[redacted]

2. Improving Access to Civil Justice

The Committee noted that submissions on the Report, in particularly those from Bell Gully, Justin Smith KC and Crown Law, had been helpful.

The Chief High Court Judge observed that Mr Smith's submission on witness statements highlighted an important issue which must be grappled with; the High Court deals with a wide range of litigation – from simple to extremely lengthy and complex proceedings. There are often challenges associated with drafting rules which are workable across the whole range of litigation. The Chief High Court Judge suggested that overly prescriptive rules should be avoided, as it is often necessary to make practical adjustments to court processes, both in specific cases, and more widely.

The Chair acknowledged Mr Smith's feedback on "will say" statements and noted that, in New South Wales, evidence is by way of affidavit, which is a fuller witness statement than was contemplated by the recommendations. The Chair agreed that flexibility should be retained. He noted several examples of flexibility in the New South Wales jurisdiction, such as where parties in a particularly complex case may be permitted to defer filing their evidence until a later stage of the proceeding, or cases where more comprehensive discovery will be ordered.

The President of the Court of Appeal agreed that flexibility was key to the new rules. He suggested that it may be necessary to create exceptions and criteria for exceptions as part of a comprehensive drafting process.

Ms Murdoch Moar observed that, from a registry perspective, flexible rules were important, but that it was equally important that there were still specific sets of expectations on which training for the Registries can be based. Several of the recommendations also appeared to front load case management which would create more deadlines for registry to keep track of.

The Chief High Court Judge referred to Bell Gully's examination of the New South Wales regime in its submission and suggested further analysis of this jurisdiction should be conducted. The Chair noted that several other Australian states appear to follow similar processes and suggested that the Clerk to the Committee be asked to research the rules of court more generally in Australia.

The Chair then suggested that similarly to the process for formulating the Committee's recommendations and report, a subcommittee should be formed to determine the contents of the High Court Rules based on the recommendations and further submissions. The subcommittee would then report back to the Committee. The Chair nominated himself and Mr Kalderimis as well as any other Committee members who may wish to be involved. Mr Chhana suggested that Ms Anne Murdoch Moar assist the subcommittee. Ms Murdoch Moar is familiar with how rules are implemented in practice in the registries and would be able to provide insight from an operational perspective.

The Chair asked for insight from the Parliamentary Counsel Office (PCO) into resourcing and rules drafting. Ms Pooke agreed that the Committee should work through the details of exactly what to

include in the Rules. Once this had occurred, PCO could become involved in the more formal drafting stage

The Chair addressed the question of implementation, noting three possible methods: firstly, by way of a pilot, secondly, by incremental steps, and thirdly, by implementing all rules at one time. The Chair noted that running a pilot in one registry was not likely to be workable. Mr Chhana and Ms Murdoch Moar agreed it would be difficult to implement a pilot in practice. Ms Murdoch noted that from a registry perspective, incremental implementation, beginning with proportionality as a guiding principle, would be preferable.

The Chief High Court Judge observed that for several reasons, including the nature of scheduling for judges, the desirability of consistency between aspects of the High Court and District Rules, and resourcing, it may be difficult to comprehensively discuss and make decisions concerning implementation without first seeing a draft of the rules.

Mr Chhana also suggested that the Committee should carefully consider how best to clearly communicate changes (both to the rules and to the mindset for approaching litigation) and the associated expectations. The Chair agreed and noted that it would likely be necessary to run workshops for judges and the profession as the Chief Justice had previously suggested.

The Chief High Court Judge noted the High Court was also taking steps to examine whether existing practices may be amended to facilitate greater access to justice in the meantime. One of the goals of the Report was to encourage a change in mindset for all parties involved in mitigation. It was hoped that such changes with High Court processes would assist with this.

The Committee agreed that implementation would not proceed by way of a pilot, but that a more comprehensive discussion of implementation would be deferred until after the contents of the draft rules were determined.

A subcommittee will be formed to make recommendations of the contents of the High Court Rules.

District Court

The Chair noted a minor change the Committee was making to the District Court Rules, which was that the judge who presided over the issues conference would also preside over the case management conference.

Judge Kellar then discussed pre-action protocols for debt claims. He suggested this should be implemented through a specific rule change, rather than by way of a practice direction or protocol made by the Chief District Court Judge under s 24 of the District Court Act 2016.

The Committee engaged in discussion about the need to provide the pre-action protocol in languages other than English and the best way this might be accomplished. It was agreed that PCO would consider this and report back to the Committee.

It was agreed PCO would draft the rule change relating to the same judge presiding over both the issues conference and the case management conference.

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2. Improving Access to Civil Justice

The Chair provided an oral update from the Access to Justice subcommittee. It was proposed the subcommittee would produce a report containing suggestions on how to implement High Court recommendations from the Access to Justice Report. Subject to the Committee's views, this would form the basis of drafting instructions for PCO. AJ Lester and Ms Murdoch Moar would join the subcommittee to enable a registry and associate judge perspective to be canvassed.

The Committee agreed that the subcommittee would produce an implementation report outlining how the High Court recommendations may be implemented.

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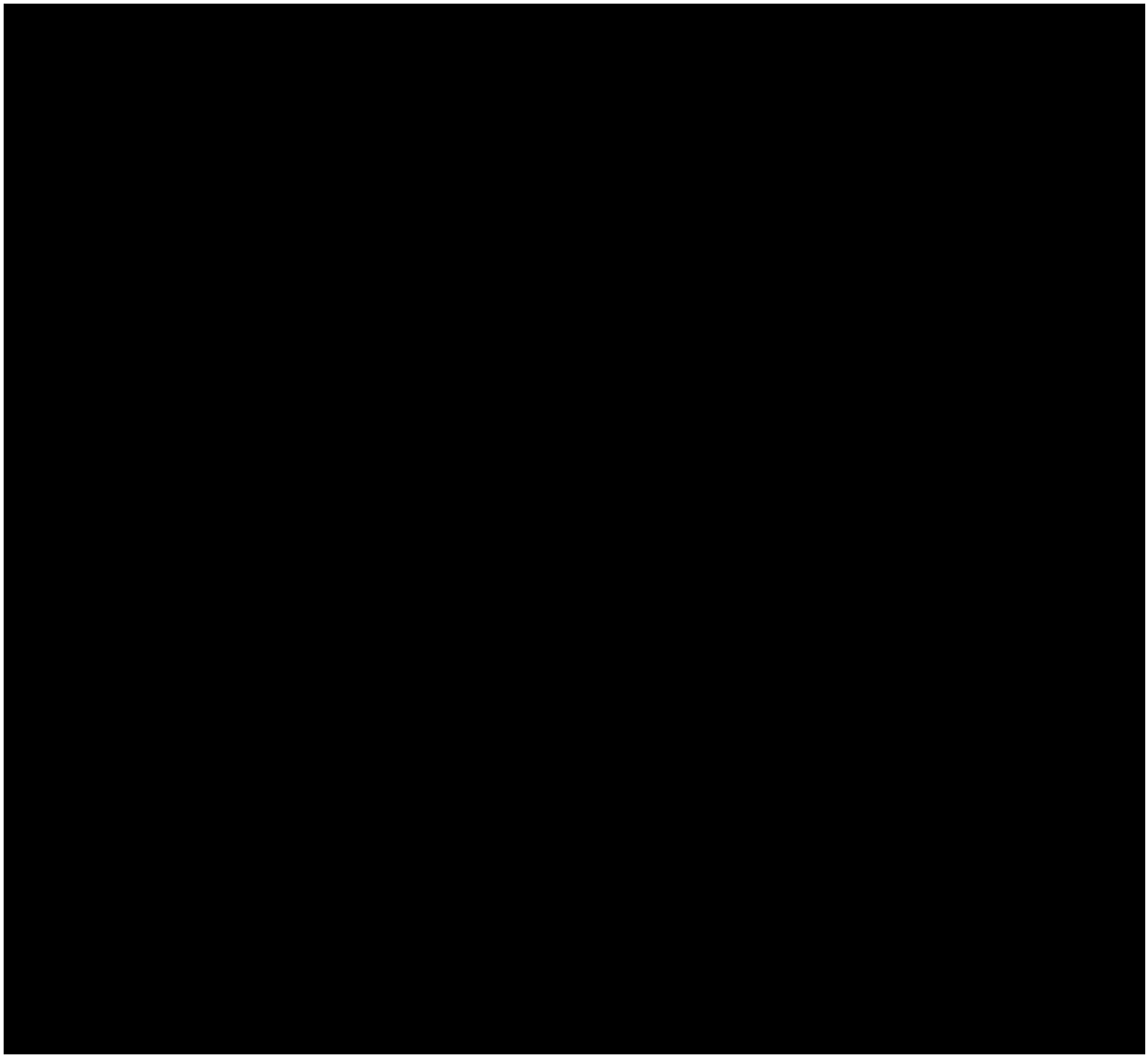


5. Improving Access to Justice

The Access to Justice Sub-Committee[1] prepared and circulated, prior to the meeting, a paper outlining how recommendations in the Committee's Access to Civil Justice Report may be translated into High Court rules in the form of drafting instructions to PCO (C 30 of 2023). The Sub-Committee had expanded on the Committee's recommendations when formulating the proposed rules on some occasions, and in formulating the proposals the Sub-Committee took into account further submissions received on the Committee's Report.

The Chief Justice congratulated the Sub-Committee on its work on the paper and noted that the rules change would need to be followed by an education programme to effect a change of culture to both the Profession and the Courts.

[1] The Chair and Daniel Kalderimis with assistance from Associate Judge Lester and Anne Murdoch-Moar.

The Chair noted there were three particular areas where reform was required due to disproportionate costs: discovery, lengthy and overly elaborate briefs of evidence, and the tendency to broaden rather than narrow issues prior to trial.

The Committee then considered the particular issues arising from the proposed drafting instructions which followed the recommendations in the Committee's Improving Access to Civil Justice Report of November 2022.

Recommendation 16: Introducing proportionality as a key principle

The Committee's Report recommended that proportionality should be expressly introduced as a guiding principle in the determination and application of the procedures applied to a civil proceeding, with r 1.2 of the High Court Rules amended to this effect. A new definition of "overriding objective" meaning the "objective specified in r 1.2" should then be inserted into r 1.3. The Chair noted that the proposed rules would expressly cross-reference this objective, particularly when a discretionary decision of the Court is involved. In other words, when there is a discretionary departure from the proposed rules, that should be based on the overriding objective "proportionality".

The Chief Justice queried whether the rules should include a fuller explanation of what proportionality means, along the lines of r 1.1. of the United Kingdom's Civil Procedure Rules 1998. This suggestion received overall support from Committee members.

Justice Muir noted that r 1.1(2)(a) referred to "ensuring that the parties are on an equal footing and can participate fully in proceedings …" from the UK Rules and expressed some concern to the Court committing itself to ensuring parties on an equal footing. He noted that while the Court could commit to equality of opportunity it could not commit to equality of outcome. The reality is that some parties will be able to retain a KC while others may be a litigant in person.

The Chief Justice noted that it would be possible to refer to how the English Courts have addressed this issue. Moreover, the goal of ensuring the parties are on an equal footing was prefaced by the caveat in r 1.1(2) "so far as is practicable".

It was agreed that the Sub-Committee would amend the draft rules to more closely resemble r 1.1 of the UK Civil Procedure Rules 1998, including listing examples of what it means to deal with a case proportionately.

Recommendation 17: Witness statements and expert evidence

The Committee's Report recommended that the current rules for the exchange of briefs of evidence for trial be replaced by requirements:

(a) To serve witness statements shortly after the exchange of pleadings and any preliminary interlocutory applications (such as strike out) but prior to discovery and the judicial issues conference.
(b) That such statements not be argumentative, or engage in the recital of the chronology of events to be established by documentation at trial.

The Chair noted that several submissions had disagreed with this recommendation and asked the Committee to confirm its support of the proposal that witness statements be filed near the commencement of the proceedings. The Committee agreed with and confirmed its support for this proposal.

The second question for the Committee to consider was what form those statements should take. The Chair noted that the Committee's original recommendation was that evidence be "closer in format to the former "will say statements that were once common in civil litigation". However, as submissions noted, there is ambiguity about what a "will say" statement would actually involve – it may be interpreted as being only an abbreviated document that indicates what the witness will say by way of oral evidence. This would be undesirable. Instead, the Sub-Committee recommended that the terminology in r 9.7 change from "briefs" to "witness statements", and the rule be amended to emphasise that there is a change, and to reflect the expectation that the evidence will no longer be as long, adversarial, or based on the recitation of documents as has been the case in the past.

The Solicitor-General referred to the proposed phrasing of r 9.7(3)(f), that every witness statement "must avoid the recital of the contents or a summary of documents, or otherwise address matters revealed by the documentary record to be received by the Court in accordance with rules …" She noted that witnesses may wish to address matters in the record. The Chair noted that what was intended was to avoid unnecessary repetition, so the wording could be changed to provide that witnesses could not "unnecessarily address" matters revealed by the documentary record. The Committee agreed to a change along these lines.

The Chair then raised the further issue in relation to the Court's ability to direct that the witness statements be served at a later stage in some cases. As the Committee observed in the Report, there will be cases where it is necessary to allow some discovery before the service of witness statements. The New South Wales provisions allow for the later service of evidence in "exceptional circumstances", however commentary on the rule indicates that the requirement for "exceptional circumstances" is approached in a pragmatic way. Other regimes, including the Federal Court of Australia and Singapore adopt a flexible approach.

The Chair suggested that the test to be applied for exceptions should be based on establishing that the objective of the just, speedy, inexpensive determination of the proceedings by proportionate means set out in r 1.2 would be better achieved by later service of evidence. It was also proposed that the rule allowing "supplementary briefs" at the discretion of the trial judge should be maintained. The Chair asked the Committee for its view.

It was suggested that requiring statements to be served at the beginning of proceeding may result in a default position where proceedings have two stages of witness statements which would increase rather than reduce costs. It was noted that once discovery occurs, inconsistencies between the documentary evidence and witness statements may arise, important matters which need to be addressed may be raised, and that people's memories of events may change based on those documents. The President of the Court of Appeal was of the view that some flexibility with supplementary statement should be allowed.

The Chair agreed that there may be cases where supplementary statements will be necessary and that, based on the New South Wales experience, flexibility in the application of the rules was important.

The Chief Justice noted that civil law systems in Europe put little weight on witness statements, and that this process aimed to reduce the significance of witness evidence and give documentary evidence greater prominence in the fact-finding process.

The Committee agreed that the ability to file witness statements later in the proceeding, and the ability to file supplementary statements should both be governed by the overriding objective test (speedy, inexpensive determination of the proceeding by proportionate means).

The Chief High Court Judge emphasised that the success of the rules would depend on educating Judges and the Profession and making sure that the rules were applied with consistency.

Recommendation 18: Discovery and disclosure

The Committee recommended in the Report that existing discovery rules be changed so that:

(a) Initial disclosure includes adverse documents known to the party.
(b) Subsequent discovery be ordered at the judicial issues conference as is necessary and proportionate for the determination of the issues in the case.

Mr Kalderimis discussed this recommendation noting that it was proposed that pt 8 of the rules, which regulates discovery and disclosure, be renamed "Disclosure" to emphasise the change in approach. The initial disclosure obligation in r 8.4(1) requires disclosure of documents referred to in the pleading and any additional principal documents that the party has used when preparing the pleading and on which the party intends to rely. The Committee's recommendation requires the additional disclosure of "known adverse documents". It was hoped that expanding the categories of initial disclosure required will reduce the arguments for more extensive disclosure later in the proceedings.

The proposed category of known adverse documents was similar to the concept already referred to in r 8.7(b) and (c) in relation to standard discovery which requires disclosure of documents "that adversely affect that party's own case" and "documents that support another party's case". But it picked up the concept of "known adverse documents" referred to in United Kingdom Practice Direction 57AD.

A more elaborate regime of disclosure rules of the type implemented in the English rules was not proposed. It was suggested "known adverse documents" be defined in r 8.4 as follows:

> *Known adverse documents are documents of which a party is aware containing information adverse to the party's case. A party is aware of such documents if a person with responsibility for the events or circumstances is actually aware of them or is aware they may well exist. For this purpose a party must take reasonable steps to check for the existence of such documents but is not required to engage in a general search for documentation.*

Justice Muir suggested that the phrase "but is not required to engage in a general search for documentation" might detract from the obligation to take reasonable steps. If material which is adverse to a party exists somewhere in the organisation but the person who counsel is dealing with is

unaware of it and does not conduct a reasonable general search, such documentation may never come to light. The Chief Justice agreed and suggested that these words should be removed.

The Chair explained that 'not required to engage in a general search for documentation" came from the case *Castle Water Ltd v Thames Water Utilities* [2020] EWHC 1374 at [11], which explained that a "check" does not include the kind of search normally expected from discovery. The Chair noted that the new rule was about balancing the desire to limit unnecessary expenditure on vast discovery and the need to ensure that disclosure is fair. It was not the intention that everyone would undertake the equivalent of discovery at the beginning of a proceeding. However, the Chair agreed that the words in relation to not conducting a search could be removed, and the Committee agreed.

Mr Kalderimis moved on to discuss the question of cooperation in relation to further disclosure. The Sub-Committee recommended:

(a) That a specific rule should apply, in light of the duty of cooperation, to regulate requests for specific information apart from initial disclosure, including prior to the judicial issues conference.
(b) That any further disclosure then be ordered at the judicial issues conference, and that the existing rules for general and tailored discovery be repealed.

The current rules contain a duty to cooperate in r 8.2. It was proposed that this should be amended so that the focus of this rule was on the specific disclosure now contemplated and that a separate rule be introduced concerning requests for particular documents. Mr Kalderimis noted that a deliberate decision was made to no longer refer to the concepts of general or tailored discovery due to the danger parties will revert to existing practices. The reference to "disclosure" rather than "discovery would emphasise the need for greater focus. However, the disclosure the Court could order could amount to what is presently general discovery, if the Court was persuaded that this was needed in the circumstances of a particular case.

Mr Kalderimis noted that in the proposed new rule, parties could agree on further disclosure. The Court could also order further disclosure at the judicial issues conference, with the test again being the overriding objective. The Committee agreed that further disclosure should be tied to the overriding objective.

The Committee also agreed that it would be important for parties to understand there are still obligations in relation to disclosure, which will be enforced. The powers in r 7.48 should be available in relation to disclosure obligations and that the rule should be amended to cover disclosure.

Mr McHerron queried when the parties would be required to provide an affidavit of documents as discussed in r 8.15. The Chief Justice observed that initial disclosure could be managed without a full affidavit, so long as there was a confirmation that duties of disclosure had been complied with. The Committee asked that this issue be further addressed.

Mr McHerron queried whether rule changes would have implications for r 8.3 which deals with preservation of documents. The Chair agreed r 8.3 would be amended to contemplate the documents generally disclosable in the proceedings rather than the more general concept of discoverable

documents, and not limited to known adverse documents. In other words, a litigation hold on document destruction would still be required.

Recommendation 19: Judicial issues conference

Mr Kalderimis noted that another key aspect of the Committee's recommendations was that a comprehensive judicial issues conference would occur later in the course of the proceedings, after initial interlocutories and the service of witness statements. This would effectively replace the existing case management conferences set out in sub-part 1 of Part 7 of the rules. The object of a judicial issues conference was to have a comprehensive review of what the issues in the case actually are, what further disclosure or other orders are necessary for the fair disposition of the case, what the requirements for the trial will be and other related matters. The earlier focus on identifying what the key issues actually are may also facilitate the earlier resolution of cases.

Mr Kalderimis noted that there has been criticism of the Committee's Report based on a failure to introduce more emphasis on mediation as part of the new procedures. But the promotion of settlement has always been seen as a key purpose of the judicial issues conference. The proposed r 7.5(e) and (f), which reference alternative dispute resolution, were intended to give Judges the opportunity to discuss whether any matters or issues may be resolved, or further refined through some sort of facilitative process. A greater involvement of facilitation was also proposed in conjunction with expert evidence.

The existing r 8.2 contains a duty of cooperation in relation to discovery. It was proposed that a specific rule that introduces a duty of cooperation in relation to the fair disposition of the proceedings generally be added. The Committee agreed.

Rule 7.1 would cover standard directions prior to a judicial issues conference. Rule 7.1(1)(b) and (c) provide that parties shall serve factual witness statements and a draft chronology of events. It was suggested that a new form provide a template for parties' chronologies. A chronology should not include every event or occurrence but should focus on pleaded material facts. This includes any important factual context as well as linking facts needed to support the pleaded material facts or denials of material facts in another party's pleading, refute contrary factual inferences and/or establish the overall narrative. The final column of the chronology should list documents upon which a party intends to rely to prove the specified factual proposition. Mr Kalderimis observed it was important that chronologies do not become too long.

The Chief Justice questioned whether this rule would see the end of agreed chronologies and noted that documents used to come in through opening submissions. Mr Kalderimis noted that parties would still be able to get documents before the Judge through referring to them in opening, but they would have to move through the chronology process. Mr Kalderimis acknowledged that this could be seen as taking one complicated mechanism and replacing it with another not entirely straightforward mechanism. However, the purpose was not to list every document a party may wish to use, rather it should be linked to what their case is supposed to be about. This is something Judges would have to supervise and help educate parties on.

The Committee agreed with the proposals.

Recommendation 20: Interlocutories

The Chair observed that this recommendation from the Committee's report related back to the presumptions about whether interlocutories are in person or dealt with on paper. It was recognised that there are some interlocutories which, by nature, should be dealt with in person. New rule 7.33 would identify what types of hearing should be heard in person, unless the parties and the Court agree on another form of hearing. This would include matters such as summary judgments and strike out applications. In other interlocutory applications, the registrar would liaise with the Judge on how the matter should be dealt with. This was a slightly different approach than that which was recommended in the Access to Justice Report but still captured what the Committee was trying to achieve. The Committee agreed with the proposal.

Recommendation 21: Expert evidence

The Chair discussed the Sub-Committee's recommendation in relation to expert evidence. The feedback to the Committee's Access to Justice Report generally supported the presumption of limiting parties to one expert witness per topic and requiring expert conferral before expert evidence is lead at trial. Rule 9.44(1)(a)-(e) would lay out matters which the Judge may direct expert witnesses to do. The proposed changes would remove the limitation on the Court being able to direct experts confer and prepare joint statements without the presence of legal counsel. The proposals would also allow the Court to appoint an independent person to convene and conduct the conference of expert witnesses without the agreement of the parties. The Chair noted that this would provide greater capacity for expert evidence to be facilitated in some way. The Committee agreed with the proposals.

The Chief High Court Judge queried whether the Rules should specifically address the question of Judges directing expert evidence be heard on a topic-by-topic basis, rather than the plaintiff's evidence followed by the defendant's evidence. She noted that in some larger cases, it is easier to present the evidence in this way. The President of the Court of Appeal noted that this ability may already exist in r 9.46, which empowers the Court to direct evidence is given in a sequence the Court thinks is best suited to the proceeding. The Chair noted that this could be further included as a matter to be addressed at the judicial issues conference.

Recommendation 22: Evidence at trial

The Committee's Report had recommended:

- The core events are to be stablished by the documentary record evidenced by the documents in the agreed bundle, and chronologies setting out facts to be drawn from the documents will be required.
- The provisions in the Evidence Act 2006 and the High Court Rules be amended to allow such documents to be admissible as to the truth of their contents.
- Evidence given by witnesses will not be expected to traverse the events disclosed by the documentary record, or engage in argument, but address genuine issues of fact.
- Witness statements are allowed to be taken as read, and supplemented by further statements or viva voce evidence.

A key aspect of the proposals is that the primary evidence of events should be taken from the documentary record and that, subject to any specific objection to be resolved at trial, the documents nominated for inclusion in the agreed bundle should be received as evidence without the need for witnesses to traverse those events or produce documents in their evidence. A chronology setting out the facts to be drawn from the documents will be required. As part of these recommendations the Committee proposed that the documents in the agreed bundle be admissible as to the truth of their contents.

The interaction between the Rules and the Evidence Act was noted as raising a number of issues which were discussed. The Committee's consideration and previous consultation focused on documentary hearsay. However, there may be other issues – there is also a limitation on the ability to rely on documents in s 35 (the prior consistent statements rule) which may also create uncertainties. In terms of documentary hearsay, s 17 means that hearsay statements offered in reliance on other provisions of the Act must nevertheless also comply with the hearsay rule unless the operation of the hearsay rule is excluded (as it is in ss 27(3) and 138(3)).

The Chair acknowledged that it may not be possible to completely resolve the difficulties that had been identified (and which may be addressed by the Law Commission) through changes to the Rules. However, consideration had been given to amending the rules to reduce the difficulties and to give effect to the Committee's recommendations while remaining consistent with the Evidence Act as presently drafted. Section 132(2) and (4) contemplate that the Rules can regulate the procedures to be followed in relation to documentary admissibility, to the point of having rebuttable presumptions. It was therefore proposed that r 9.5 be amended. A new r 9.5A then contemplated that the parties would be able to object to the admissibility of documents in accordance with the Evidence Act, including on the basis of documentary hearsay. But the rule would regulate when and how such objections could be made as a matter of procedure. If the objections are not made then the evidence is duly received without objection in accordance with the presumption, and the implicit agreement of the parties. The proposed rule was also formulated in a manner that disincentivised technical objections being advanced. The Court could uphold the technical objection but give the other party an opportunity to address the evidential issue by calling a witness and also make costs awards against the party who may have caused unnecessary cost. A Court could also determine that the objection is best dealt with as a matter of weight.

Justice O'Gorman observed that while she admired the drafting and what it attempted to achieve, that substantive requirements relating to admissibility under the Evidence Act could not be overridden. The tension between the strict legal position and what the Committee sought to achieve was acknowledged. It was intended that the recommendations would allow the strict legal position to prevail at necessary but would hopefully mean that objections are only made when they really matter, and to disincentivise objections in any other case.

The Chair then referred the Committee's attention to the recommendation that witness statements be allowed to be taken as read. This is consistent with the current practice as briefs of evidence are frequently taken as read by the witness. However, strictly speaking, the current rules do not permit this.

The Chief Justice queried whether, if witness statements are allowed to be taken as read, this would interfere with the ability to pursue people for perjury. Currently, witnesses confirm their witness statement when they are sworn in. If the rules are changed, people may lose sight of their responsibilities to the Court. Judge Kellar noted that, in criminal proceedings, formal written statements are often taken as read. The person making the statement signs a declaration acknowledging the statement is true and setting out the consequences if it is not. This could easily be adapted to witness statements. The Chair agreed that the Sub-Committee would examine the draft rules to ensure that the ability to pursue for perjury is not affected.

The Chief High Court Judge noted that whether or not the evidence would be taken as read is something Judges and counsel would need to remember to address at the issues conference, because a situation could result where parties give a time estimate on the assumption the evidence would be taken as read, but the Judge is operating on the assumption that the evidence would be read in Court. The Committee agreed.

The Chair noted a further element of evidence at trial which would involve a rule change. This related to cross-examination duties. The cross-examination duties outlined in s 92 of the Evidence Act are sometimes misunderstood. A party cannot invite the Court not to accept a witness's evidence, particular on the basis that it is untrue, without that evidence being challenged. But it does not involve an obligation for a party to put every aspect of their case to the witness. It was proposed that a rule be created to allow greater judicial control of cross-examination.

The Committee agreed with the proposals subject to the issues raised.

Recommendation 23: Remote hearings

The final recommendation suggests that the practice developed during the COVID-19 pandemic, including electronic filing, document management and remote hearings become a standard part of the Court's processes.

The Chair noted that the High Court is in the process of considering when remote hearings should be used. The Digital Strategy for Courts and Tribunals led by Justice Goddard was published in March 2023 by the Office of the Chief Justice. The document sets out a pathway to electronic filing and document management which should now be followed. It was not considered that any rule change is required to further the Committee's recommendation as the existing powers allow remote hearings to take place.

Moving forward

The Committee agreed that the Sub-Committee would consider the Committee's feedback and comments on the proposed draft rules and would amend the proposed drafting instructions for PCO for consideration at the next meeting.

2. Improving Access to Civil Justice

The Chair led a discussion on the proposed drafting instructions for the changes to the High Court Rules (C 34 of 2023). These had been amended by the sub-committee and PCO as a consequence of the Committee's comments at the last meeting. The draft instructions were approved by the Committee subject to the changes noted below.

Proposed Rule 1.2 Overriding Objective

The Committee debated the proposed broader statement of the overriding objective that had been formulated by the sub-committee on the basis of the English and Welsh rule. Whilst there were aspects of this formulation that were supported by the Committee it was decided to revert to the shorter and simpler version of the objective as provided in the initial draft. It was nevertheless also agreed that the sub-committee should continue to work with PCO on a fuller formulation for consideration after conducting additional research.

Proposed Rule 9.7 Requirements in relation to witness statements

The Committee agreed not to change proposed r 9.7 by inserting the term "unnecessarily" in proposed r 9.7(2)(f) as the limitations on referring to documentation were already adequately identified.

Proposed Rule 8.4 Initial disclosure

The Committee agreed with the proposal that initial disclosure be verified on affidavit.

The Committee agreed to revoke the proposed r 8.4(2) and (3) in relation to certification non-compliance with providing initial disclosure. Directions from the Court would be appropriate for such circumstances.

The Committee agreed to change r 8.4(1B) to remove "or any person associated with the party who is directly involved in the events-" as it involved complexity and may invite argument.

Proposed Rule 7.5 Judicial issues conference

The Committee considered whether r 7.5(2), which outlined the purpose of judicial issues conferences, was necessary but agreed it served a useful purpose.

It was agreed to add in an explicit reference to a duty to cooperate in preparation for and throughout the judicial issues conference process in r 7.5(2).

The Committee also agreed to add in a reference to tikanga as an agenda item for the conferences in r 7.3(3) and to extend the matters to be considered in relation to expert evidence in r 7.5(3)(d).

Proposed Rule 7.1 Standard directions prior to judicial issues conference

The Committee agreed to change wording in r 7.1(1)(a)(i) from "within" to "no later than".

The Committee agreed to remove the reference to applications to join third parties from the proposed r 7.1(1)(a) but asked the sub-committee to consider implementing a specific rule that addresses the issue of joining third or subsequent parties.

The Committee approved the revised dates of 20 days (plaintiff) and 40 days (defendant) for the service of witness statements.

Proposed Rule 9.5 and 9.5A Admissibility of documents in common bundle

The Committee further debated the formulation of the rule for admissibility of documents in the common bundle and approved the proposed re-wording of r 9.5A (subject to a greater focus on plain English drafting).

Proposed Rule for events arising from documents in narrative form

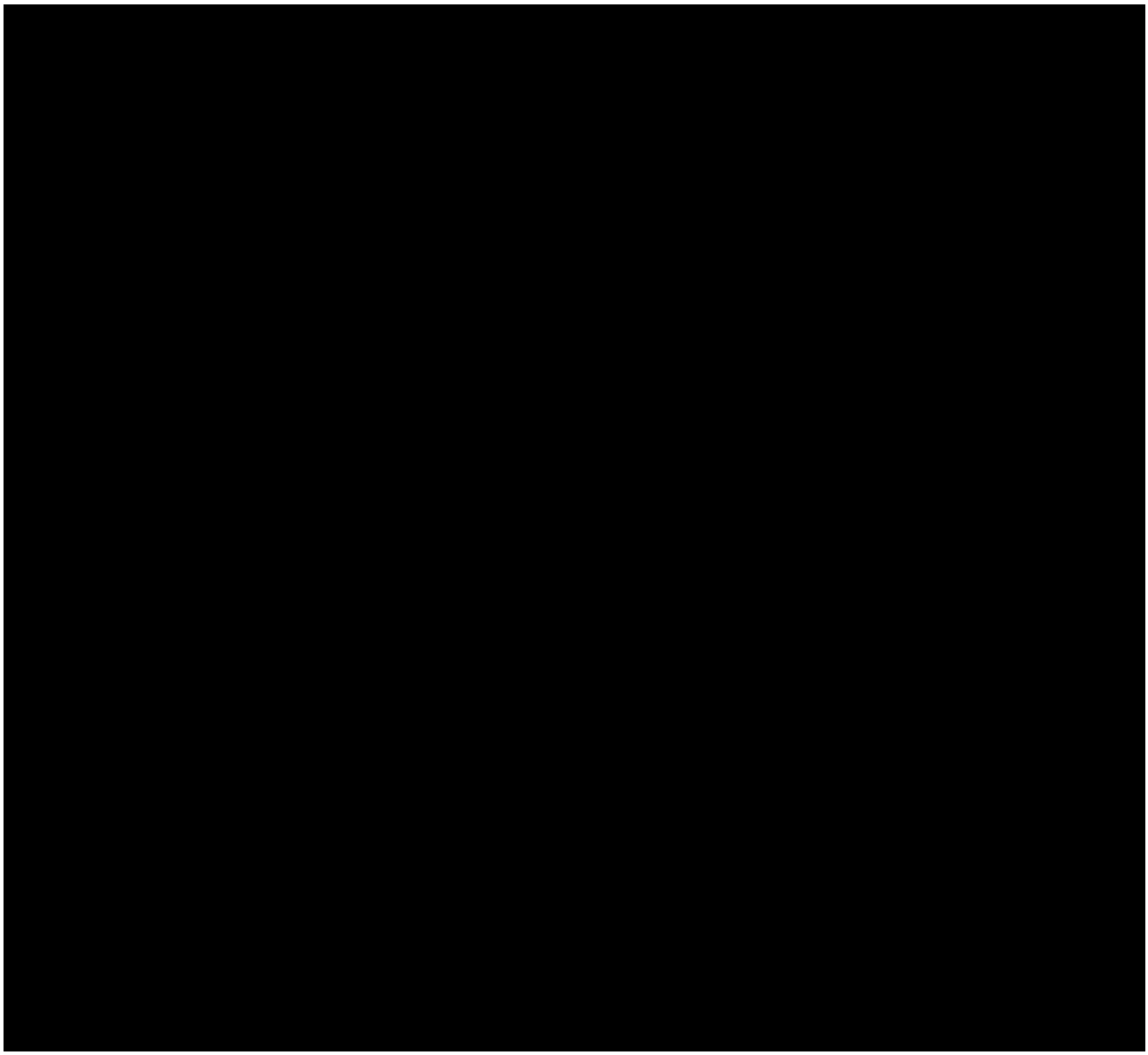
The Committee debated whether parties should file and serve a document outlining the events the party alleged were disclosed by the contemporaneous documents in narrative form. The required chronologies would not set out such a narrative and the objective was to remove such documents from witness statements. The proposal by the sub-committee was for this to be included in opening submissions, and that the dates for openings should be changed so that openings were served by the parties earlier.

The Committee agreed that requiring a narrative to be served was appropriate, but decided that this should be exchanged before opening submissions. The Committee also agreed that such a narrative should be served later than the witness statements. The Committee agreed that the narrative of events should be in a separate document, and that the plaintiffs narrative should be provided no later than 30 working days before trial, and the defending parties no later than 20 working days before trial. Those dates could be varied by Court directions. The Committee decided to leave the time for opening statements as currently provided.

General observations

The Committee agreed it will be appropriate to review the costs schedules to reflect the proposed changes.

The Committee agreed to discuss how to implement the proposed changes at the next meeting, including considering when the changes would be implemented, and the form of seminars (etc) that would take place before the changes took effect.



Justice Francis Cooke
Chair

[redacted]

3. Improving Access to Civil Justice

a. Proposed drafting instructions for the changes to the High Court Rules (C 8 and C 9 of 2024)

The Chair and Mr Daniel Kalderimis led a discussion on the proposed drafting instructions for the changes to the High Court Rules (C 9 of 2024) and the proposed amendments to the Rules (C 8 of 2024). The Committee approved the drafting instructions and made several suggested changes to the proposed amendments as set out below. The Committee agreed the sub-committee would make edits according to those suggested changes before circulating the proposed amendments to members for comment and to approve the proposed amendments subject to any further written comments by members.

Proposed Rule 1.2 Overriding Objective

The Committee discussed the proposed sub-r (2), which set out factors a judge may consider in applying the overriding objective. The Committee agreed to remove the proposed sub-r 2(c) ("whether any obvious difference in means or resources between the parties could impact on the participation of any of them in the proceeding") on the basis it was unnecessary given the inclusion of sub-r (2)(a) ("how best to both fairly and expeditiously identify and resolve the issues in dispute").

Proposed Rule 1.20A General duty to co-operate

The Committee agreed to change the placement of the proposed rule to be at the outset of the rules to reflect the anticipated importance of this duty (to be re-numbered as 1.2A).

Proposed Rule 7.4 Standard directions prior to judicial issues conference

The Committee agreed to add the qualifier "of significance" in proposed sub-r (1)(c)(ii)(A) with the effect that a chronology under the proposed rules will refer only to all pleaded or other material facts of significance. This change was suggested as the best way to balance the need for chronologies to be succinct while not excluding material documents that would then need to be presented later.

The Committee agreed to add references to affirmative defences as well as counterclaims in the proposed rule.

The Committee discussed the default timeframe of 10 working days within the proposed rule 7.4(1)(a)(ii) and determined that it would be an appropriate length of time in most cases. The Committee discussed whether harsher penalties for non-compliance with timeframes were required and considered they were not given the existing r 1.54.

Proposed Rule 7.5 Judicial issues conference

The Committee discussed concerns that the proposed r 7.5(2) (the duty to cooperate when preparing for and participating in a judicial issues conference) would not encourage meaningful engagement. The Committee agreed to add to the proposed rule a reference to the purpose of a judicial issues conference, set out in proposed r 7.5(3).

The Committee agreed to amend proposed r 7.5(3) to encourage parties to meaningfully, rather than superficially, identify the issues in dispute when engaging in a judicial issues conference.

Proposed Rule 7.5A Agenda for judicial issues conference

The Committee agreed to amend the proposed r 7.5A(f) to more expressly provide for the ability of the judge to resolve interlocutory matters at a judicial issues conference and to provide the judge the flexibility to elect a mode of resolving interlocutory issues that best suits the circumstances.

The Committee agreed to amend the wording of the proposed r 7.5A(g) to focus the inquiry on whether there are any issues of tikanga that have been raised in the proceedings.

Proposed Rule 7.5B What parties must do before a judicial issues conference

The Committee discussed the position papers that parties must file before a judicial issues conference and agreed that a page length of 10 provided an appropriate balance between conciseness and the need to allow an appropriate length for complex cases.

Proposed Rules 7.33 and 7.34 Hearing interlocutory applications and Mode of hearing

The Committee agreed to include an express reference to the Courts (Remote Participation) Act 2010 to allow the Rules to remain consistent with the legislation.

Proposed Rules 8.4 Initial disclosure

The Committee raised concerns that the proposed r 8.4(1)(b) (initial disclosure must include documents on which on which a party intends to rely at the trial or hearing) may encourage over-cautiousness in that parties may interpret it as requiring them to engage in a full discovery process at the outset, which is not the Committee's intention. The Committee agreed to amend the proposed rule to reflect that parties will only need to include documents they know – at the time of giving initial disclosure — they intend to rely on at trial.

The Committee discussed the proposed timeframe of 25 working days for defendants to complete initial disclosure (a timeframe premised upon the interaction between the proposed r 8.4 and existing rules setting out when a defendant must file a statement of defence, for example r 5.47) and agreed it was an appropriate length of time.

Proposed Rule 9.1A Exchange of witness statements of factual evidence and expert evidence

The Committee agreed to change proposed r 9.1A(3) to provide judges the flexibility to make directions about the time of filing of statements of expert evidence at any time and not just at the judicial issues conference.

Proposed Rule 9.5 Consequences of incorporating document in common bundle

The Committee agreed to amend proposed r 9.5(3) so that it applied to groups as well as individual documents.

Proposed Rule 9.7 Requirements for witness statements of factual evidence

The Committee agreed to add another proposed sub-rule that requires witness statements to avoid needlessly referring to documents.

The Committee agreed to remove the proposed r 9.7(7) (once a party has served witness statements they must advise the registrar) on the basis it overlapped with the proposed r 7.4(8).

Proposed Rule 9.15A Narrative of events and facts

The Committee revisited whether the requirement for filing and serving a narrative of events would be valuable. Concerns were raised that artificially separating a narrative of events from openings would not be valuable as it would undermine the completeness of the opening statement and such a narrative filed well in advance of a trial may not assist a judge in familiarising themselves with the proceedings given judges will not usually be in a position to prepare for trial until much closer to the trial's start date and, by that stage, other documents would be filed, particularly the opening submissions which should contain the same narrative information. Points were raised also that it would be best to reduce the number of documents parties need to file, where possible.

The Committee agreed to remove the requirement for parties to file and serve a narrative of events separately from opening submissions. To compensate for that removal, the Committee agreed to move forward the filing timeframe for parties' opening submissions. The Committee agreed that plaintiffs should have a deadline of 10 working days ahead of a trial and responding parties should have five working days ahead of a trial. Further, parties' opening submissions should include the narrative of events that the parties think is revealed by the documentary evidence.

General matters

The Committee approved of the following proposed rules as presented or with minor changes: proposed rr 8.2, 8.4A, 8.15, 8.18, 8.24, 8.33, 9.2, 9.4, 9.5A, 9.9, 9.12, 9.15, 9.36AA and 9.44.

The Committee agreed to make a small change to Schedule 1 and to remove the proposed r 1.11.

The Committee endorsed the Chair and Chief Justice's acknowledgement and thanks to the Parliamentary Counsel Office and the sub-committee for the important work in drafting the proposed amendments.

b. Interlocutory decisions

The Chair led discussion on a proposal that judges not be required to provide reasons for non-dispositive interlocutory decisions to decrease the burden on judicial resources (C 10 of 2024). The Committee agreed to retain the requirement that judges provide reasons in such circumstances but agreed that judicial education encouraging judges to avoid the provision of unnecessarily lengthy reasons could be helpful in addressing this concern.

[redacted]

d. Timing and processes for introduction of changes to the High Court Rules

The Committee agreed that once it had approved of the amendments, a letter should be sent to submitters, the New Zealand Bar Association and the New Zealand Law Society. The letter will describe the Committee's essential decisions on the proposed amendments, and seek submissions on the proposed transitional arrangements.

The Committee agreed that there would need to be comprehensive education on the amendments once they were finalised.

[redacted]