The Rules Committee
Te Komiti mō ngā Tikanga Kooti

30 September 2024
Minutes 09/2024

Circular 30 of 2024

Minutes of Meeting of 30 September 2024

*The meeting called by Agenda 11/06 (**C 20** 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 KC, New Zealand Law Society Representative and Barrister
Mr Paul David KC, Special Purposes Appointee and New Zealand Bar Association President
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 Cathy Rodgers, Parliamentary Counsel Office R
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
His Honour Judge Kellar, District Court Judge

1. Preliminary

Minutes of previous meeting

The Committee approved the minutes of its meeting of 24 June 2024. The point was made in relation to item 2(c) of that meeting that Judicial Issues Conferences, while perhaps not always requiring a full day of judicial resource, would prudently be allocated a full day of resource for planning purposes at least at the outset.

2. Updates and correspondence

a. Sub-committee for code of conduct for expert witnesses in tikanga and mātauranga

The Chair noted that a sub-committee has been formed, made up of Justice Harvey, Justice Whata, Justice Cooke, Professor Wiremu Doherty, Mr Matanuku Mahuika, Ms Virginia Hardy and Mr Jason Gough. The work they are to undertake in deciding whether to recommend to the Committee a new or amended code of conduct for expert witnesses with expertise in tikanga or mātauranga is underway, with an update expected in the new year.

b. Letter to Attorney-General and Minister for Justice

The Chair's letter to the Attorney-General and Minister for Justice dated 12 July 2024 discussing matters arising from the Committee's Improving Access to Civil Justice Report was tabled.

c. Redundant practice notes in criminal jurisdiction

The Chair's letter to the Chief Justice's Advisory Committee dated 25 June 2024 concerning redundant Practice Notes in the criminal jurisdiction (as discussed at Item 4 in the Committee's meeting of 24 June 2024) was tabled.

d. Te reo Māori and sign language in courts

In previous meetings, the Committee agreed to propose amendments enabling translation services to be provided to enable court participants to participate in te reo Māori or in sign language. That matter was paused at the Ministry's request to enable the costs implications of such an amendment to be investigated. Mr Chhana provided an update. After discussion it was agreed that the matter needed to be finalised at the Committee's next meeting.

e. Victim impact statements

The Committee considered proposed amendments to the Criminal Procedure Rules 2012 that would see victim impact statements filed and served five working days prior to a sentencing hearing.

The proposed amendments contained a requirement to serve a statement on the defendant. The point was made that this requirement is problematic because of the interrelation between

the proposed rule and the Victims Rights Act 2002: the Act requires under s 23 that defendants are not given copies of statements to keep, and it is otherwise silent on the issue of service. The Act's silence on the point may indicate the problems of reconciling service on a defendant with s 23. The Committee agreed to refer the matter back to the Criminal Rules Sub-committee for it to address those matters and the draft rules generally.

The Committee also agreed that two minor changes would be appropriate. First, that references be changed from "defendant" to "offender" for consistency with the Act and because by the time a statement is provided the relevant defendant will have been convicted. Second, a question was raised about the wording of the proposed rule requiring a statement to be submitted to a "judicial officer". The point was made that it may not be practically feasible for the statements to get before a judge in the timeframe allocated, rather than to the registry. The Committee agreed an amendment such as requiring statements to be "filed with the court" would be appropriate.

3. Improving Access to Civil Justice

a. Submissions received in consultation

In its last meeting, the Committee agreed to conduct a final round of limited consultation on the final draft of proposed amendments. As a result, the Committee received 11 submissions. The Committee noted the thorough and detailed way they engaged with the proposed rules.

In response to the submissions, the access to justice sub-committee compiled a memorandum of advice, commenting upon themes across the submissions.

Proposed r 1.2 | overriding objective: the Committee agreed with the suggestion made by the New Zealand Law Society to change the wording of r 1.2 to avoid a tension between "justice" on one hand and "speed" and "inexpensiveness" on the other.

Proposed r 1.2A | general duty to cooperate: the Committee agreed to make no change to proposed r 1.2A about a general duty to co-operate, despite some concerns raised that the duty to co-operate may not always be achievable.

Proposed r 7.4 | standard directions

The Committee agreed with the sub-committee's recommendations as set out in paras [7(a)–(f)], [7(h)–(k)] and [7(n)] of its memorandum of advice.

The Committee decided to act on the suggestion by some submitters to extend the timeframes in the standard directions, addressed at para [7(g)] of the sub-committee's memorandum. It accepted the points made that defendants especially could benefit from longer timeframes. The Committee decided to action this decision by amending the existing r 5.47, which currently requires a statement of defence to be filed 25 working days after the day on which the statement of claim and notice of proceeding are served on the defendant, to extend the time

to file by five working days. Further consequential amendments, for example to the notice of proceeding, would also need to be made.

The Committee agreed with the sub-committee's recommendations set out in paras [7(l) and (m)]. It observed, in relation to [7(l)], that the sentiment behind Crown Law's suggestion — to require Registrars not schedule Judicial Issues Conferences earlier than 25 working days after the plaintiff has given advice to the Registrar that all evidence and chronologies have been served by the parties – was best addressed as a matter of Registry practice than rule provision. The Committee observed, in relation to [7(m)], that timetabling steps going forward from the Judicial Issues Conference rather than backwards from the date of hearing / trial was increasingly seen as good registry practice but that, similarly, a requirement in the Rules to that effect was not appropriate.

Proposed rr 7.4 and 9.1A | witness statements:

The Committee agreed to remove the words "(excluding any relating to any affirmative defence or counterclaim)" in proposed r 7.4(1)(c)(i), as a way to address the concern raised in the sub-committee's memorandum of advice at [8(a)].

The Committee otherwise agreed with the sub-committee's recommendations and comments as set out at paras [8(a)–(d)]. The point was made that supplementary witness statements (as referenced at [8(b)]) would be appropriate in some cases.

Proposed r 7.5 | Judicial Issues Conference

The Committee agreed with the views of the sub-committee set out at [9(a)–(f)] of its memorandum of advice. The suggestion that parties ought to provide draft timetables for trial received particular support, with the point made that such an activity has been shown to be helpful in avoiding inadequate timeframes that lead to the adjournment of longer trials, having negative implications for court scheduling. The point was also made, in relation to the suggestion discussed at para [9(d)] of the memorandum, that more forceful wording concerning settlement would signal to parties that they ought to be seriously considering alternative dispute resolution and its appropriateness.

In relation to [9(a)] of the memorandum, the importance of the Issues Conference was noted, and that it would only not occur if a Judge agreed that not having one better met the overriding objective in r 1.2 of the proposed rules.

Proposed r 7.34 | mode of hearing interlocutory applications:

The Committee agreed with the sub-committee's suggestions set out at para [10] of its memorandum of advice. It was agreed that Registry communication, rather than a rule, advising parties of the option to apply to change the mode of hearing of interlocutory applications was appropriate. The Committee decided against creating a presumption of

remote hearings for interlocutory applications, preferring the approach that the decision should be left to judicial discretion. The Committee agreed that the language of r 7.34 should be softened to reflect that such an application need not be formal.

Disclosure

The Committee agreed that judicial education would be helpful in clarifying the process envisioned under the new disclosure regime, and in particular that parties can request further disclosure where appropriate. The proposed rules try to balance a desire to reduce the excessive documentation currently produced in litigation on one hand, with the need for relevant and essential documents to be before both parties, on the other.

After considering submissions raising questions about the meaning of the term "known adverse documents" which are required to be provided in initial disclosure (set out in paras [11(c) and (d) of the memorandum of advice), the Committee agreed to remove "known" from the term as it is expressed in proposed r 7.5 and all related rules and forms. The Committee considered that the substance of related provisions will make it clear that the term "adverse documents" imports a requirement of knowledge, while removing "known" from the term reduces the prospect of parties superficially interpreting it and claiming they did not need to disclose a document they ought to have.

Otherwise, the Committee agreed with the sub-committee's views, as expressed in paras [11(a), (b) and (e)–(j)] of its memorandum of advice.

Proposed r 9.5A | documentary hearsay at trial:

The Committee noted the disappointment of one submitter that it had not gone further in allowing documentary hearsay through the proposed common bundle rules. The Committee agreed to raise the matter with the Legislation and Law Reform Committee, to consider whether an amendment to the Evidence Act might be appropriate – noting that the Committee itself was not able to make such an amendment.

The Committee otherwise agreed with the sub-committee's views as expressed in paras [12] and [13] of its memorandum of advice.

Proposed r 9.15 | cross-examination duties:

A submitter made the point that the wording of proposed r 9.15 was cryptic (addressed in para [14] of the memorandum of advice). The Committee agreed that adjusting the wording would be appropriate, and agreed on the wording, "before questioning a witness in order to meet any duties that might arise under section 92 of the Evidence Act 2006, a party may raise with the court when or the extent to which questioning is required".

Expert evidence: The Committee agreed with the sub-committee's views as expressed in paras [15]–[17] of its memorandum of advice, relating to expert evidence under the proposed rules.

Other technical suggestions

The Committee agreed with the sub-committee's views on what other technical amendments may be appropriate, as set out in para [18] of its memo, with one exception. In relation to para [18(o)], the Committee considered that use of "may" rather than "must" for proposed r 8.15(3) was appropriate.

Relation to other parts of the Rules: The Committee agreed with the sub-committee's views as they related to submitters' suggestions that the reforms should apply to other parts of the Rules, set out at para [19] of the sub-committee's memorandum of advice.

General: The Committee agreed the sub-committee would liaise with PCO to implement the Committee's decisions. It was also agreed that the timing of education on the new rules would ideally take place in the middle of next year.

b. Costs schedule

In the last meeting, the need for the costs regime set out in sch 3 of the Rules to be amended to reflect the proposed access to justice amendments was raised. An exposure draft of amendments to the costs schedule was tabled and the Committee agreed to address it at its next meeting.

4. Miscellaneous amendments

The Committee agreed to address various suggestions made by judges and members of the public, set out in a memorandum from the Chair, at its next meeting. Mr Chhana said he would make inquiries about costs awards by Commissions of Inquiry that had been raised.

Meeting closed at 11.30am

Justice Francis Cooke
Chair