The Rules Committee
Te Komiti mō ngā Tikanga Kooti

10 May 2021
Minutes 01/2021

Circular 12 of 2021

Minutes of Meeting of 22 March 2021

The meeting called by Agenda 01/20 (C 2 of 2021) began at 10.00 am on 22 March 2021 at the Supreme Court Complex, Wellington.

Present

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Hon Justice Kós, Special Purposes Appointee and President of the Court of Appeal
Hon Justice Thomas, Chief High Court Judge
Hon Justice Cooke, Chair and Judge of the High Court
His Honour Judge Taumaunu, Chief District Court Judge
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice
Ms Jessica Gorman, Senior Crown Counsel as Representative of Ms Una Jagose, Solicitor-General
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association Past President
Mr Jason McHerron, New Zealand Law Society Representative and Barrister
Mr Daniel Kalderimis, New Zealand Law Society Representative and Barrister
Ms Laura O'Gorman, Special Purposes Appointee and Barrister

In Attendance

Associate Professor Amokura Kawharu, President of the Law Commission (Item 2 Only)
Ms Catherine Helm, Senior Legal and Policy Adviser at the Law Commission (Item 2 Only)
Ms Jennifer Ryan, Senior Legal and Policy Adviser at the Law Commission (Item 2 Only)
Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court
Mr Bill Moore, Special Counsel in the Parliamentary Counsel Office
Ms Maddie Knight, Secretary to the Rules Committee and Policy Advisor in the Ministry of Justice
Mr Sebastian Hartley, Clerk to the Rules Committee and Judges' Clerk

Apologies

Hon David Parker MP, Attorney-General
Hon Justice Muir, Special Purposes Appointee and Judge of the High Court
His Honour Judge Kellar, District Court Judge

1. Formal Items

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

The minutes of the previous meeting as provisionally circulated in C 1 of 2021 were received and adopted, subject to minor corrections to be made by the Clerk. The minutes are then to be published on the Committee's website.

The Committee moved to consider item 6 out of sequence, as discussion of item 2 required the presence of the President of the Law Commission, who was not due to attend until 10.15 am.

6. Vires of Proposed Emergency Preparedness Amendments

The Chair invited Mr Moore, Special Counsel in the Parliamentary Counsel Office, to speak to C 5 of 2021, a legal opinion from that Office prepared by Mr Moore and Ms Fiona Leonard with the assistance of Crown Law, advising the Committee as to whether the making of the emergency preparedness amendments considered by the Committee at its meeting of 21 September 2020 (refer C 28 of 2020) would be intra vires the Committee's rule-making power under the Senior Courts Act 2016 and District Court Act 2016.

These proposals, in summary, would allow each head of bench the power to modify the operation of the rules of court in all proceedings pending before their court in the event of an emergency without needing to wait for those rules to be modified by the Committee in the ordinary manner. The Committee's concern, given its experience during the COVID-19 emergency in April 2020, was that that the ordinary process may not be sufficiently agile as a response to certain types of emergency situations. Empowering the head of bench in this manner would allow for prompt responses tailored to the requirements of each type of emergency. The alternative, of the Committee promoting a comprehensive suite of emergency provisions dealing with the requirements of each type of emergency conceivable, was thought unworkable, and would not be consistent with best practice internationally.

For the reasons given in C 5 of 2021, the advice received was that the making of the proposed amendments under the existing rules making powers would likely be ultra vires those powers, and thus unlawful. Mr Moore recommended that the Committee's rule-making powers be amended by legislation to expressly authorise the delegation of the Committee's rule-making power to each head of bench in an emergency in this manner. He advised, as did Mr Chhana on behalf of the Ministry of Justice, that this may be able to be done as part of a broader legislative package being promoted by the government to improve emergency preparedness following the COVID-19 emergency in 2020.

Mr Moore advised that the Committee consider, in the interim, amending the definition of emergency found in r 3.4A of the High Court Rules 2016, in a manner similar to the proposed broader definition of emergency found in the proposed amendments set out in C 28 of 2020, so as to ensure the current emergency provisions under the Rules operate in as wide a range of circumstances as possible.

The Committee thanked Mr Moore and the Parliamentary Counsel Office for their advice on the matter, which was accepted, and agreed to request that Parliament expand the Committee's rules-making power in order to allow emergency preparedness provisions of the sort proposed in C 28 of 2020 to be promulgated. The Ministry of Justice, with the assistance of the Parliamentary Counsel Office, agreed

to draft potential language for statutory amendments, and identify the appropriate legislative vehicle in which the potential amendments can be presented to Parliament.

The Committee also agreed with the Chief District Court's comment that it is important that the Family Court, which may not be a body for which the Committee has rules-making power, also be addressed. This may require the amendment of the rules-making provision of the Family Court Act 1980 to allow suitable amendments to the Family Court Rules 2002 to be promulgated.

The Committee also agreed with Mr McCarron's suggestion that the Ministry of Justice have regard to the desirability of introducing collateral emergency preparedness provisions into regulations for which it is responsible that have a direct bearing on the operation of the Courts, such as the various Fees Regulations, so as to avoid the courts' response to future emergencies being impaired by inflexible provisions in such regulations.

The Committee accepted the legal advice from the Parliamentary Counsel Office contained in C 5 of 2021; accepting it would likely be ultra vires the committee's rules-making power to promote the proposed emergency preparedness provisions contained in C 28 of 2020.

The Ministry of Justice, in conjunction with the Parliamentary Counsel Office, is to draft suitable amendments to the provisions of the Senior Courts Act 2016, District Court Act 2016, and other enactments providing the committee with rule-making powers to empower the committee to promote in future emergency preparedness provisions underpinned by the same rationale as the draft proposals contained in C 28 of 2020.

In the interim, the Committee will promote amendments to r 3.4A of the High Court Rules 2016, drawing on the proposals contained in C 28 of 2020, to broaden the definition of emergency to allow the existing emergency provisions to be employed in the broadest possible range of emergency situations. The Parliamentary Counsel Office is to include suitable amendments in the next omnibus amendment rules.

Associate Professor Amokura Kawharu, the President of the Law Commission, and Ms Catherine Helm and Ms Jennifer Ryan, Senior Legal and Policy Advisers at the Law Commission, joined the meeting at 10.11 am.

2. Representative Actions and Litigation Funding Reform – Law Commission Dialogue

The Chair welcomed Associate Professor Kawharu, the President of the Law Commission, and her Senior Legal and Policy Advisers, Ms Catherine Helm and Ms Ryan, and invited them to address the Committee regarding the Law Commission's current work on representative actions and litigation funding, with a particular focus on the potential for collaboration between the Committee and Commission.

Associate Professor Kawharu referred the Committee to C 6 of 2021, a memorandum from the Commission addressing these issues. Developing the points made in that paper, she and Ms Helm and Ms Ryan noted that the Commission has to date received 50 submissions from corporate actors, lawyers, parties likely to bring class actions, and other key stakeholders. The Commission has also undertaken a survey of class members and has so far received about 400 responses. Once submissions have been reviewed, the Commission will assess whether to maintain its preliminary views as set out in the issues paper, and develop recommendations for reform. The Commission may then consult further on particular aspects of the project where consultation may be aided by having detailed technical

proposals put forward, by circulating for comment draft provisions in certain areas. The Commission intends to publish a report on this issue in May 2022. That would then be provided to the Minister, who is required to table it in Parliament and prepare a Cabinet paper indicating which of the Commission's proposals the government intends to adopt, which would then lead to more detailed policy work by the Ministry of Justice to implement the proposals.

As noted in that memorandum, the Commission anticipates identifying as desirable reforms that will require expression in both primary legislation and also the rules of court. The President explained that the Commission's current concern, in doing so, is to articulate a principled basis for class actions and regulation of litigation funding in New Zealand, rather than necessarily identify a particular proposed form for that framework in the form of proposed rules amendments and draft legislation. It will certainly make sense for certain matters to be addressed by way of rules of court, based on overseas experience, best practice, and the feedback received by the Committee during its consultation process. However, the division between primary legislation and the rules of court may not always be that clear. This raises the question, Professor Kawharu explained, for the Commission of how best to make recommendations for reform while not suggesting, for example, that this Committee implement its recommendations.

In response to questions from the Chief Justice and Justice Kós, the President explained that the Commission has done some work in identifying areas in respect of which judgments suggest the Courts lack institutional competence to promote reform, that is, areas in respect of which a legislative response is required because of the policy nature of the considerations involved, or in which it is not legitimate for bodies like the Committee to make rules. Some areas, for instance a certification test, would most appropriately be provided for in statute, although this Committee might then wish to develop rules to ensure the High Court is provided with the necessary guidance in applying the test.

In response to a question from Ms Gorman, the Commission indicated that it should be able to make available to the Committee the findings of its survey of class participants in due course. It was agreed this will be of value to the Committee in understanding class members' experience of the court process, which will be of value to the Committee's future work in both this area and also in relation to promoting access to civil justice. The President indicated that, from their preliminary analysis, the data tends to show that class members are not well equipped with knowledge of the litigation process.

The Committee turned to evaluate, in light of the Law Commission's process and work in this area, whether to reactivate work on its proposed amendment rules related to representative proceedings intended to codify the existing common law as developed in reliance on r 4.24 of the High Court Rules 2016, as agreed to by the Committee at its meeting of 18 March 2019 (refer C 58 of 2018 and C 21 of 2019 at Item 2, pp 4-5). The Committee had formally reached the stage of concurring in the making of these amendments when the Court of Appeal's decision in *Ross v Southern Response Earthquake Services Ltd* [2019] NZCA 431 (see C 61 of 2019) recapitulated the availability of "opt-out" representation orders in New Zealand. Given the Committee's objective is to capture, rather than modify, the common law developed in reliance on r 4.24, this decision prompted suspension of the Committee's work pending the outcome of the subsequent appeal to the Supreme Court, which ultimately resulted, in late 2020, in the Court of Appeal's decision being upheld (see *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, circulated as C 50 of 2020).

The Committee considered that it may well be appropriate to reactivate its work in this area, updating the amendment rules agreed at the beginning of 2019 and consulted on in late 2018 so far as is necessary to capture the statements made in *Ross* (which, the Committee felt, would be a fairly trivial effort), so as to improve accessibility of the law in advance of any legislation and further rules changes required as a result of the Commission's work. The Ministry of Justice advised that it is unlikely that any law change consequential on the Commission's work will result before the end of 2023 or early 2024. It was thought that it may well be important from an access to justice perspective to make interim changes, given the law founded on r 4.24 is only obliquely accessible and visible to non-lawyers.

Following discussion, it was agreed, in terms of furthering co-operation between the Commission and Committee in this area, that the Commission should continue its processes and come back to the Committee at its September meeting with further updates, having had an opportunity to formulate any requests for specific input from the Committee as the Commission's thinking develops. This will also allow the Committee to develop, at its June meeting, its thinking as to its revised draft amendment rules of court, so as to allow the Commission to take this into account in making its final report in early 2022. The Ministry of Justice advised that, if those rules were to be agreed to by the Committee no later than its September meeting, the amendment rules can be promulgated in November 2021, having gone through the cabinet process, coming into force at the close of 2021 or in early 2022.

The Committee will, at its next meeting, review the amendment rules agreed in early 2019 and agreed in, with minor amendments, at its meeting of 18 March 2019 (refer C 21 of 2019 at Item 2, pp 4-5) and determine whether to promote these as an interim measure, pending the outcome of the Law Commission's work in this area, and, if so, determine what amendments are required to reflect the decisions in [2019] NZCA 431 and [2020] NZSC 126.

The Committee will invite the Commission to attend its meeting on 27 September 2021 to further discuss this issue, in light of the Commission's ongoing work in this area and the Committee's discussions at its meeting of 28 June 2021.

Associate Professor Kawharu, Ms Helm, and Ms Ryan, left the meeting at 10.40 am.

3. Improving Access to Civil Justice – Judicial Subcommittee Recommendations

The Chair referred the Committee to C 2 of 2021, the initial report from the judicial subcommittee of the Committee on improving access to civil justice, which was supplemented by C 11 of 2021, a memorandum by Ms McClay, a judge's clerk in the District Court at Christchurch, regarding pre-trial action protocols in England and Wales commissioned by Judge Kellar.

The Chair noted that the subcommittee, in order to ensure the proposals outlined in the initial paper adequately reflected the feedback to the Committee's initial consultation on improving access to civil justice (see C 28 of 2020), had included a number of proposals not canvassed in the initial consultation paper. These include, in summary, increasing the jurisdiction of the Disputes Tribunal and recommending that the government increase the institutional competence of the District Court civil jurisdiction. It is also proposed, more in-keeping with the matters canvassed in the consultation paper, to significantly streamline High Court civil proceedings by amending the High Court Rules 2016. This went beyond the rules into areas requiring a legislative response by government, but such

recommendations are necessary, in the view of the subcommittee, to delivery proposals that meaningfully and comprehensively improve access to justice. The Chair noted the Attorney-General has already been alerted to the fact that recommendations of this type are likely to be made.

The Chair proposed that the Committee agree to the subcommittee's report serving as the basis of further consultation with the legal profession and wider community.

The Committee agreed that it is appropriate to consult further, given matters not canvassed in the original consultation document are being discussed, and that the proposals outlined in C 2 of 2021 are a suitable basis for further consultation. Particular support was expressed for the proposal to make use of part time judges (with Ms O'Gorman suggesting consideration also be given to recommending the introduction of a pathway for talented graduates to be trained and work doing triaging of civil files in a judicial capacity), and also for the proposals to make grater use of issues conferences in the High Court, and to reduce the extent to which the presentation of evidence is an exercise in advocacy.

However, the Committee agreed that certain points need to be clarified and developed, and certain countervailing arguments noted in the consultation document, not least to ensure the consultation document is not perceived as a fait accompli.

Firstly, the Committee considered that it is necessary to clarify that the proposal to introduce a pre-action protocol in the District Court civil jurisdiction relates only to actions in debt, at least at this stage, which was the subcommittee's intention. It was also thought important to record the Committee's awareness of certain tensions related to the operation of such protocols. In particular, the Committee was mindful of the risk that imposing overly onerous pre-action requirements could produce a barrier to access to justice by increasing the costs to parties seeking to legitimately access the courts, thereby also increasing the costs of unsuccessful parties contractually obliged to pay the successful party's costs (as is often the case), without realising any benefits.

In this respect, the Committee noted that the assessment given in C 11 of 2021 was not an overwhelming endorsement of the efficacy of such protocols in avoiding litigation or making litigation more efficient once it begins. This accorded with the impression of Committee members with experience of practicing in England and Wales, who considered the pre-action requirements in place there excessive and not helpful in avoiding litigation or constraining the issues for litigation in most cases. It was agreed that the main value of the protocol in England is in reinforcing an expectation that parties will not rush to litigation without some discipline in exploring other options for resolution.

It was thought that an appropriate balancing of these concerns might involve introducing reasonably constrained pre-action protocols requiring – for example, only requiring that a letter in advance of litigation be served on an intended defendant by an intending plaintiff in debt recovery actions. The Committee observed that it might be possible to require that these letters contain particular information, perhaps by highlighting the possibility of agreeing a payment plan with the creditor as an alternative to judgment being obtained against the defendant and an attachment order being entered, and warning debtors that it was important that they seek to engage with the creditor, or at least take steps to defend their position. This would serve to address the Chief District Court Judge's and Judge Kellar's concerns that the District Court is currently being used by creditors as a vehicle to get judgment by default and attachment orders against creditors who face a significant disadvantage in responding

to such claims or in understanding their rights. This concern reflected the submissions of community law centres to the Committee's initial consultation that many people take action to challenge claims of debts owing by them, even when they have an arguable defence, only after judgment has already been entered against them. The imposition of such a requirement could potentially allow these access to justice concerns to be met while not making the debt recovery jurisdiction unduly inefficient, which would ultimately only increase borrowers' costs.

Secondly, so far as the proposals relating to the Disputes Tribunal are concerned, Mr McHerron put forward an alternative view to that expressed in C 2 of 2021, which the Committee agreed ought to be reflected in the consultation paper. He suggested that the jurisdiction of the Tribunal be increased to $100,000 – rather than $50,000 as envisaged in the discussion paper – at least where the parties consent. He noted that, in the Motor Vehicle Disputes Tribunal (MVDT), of which he is an adjudicator, disputes of that value are regularly satisfactorily resolved (in terms of his impression of the experience of parties, and the few successful appeals from the body to the District) even without the presence of lawyers as representatives in the hearings. If that was done, it may be necessary to increase the rights of appeal from the Tribunal to the District Court. Again drawing on the example of the MVDT, he suggested a graduated system of appeal rights based on the value of the dispute in question. He suggested, based on the experience with the MVDT, that having broader appeal rights of this type, compared to the very restricted appeal rights extant in Disputes Tribunal proceedings, does not result in a flood of appeals. In order to provide other assurances as to the quality of Disputes Tribunal decisions, Mr McHerron suggested the Committee recommend that the statutory criteria for appointment as a Disputes Tribunal referee be increased to five years' experience as a lawyer (which most new appointments met in any case he understood), that referees be required to apply the law in all cases (which appears to be the case in practice in any event), that hearings ought to be in public, and that decisions ought to be published (which hearings being conducted in public would facilitate). He suggested that the power to appoint an investigator in Disputes Tribunal hearings should be expanded to allow of rthe appointment of a technical advisor as part of the Tribunal, with the adjudicator retaining the ultimate power of decision, but being able to be substantively assisted by the advisor in determining the matter, drawing on the role of technical experts in the MVDT. He did not consider that the body ought to be renamed a court, so as to avoid generating consumer resistance to use of the body but did agree that referees ought to be renamed adjudicators.

The Committee agreed that, given the above views derived from Mr McHerron's experience with the MVDT – as an apparently successful body delivering legally robust decisions according to law in a timely manner – that information about the operation of the Tribunal ought to be included in the further consultation paper. This would allow for another view of the potential operation of the Disputes Tribunal to be advanced, in addition to the views of the subcommittee set out in C 2 of 2021. In particular, the Committee accepted the point underlying Mr McHerron's concerns that more valuable claims are more important to the parties involved, and it is more important that the precautionary functions of the legal system be given effect to in claims of greater importance to parties.

Thirdly, relatedly, the Committee agreed with the Chief District Court Judge's observation, drawing on the submissions to the consultation process, that Māori and Pacifica are much less likely than other groups to make use of the Disputes Tribunal, and other court processes, lacking trust and confidence in the dispute resolution services offered by those bodies. The Committee agreed that it is important

to ensure that these bodies are seen as providing justice by all New Zealanders, pointing to the need for the government to ensure that people are aware of how to use their rights to seek civil justice, and feel entitled and able to come to courts and tribunals to exercise those rights (as an adjunct to the Committee's efforts to ensure they have the material means to do so).

Fourthly, and more generally, the Committee agreed with Mr Chhana that it is important that the paper present a coherent vision for the civil justice system, rather than being presented as a series of proposals relating to individual bodies, so as to enable people to understand why the recommendations as to the jurisdictional boundaries and operation of the various bodies concerned being made are being advanced. Giving a clear sense of the purpose and function of each body will help convey the rationale for these recommendations, and ensure that the bodies, if reformed in the manner proposed, function together in a cohesive manner.

Relatedly, Ms Gorman queried whether the Committee ought to consider recommending that the District Court's jurisdiction be increased up to $500,000, so as to avoid 'squeezing' that jurisdiction between an enlarged Disputes Tribunal and a streamlined High Court. The judicial subcommittee members explained that they would consider that premature, given the real problems with the operation of the District Court's civil jurisdiction at present. The subcommittee's sense, which will be the subject of further consultation, is that, if those problems of institutional capacity are addressed, that may allow for claims falling into the $50,000-$350,000 range to be effectively addressed in the District Court. At that stage, it might be appropriate to recommend that the District Court's jurisdiction be increased.

The Committee noted that it would be desirable to have more information about where the unmet need at the lower end is currently being most felt in terms of the dollar value of claims. The Clerk noted Judge Kellar's 2019 report to the Committee that such information is not easily able to be extracted from the Court's case management systems, and the Committee agreed that it would be unworkably burdensome to attempt to compile a representative report on this issue. Other methods of gaining insight into the position were regarded as unlikely to provide a representative view of the issue. Absent such data, the impression that there are a large number of Disputes Tribunal cases where parties are abandoning parts of their claim in excess of that body's jurisdictional cap suggests that the greatest unmet need is in respect of disputes currently too valuable to be addressed in that body without partial abandonment but which are not economic to address in the District Court or High Court.

The Committee agreed that the Chair, with the assistance of the Clerk, and input from Mr McHerron and Mr Kalderimis as representatives of the profession should produce a consultation paper, not to exceed forty pages in length, building on C 2 of 2021, to serve as the basis for further consultation with the profession and wider community on these proposals. It is intended that the paper be ready for circulation to the legal profession and wider community before the end of quarter two 2021.

The paper is to make clear that the Committee is aware that it is considering making recommendations related to matters outside its competence, which would take the form of recommendations to the government. The submissions elicited by the paper will then serve as the basis of the Committee's final report on this issue, which would outline its proposed amendments to the rules of court and its recommendations to the Executive.

Chair, with assistance of Clerk, and input from Mr McHerron and Mr Kalderimis, to produce consultation paper inviting comment on proposals outlined in C 2 of 2021, reflecting also the additional points addressed by the Committee in its discussions, for circulation for approval by Committee in advance of its next meeting and publication before the end of June 2021.

4. Costs for Self-Represented Litigants

The Chair referred the Committee to C 3 of 2021, a paper by the Clerk providing a detailed consideration of the issues related to potentially reforming the rules of practice and procedure concerning the availability of costs for self-represented litigants with a covering memorandum from the Chair, following the Committee's discussion of this issue and the results of its consultation on this matter at its meeting of 30 November 2020 (see C 1 of 2021 at 5-9 and CC 41, 41A, and 49 of 2020).

The Chair invited the Committee to decide whether to use the Clerk's paper as a resource with which to now make determinations in relation to the outstanding issues arising under this heading, as outlined in the Chair's covering memorandum, or whether to engage in further consultation in relation to the more contentious matters (and also, potentially, other issues under this heading).

Justice Kós was of the view that the Committee could proceed to take decisions on the remaining issues. If costs are now best conceptualised as an allowance for an item of work done by or on behalf of a successful party, calculated on an objective basis, then there was no basis for distinguishing between successful parties. Doing so, he contended, would be a windfall to the unsuccessful party who compelled the successful party to bring or defend the proceeding based on whether the successful party is or is not represented by (external) counsel.

The Chief Justice noted that this is true so far as it goes, but that the costs regime has a number of objectives, and adopting this view implicitly entails abandoning other objectives of the regime, such as incentivising people to seek representation. She voiced support for maintaining that objective, given the real advantages the courts gain, in terms of efficiently administering cases and developing the law, in having independent counsel appear in proceedings.

The Committee agreed that the costs regime ought to continue to pursue this policy objective, and that this justified drawing some distinction between represented and unrepresented litigants in terms of the availability of costs awards, and potentially between those represented by external counsel and in-house lawyers, but not so starkly as the present regime. Rather, and consistently with the Committee's discussion at its meeting of 30 November 2020, each category of litigant will be able to receive an award of costs according to the current scale, albeit at different daily recovery rates.

In accordance with that resolution, the Committee confirmed that it intends to promote amendments to the costs regime that will allow self-represented litigants to be eligible for costs under the existing scale on the basis of a new daily rate to be determined by the Committee. This may include introducing a definition of costs into the rules of court expressing the conception of costs as an allowance for an item of work done by or on behalf of a successful party, calculated on an objective basis.

The Committee was unable to agree what the new daily recovery rate for litigants-in-person ought to be, though was able to agree that one rate, not sensitive to category, should apply in represent of all self-represented litigants, and that the rate should not be so high as to incentivise people to litigate (or,

more importantly, act as *McKenzie* friends), as a means of employment. This was considered the approach most consistent with maintaining the award of costs as an expeditious and predictable process, as opposed to fixing the daily recovery rate as a percentage of the rate applicable to represented parties for each category of proceeding. The Committee agreed that further consultation on the applicable daily recovery rate would be required but agreed to nominate a figure of $500/day as the applicable rate for the purposes of consultation.

The Committee considered whether r 14.2(1)(f) should be repealed so far as it relates to unrepresented parties, but maintained, in modified form, for represented parties. The underlying purpose of r 14.2(1)(f) is to avoid parties receiving excessive recovery and to ensure the courts have the power to avoid costs awards being impressive. It was noted that r 14.2(1)(f) also provides an imperative for restraint and moderation in litigation, and likely deserves to deter parties from making unmeritorious applications for excessive awards of costs. At the same time, it was accepted that it is necessary to at least modify the framing of r 14.2(1)(f) to avoid doubt as to the position of self-represented litigants, and to give clear expression to the new conception of costs as other than an indemnity for out-of-pocket legal expenses.

Relatedly, the Committee agreed, the amendments need to be drawn with the whole of the costs regime in mind, including provisions such as r 14.15 (and that related to the joint and several liability of parties for costs r 14.14), to avoid creating any ambiguity or anomalies, so as to implement this new conception of costs throughout the rules.

The Committee agreed to amend the definition of disbursements as part of the proposed changes to clarify that litigants-in-person are no longer to be able to claim disbursements in respect of advice taken or assistance received by them in relation to a proceeding under a limited retainer or similar, as they are at present, but will rather recover in respect of any such outlay according to the ordinary scale.

The Committee also agreed that, where a party is represented for part of a proceeding and unrepresented for other parts of the proceeding, the new daily recovery rate for litigants-in-person would apply for those parts of the proceeding where they were unrepresented and the current rates would apply for those portions where they were represented, paralleling the current situation.

The Committee confirmed that lawyers appearing on their own behalf are to be treated as are lay-litigants (that is, that they will recover at the new lower rate), thereby abrogating any remnant of the Chorley exception, which will entail repealing r 14.17 of the District Court Rules 2014. Relatedly, the Committee agreed that lawyers who are the sole principal or director of their firm are also to be treated as appearing on their own behalf in terms of the costs regime, even where nominally appearing on behalf of their firm or incorporated firm. Similarly, any distinction to be drawn in favour of in-house counsel does not extend to the position of firms of barristers and solicitors represented by employed solicitors appearing on behalf of the firm in, say, a debt recovery action, as has been the case.

The Committee also agreed that consideration needs to be given to whether any co-ordinate changes to the Court of Appeal (Civil) Rules 2005 and Supreme Court Rules 2004 are required, and as to whether, given the significance of this change, and whether, given the significance of this change, express transitional provisions ought to be included in any amendment rules giving effect to these changes, so as to provide certainty to court users, despite that not being the Committee's usual practice.

The Committee was less able to agree how to proceed with respect to in-house counsel and considered further consultation on this issue to be necessary. The Committee was divided as to whether parties represented by employed solicitors ought to recover at the daily recovery rates applicable to represented parties, or a new rate somewhere close to but below the category one rate. Some members of the Committee thought that this might be justified on the basis that employed lawyers are necessarily not as independent of their employers as external counsel, such that it is appropriate, on arguably the same basis that a separate daily recovery rate is being adopted for self-represented litigants, to incentivise parties to use external counsel in litigation rather than in-house counsel. It was acknowledged that this is a contentious proposition, that many in the profession who practice as in-house lawyers feel that they take their obligations to act as officers of the court seriously, and that they do have the objectivity required. The Committee also acknowledged the concerns of submitters that this will distort the market for legal services and reduce competition in that market.

The Committee was agreed, however, that whatever decision is taken in respect of in-house lawyers generally, an exception should be made in respect of parties represented by Crown Law, which was acknowledged as effectively operating as an independent law firm within the government that provides the same objectivity as their independent clients. The Committee acknowledged the argument that other lawyers employed by government agencies appearing on behalf of the Crown, given they ultimately also fall under the supervision of the Solicitor-General in the same way as Crown Law employees, perhaps also ought to be exempted from the lower rate.

The Committee agreed that further consultation is required. For the purposes of consultation, the Committee will propose a new daily recovery rate of $1000/day for parties represented by in-house counsel in all proceedings, except for those parties represented by Crown Law employee, while signalling its awareness of the concerns noted in the Committee's discussions and by submitters.

The Committee expressed its thanks to the Clerk for preparing C 3 of 2021, which was described as a comprehensive and impressive piece of research and scholarship. The paper is to be published on the Committee's website as a record of the advice given to the Committee on this issue, to provide background for those interested in understanding the Committee's thinking on the issues arising under this heading, and as a resource for further discussions.

The Chair, with the assistance of the Clerk, is to prepare and circulate for approval by the Committee, in advance of its next meeting, a further consultation paper on this issue, inviting comment in particular on the proposal to create a new non-category-sensitive daily recovery rate for self-represented litigants, and the amount of that rate, and also on whether a new daily recovery rate should be created for self-represented litigants, what exceptions should be made to the application of that rate, and the amount of that rate. The paper is also to outline the matters on which the Committee has reached firm conclusions, so as to contextualise the matters on which comment is sought and alert the profession and community as to likely changes in this respect.

The Committee will determine its final position on these issues and consider draft amendments to the High Court Rules 2016 and District Court Rules 2014 implementing these reforms, once a further opportunity for comment on these contentious issues has been extended to the profession and community.

5. Update on Drafting of Amendments to Enable Strike Out on Court's Own Motion of Abusive Interlocutory Applications Before Service

Mr Moore advised that, further to the Committee's discussions at its meetings of 21 September 2020 and 30 November 2020, the Parliamentary Counsel Office has begun drafting amendments to the High Court Rules 2016 to empower judges to strike out on their own motion abusive interlocutory applications before service of those applications. He confirmed that draft language will be presented to the Committee for consideration at its next meeting.

Parliamentary Counsel Office to circulate draft language for amendments to High Court Rules 2016 giving effect to Committee's decision on this issue at meeting of 30 November 2020 for consideration at Committee's next meeting.

7. Court of Appeal (Civil) Rules 2005 – Reform Proposals from Court of Appeal Judges

Justice Kós referred the Committee to C 4 of 2021, a memorandum he had prepared to advise the Committee of his further discussions with the Court of Appeal registry regarding whether the proposed amendments to the Court of Appeal (Civil) Rules 2005 outlined in C 48 of 2020 could potentially impede access to justice in that Court, rather than promote it because of the interaction between the rules concerning legal aid, security for costs, and the allocation of a fixture.

He advised the Committee that, following lengthy discussions, his view, and that of his registry, is that access to justice is likely better promoted by requiring continued engagement between Court of Appeal registry staff and appellants to help keep their cases on track. This as opposed to the likely alternative of allowing automatic extensions for appellants on the basis of their status as a legally aided person or someone seeking to be exempted from the requirements to pay fees or pay in security for costs. The proposed amendments where intended to make the Rules simpler, and the Court's processes more efficient, conforming to current informational practice, whereas providing automatic status-based exemptions will promote disputes as to whether the claim status in fact applies. The Committee agreed.

The Committee agreed with the proposed amendments to the Court of Appeal (Civil) Rules 2005 outlined in C 48 of 2020 being made. Parliamentary Counsel Office is to draft amendment rules, to be circulated for formal concurrence in due course.

8. Update on Progress of Omnibus Amendments Rules

Mr Chhana advised that the various omnibus amendment rules in the making of which the Committee formally concurred in late 2020 will likely go to cabinet on 19 April 2021, hopefully entering into force from 28 May 2021.

He advised that some delay may occur in the coming into force of those parts of the amendment rules requiring the inclusion of the Te Reo Māori name of the relevant registry of the Court as part of the heading of all documents filed, as this will require some modification be made to forms maintained by the Ministry of Justice.

The Committee thanked Mr Chhana for the update, noting the possibly delayed implementation of certain aspects of the omnibus amendment rules in question.

In accordance with the Committee's normal practice, the Chair will have regard to whether to prepare memoranda for circulation by the relevant heads of bench providing notice of the changes to the rules of court in their respective courts once the commencement date for the amendments is confirmed.

9. Additions to Rule 19.2 of the High Court Rules 2016

Ms Knight advised, further to the Committee's discussion at its meeting of 30 November 2020, that the Ministry of Justice is undertaking a wide-ranging consultation with the profession, judiciary, and government to identify other applications that might usefully be added to those applications required to be brought by way of originating application under r 19.2 of the High Court Rules 2016 in addition to those under ss 316 and 317 of the Property Law Act 2007, which the Committee agreed at its last meeting should be added to the list in r 19.2.

At present, the Ministry has identified thirty provisions across seven statues that it considers ought to be added to the list, based on the feedback so far received. It anticipates potentially receiving a significant number of additional suggestions from the Ministry of Business, Innovation, and Employment (MBIE), which is responsible for administering a number of commercial and economic statutes, once MBIE is able to offer a response, which it cannot at present due to its significant involvement in the government's ongoing response to COVID-19.

The Ministry has determined, on this basis, to revert to the Committee with an initial list of recommended additions to r 19.2 at the Committee's June meeting, then providing a separate list of recommended additions at a later date once a response can be obtained from MBIE. The Ministry agreed, in response to a question from Mr McHerron, to consider whether the list in r 19.2 should instead now be scheduled to the Rules, given it may become cumbersomely long.

Ministry of Justice to circulate its first list of recommended additions to r 19.2 for consideration by the Committee at its next meeting, with a further list to follow once a response can be obtained from MBIE. The Ministry is also to consider whether to move the list in r 19.2 to a schedule to the Rules.

10. Restoration of Power to Execute Instruments by Order of High Court

Mr Chhana referred the Committee to C 9 of 2021, a memorandum from the Ministry of Justice advising the Committee of its response to the suggestion in C 15 of 2020, correspondence from Mr Grimmer, a barrister of Auckland, as discussed at the meeting of 29 June 2020.

The Ministry advised that the repeal and non-replacement of s 3 of the Judicature Amendment Act 1910 as part of the Senior Courts Act 2016, which provision formerly the High Court to authorise a person to execute documents on behalf a recalcitrant party, was inadvertent. Having researched the point, and discovered authority suggesting that power cannot be exercised by the High Court in its inherent jurisdiction (which authority led to the enactment of s 3 in 1910 in the first place), and agreeing that the power should be reinstated as it supports the effect functioning of the Senior Courts, the Ministry recommended that an amendment should be made to the Senior Courts Act 2016 restoring the power. The power would be conferred on the High Court only but could be exercised to give effect to orders of the Court of Appeal and Supreme Court. The Ministry advised that, given the reasonably minor nature of the change, the appropriate vehicle for this amendment would be the next Statutes Amendment Bill (subject to all parties in Parliament being agreed to the use of this procedure).

The Ministry did not consider the power should be extended to the District Court. Rather, the Ministry recommended continuing the existing practice of conferring the power to deal with specific situations arising in particular proceedings should be maintained, given the absence of any evidence this is

producing a problem in practice. Extending the power to the District Court would require the use of a standalone bill, which bill Parliament would be unlikely to consider in the near future.

The Committee accepted the Ministry's advice but recommended that the amendment legislation provide for the High Court to exercise the power in respect of the decision of any court, including the District Court.

The Committee thanked the Ministry for its memorandum C 9 of 2021, agreed with the recommendations contained therein, confirmed its preference for reinstating the power, and requested that the Ministry advise the government that an appropriate provision be inserted into the next statues amendment bill, preferably in a form ensuring that District Court orders can be given force by application to the High Court.

11. Amendment of the Supreme Court Rules 2004 – Request from Supreme Court Judges

The Chief Justice referred the Committee to C 8 of 2021, a letter from her covering a memorandum from Justice O'Regan requesting that the Committee promote two amendments to the Supreme Court 2004. The first of these is to amend the references to the Te Reo Māori name of the Court found in the Rules – currently "Te Kōti Mana Nui" – to align it with the statutory name of the Court - the Supreme Court of New Zealand. This, in essence, involves adding the words "o Aotearoa" to one provision of the Rules and three forms in the first schedule to the Rules.

The Committee agreed to promote this amendment.

The second is to amend the Rules to align the Rules with the provisions of the Supreme Court Civil Electronic Document Practice Note 2020 and the Supreme Court Criminal Electronic Document Protocol 2020, which are currently inconsistent with the Rules but which govern, in practical terms, the current practice of the Court with respect to electronic filing and document management.

The Committee agreed to promote this amendment, being satisfied, based on the explanation provided by the Chief Justice and Mr McCarron, that doing so will remove any inconsistency between the Court's practice and the Rules, and that the current practice is more efficient and consistent with promoting access to justice than the procedure currently envisaged by the Rules.

Parliamentary Counsel Office is to draft amendments to the Supreme Court Rules 2004, to be circulated for formal concurrence in due course, giving effect to the proposed amendments outlined in C 8 of 2021.

The meeting closed at 12.22 pm.

The next meeting of the Committee is scheduled to begin at 10.00 am on 28 June 2021.

Justice Francis Cooke
Chair