The Rules
Committee

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11 April 2019
Minutes 01/18

Circular 21 of 2019

Minutes of meeting held on 18 March 2019

The meeting called by Agenda 01/19 began at 10 am on Monday 18 March 2019 in the Chief Justice's Boardroom, Supreme Court, Wellington.

1. Preliminary

In Attendance

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Hon Justice Venning, Chief High Court Judge
Hon Justice Dobson, Interim Chair
Judge Gibson
Judge Kellar
Mr Andrew Beck, New Zealand Law Society (**NZLS**) Representative
Ms Jessica Gorman, Representative for the Solicitor-General
Mr Jason McHerron, NZLS Representative
Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice
Ms Laura O'Gorman
Ms Jessica Braithwaite, Alternate for Ms Fiona Leonard (Parliamentary Counsel Office)
Ms Elise Daly Sadgrove, Acting Secretary to the Rules Committee (Alternate for Ms Alexandria Mark)
Mr Sebastian Hartley, Clerk to the Rules Committee

Apologies

Hon David Parker, Attorney-General
Hon Justice Courtney, Chair of the Rules Committee
Judge Doogue, Chief District Court Judge
Mr Andrew Kibblewhite, Secretary of Justice
Ms Fiona Leonard, Parliamentary Counsel Office
Mr Rajesh Chhana, Representative for the Secretary of Justice
Ms Alexandria Mark, Secretary to the Rules Committee

Minutes of Previous Meeting

The minutes of the Committee's meeting of 26 November 2011 (**C 58 of 2018**) were confirmed.

Preliminary General Business

Justice Dobson assumed the chair in the absence of Justice Courtney. The Chair acknowledged the tragic events of 15 March 2019 in Christchurch and noted that many of the usual representatives from the Ministry of Justice (**MOJ**) and Parliamentary Counsel Office (**PCO**) were unable to attend because of their involvement in the Government's response to the attacks.

The Chair noted that Mr Andrew Kibblewhite, recently appointed Secretary for Justice, had hoped to attend the meeting but was unavoidably detained by his role in that response.

The Chair welcomed the Chief Justice to her first meeting in that capacity.

The Chair indicated that the meeting would first consider agenda items 4 and 5 to allow Judge Kellar to speak to those items before his departure.

4. Access to Justice in the District Court

At its meeting on 27 August 2018 (see **C 45 of 2018** for minutes) the Attorney-General raised the issue of whether the alignment of the High Court's and District Court's Rules produces a barrier to access to justice by replicating the High Court's pre-trial proceedings in respect of matters adjudicated in the District Court.

At the meeting on 26 November 2018, Judge Kellar noted initial findings (see **C 48 of 2018**) that debt collection cases make up the vast majority of District Court civil proceedings and only 4% go to trial. Since then, the Committee has received research recently undertaken by Dr Bridgette Toy-Cronin of the University of Otago Legal Issues Centre. Dr Toy-Cronin was contacted by the Clerk and provided a comprehensive statement of findings on research on access to justice. Judge Kellar spoke to this, together with his research conducted since the last meeting (see **C 20 of 2019**).

Judge Kellar saw the Attorney-General's concern as primarily cost-based. It is generally accepted that the costs of fully defending a civil proceeding are disproportionate to the value of claims for less than $100,000. His Honour acknowledged that the responsibility to fully observe the procedural obligations under the District Court Rules (**DCRs**) may discourage filing or, alternatively, encourage settlements that might not otherwise take place. However, the Judge's view is that the DCRs are not an impediment in themselves. There is sufficient flexibility available under the DCRs to allow judges to tailor the procedural requirements to the circumstances of each case, allowing costs to be reduced where possible. Equally, the interests of justice sometimes require procedural complexity to remain in place.

Dr Toy-Cronin's paper indicates that the District Court's civil jurisdiction is underutilised compared to that of the Disputes Tribunal and the High Court, indicating that there is an issue as to its utility. Noting concerns raised in Dr Toy-Cronin's paper, Judge Kellar did not consider the District Court's civil jurisdiction is tardy in resolving cases. Three-quarters of matters are disposed of within a year of filing. The Judge acknowledged that concerns remain over the responsiveness and accessibility of staff in the Court's centralised registry, but Chief Judge Doogue has commissioned surveys that report general satisfaction with that registry's performance. The Judge acknowledged there is a focus on achieving and encouraging settlement under the DCRs that may not be appropriate in all cases, and that the costs of full procedural compliance may encourage settlement as defending a matter may be uneconomic.

Judge Kellar acknowledged difficulties in identifying the best solution. The Judge noted a wide range of suggestions which may be worth considering further:

- previous suggestions from President Kós and the NZBA;

- the District Court's civil bench being encouraged to use the flexibility available under the current rules to tailor procedural requirements to each proceeding to reduce costliness;

- amend legislation to increase the Disputes Tribunal's and District Court's civil jurisdiction to ensure costs remain proportionate to the value of claims litigated. On this suggestion, Mr McHerron raised the need to evaluate whether altering the rights of appeal from the Disputes Tribunal would be necessary, or whether tiered appeal rights might be prudent (as suggested by Judge Gibson, noting the similar position with motor vehicle disputes);

- looking at other jurisdictions' approaches to electronic courts and tribunals as a tool for addressing these concerns, while acknowledging the root and branch nature of such measures and the need for caution in pursuing radical reforms.

The Chair thanked Judge Kellar for his report. A general discussion ensued. Judges Kellar and Gibson expressed reluctance about a dedicated civil division of the District Court to concentrate expertise in managing such proceedings; noting general civil proceedings constitute a small percentage of the District Court's overall caseload.

The Chief Justice noted that there are two possible responses available. The first would be more Government-led and would involve increasing civil legal aid to increase access to representation. The Committee would do what it could to achieve that outcome, such as supporting unbundling of legal services where possible. The second approach would be for the Committee to change or modify procedure to make justice cost less, adopting innovative thinking to trim back complexity and cost by promoting short form trials, reviewing the necessity for briefs of evidence, etc. At the extreme end of responses would be embracing President Kós's suggestions for a civilian approach to civil justice in claims below a certain value or level of complexity, removing the right to discovery and other common law procedures which overseas experience suggests can substantially reduce costs.

The immediate response to the Attorney-General's more specific query is that there is sufficient flexibility in the DCRs to allow for proportionality to be maintained between cost and complexity on the one hand, and the interests of justice on the other, to promote access to justice, but the presumptive procedural model is complex and expensive. But achieving that flexibility depends upon the exercise of judicial discretion on a case by case basis.

The difficulty of making informed policy decisions in the absence of adequate data was also noted. There is already a lot of data produced by MOJ and other stakeholders. The Committee's difficulty, Justice Venning noted, is having the relevant expertise and knowledge to formulate requests for targeted data and to interrogate and analyse that data once received.

Conclusions Reached and Action Points Agreed

- Committee, as an ongoing area of work, to consider unbundling of legal services, costs issues, and the issues with solicitors on the record to address the costs of representation impeding access to justice. (See also **Item 3** and **Item 14**)

- Committee to evaluate, as an ongoing area of work, whether to adopt a streamlined procedure for matters of lesser value or complexity in the District Court in which there are proportionately simplified procedural rights and responsibilities.

- A working group was formed, comprised of **Venning J**, **Judge Kellar**, and **Jason McHerron**. The **Clerk** is to produce an initial discussion paper for the group. Ultimately, the paper to be applied towards canvassing users' demand for these changes. Key stakeholders contemplated are the Citizens Advice

Bureaux, Community Law Centres, Disputes Tribunal, the NZBA and the NZLS. Regard should be had to the High Court civil jurisdiction, and the utilisation of electronic courts and tribunals annexed to the existing justice system.

5. Usability and Consistency of District Court Forms

At its meeting on 26 February 2018 (see **C 9 of 2018** for minutes) the Committee considered correspondence from Mr Julian Long asking the Committee to consider long-term changes to District Court forms to enable easier comprehension and completion by non-lawyers. Mr Long also asked the Committee to consider utilising electronic forms in the DCRs. The PCO representative agreed to consider the general usability and consistency of the District Court Forms.

A December 2018 'stocktake' of outstanding items identified that this item had not been progressed. Following correspondence between the Clerk and Ms Leonard (PCO), Ms Leonard provided a memorandum regarding the feasibility and desirability of revisions to the District Court Forms (**C 9 of 2019**).

Ms Braithwaite, in attendance for PCO, recommended the Committee consider adopting an approach the PCO has been using with executive agencies. Instead of a form being included in legislation and legislative instruments, a list of prescribed information is provided. This allows agencies to control the appearance of the form, facilitates the presentation of the form in different media (including electronically), while not mandating the use of any particular medium, and can allow lay persons to more precisely prepare what is expected of them.

The view of the Committee was that this approach is not suited to the forms and processes within the province of the Committee. The goal is to have all necessary rules of court and forms in one location to aid accessibility. Accessibility is also aided by offering all users a template to complete. Acknowledging that templates could still be provided based on the list of prescribed information, it was considered desirable for judges and other court staff to have all documents siloed into the single form currently provided. The Courts' forms seldom change, meaning the easier nature of changing forms not embedded in legislative instruments is not a material advantage for the Committee.

Practitioner members noted the advantages of being able to point litigants to forms to assist understanding of their obligations, and the desirability of being able to update internal precedents as soon as amendments were notified.

Conclusions Reached

No action to be taken on PCO proposal to adopt list of prescribed information.

Judge Kellar left the meeting at 10:59 am. Having discussed items 4 and 5, the Committee turned to other business in the agenda order.

2. Representative Proceedings

The Committee's 26 November 2018 meeting (see **C 58 of 2018** for minutes) considered feedback received from a number of stakeholders on proposed amendments to the High Court Rules (**HCRs**) to provide an interim framework for representative proceedings (**C 2 of 2019**) pending consideration by the Law Commission and Parliament.

Ms Sadgrove advised that the Law Commission has reactivated its work on this area. The Committee decided it was preferable to continue work on this as an interim measure until legislative efforts are concluded.

The Committee noted the decision of Associate Judge Matthews as to the terms of the representation order in *Ross v Southern Response Earthquake Services Ltd* HC Christchurch CIV-2018-409-000361, 13 December 2018. This was drawn to the Committee's attention by Messrs Philip Skelton QC, Kelly Quinn, and Carter Pearce, who act as counsel for plaintiffs in this matter. They urged that the HCRs should expressly accommodate representation orders being made on an 'opt-out' basis. The Committee resolved to leave the issue to the legislature; noting that the proposed wording was intended to accommodate either approach (the reference to "opt-in" in r 4.71(2)(b) notwithstanding).

It was reiterated that the objective of this exercise is to 'codify' the common law developments to provide clarity in anticipation of subsequent legislative developments. Having considered all feedback, the Committee was satisfied that the proposed rules achieve this outcome, save for references to likely defences to be omitted from proposed r 4.72(b). Subject to that change, the Committee endorsed the proposal for adoption.

Conclusion Reached and Action Points

PCO to delete reference to likely defences in proposed r 4.7(2)(b). Subject to that deletion, and any other changes agreed at previous meetings being incorporated, the Committee concurs in the proposed amendments to the HCRs contained in C 58 of 2018 being adopted.

3. Costs

Litigants in Person, Lawyers in Person, and Employed Lawyers

The Committee noted the Supreme Court's decision in *McGuire v Secretary of Justice* [2018] NZSC 116. That decision had relevance to discussion at the Committee's meeting on 11 June 2018 concerning the decision of Associate Judge Matthews in *Commissioner of Inland Revenue v New Orleans Hotel (2011) Ltd* (see C 33 of 2018 for minutes). That decision disallowed a claim for costs on behalf of CIR where she had been represented by in-house counsel. It adopted the approach of the Court of Appeal in *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70, in which "costs incurred" required the litigant claiming costs to have received an invoice for the legal costs in issue. That discussion was subsequently deferred pending resolution of an appeal in *CIR v New Orleans Hotel*. That appeal has now been overtaken by the Supreme Court's decision in *McGuire*, which has held the "invoice required" approach to be wrong.

It was noted that the Court of Appeal's interpretation of the HCRs given in *Joint Action Funding* left open two important broader questions:

- should the primary rule (precluding litigants in person who do not fall under the lawyer in person and employed lawyer exceptions from obtaining an award of costs) be abrogated; and

- is it for this Committee to do so? The Supreme Court said in *McGuire* it was either for Parliament or the Rules Committee to take this step if desired, not the Courts. It appears unlikely that Parliament would take such a step.

The Chief Justice noted that, if the Committee answers both questions affirmatively, the third question becomes what information the Committee would need to decide what alternative rules as to cost should be put in place. Views were expressed that this would likely involve abandoning, to some extent, the current approach to costs, and that it could involve a fundamental change to the way in which costs are determined and applied. This may have implications for the structure and resourcing of the Courts, such as requiring the appointment of Taxing Registrars or Associate Judges. It was acknowledged that an easier course would be to abrogate the exceptions to the primary rule. A view was expressed that the primary rule is pernicious, especially considering the exceptions, and that the Committee should act following the decision in *McGuire*.

Taylor v Roper

The Committee noted the costs decision in *Taylor v Roper* [2019] NZHC 16. That litigation involved a claim for damages for mental injury (PTSD) caused by sexual and other assaults whilst the plaintiff was serving in the armed forces. Although her allegations of mistreatment were made out, a Limitation Act defence was upheld. Reduced costs were granted in favour of the individual defendant alleged to have carried out the assaults. Mr McHerron noted some negative commentary in the media about the decision, which suggested that, if the outcome in that case was the correct outcome under the rules, then the rules should change. However, in his view, properly read, there is sufficient flexibility in the HCRs to allow judges to depart from the principle of costs following the event in appropriate cases. The Committee concurred in this assessment.

Conclusions Reached and Action Points

- **Clerk** to look at overseas approaches to costs to support consideration of whether to abrogate the primary rule and/or the exceptions to that rule.

- No action to be taken in respect of the costs rules in light of *Taylor v Roper*.

6. Schedule 3 costs allocations

At its meeting on 26 November 2018 (see **C 58 of 2018** for minutes), the Committee considered feedback from the NZLS and NZBA on its draft amendment to sch 3 of the HCRs. This amendment introduces new time allocations for trial preparation differing between witness and affidavit hearings, and linking the allocations more closely to the length of hearing. The Bar Association agreed with the proposal and NZLS raised some concerns. The Committee agreed to make some changes and PCO was instructed accordingly. The Clerk was to liaise with ADLS to advise them of the agreed changes and to arrange for any feedback to be received before the first meeting of 2019.

ADLS subsequently stated that it would not be providing feedback on the proposed changes. The Committee agreed the proposed changes should be adopted, subject to correction of two minor apparent omissions (the omission of the word "after" in columns 2 and 3, item 30, sch 2). The costs amendments are to come into force from 1 August 2019.

Conclusions Reached and Action Points

The Committee agreed that the proposed amendments to the HCRs contained in **C10A of 2019** be adopted, subject to **PCO** making the minor corrections noted above and inserting 1 August 2019 as the commencement date.

7. Electronic Courts and Tribunals

The Committee noted that the latest version of the Senior Courts Civil Electronic Document Protocol (**C 12 of 2019**) had been released to the public. The Committee had regard to correspondence from Mr Easterbrook concerning technical matters raised by a previous version of the protocol, and agreed his concerns were addressed in Justices Miller's and Asher's comments included in the meeting materials (**C 17 of 2019**).

It was agreed that there is merit in Mr Easterbrook's point that the protocols should be technologically neutral as between software and platforms as an access to justice and 'future-proofing' consideration, and also that the protocol should contain adequate flexibility to ensure the needs of each case are met.

The Committee reconsidered a memorandum received from Justice Osborne on the concept of filing under the HCRs (**C 38 of 2018**), which it had considered briefly at the meeting of 29 September 2018 and tabled for discussion at this meeting. This raised the desirability of aligning the HCRs on filing and

service with those of the Court of Appeal and Supreme Court to facilitate electronic filing of documents other than originating documents and provide certainty to parties and counsel.

The Chair noted the key practical question raised by the memorandum is whether the HCRs should allow a document to be treated as filed if submitted digitally before the hard copy is received. Judicial members of the Committee considered the proposal to have merit. It is highly important to have certainty as to when a document was filed, particularly in areas such as insolvency. It was agreed that the possibilities suggested in Justice Osborne's memorandum should be explored further.

Conclusions Reached and Action Points

Clerk to advise changes necessary in the HCRs to address the points raised by Justice Osborne (**C 38 of 2018**). Mr McCarron noted that the only document required to be filed in hard copy in the Supreme Court is the application for leave to appeal, which equates to the position Justice Osborne proposed for other courts.

8. High Court Rule 7.4

At its meeting on 26 November 2018 (see **C 58 of 2018** for minutes), the MOJ sought the Committee's agreement to change the reference to rr 7.3(5) in HCR 7.4(3) to r 7.3(3) (see **C 49 of 2018**). Mr McHerron queried whether the change is appropriate. Referring to r 7.3(3) will necessarily refer to r 7.3(3)(a) which contains a time limit that is inappropriate in this context: "the plaintiff must file the first memorandum not later than 15 working days after the statement of defence is filed". In contrast to r 7.3(3), r 7.4 deals only with further conferences.

Mr McHerron suggested that the rule should be redrafted to consider this implication. The Committee agreed to Mr McHerron providing a redraft to Mr Chhana for consideration, with a copy to Justice Venning. The Committee received, with approval, Mr McHerron's suggested amendment (as stated in **C 11A of 2019**).

Conclusions Reached and Action Points

The Committee concurs in the proposed amendments to the HCRs contained in **C11A of 2019** being adopted. **PCO** to incorporate into HCRs.

The remaining agenda items were considered as a "stocktake" of matters that had been in abeyance.

9. Te Reo Māori Intituling

At its meeting on 4 December 2017 (see **C 64 of 2017** for minutes), a question was raised as to whether r 2.1(2)(a) of the Criminal Procedure Rules 2012 (**CPRs**) ought to be amended to formally enact the requirement for documents filed to include the name of the court and registry in both English and te reo Māori. As a matter of practice, the High Court is already including te reo Māori on the intituling of criminal judgments. The Committee agreed to this suggestion.

The additional issue arose as to whether corresponding rule-changes are necessary to incorporate this practice in the District Court, Court of Appeal and Supreme Court. Judge Gibson explained that, at that time, there was no confirmation of the te reo Māori names of all of the different District Court registries. The Court of Appeal and Supreme Court were awaiting changes to the intituling in the judgment template which, at that time, did not have sufficient room for the addition.

PCO was instructed to draft amendments to the CPRs to include a formal requirement for te reo Māori in the name of the court and registry and to check whether a change was necessary.

At its meeting on 26 February 2018 (see C 13 of 2018 for minutes), it was noted that the MOJ had prepared a memorandum updating the Committee on the certified te reo Māori translations for court locations for the purposes of the intituling of court documents. The Committee agreed to endorse those translations for future changes to the Criminal Procedure Rules 2012, the District Court Rules 2014, and the High Court Rules 2016 insofar as they are inconsistent. PCO was instructed to investigate any necessary amendments to the Rules, and the MOJ agreed to implement necessary changes to JDI.

This item of business had not been progressed since then. Following correspondence between the clerk and Ms Leonard, Ms Leonard provided a memorandum stating the feasibility and status of such changes (C 14 of 2019).

The Committee considered these materials.

Conclusions Reached and Action Points

- The Committee reconfirmed that PCO should, in future, use the MOJ certified translations noted in C 13 of 2018 to rectify any inconsistencies or errors in the naming of District and High Court registries in te reo Māori.

- The Committee concurred in the adoption of the draft amendments to rr 2.1 and 3.2 CPRs contained in C 19 of 2019 and advised PCO accordingly.

- The Committee agreed to include corresponding amendments in the Court of Appeal (Criminal) Rules to promote consistency; instructing the PCO accordingly, with the Chair to write to the President of the Court of Appeal to seek his concurrence in this change.

- It was noted that the DCRs do not contain the same formal requirements, but this had been achieved organically over time. The PCO was instructed to draft appropriate changes to the DCRs to achieve consistency.

- It was noted that the MOJ will make corresponding amendments to its forms and templates to require use of te reo Māori on other similar documents, such as non-traditional pleadings.

10. Miscellaneous Amendments to High Court Rules

At its meeting on 4 December 2017 (see C 64 of 2017 for minutes), Ms Gorman noted several miscellaneous issues with the HCRs. These included r 30.3(4) still referring to the Judicature Amendment Act 1972.

Ms Leonard provided a memorandum advising that HCR 30.3(4) is not a transitional provision. PCO's view was that r 30.3(4) is spent and can be revoked.

Conclusions Reached and Action Points

The Committee concurred in r 30.3(4) of the HCRs being revoked, with PCO to take action accordingly.

11. Expert Witness Conferencing (Hot-Tubbing)

At its meeting of 4 December 2017 (see C 64 of 2017 for minutes), the Committee considered a submission from NZLS encouraging the Committee to provide guidance in the rules as to expert witness conferencing (hot-tubbing) to encourage its use.

The Committee agreed that hot-tubbing is an effective and efficient practice. While demurring from the exact procedures suggested by the NZLS, the Committee considered it prudent, given that some counsel are not familiar with the procedure or are concerned about committing to it, to add hot-tubbing to the

list of matters contained in sch 5 HCRs. Hot-tubbing would then be flagged as an issue for discussion at case management conferences when appropriate. The PCO was instructed to draft a corresponding change to sch 5.

This item of business had not been progressed. Ms Leonard provided a memorandum (**C 14 of 2019**) advising that PCO had incorporated an amendment into the draft amendment HCRs to reflect this position (see **C10A of 2019**).

The Committee considered these materials. It was noted that the use of the word "panel" in the proposed new cl 8(e) sch 5 is new to this jurisdiction. Ms Braithwaite explained the term has been adopted from Australia. Justice Venning suggested that, instead of the amendment suggested by the PCO in **C10A of 2019**, the words "whether expert witnesses should conference, and how expert evidence is to be given (ie, in the normal course of the parties' case, in a consecutive manner, or by way of a panel)" should replace "and how the witnesses are to be heard." The Committee concurred in this alternate amendment being made.

Justice Venning noted that the adoption of the new Senior Courts Civil Electronic Document Protocol (see **Item 7** above) meant case management conferences should include discussion about preparation of an electronic bundle. The Committee agreed his Honour should supply appropriate wording to PCO for further consideration at a later meeting.

Conclusions Reached and Action Points

- The Committee concurred in cl 8(e), sch 5 of the HCRs being amended in accordance with Justice Venning's suggestion and instructed **PCO** accordingly.

- **Justice Venning** to suggest additional sch 5 wording to PCO to ensure the preparation of an electronic bundle is raised at case management conferences . **PCO** to draft amendments to sch 5 of the HCRs accordingly.

12. Amendment of Criminal Procedure Rules to Refer to District Court (Access to Court Documents) Rules

At its meeting on 26 February 2018 (see **C 13 of 2018** for minutes), the Committee agreed to amend r 6.1 of the CPRs to refer to the DCRs and to the District Court (Access to Court Documents) Rules 2017. PCO was instructed to assist in implementing these changes.

This item of business had not been progressed. Ms Leonard provided a memorandum (**C 14 of 2019**) advising that these had been incorporated into the draft amendment CPRs (**C 19 of 2019**).

The Committee considered these materials.

Conclusions Reached and Action Points

The Committee noted, and concurred in the making of, the amendments to the CPRs noted in **C 19 of 2019**, subject to final checking by **Mr McHerron**, and advised **PCO** accordingly.

13. Updating of Statutory References in r 21.2 DCR to Refer to District Courts Act 2016

At its meeting on 26 February 2018 (see **C 13 of 2018** for minutes), the Committee considered a submission from Associate Professor Barry Allan noting that r 21.2 refers to the provisions of the now-repealed District Courts Act 1947. It should now refer to the District Court Act 2016. The Committee agreed to make this change and instructed PCO accordingly.

This item of business had not been progressed. Ms Leonard provided a memorandum (**C 14 of 2019**) advising that PCO had incorporated appropriate amendments into the draft amendment DCRs (**C 15A of 2019**).

The Committee considered these materials.

Conclusions Reached and Action Points

The Committee noted, and concurred in the making of, the amendments to the DCRs noted in proposed r 4 of **C 15A of 2019**, and advised **PCO** accordingly, subject to the correction of any erroneous cross-references to "sections" as opposed to "rules", "clauses, etc.

14. Late Paper – NZLS Correspondence on Unbundling of Retainers

The Committee considered a letter received from the NZLS shortly before the meeting, which was not notified as an agenda item (**C 4 of 2019**). The NZLS noted that the Otago Legal Issues Centre (OLIC) had requested that the Law Society support potential rules changes so that lawyers would be more confident about providing unbundled representation. The OLIC had suggested these changes to the Committee in 2016, at which time the Committee considered that because the changes have potentially significant consequences it would be reluctant to proceed without an indication of NZLS support.

NZLS stated that the provision of unbundled legal services is an issue of considerable interest to the Law Society, as well as to the profession and the judiciary, because of the potential for improving access to justice. Unbundling also has the effect of improving the quality of the documents filed by self-represented litigants.

The NZLS agrees there is merit in investigating the OLIC's proposal to reform the rules to explicitly encompass the situation where a lawyer is acting on a limited retainer, and to provide flexibility around being lawyer on the record. NZLS noted that this could well form part of a wider discussion about litigation costs, and that any changes would need to be made only after wide consultation with the profession (including bar representatives, Community Law Centres, the Auckland Litigant in Person Pro Bono Service, Law Society committees and so on).

NZLS requested the Committee have a preliminary discussion about its views on unbundled legal services and what issues the Committee sees as a priority for exploration.

Speaking to the letter, Mr Beck said the first question must be what the Committee is to ask the profession in canvassing opinions on any such reforms. This involves establishing what alternatives might be adopted as discussion points in consultation, which requires knowledge of what is happening in other jurisdictions.

It was noted that no solicitor on the record needs to be recorded at present, and there is no impediment to a solicitor advising on some parts of a matter without being nominated as the solicitor on the record. Mr Beck stated that, in the NZLS' view, while that may be true, the rules do not expressly contemplate that situation, and it would give practitioners greater confidence to unbundle their retainers to have clearer guidance in the Rules.

In principle, the judicial members of the Committee agreed that unbundling is to be supported in general and took the view that only relatively minor adjustments will need to be made to the rules to support that outcome. The Clerk was instructed to undertake research to help the Committee determine next steps. Mr Beck advised that, to his knowledge, there is general support, or at-least no general opposition, to this proposal, and that practitioners will be encouraged to receive guidance from rules amendments on how to act appropriately on limited retainers.

Conclusions Reached and Action Points

Generally supporting the unbundling of retainers in principle, the Committee instructed the **Clerk**, with assistance from **Mr Beck** if required, to evaluate what the rules contemplate and provide for at present, what the situation is in other jurisdictions , and to consider the implications for any changes (such as potentially allowing costs awards in the amounts of invoices billed to otherwise self-representing litigants for assistance and advice from practitioners).

Meeting Closed 12:13 pm

Next Meeting 10 am, Monday 17 June 2019 at the Chief Justice's Boardroom, Supreme Court, Wellington