



# The Rules Committee

## Te Komiti mō ngā Tikanga Kooti

3 April 2023  
Minutes 04/2023

### Circular 12 of 2023

### Minutes of Meeting of 3 April 2023

*The meeting called by Agenda 04/22 (C 2 of 2023) convened at 9:45 am using the Microsoft Teams virtual meeting room facility.*

#### *Present (Remotely)*

Hon Justice Cooper, Special Purposes Appointee and President of the Court of Appeal  
Hon Justice Thomas, Chief High Court Judge  
Hon Justice Cooke, Chair and Judge of the High Court  
Hon Judge Taumaunu, Chief District Court Judge  
His Honour Judge Kellar, District Court Judge  
Ms Maria Dew KC, Special Purposes Appointee and New Zealand Bar Association President  
Ms Alison Todd, Senior Crown Counsel as Representative of the Solicitor-General  
Ms Laura O’Gorman KC, Special Purposes Appointee and Barrister  
Mr Jason McHerron, New Zealand Law Society Representative and Barrister  
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice as Representative of the Secretary of Justice

#### *In Attendance (Remotely)*

Ms Georgia Shen, Secretary to the Rules Committee  
Ms Anna McTaggart, Clerk to the Rules Committee  
Ms Cathy Pooke, Parliamentary Counsel Office  
Ms Anne Murdoch Moar, Technical Specialist Operations and Service Delivery Group Ministry of Justice

#### *Apologies*

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand  
Hon David Parker MP, Attorney-General  
Hon Justice Muir, Special Purposes Appointee and Judge of the High Court  
Daniel Kalderimis, New Zealand Law Society Representative and Barrister

## 1. Preliminary

#### *Apologies*

The apologies of the Attorney-General, the Chief Justice, Justice Muir and Daniel Kalderimis were noted.

The Chair welcomed Maria Dew KC to her first Rules Committee meeting.

The minutes of the previous meeting as provisionally circulated in **C 1 of 2023** were received and adopted. The Clerk is to publish these on the Committee's website.

## **2. Improving Access to Civil Justice**

The Committee noted that submissions on the Report, in particularly those from Bell Gully, Justin Smith KC and Crown Law, had been helpful.

The Chief High Court Judge observed that Mr Smith's submission on witness statements highlighted an important issue which must be grappled with; the High Court deals with a wide range of litigation – from simple to extremely lengthy and complex proceedings. There are often challenges associated with drafting rules which are workable across the whole range of litigation. The Chief High Court Judge suggested that overly prescriptive rules should be avoided, as it is often necessary to make practical adjustments to court processes, both in specific cases, and more widely.

The Chair acknowledged Mr Smith's feedback on "will say" statements and noted that, in New South Wales, evidence is by way of affidavit, which is a fuller witness statement than was contemplated by the recommendations. The Chair agreed that flexibility should be retained. He noted several examples of flexibility in the New South Wales jurisdiction, such as where parties in a particularly complex case may be permitted to defer filing their evidence until a later stage of the proceeding, or cases where more comprehensive discovery will be ordered.

The President of the Court of Appeal agreed that flexibility was key to the new rules. He suggested that it may be necessary to create exceptions and criteria for exceptions as part of a comprehensive drafting process.

Ms Murdoch Moar observed that, from a registry perspective, flexible rules were important, but that it was equally important that there were still specific sets of expectations on which training for the Registries can be based. Several of the recommendations also appeared to front load case management which would create more deadlines for registry to keep track of.

The Chief High Court Judge referred to Bell Gully's examination of the New South Wales regime in its submission and suggested further analysis of this jurisdiction should be conducted. The Chair noted that several other Australian states appear to follow similar processes and suggested that the Clerk to the Committee be asked to research the rules of court more generally in Australia.

The Chair then suggested that similarly to the process for formulating the Committee's recommendations and report, a subcommittee should be formed to determine the contents of the High Court Rules based on the recommendations and further submissions. The subcommittee would then report back to the Committee. The Chair nominated himself and Mr Kalderimis as well as any other Committee members who may wish to be involved. Mr Chhana suggested that Ms Anne Murdoch Moar assist the subcommittee. Ms Murdoch Moar is familiar with how rules are implemented in practice in the registries and would be able to provide insight from an operational perspective.

The Chair asked for insight from the Parliamentary Counsel Office (PCO) into resourcing and rules drafting. Ms Pooke agreed that the Committee should work through the details of exactly what to

include in the Rules. Once this had occurred, PCO could become involved in the more formal drafting stage

The Chair addressed the question of implementation, noting three possible methods: firstly, by way of a pilot, secondly, by incremental steps, and thirdly, by implementing all rules at one time. The Chair noted that running a pilot in one registry was not likely to be workable. Mr Chhana and Ms Murdoch Moar agreed it would be difficult to implement a pilot in practice. Ms Murdoch noted that from a registry perspective, incremental implementation, beginning with proportionality as a guiding principle, would be preferable.

The Chief High Court Judge observed that for several reasons, including the nature of scheduling for judges, the desirability of consistency between aspects of the High Court and District Rules, and resourcing, it may be difficult to comprehensively discuss and make decisions concerning implementation without first seeing a draft of the rules.

Mr Chhana also suggested that the Committee should carefully consider how best to clearly communicate changes (both to the rules and to the mindset for approaching litigation) and the associated expectations. The Chair agreed and noted that it would likely be necessary to run workshops for judges and the profession as the Chief Justice had previously suggested.

The Chief High Court Judge noted the High Court was also taking steps to examine whether existing practices may be amended to facilitate greater access to justice in the meantime. One of the goals of the Report was to encourage a change in mindset for all parties involved in mitigation. It was hoped that such changes with High Court processes would assist with this.

*The Committee agreed that implementation would not proceed by way of a pilot, but that a more comprehensive discussion of implementation would be deferred until after the contents of the draft rules were determined.*

*A subcommittee will be formed to make recommendations of the contents of the High Court Rules.*

#### District Court

The Chair noted a minor change the Committee was making to the District Court Rules, which was that the judge who presided over the issues conference would also preside over the case management conference.

Judge Kellar then discussed pre-action protocols for debt claims. He suggested this should be implemented through a specific rule change, rather than by way of a practice direction or protocol made by the Chief District Court Judge under s 24 of the District Court Act 2016.

The Committee engaged in discussion about the need to provide the pre-action protocol in languages other than English and the best way this might be accomplished. It was agreed that PCO would consider this and report back to the Committee.

*It was agreed PCO would draft the rule change relating to the same judge presiding over both the issues conference and the case management conference.*

*It was agreed PCO would consider the best way to provide pre-action protocol information in languages other than English and would report back to the Committee.*

### **3. Costs for lay-litigants**

The Committee thanked PCO for its excellent work in drafting the rules agreed on at the last meeting (C 6 of 2023).

It was agreed the Committee would move towards implementing the new rules. The Chair asked the Committee's view on asking PCO to now draft equivalent rules for the District Court, Court of Appeal and Supreme Court Rules.

Ms Pooke and the President of the Court of Appeal noted that the Supreme Court Rules do not adopt the same formulaic approach for costs. Rule 44 of the Supreme Court Rules 2004 provide that the Court may, in its discretion, make any orders that seem just concerning the whole or any part of the costs and disbursements of a civil appeal.

Ms Pooke also noted r 14.17 of the District Court Rules 2014, which provides that a solicitor who is party to a proceeding and acts in person is entitled to solicitors' costs. Ms Todd noted that the Committee had previously decided, in its second consultation paper, that it was appropriate to repeal r 14.17.

*The proposed High Court Rule was approved. It was agreed that PCO would work to draft District Court and Court of Appeal Rules and would investigate whether Supreme Court Rules would also need to be drafted.*

### **4. Law Commission Report on Class Actions and Litigation Funding**

Mr Chhana noted that the Law Commission had recently finalised a report on class action and litigation funding. The report makes both legislative and rules committee recommendations. The Ministry of Justice is engaged in a programme of work to implement recommendations made in the report. Mr Chhana raised the question of a Rules Committee workstream to implement the recommendations which fall within the scope of its powers.

The Chair noted that he had discussed the report with, Justice Goddard, the chair of the Legislation and Law Reform Committee including the fact that several of the legislative recommendations may perhaps be implemented by the Rules Committee process, for example recommendation 29. One benefit of rules made with the concurrence of the Committee, is that they are easier to amend and involve relevant input from the profession and other stakeholders.

The Chair noted that the Chief Justice suggested that the Chair and Justice Goddard collaborate with the Ministry on legislative design. Any implementation proposals would then be referred back to the Committee.

*The Committee agreed to await recommendations from further consultation between the Ministry of Justice, the Chair and Justice Goddard on implementation.*

### **5. Te Reo Māori in Courts**

Mr McHerron provided a report on the subcommittee's meeting with representatives of the parties in the (now discontinued) proceeding *Te Pōari o Ngatiwai, Te Rūnanga o Ngāti Rēhia, Te Rūnanga ā Iwi o Ngāpuhi, Te Reo o NgātiHine Charitable Trust v Minister of Justice & Ors CIV-2021-485-561*.

The subcommittee will meet in April to discuss what changes should be recommended to the Committee, in addition to the interim changes agreed to in the last meeting.

*It was agreed that PCO will draft the rules determined by the Committee in the November 2022 meeting:*

- (1) Rule 1.11(4) of the High Court Rules should be softened to provide that the use of form G 12 is optional, and that notice can be given informally, for example by email to the case manager and other parties.*
- (2) Rules 1.12 and 1.14 (translation of documents into te reo Māori) should be merged into a single rule and amended to provide that a Judge may (on their own initiative or on the application of a party, including an informal application) order a translation of a document from Māori to English or vice versa, at the expense of the Ministry of Justice. There should be no need to prove inability to read the document in either language.*
- (3) Rule 1.13(b) (failure to comply with r 1.11 a relevant factor in an award of costs) should be revoked.*

*The Committee will consider those further recommendations from the subcommittee at the June 2023 meeting.*

## **6. Access to Court Documents**

Mr Chhana provided an update to the Committee following the Chief Justice's request at the November meeting for further information on why a requester's address was a requirement for an application for access to documents, Mr Chhana provided an update to the Committee.

Prior to the enactment of a single set of access rules in 2017, applications were made under the Court of Appeal (Access to Court Documents) Rules 2009, the High Court rules 2016, and the District Court Rules 2014. A person seeking access to court documents could apply informally to the Registrar identifying the document(s) being requested and the reason for the request. The rules did not contain a requirement to provide an address or other contact details. On receipt of an informal application, a judge or registrar could direct the requester to file an interlocutory application or originating application, which would include full details of the applicant in accordance with general filing rules.

Mr Chhana noted that after examination of Rules Committee and other materials, there was nothing in the Committee's formal records stating the purpose of the address requirement.

The Committee discussed the fact that it is often important for the parties consulted to have access to information about who is asking to access court records, but that the same could not be said the requestor's address.

The Committee agreed that the rules should be amended to not require the address of the person requesting access to documents to be sent to the parties. The person requesting access to the documents would fill out a form which included their name, and then send that, along with something like a covering email providing the address where the documents can be sent to, to the registry. The Chair noted the necessity of making it clear in the rules that parties consulted on the application would receive the form but not the covering email with the applicant's address.

**Justice Francis Cooke**  
Chair