The Rules Committee
Te Komiti mō ngā Tikanga Kooti

28 June 2022
Minutes 06/2022

Circular 34 of 2022

Minutes of Meeting of 27 June 2022

The meeting called by Agenda 06/22 (C 18 of 2022) convened at 10.00 am using the Microsoft Teams virtual meeting room facility.

Present (Remotely)

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Hon Justice Kós, Special Purposes Appointee and outgoing President of the Court of Appeal
Hon Justice Thomas, Chief High Court Judge
Hon Justice Muir, Special Purposes Appointee and Judge of the High Court
Hon Justice Cooke, Chair and Judge of the High Court
Hon Judge Taumaunu, Chief District Court Judge
Ms Alison Todd, Senior Crown Counsel as Incoming Representative of the Solicitor-General
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association Past President
Ms Laura O'Gorman QC, 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

In Attendance (Remotely)

Ms Janet Robertshawe, Principal Disputes Referee
Ms Nicola Wills, Private Secretary to the Attorney-General
Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court
Ms Maddie Knight, outgoing Secretary to the Rules Committee and Policy Advisor in the Ministry of Justice
Ms Georgia Shen, incoming Secretary to the Rules Committee
Ms Anna McTaggart, Clerk to the Rules Committee

Apologies

Hon David Parker MP, Attorney-General
His Honour Judge Kellar, District Court Judge
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice

1. Formal Items

Apologies

The apologies of the Attorney-General, Judge Kellar and Mr Rajesh Chhana were received and noted.

Minutes of previous meeting

The minutes of the previous meeting as provisionally circulated in C 17 of 2022 were received and adopted subject to minor amendments to be addressed. The Clerk is to publish these on the Committee's website once finalised.

2. Improving Access to Civil Justice – review of draft sections of Access to Justice Report

Process for finalising report

The Committee agreed to form a subcommittee to finalise the Report after further work from the drafters of each section. The subcommittee's membership would consist of the Chair, Justice Kós and Mr McHerron. Ms Todd volunteered to assist the subcommittee.

Each section of the proposed report was then addressed. Those sections were approved subject to the further decisions and comments of the Committee to be addressed by the drafters.

Disputes Tribunal

Mr McHerron and Ms Robertshaw led the discussion relating to the Disputes Tribunal section.

The possibility of greater use of inquisitorial processes in the District and High Courts was discussed. The Committee discussed the references in the draft to the District Court and High Court Judges not having the training or ability to deal with inquisitorial process. The point was made that this did not accurately state the position. There are a number of Judges well skilled in the use of inquisitorial processes. The issue is that the overall court processes were not designed around that approach, nor resourced for it. It was agreed that the references in this, and other sections of the draft report would be amended accordingly.

Justice Kós questioned whether it was appropriate for the Committee to recommend a change of name for the Disputes Tribunal without any view on what it should be changed to. He noted that the name "Disputes Tribunal" seemed appropriate based on overseas examples and that ultimately, any name change was a matter for the Tribunal and the appropriate Minister to consider. Ms Robertshawe reported that the Tribunal was already investigating alternative names in order to move away from the concept of negotiation or discord reflected by the current translation – Te Rōpū Whakawawao Tautohe, to better reflect the wairua (spirit) of resolution or peace. The Chief District Court Judge agreed an appropriate alternative name would reflect that the process seeks to restore balance and achieve resolution. The Committee recorded its consensus that it would change its recommendation relating to the Tribunal's name but would maintain its recommendation that the title of "referee" be changed to "adjudicator".

There was further discussion about the upper limit of claims which the Tribunal would consider as of right. Ms Wills raised a suggestion on behalf of the Attorney-General that the limit be raised to $70,000 as future proofing. Ms Robertshawe noted that it was difficult to assign a particular dollar value, but

that based on the resources available to the Tribunal and the current capacity of its members and framework, it was felt that an increase to $50,000 as of right was a safe and achievable progression. The Chair noted that the draft Report could state that the upper limit of claims which the Tribunal would consider as of right could be increased higher than $50,000 if Tribunal resourcing was sufficient for that purpose. The Committee recorded a general consensus for this view.

The Committee agreed that the recommendation that Tribunal hearings continue to be held in private should remain unchanged.

The Committee agreed there should be less emphasis on promoting the Tribunal in the report.

Other amendments were also discussed.

District Court

Ms Davenport QC led the discussion on the District Court section.

She invited the Committee to re-visit its previous decision not to recommend the establishment of a separate civil division of the Court and to leave that as a matter to be considered by the new Principal Civil Judge. She suggested that the purpose of reform was to revitalise and increase confidence in the District Court and that recommending the creation of a civil division would support this.

The Chief District Court Judge said that pressure of work in the criminal and family divisions led to judge time being applied to those areas to the detriment of progressing the civil workload. There was also a lack of expertise and experience in the civil area in the registries. A Principal Civil Judge could ensure judicial supervision of the Central Processing Unit, support skill development in the local registries and work with schedulers to ensure adequate judicial resources. This Judge would be able to see the national perspective and could advocate for resources to be allocated where required. There was currently a somewhat loose relationship between the judiciary and the central registry. The appointment of a Principal Civil Judge formed part of a multi-stranded approach to revive confidence within the profession. He stated that a Principal Civil Judge and a dedicated civil division would compliment each other.

The Committee agreed that the recommendations be amended to propose the creation of a separate civil division as well as the appointment of a Principal Civil Jurisdiction Judge.

The Committee agreed that it was not just the 2009 reforms that had led to the loss of confidence in the civil jurisdiction. Rather a combination of the reforms and restructuring by the Ministry and the establishment of the Central Processing Unit, which occurred at the same time, led to a significant reduction of experienced civil registry staff. The Committee agree the draft report should be amended accordingly.

The Committee engaged in general discussion about who might be eligible to perform the role of a Deputy Judge. It was noted that due to the perspective that there had been a loss of mana in the civil jurisdiction, the role should be filled by experienced civil lawyers. The Committee agreed that the key point was that those appointed should have the knowledge, experience and also the mana to fulfil the role.

Mr McHerron identified some changes that were required to the draft provisions concerning the Deputy Judge appointments which he would pass on to the drafters.

Other amendments were also discussed.

High Court

The Chair and Mr Kalderimis led the discussion on the High Court section.

They invited the Committee to reconsider its decision to trial the changes in the High Court because of the practical difficulties of doing so. The Chair noted that running the changes as a pilot in a single Registry may result in confusion due to the necessity of two sets of rules – one for the pilot registry and one for the other registries. He stated that conducting the pilot on a voluntary basis would not allow the necessary results to be fully or accurately tested. Mr Kalderimis suggested that even if there were no formal pilot, it would be possible to alter or reverse the changes if there was overwhelming adverse feedback and if the profession found the changes unworkable in practice.

Justice Muir noted the importance of incremental changes and noted Dr Toy-Cronin's views on the process for changes. He acknowledged there was a general consensus that the suite of proposed changes would improve access to civil justice and lower costs but pointed out that the practicalities of these changes were still untested. He stated his support for trialling the changes if possible. The Chief Justice similarly noted the concern raised elsewhere in the draft report about implementing untested reforms. Ms O'Gorman suggested that the efficacy of the reforms depended not only on a mere rule change but would also require changes in the conduct of litigators and the courts. She acknowledged the desirability of approaching reforms cautiously but agreed that any pilot would need to be on a mandatory rather than voluntary basis.

The Chief High Court Judge and Justice Kós suggested that it would be helpful to have more information about practitioner's responses to the disclosure and discovery rule changes implemented in New South Wales and Singapore. Mr Kalderimis noted that it might be helpful to have dialogue with the New South Wales judges responsible for leading the rule changes in that state.

The Chair suggested that the question of implementation of the Committee's recommendations would be something the Committee would be required to address later. The views of the profession and others on this matter could be addressed after release of the report. In effect this would involve further consultation before any rule changes were adopted. The report could refer to the issues, and to the possibility of a pilot. The Committee agreed with this approach.

The Committee agree to amending the references in the recommendation in relation to judicial issues conferences to judges providing views on the prospects of the case's success to avoid raising expectations that judges would be expected do so at such conferences.

The Committee also agreed to the proposed recommendation 8 relating to the use of technology which had not been previously considered by it.

Other amendments were also discussed.

Introduction to Report

The Chair discussed the draft introduction noting that the information used to draft it was sourced from the previous consultation papers. The Committee offered some feedback.

Justice Kós noted the Committee's appreciation to the Report drafters for their work.

3. Costs to Lay Litigants – oral update

The Committee agreed to defer its further discussion of the Costs to Lay Litigants submissions until the September 2022 meeting.

The Chair noted that the main issue arising from the submissions was the question of whether in-house lawyers, particularly lawyers employed by Government Departments, should recover under a reduced costs rate.

Ms Todd agreed to prepare a memorandum explaining the process of identifying the cost of legal services for the Crown Law Office and Government Departments.

The Chief Justice left the meeting at 12:02.

4. Potential review of Part 25 of the High Court Rules (Admiralty)

The Chair noted that the Committee had received a letter from Dr Bevan Marten offering to review the Admiralty rules with the aim of bringing them up to date. The Committee agreed to accept Dr Marten's offer. The Chair noted that he would also inquire with the Australasian Rules Harmonisation Committee, of which he was a member, whether there were agreed admiralty rules recommended by that Committee.

5. Amendments to the District Court Rules 2014

The Paper from the Ministry was discussed. Mr McHerron noted that this issue first came before the Committee some three years ago. He questioned whether it was necessary for the Committee to deal with these amendments and whether the changes could be made under s 87 of the Legislation Act 2019, which allowed for editorial changes to be made.

Ms O'Gorman noted that there were several substantive changes which may have to be amended through the Rules Committee.

The Chair suggested that the Ministry of Justice and the Parliamentary Counsel Office consider what is needed to make the necessary changes and to report back at the next Committee meeting.

6. Matters for noting

The Chair noted items of correspondence received since the last meeting. One letter from the Ministry of Justice suggested that documents held by the Committee were discoverable in a judicial review proceeding concerning te reo in the courts. The Chair noted that the Committee responded saying it was independent of the executive so that its documents were not it the executive's power or control, but that the relevant documents were being made available to both sides of the proceedings.

The Chair also noted a letter from the Minister of Justice regarding the repeal of the Three Strikes legislation and highlighting the possibility of rules change. The Chair noted that the Criminal Procedure Rules 2011 fall under the purview of the Committee and that the necessary consequential amendments were being considered.

The Chair raised the question of whether future Committee meetings should proceed remotely for the time being. It was decided that future meetings would proceed remotely unless it was otherwise advised.

Justice Francis Cooke
Chair