The Rules Committee
Te Komiti mō ngā Tikanga Kooti

28 March 2022
Minutes 03/2022

Circular 17 of 2022

Minutes of Meeting of 28 March 2022

The meeting called by Agenda 03/22 (C 2 of 2022) convened at 10:00am using the Microsoft Teams virtual meeting room facility due to the ongoing spread of the Omicron strain of COVID-19.

Present (Remotely)

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 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
Hon Judge Kellar, District Court Judge
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice
Ms Alison Todd, Senior Crown Counsel as 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
Ms Janet Robertshawe, Principal Disputes Tribunal Referee

In Attendance (Remotely)

Ms Maddie Knight, Secretary to the Rules Committee and Policy Advisor in the Ministry of Justice
Ms Te Uranga Royal, Clerk to the Chief District Court Judge
Ms Anna McTaggart, Clerk to the Rules Committee

Apologies

Hon David Parker MP, Attorney-General

1. Formal Items

Apologies

The apologies of the Attorney-General, were received and noted.

Minutes of previous meeting

The minutes of the previous meeting as provisionally circulated in C 1 of 2022 were received and adopted. The Clerk is to publish these on the Committee's website.

Matters arising

The Chair welcomed Ms Anna McTaggart, the incoming clerk to the Committee, to her first meeting.

2. Improving Access to Civil Justice – Discussion of Submissions from Second Consultation Round

The Chair proposed that the Committee should proceed directly to a discussion of the submissions from the second consultation round. It was noted that the Committee's views would ultimately be outlined in a formal report.

As foreshadowed in the November 2021 meeting, the Chair first invited Mr McHerron and Ms Robertshawe to facilitate discussion of the submissions relating to the Disputes Tribunal in accordance with their proposals formulated following consideration of submissions (C 9 of 2022).

Discussion of submissions and proposals relating to the Disputes Tribunal

Ms Robertshawe gave a summary of the work undertaken by the Disputes Tribunal and discussed its particular strengths. The proposals for reform in C 9 of 2022 were then discussed.

(1) Proposal one: increase in jurisdiction

It was proposed that the jurisdiction of the Tribunal should be extended to claims of up to $50,000 as of right and up to $100,000 by agreement.

Ms Robertshawe noted that a substantial percentage of submitters favoured this increase. She did not believe that increasing jurisdiction to include claims up to $50,000 would impact the Tribunal's ability to deliver access to smaller claims. She noted that in her experience, claimants often abandon part of their claim to fall within the current $30,000 jurisdiction and this increase would provide those claimants with an opportunity for greater recovery rather than resulting in an unmanageable increase of higher-value claims. Ms Robertshawe believed that if the jurisdiction was expanded to $100,000 as of right the landscape would change and may lead to a substantial increase in claims, would refocus what is inherently a small claims jurisdiction and would need to be resourced quite differently.

There was a general discussion, prompted by a question from the President of the Court of Appeal, whether the Committee should focus on aspirational changes or on pragmatic ones. He asked whether changes should be made in light of what the Tribunal should look like in the long term, or what is achievable under the Tribunal's current model. The Chief Justice suggested it might be possible to signal alongside the reform that the jurisdiction could be further extended would be considered in the future.

Judge Kellar expressed some concern that a claim of up to $100,000 was a substantial sum of money to be dealt with in a forum which does not allow legal representation or the same ability to recover costs as the District and Senior Courts. Mr McHerron noted this reservation and stated that an increase in risk associated with a higher jurisdictional cap may be mitigated by appeal rights.

The Chief Justice stated her overall support for the jurisdictional limits as proposed. However, she noted that the jurisdictional change may need to be accompanied by public communication to reiterate that the Tribunal is a forum staffed by skilled professionals and to encourage confidence it is an environment which will provide justice. Ms Robertshawe stated that the Tribunal was currently engaged in a community-engagement programme which aimed to provide greater confidence in services provided by the tribunal.

The Committee agreed to record a general consensus approving of the proposal as currently worded.

(2) Proposal two: appeal rights

It was proposed that the appeal rights for claims of up to $30,000 should remain unchanged (i.e. limited to procedural unfairness) but that there should be a general right of appeal for claims of $30,000 and above.

There were different views expressed in relation to the change to appeal rights that would be appropriate.

Ms Robertshawe stated that one benefit of the existing model is that it provides finality. She stated that in her experience, while on the face of it the existing appeal rights may seem unsatisfactory, they work well in practice. However, beyond $30,000 a general right of appeal did seem necessary as a party could potentially lose substantial assets on the decision of a Referee.

The President agreed that if the jurisdiction was increased that having an appeal right on the basis of a procedural unfairness ground would probably not be sufficient but questioned whether a general right of appeal would be appropriate on the basis that it would undermine the finality of the process. He suggested that appeals could be by way of leave only, applying the *Kacem v Bashir* test (fundamental error of law, something relevant has been overlooked, an irrelevancy has been taken into account or the decision is plainly wrong). Ms Davenport QC also questioned whether more limited appeal rights might be preferable due to the concern that increased rights would lead to a greater workload for the District Court and risk creating yet another tier of civil justice.

Judge Kellar noted that he would be in favour of the existing limited appeal rights being applied up to the increased jurisdiction of $50,000 but that matters would be more complicated if this were extended to claims of up to $100,000. Justice Muir noted that in instances where something seriously wrong has occurred, the District Court has found a mechanism of dealing with such issues at a practical issue and questioned whether there was any reason to suppose that this would not similarly apply if existing appeal rights were retained for all levels. He also noted that any changes made to appeal rights will have potential impacts on access to justice.

Ms Robertshawe noted that if an appeal was granted it could be remitted back to the Tribunal to be heard which would limit the burden imposed by appeals. She also indicated that the Tribunal only has a limited number of appeals in proportion to the services provided and she did not expect that a broader right of appeal would create an unworkable administrative burden.

The Chair suggested an appeal right involving the decision being wrong in law or manifestly unjust. The Chief Judge of the High Court noted it was important to remember the method by which the Tribunal must determine disputes, as articulated in s 18(6) of its governing Act. The Chief Justice suggested that the Referee should be required to express their reasons for departing from the law under s 18(6) when they did so. Mr McHerron noted that based on example decisions provided in the Disputes Tribunal report (C 9 of 2022), it appeared Referees already did this.

Mr McHerron expressed a reservation about extending the current procedural unfairness ground of appeal to include claims up to $50,000 because, in effect, it would involve removal of current general appeal rights in respect of claims between $30,000-$50,000 (in the District Court) which seems wrong in principle. Mr McHerron also expressed concern about having overly nuanced appeal rights because they are more difficult for non-lawyers to understand than a general right of appeal would be, which is contrary to the aim of improving access to justice. In respect of concerns about finality, Mr McHerron referred to the ability to limit further appeals beyond the District Court (as in s 23 of the Act).

Approximately two-thirds of the Committee agreed with the proposal as written in C 9 of 2022 that there be no change to appeal rights up to $30,000 and a general right of appeal for awards between $30,000 and $100,000. It was determined that a general consensus would be recorded, with the minority views outlined in the subsequent report of the Committee.

(3) Proposal three: representation

Current rights of representation are limited to circumstances where people are unable to adequately represent themselves or where a party is under 18 years of age. Lawyers are excluded as representatives or support people.

Ms Robertshawe and Mr McHerron recommended that no changes be made to the current rules regarding representation. Ms Robertshawe noted that the role of Referees is to provide appropriate legal support to both parties and to analyse issues.

The Chief Justice raised a possible situation where one party, while being unrepresented, is a corporate litigant with extensive business knowledge, and questioned how this obvious imbalance might be addressed if the other party is not permitted representation. Ms Robertshawe indicated that Referees were aware of imbalances between parties and that the Tribunal aims to provide support for vulnerable people by remaining objective and protecting the integrity of the process. She stated that the Tribunal was increasingly becoming populated with people who have a strong legal skillset.

The Committee recorded an overall consensus agreeing with this proposal.

(4) Proposal four: public hearings and publication

Hearings are currently conducted in private and there are limitations on what is published in terms of Tribunal jurisprudence. Ms Robertshawe and Mr McHerron recommended that private nature of hearings not be changed, but that increased publication of hearing decisions should occur, particularly in cases of public interest.

There was general agreement for this proposition. Ms Robertshaw noted that while there is a fundamental right to open justice, there is a good reason for the Tribunal to hear claims in private. If

hearings were public, it may adversely affect the sense of comfort claimants experience from attending a forum which allows them to discuss their claim in an open and frank way. She noted that this privacy reflects the needs of users and underpins the ability to provide real access to justice.

The Chief Justice, the President and the Chief High Court Judge noted their support for this position. The Chief High Court Judge noted that if the hearings were made public it may lose some of the access to justice which the Committee is trying to achieve and that people may be unwilling to commence claims.

The Chief Justice noted that at the point a case was appealed, there would be greater public involvement in the process.

The Committee recorded its agreement with this recommendation.

(5) Proposal five: the Disputes Tribunal as settlement forum for the District Court

Ms Robertshawe discussed the fact that under s 18(4) of its governing Act, the Tribunal has no cap on its jurisdiction for approving a settlement. She noted that District Court Judges could identify an opportunity to use the Tribunal Process in appropriate cases and transfer the matter to the Disputes Tribunal solely for the purpose of exploring the opportunity for settlement.

The Chief High Court Judge expressed some concern about this suggestion. She noted that the District Court Rules were clearly written with a judicial settlement conference as part of the District Court system. If unsuccessful a judicial settlement conference transitions into an issues conference which has inquisitorial aspects in terms of what evidence both parties are likely to bring. She was concerned that this proposal might undermine the intended use of the District Court Rules.

Judge Kellar noted that the proposal was not legislatively possible at present. He also noted that if the Tribunal's jurisdiction were increased to $100,000 the Tribunal would have a greater opportunity to utilise its settlement functions in any event. He noted that he was not opposed to the underlying philosophy of the proposal, but as the Chief High Court Judge had indicated, there were existing processes in the District Court Rules in the form of the judicial settlement conferences which were already effective.

Ms Robertshawe noted that there was a fundamental difference between what the Tribunal could offer compared with a judicial settlement conference.

The Chair expressed general support for the proposal and stated the Rules Committee was concerned with assessing how further inquisitorial systems may be introduced into rules of civil procedure. He noted that it may be difficult to alter the processes of the District and High Court to transform them into more inquisitorial bodies whereas the Tribunal was already well-trained and equipped to do this. He raised the potential for the Tribunal to act as a further option alongside a short trial and judicial settlement conference avenues in the District Court.

The Committee recorded support for developing this proposal further but noted that there were many factors to take into account.

It was also agreed that the District Court Rules should be amended so that the Judge who presided over an unsuccessful judicial settlement conference would give the directions for the progress of the proceeding in the District Court as had been envisaged by the 2014 reforms.

(6) Proposal six: recovery of filing fees, costs and disbursements

It was noted that there is currently no jurisdiction to award costs other than in exceptional circumstances as outlined in s 43 of the governing Act. Ms Robertshawe noted a significant degree of support in the submissions for creating a limited costs system.

Ms Robertshawe and Mr McHerron noted that their recommendation was not to alter the current system as it operates effectively. It was noted that allowing costs would complicate matters and that in Ms Robertshawe's experience, there was not injustice in the current regime. However, it was suggested that filing fees should be recoverable by successful applicants and that the filing fee should be subject to waiver.

The Committee recorded its overall consensus in support of this proposal.

(7) Proposal seven: qualification of referees

It was noted that submissions broadly favoured the suggestion that all Referees are legally qualified. It was recommended that all incoming Referees should possess legal qualifications, but that transitional provisions should allow unqualified Referees currently in office to retain their position.

The Committee recorded its overall consensus in support of this proposal.

(8) Proposal eight: resolving disputes according to the law

It was recommended that there be no change to s 18(6), which requires Referees to "determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities".

It was questioned whether the wording of this provision should be altered. It was noted that s 85(2) of the Residential Tenancies Act 1986, which governs the operation of the Tenancy Tribunal employed different wording. The Chair noted that case law had determined that the two tests were fundamentally different.

The Chief Justice suggested that it may be preferable to apply a proviso to s 18(6) along the lines of "except where it would result in substantial injustice". The Chief Justice also noted that it may be wise to impose an obligation on the Referee to articulate why they are departing from a strict legal right in any given situation.

The President noted the desirability of retaining what is effectively an equitable jurisdiction. The Referee's power under s 18(6) was one of the Tribunal's particular characteristics. He noted that if there are rights of appeal claimants need not be concerned about any departure from strict legal rights.

The Committee recorded its overall consensus in support of the proposal but noted that the proviso suggested by the Chief Justice should be applied.

(9) Proposal nine: enforcement and recovery processes

Two proposal were put forward. One, that consideration be given to finding more effective and straightforward ways for claimants to enforce a successful award and two, that the $200 enforcement fee imposed for collection of a Tribunal award be abolished or at least subject to waiver.

Ms Robertshawe noted a general consensus in submissions that something should be done to improve enforcement, but that there was a lack of concrete suggestions. She noted that the enforcement fee had only recently been introduced and should be re-examined due to the fact that many parties were seeking to enforce decisions in relation to low-value claims and could not afford the current fee.

The President expressed approval for the second proposal but noted that the first proposal was a District Court issue in relation to procedure and was not within the Tribunal's jurisdiction to resolve.

The Committee expressed overall agreement with the second proposal and agreed that the first proposal should be discussed at another time.

(10) Proposal ten: appropriate name

It was recommended that Referees be renamed "adjudicators" and that consideration be given to renaming the Tribunal to better reflect its connection to the community and the spirit of its processes. It was also noted that there was a need to consider an appropriate Reo Māori name.

The President noted that it was important to distinguish courts and tribunals for various purposes.

The Committee agreed to recommend that the title of "referee" be changed to "adjudicator". It was also noted that the phrase "Disputes Tribunal" had adversarial connotations. A new name may encourage a broader section of the community to engage with the Tribunal's services and should refer to community engagement and resolution rather than focusing on the idea of disputes.

The Committee agreed to move forward with this proposal.

Discussion of submissions and proposals relating to the District Court

Discussion of the submissions relating to the District Court was facilitated by Judge Kellar and Ms Davenport QC in accordance with their recommendations following the consideration of submissions (C 7 and C 11 of 2022).

Judge Kellar noted that the first three proposals, namely the appointment of a Principal Civil Judge of the District Court, the improvement or restoration of civil registry expertise in the District Court and the use of part-time Deputy Judges for civil cases, received almost universal support in submissions. One exception in relation to Deputy Judges was in the submission from Bell Gully which argued that it is constitutionally and professionally appropriate to maintain the separation between the role of advocate and the role of Judge.

Judge Kellar noted general but not unreserved support for the introduction of pre-action protocols to debt collection proceedings. Judge Kellar noted that the Auckland City Council appears to have adopted a similar process with some success. There was some support for the proposal that an inquisitorial process and case management be adopted.

Before considering the specific proposals, the Committee engaged in a general discussion about the District Court Rules, and resourcing within the District Court. It was concluded that the Rules are fit for purpose. There was significant consultation prior to their enactment, and as noted by the President, the submissions did not raise serious problems with the rules themselves. It was noted that issues like delays in being heard and an associated loss of confidence within the community are likely attributable to resourcing issues.

(1) Proposal one: appointment of a Principal Civil Judge of the District Court

The President noted that the appointment of a Principal Civil Judge (as well as Deputy Judges) would likely go some way towards addressing resourcing issues in the District Court. The Chief Justice agreed, noting that the new Principal Civil Judge could work with the Heads of Bench and the Ministry of Justice to cast light on issues such as the steady depletion of civil registry expertise.

Justice Muir noted that the appointment of a Principal Civil Judge may also remedy existing perceptions about the District Court.

Mr Chhana stated the concern that changes could be instituted to bring greater capacity to the District Court, but there was no guarantee that people would engage with it. He queried whether a strategy needed to be put in place to attract users of the Court. Ms Davenport responded that part of the intended role of the Principal Civil Judge would be to promote the Court to people who may not be utilising it at present.

Judge Kellar proposed the consideration of a separate civil division of the District Court but suggested that this be left until after the appointment of a Principal Civil Judge.

The Committee recorded its overall consensus in support of this proposal.

(2) Proposal two: improving or restoring the civil registry expertise in the District Court

Judge Kellar noted that the formation of the central registry removed a large degree of interaction between local registries and individuals filing documents with the District Court. There is also an overall lack of specialisation in civil registries. Institutional knowledge has been lost and incoming staff often have little experience.

The Committee recorded its overall consensus in support of this proposal.

(3) Proposal three: making use of part-time Deputy Judges/Recorders for civil cases in the District Court

Mr McHerron stated that he was not opposed to the idea of part-time Judges/Recorders but questioned why this option was preferable to making better use of the existing District Court Judges, or to appointing additional Judges. He expressed concern that Deputy Judges may lack the individual and collegial support and the independence of tenure enjoyed by full-time Judges.

The President responded that the Court possesses a fixed resource in terms of Judges and while full-time Judges are best practice, part-time Judges would be of great assistance when dealing with the

variability of workflow. Deputy Judges could also assist with the speedy provision of justice in situations where fixed resources could not deal with an increased workload.

The Chief Justice also noted that the opportunity to appoint a part-time Judge offered a systemic advantage. When somebody receives a judicial appointment they typically do not return to their previous career as an advocate. The opportunity to be appointed as a Deputy Judge allows prospective Judges to experience the system before fully committing. Judge Kellar also noted a submission which suggested the role of a Deputy Judge may appeal to people who do not have judicial aspirations on a full-time basis.

Mr Chhana queried what the jurisdiction of Deputy Judges within the District Court jurisdiction would be. The Chair suggested that Deputy Judges would not have criminal (or presumably family) jurisdiction but would otherwise have all the civil jurisdiction of a District Court Judge.

Judge Kellar noted that the appointment of Deputy Judges may provide a great deal of flexibility. However, he also noted that competition for the time of Judges between civil, family and criminal jurisdictions was not the only issue. There are limited courtroom and registry staff resources. The Chief Justice noted that there would have to be an increase in registry capacity and suggested a creative and flexible way of utilising existing resources may be considered. For example, utilising courtrooms at times they are not typically in use or using alternative venues. Mr Kalderimis also suggested that a realistic way to add capacity without being constrained by a lack of courtrooms would be to run hearings remotely.

The Committee recorded its approval of this proposal.

(4) Proposal four: introducing pre-action protocols for debt collection matters and considering the introduction of other pre-action protocols

Judge Kellar noted that debt collection represents a significant proportion of the District Court's overall civil workload. The United Kingdom utilises pre-action protocols in debt collection claims and various other proceedings. A pre-action protocol would describe the way the Court expects parties to behave prior to initiating proceedings, including requiring lenders to inform defendants of their rights and where they can seek legal assistance. It is hoped that pre-action protocols will encourage parties to engage in a reasonable and proportionate manner between each other. Ultimately, it is hoped early engagement may encourage parties to resolve the matter without the need for court proceedings.

Judge Kellar acknowledged the disadvantage of instituting pre-action protocols for debt collection would front-load the cost and possibly delay proceedings.

The Chief Justice indicated that she was not opposed to pre-action protocols but that it would be preferable that they were targeted specifically towards debt collections as it is clear that many people who have proceedings for debt collection brought against them in the District Court did not fully understand what is happening. Judge Kellar replied that in the United Kingdom pre-action protocols are aimed at businesses, including sole traders. He acknowledged the fact that the District Court is often used as a debt-collection agency and that many defendants are either unaware of available defences or do not raise them due to a fear of costs.

Judge Kellar suggested that that before a new provision was created, a trial pre-action protocol process should be run, and the outcome evaluated. He noted that there was significant scope to simplify the pre-action protocol used in the United Kingdom, which would in turn reduce front-loaded costs. The Chief High Court Judge supported the idea of running a trial to obtain more data and to ensure the protocol was properly designed and was able to be understood by the people who need it most.

Justice Muir raised the idea that proceedings are typically not issued straight away when a debt is not paid. Typically, there are a number of opportunities for parties to engage with the issue prior to the initiation of proceedings. He expressed concern that this may become yet another level of administration. The Chief High Court Judge replied that this protocol is not directed at responsible lenders who would engage with borrowers to ensure they understood their position.

The Committee recorded its agreement with this proposal.

Judge Kellar to prepare draft rules based on a simplified version of the United Kingdom Civil Procedure Rules as part of the Committee's report.

(5) Proposal five: an inquisitorial process and case management

The Committee discussed whether a more flexible process for determining substantive claims, drawing on the more inquisitorial aspects of the procedure of the Disputes Tribunal, should be introduced.

The Chair noted that since this proposal was last discussed the Committee had come to the conclusion that the District Court Rules were fit for purpose and was therefore not convinced the District Court needed to change along these lines.

The Chief High Court Judge referred to Judge Kellar's earlier comment that a case management conference did not always take place after a failed judicial settlement conference. She noted the intention of the Rules was that the same judge would preside over both the case management conference and the judicial settlement conference. This would allow the judge to take on a more inquisitive role and would place them in a better position to know what orders are required.

Judge Kellar replied that this process has not been operating as intended. It was unusual for the same judge to oversee a case management conference after a failed judicial settlement conference for reasons of practicality. In reply to a question from Ms Davenport QC he noted that such issues are largely attributable to scheduling.

The Chief Justice suggested that a failed judicial settlement conference should transition directly into a case management conference, which would allow the judge who understands the issues at the heart of the case to dictate directions for future actions. Judge Kellar agreed that the judge would be well placed to make directions at the end of an unsuccessful judicial management conference, but that the parties may not have much appetite for staying to hear them.

The Chief Justice noted the Attorney-General had advocated an inquisitorial style of proceeding where the judge would ask parties to state their case and would then adjourn to discovery. Discovery

would not proceed until the judge had enough knowledge to know how they want the issue resolved. Judge Kellar replied that the submissions indicated there was not enthusiasm for such processes. Some submissions suggested that an iterative type process may be inefficient as parties might be called more than once, drawing the process out. Submissions referred to the Canterbury-based Earthquake List.

The President stated that rules 7.2-7.3 of the District Court Rules already provide for judicial input but noted the possibility of establishing an inquisitorial list for litigants in person, who may be in an unequal position. He noted that the District Court Rules do not contain an equivalent to High Court Rule 7.2, which permits the judge to give directions to secure the just, speedy, and inexpensive determination of the proceedings. The Chief Justice agreed with the President regarding an inquisitorial list for litigants in person on the basis that there may not be proper procedural protections for some people.

Ms Robertshawe noted the success of the Dispute Tribunal's inquisitorial process and offered to assist Committee members should they wish to develop similar processes. The President noted his interest in conversing with Ms Robertshawe in relation to developing a rule which would enable a judge to refer certain cases towards an inquisitorial process.

The Chair suggested there was a consensus that the rules were fit for purpose but noted that a change could be made to ensure that the same judge can deal with both the judicial settlement conference and the case management conference.

Discussion of submissions relating to the High Court

Discussion of submissions relating to the High Court was facilitated by Mr Kalderimis and the Chair. The questions for the Committee to determine were set out in C 14 of 2022 and an overall recommended proposal for a reformed civil justice procedure was set out in flowchart form in C 15 of 2022.

The Chair stated that the substantial expense of proceedings was the primary access to justice issue in the High Court. The aim of the proposals was to achieve a reduction in costs and an increase in efficiency.

(1) Proposal one – proportionality as a guiding principle

The Chair asked whether proportionality should be emphasised as a guiding principle in the application of the rules and added as such in r 1.2.

There was general agreement with this proposal.

(2) Proposal two – discovery and commencement

Mr Kalderimis outlined the proposed structure for streamlined High Court proceedings in C 15 of 2022. He noted that the most novel aspect of this structure was that the Court would not make discovery orders until the parties to the proceedings had served their proposed evidence. This proposal took inspiration from procedural rules in New South Wales, particularly Practice Note No. SC EQ 11 (C 6 of 2022). It was hoped that this proposal would encourage counsel to produce shorter and

more concise briefs of evidence. The issues conference would then occur at a later stage, after briefs had been exchanged, and any further discovery ordered at that point.

The Chair noted that the proposal that evidence be served at this early stage would potentially remedy the issue that briefs of evidence often contained too much advocacy. After such briefs had been served, the judge would also have a more accurate idea of what additional discovery is needed to dispose of the case.

The President noted that the documentary record is the most important aspect and that the High Court should focus on this. He expressed caution that the Committee should take care with the extent to which the existing written brief system is continued. He stated that a return to "will say" statements would be preferable.

The Chair agreed that contemporaneous documents are a key source of facts. In many cases unnecessary time is spent cross-examining on matters already on the record.

The Chief Justice noted her support for delaying full discovery but noted that the timing around when adverse documents must be disclosed was critical. Mr Kalderimis noted that while there was anxiety from within the legal profession when the changes to timing of discovery were made in New South Wales, this has since dissipated.

Ms Davenport noted that a key tension in discovery, especially from the weaker party in a dispute, was the fear that the opposing side would destroy or not disclose documents. Ms Davenport referred to a suggestion in submissions that the party in question could provide certification that they searched for all adverse documents.

Mr Kalderimis noted that initial disclosure would still be provided at the beginning of proceedings.

Mr McHerron questioned whether the proposal by associate judges (C 4 of 22) that tailored discovery be the default should be adopted as this would force parties to establish what the issues are. The Chair stated that tailored discovery could easily be the standard order made at the subsequent issues conference.

Justice Muir stated that he would roll back the entire requirement for briefs of evidence or affidavits. He believed this would solve many downstream issues relating to expanded processes and lost time.

The Chief Justice noted that delaying discovery until after service of briefs of evidence would naturally limit the case which is the intention underlying the New South Wales practice note. When a large volume of documents was introduced a case often began to lose its shape. Justice Muir noted that this is precisely why the associate judges placed emphasis on tailored discovery as a limiting exercise.

Ms O'Gorman noted that tailored discovery is not necessarily narrower than default discovery. The saving arises mainly if specific discovery constrains the extent of the search. She said she doubted whether requiring tailored discovery would ultimately lead to substantial costs savings, and agreed it was necessary to attempt significant changes so she expressed her support for measures which would seek to radically reform the current approach. The proposed structure in C 15 of 2022 clearly had those objectives and could achieve a real transformation, along with other important changes such as

the proposed changes about documentary hearsay. She suggested that the documentary hearsay rules about admissibility might be dispensed with entirely for civil proceeding. The Court can give documents what weight they think is appropriate. If a statement is not substantiated or is untrue it will be given little to no weight. It would make sense for evidence to mainly be given on the papers with witnesses addressing aspects relating to weight.

Mr Kalderimis noted that tailored discovery was often difficult as a party effectively has to attempt to create a universe of documents the other party may hold without actually knowing what they are. In some cases, it is easier to order general discovery. Tailored discovery is useful if there is a reasonable document base, and the party knows what they are looking for. Mr Kalderimis also stated that the briefs of evidence are envisaged as closely resembling the "will say" statements discussed by the Chair.

The President questioned when, during the overall proceeding, the judicial issues conference would actually occur. Mr Kalderimis noted that it would occur midway through the proceedings, after parties have made any dispositive interlocutory applications, have submitted "will say" statements and prepared a chronology of events. He noted that the key question for the Committee to confront was whether this proposal was realistic as it would only be effective if sufficient, time, resources, capacity and interest were applied.

The Chief Justice noted that, to be successful, issues conferences likely required specialise case management. She noted that this may be a personnel issue as not all judges are expert case managers.

[The Chief Justice excused herself and left the meeting at this point].

The Chief High Court Judge questioned what the Australian experience of this approach to disclosure has been in the context of time and cost savings. Mr Kalderimis stated that Australian practitioners consulted had reported a significant change. The Chief High Court Judge noted that the importance of cooperation between counsel cannot be overestimated. Mr Kalderimis noted that the proposal would encourage cooperation as both parties would need to understand their case before coming before the judge.

The Chief High Court Judge queried whether parties may begin to send junior lawyers who do not have decision-making capacity to the issues conferences rather than attending themselves. The President noted that in his experience in the Earthquake List, parties almost always attended. The Chair noted that the reform would require a change in litigation culture and that the Committee could not make any rule which would achieve this. Rather, it would need to change the signposts for people engaging in litigation.

Ms O'Gorman expressed concerns that an implied search obligation in initial disclosure may confuse what is required at that early stage (as opposed to discovery which takes place later). The President noted that it should be emphasised that there is clearly a continuing obligation in relation to disclosure. The Chair agreed, noting that initial disclosure of adverse documents does not create an obligation to search relevant materials, only to disclose adverse documents the party is aware of.

The Committee recorded its general agreement with this proposal. However, it was decided that the new regime should initially be run as a pilot.

(3) Proposal three – issues conference

The Chair asked whether the Committee agreed with the proposal that a judicial issues conference would occur essentially in the middle of the proceedings as contemplated by the prior discussions.

The Committee recorded its general agreement with this proposal.

(4) Proposal four – interlocutories

The Chair questioned whether interlocutory applications should:

(a) Be presumptively determined on the papers?
(b) Be authorised to be determined on the papers?
(c) Be presumptively determined by remote means?

The Chair noted that, from the judicial perspective there was opposition to interlocutories being determined on the papers. He also indicated that one benefit of COVID-19 is that remote proceedings had proved to be more efficient. The Chair suggested that interlocutory applications should be presumptively determined by remote means but stated that judges should have the ability to decide an application should be determined on the papers.

The Chief High Court Judged noted a strong feeling among judges that interlocutory applications should not be presumptively determined on the papers given the benefit of judicial engagement. Mr Kalderimis agreed, stating the profession was in general agreement that this would tend to lead to counsel writing lengthier submissions.

The President noted that in the Court of Appeal some matters are dealt presumptively on the papers which is often effective, but on occasion confusion arises and counsel must be called in. The President also noted that interlocutory applications provide a good opportunity for junior counsel to practice their advocacy skills and that it would be a shame if this opportunity was lost.

The Committee recorded a consensus that interlocutory applications should be presumptively determined by time limited remote hearings, but that judges should be authorised to determine applications on the papers.

(5) Proposal 5 – should greater emphasis be placed on contemporaneous documents to establish the facts at trial

The Chair noted that the proposal that core facts be established by the common bundle/chronology of events was favoured by the majority of judges. Witnesses would not address events revealed in the documents, only factual matters in dispute. The Chair acknowledged that given the proposal for service of briefs before additional discovery this could result in supplementary briefs of evidence coming in from a witness, as they may gain a different impression of events as more documentation was discovered. The President noted that it may have to be accepted that it might be necessary to revise will say statements.

Justice Muir expressed some resistance to the phrasing 'brief of evidence'. He suggested a need to roll back some assumptions about how evidence is ultimately produced at trial. There have been issues with briefs of evidence containing irrelevant information. Justice Muir stated that he would like to re-introduce the older process of oral evidence based on a will say statement.

The Chair noted that due to the New South Wales initiative evidence will be advanced by will say statements or briefs. Mr Kalderimis noted that not all evidence needed to be viva voce at trial. The statements could be taken as read, with the witness being led through anything they would like to add.

The President noted that the court would need to ensure that will say statements dealt with possible "ambush", as this is something parties may be apprehensive about. The Chair noted that supplementary will say statements could be submitted after document disclosure. The proposed process aimed to minimise the expansion of written materials present in the current system. Mr Kalderimis stated that the point is to find rules which will encourage the right kind of behaviour from counsel and which ought to put counsel on notice that leading ambush evidence at trial would be a risky step.

Ms O'Gorman stated that there was still merit in the idea that evidence relating to matters that are not contentious may be taken as read. Contentious evidence should be given viva voce.

Justice Muir noted that the practice of written briefs of evidence, whether received as affidavits and taken as read or not, is the single greatest predictor of additional cost. He noted that many briefs contain argumentative, unnecessary and irrelevant information. He stated that he was open-minded when it came to aspects of will say statements being received in evidence and believed that these statements may flush out areas of contention to remove the issue of ambush, but that matters would proceed more effectively if contested evidence is then given viva voce.

Mr McHerron noted that it is often difficult to tell what the facts in dispute are and that this often remains an open question well into trial. The Chair replied that the suggested pilot may provide a clearer picture of how matters would unfold.

The Chair discussed whether the existing rules would need to be amended to address the proposed changes – for example ss 5(2), 20(2) and 132 of the Evidence Act. He noted that, as Ms O'Gorman had pointed out, documents being admissible as to truth may not be as problematic as some thought. In practice judges examine all sorts of documentary material for the purpose of making factual findings. Mr McHerron questioned that if the rule was not changed, it may avoid a scenario where people are incentivised to create documents for litigation purposes. The Chair replied that such documents would not carry much weight in any event.

Ms O'Gorman noted that it is difficult for a witness to recall events from five or ten years ago. Some claims include historical documents with no witnesses to produce it, but with a genuine belief the document held by the company accurately recorded those events. She noted that such technical issues should not be an admissibility barrier. She supported the hearsay rules being amended. The Chair agreed that this would require an amendment of the Evidence Act.

There was general support for the proposal, including that the documentary hearsay rules be changed.

(6) Proposal six – regime for expert evidence to be changed

The Chair outlined this proposal which asked whether the regime for expert evidence be changed so:

(a) There is greater use of Court appointed experts;
(b) There be a presumption of one expert per topic;
(c) That no evidence is received in the absence of expert conferral unless the Court orders otherwise.

There was general support for these proposals with the exception to the mandatory use of Court appointed experts which received less enthusiastic support in submissions.

The President noted that all three points had valid aspects. He noted that in some cases three experts will be called, but only two were really necessary. The President recounted his experience in the Earthquake List, which required experts to confer before filing evidence. He noted that the experts have a responsibility to the Court and should therefore be able to meet before submitting evidence.

Justice Muir noted that court appointed experts are often able to take care of complex issues immediately. The Chair noted that the idea was not to remove the possibility of court appointed experts, but that some people become concerned they are losing control of litigation.

There was a general consensus for the proposals with the exception of the mandatory use of Court appointed experts.

Further general discussion

The Chair asked whether there were any further questions relating to the High Court proposals.

Ms Todd questioned what sort of compliance mechanisms in relation to discovery and disclosure, if any, should be suggested in relation to the proposed pilot. The Chair noted that to some extent the court would have to expect parties to obey the rules. In his own view no particular compliance regime needed to be developed.

Ms O'Gorman noted that the success of the proposals would depend on the willingness of counsel to work together cooperatively and the willingness of High Court Judges to firmly enforce the proposals.

The Chief High Court Judge noted that it may be desirable to create a separate stream of work which would consider measures to assist litigants in person, she noted that the cost to the system in relation to this issue is substantial. Mr Kalderimis stated that there was a reasonable amount of feedback from litigants in person that they do not understand the rules and that any reforms will likely not work for them. The Chair noted that this was a separate topic for another time.

3. Programme for Committee's future work on proposals

The Chair stated that the Committee members tasked with presenting on each Court should consult with each other and then author a section of the final report for the Committee's consideration. He

noted that the intention was that some draft materials would be produced in advance of the next Committee meeting.

Designated Committee members to begin drafting sections of the Committee's report.

4. Matters for noting

The Clerk provided an oral update on the submissions relating to costs for self-represented litigants. The Chair noted that these submissions will be discussed in a future meeting.

The Committee discussed the next committee meeting, with the presumption at this point that the June 27th meeting would take place in person.

The meeting closed at 4:26 pm.

The next meeting of the Committee is scheduled to take place on 27 June 2022.

Justice Francis Cooke
Chair