pleading under new r 8.1(1).

9. I trust that this submission is helpful. I apologise for the delay in its provision to the Committee.

Stephen Trevella

12 September 2024

6 September 2024

Georgia Barclay
Clerk to the Rules Committee
High Court
Auckland

By email: RulesCommittee@justice.govt.nz

Dear Ms Barclay

Rules Committee consultation on draft amendments to the High Court Rules

1. Thank you for the opportunity to submit on the Rules Committee's consultation on proposed amendments to the High Court Rules.

2. We are barristers practicing at Stout Street Chambers in Wellington. Our practice areas include the civil jurisdiction of the High Court.

3. This submission is focussed on the details of the draft proposed amendment to the High Court Rules that has been prepared by Parliamentary Counsel Office.

Initial disclosure

4. We consider there are some practical difficulties with the Committee's proposal for an enhanced initial disclosure obligation which have not been addressed since earlier consultation rounds.

5. Our primary concern is that a plaintiff will not necessarily know what documents are "adverse documents" that need to be included in initial disclosure until it has received pleadings from the other parties. Lawyers may be reluctant to advise clients to disclose documents when the other party's theory of the case is not yet known and it is not possible to tell whether a document will support the case of another party. It may also result in inefficiencies if a further round of disclosure is required, as a matter of course, after the plaintiff is made aware of the defendant's pleaded position and any affirmative defences.

6. To ameliorate this concern, and promote consistency in how the rules are applied, we suggest that the rules should specifically say that a plaintiff is required to disclose documents that it reasonably anticipates will support the case of another party in circumstances where that party has not yet

pleaded. We suggest that some additional drafting along the following lines could be added to rule 8.4:

> For the purposes of rule 8.4(1A), a document is a "known adverse document" if it is a document known to a party to contain information that supports the case that it is reasonably anticipated will be advanced by another party who has not yet filed a pleading.

7. Our other practical concern relates to the obligation on parties to "check" for known adverse documents. The Committee has drawn a distinction between a "check" and a "search" for documents. We consider some guidance about the scope of the new obligation will be needed assist lawyers and parties to understand the distinction and apply it consistently. This clarity is particularly important due to the new requirement for a verifying affidavit to be provided with initial disclosure.

Further disclosure

8. We also have a comment on new rule 8.4A, which governs further disclosure by agreement or order. This rule is currently focussed on parties making requests for specific documents to be disclosed.

9. We consider that another key matter that should be covered in this rule is requests for a party to undertake specific searches for relevant documents — either by searching a particular physical/electronic location, or using specific search terms. It will be important that parties are able to make such requests, especially given that the preceding initial disclosure will not necessarily encompass searching for documents.

10. To address this, we suggest that a new provision is added after rule 8.4A(2) as follows:

> A party may request that specific searches be undertaken by another party if there is good reason to believe that those specific searches will be likely to result in relevant and material documents being identified and disclosed.

Interlocutories

11. We consider that the list of interlocutory matters referred to in rules 7.4(1)(a) and (5) requires some further thought.

Summary judgment

12. The list of interlocutories which fall under rule 7.4(1)(a) of the new rules include applications for summary judgment. Under the current rules, plaintiff's applications for summary judgment are made either at the time the statement of claim is served on the defendant, or later with the leave of the court. Similarly, defendant's applications for summary judgment are made when the statement of defence is served or later with the leave of the court. We do not understand the

rationale for changing that current position, given it would appear to slow down the summary judgment process. The plaintiff or defendant should be able to assess whether the case is suitable for summary judgment at the outset.

13. We therefore suggest that summary judgment applications should be removed from the list in rule 7.1(5), and that the timing of those applications should continue to be regulated by the current regime in rule 12.4.

Protest to jurisdiction

14. One of the matters listed in rule 7.4(5) is "protest to jurisdiction". Under the current rules, the defendant may file a protest to jurisdiction instead of a statement of defence. A protest to jurisdiction is not in itself an interlocutory application. Once a protest is filed, the defendant may then apply under rule 5.49(3) for the proceeding to be dismissed for lack of jurisdiction, or the plaintiff may apply under rule 5.49(5) for the appearance to be set aside. In practice, it is usually the plaintiff who applies, since the proceeding is suspended in the meantime.

15. We suggest amending rule 7.4(5)(c) to read "an application to set aside an appearance under protest to jurisdiction under rule 5.49(5)". This would mean that the plaintiff has the obligation to bring the question of jurisdiction on for determination within the specified time period, unless the defendant has already applied.

Further particulars

16. We consider that there are interlocutory applications that need to be in the list in rule 7.4(5). The most obvious is an application for further particulars under rule 5.21(3). Such applications need to be made and dealt with at an early stage and prior to the exchange of evidence. This is because it is difficult and unfair for a party to prepare evidence if the case to which they are responding has not been adequately particularised. Yet on the current draft amended rules, parties would be obliged to prepare evidence in accordance with the default timings in rules 7.4(6) and (7) before an application for further particulars is addressed.

Remote hearings

17. The Committee's drafting instructions propose that interlocutory applications should be addressed remotely by default, subject to a right to an in person hearing for "potentially dispositive interlocutories" (see drafting instructions at [50]).

18. We make two comments on how that instruction has been carried through to the draft amendment rules.

19. First, we consider that the scope of "potentially dispositive interlocutories" for which an in person hearing is required is too broad. It includes applications for security for costs, and to remove/add parties (see rule 7.4(5)(a)–(b)). We do not see the justification for those types of interlocutories to be grouped together with

applications for strike out or summary judgment and accorded a right to an in person hearing.

20. Secondly, the amended rules do not say that non-dispositive interlocutories should be heard remotely by default. Amended rule 7.34 simply says that applications "may" be heard remotely. This language should be tightened so that there is a presumption of a remote hearing for most interlocutory applications, as the Committee's drafting instructions suggested.

Conclusion

21. We are generally supportive of the proposed reforms, and our submission is intended to highlight potential difficulties with the implementation of the Rules Committee's vision. These difficulties should be considered before any amendments to the High Court are implemented.

Yours sincerely

Wendy Aldred KC, Mike Lennard, Jack Wass, Duncan Ballinger, Monique van Alphen Fyfe, Kate Fitzgibbon, Siobhan Davies, Luke Borthwick
Barristers
Stout Street Chambers