



The Rules Committee

Te Komiti mō ngā Tikanga Kooti

19 June 2023
Minutes 6/2023

Circular 26 of 2023

Minutes of Meeting of 19 June 2023

The meeting called by Agenda 6/23 (C 13 of 2023) convened at 9:45 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 Thomas, Chief High Court Judge
Hon Judge Taumaunu, Chief District Court Judge
Hon Justice Cooke, Chair and Judge of the High Court
Ms Alison Todd, Senior Crown Counsel as Representative of the Solicitor-General
Ms Laura O’Gorman KC, Special Purposes Appointee and Barrister
Mr Jason McHerron, New Zealand Law Society Representative and Barrister
Mr Daniel Kalderimis, New Zealand Law Society Representative and Barrister
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice

In Attendance (Remotely)

Hon Justice Churchman
Ms Fiona McDonald, Senior Advisor, Policy Group
Ms Georgia Shen, Secretary to the Rules Committee
Ms Anna McTaggart, Clerk to the Rules Committee
Ms Cathy Pooke, Parliamentary Counsel, PCO Committee Liaison

Apologies

Hon David Parker MP, Attorney-General
Maria Dew KC, Special Purposes Appointee and New Zealand Bar Association President
Hon Justice Muir, Special Purposes Appointee and Judge of the High Court
His Honour Judge Kellar, District Court Judge

1. Preliminary

Apologies

The apologies of the Attorney-General, Justice Muir, Judge Kellar and Maria Dew were received and noted.

Minutes of previous meeting

The minutes of the previous meeting as provisionally circulated in **C 12 of 2023** were received and adopted. The Clerk is to publish these on the Committee's website.

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.

3. Changes to Criminal Rules

Re-establishment of Criminal Rules Subcommittee

The Committee agreed to re-establish the Criminal Rules Subcommittee. Justice Mander from the High Court and District Court Judge Russell Collins were identified as members. It was agreed the Chair would organise further appointments reflecting, as much as was practical, the previous composition of the subcommittee.

The Criminal Rules Subcommittee is to be re-established. The Chair is to appoint further members after reviewing the composition of the previous subcommittee.

Automatic Name Suppression for Complainants in Sexual Violence Cases

The Chair noted that a letter from the Minister of Justice had been received, regarding the Criminal Procedure Act 2011 (CPA). As the Minister observed in the letter, the CPA provides complainants in sexual violence cases with automatic name suppression for their protection. Complainants may apply to lift their name suppression however, there is not a streamlined process for making such applications and complainants are not consistently provided information about this option. This can prevent complainants from being able to easily navigate the court process and to make applications to lift name suppression if they wish to do so. The letter concluded by informing the Committee that a new prescribed process that sets out the steps for complainants to lift their suppression order is needed and that feedback from consultation suggested the Criminal Procedure Rules 2012 may be the most appropriate legislative instrument for such a process. The Minister invited the Rules Committee to consider this matter and the new proposed process.

The Chair suggested that this programme of work should be addressed by the newly re-established Criminal Rules Subcommittee. Mr Chhana said that the Ministry of Justice would be putting together a package of information and would work with the subcommittee.

The Committee agreed that the Criminal Rules Subcommittee would address this programme of work.

Review of the Rules to Remove References to Three Strikes Regime

The Chair noted previous communication received by the Committee in relation to the repeal of the three strikes legislation. There were still minor references in the Criminal Procedure Rules 2012 which would need to be amended.

The Committee agreed that the Criminal Rules Subcommittee would confirm what amendments were needed.

Proposed Court of Appeal (Criminal Rules) 2023

The President of the Court of Appeal noted that the Court of Appeal had, for several years, been engaged in a programme of work to amend the Court of Appeal (Criminal) Rules and that replacement rules had now been drafted.

The Committee agreed that the Court of Appeal would undertake consultation regarding the proposed Rules with Crown Law, the Law Society and the Criminal Bar Association.

The Committee agreed that the Court of Appeal would organise its own consultation process and would report back on the outcome of that consultation at the September 2023 Rules Committee meeting.

4. Te Reo Māori in Courts

The Committee discussed draft High Court amendment rules which incorporated the changes previously agreed to. The subcommittee noted that there were several additional matters which may need to be reviewed in the future, including whether similar changes should be made to the Court of Appeal Civil and Criminal Rules, the Criminal Procedure Rules and the Supreme Court Rules. Rule 1.16 relating to sign language, also provides that failure to give notice of intention to use New Zealand Sign Language is a relevant consideration in an award of costs. It would likely be necessary to repeal this so that rules relating to the use of sign language were consistent with the use of te reo Māori.

A point was raised in relation to draft r 1.11(6) which provides that a failure to comply with the subclauses relating to notice of intention to speak te reo Māori does not prevent a person speaking te reo Māori, but that the court may adjourn the conference or hearing to enable translation services to be made available. It was queried whether a party could seek to take advantage of this subclause to delay proceedings. Justice Churchman, who attended the meeting as a member of the subcommittee noted that if a party was attempting to obstruct or delay proceedings, this was something which could be sanctioned generally. The Chair observed that the rules of procedure could be abused and that there was no reason to single out the use of te reo Māori rule in relation to costs.

The Committee agreed that the draft High Court amendment rules should move forwards towards concurrence and that District Court amendment rules could be drafted. The subcommittee would

continue to investigate other areas as a continued programme of work. The Criminal Rules Subcommittee could also consider the use of te reo Māori and sign language in relation to the Criminal Procedure Rules and the Court of Appeal (Criminal) Rules.

5. Miscellaneous Draft Rules

Access to Court Documents Amendment Rules

At the April 2023 meeting, the Committee agreed that the rules relating to applications to access court documents would be amended so as not to require the address of the applicant to be sent to the parties. The Chair noted that the format of the draft rules differed slightly from what had been suggested at the previous meeting. Rather than involving a covering form which would not be forwarded to the parties, the draft rules provide that the registrar will redact the applicant's address. However, this change was not significant.

The Committee agreed that the draft Senior Court and District Court amendment rules would move towards concurrence.

Costs for Lay-Litigants

After having previously approved of the contents of draft amendment rules for the High Court, the Committee considered and approved draft amendment rules for the Court of Appeal and District Court. After a few minor amendments, the rules would proceed to concurrence.

The Chief Justice noted an ongoing project to consider rules relating to costs in the Supreme Court, including costs for lay litigants.

The Committee agreed that the draft High Court, District Court and Court of Appeal amendment rules would proceed forward in the concurrence process.

Supreme Court Amendment Rules – r 5A

The Committee previously agreed that a new rule 5A would be inserted into the Supreme Court Rules, replicating r 5A of the Court of Appeal (Civil) Rules 2004. This would enable the registrar to refuse documents for filing where they are non-compliant, patently abusive, or where the court lacks jurisdiction. The Committee approved the contents of the draft amendment rules.

The Committee agreed that the draft rule would move towards concurrence.

District Court (Updating References) Amendment Rules

Mr Kalderimis noted that r 5.2 of the District Court Rules 2014 provides that a notice to transfer a proceeding from the District Court to the High Court must be filed by the defendant not later than 5 working days after service of the notice of proceeding on the defendant, including the day of service. Mr Kalderimis observed that when it comes to calculating time, most rules do not include the relevant event counted from, in this case the day of service, and to have r 5.2 as an exception to this could be confusing.

The Chief High Court Judge noted that the 5 working day timeframe seemed unreasonably short and suggested that it be changed to 10 working days.

The Committee agreed that the timeframe in r 5.2 should be changed to 10 working days, not including the day of service.

6. Duplication in District Court (Electronic Filing) Amendment Rules 2023

The Chair noted that the Secretary for Justice had received a letter from the Regulations Review Committee to the effect that there was duplication within new rule 5.1A of the District Court Rules. The Review Committee suggested that subclauses (6) and (7) had a similar effect and suggested repealing subclause (6).

The Committee agreed that subclause (6) should be repealed. The Chief Justice suggested that in future the Review Committee should direct matters relating to rules of court to the Rules Committee rather than to the Secretary of Justice.

It was agreed that r 5.1A(6) would be repealed. The Chair will draft a letter to the Regulations Review Committee noting the role of the Rules Committee and suggesting that matters relating to the rules should be directed to the Rules Committee in future.

7. High Court Rule 5.40 – Change of Representation

Alison Todd raised the possibility of amending r 5.40 of the High Court Rules. Ms Todd noted that when a party wishes to change their representation in the High Court, they must file and serve a notice of change in representation. However, before the change in representation takes effect, they must also file an affidavit proving service of that notice. In Crown Law's experience, an affidavit proving service is not always prepared. She noted that it appears the formalities required in the rule may not match the practice of many lawyers or the expectations of some registry staff.

The Committee agreed that the requirement to file an affidavit should be removed from the Rules.

Laura O'Gorman suggested that a copy of the notice should be provided to the previous solicitor at the time of service if possible. Mr Kalderimis agreed. The Committee noted this would ordinarily be covered by r 5.40(2), which requires service of the notice at the party's previous address for service.

The Committee agreed that the requirement to file an affidavit proving service of a notice of change in representation would be removed from the Rules.

8. Witnesses and Interpreters Fees Regulations 2023

The Committee received correspondence from an editor of one of the leading texts on practice and procedure. His view was that the new Regulations may be interpreted as having introduced a change to the approach that the Court should adopt to the award of costs under Part 14 of the High Court Rules 2016 and the associated rules in other courts. That is because the new Regulations prescribe the rates that experts must use for their fees for giving evidence in proceedings to which the Regulations apply. This could be interpreted as re-establishing the link between these Regulations and the costs regime.

The Committee did not agree that the Regulations have this effect. While the Regulations do not say so expressly, it is apparent that they apply in circumstances where the Court has compelled the relevant witness, including an expert, to give evidence. That is contemplated by other provisions, such as s 41 of the Senior Courts Act 2016. This is also indicated by r 13 of the Regulations which provides when the prescribed fees are payable by the Crown. It is also the approach that was taken under the 1974 Regulations even though they were applicable to “any proceedings” to which they were applied. The Committee did not consider that the Regulations govern the fees payable to experts retained by parties to litigation, or what costs may be awarded to such parties under the rules. The Committee noted that the Court of Appeal considered that the link between costs and these regulations was severed by the rules rather than by the terms of the regulations (see *Air New Zealand v Commerce Commission* [2007] 2 NZLR 494 (CA) at [49]-[50]).

However, the Committee agreed there was a lack of clarity in the Regulations which may have access to justice considerations. The Committee was of the view the Regulations should be amended given the lack of clarity.

The Committee agreed that the Chair would write to the Secretary of Justice noting the view that the Regulations should be amended given the lack of clarity, and that the Committee’s view on the Regulations would be recorded in the Minutes and that the Chair would reply to the author of the correspondence explaining the Committee’s views.

9. Matters for Noting

It was noted that proposed meeting dates for the 2024 Committee meetings were Monday 8 April, Monday 24 June, Monday 30 September and Monday 25 November.

Justice Francis Cooke
Chair