



The Rules Committee

Te Komiti mō ngā Tikanga Kooti

26 June 2024
Minutes 06/2024

Circular 19 of 2024

Minutes of Meeting of 24 June 2024

The meeting called by Agenda 11/06 (C 14 of 2024) convened at 10.00 am using the Microsoft Teams virtual meeting room facility.

Present (Remotely)

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Hon Justice Cooper, Special Purposes Appointee and President of the Court of Appeal
Hon Justice Cooke, Chair and Judge of the Court of Appeal
Hon Justice Fitzgerald, Chief High Court Judge
Hon Justice Gault, Judge of the High Court
His Honour Judge Taumaunu, Chief District Court Judge
Ms Alison Todd, Senior Crown Counsel as Representative of the Solicitor-General
Ms Stephanie Grieve KC, New Zealand Law Society Representative and Barrister
Mr Daniel Kalderimis, New Zealand Law Society Representative and Barrister
Mr Paul David KC, Special Purposes Appointee and New Zealand Bar Association President Elect
Mr Sam Kunowski, attending on behalf of Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice and Representative of the Secretary of Justice

In Attendance (Remotely)

Ms Cathy Pooke, Parliamentary Counsel Office Rules Committee Liaison
Ms Georgia Barclay, Clerk to the Rules Committee
Ms Georgia Shen, Secretary to the Rules Committee
Mr Kieron McCarron, Chief Advisor Legal and Policy Supreme Court

Apologies

Hon Judith Collins KC MP, Attorney-General
Hon Justice Whata, Judge of the High Court
His Honour Judge Kellar, District Court Judge

1. Preliminary

Minutes of previous meeting

The minutes of the previous meeting as provisionally circulated were received and adopted, with one small change.

Meeting dates for 2025

The Committee approved of the proposed meeting dates for 2025 of 31 March, 23 June, 6 October and 24 November.

2. Improving Access to Civil Justice

a. Approval of draft Rules

The Committee reviewed the further draft of proposed amendments to the Rules, prepared by Parliamentary Counsel Office and the Access to Justice sub-committee. The Chair provided a memorandum of advice, highlighting several suggested changes the sub-committee had proposed since the Committee's last meeting.

Standard directions: The Committee agreed to add five days to each of the timeframes for standard directions in proposed r 7.4 to give parties greater time to meet those directions. The Committee agreed not to include provision for applications for further particulars as one of the applications referred to in r 7.4(5) that deferred the standard timetable. Parties can continue with the standard directions before a Judicial Issues Conference with any need for better particularisation able to be considered at the Judicial Issues Conference itself. Because Judicial Issues Conferences will, under the proposed rules, happen after the service of evidence, this approach may reduce the need for particulars. In most cases, parties should still be able to plead to and file evidence for a pleading that they think is inadequately particularised. In other cases parties could ask a judge for alternative directions under proposed r 7.4(7) on the basis further particularisation would best achieve the overriding objective in proposed r 1.2. Parties could also write to each other to request particulars and with seriously deficient pleadings an application for strike out could be pursued. Excluding this as a specific application under 7.4(5) maintained the focus on efficiency promoted by the new amendments.

Adding a requirement that a party seek leave if they wish to include documents in the common bundle that have not been previously disclosed. The Committee agreed that this requirement should be added as proposed r 9.2(2) to discourage parties trying to introduce non-disclosed documents late in the process.

Presumptive admissibility for documents in the common bundle: The Committee agreed to amending the wording of proposed r 9.5(2)(a)(iii) so that a document in the common bundle

will only be automatically received into evidence and presumed to be admissible if it is referred to in a witness's evidence, a chronology or in opening submissions. Previously, proposed r 9.5(2)(a)(iii) had provided for presumptive admissibility for documents referred to in submissions generally apart from closing submissions. The amended rule was clearer.

Changing the wording of proposed r 7.5B: The Committee considered whether the proposed r 7.5B as worded may encourage parties to file an unduly high volume of evidence for Judicial Issues Conferences. As worded, it stated that parties must file and serve a "bundle of their key evidence and documents" along with a position paper. It was agreed to change the wording to limit it to key evidence and documents referred to in a party's position paper.

b. Transitional arrangements

The Chair led discussion on the transitional arrangements. A memorandum was provided to the Committee outlining the Committee's previous approaches to transitional arrangements. It advised that the Committee had tended to avoid the use of transitional provisions (see the minutes of the Committee's meetings of 13 June 2011, 6 August 2012 and 21 September 2020).

The Chair suggested that a different approach was required here in light of the regime change involved in the proposed amendments. He suggested a transitional provision that would provide that the proposed new regime would only apply to proceedings commenced on or after a commencement date with a discretionary power for the Court to bring existing proceedings under the proposed new regime.

The Committee agreed with this suggestion. The point was made that introducing a more specific mechanism for existing proceedings to fall under the proposed new regime would be overly complex and that not all existing proceedings would be able to transition to the new regime (for example, if parties had already embarked on discovery). Having a particular date on which the proposed new regime would apply would also give certainty both to the profession and to court registries, who would be able to better resource and implement the new system if the implementation date was more certain.

c. Judicial resourcing implications

The Chair brought to the Committee's attention a concern that judicial resources may be strained by the introduction of the proposed regime. There may not be enough judicial resources to account for the number of Judicial Issues Conferences that could conceivably be required under the proposed new regime. Model rosters had been prepared assuming one day of judicial resource was required for each new proceeding filed which suggested there was insufficient judicial resource. However, there were mitigating factors as most Judicial Issues Conferences are unlikely to require a full day of judicial resource, and the proposed regime aims to increase the number of parties resolving matters prior to a Judicial Issues Conferences.

The Committee noted the concern.

d. Consequential changes to other Parts of the High Court Rules 2016

The Chair raised the point that the proposed rules were only intended to apply to ordinary proceedings, rather than specialised proceedings dealt with under other Parts of the Rules. Having canvassed the extent of cross-referencing between the proposed changes and other Parts of the Rules, only one change was identified as needed to clarify that the amended case management procedure would not apply to those other Parts. The Committee agreed to a new express power in Pt 18 to allow the Court to give directions for a Pt 18 proceeding.

The Chair also raised the point that the time allocations for the costs regime set out in sch 3 of the Rules would need to be amended to reflect the proposed changes (for example, providing an allowance for a Judicial Issues Conference). Alison Todd agreed to work with the sub-committee on this issue.

e. Approach moving forward with the proposed amendments

The Committee agreed to conduct a final round of limited consultation on the final draft of proposed amendments. The Committee discussed the necessary steps before any consultation, deciding that it would be appropriate to, in addition to the changes discussed above:

- Prepare the standard form chronology;
- create a flowchart of the proposed new regime, possibly to be included in the Rules themselves; and
- receive feedback from the High Court Registry.

In light of the steps required before the proposed amendments could be finalised, the Committee considered that it was feasible to aim for a commencement date in the latter half of 2025. Before that stage, there would be time for judicial and professional education about the proposed regime, through roadshows and other means.

3. New Zealand Law Commission's recommendations to the Committee concerning Code of conduct for Expert Evidence and Tikanga

The New Zealand Law Commission's report on its third review of the Evidence Act 2006 was referred to the Committee. In the report, the Commission recommended the Committee amend the code of conduct for expert witnesses contained in sch 4 of the High Court Rules to clarify certain matters in relation to mātauranga and tikanga evidence. At the Committee's February meeting it was agreed that the Chair would invite Justice Whata to provide advice on the appropriate response.

The Chair, on behalf of himself and Justice Whata, put forward a proposal to establish a sub-committee that would aim to review the Law Commission's recommendations and potentially

establish a new separate code of conduct relating to mātauranga and tikanga expert evidence. The new code may be influenced by the underlying concepts that inform the current Code of Conduct, but would recognise the particular perspectives that arise in relation to mātauranga and tikanga evidence. The Chair and Justice Whata considered this to be a more appropriate solution than amending the existing code.

The Committee agreed that the current code of conduct for expert witnesses may not be suitable for experts in tikanga and mātauranga. It also agreed that given the implications of a code relating to mātauranga and tikanga evidence the best approach would be to establish a specialist sub-committee with a preliminary view to preparing a new code of conduct. Any should account for the different codes of conduct applying in specialist courts, for example the Environment Court.

The Committee agreed with the make up of the group suggested by the Chair and Justice Whata: Justice Whata, Justice Harvey, Professor Wiremu Doherty and Mr Matanuku Mahuika. In addition, the Committee considered that representation from Crown Law should be included. It was also agreed that the Chief Judge of the Environment Court should be informed of the Committee's approach, as it is possible that any code of conduct so formulated may have an impact on proceedings before that Court in particular.

As a separate but related matter the Chief Justice raised the issue of a separate code of conduct for expert witnesses in criminal proceedings. The Committee agreed to refer this matter to the Criminal Rules Sub-Committee, which had previously begun looking at this issue before its disbandment in 2015.

4. Recommendations of the Criminal Rules Sub-Committee

The letter of the Chair of the Criminal Rules Sub-Committee to the Rules Committee proposing two recommendations of the Sub-Committee was considered. This involved proposals:

- (a) to amend the Criminal Procedure Rules 2012 to require victim impact statements and any request to read those statements to the Court be filed and served at least five working days prior to a sentencing hearing; and
- (b) suggesting a communication to the Chief Justice's Advisory Committee recommending that Heads of Bench revoke several practice notes made redundant by the introduction of the Criminal Procedure Act 2011.

The Committee agreed with the Sub-Committee's recommendation to amend the notification requirements for victim impact statements, noting the recommendation had support from the profession and the Chief Victims Advisor but that any requirement would need to be carefully drafted to avoid restricting any rights under the Victims Rights Act 2022.

The Committee also agreed with the Sub-Committee's proposal that a memorandum be sent to the Chief Justice's Advisory Committee recommending the revocation of several out-of-date practice notes.

5. Outstanding COVID-19 Amendments

In February, the Committee had received an inquiry about whether it intended to reinstate r 9.7(4)(a) of the High Court Rules which had required briefs of evidence to "be signed by the witness by whom the brief is provided". This was revoked in 2020 by the High Court (COVID-19 Preparedness) Amendment Rules 2020. Following receipt of this inquiry, further investigations were conducted to establish whether any other changes made during COVID-19 should be reconsidered.

A memorandum from the Chair suggested that most of the changes continued to be relevant and should remain as they stand was considered. Two changes were identified as no longer required: the revocation of the requirement under r 9.7(4) that briefs of evidence be signed by the witness; and the revocation of the requirement that signatures be original under r 5.6.

The Committee agreed that these two changes should be reversed. The Committee agreed that the requirement that required signatures be original in r 5.6 was important for the integrity of documents, although any amendment should include a proviso allowing for electronic signatures.

The Committee discussed whether it was worth making such amendments now or whether it would be better to make them with the proposed Improving Access to Civil Justice amendments. Ultimately, it considered that it was best to address these outstanding COVID-19 amendments separately now.

6. Public release of Rules Committee meeting materials

The Chair raised a question about the public availability of materials received and considered by it. The Committee currently publishes the minutes of its meetings on the website. It does not publish the meeting materials, although members of the public can write to the Clerk of the Committee requesting them. The Chair pointed out that documents provided to the Rules Committee might be subject to the Official Information Act 1982.

The Committee saw that publishing its meeting materials, other than any confidential information, could have merit. The Committee decided to investigate whether it had discussed such publication in the past before deciding on a path forward before the next meeting.

7. Matters for Noting

The Committee considered that it would be appropriate to seek an update from the Attorney-General and Minister of Justice on their planned response to the Committee's recommendations in its report on Improving Access to Civil Justice of November 2022 that did not involve changes to the rules but legislative and policy changes. The Committee agreed that the Chair should write to the Ministers to ask whether steps had been considered.

Meeting closed at 11.30am

Justice Francis Cooke
Chair