



The Rules Committee

Te Komiti mō ngā Tikanga Kooti

8 April 2024
Minutes 04/2024

Circular 13 of 2024

Minutes of Meeting of 8 April 2024

The meeting called by Agenda 08/04 (C 1 of 2024) 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 Cooke, Chair and Judge of the Court of Appeal
Hon Justice Fitzgerald, Chief High Court Judge
Hon Justice Gault, Judge of the High Court
His Honour Judge Taumaunu, Chief District Court Judge
Ms Alison Todd, Senior Crown Counsel as Representative of the Solicitor-General
Ms Stephanie Grieve KC, New Zealand Law Society Representative and Barrister
Mr Daniel Kalderimis, New Zealand Law Society Representative and Barrister
Mr Paul David KC, Special Purposes Appointee and New Zealand Bar Association President
Mr Rajesh Chhana, Deputy Secretary (Policy) in the Ministry of Justice and Representative of the Secretary of Justice

In Attendance (Remotely)

Ms Cathy Pooke, Parliamentary Counsel Office Rules Committee Liaison
Ms Cathy Rodgers, Parliamentary Counsel Office
Ms Georgia Barclay, Clerk to the Rules Committee
Ms Georgia Shen, Secretary to the Rules Committee
Mr Kieron McCarron, Chief Advisor Legal and Policy Supreme Court

Apologies

Hon Judith Collins KC MP, Attorney-General
His Honour Judge Kellar, District Court Judge

1. Preliminary

a. Apologies / Changes in membership

The Committee endorsed the Chair's thanks to previous members of the Committee – Justice Thomas, Justice Muir, Justice O’Gorman, Justice McHerron and Ms Maria Dew KC– and acknowledged the work those members carried out. The Chair wished to particularly thank Justice O’Gorman, who was a member of the Committee for 10 years, and Justice McHerron, who was a member of the Committee for six years. Both contributed significantly to the Committee’s work during that time. The Chair also welcomed the new members of the Committee.

b. Minutes of previous meeting

The minutes of the previous meeting as provisionally circulated in **C 2 of 2024** were received and adopted, with one small change.

2. Updates and reports from the Chair

a. Update on the progress of amendments agreed to in 2023

The Chair provided the Committee with an update on the progress of amendments previously agreed to. Mr Chhana for the Ministry indicated that the amendments could be enacted with a commencement date later this year, other than those relating to Te Reo Māori and sign language in Courts package (Te Reo Māori package), for which delay was required to reflect possible difficulties in implementation and funding. After discussion, the Committee agreed to sever the parts of amendments relating to Te Reo Māori package from the rest of the amendments to enable a delay while any difficulties are resolved. The remaining amendments are to go forward with commencement to be later this year. The Committee discussed the timing and processes for public education on the remaining amendments which include the ability for litigants to be awarded costs and agreed to seek the publication of articles in legal publications.

The Committee approved the proposed amendments to the Court of Appeal (Civil) Rules 2005 (**C 3 of 2024**), subject to the removal of elements addressing Te Reo Māori package.

The Committee approved the proposed amendments to the Supreme Court Rules 2004 (**C 4 of 2024**), subject to the removal of elements addressing Te Reo Māori package and one other small change.

b. Reports of the Criminal Rules Sub-Committee

The Chair addressed three reports from the Chair of the Sub-Committee (**C 5, C 6 and C 7 of 2024**).

The Committee resolved that in future any proposed or exposure drafts prepared by the Sub-Committee should go before the Committee for approval before going to other bodies.

The Committee agreed to implement the Sub-Committee's suggested changes (within **C 7 of 2024**) to remove remaining references to the three-strikes legislation.

3. Improving Access to Civil Justice

a. Proposed drafting instructions for the changes to the High Court Rules (C 8 and C 9 of 2024)

The Chair and Mr Daniel Kalderimis led a discussion on the proposed drafting instructions for the changes to the High Court Rules (**C 9 of 2024**) and the proposed amendments to the Rules (**C 8 of 2024**). The Committee approved the drafting instructions and made several suggested changes to the proposed amendments as set out below. The Committee agreed the sub-committee would make edits according to those suggested changes before circulating the proposed amendments to members for comment and to approve the proposed amendments subject to any further written comments by members.

Proposed Rule 1.2 Overriding Objective

The Committee discussed the proposed sub-r (2), which set out factors a judge may consider in applying the overriding objective. The Committee agreed to remove the proposed sub-r 2(c) ("whether any obvious difference in means or resources between the parties could impact on the participation of any of them in the proceeding") on the basis it was unnecessary given the inclusion of sub-r (2)(a) ("how best to both fairly and expeditiously identify and resolve the issues in dispute").

Proposed Rule 1.20A General duty to co-operate

The Committee agreed to change the placement of the proposed rule to be at the outset of the rules to reflect the anticipated importance of this duty (to be re-numbered as 1.2A).

Proposed Rule 7.4 Standard directions prior to judicial issues conference

The Committee agreed to add the qualifier "of significance" in proposed sub-r (1)(c)(ii)(A) with the effect that a chronology under the proposed rules will refer only to all pleaded or other material facts of significance. This change was suggested as the best way to balance the need for chronologies to be succinct while not excluding material documents that would then need to be presented later.

The Committee agreed to add references to affirmative defences as well as counterclaims in the proposed rule.

The Committee discussed the default timeframe of 10 working days within the proposed rule 7.4(1)(a)(ii) and determined that it would be an appropriate length of time in most cases. The Committee discussed whether harsher penalties for non-compliance with timeframes were required and considered they were not given the existing r 1.54.

Proposed Rule 7.5 Judicial issues conference

The Committee discussed concerns that the proposed r 7.5(2) (the duty to cooperate when preparing for and participating in a judicial issues conference) would not encourage meaningful engagement. The Committee agreed to add to the proposed rule a reference to the purpose of a judicial issues conference, set out in proposed r 7.5(3).

The Committee agreed to amend proposed r 7.5(3) to encourage parties to meaningfully, rather than superficially, identify the issues in dispute when engaging in a judicial issues conference.

Proposed Rule 7.5A Agenda for judicial issues conference

The Committee agreed to amend the proposed r 7.5A(f) to more expressly provide for the ability of the judge to resolve interlocutory matters at a judicial issues conference and to provide the judge the flexibility to elect a mode of resolving interlocutory issues that best suits the circumstances.

The Committee agreed to amend the wording of the proposed r 7.5A(g) to focus the inquiry on whether there are any issues of tikanga that have been raised in the proceedings.

Proposed Rule 7.5B What parties must do before a judicial issues conference

The Committee discussed the position papers that parties must file before a judicial issues conference and agreed that a page length of 10 provided an appropriate balance between conciseness and the need to allow an appropriate length for complex cases.

Proposed Rules 7.33 and 7.34 Hearing interlocutory applications and Mode of hearing

The Committee agreed to include an express reference to the Courts (Remote Participation) Act 2010 to allow the Rules to remain consistent with the legislation.

Proposed Rules 8.4 Initial disclosure

The Committee raised concerns that the proposed r 8.4(1)(b) (initial disclosure must include documents on which on which a party intends to rely at the trial or hearing) may encourage over-cautiousness in that parties may interpret it as requiring them to engage in a full discovery process at the outset, which is not the Committee's intention. The Committee agreed to amend the proposed rule to reflect that parties will only need to include documents they know – at the time of giving initial disclosure – they intend to rely on at trial.

The Committee discussed the proposed timeframe of 25 working days for defendants to complete initial disclosure (a timeframe premised upon the interaction between the proposed r 8.4 and existing rules setting out when a defendant must file a statement of defence, for example r 5.47) and agreed it was an appropriate length of time.

Proposed Rule 9.1A Exchange of witness statements of factual evidence and expert evidence

The Committee agreed to change proposed r 9.1A(3) to provide judges the flexibility to make directions about the time of filing of statements of expert evidence at any time and not just at the judicial issues conference.

Proposed Rule 9.5 Consequences of incorporating document in common bundle

The Committee agreed to amend proposed r 9.5(3) so that it applied to groups as well as individual documents.

Proposed Rule 9.7 Requirements for witness statements of factual evidence

The Committee agreed to add another proposed sub-rule that requires witness statements to avoid needlessly referring to documents.

The Committee agreed to remove the proposed r 9.7(7) (once a party has served witness statements they must advise the registrar) on the basis it overlapped with the proposed r 7.4(8).

Proposed Rule 9.15A Narrative of events and facts

The Committee revisited whether the requirement for filing and serving a narrative of events would be valuable. Concerns were raised that artificially separating a narrative of events from openings would not be valuable as it would undermine the completeness of the opening statement and such a narrative filed well in advance of a trial may not assist a judge in familiarising themselves with the proceedings given judges will not usually be in a position to prepare for trial until much closer to the trial's start date and, by that stage, other documents would be filed, particularly the opening submissions which should contain the same narrative information. Points were raised also that it would be best to reduce the number of documents parties need to file, where possible.

The Committee agreed to remove the requirement for parties to file and serve a narrative of events separately from opening submissions. To compensate for that removal, the Committee agreed to move forward the filing timeframe for parties' opening submissions. The Committee agreed that plaintiffs should have a deadline of 10 working days ahead of a trial and responding parties should have five working days ahead of a trial. Further, parties' opening submissions should include the narrative of events that the parties think is revealed by the documentary evidence.

General matters

The Committee approved of the following proposed rules as presented or with minor changes: proposed rr 8.2, 8.4A, 8.15, 8.18, 8.24, 8.33, 9.2, 9.4, 9.5A, 9.9, 9.12, 9.15, 9.36AA and 9.44.

The Committee agreed to make a small change to Schedule 1 and to remove the proposed r 1.11.

The Committee endorsed the Chair and Chief Justice's acknowledgement and thanks to the Parliamentary Counsel Office and the sub-committee for the important work in drafting the proposed amendments.

b. Interlocutory decisions

The Chair led discussion on a proposal that judges not be required to provide reasons for non-dispositive interlocutory decisions to decrease the burden on judicial resources (**C 10 of 2024**). The Committee agreed to retain the requirement that judges provide reasons in such circumstances but agreed that judicial education encouraging judges to avoid the provision of unnecessarily lengthy reasons could be helpful in addressing this concern.

c. New Zealand Law Commission's proposed recommendations to the Committee following its third review of the Evidence Act 2006

The Committee agreed to address this matter (see **C 11 of 2024**) at the next meeting, with Justice Whata to be asked to attend to give specialist technical advice.

d. Timing and processes for introduction of changes to the High Court Rules

The Committee agreed that once it had approved of the amendments, a letter should be sent to submitters, the New Zealand Bar Association and the New Zealand Law Society. The letter will describe the Committee's essential decisions on the proposed amendments, and seek submissions on the proposed transitional arrangements.

The Committee agreed that there would need to be comprehensive education on the amendments once they were finalised.

4. Outstanding COVID-19 amendments

The Committee resolved to discuss the memorandum on outstanding COVID-19 amendments from the Chair (**C 12 of 2024**) at the next meeting.

5. Matters for Noting

There were no matters for noting.

Justice Francis Cooke
Chair