

1 September 2020

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

Attention: Chair of the Rules Committee

By email: Rulescommittee@justice.govt.nz

Dear Sir

Rules Committee Consultation: Improving Access to civil justice
Our Ref: SOL115/1180

Thank you for the opportunity to comment on the Rules Committee's proposals. We set out comments on behalf of Crown Law.

In preparing these comments we have been mindful of the government's role in upholding the rule of law and the importance of access to justice to that principle. Crown Law sees its role as one of the kaitiaki of the law, along with the judiciary, the legal profession and others, and our comments reflect that role rather than taking the position of a self-interested litigant.

In addition, we note that much of the High Court litigation we are involved with is either short and swift or complex and precedential, so is unlikely to be suited to being dealt with in the way proposed.

Overall, Crown Law supports proposals which seek to resolve proceedings in a more timely way, and include only procedural steps that are necessary in the context of the issues at stake. The more speedy resolution of litigation is aligned with the objective of reducing the costs of civil litigation and therefore increasing access to civil justice. We are aware, however, that for new practices to become embedded, a high degree of judicial intervention (as well as substantive attention to the proceedings at an early stage) is likely to be needed, as the driver towards speedy resolution may not always align with a party's incentives in litigation.

We address the proposals in turn.

Short form trial processes

We agree that a streamlined process for some cases, eg. simple money cases or cases where the facts are not in dispute, may speed up the resolution of those cases and therefore reduce cost. We agree with the Rules Committee that not all cases would suit this process and the need for cost effective resolution must be balanced against the precedent effect of the case and its financial impact for the parties.

Success will depend on compliance by all parties, ideally without additional appearances or unnecessary documentation, both of which would reduce the benefits of the otherwise streamlined approach. As noted above, increased judicial intervention may be needed in order to embed this approach.

Inquisitorial processes

We would be interested to understand more about the proposal for inquisitorial processes if it were developed further. There may be concerns about the fundamental nature of the change proposed by the introduction of more informal dispute resolution; the effect of that on the transparency of the law; and the possibility that it could be seen as a “second class” or lesser justice process.

There was support for a proposal for compulsory judicial settlement conferences as an alternative, although we acknowledge this could add cost and delay in cases where it does not resolve the issues.¹

Summary Judgment

In comparison to the other options mooted in the consultation paper, we did not consider that expansion of the application of the summary judgment process would be likely to have a significant impact on the timely resolution of proceedings.

From our perspective, the current scope of cases for which summary judgment is available is appropriate. A requirement to engage in the summary judgment procedure in all cases would add additional time and cost, for example in the preparation of affidavits in support of the application, and effectively lead to a case being litigated twice.

Streamlining Standard Pre-Trial and Trial processes

The mode of giving evidence

We agree that the process of preparing written briefs can be a costly exercise. In cases where oral, as opposed to affidavit, evidence is required, the use of will say statements could operate to reduce cost. We preferred this option, together with tools such as agreed statements of facts, to the practice of written briefs being taken as read. The latter practice, in our experience, tends to be a relatively ineffective way for the court to obtain a full picture of the witness’ evidence and demeanour.

Discovery proposals

We agree that discovery is a requirement that adds considerably to the cost of civil litigation; and that further reform refining what is truly required for the resolution of different categories of proceedings would be beneficial.

Additional suggestion for consideration

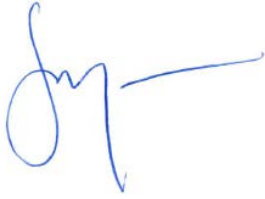
A more minor suggestion that we consider may help with access to justice in civil litigation would be to provide a user friendly guide to the requirements of the rules, perhaps in a

¹ While the consultation documents refer to this applying in the District Court, it is difficult in some fora that apply the District Court Rules if there is only one Authority, eg, Taxation Review Authority or Customs Appeal Authority.

flowchart form. A flowchart could be used to illustrate to those not familiar with the rules the different steps required in bringing or responding to a proceeding.

Yours faithfully

Crown Law

A handwritten signature in blue ink, appearing to be 'JG' with a long horizontal stroke extending to the right.

Jessica Gorman
Senior Crown Counsel