



## THE RULES COMMITTEE

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Wellington

10 July 2000

Minutes/2/2000

### **CIRCULAR NO 29 OF 2000**

#### **Minutes of the Meeting held on Friday 2 June 2000**

The meeting called by Agenda/2/2000 was held in the Judges Common Room, High Court, Wellington on Friday 2 June 2000 commencing at 9.30am.

#### **1. Preliminary**

##### *In attendance*

The Chief Justice (The Rt Hon Dame Sian Elias GNZM)  
The Hon Justice Fisher (in the Chair)  
The Hon Justice Chambers  
The Hon Justice Wild  
Master G J Venning  
Chief District Court Judge Young  
Judge C J Doherty  
The Attorney-General (The Hon Margaret Wilson)  
Ms E D France (for the Solicitor-General)  
Mr K McCarron (for the Chief Executive, Department for Courts)  
Mr T C Weston QC  
Mr C F Finlayson  
Mr G E Tanner (Chief Parliamentary Counsel)  
Ms E Tobeck (Clerk to the Rules Committee)  
Miss M A Soper (Secretary)

##### (a) *Apologies*

Judge J P Doogue

##### (b) *Confirmation of minutes*

On the motion of Master Venning, seconded by Mr Weston, the minutes of the meeting held on Friday 25 February 2000 were taken as an accurate record and were confirmed.

(c) *Welcomes*

The Chairman welcomed the Attorney-General, Judge Doherty and Elizabeth Tobeck to the Committee.

**2. Habeas Corpus**

The Committee referred to the reforms which originally emanated from the Law Commission and which are now contained in a Private Member's Bill before the Select Committee.

The Attorney-General undertook to ascertain the Government's position on the Bill.

The Committee agreed that it should make submissions to the effect that matters of procedure should be contained in the rules for all of the reasons already submitted by the Chief Justice. The Committee also agreed to express concern about some of the changes of substance that are proposed. Of particular concern is the direction to the Courts to give priority to habeas corpus over everything else. The Committee considered that other matters can be more pressing and it should be for the Court to order its own work. The Committee also agreed to make submissions on matters of detail relating to the rules.

The Committee finalised the draft submission prepared for the Select Committee.

**3. Australasian Harmonisation**

The Committee agreed to support the concept in principle. The Committee noted that harmonisation is especially useful where there is interaction between the two countries such as admiralty, expert witnesses and commercial law. The Committee noted that it is not always appropriate to adopt uniform rules, especially where the law is different. The Committee was mindful of the resource implications of harmonisation and would also not want to lose New Zealand's speedy amendment process.

**4. District Courts' Rules Harmonisation***Discussion*

The Committee agreed that there needs to be a uniform procedural code applicable to both the District Courts and the High Court recognising that there will be specialist areas for each. In the context of the District Courts particularly, the Committee noted the need to ensure that the complexity of procedures are not out of proportion to the value of what is at stake. The Committee expressed concern that extensive pre-trial procedures can compromise the ability of the Courts to decide matters quickly which is why alternative dispute resolution has become so popular.

The Committee noted that the District Courts' Rules Subcommittee had met and made decisions in principle on amendments necessary to update the District Courts' Rules in line with the High Court Rules. Mr Tanner said that the drafting has yet to be done but he was hoping that his office would be able to do it a month before the next meeting on Friday 25 August 2000.

### *Decisions*

Justice Fisher agreed to draft a statement of objects for both the District Courts and High Court Rules. In this regard he referred to precedents from Queensland and South Australia.

The Committee also noted the need to refer to rules to the Department for Courts so that it can address any structural requirements.

## **5. Extraordinary Remedies**

### *Discussion*

The Committee noted the lack of clarity in the relationship between the prerogative writs and the Judicature Amendment Act 1972. The Committee discussed whether the legislation should define the scope of judicial review (i.e. establish a threshold) or just set out the remedies, and did not reach a final view on that issue. The Committee noted that if the Judicature Amendment Act 1972 were repealed in order to leave the jurisdictional issues to the Courts it would be necessary to make it clear that judicial review is still available.

The Committee discussed whether leaving matters of jurisdiction to the courts might restrict development of the law in that the removal of the statutory threshold might provide a basis for judicial conservatism. The Committee also discussed whether the implementation of the Law Commission's proposals might foster judicial activism. The Committee discussed whether the problems could be met by dealing solely with the procedural complexities of maintaining the Prerogative Writs.

The Committee discussed whether the present definition of a statutory power of decision could be amended but did not reach a firm view on the issue.

### *Decisions*

The Committee agreed that the legislation should define matters of substance and that matters of procedure should be contained in the Rules. The Committee came to the view that policy issues are beyond the scope of the function of the Rules Committee. Ms France agreed to address the issues further with the Law Commission.

## **6. Bill of Rights Procedure**

### *Discussion*

The Committee referred to the Court of Appeal decision in *R v Poumako* (CA 565/99) and noted the comments on the retrospectivity of the home invasion remedies. The decision indicates that the Court is now recognising the jurisdiction to give an indication of inconsistency between a statute and the New Zealand Bill of Rights Act 1990.

The issue for the Committee is whether or not it should make rules about indications of inconsistency. In the United Kingdom, for example, the legislation spells out which Courts can make declarations and there is provision in the rules for the Crown to be given notice so that it can give evidence and make submissions.

The Committee noted that in the United Kingdom a declaration of inconsistency does not affect the validity of the statute; it becomes a matter for the Government how the issue is addressed.

*Decision*

Ms France agreed to do a memorandum for the Committee recommending the position that the Committee should take.

**7. Proceedings Against Rules Committee**

*Discussion*

The Committee referred to the draft proceedings *Bennett and Others v the Attorney-General and Others* and noted that the Rules Committee is provisionally named as fourth defendant. The proceedings allege breach of the New Zealand Bill of Rights Act 1990 and breach of natural justice in the way that the Court of Appeal deals with ex parte appeals. It is alleged that the Rules Committee failed to make rules under s486 of the Crimes Act 1961. The proceedings also allege that the Committee adopted the Court of Appeal Rules contrary to the Statute of Westminster. The remedy sought is mandamus requiring the Rules Committee to make different rules.

The Committee noted that the Rules are made by Order in Council with the concurrence of the Committee and that technically mandamus does not lie.

The Committee noted that it is arguable that it has jurisdiction over matters of criminal procedure. The Committee noted that it does not at present have expertise in that area available to it. The Committee noted there is a Criminal Practice Subcommittee at present reporting to the Ministry of Justice.

*Decision*

The Committee agreed to refer the matter to the Crown Law Office for advice on the appropriate course of action. The Committee agreed it seemed appropriate that the Attorney-General be named in lieu of the Rules Committee and that in any event, the Committee should abide by the decision of the Court.

**8. Review of Rules Committee**

The Committee addressed the problem of the increasing workload and noted that the options include having more meetings of the Committee and/or more subcommittees.

The Committee agreed to trial a system whereby subcommittees meet once between Rules Committee meetings. The subcommittees would meet at the High Court on the same day, with meetings at different times and for different lengths of time. Individual members would probably attend more than one subcommittee meeting. It was suggested that Ms Tobeck do the "air traffic control".

The Committee proposed four subcommittees: a Management subcommittee to deal with the review of the Committee, a Rules Overview subcommittee to address such issues as moving to a uniform code for both the High and District Courts, a Current Special Projects subcommittee to address individual rule changes such as Expert Evidence, and a Standing Particular Topic subcommittee to address such issues as

costs, admiralty and appeals. The Committee envisaged that the first three subcommittees would meet every three months.

The Committee agreed that minutes should be a matter for the individual subcommittees and that if possible someone from the Parliamentary Counsel Office should attend each subcommittee meeting.

The Committee agreed that the full Committee should have a more supervisory role with the real work being done by subcommittees.

## 9. Progress on Changes Already Recommended

### (a) *Matters referred to Parliamentary Counsel for drafting*

The Committee addressed the Family Court's Rules and noted that a bill is currently before Parliament.

The Chief District Court Judge agreed to follow up Justice Fisher's letter of 8 February 2000 to the Chief Justice.

### (b) *Rules change follow-up*

The Committee approved the text of an article for publication in "Law Talk".

Justice Fisher agreed to prepare a memorandum on the latest rule changes for High Court Judges and to liaise with the Chief Justice to ensure that all of the High Court Judges receive a copy.

Justice Fisher agreed also to provide a copy to Mr McCarron to make available to the registrars.

## 10. Practice Notes: Omnibus/Appeals/Case Management

### *Discussion*

The Committee noted that practice notes can be difficult to identify for what they are and discussed whether all matters of procedure should be in the rules on the basis that they can be easily located.

The Committee discussed whether minor aspects of procedure should be in a Practice Note or in a Schedule to the Rules.

The Committee noted that practice notes can be more flexible although in Australia the procedure is that practice notes cannot be made until they have been passed by the Rules Committee in order to ensure that there are no inconsistencies. If practice notes are going to be passed by the Rules Committee then there would seem to be no reason why they should not form part of the rules.

### *Decision*

Master Venning agreed to address his paper in the light of the discussion.

## 11. Evidence – Experts

The Committee addressed Expert Witnesses/2/2000 which presented a practitioner's view of the issues and needed to be augmented by a judicial perspective.

### *Discussion: pre-trial*

The Committee identified two aspects to the giving of expert evidence. The first is the process by which experts get together pre-trial, and the second (described as "hot tub") is the process by which experts give evidence during trial.

In getting together pre-trial the conversations can be either without prejudice or on the record. If the conversation is without prejudice it can be more wide-ranging but there is then an issue about the status of the document at the end, i.e. whether it is a consent memorandum or is evidence. Another issue is whether the lawyers should be present at the meeting of experts; in Australia the rule is that they should not be but in practice, if the lawyers do not like the outcome the document is not tendered to the Court. The Committee tentatively agreed that the discussions should be without prejudice.

The Committee discussed whether an expert witness is an agent of the court or a witness for the parties. The Court noted that the trend overseas is to regard an expert witness as an agent of the Court and to tightly control the ability of Counsel to "go shopping" for the expert that they want. On that view any evidence should come to the Court without the intervention of the lawyers.

The Committee noted that in Australia in order to stop "expert shopping" the parties are required to expose negotiations with a witness and the witness is required to disclose any instructions. In consequence there are two experts, one to advise on who to choose, which doubles the cost. The Committee noted that there may be many reasons why an expert may not advise a party, including availability, acting for the other side or knowing a witness in the case.

In this context the Committee noted that competition law is a special case because a party can rely on having done something on legal advice. In order to rely on that as a defence the party must disclose who the party has taken advice from.

The Committee noted that the United Kingdom position is that the leave of the Court is required in order to call an expert, but that the United Kingdom still has personal injury claims so that abuses that occur in England are not relevant in New Zealand.

### *Discussion: "hot tub"*

In respect of the "hot tub" the experts will be around a table in the Courtroom and the proximity of their peers tends to create a climate of honesty. The Committee noted that the "hot tub" is most useful for economists, noting that much of their evidence can be hypothetical. For this system to work the Judge needs to be intellectually agile and have a good handle on the case.

The Committee noted also in respect of the "hot tub" that it is up to Counsel to decide that if an expert needs to hear earlier witnesses, and the witness needs to state what their assumptions are in giving evidence. The "hot tub" can be a disaster if one expert is allowed to take over.

*Decisions*

The Committee established a subcommittee of Justice Wild, Judge Doherty, Mr Weston and Mr Finlayson.

Mr Weston agreed to capture the points from the discussion and incorporate those in his paper. The subcommittee agreed to finalise the paper for release for comment to judges, lawyers and expert witnesses.

Justice Fisher agreed to sign off the paper to go to consultation.

**12. Costs**

The Committee agreed to establish a Costs subcommittee comprising Justice Wild, Master Venning and Judge Doherty.

On an ongoing basis the subcommittee needs to collate comments and judgments on costs. The Committee also noted the suggestion by Justice Baragwanath for a "wasted costs system". The Committee also noted there is a present a lacuna in the context of appeals.

The subcommittee also needs to conduct the annual consultation with the Law Society, the Legal Services Board, and the Bar Association on changes to the rates in the schedule. In order to have any rule change made by the end of the year that process needs to start now.

**13. Admiralty**

The Committee noted that the Maritime Law Association of Australasia is having a conference in August. That conference will be attended by the Australian Judge in charge of the process of harmonising the Admiralty Rules.

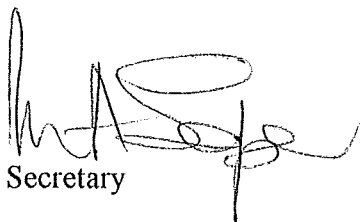
Mr Finlayson, who is attending the August conference, agreed to report to Justice Fisher. Mr Finlayson also agreed to deal with other concerns on Admiralty matters including those of Mr Fantham.

**14. Statement of Objectives in Rules**

Justice Fisher agreed to propose a statement of objectives in rather more detail than the current Rule 4. He noted that the Australian Rules occupy a page and he said he would like to include recognition, for example, of the need for active judicial intervention in case management. The Committee noted that the Costs rules contain a Statement of Objectives in Rule 47.

The meeting closed at 3.15 p.m.

The next meeting will be held on Friday 25 August 2000.



Secretary