The Rules Committee
Te Komiti mō ngā Tikanga Kooti

21 September 2020
Minutes 02/20

Circular 23 of 2020

Minutes of Meeting of 29 June 2020

The meeting called by Agenda 02/20 (C 12 of 2020) began at 10:00 am on Monday 29 June 2020 in the Conference Room 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 Susan Thomas, Chief High Court Judge
Hon Justice Dobson, Chair and Judge of the High Court
Hon Justice Cooke, Special Purposes Appointee and Judge of the High Court
His Honour Judge Taumaunu, Chief District Court Judge
His Honour Judge Kellar, District Court Judge
Ms Kate Davenport QC, Special Purposes Appointee and New Zealand Bar Association (NZBA) President
Mr Andrew Beck, New Zealand Law Society (NZLS) Representative
Mr Jason McHerron, NZLS Representative
Ms Laura O'Gorman, Special Purposes Appointee
Ms Jessica Gorman, Crown Law (Representative for Ms Una Jagose, Solicitor-General)

In Attendance

Mr Kieron McCarron, Chief Advisor Legal and Policy in the Office of the Chief Justice and Registrar of the Supreme Court
Ms Fiona Leonard, Chief Parliamentary Counsel
Ms Andrea King, Group Manager (Senior Courts) in the Ministry of Justice
Ms Alexandria Mark, Outgoing Secretary to the Rules Committee
Ms Maddie Knight, Incoming Secretary to the Rules Committee
Mr Sebastian Hartley, Clerk to the Rules Committee

Apologies

Hon David Parker, Attorney-General
Hon Justice Venning, Special Purposes Appointee and Judge of the High Court
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice (Representative for Mr Andrew Kibblewhite, Chief Executive of the Ministry of Justice and the Secretary of Justice)

1a. Apologies

The Chair noted the apologies of the Attorney-General, Justice Venning, and the apologies for lateness of Mr Chhana (who subsequently gave in his apologies).

1b. Confirmation of Minutes of Previous Meeting

The minutes of the Committee's meeting of 23 March 2020 (C 11 of 2020) were confirmed.

1c. Matters Arising from Minutes of Previous Meeting

Further to discussions at the previous meeting (refer item 5 of C 11 of 2020), Mr McHerron, Justice Kós, and the NZLS and NZBA representatives have now agreed in amendments intended to clarify and codify the proper manner of the bringing of *Beddoe* applications. These have been communicated to the Parliamentary Counsel Office (PCO) for inclusion in the next omnibus amendment Rules.

The Committee deferred consideration of agenda item 2 until after the other matters for discussion to allow members of the Committee to be present.

3. High Court Rules 2016, r 31.15: Manner of Bringing Applications Under Part 16 of the Companies Act 1993

Further to discussions at the previous meeting (refer item 6 of C 11 of 2020), Justice Cooke explained the genesis of this issue, which had been referred to him by Associate Judge Johnston.

The effect of r 31.35 of the High Court Rules 2016 is to require many applicants under Part 16 of the Companies Act 1996 to bring their applications by way of interlocutory applications in the relevant company liquidation proceeding. In practice this means that such applications can be brought in proceedings some years after the liquidation was commenced despite often involving distinct parties and having little to do with the initial application to liquidate.

The proposition is that it makes little sense to require that the liquidation file be recalled from the archives to allow the application to be argued in that proceeding, when the application has little to do with the original parties. It was suggested it might be better to promote a rule change to provide that the pt 31 procedure does not apply in any case where the court determines another procedure is better. This would allow such applications to be dealt with under pts 18 or 19 of the Rules.

It was noted the purpose of the requirement in r 31.35 rule is to facilitate the efficient hearing of matters appurtenant to liquidation proceedings by ensuring all matters related to a single liquidation go to a single registry of the High Court to be heard together.

It was also was noted that many matters appurtenant to liquidation proceedings (such as challenges to voidable transactions) would already be brought as originating applications under pt 19 pursuant to the Companies Act 1993, such that this may not be much of a concern in practice. Moreover, some members of the Committee wondered whether some applications of the sort currently governed may r 31.35 might be inapt to be brought using the pt 19 originating application procedure.

Nonetheless, some members of the Committee thought there was merit in those matters that would be governed by r 31.35, such as disputes about how documents have been dealt with such as that in issue in *CIR v Livingspace Properties Ltd* [2019] NZHC 2213 at [1]-[40] (C 5 of 2020), being brought as originating applications under pt 19.

Overall, the Committee felt it best not to promote any rules changes in this area without first receiving more information. It was felt the Associate Judges would be best placed to provide that information.

Justice Cooke, before the Committee's next meeting, to consult with the Associate Judges to determine whether the operation of r 31.35 is causing any problems and, if so, what the best solution may be, and to report back to the Committee at its next meeting.

4. Status of the High Court (Personal Property Securities) Amendment Rules 2020

Ms Leonard provided an oral update on the drafting status of the High Court (Personal Property Securities) Amendment Rules 2020. She explained that draft rules had been sent to the Ministry of Justice for comment by registry staff in February, with those comments having been returned in the week before the meeting. Some redrafting of the Amendment Rules was required in light of the comments received, which PCO was now undertaking.

PCO to provide redraft to the Clerk for circulation before the Committee's September meeting.

5. Use of Macrons in English Translations of High Court Registry Names

Ms King (Group Manager (Senior Courts) in the Ministry of Justice) referred the Committee to C 8 of 2020, a memorandum produced by the Ministry of Justice in response to a suggestion forwarded to the Clerk by Judicial Office staff. That suggestion was that the High Court Rules should be amended to add a macron to the English language name of the Whangārei registry of the High Court.

The Ministry had canvassed the views of the New Zealand Geographic Board, Te Arawhiti, Ministry of Justice Office of Legal Counsel, and the Māori Language Commission. The Board, Te Arawhiti, and the Office of Legal Counsel all expressed support for that amendment being made. The Commission did not respond.

The Committee agreed that the amendment should be made. The Committee also decided to implement a drafting practice moving forward of following the orthographic practice of the New Zealand Geographic Board. Ms Leonard advised that PCO can reprint the Rules under the Legislation Act 2012 to reflect orthographic innovations without any formal amendments needing to be made.

That course of action was considered preferable to the possibility suggested by the New Zealand Geographic Board of the Committee's introducing an amendment to rr 5.11(2) and 19.9(1) requiring compliance with s 32 of the New Zealand Geographic Board Act (which would have obliged parties to refer to the Board's position as it develops, supervening the Rules where the Committee did not keep pace with the Board).

It was noted that there is something of a fallacy underpinning the current description of some registries as having "English" and Te Reo Māori names in that some of the registries of the Court – namely Whanganui and Whangārei – do not have English names but rather misspelt Te Reo Māori names in

(until recently) common usage. It was suggested that, to remove this fallacy, a rules change be promoted to remove references to registries being named in both English and Te Reo Māori and substitute a statement that registries are to be identified by their official name and also their Te Reo Māori name. While the Committee appreciated the fallacy of referring to a misspelt Te Reo Māori name as an "English language name", it was considered that such changes would likely create more confusion than was warranted.

PCO to include a macron in the "English" name of the registry of the High Court at Whangārei in *the next republication of* the *High Court Rules 2016.*

Committee to adopt a drafting practice moving forward of following the New Zealand Geographic Board in matters of orthography.

PCO to follow the Board's orthographic innovations as they occur from time to time in future republications of the High Court Rules 2016.

6. Letter Identifying Minor Cross-Referencing Errors in High Court Rules 2016

The Committee considered a letter received from Mr Grimmer, a junior barrister in Auckland, identifying a number of minor cross-referencing errors in the High Court Rules 2016 (C 14 of 2020). Agreeing that it is right to tidy-up such inconsistencies where located, the Committee directed PCO to address the cross-referencing errors identified by Mr Grimmer, whether using the Legislation Act 2012 correction powers or through amendments to be included in the next omnibus rules amendment.

PCO to correct cross-referencing errors in High Court Rules 2016 identified by Mr Gimmer.

7. Proposal to Include of Provisions Equivalent to ss 3 and 4 Judicature Amendment Act 1910 in the High Court Rules 2016

The Committee considered a second letter from Mr Grimmer in which Mr Grimmer proposed that the Committee incorporate into the Rules provisions equivalent to ss 3 and 4 of the Judicature Amendment Act 1910 following the repeal of that enactment by s 182 of the Senior Courts Act 2016.

Section 3 of the Judicature Amendment Act 1910 empowered the High Court to execute instruments where the High Court or Court of Appeal required any person to execute that instrument, but that person neglected or refused to comply with the order.

The Ministry of Justice and PCO confirmed that the removal of the power under s 3 was not, so far as they have established, the product of a deliberate policy or drafting decision.

The Committee agreed that, prior to its repeal, s 3 was an important tool in those rare cases in which a recalcitrant party refused to comply with a court order. While the powers available under r 11.22(4) of the High Court Rules and s 16 of the Land Transfer Act 2017 could assist in cases of the sale of property, they were confined to that situation, and a similar power might be needed in other cases. The Committee agreed that the inherent jurisdiction of the Court might allow that Court to execute instruments even absent the presence in statute of a s 3 analogue but considered that there is a prima facie question as to whether a statutory basis is required for that Court to act in that manner. The

statutory courts would certainly require a statutory basis for exercising such a power. It was considered unfortunate that, apparently through an oversight, the provision had not been re-enacted.

It was agreed that the Ministry of Justice would assess whether the High Court required a statutory basis to act in that manner, and also whether and how best to suggest that statute be amended to provide a similar power to the statutory courts.

Mr Grimmer also suggested the desirability of including a provision into the High Court Rules analogous to s 4 of the Judicature Amendment Act 1910, which gave the High Court a wide discretion in respect of actions brought under s 3 of the Imprisonment for Debt Limitation Act 1908 (which remains in force). The Committee considered that s 4 merely stated that which is inherent – that the Court will always thoroughly examine the circumstances where an application is made in those circumstances – and that no action is required.

Ministry of Justice to advise committee whether a statutory basis is required for the High Court to exercise a power analogous to that formerly conferred on that court by s 3 of the Judicature Amendment Act 1910 (repealed) and whether and how to give a similar power to the statutory courts.

No further action to be taken on Mr Grimmer's proposal to replicate s 4 of the Judicature Amendment Act 1910 in the High Court Rules 2016.

8. High Court Rules 2016, r 20.9: Naming of Decision-Makers as Respondents to Appeals

Mr Beck referred the Committee to his memorandum C 16 of 2020, noting that the effect of r 20.9 of the High Court Rules 2016 has been to prevent decision-makers being named as respondents to appeals even where the decision-maker is effectively the other party to the dispute and the public interest is served by having the decision-maker appear as a party on the appeal and having rights of appeal.

The Committee noted that r 20.9 produces appropriate outcomes where the decision-maker is an adjudicator of disputes inter pares, such that there is another controverter, but agreed that the rule can serve to deprive the Court of a contradictor and the decision-maker/regulator of an appeal right where that decision-maker is truly a partisan. This will be true, say, of regulators such as the Charities Registration Board and the Registrar of Incorporated Societies. This outcome is not justifiable in terms of the policy rationale for r 20.9, which is to safeguard regulators and tribunals that act as adjudicators of disputes inter pares, and the public purse, from the cost and inconvenience of being named as respondents to appeals where the regulator or tribunal has simply decided a dispute inter pares in a judicial manner.

It was noted that while r 20.17 allows the decision-maker to apply for leave to be heard on the appeal, it was clear r 20.9 was sending a signal to the courts that the decision-maker/contradictor ought not to be present. The existence of the specific carve-out for the Commerce Commission in Commerce Act matters (but not other matters: see *Fonterra Co-Operative Group Ltd v Grate Kiwi Cheese Ltd* (2009) 19 PRNZ 824 (HC)) further signals that other regulators should not be treated in the same manner as the Commerce Commission.

The Committee agreed that r 20.9 should be revisited and turned to consider how best to do that.

The suggestion that r 20.9 be amended to provide that the decision maker can be named where they are the true contradictor was agreed to capture the thrust of what the amendment needed to be achieved, but the terminology of "contradictor" was considered undesirable as it would promote disputes as to the meaning of that word. Similarly, the suggestion that a leave-type provision be created by introducing language such as "unless the Court directs" into r 20.9 was thought likely to lead to interlocutory skirmishes requiring the intervention of the Court in every matter.

The Committee preferred the suggestion of 'flipping r 20.9 on its head' by recasting it to somehow provide that the Court has a discretion to direct that the decision maker to be named, and also state that a regulator/decision-maker who consents to being named may be so named.

It was determined that a subcommittee should be convened to address how best to couch any amended r 20.9.

Justices Kós and Cooke and Mr Beck to form a subcommittee to provide a recommendation on how to amend r 20.9 and report back to the Committee at its next meeting. Clerk to provide support to the subcommittee, including research as to how the issue is addressed in other jurisdictions.

9. Manner of Bringing Application for Declarations of Inconsistency with the New Zealand Bill of Rights Act 1990

Mr McHerron referred the Committee to his memorandum C 17 of 2020 regarding the question of how proceedings in which the only relief sought is a declaration of inconsistency with the New Zealand Bill of Rights Act 1990 (to the exclusion, for example, of a claim for *Baigent's* damages) should be brought.

Mr McHerron reported that the claims of this type so far brought as ordinary proceedings had produced procedural issues. While these were resolved through co-operation between the claimant and the Crown, he suggested these could be avoided by a different procedural track being used for claims of this type.

Mr McHerron suggested that the pt 18 procedure would be a suitable vehicle, given these disputes are likely to include legislative fact evidence of the type suited to affidavits only and applications for declaratory judgments are already included under the pt 18. He suggested that, while it would also be possible for the pt 19 procedure to be used, the fact that pleadings are required under pt 18 rendered that procedure more appropriate to cases of this sort than the pt 19 procedure.

The Committee agreed with Mr McHerron's reasoning, and also the desirability of clarifying the procedure in cases of this type despite the fact that the jurisdiction is nascent. In particular, Ms Gorman advised that Crown Law's Constitutional and Human Rights team agrees that there should be a clear procedural pathway in respect of proceedings of this type, and that pt 18 is regarded by Crown Law to be the most appropriate pathway.

The Committee agreed to promote a rules amendment in terms of Mr McHerron's memorandum C 17 of 2020. PCO instructed to incorporate an amendment of r 18.1 in terms of Mr McHerron's draft r 18.1(ba) as set out at page 108 of the compiled meeting materials.

10. Status of the High Court Omnibus Amendment Rules and Rule-Making Processes Generally

Responding to a request by the NZLS representatives for an update on the progression of the various amendment rules discussed by the Committee in the last half-year, the Ministry of Justice and PCO representatives advised that the High Court (Contempt of Court) Amendment Rules 2020 and the District Court (Contempt of Court) Amendment Rules 2020 will come into force together with the principal Act on 26 August 2020. The High Court Amendment Rules 2020 will come into effect on 24 July 2020.

The representatives explained that the progression of these Rules, particularly the High Court Amendment Rules 2020 which were last seen by the Committee as the High Court Amendment Rules 2019 in November 2019 for concurrence, were delayed by the disruption associated with COVID-19.

More generally, the representatives advised that amendment rules cannot be progressed within the same calendar year that they are concurred to by the Committee unless concurred to and given to the Ministry to progress earlier than late November, as the High Court Amendment Rules 2019 were. This because amendment rules need to go to the Cabinet Legislation Committee before the House of Representatives rises for the year in mid-December (that Committee meeting only during sitting weeks).

Additionally, in election years, cabinet ceases to hold regular meetings about six weeks in advance of the election (in 2020, this means cabinet will cease to meet in early August) and does not meet until after a new government is formed (which can take until November). As a result, the Committee will likely face significant delays in having amendments promulgated in the second half of an election year.

The Committee noted that, practically speaking, this means that omnibus rules will need to be concurred to following the Committee's September meeting each year, rather than its November meeting, if they are to be promulgated before the end of the calendar year in question. Additionally, the Committee will need to be mindful of the impact of scheduled elections on rules-making.

The Committee noted the advice received and identified the need to align its rules reform efforts with the practicalities associated with cabinet processes, including in respect of election years, to help ensure that rules reforms agreed to by the Committee are progressed and promulgated in a timely manner.

11. Other Business – Oral Update: Access to Civil Justice Initiatives

The Chair provided an oral update on the status of the Committee's ongoing access to civil justice initiatives, and in particular the consultation process currently underway.

The consultation period has now been extended until the beginning of September to allow submitters more time to respond following the disruptions associated with COVID-19 (refer item 2 of C 11 of 2020).

The Clerk summarised the extent of the submissions so far received (refer the summary given in C 18 of 2020). Submissions have so far been received from two former members of the Committee, two barristers, a firm of solicitors, and one litigant-in-person. Of the submissions so far received some:

- expressed general support for improving access to civil justice by the adoption of radical reforms, such as a full inquisitorial process;

- offered useful insight into the experience of members of the legal profession in representing litigants of limited means, which submitters supported the introduction of a strengthened judicial settlement conference-type procedure as the first stage in proceedings;
- provided detailed reflections on the proposals in the Committee's discussion paper;
- drew on the submitter's wide-ranging experience of civil litigation to respond both to the initiatives contained in and themes raised by the Committee's paper and to offer wider suggestions and observations about how those intersect with wider questions of judicial governance and administration; and
- suggested ideas for reforms not mentioned in the Committee's discussion paper, such as those suggesting that the Committee draw on lessons taken from the response to COVID-19 to more generally improve access to civil justice.

The Clerk summarised the publicity that the Committee's initiatives have so far attracted in the professional and popular press and listed those organisations that have indicated they will submit before the extended deadline. This list included the larger law firms, a small number of community organisations, academics, and government departments.

It was agreed that efforts should be made to promote awareness of and engagement with the consultation process before the deadline for submissions. It was agreed that a publicity programme needed to be designed and implemented within the next month to provide impetus to both members of the profession and others to engage with the Committee.

To that end, it was suggested that a judicial member of the Committee, most likely the Chair, should provide an interview or similar to the legal professional publications to urge members of the profession to get their submissions in before the deadline.

More broadly, it was noted as essential that the Committee engage with organisations, such as the Citizens Advice Bureaux, the Community Law Centres, the Māori Community Law Centres, and the Māori, Pasifika, and Asian lawyers' associations as part of the consultation process. The Chair noted that a "Plain English" consultation paper targeted at these groups had already been provided, with organisations such as Financial Capability and the Auckland Community Law Centre having indicated that they intended to make a submission in response.

The Committee agreed that it would help promote engagement by both practitioners and other members of the community for the Committee to provide a forum, whether by AVL or in-person, for the making of oral submissions. This would allow those unable to go to the time and expense of providing written submissions to participate. This could be combined with the previously suggested visits by Committee members to the larger chambers.

Access to Civil Justice Subcommittee working group to rapidly produce and implement plan for promoting and facilitating engagement with Committee's ongoing consultation process, particularly by community organisations and those helping litigants with limited means.

Chief High Court Judge and Ms Davenport QC to join the Access to Civil Justice Subcommittee.

2. Status of the High Court (COVID-19 Preparedness) Amendment Rules 2020: Emergency Preparedness and Electronic Filing

The Chair referred the Committee to memoranda from Justice Cooke and the Clerk updating the status of the High Court (COVID-19 Preparedness) Amendment Rules 2020 (CC 13 and 19 of 2020).

As noted in C 13 of 2020, the Amendment Rules were prepared in circumstances of urgency to facilitate the continuation of civil proceedings in the High Court during the course of the outbreak of COVID-19. It was understood that the continuing need for the Amendment Rules was to be reviewed by the Rules Committee on a decision by the Government that the outbreak is at an end. The Committee understood that point would be reached with the Epidemic Notice given by the Prime Minister under s 5 of the Epidemic Preparedness Act 2006 on 24 March 2020 expiring on 24 September 2020.

It was explained that, because the Amendment Rules were made pursuant to s 148 of the Senior Courts Act 2016, they would remain part of the Rules post the end of the emergency. In-keeping with the intention behind the Rules, many of the Rules were drafted so as to modify the position compared to that prevailing before the COVID-19 emergency were made only during an emergency; becoming "dormant" absent an emergency.

That is not however true of all of the provisions introduced by the Amendment Rules. Most notably, because of the manner of their drafting, some of the amendments, including most notably the rules authorising electronic filing in the High Court (rr 5.1A and 5.1B), will remain practically effective indefinitely as part of the ordinary rules of court.

Electronic filing in the High Court

The Committee therefore considered what to do in respect of electronic filing in the High Court. The Chair advised he had met with Ministry representatives on the issue; one of whom, Ms King, was in attendance. The Ministry advised that the High Court had faced initial challenges in accepting documents for electronic filing during the COVID-19 emergency, but that within six weeks from the date of the meeting an electronic payment mechanism will be in place, potentially on the basis of a web-based application. That, coupled with other innovations by the registries, will provide a durable mechanism for electronic filing in the High Court moving forward.

The Clerk advised the Committed, based on his research, that New Zealand is the last of the comparator jurisdictions to adopt a comprehensive electronic filing and file management system as the basis for filing. Pending the introduction of such a system, electronic filing has and would take the form of using filing by email as an adjunct to having a physical file maintained by the court registry. Electronic filing, and electronic files, could not become the default position as it has in some of those jurisdictions, even if greater use of filing by email was permitted. The Clerk reported that, more broadly, based on the overseas experience, whatever rules position is adopted will need to follow the practical realities associated with the electronic filing system in use and its practical limitations; that being the position in the other jurisdictions.

Equally, it was agreed that it is desirable that electronic filing be kept in place in the High Court. The Committee considered that the rules put in place by rr 5.1A and 5.1B may not be the best possible foundation for electronic filing being maintained moving forward, but that there is no need to move urgently to improve the position as the current position appears durable. It was determined to await the receipt of more detailed advice and the products of further research before making more changes.

The position in the District Court was to remain distinct. The Chief District Court Judge advised that the Ministry of Justice had been unable to sustain electronic filing in that Court on an ongoing basis because

The only amendment to the current rules that the Ministry, based on feedback from registry staff, would like to see introduced promptly is an ability for registrars to require certain large documents to be filed in paper as well as electronically within 5 days of being filed electronically, so as to ease the technical burden associated with such documents and to avoid shifting the costs of providing physical copies of these documents for use in court from parties to the Ministry.

The Clerk was tasked with providing the Committee with a paper for consideration at its next meeting providing possible solutions to the issues raised during the course of the Committee's discussion regarding maintaining electronic filing in the High Court, as well as other relevant concerns and problems identified by the Clerk.

Electronic filing in the Court of Appeal and Supreme Court

Justice Kós noted that both the Court of Appeal and Supreme Court Rules allow documents to be filed electronically, but both set of rules require the document initiating such appeals to be hand delivered or posted (rr 31 and 16 of the Court of Appeal (Civil) Rules 2005, and r 13 of the Supreme Court Rules 2004). There are similar requirements in relation to criminal appeals. During the period in which an Epidemic Notice under the Epidemic Preparedness Act 2006 has been in force, those Courts have used their powers under s 24 of the Epidemic Preparedness Act 2006 and r 4(3) of the Court of Appeal (Criminal) Rules 2001 to allow these initiating documents to be filed electronically.

Reliance on those provisions will have to cease following the expiry of the Epidemic Notice, and Justice Kós reported the Judges of the Court of Appeal considered it undesirable that Court would have to revert to the pre COVID-19 position. The Chief Justice expressed a similar view in respect of the position in the Supreme Court.

No member of the Committee felt that court staff should have to sight an original of an initiating document before accepting it for filing in order to ensure the authenticity of the document. It was noted that initiating documents can be tendered for filing by post, and there is no greater guarantee of the authenticity of a document received by post compared to one received by email.

The Committee noted the desirability of amending the relevant rules of court for the appellate courts to avoid initiating documents having to be filed electronically (and also affidavits, which are also required to be filed in hard copy at the present).

Clerk to draft rules amending the Court of Appeal (Civil) Rules 2005, Court of Appeal (Criminal) Rules 2001, and the Supreme Court Rules 2004 in terms of the Committee's discussion of this issue.

Remediation of the rules

The Clerk advised the Committee that, due to the speed with which the Amendment Rules were required to be prepared, a number of minor and consequential changes were made in overbroad and not fully-considered terms. Some of these might have inadvertent and not-yet realised impacts on the rules of court, such as the deletion of the requirement for all signatures to be original.

The Clerk was tasked with identifying any such matters requiring remediation and proposing a manner of remediating them co-ordinate with any further amendments to be made to the Rules in respect of this issue.

Preparedness for future emergencies

The Committee identified the desirability of drawing on the lessons to be taken from the response to the COVID-19 lockdown to improve the courts' preparedness for future emergencies by revisiting the emergency preparedness provisions inserted into the High Court Rules 2016 by the High Court (COVID-19 Preparedness) Amendment Rules 2020 and reviewing those in place in other rules.

The Committee reviewed the three models for emergency preparedness measures proposed in C 13 of 2020. The preferred course of action was to introduce into each set of the rules of court provisions allowing the head of bench or an acting head of bench to derogate from the provisions of their Court's rules in an emergency by means of practice note (so far as the relevant rules-making power under each statute in question allowed). This, it was noted, would essentially serve to regularise the approach successfully adopted in the District Court under COVID-19 Alert Levels Three and Four in reliance on s 24 of the Emergency Preparedness Act 2004 while also allowing for a clear response mechanism outside of pandemic-type circumstances.

This course of action was considered preferable to implementing the "suite of rules" approach adopted in the High Court (COVID-19 Preparedness) Rules 2020 because of the difficulty in anticipating the requirements of any future emergency ahead of time, which the suite of rules approach requires the Committee to do. At the same time, the Committee acknowledged the certainty and predictability offered by the suite of rules approach, noting that it did not require rapid consultation with the Ministry and profession to be undertaken if put in place ahead of time, unlike the use of the practice note approach.

Overall however, the Committee considered preferable the practice note approach, underpinned by a general provision being inserted into the rules of court clearly authorising the issuing of such practice notes and clearly defining the 'emergency' conditions under which such notes could be issued. While this would involve deleting from the High Court Rules most of the changes recently made, the Chief High Court Judge noted an internal guidance document for the heads of bench directing their attention to the various things a practice note may need to address could be prepared. This would ensure the work already done in this direction was not unnecessarily cast aside and expedite the process of practice notes being issued in future emergencies.

The Committee noted that there was no need to progress these changes urgently, as any return to higher COVID-19 alert levels could be addressed using the mechanisms already in place, and absent any such emergency there was no need for the new mechanisms to be put into place ahead of the Committee's next meeting.

Separately, the Committee noted the desirability of a similar provision being introduced in respect of the Family Court, for which Court the Committee does not have rules-making power. It was determined the Ministry should be advised to amend that Court's rules in a co-ordinate manner. More broadly, the Ministry was asked to advise the Committee as to the background of the Ministry rather than

Committee having competence for making rules of court for the Family Court, given that the experience during the COVID-19 emergency suggested the Committee may potentially be better placed to make rules for the Family Court than the Ministry. It was recognised this may require a statutory reform.

The Clerk was tasked with providing the Committee, well in advance of its next meeting, with draft amendments to the District Court Rules, High Court Rules, Court of Appeal Rules, and Supreme Court Rules introducing emergency preparedness provisions in terms of the Committee's discussion.

Miscellany

The Clerk was further directed to provide the Committee with a summary of the features introduced into the High Court Rules 2016 by the Amendment Rules to allow the Committee to decide which features of the procedural innovations to maintain outside of emergency situations. These include the potential desirability of maintaining the rules providing greater clarity as to the Court's power to require and/or permit hearings to take place by AVL.

12. Vote of Thanks to Outgoing Chair

The Committee thanked Justice Dobson for his service as chair from early 2019 and his contributions to the Committee since becoming a member in 2017, and in particular for his admirable performance in the face of the exigent pressures placed on the Committee during the COVID-19 emergency.

The Committee expressed its thanks to Justice Dobson for his service as Chair with a vote of thanks expressed by way of acclamation.

The meeting closed at 12.15 pm.

The next meeting of the Committee is scheduled to begin at 10:00 am on Monday 28 September 2020.

Justice Robert Dobson
Chair