The Rules Committee
Te Komiti mō ngā Tikanga Kooti

20 October 2023
Minutes 10/2023

Circular 31 of 2023

Minutes of Meeting of 9 October 2023

The meeting called by Agenda 10/23 (C 27 of 2023) convened at 9:45 am using the Microsoft Teams virtual meeting room facility.

Present (Remotely)

Rt Hon Dame Helen Winkelmann GNZM, Chief Justice of New Zealand
Hon Justice Cooper, Special Purposes Appointee and President of the Court of Appeal
Hon Justice Thomas, Chief High Court Judge
Hon Judge Taumaunu, Chief District Court Judge
Hon Justice Cooke, Chair and Judge of the High Court
Hon Justice Muir, Special Purposes Appointee and Judge of the High Court
Hon Justice O'Gorman, Special Purposes Appointee and Judge of the High Court
His Honour Judge Kellar, District Court Judge
Ms Una Jagose KC, Solicitor-General
Ms Maria Dew KC, Special Purposes Appointee and New Zealand Bar Association President
Mr Jason McHerron, New Zealand Law Society Representative and Barrister
Mr Daniel Kalderimis, 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, PCO Committee Liaison
Ms Cathy Rodgers,

Apologies

Hon David Parker MP, Attorney-General
Ms Alison Todd, Senior Crown Counsel as Representative of the Solicitor-General

1. Preliminary

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 26 of 2023 were received and adopted. The Clerk is to publish these on the Committee's website.

The Chair congratulated Laura O'Gorman, now Justice O'Gorman, on her appointment to the High Court bench and noted that she would remain on the Committee in the short term to assist with the ongoing justice reforms.

2. Update on previous Committee decisions

The Chair provided an oral update on the Criminal Rules Sub-Committee. Its membership comprises Justice Mander as Chair, Judge Collins, three representatives from the profession and three representatives from the Ministry of Justice. The Sub-Committee had its first meeting on 26 September 2023, and addressed the matters discussed in the 19 June 2023 Rules Committee meeting. The Sub-Committee will work towards proposing rule changes for recommendation, which will be referred back to the Rules Committee, who will then formally adopt the recommendations.

The Chair also provided an oral update on the rules previously agreed to by the Committee. The Cabinet Legislation Committee ceased to meet prior to the election before these rules could be referred to that Committee. Further progress on the rules would be suspended until the next government formed.

3. Te reo Māori in courts

Jason McHerron referred to the Committee's attention proposed amendments to the Court of Appeal Civil Rules 2005 and the Supreme Court Rules 2004 in relation to Te Reo Māori and sign language. Mr McHerron noted that the Te reo Māori subcommittee had also considered whether to propose changes to the Court of Appeal Criminal Rules 2001 and the Criminal Procedure Rules 2012. The Sub-Committee proposed that the issue of any changes to those rules be passed on to the Criminal Rules Sub-Committee for consideration, as it would be necessary to consider policy issues.

Mr McHerron noted that the suggested changes to the Court of Appeal Civil and Supreme Court Rules were along the same lines the High Court and District Court Rules which had already received preliminary approval from the Committee. While the Sub-Committee had prepared proposed draft rules (C 28 of 2023) they would require further consideration from the Parliamentary Counsel Office (PCO). He noted that some work may need to be carried out to make sure applications for leave to appeal and cross appeals were included.

The President of the Court of Appeal drew the Committee's attention to proposed rules 12A(4) and 10B(4), in relation to Te Reo Māori and proposed rules 12C(1) and 10D(1) in relation to sign language, and the requirement that a notice to speak Te Reo Māori, or use sign language must be given no less than 10 days before the conference or hearing. He noted that conferences in the Court of Appeal often occur quickly and queried whether this rule would prevent the Court from operating quickly if necessary.

It was agreed that the Court of Appeal and Supreme Court Judges would have an opportunity to review the draft rules before the next meeting. The Committee also agreed that the rule providing for 10 working days' notice would be examined to ensure it did not prevent flexibility in case management.

4. Local Electoral Act

The Chair noted a letter from the Te Tari Taiwhenua I Department of Internal Affairs regarding procedures in the District Court about electoral issues. Rule 20.13(1)(l) states that several applications under the Electoral Act 1993, including s 180 which applies to applications for recounts for parliamentary elections, are to be filed as originating applications. However, there is no reference to s 90 of the Local Electoral Act 2001, which deals with recounts in local elections.

It was also noted that the Local Government Electoral Legislation Bill was presently completing its remaining stages through Parliament. The Bill will add a new section 90A to the Local Electoral Act which will require an automatic judicial recount in the event of a tie. The local electoral officer must apply to the District Court for a recount.

It was suggested that reference to ss 90 and 90A be included in r 20.13.

The Committee agreed that such amendments should be made to the District Court Rules.

5. Improving Access to Justice

The Access to Justice Sub-Committee[1] prepared and circulated, prior to the meeting, a paper outlining how recommendations in the Committee's Access to Civil Justice Report may be translated into High Court rules in the form of drafting instructions to PCO (C 30 of 2023). The Sub-Committee had expanded on the Committee's recommendations when formulating the proposed rules on some occasions, and in formulating the proposals the Sub-Committee took into account further submissions received on the Committee's Report.

The Chief Justice congratulated the Sub-Committee on its work on the paper and noted that the rules change would need to be followed by an education programme to effect a change of culture to both the Profession and the Courts.

[1] The Chair and Daniel Kalderimis with assistance from Associate Judge Lester and Anne Murdoch-Moar.

The Chair noted there were three particular areas where reform was required due to disproportionate costs: discovery, lengthy and overly elaborate briefs of evidence, and the tendency to broaden rather than narrow issues prior to trial.

The Committee then considered the particular issues arising from the proposed drafting instructions which followed the recommendations in the Committee's Improving Access to Civil Justice Report of November 2022.

Recommendation 16: Introducing proportionality as a key principle

The Committee's Report recommended that proportionality should be expressly introduced as a guiding principle in the determination and application of the procedures applied to a civil proceeding, with r 1.2 of the High Court Rules amended to this effect. A new definition of "overriding objective" meaning the "objective specified in r 1.2" should then be inserted into r 1.3. The Chair noted that the proposed rules would expressly cross-reference this objective, particularly when a discretionary decision of the Court is involved. In other words, when there is a discretionary departure from the proposed rules, that should be based on the overriding objective "proportionality".

The Chief Justice queried whether the rules should include a fuller explanation of what proportionality means, along the lines of r 1.1. of the United Kingdom's Civil Procedure Rules 1998. This suggestion received overall support from Committee members.

Justice Muir noted that r 1.1(2)(a) referred to "ensuring that the parties are on an equal footing and can participate fully in proceedings …" from the UK Rules and expressed some concern to the Court committing itself to ensuring parties on an equal footing. He noted that while the Court could commit to equality of opportunity it could not commit to equality of outcome. The reality is that some parties will be able to retain a KC while others may be a litigant in person.

The Chief Justice noted that it would be possible to refer to how the English Courts have addressed this issue. Moreover, the goal of ensuring the parties are on an equal footing was prefaced by the caveat in r 1.1(2) "so far as is practicable".

It was agreed that the Sub-Committee would amend the draft rules to more closely resemble r 1.1 of the UK Civil Procedure Rules 1998, including listing examples of what it means to deal with a case proportionately.

Recommendation 17: Witness statements and expert evidence

The Committee's Report recommended that the current rules for the exchange of briefs of evidence for trial be replaced by requirements:

(a) To serve witness statements shortly after the exchange of pleadings and any preliminary interlocutory applications (such as strike out) but prior to discovery and the judicial issues conference.
(b) That such statements not be argumentative, or engage in the recital of the chronology of events to be established by documentation at trial.

The Chair noted that several submissions had disagreed with this recommendation and asked the Committee to confirm its support of the proposal that witness statements be filed near the commencement of the proceedings. The Committee agreed with and confirmed its support for this proposal.

The second question for the Committee to consider was what form those statements should take. The Chair noted that the Committee's original recommendation was that evidence be "closer in format to the former "will say statements that were once common in civil litigation". However, as submissions noted, there is ambiguity about what a "will say" statement would actually involve – it may be interpreted as being only an abbreviated document that indicates what the witness will say by way of oral evidence. This would be undesirable. Instead, the Sub-Committee recommended that the terminology in r 9.7 change from "briefs" to "witness statements", and the rule be amended to emphasise that there is a change, and to reflect the expectation that the evidence will no longer be as long, adversarial, or based on the recitation of documents as has been the case in the past.

The Solicitor-General referred to the proposed phrasing of r 9.7(3)(f), that every witness statement "must avoid the recital of the contents or a summary of documents, or otherwise address matters revealed by the documentary record to be received by the Court in accordance with rules …" She noted that witnesses may wish to address matters in the record. The Chair noted that what was intended was to avoid unnecessary repetition, so the wording could be changed to provide that witnesses could not "unnecessarily address" matters revealed by the documentary record. The Committee agreed to a change along these lines.

The Chair then raised the further issue in relation to the Court's ability to direct that the witness statements be served at a later stage in some cases. As the Committee observed in the Report, there will be cases where it is necessary to allow some discovery before the service of witness statements. The New South Wales provisions allow for the later service of evidence in "exceptional circumstances", however commentary on the rule indicates that the requirement for "exceptional circumstances" is approached in a pragmatic way. Other regimes, including the Federal Court of Australia and Singapore adopt a flexible approach.

The Chair suggested that the test to be applied for exceptions should be based on establishing that the objective of the just, speedy, inexpensive determination of the proceedings by proportionate means set out in r 1.2 would be better achieved by later service of evidence. It was also proposed that the rule allowing "supplementary briefs" at the discretion of the trial judge should be maintained. The Chair asked the Committee for its view.

It was suggested that requiring statements to be served at the beginning of proceeding may result in a default position where proceedings have two stages of witness statements which would increase rather than reduce costs. It was noted that once discovery occurs, inconsistencies between the documentary evidence and witness statements may arise, important matters which need to be addressed may be raised, and that people's memories of events may change based on those documents. The President of the Court of Appeal was of the view that some flexibility with supplementary statement should be allowed.

The Chair agreed that there may be cases where supplementary statements will be necessary and that, based on the New South Wales experience, flexibility in the application of the rules was important.

The Chief Justice noted that civil law systems in Europe put little weight on witness statements, and that this process aimed to reduce the significance of witness evidence and give documentary evidence greater prominence in the fact-finding process.

The Committee agreed that the ability to file witness statements later in the proceeding, and the ability to file supplementary statements should both be governed by the overriding objective test (speedy, inexpensive determination of the proceeding by proportionate means).

The Chief High Court Judge emphasised that the success of the rules would depend on educating Judges and the Profession and making sure that the rules were applied with consistency.

Recommendation 18: Discovery and disclosure

The Committee recommended in the Report that existing discovery rules be changed so that:

(a) Initial disclosure includes adverse documents known to the party.
(b) Subsequent discovery be ordered at the judicial issues conference as is necessary and proportionate for the determination of the issues in the case.

Mr Kalderimis discussed this recommendation noting that it was proposed that pt 8 of the rules, which regulates discovery and disclosure, be renamed "Disclosure" to emphasise the change in approach. The initial disclosure obligation in r 8.4(1) requires disclosure of documents referred to in the pleading and any additional principal documents that the party has used when preparing the pleading and on which the party intends to rely. The Committee's recommendation requires the additional disclosure of "known adverse documents". It was hoped that expanding the categories of initial disclosure required will reduce the arguments for more extensive disclosure later in the proceedings.

The proposed category of known adverse documents was similar to the concept already referred to in r 8.7(b) and (c) in relation to standard discovery which requires disclosure of documents "that adversely affect that party's own case" and "documents that support another party's case". But it picked up the concept of "known adverse documents" referred to in United Kingdom Practice Direction 57AD.

A more elaborate regime of disclosure rules of the type implemented in the English rules was not proposed. It was suggested "known adverse documents" be defined in r 8.4 as follows:

> *Known adverse documents are documents of which a party is aware containing information adverse to the party's case. A party is aware of such documents if a person with responsibility for the events or circumstances is actually aware of them or is aware they may well exist. For this purpose a party must take reasonable steps to check for the existence of such documents but is not required to engage in a general search for documentation.*

Justice Muir suggested that the phrase "but is not required to engage in a general search for documentation" might detract from the obligation to take reasonable steps. If material which is adverse to a party exists somewhere in the organisation but the person who counsel is dealing with is

unaware of it and does not conduct a reasonable general search, such documentation may never come to light. The Chief Justice agreed and suggested that these words should be removed.

The Chair explained that 'not required to engage in a general search for documentation" came from the case *Castle Water Ltd v Thames Water Utilities* [2020] EWHC 1374 at [11], which explained that a "check" does not include the kind of search normally expected from discovery. The Chair noted that the new rule was about balancing the desire to limit unnecessary expenditure on vast discovery and the need to ensure that disclosure is fair. It was not the intention that everyone would undertake the equivalent of discovery at the beginning of a proceeding. However, the Chair agreed that the words in relation to not conducting a search could be removed, and the Committee agreed.

Mr Kalderimis moved on to discuss the question of cooperation in relation to further disclosure. The Sub-Committee recommended:

(a) That a specific rule should apply, in light of the duty of cooperation, to regulate requests for specific information apart from initial disclosure, including prior to the judicial issues conference.
(b) That any further disclosure then be ordered at the judicial issues conference, and that the existing rules for general and tailored discovery be repealed.

The current rules contain a duty to cooperate in r 8.2. It was proposed that this should be amended so that the focus of this rule was on the specific disclosure now contemplated and that a separate rule be introduced concerning requests for particular documents. Mr Kalderimis noted that a deliberate decision was made to no longer refer to the concepts of general or tailored discovery due to the danger parties will revert to existing practices. The reference to "disclosure" rather than "discovery would emphasise the need for greater focus. However, the disclosure the Court could order could amount to what is presently general discovery, if the Court was persuaded that this was needed in the circumstances of a particular case.

Mr Kalderimis noted that in the proposed new rule, parties could agree on further disclosure. The Court could also order further disclosure at the judicial issues conference, with the test again being the overriding objective. The Committee agreed that further disclosure should be tied to the overriding objective.

The Committee also agreed that it would be important for parties to understand there are still obligations in relation to disclosure, which will be enforced. The powers in r 7.48 should be available in relation to disclosure obligations and that the rule should be amended to cover disclosure.

Mr McHerron queried when the parties would be required to provide an affidavit of documents as discussed in r 8.15. The Chief Justice observed that initial disclosure could be managed without a full affidavit, so long as there was a confirmation that duties of disclosure had been complied with. The Committee asked that this issue be further addressed.

Mr McHerron queried whether rule changes would have implications for r 8.3 which deals with preservation of documents. The Chair agreed r 8.3 would be amended to contemplate the documents generally disclosable in the proceedings rather than the more general concept of discoverable

documents, and not limited to known adverse documents. In other words, a litigation hold on document destruction would still be required.

Recommendation 19: Judicial issues conference

Mr Kalderimis noted that another key aspect of the Committee's recommendations was that a comprehensive judicial issues conference would occur later in the course of the proceedings, after initial interlocutories and the service of witness statements. This would effectively replace the existing case management conferences set out in sub-part 1 of Part 7 of the rules. The object of a judicial issues conference was to have a comprehensive review of what the issues in the case actually are, what further disclosure or other orders are necessary for the fair disposition of the case, what the requirements for the trial will be and other related matters. The earlier focus on identifying what the key issues actually are may also facilitate the earlier resolution of cases.

Mr Kalderimis noted that there has been criticism of the Committee's Report based on a failure to introduce more emphasis on mediation as part of the new procedures. But the promotion of settlement has always been seen as a key purpose of the judicial issues conference. The proposed r 7.5(e) and (f), which reference alternative dispute resolution, were intended to give Judges the opportunity to discuss whether any matters or issues may be resolved, or further refined through some sort of facilitative process. A greater involvement of facilitation was also proposed in conjunction with expert evidence.

The existing r 8.2 contains a duty of cooperation in relation to discovery. It was proposed that a specific rule that introduces a duty of cooperation in relation to the fair disposition of the proceedings generally be added. The Committee agreed.

Rule 7.1 would cover standard directions prior to a judicial issues conference. Rule 7.1(1)(b) and (c) provide that parties shall serve factual witness statements and a draft chronology of events. It was suggested that a new form provide a template for parties' chronologies. A chronology should not include every event or occurrence but should focus on pleaded material facts. This includes any important factual context as well as linking facts needed to support the pleaded material facts or denials of material facts in another party's pleading, refute contrary factual inferences and/or establish the overall narrative. The final column of the chronology should list documents upon which a party intends to rely to prove the specified factual proposition. Mr Kalderimis observed it was important that chronologies do not become too long.

The Chief Justice questioned whether this rule would see the end of agreed chronologies and noted that documents used to come in through opening submissions. Mr Kalderimis noted that parties would still be able to get documents before the Judge through referring to them in opening, but they would have to move through the chronology process. Mr Kalderimis acknowledged that this could be seen as taking one complicated mechanism and replacing it with another not entirely straightforward mechanism. However, the purpose was not to list every document a party may wish to use, rather it should be linked to what their case is supposed to be about. This is something Judges would have to supervise and help educate parties on.

The Committee agreed with the proposals.

Recommendation 20: Interlocutories

The Chair observed that this recommendation from the Committee's report related back to the presumptions about whether interlocutories are in person or dealt with on paper. It was recognised that there are some interlocutories which, by nature, should be dealt with in person. New rule 7.33 would identify what types of hearing should be heard in person, unless the parties and the Court agree on another form of hearing. This would include matters such as summary judgments and strike out applications. In other interlocutory applications, the registrar would liaise with the Judge on how the matter should be dealt with. This was a slightly different approach than that which was recommended in the Access to Justice Report but still captured what the Committee was trying to achieve. The Committee agreed with the proposal.

Recommendation 21: Expert evidence

The Chair discussed the Sub-Committee's recommendation in relation to expert evidence. The feedback to the Committee's Access to Justice Report generally supported the presumption of limiting parties to one expert witness per topic and requiring expert conferral before expert evidence is lead at trial. Rule 9.44(1)(a)-(e) would lay out matters which the Judge may direct expert witnesses to do. The proposed changes would remove the limitation on the Court being able to direct experts confer and prepare joint statements without the presence of legal counsel. The proposals would also allow the Court to appoint an independent person to convene and conduct the conference of expert witnesses without the agreement of the parties. The Chair noted that this would provide greater capacity for expert evidence to be facilitated in some way. The Committee agreed with the proposals.

The Chief High Court Judge queried whether the Rules should specifically address the question of Judges directing expert evidence be heard on a topic-by-topic basis, rather than the plaintiff's evidence followed by the defendant's evidence. She noted that in some larger cases, it is easier to present the evidence in this way. The President of the Court of Appeal noted that this ability may already exist in r 9.46, which empowers the Court to direct evidence is given in a sequence the Court thinks is best suited to the proceeding. The Chair noted that this could be further included as a matter to be addressed at the judicial issues conference.

Recommendation 22: Evidence at trial

The Committee's Report had recommended:

- The core events are to be stablished by the documentary record evidenced by the documents in the agreed bundle, and chronologies setting out facts to be drawn from the documents will be required.
- The provisions in the Evidence Act 2006 and the High Court Rules be amended to allow such documents to be admissible as to the truth of their contents.
- Evidence given by witnesses will not be expected to traverse the events disclosed by the documentary record, or engage in argument, but address genuine issues of fact.
- Witness statements are allowed to be taken as read, and supplemented by further statements or viva voce evidence.

A key aspect of the proposals is that the primary evidence of events should be taken from the documentary record and that, subject to any specific objection to be resolved at trial, the documents nominated for inclusion in the agreed bundle should be received as evidence without the need for witnesses to traverse those events or produce documents in their evidence. A chronology setting out the facts to be drawn from the documents will be required. As part of these recommendations the Committee proposed that the documents in the agreed bundle be admissible as to the truth of their contents.

The interaction between the Rules and the Evidence Act was noted as raising a number of issues which were discussed. The Committee's consideration and previous consultation focused on documentary hearsay. However, there may be other issues – there is also a limitation on the ability to rely on documents in s 35 (the prior consistent statements rule) which may also create uncertainties. In terms of documentary hearsay, s 17 means that hearsay statements offered in reliance on other provisions of the Act must nevertheless also comply with the hearsay rule unless the operation of the hearsay rule is excluded (as it is in ss 27(3) and 138(3)).

The Chair acknowledged that it may not be possible to completely resolve the difficulties that had been identified (and which may be addressed by the Law Commission) through changes to the Rules. However, consideration had been given to amending the rules to reduce the difficulties and to give effect to the Committee's recommendations while remaining consistent with the Evidence Act as presently drafted. Section 132(2) and (4) contemplate that the Rules can regulate the procedures to be followed in relation to documentary admissibility, to the point of having rebuttable presumptions. It was therefore proposed that r 9.5 be amended. A new r 9.5A then contemplated that the parties would be able to object to the admissibility of documents in accordance with the Evidence Act, including on the basis of documentary hearsay. But the rule would regulate when and how such objections could be made as a matter of procedure. If the objections are not made then the evidence is duly received without objection in accordance with the presumption, and the implicit agreement of the parties. The proposed rule was also formulated in a manner that disincentivised technical objections being advanced. The Court could uphold the technical objection but give the other party an opportunity to address the evidential issue by calling a witness and also make costs awards against the party who may have caused unnecessary cost. A Court could also determine that the objection is best dealt with as a matter of weight.

Justice O'Gorman observed that while she admired the drafting and what it attempted to achieve, that substantive requirements relating to admissibility under the Evidence Act could not be overridden. The tension between the strict legal position and what the Committee sought to achieve was acknowledged. It was intended that the recommendations would allow the strict legal position to prevail at necessary but would hopefully mean that objections are only made when they really matter, and to disincentivise objections in any other case.

The Chair then referred the Committee's attention to the recommendation that witness statements be allowed to be taken as read. This is consistent with the current practice as briefs of evidence are frequently taken as read by the witness. However, strictly speaking, the current rules do not permit this.

The Chief Justice queried whether, if witness statements are allowed to be taken as read, this would interfere with the ability to pursue people for perjury. Currently, witnesses confirm their witness statement when they are sworn in. If the rules are changed, people may lose sight of their responsibilities to the Court. Judge Kellar noted that, in criminal proceedings, formal written statements are often taken as read. The person making the statement signs a declaration acknowledging the statement is true and setting out the consequences if it is not. This could easily be adapted to witness statements. The Chair agreed that the Sub-Committee would examine the draft rules to ensure that the ability to pursue for perjury is not affected.

The Chief High Court Judge noted that whether or not the evidence would be taken as read is something Judges and counsel would need to remember to address at the issues conference, because a situation could result where parties give a time estimate on the assumption the evidence would be taken as read, but the Judge is operating on the assumption that the evidence would be read in Court. The Committee agreed.

The Chair noted a further element of evidence at trial which would involve a rule change. This related to cross-examination duties. The cross-examination duties outlined in s 92 of the Evidence Act are sometimes misunderstood. A party cannot invite the Court not to accept a witness's evidence, particular on the basis that it is untrue, without that evidence being challenged. But it does not involve an obligation for a party to put every aspect of their case to the witness. It was proposed that a rule be created to allow greater judicial control of cross-examination.

The Committee agreed with the proposals subject to the issues raised.

Recommendation 23: Remote hearings

The final recommendation suggests that the practice developed during the COVID-19 pandemic, including electronic filing, document management and remote hearings become a standard part of the Court's processes.

The Chair noted that the High Court is in the process of considering when remote hearings should be used. The Digital Strategy for Courts and Tribunals led by Justice Goddard was published in March 2023 by the Office of the Chief Justice. The document sets out a pathway to electronic filing and document management which should now be followed. It was not considered that any rule change is required to further the Committee's recommendation as the existing powers allow remote hearings to take place.

Moving forward

The Committee agreed that the Sub-Committee would consider the Committee's feedback and comments on the proposed draft rules and would amend the proposed drafting instructions for PCO for consideration at the next meeting.

Justice Francis Cooke
Chair