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30 August 2024

Joe
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Our ref: OIA 113809

Tēnā koe Joe

Official Information Act request: Rules Committee documents

Thank you for your email of 6 July 2024, requesting under the Official Information Act 1982 (the Act), documents in relation to the Rules Committee. Specifically, you requested:

> *This is a request for the Rules Committee Meeting minutes, discussion papers/notes, and proposals from 01/01/2022 to present that include information on Costs for litigants-in-person.*

On 2 August 2024, the Ministry advised you that due to the need for external consultation, a response could not reasonably be made within the original timeframe. Under section 15A of the Act, we extended the timeframe and advised that you could expect to receive a response by 30 August 2024.

In response to your request please refer to Appendix 1, which lists the documents in scope of your request and my decisions on their release. Please note, some documents have been provided to you as an excerpt in accordance with section 16(1)(e) of the Act and some information has been withheld under section 9(2)(a) of the Act to protect the privacy of natural persons.

In accordance with section 9(1) of the Act, the Ministry has considered the public interest in making available the information being withheld and determined that it does not outweigh the need to withhold the information at this time.

Some documents have been refused under section 18(d) of the Act, as the information is publicly available. Meeting minutes are available at: courtsofnz.govt.nz/about-the-judiciary/rules-committee/meetings/

Please note, most discussion papers/notes that reflect the Rules Committee's consideration and work in progress on Costs for litigants-in-person can be found on the Rules Committee's website at: courtsofnz.govt.nz/about-the-judiciary/rules-committee/lay-litigants-costs-consultation/

Other relevant pages on the Rules Committee webpage that feature its work on the Costs for litigants-in-person are:

- What's new — courtsofnz.govt.nz/about-the-judiciary/rules-committee/new/

- Current projects — courtsofnz.govt.nz/about-the-judiciary/rules-committee/projects/
- Consultation and discussion papers — courtsofnz.govt.nz/about-the-judiciary/rules-committee/consultation/
- Resources and links — courtsofnz.govt.nz/about-the-judiciary/rules-committee/resources/

If you require any further information, please contact Media & Social Media Manager Joe Locke at media@justice.govt.nz

Please note that this response, with your personal details removed, may be published on the Ministry website at: justice.govt.nz/about/official-information-act-requests/oia-responses

You have the right under section 28 of the Act to seek an investigation and review by the Ombudsman of this response. Information about how to make a complaint is available at ombudsman.parliament.nz or call 0800 802 602.

Nāku noa, nā

Sam Kunowski
General Manager, Courts and Justice Services Policy

Appendix 1: Documents in scope of your request

Number	Date	Document Type	Document Title/ Subject	Decision on Release
1	14/03/2022	Meeting material	Materials for the Meeting of 28 March 2022 – Part 1	Excerpt provided in accordance with s16(1)(e)
2	13/06/2022	Meeting material	Materials for the Meeting of 27 June 2022	Excerpt provided in accordance with s16(1)(e) and Minutes refused as publicly available. Some information withheld under section 9(2)(a)
3	3/11/2022	Meeting material	Materials for the Meeting of 28 November 2022	Excerpt provided in accordance with s16(1)(e) and Minutes refused under section 18(d) as publicly available.
4	27/03/2023	Meeting material	Materials for the Meeting of 28 March 2022	Excerpt provided in accordance with s16(1)(e) and Minutes refused under section 18(d) as publicly available.
5	9/06/2023	Meeting material	Materials for the Meeting of 19 June 2023 - Meeting minutes - Draft High Court Amendment Rules - Draft District Court Amendment Rules - Draft Court of Appeal (Civil) Amendment Rules	Refused under s18(d) as all relevant sections are publicly available. Draft High Court/ District Court and Court of Appeal Amendment Rules are available at: legislation.govt.nz/regulation/public
6	-	Annual Report	Chief Justice's 2022 Annual Report	Refused under s18(d), available at: courtsofnz.govt.nz/publications/judicial-reports/chief-justices-2022-annual-report/
7	4/10/2024	Meeting material	Materials for the Meeting of 9 October 2023	Refused under s18(d) as only item in scope are the minutes which are publicly available.

Number	Date	Document Type	Document Title/ Subject	Decision on Release
8	-	Document	Summary of Court Rules Amendment Pack	Refused under s18(d) as this information is publicly available. Draft High Court/ District Court and Court of Appeal (Civil) Amendment Rules are available at: legislation.govt.nz/regulation/public
9	-	Document	Detailed summary of court rules amendment pack	Refused under s18(d) as this information is publicly available. Draft High Court/ District Court and Court of Appeal (Civil) Amendment Rules are available at: legislation.govt.nz/regulation/public
10	26/03/2024	Meeting material	Materials for the Meeting of 8 April 2024	Refused under s18(d) as relevant section is publicly available. Court of Appeal (Civil) Amendment Rules are available at: legislation.govt.nz/regulation/public
11	11/06/2024	Meeting material	Materials for the Meeting of 24 June 2024	Refused under s18(d) as only item in scope are the minutes which will soon be publicly available.

1. Excerpt from 14/03/2022 - Meeting material - Materials for the Meeting of 28 March 2022 – Part 1

4. Matters for Noting
    a. Update on submissions on proposals for awards of costs for self-represented litigants.
    Returning item: Refer Meeting of 23 March 2020 at Item 4, Meetings of 21 September and 30 November at Item 3, and Meeting of 21 March 2021 at Item 4.

2. Excerpt from 13/06/2022 - Meeting material - Materials for the Meeting of 27 June 2022

Page 3

3. Costs for lay-litigants – Submissions to the second round of consultation
For Consideration – Returning Item: Refer Meeting of 23 March 2020 at Item 4, Meetings of 21 September 2020 and 30 November 2020 at Item 3, Meeting of 21 March 2021 at Item 4 and Meeting of 28 June 2021 at Item 3.
Chair to lead the discussion
    a. Costs awards for self-represented litigants.
    b. Costs awards for in-house solicitors.
    c. Amendment or repeal of r 14.2(1)(f).

Pages 108- 168:

The Rules Committee
Te Komiti mō ngā Tikanga Kooti

M E M O R A N D U M

TO:	Rules Committee
FROM:	Anna McTaggart
DATE:	13 June 2022
RE:	Executive Summary of Responses to Second Consultation Paper on Costs for Self-Represented Litigants

[1] The rules committee received eleven submissions from ten different submitters in response to its second consultation paper on costs for self-represented litigants.[1] The opinions expressed in the submissions varied widely.

Daily recovery rates for self-represented litigants

[2] For the purpose of submissions, the Committee proposed that self-represented litigants should be eligible for a recovery rate of $500 per day.

[3] There was general support for the proposal that self-represented litigants be eligible for costs awards and that the current system was unfair. There was also overall agreement that self-represented lawyers should recover costs at the same rate as any other self-represented litigant.

[4] Several submitters either did not discuss the specific daily recovery rate or noted, that while it should not be higher than $500 per day, it might be difficult to assess what the actual rate should be.[2]

[5] One submission, from the New Zealand Law Society, supported the Rules Committee's reasons for proposing a $500 daily rate for self-represented litigants. It

1 Mr Peter Stockman made two submissions. The New Zealand Law Society also presented the views of the In-House Lawyers Association of New Zealand.

2 Community Law "Submission on the Rules committee consultation on costs" (28 January 2022); Crown Law "Rules Committee consultation on costs for self-represented litigants: Submission from Solicitor-General" (28 January 2022) at [61]; Submission from Kelly Roe at [6].

acknowledged that while this rate may represent under-recovery for some litigants and a windfall for others, it represented an appropriate compromise which provided some compensation for opportunity costs.[3]

[6] Two submissions disagreed with the proposed rate, albeit for different reasons. Peter Stockman suggested that this rate was possibly too low in comparison with lawyers and did not adequately reflect the time dedicated by lay-litigants.[4] He submitted that self-represented litigants and any party represented by counsel should receive the same rate of costs.[5] Sean McAnally submitted the proposed rate was set too high and suggested that guidance should be taken from the daily rates paid to jurors and witnesses and interpreters.[6] He suggested a daily rate of $300 be adopted.[7]

Recovery rates for in-house lawyers

[7] The question of whether a new rate should be established for in-house lawyers was far more divisive.

Several submissions supported the creation of different recovery rates for in-house lawyers to some extent, or at least the idea of creating categories with different eligibility for costs.[8] The New Zealand Law Society (NZLS) noted that its members were divided on this issue, but that some members noted it would be reasonable to award costs at a lower scale to parties represented by in-house lawyers on the basis that, like lay litigants, their legal costs may be less than if they were engaging external lawyers.[9]

NZLS noted that some practitioners observed there may be a public perception risk in treating all in-house lawyers in a similar manner to external lawyers for cost purposes and that this approach could lead to inconsistencies. They provide, by way of example,

3 New Zealand Law Society "Rules Committee further consultation paper: *Costs for Self-Represented Litigants*" (11 February 2022) at [3.4]-[3.5].
4 At [6].
5 Peter Stockman "RE: Costs for Litigants-in-Person (Third Submission)" (11 February 2022) at [5].
6 Sean McAnally "Costs for Self-Represented Litigants" (28 January 2022) at [11].
7 At [16].
8 Community law; Employment Court; New Zealand Law Society, Sean McAnally.
9 New Zealand Law Society "Rules Committee further consultation paper: *Costs for Self-Represented Litigants*" (11 February 2022) at [3.14].

a situation where two businesses on opposite sides have not appointed an external lawyer, but one side is able to use a higher multiplier for the purpose of costs, solely because its representative holds a practicing certificate.[10]

Three submitters noted that, (unlike litigants in person) in-house lawyers and external counsel are providing a regulated service and are all bound by the same rules of conduct and ethical obligations and owe the same duties to the Court. Their first duty is to the Court and the second is to their client and they must comply with fundamental obligations, including to be independent in the conduct of litigation.[11]

Mike Cook noted that the fact their client happens to be their employer does not change this duty and that an in-house lawyer would not be able to defend a complaint to the NZLS Standards Committee by stating they were in a different position because they were more closely aligned with their client's stance.[12]

Crown Law argued that externally briefed lawyers may have one client, who they are financially dependent on. Crown Law noted that externally briefed lawyers may be subject to their retainer being terminated on absolute discretion, while in-house lawyers are protected by their employment contract and can deliver independent advice and litigation services without fear of dismissal.[13]

Two submitters noted that the use of in-house lawyers may not actually led to less costs.[14] The employers of in-house lawyers suffer both actual costs and opportunity costs. Whether external counsel costs more will depend on a number of factors including the in-house lawyer's salary and other overhead costs and the external lawyer's charging model. Crown Law argued that, as long as the costs provided for in the schedule do not exceed actual costs, no further inquiry into actual expenditure is warranted. The In-House Lawyers Association of New Zealand (ILANZ), through the NZLS submission noted that the High Court Rules already provides for

10 NZLS at [3.13].
11 Crown Law from [8]; NZLS, citing views of ILANZ at [3.15]; and Mike Cook from [3].
12 Mike Cook "Feedback on the Second Consultation Paper" at [10].
13 Crown Law at [26].
14 ILANZ in NZLS at [3.15]; and Crown Law from [47].

categorisation of costs depending on whether the proceeding is straightforward or not or whether counsel conducting the matter are considered to be junior or senior.

Two submitters argued that the use of in-house counsel is a legitimate business decision, and that differentiating between in-house and external lawyers for the purposes of costs would prejudice employers who choose to structure their organisations this way and would create an unjustifiable two-tier standard within the legal profession.[15]

Recovery rate for Crown lawyers

[8] Four submissions explicitly addressed the question of whether Crown lawyers should be treated on the same basis as in-house lawyers. All such submissions agreed that Crown Law should be eligible for the same costs as external counsel, and most submitters thought that all government lawyers should be treated the same.

[9] Crown Law and Mike Cook both strongly opposed differentiating between Crown Law lawyers and other government lawyers. They noted that the fact Crown Law issues invoices and receives payments from the particular government department it is representing is not a relevant distinguishing feature and does not represent any greater or more independent solicitor-client relationship.[16] The reason Crown Law issues invoices is not because of any greater independence or ethical relationship, it is to control demand for Crown Law's services. Crown Law is subject to an appropriation and cannot spend more than this. Some of the money comes from the Treasury and some comes from government departments by payment of invoices for hours worked. The Government could simply fund all Crown Law appropriation from the Treasury, but if it did, every government department would be incentivised to send all legal work to Crown Law which would essentially shift legal costs to Crown Law. However, by charging, if demand for services rises, then payments from government departments also rise and Crown Law can hire more lawyers within the appropriation cap. Crown law noted that other in-house government lawyers have

15 Crown Law at [18]; and ILANZ in NZLS at [4].
16 Crown Law at [46]; and Mike Cook from [20].

time recording mechanism and some like Ministry of Business, Innovation and Employment (MBIE) similarly 'charge' their internal clients.

[10] Crown Law notes that the fundamental premise of its submission is that when the Crown appears in litigation by way of in-house government lawyers, it should be entitled to a costs award at the same daily rate as when using externally briefed counsel.[17] Crown Law notes that no real distinction can be drawn between government department in-house lawyers and Crown Law Lawyers. As well as the duty to comply with all professional standards and obligations, including the overriding duty to the Court, all government in-house lawyers are subject to additional oversight and obligations to their agency, the Solicitor-General, the Public Service Commission and the statutory regime. Crown Law notes that there are significant supervisory systems in place including formal reporting of legal risks.

[11] Crown Law also notes that differentiating between external counsel, in-house government lawyers and Crown Law may create practical problems. It is common to have a 'mixed model' of in-house and external lawyers engaged, who work together on a spectrum. Crown Law questioned whether, if in-house government lawyers were assigned costs at a different level, the Crown would need to identify which steps were carried out by which lawyer and questioned what would happen if both in-house and external lawyers worked on the same step.

[12] Mike Cook expressed concern that the Committee's proposals seemed to be suggesting that in-house government lawyers were not independent and do not diligently and properly seek to abide by the Rules and ethical obligations.

Amendment or repeal of r 14.2(1)(f)

[13] Three submitters were of the opinion that the rule should not be repealed. Crown Law argued that it was an important safeguard to ensure a successful litigant did not make a profit from the litigation process.[18] Mike Cook noted that if external, in-house and Crown Lawyers have the same daily rate, then r 14.2(1)(f) will prevent

17 Crown Law at [3].
18 Crown Law; Mike Cook; and Peter Stockman.

clients from receiving more costs than they actually expended on legal counsel. Peter Stockman noted that costs are supposed to be a partial recompense and never a windfall.

[14] Three submitters supported the repeal of r 14.2(1)(f).[19] The NZLS noted that it did not support the alternative option of repealing the rule while providing an ability for self-represented litigants to recover costs in accordance with a new prescribed rate. The NZLS noted that if the indemnity principle is to be abrogated in respect of self-represented litigants it should not continue to apply to parties who engage external lawyers.

Changes to Court of Appeal and Supreme Court Rules

[15] Three submitters addressed the question of whether changes made to the High Court and District Court regarding costs should be made to the Court of Appeal and Supreme Court Rules. All three submitters agreed that equivalent changes should be made to all the rules.[20]

19 Employment Court; NZLS; and Sean McAnally.
20 Crown Law, NZLS; and Sean McAnally.

Submission on the Rules Committee consultation on costs

Community Law Centres o Aotearoa, 28 January 2022

1. Introduction

1.1. Community Law Centres o Aotearoa (CLCA) welcomes this opportunity to provide feedback on this follow-up consultation on costs for self-represented litigants and in-house lawyers. The contact for this submission is s9(2)(a) please contact me to discuss any matters outlined below.

1.2. CLCA is the national organisation for the Community Law network. Twenty-four Community Law Centres ('**CLCs**') work out of over 140 locations across Aotearoa to provide free legal help to those who are unable to pay for a private lawyer and do not have access to legal aid. As well as around 200 staff, Community Law Centres' services are boosted by over 1,200 volunteer lawyers who run legal advice clinics and deliver free assistance.

1.3. This submission has been drafted with significant input from Te Ara Ture, the Pro Bono Clearing House which was launched in May 2021. CLCA, supported by the New Zealand Law Society and the New Zealand Bar Association, developed a proposal to establish a nation-wide pro bono clearing house to grow and maintain a network of referral agencies and pro bono providers. CLCA was able to secure funding in Budget 2020 for Te Ara Ture/the Pro Bono Clearing House, which will increase access to free legal assistance and support people who cannot afford a lawyer by matching them with lawyers who are offering their services for free.

1.4. The purpose of a costs order is to compensate the successful party in litigation for the legal costs necessarily incurred to obtain justice (the indemnity principle). This is typically applied on the basis that costs follow an event; if you are successful, you will get costs.

1.5. Together, these principles act as an incentive to settle disputes and a disincentive to conduct unmeritorious litigation. This promotes efficiency, balance and a level playing field in the case of privately represented litigants.

1.6. The current regime, which focusses on external legal costs, distorts this principle because the risk of costs to a represented litigant disappears where an opponent is self-represented, but remain for the self-represented litigant. This is inherently unfair and contrary to the purpose of the High Court Rules which is to promote the "just, speedy and inexpensive determination of proceedings"

1.7. Accordingly, we welcome the decision by the Rules Committee that self-represented litigants should be eligible for a costs award when they succeeed with their litigation. While we support the creation of new classes of people entitled to costs we consider that any general widening or relaxing of the costs regime requires broader policy work. Our focus in relation to this consultation is:

a. to ensure a level playing field by bringing balance to the existing rules, rather than suggesting a new regime.

b. to consider how the award of costs to pro-bono lawyers and lawyers employed by CLCs should be be treated should the rules be amended to allow for the award of costs to self-represented litigants and in-house lawyers.

2. New Classes for Costs

2.1. We support the creation of several new classes of person entitled to costs under the existing regime. In addition to self-represented litigants and in-house lawyers we recommend either new classes for lawyers acting pro bono and lawyers employed by CLCs, or that consideration be given to how these lawyers can fit within the proposed new classes.

2.2. We also think consideration should be given to the award of costs to lay advocates and regulated advocates.

2.3. The majority of those represented by these new classes (other than in-house lawyers) typically cannot afford private legal support and are left to rely on alternatives such as pro bono or self-representation. These classes are still potentially liable for costs should their legal action not be successful. The exclusion of such classes from costs awards places them at a competitive disadvantage and further aggravates the inequities of access to justice. Our CLCs have seen many clients discontinue a meritorious case out of fear of costs liability.

2.4. We support bringing new classes into the scale regime because this promotes predictability. Leaving costs entirely to discretion for these new classes would be a further distortion of the principle of even-handedness.

2.5. Predictability is particularly important in negotiation and settlement. Being able to predict the likely costs of trial make settlement negotiations more effective and efficient.

2.6. Having a scale, as opposed to an entirely discretionary regime, also helps to protect litigants against price gouging or other unethical behaviour by lawyers (see paragraph 4.4 for more discussion).

3. Community Law Centres

3.1. Our CLCs are seeing increasing of numbers of clients needing to access the District Court to challenge decisions of the Tenancy Tribunal, Disputes Tribunal and ACC Reviews and the risk of a costs award is a significant disincentive to people continuing with their legal cases.

3.2. The issue of awarding costs to parties represented by CLCs has been considered by the District Court recently[1] with the Court considering rule 14.2(f) and accepting many of the arguments in favour of a costs award. Judge Kellar noted *'that there are a number of policy considerations that would support costs being awarded in situations such as the current'*[2]and that *'It is clear that important public policy considerations are at issue and support the expansion of the primary rule and its exceptions. It is equally arguable that the rule may be outdated and require complete abrogation.'*[3]

3.3. Ultimately Judge Kellar ruled that under the current approach they were unable to award costs, noting that *'any changes in the area of costs ought to be expressly mandated in Parliament, or indeed, the Rules Committee, after proper consultation with relevant stakeholders in this area'*[4]

3.4. Accordingly, we submit that this consultation is timely and the ideal opportunity to consider how costs can be awarded to clients represented by Community Law centres.

3.5. Parties represented by CLCs are often awarded costs in the employment jurisdiction with this issue being considered recently in *Innovative Landscapes (2015) Limited v Popkin*[5]. In this case the Employment Court awarded costs to the defendant and directed that the costs and disbursements ordered against the plaintiff be paid by the defendant to the CLC[6]. The Court was at pains to note the importance of assistance provided by CLCs to the Court, especially in situations where a vulnerable individual is facing "*an imbalance in financial power, which manifests in disparate levels of access to legal services and resources*."[7] The Employment Court also noted concerns that being unable to recover costs would disincentivise the provision of services by CLCs, therefore impeding access to justice[8].

[1] *Chilton v Leckey* [2020] NZDC 22317
[2] Ibid at [37]
[3] Ibid at [38]
[4] Ibid at [39]
[5] *Innovative Landscapes (2015) v Popkin* [2020] NZEmpC 96
[6] *Innovative Landscapes* at [24]
[7] *Innovative Landscapes* at [19]
[8] Ibid

3.6. In the Employment Court, Environment Court, and Māori Land Court and Māori Appellate Courts, the special nature of those jurisdictions has led to the awards of costs for lawyers acting pro bono[9] and to community law centres[10]. This recognises certain cases would not be brought without the presence of community law centres or pro bono lawyers. We note the recent success in the High Court of Community Law Waikato in *Afghan Nationals v The Minister for Immigration.*[11]

3.7. Arguments are often made to exclude CLCs from costs awards on the basis that they already receive government funding. But this is true also of Crown Law and we note the Rule Committee's majority view that parties represented by Crown Law should be entitled to costs award as if represented by external counsel.

3.8. We note the justifications for awarding costs to in-house lawyers at a higher rate than those proposed for self-represented litigants[12]. CLC lawyers are subject to the same professional standards as any other lawyer, including in-house lawyers. However, CLC lawyers are not in the same position as in-house lawyers as all legal services, including legal representation, provided by CLCs must be directly supervised by a lawyer qualified to practice on their own account[13].

3.9. Our CLCs serve the most vulnerable in our communities and the bottom 20% of income earners. While legal aid recipients are generally protected from costs awards[14], there is no such protection for clients of Community Law lawyers. Some of our CLCs have established contingency funds to cover costs for clients should they be unsuccessful in their legal case and liable to pay costs to the opposing party.

3.10. This cohort is already at a significant disadvantage when considering how to enforce their legal rights and most often the opposing party has the financial resources to fund any legal action. If there is little to no prospect of costs being awarded due to a party being represented by a CLC, there is little incentive to settle and there is a risk of protracted litigation with opposing parties incentivised to drag out proceedings. For CLCs this then becomes a resourcing issue due to our funding constraints, we are bulk- funded for a contracted number of clients regardless of whether a lawyer spends one hour or twenty hours on a client matter.

[9] *Trustees of Maungatautari 4G Sec IV Block v Maungatautari Ecological Island Trust* (2015) Māori Appellate Court MB 634 and *Taipari v Hauraki Maori Trust Board* (2009) 120 Hauraki MB 225 at [10].
[10] *Innovative Landscapes*
[11] *Afghan Nationals v The Minister for Immigration* [2021] NZHC 3154
[12] Paragraph 33 of the Rules Committee consultation on costs for self-represented litigants
[13] Section 31(4) of the Lawyers and Conveyancers Act 2006
[14] Sections 45 and 46 of the Legal Services Act 2011

3.11. A relatively common issue observed by our law centres is landlords appealing Tenancy Tribunal decisions to the District Court. If, as a result of the tenant being represented by a CLC, there is little prospect of liability for costs there is a risk of a landlord pursuing an appeal as a means of intimidating a tenant into not enforcing the decision of the Tenancy Tribunal.

3.12. We see similar issues in the employment jurisdiction (at both the Employment Relations Authority and the Employment Court), with clients deciding against pursuing valid claims as they fear they may have to pay for their employers legal costs whereas the employer faces no such dilemma.

3.13. As outlined in *Chilton v Leckey*[15]with Judge Keller's reference to the 'unfortunate gap'[16], there is an opportunity cost in relation to legal representation undertaken by Community Law centres as there is vast unmet legal need in the communities that we serve. On current resourcing CLCs cannot meet the need that exists in the community. Representation in the Distict Court is not currently a key component of our funding but some of our CLCs are increasingly undertaking this work. Litigation takes up considerable resources and impacts on the capacity of our lawyers to assist other clients. Awarding costs is an appropriate way of addressing this issue.

3.14. In terms of how to quantify costs we suggest that at the very least CLC lawyers should be treated the same as in-house lawyers, but that consideration should be given to awarding a rate that is the difference between the hourly rate of our supervising lawyers (those qualified to practice on their own account), and the rate proposed to be paid to Crown Law lawyers.

4. Costs for Pro Bono representation

4.1. The key concern in the context of pro bono representation is that the indemnity principle does not apply, the successful party does not need to be compensated where no loss has been incurred. We believe this principle is unjust and inconsistent with the objects of the High Court Rules.

4.2. Other jurisdictions have tried to deal with this by having conditional costs agreements, whereby lawyer-client costs accrue, but clients become liable to pay only what is ordered by the Court or Tribunal, and only what is recovered by the client from the losing parting. Such agreements are not always upheld by the Courts and making them a condition

[15] *Chilton v Leckey* at [11] and [12]
[16] Ibid at [38]

precedent for a costs award leads to inconsistencies – only those pro bono lawyers with costs agreements get costs.

4.3. For the sake of consistency and as a matter of equitable treatment of litigants, we support creating a new pro bono class or at least amending the High Court Rules and District Court Rules to make clear that r 14.2(1)(f) does not apply to pro bono representation. While the Rules make an exception for conditional fee agreements, including specific reference to pro bono representation would ensure predictability and avoid unnecessary arguments or confusion. As we have noted that predictability of costs plays an important role in settlement negotiations and supports efficiency of the negotiations as all parties can predict the risks.

4.4. Greater clarity around pro bono costs would also offer protections to both lawyers and clients during a negotiation or settlement:

a. As a protection to vulnerable litigants, because it acts as a quasi-cap on what a pro bono client might have to pay to their pro bono lawyer. This protects pro bono clients from price gouging.

b. As a protection to pro bono lawyers because it makes it harder for a client to cut their pro bono lawyers out of a fair share of settlements, where settlements ought to include a provision for costs.

4.5. While outside of the scope of this consultation we note that Te Ara Ture is currently considering how best to deal with contingency agreements while upholding the spirit and values of pro bono work and encouraging lawyers to offer pro bono services without offering any financial incentives to do so. We are particularly interested in the approach pf the United Kingdom which allows the Court to direct that any cost award in a pro bono representation be paid to a prescribed charity.[17] This approach balances competing policy considerations. The spirit of pro bono is maintained because lawyers who agree to work pro bono do not end up receiving a fee, while the deterrent value of costs is also maintained as unsuccessful litigants are not relieved of the obligation to compensate the successful party.

[17] Section 194 Legal Services Act 2007, Legal Services Act 2007 (legislation.gov.uk)

28 January 2022

The Rules Committee
c/ Auckland High Court
Cnr Waterloo Quadrant and Parliament St
Auckland, 1010

Attention: Clerk to the Rules Committee

By email: Rulescommittee@justice.govt.nz

Tēnā koe

Rules Committee consultation on costs for self-represented litigants: Submission from Solicitor-General
Our Ref: SOL115/1180

1. Thank you for the opportunity to comment on the second consultation paper, issued 16 September 2021.

2. Given the significance of the issues raised, this submission is made by the Solicitor-General. We have consulted with Chief Legal Advisors from central/core government and they endorse the contents.[1] The points made in this submission do, however, apply equally to lawyers within the wider public sector.[2]

Summary

3. Lawyers in central/core government, referred to as 'government lawyers' throughout this submission, are in-house lawyers. That includes lawyers in Te Tari Ture o te Karauna Crown Law as well as other departments. The fundamental premise of our submission is that when the Crown appears in litigation by way of its in-house government lawyers, it should be entitled to a costs award at the same daily recovery rate as when it uses externally briefed counsel.

4. Two separate levels of costs – one for in-house lawyers and one for external lawyers – would set up a two-tier standard within the legal profession that we do not consider justified. To have such a two-tier standard seems to suggest that in-house counsel are in some way inferior to external lawyers. We strongly refute that notion. It would be contrary to the legislative and regulatory framework

[1] References to lawyers and chief legal advisors within central or core government are references to lawyers within departments, departmental agencies, interdepartmental executive boards, the NZ Defence Force, NZ Police and Parliamentary Counsel Office. Note that while the Crown Law Office is a department, where necessary we refer to Crown Law lawyers separately from departmental lawyers, given the distinction between the two made in the consultation paper.

[2] This would include lawyers within Crown Entities, such as Crown Agents and Independent Crown Entities.

under which lawyers operate, which require all practising lawyers to comply with the same fundamental obligations, including to be independent in the conduct of litigation. There is also no real distinction to be drawn between government department in-house lawyers and Crown Law Office lawyers: all are subject to the supervision of the Law Officers of the Crown and the constitutional conventions that brings. This oversight is in addition to the fundamental obligations that all lawyers (in-house or external) are subject to.

5. A differential approach to costs that is premised on the actual cost of in-house lawyers being less than the actual cost of external lawyers, proceeds on the incorrect assumption that this will always be the case. But in any event that is not material. What matters is that the allowance under the costs schedule (which is typically only a proportion of actual costs) does not exceed actual costs, so no profit is made. The actual costs of in-house lawyers can be simply ascertained.

6. Differentiating between lawyers would lead to inefficiencies in publicly funded resources, and could create practical problems when a 'mixed model' of in-house/external lawyers are engaged.

7. We address each of these points in detail below, after dealing briefly with the necessary distinction between self-represented litigants and in-house lawyers. We turn to the issue of the daily recovery rate for self-represented litigants and retention of rule 14.2(1)(f) at the end of the submission.

Self-represented litigant or lawyer distinguished from in-house lawyer

8. As a preliminary framing point, we emphasise that self-represented litigants, including self-represented lawyers, should be distinguished from a litigant who uses in-house lawyers. An in-house lawyer is defined in the Conduct and Client Care Rules ("the CCR") at rule 15.1 as:

> …a lawyer who is engaged by a non-lawyer and who, in the course of his or her engagement, provides regulated services to the non-lawyer on a full-time or part-time basis.

9. In-house lawyers act on behalf of a client, having taken instructions from their client (albeit that client is their employer) and are subject to the Conduct and Client Care Rules. Rule 15.2 CCR provides that:

> When an in-house lawyer provides regulated services to the non-lawyer by whom she or he is employed, she or he must do so pursuant to a lawyer-client relationship.

10. The effect of this is that an in-house lawyer provides regulated services to their employer client. The in-house lawyer is therefore obliged to uphold the standards and duties in the CCR to:

> exercise independent professional judgment on a client's behalf, and give objective advice to the client based on the lawyer's understanding of the law - CCR r 5.3; and
>
> provide independence in the conduct of the litigation - CCR r 13.5.

11. In contrast, a self-represented litigant or lawyer has no identifiable client, there is no separation of the roles, and the litigant or lawyer is not subject to any standards or duties in the CCR.

12. Further, self-represented litigants and lawyers suffer opportunity costs rather than actual costs, as acknowledged in the consultation paper. But with in-house lawyers, the employer suffers a real or actual cost (in addition to opportunity cost and the diversion of a lawyer's time away from other responsibilities). The cost will not always be represented by an invoice, but is made up of other associated—but actual—costs such as wages, equipment and technology costs, lease payments, legal support staff costs etc.

13. We elaborate on these points further below.

Position of government lawyers

14. The Crown is involved in a significant amount of civil litigation. Some is handled by in-house lawyers within the relevant government department; some is handled by in-house lawyers at the Crown Law Office; and some is briefed to external counsel. Also, it is not uncommon to have a 'mixed model', where the litigation team is made up of a departmental lawyer together with CLO counsel and/or external counsel. Decisions on handling of litigation are made in accordance with the Cabinet Directions for the Conduct of Crown Legal Business 2016 and standing or specific authorisations as to legal representation given by the Solicitor-General. In very broad terms, decisions will turn on issues relating to capacity, expertise, fiscal and accessibility implications and the nature of the legal challenge. All civil litigation must be conducted in accordance with the Attorney-General's Civil Litigation Values.

15. Our strong and consistent position is that when the Crown appears in litigation by way of its in-house lawyers, they should be treated the same as externally briefed lawyers in terms of costs recovery. We see no justification for applying different daily recovery rates based on the in-house/externally-briefed distinction.

16. A differential approach would significantly undermine the framework of our legal profession, which is based on the fact all lawyers are required to meet the same fundamental obligations (and are treated in the same way for regulatory purposes). The potential basis for differential treatment set out in the consultation paper, namely that in-house lawyers might lack independence, is wholly inconsistent with that established framework.

17. The other basis for different treatment identified in the paper, that actual costs of in-house lawyers may be less than actual costs of externally-briefed lawyers, may or may not be true in any particular case. It will depend on the in-house lawyer's salary and the external lawyer's charging model. But whether they are more or less is not material. So long as the costs provided for in the schedules does not exceed actual cost, no further inquiry into actual expenditure is warranted.

18. Further, distinguishing between in-house and external lawyers for costs purposes prejudices employers who choose to structure their organisations in this way. This is particularly important for the Crown, as deploying in-house lawyers enables the efficient allocation of publicly funded resources.

Drawing distinctions between lawyers undermines our professional framework, by which all lawyers must be independent in providing regulated services

19. Section 4 of the Lawyers and Conveyancers Act 2006 (LCA) provides that *every* lawyer who provides regulated services must, in the course of his or her practice, comply with certain fundamental obligations:

    (a) to uphold the rule of law and to facilitate the administration of justice in New Zealand:

    (b) to be independent in providing regulated services to his or her clients:

    (c) to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:

    (d) to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

20. No distinction is drawn in the LCA between in-house lawyers and other lawyers (whether employed within a law firm or authorised to practice on their own account) in terms of their provision of regulated services, and therefore in their fundamental obligations.

21. We set out the relevant rules in the CCR below that also deal with these fundamental obligations and address the concerns identified in paragraphs 30-39 of the consultation paper.

Lawyer-client relationship

22. Rule 15.2 CCR (set out above) makes it clear that where an in-house lawyer appears for their employer in litigation, a regulated service is being provided. The in-house lawyer is in a lawyer-client relationship with the employer client, as is the externally-briefed lawyer. Both represent the interests or case of their client.

23. We strongly disagree with the statement in paragraph 32 that, in the conduct of litigation, in-house lawyers are more closely aligned with the "stance of the party than the external counsel". This ignores the fundamental professional obligations that all lawyers are required to meet. As rules 15.2.1 and 15.2.2 note, the in-house lawyer must not accept terms of the employment contract nor instructions from the employer that would compromise the lawyer's "obligations or duties imposed by the Act or the regulations and rules under the Act or that arise by virtue of the lawyer–client relationship". Speaking for the Crown, this obligation is one we actively work to ensure is well understood and complied with by in-house counsel acting for the Crown.

Independence and duties to Court

24. A further key aspect of lawyers' obligations, which is the same for both in-house and externally-briefed lawyers, is the duty of independence. This is set out expressly in section 4 LCA set out above. In addition, various CCR rules require independence. CCR 5.3 states that lawyers acting on behalf of clients bring "independent professional judgement" and must "give objective advice to the client"; CCR 13.5 provides that a lawyer engaged in litigation for a client must maintain his or her independence in the conduct of litigation. And, as noted above, CCR 15 provides that in-house lawyers are in a professional relationship, which gives their advice or actions an independent character, notwithstanding their employment.

25. These obligations do not change just because an in-house lawyer has only one employer/client. (On this, we note that it is often, but not always, the case. CCR 15.1 provides for in-house lawyers to have more than one employer, and this can arise, for example, when a lawyer is employed by more than one District Health Board.)

26. Further, while an in-house lawyer often has only one employer/client, this is also true of some externally briefed lawyers. They may be financially dependent on that client and are subject to the retainer being terminated at the client's absolute discretion. In-house lawyers are protected by their employment contracts and can deliver independent advice and litigation-services without any fear of dismissal. This point was made recently by Nation J in *Deliu v Solicitor-General:*[3]

> In-house counsel appearing for government departments or for Crown Law will be free from the commercial pressures which exist for solicitors in private law firms who regularly act for a commercial clients in major litigation, or a barrister who is regularly briefed to appear as counsel for such a litigant (at [74]).

27. We note the comment at paragraph 34 of the consultation paper that there may be benefit in promoting parties being represented by external lawyers over in-house lawyers. If this is a view that external lawyers provide higher quality litigation services, we strongly disagree. We emphasise that we have not been made aware of any judicial concerns regarding the general standard of representation from government lawyers. If there are general concerns that in-house government lawyers lack the necessary quality or independence that should be raised with the Solicitor-General who is responsible for the Crown's conduct in Court. In our view, effective representation does occur with in-house lawyers: they fully understand the business needs and environment of their agency and bring that specialist knowledge to bear. Further, in-house lawyers must comply with *all* of the professional standards and duties, including all those relating to their overriding duty to the court concerned (CCR rules 13.1-13.13). Further still, government in-house lawyers are subject to additional oversight from, and obligations to, their agency, the Solicitor-General, the Public Service Commission, and the statutory regime within which the lawyer is practising.

[3] *Deliu v Solicitor-General* [2021] NZHC 2246.

These obligations create expectations of transparency, model conduct and record keeping over and above that set by the CCR.

28. The costs regime is concerned with efficiency-control, not quality-control. Any issues as to quality should be handled through the established regulatory mechanisms.

It is in a client/employer's interests to have independent lawyers

29. The LCA and CCR focus on the lawyers' professional duties. It is incumbent on all lawyers to be independent, which turns on their own actions and desire to avoid influences which might undermine their independence – from any source at all. An employment relationship does not subvert their ability to do that. And nor would employers/clients want that. They benefit from having advice and litigation-services that are independent. They could place little value on the advice or services if it were not.

The independence of government lawyers has been judicially recognised in England, Australia and New Zealand

30. Courts in England, Australia and New Zealand have affirmed the independence of government lawyers. While the issue has arisen in the context of claims to legal professional privilege, rather than costs considerations, the underlying principles are equally applicable.

31. In the House of Lords, Lord Denning in *Alfred Crompton* held that salaried in-house lawyers, whether employed in the private sector or by the government: [4]

> …are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the Court. They must respect the same confidences. They and their clients have the same privileges.

32. In the High Court of Australia, Brennan J in *Waterford* found that Crown and government departmental lawyers had the institutional independence required to attract privilege, as their independence is protected by the Attorneys-General as the first law officers of the Crown, and buttressed by the laws relating to the public service and specific legislation. His Honour said the protection of the Attorney-General, as law officer, extended to all Crown lawyers, so that none of them will be affected in the performance of their professional duty by any sense of loyalty or duty to, or hope of reward from, the government of the day. [5]

33. Also in *Waterford,* Mason and Wilson JJ found that the relationship between government lawyers and the government, as with all lawyers and clients, will give rise to solicitor-client privilege if it is a "professional relationship which secures to the advice an independent character notwithstanding the employment."[6] This is a question of fact. Such a relationship existed in the case

[4] *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs* (No 2) [1972] 2 QB 102, at 129.
[5] *Waterford v Commonwealth of Australia* [1987] 163 CLR 54, at 72-73.
[6] *Waterford*, at 62.

at hand, which involved Treasury lawyers, and the claims to privilege were upheld.

34. In *Phillip Morris,*[7] which usefully summarised the Australian case law, the Court emphasised that admission to practice as a lawyer, while not decisive, may be influential in determining a lawyer's independence. Admitted officers of the court may have a wider understanding of the obligations of a legal practitioner that transcend employment relationships.[8]

35. The issue was considered in New Zealand in *Bain v Minister of Justice.* [9] Keane J referred to the fact s 54 of the Evidence Act, which governs claims to solicitor-client privilege in the context of proceedings, requires a lawyer to hold a practising certificate. So long as that is the case, such that the lawyer is subject to the ethics and discipline of the legal profession, there is no further requirement for independence. Accordingly, the Ministry of Justice lawyers were independent, and the privilege could be claimed.

36. Similarly, in *Robert v Foxton Equities*, Kos J (as he then was) agreed that privilege attaches to communications between commercial entities and their in-house counsel, as long as they are acting in their capacity as legal advisers. Lawyers being subject to the discipline and ethics of the legal profession was sufficient to demonstrate independence. [10]

37. Most recently, as referenced above, Nation J held that the Court could be confident that counsel from Crown Law, appearing for the Solicitor-General, "will not be inhibited from acting with objectivity and independence by reason of his representing the Solicitor-General or Attorney-General in the proceedings."[11]

38. This shows that questioning the independence of in-house lawyers is not only inconsistent with the framework of the LCA and CCR, but is inconsistent with the approach the courts have taken to legal professional privilege (and could have significant repercussions for legal privilege).

All government lawyers, whether at Crown Law or within the central public service, are independent and subject to the supervision of the Law Officers. We should be treated the same

39. In terms of paragraphs 40 to 42 of the consultation paper, it will be apparent from our submissions above that we consider all government lawyers, whether at Crown Law or within the central public service, should be treated the same.

40. The key point here is that *all* government lawyers are bound by their ethical duties such as independence, and all are subject to the supervision of the Law Officers of the Crown - the Solicitor-General and the Attorney-General.

41. The Law Officers have constitutional responsibility for seeing that government is conducted according to law and ensuring the Crown's litigation is properly

7 *Re Philip Morris Ltd v Prime Minister* [2011] 122 ALD 619, especially at [70]-[124].
8 *Phillip Morris,* above n 6, at [186].
9 *Bain v Minister of Justice* [2013] NZHC 2123 at [72].
10 *Robert v Foxton Equities* [2015] NZAR 1351, at [29]-[31].
11 *Deliu v Solicitor-General* [2021] NZHC 2246 at [75].

conducted.[12] They must exercise these duties independent from political direction or influence. [13]

42. Given these roles, the Solicitor-General has responsibility for all lawyers representing and advising the Crown (even though the Solicitor-General only directly employs counsel at Crown Law). The supervisory nature of the relationship assists all government lawyers to maintain their independence (and ensures the Crown operates with one consistent view of the law). His Honour Justice Matthew Palmer, when Deputy Solicitor-General, wrote about this:[14]

> As with any public servants, lawyers can come under pressure from Ministers or chief executives to give advice that is desired rather than advice that is not desired. But government lawyers have an additional professional obligation to resist that pressure. The Chief Legal Adviser … will assist lawyers to do that. The Solicitor-General, as the professional leader of all lawyers in government, will in turn assist Chief Legal Advisers where (rarely) that is required….
>
> Collectively, the independent law officers of the Crown, Crown counsel [from Crown Law] and departmental lawyers offer independent legal advice to ministers and chief executives and represent them in the courts. They are a crucial element in our constitutional arrangements aimed at ensuring that the executive government acts within the law. In so doing, they make a significant contribution to upholding the rule of law.

43. This was also the point emphasised by Brennan J in *Waterford* when His Honour said the protection of the law officers extended to all Crown lawyers.

44. We set out the significant supervisory systems in place in our letter of advice to the Committee on 17 June 2021. They include:

- Departmental Chief Legal Advisors formally report to Crown Law on any significant legal risks within their agency, and any wider system risks that they are aware of, and these are reported to the Attorney-General (currently quarterly).
- Cabinet Circular CO (16) 2 requires advice on all 'Core-Crown Legal Matters' (if not provided by departmental lawyers) and any litigation to be referred to Crown Law.
- Chief Legal Advisors and Crown Law counsel meet frequently (there are a range of weekly, monthly, quarterly and annual meetings) to share information and govern the wider network of lawyers.
- Each department has a relationship manager appointed from Crown Law to help with the flow of communications.

[12] McGrath QC, "Principles for Sharing Law Officer Power: the Role of the New Zealand Solicitor-General" (1998) 18 New Zealand Universities Law Review, 197 at 202; Cabinet Manual 2020, paragraph 4.2-4.7; and Cabinet Office Circular (16) 2.
[13] McGrath, at 198
[14] Palmer, "The Law Officers and departmental lawyers" [2011] NZLJ 333 at 338.

- The Solicitor-General, Deputy Solicitors-General and Crown Law counsel are also in close contact with Chief Legal Advisors in relation to both active litigation and legal risks within departments.

45. If counsel at the Crown Law Office are considered to have the necessary degree of structural independence from their client, the government, as is suggested at paragraph 43 of the consultation paper, then so must all government lawyers. All are overseen by the Solicitor-General and bound by those same constitutional responsibilities, and those responsibilities are consistent with the ethical duties set out in the LCA and CCR.

46. Finally, in our view it is not a relevant distinguishing feature that Crown Law issues invoices and receives payment from the particular department it is representing. Crown Law is a government department like any other, and this arrangement simply reflects the operation of the 'Strategic and Operational Legal Advice and Representation' appropriation. Further, other in-house government lawyers have time recording mechanisms and some, such as those at MBIE, similarly 'charge' their internal clients. This is a feature of the particular appropriations, and does not reflect any greater or truer solicitor-client relationship. Under rule 15.2.4, other in-house lawyers may also provide services to and invoice other departments or Crown entities for their time under back office services arrangements.

A client/employer incurs actual costs when using in-house lawyers, which may be more or less than the actual costs of using externally-briefed lawyers

47. The concern set out in paragraph 32ff of the consultation paper appears to be that it would not be fair for the costs awards for in-house lawyers and externally briefed lawyers to be the same, as the actual costs of in-house lawyers may be less.

48. As explained above, costs of in-house lawyers, including within government, are actual costs not only costs related to loss of opportunity. In sum, salaries are paid to in-house lawyers to avoid paying out-sourced legal fees,[15] with all associated overhead costs.

49. So, a salaried in-house lawyer is a cost to their employer. This actual cost has been recognised in a line of authorities following the Court of Appeal decision in *Henderson Borough Council v Auckland Regional Authority.* [16] The Court awarded costs where the Authority was represented by an in-house lawyer because "the time of a salaried employee has been occupied". At the High Court stage of that case, the Court said there is no reason why being represented by an in-house lawyer ought "to derogate from the employer's right to expect an award of costs in its favour in respect of litigation to which it has been a party and where it was represented by that solicitor".[17]

[15] As recognised by Gendall AJ in *Commissioner of Inland Revenue v Harbour City Tow and Salvage (2003) Ltd* HC Wellington, CIV 2006-485-2002, 12 February 2007 at [27].

[16] *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 (CA) at 23.

[17] *Henderson Borough Council v Auckland Regional Authority* [1982] 2 NZLR 751 (HC) at 756.

50. The actual costs incurred by a party using its in-house lawyers may be *more* than the costs of using externally briefed lawyers, or they may be *less*. It would depend on the salary and overhead costs of the in-house lawyer, and on the charging model of the external lawyer. Those factors will vary from case to case. There can be no presumption that the actual costs of in-house lawyers are less, and in any event it is inappropriate to inquire too far into costs structures. Rule 14.2(1)(f) provides the necessary safeguard in *all* circumstances where costs are awarded: an award of costs should not exceed the costs incurred by the party claiming costs. No further inquiry into actual costs is needed.

51. To the extent the actual costs of in-house counsel need to be ascertained for this purpose, this can be achieved. For Crown Law counsel, all counsel have an hourly rate (which turns on their role and experience) and they all record their time against the matter they are working on. For departmental lawyers, the cost of the salary paid to a lawyer is known to the employing Chief Executive/department, as are other factors such as overhead costs. From these factors an hourly rate can be determined, which can be multiplied by the number of hours spent by that lawyer on the proceeding. As a general proposition, this is not a difficult or onerous task.

Differentiating between in-house lawyers and external lawyers would lead to inefficiencies in publicly funded resources

52. In-house lawyers make up 25% of the legal profession. The government is the largest employer of in-house counsel, with at least 850 in-house lawyers (or 1500 counting the wider public service). A key strength of in-house counsel is their specialist knowledge of their organisation and context in which it operates, and the nature and context of associated legal issues.

53. Deployment of in-house counsel to represent the government in litigation enables the efficient allocation of publicly funded resources through retention of institutional knowledge, allocation of counsel with appropriate expertise and understanding of the business needs of the particular agency, a potential reduction in expenses like travel costs (e.g. where a department has a regional office and can use their lawyers there) and ability to ensure a consistent standard of representation in and assistance to the Court.

54. An inability to recover costs of in-house counsel at the same rate as external counsel, would disadvantage the Crown and any employer who chooses to structure its organisation in this way.

55. Further, a different rate means that litigants that are conscious both of costs, and of enforcing their rights or defending their position, will have to predict:

- any additional expense that could be incurred in using external lawyers
- the proportional benefits of recovering costs at the higher external-lawyer daily recovery rate, bearing in mind any additional time required by external counsel to understand the organisation and context, and the fact scale costs are only a proportion of actual costs

- the overall impact of not using in-house lawyers who have the necessary experience and institutional knowledge for the case at hand.

56. This adds an unnecessary and complex actuarial assessment.

Differentiating between in-house lawyers and external lawyers would lead to practical problems

57. In-house and external lawyers work together on a spectrum, not in a binary way. The proposal to have two levels of costs would struggle to deal with this.[18]

58. Government departments use different operating models and rely on external and internal lawyers to varying degrees. For instance, Oranga Tamariki lawyers appear in a large number of their matters, whereas Department of Corrections lawyers will often act in litigation together with an external lawyer. As above, this 'mixed model' is not uncommon.

59. With a mixed model, consideration would need to be given to how the costs schedules would be completed in a fair and uncomplicated way. Would the Crown need to identify which step was carried out by which lawyer, with different rates and schedules applying? What would the applicable recoverable rate be if both the in-house and external lawyer carried out a step, such as discovery? And if both lawyers appeared and there was an allowance for second counsel, would the recoverable rate be different? These are genuine practical implementation issues.

60. Still, these practical concerns should not detract from our key point that the proposal to have different daily recovery rates for in-house and external lawyers would involve unwarranted and fundamental reform to our professional legal framework. Rather they highlight the lack of a sound basis for differentiating between in-house and external lawyers in respect of costs.

Self-represented litigants – the new daily recovery rate

61. The Committee has decided that self-represented litigants should be eligible for a costs award. While it is difficult to assess what the daily recovery rate should be, our position is that it should be no higher than the $500 daily rate proposed. The level needs to recognize the time and effort in taking a meritorious case to court. But it also needs to ensure that people are not incentivised to self-represent rather than use a lawyer or incentivised to prolong proceedings unnecessarily. Lawyers, as officers of the court and pursuant to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (CCR), have obligations to contribute to the expeditious and reasonable conduct of proceedings. These obligations are not incumbent on self-represented litigants.

62. While costs will, we presume, continue to follow the event, we are mindful that costs remain at the discretion of the court. So, costs awarded to a self-represented litigant can be adjusted, if necessary:

[18] The proposal could also lead to organisations re-structuring themselves in artificial ways in order to get the benefit of a higher-recovery rate. For example, a private company could potentially turn its in-house legal team into a related organisation. The lawyers would work in a functionally equivalent way, and the organisation would gain the benefit of the higher external lawyer rate.

- to accommodate any potentially irresponsible conduct by the litigant
- to reflect a situation where the opposing party has managed the overall litigation and/or entirely identified and dealt with the point of law that ultimately proved successful.

63. After all, an effective costs regime should incentivise efficiencies on the part of represented parties.

Rule 14.2(1)(f) – costs should not exceed the costs incurred

64. Rule 14.2(1)(f) provides that an award of costs should not exceed the costs incurred by the party claiming costs. Our view is that this rule should be retained and operate in situations where in-house and/or external lawyers are retained. It is an important safeguard to ensure that a successful litigant does not make a profit from the litigation process.

65. On this basis, we agree with the proposal in paragraph 48 that the rules will need to clarify that self-represented litigants can recover notwithstanding this rule, and that costs can be awarded when a lawyer acts on a pro-bono basis. Clear rules as to how a pro bono lawyer should operate in terms of 'charging' a client so as to subsequently recover scale-costs might also encourage more pro bono work.

Appellate proceedings

66. As a matter of logic and consistency, we consider that any changes made to the High Court and District Court Rules regarding costs should be made to the Court of Appeal (Civil) Rules 2005 and Supreme Court Rules 2004 in a consequential way. Consistency across the Court structures is, in our view, important.

67. It will be evident that the consultation paper has raised significant issues for all government lawyers, which are of particular importance to me as Solicitor-General. I am happy to speak to the Committee on this subject to explain or expand upon my position.

Nāku noa, nā
Crown Law

Una Jagose QC
Te Rōiā Mātāmua o te Karauna

To

Dated 28 January 2022

The Honourable Rules Committee

Clerk to the Rules Committee

Subject :- Submission on Costs for Litigants-In- Person (Brief)

Dear Sir/ Madam

I happened to see this consultation very late, therefore thought of making a brief of humble submissions below: -

1. The background where litigants happened to represent themselves is either they have NO access to legal aid (financial security) to afford a lawyer or lawyers may NOT have a keen interest in their case. Whatever the circumstances may be, litigants self-represented in courts have a reason of their own. Those litigants who approach courts for justice have to fear the costs if they do NOT succeed in litigation. This could affect ordinary people approaching the court themselves for justice.

2. As per the consultation, it is purely stated that only the succeeding party will get the award of costs. In most of the cases, litigants' success will be limited as they have NO formal legal knowledge to argue a case in court. This will end up litigants having financial overburden after fighting for a case at court without a lawyer.

3. If the consultation is only for civil cases and civil remedies, it may NOT affect the fundamental rights of a litigant however if the costs are awarded to a litigant in a Judicial Review proceedings or a proceeding to uphold New Zealand Bill of Rights, then the award of costs has a negative impact on self-represented litigants.

4. For example if a litigant files a case under Writ of Mandamus (or to uphold constitutional rights) to a High Court/ Court of Appeal for getting an order to direct a public organisation to perform a specific duty, this comes under judicial review application. If the case is for the common good of society and the case is filed without public support, then the litigant who chooses to file a case for the benefit of the community will be penalised for bringing a case of that nature to the justice system by award of costs. If they lose a case, then that litigant has to pay costs to the public authority (Case reference Divya Sathyan v. Police Commissioner , in this case NO parties succeeded (because the police has NO resources to

investigate individual cyber intrusions) however crown law claimed costs from litigant through court registrar, then curtailed litigant's right to approach higher court through an agreement) .

5. In my opinion the consultation for awarding costs to self-represented litigants can be for civil cases. If the suit involves provisions of Human Rights Act, New Zealand Bill of Rights Act (Civil Liberties), Constitutional Rights, there may NOT be any award costs for litigants who did NOT succeed in achieving their fundamental rights and civil liberties. I make a humble submission that award of costs may please be exempted for those litigants self-representing themselves in a Judicial Review application (which involves upholding Human Rights, Women Rights, New Zealand Bill of Rights Act, Civil Liberties, Constitutional Rights etc.)

I would like to submit an elaborate analysis of this matter if you could please extend time for filing submissions.

I look forward to hearing from you.

Much Obliged

Many Thanks

Kind Regards

Divya

(1) I am a self-represented litigant. I did not choose to represent myself. I was forced to represent myself because nobody else would represent me. I have looked through my email records and it seems I have emailed no less than 20 legal aid listed lawyers and everybody was either 'busy' or claimed 'conflict' with various Universities of New Zealand. I don't know that it was about the money, at the end of the day, it was about closing ranks around or about the Government, seems to me. If people want to be open to getting money from the Government then they don't want to be taking on cases against the Government. Perhaps. Other people are in the position to understand what is going on with this more than me.

(2) My proceedings are against the Government. The Public University's of New Zealand. If they don't enrol students with capacity in (for example) Law and they don't graduate students with capacity in (for example) Law then you can't employ Lawyers (with capacity) and then nobody gets paid. You don't want to create a perverse incentive for the University's to 'software update' their transcripts anymore than they have been, already, in order to ensure that nobody gets paid. The University's are providing slaves to the courts, now?

(3) Schedule 2B costs (for example) are (according to the rules) independent of the skill of the lawyer. They are about what steps the client instructs. I would suppose. So, if the client instructs the lawyer to file unnecessary things in an attempt to delay justice then they are liable for costs involved on those steps. It is supposed to be about incentivising timely justice and out of court settlement. My understanding of the actual amounts involved is that it is more token than anything else. One isn't supposed to make a living off of schedule costs. It's an indictment on our legal system indeed that we aren't even paying schedule costs to the substantively correct party. The legal grads don't have faith in the courts that they can recover schedule costs from the courts if they bring a case of actual merit before the courts.

(4) NZ uses the term 'costs' in a slippery way. I don't know if it is intentionally deceptive or what is going on... But legal fees are separate from schedule costs. I was informed that Aaron Perkins QC invoiced the ADHB more than $20,000 for filing either a motion to have proceedings struck out or an interlocutory (that is yet to be settled) and that is in addition to more than $5,000 costs for filing and preparing for a 2 hour hearing etc. That is to say that he (as one of the most highly paid lawyers, I understand, because very competent) charges legal fees around 4 orders of magnitude higher than schedule fees.

(5) It seems to me that schedule costs are available to anyone who brings a case to the courts.

(6) It seems to me that refusing to allow people to claim some kind of fee for the time and effort involved in working the legal proceedings (given the inavailability of legal counsel) is nothing other than slavery. $500 a day might be reasonable. I don't know. How do you work out how many days are associated with the proceedings? Are the number of days given by the schedule costs?

(7) I don't understand the legal aid system... But it seems to me that the government has been training people to collect legal fees from the victims. That is to say, the government wrongs the people (e.g., by not paying them for the work they have done) and then they are directed to lawyers. The lawyers get the money out of the government -- taking a portion of that money for themselves as fees. But the lawyers should be getting the money for their fee out of the government. That way the government would be incentivised to pay their debts properly in the first place. Then lawyers' time would be freed to pursue justice in other matters... Baby lawyers need to be instructed to get costs from the government for the government's wrongs. Not go after the victims. Otherwise the system is corrupt.

(8) That is to say paying me anything at all might be seen to be unfair to the legal aid lawyers. People trying to make a living on that. But nobody should be trying to make a living on that... Why apply for fees to be waived when you can pry the fees out the cold dead hands of the government officials. Why does it always have to get to be that, in this country? ffs...

(9) I am waiting to hear how the fees were invoiced by the partners from firms involved in the legal action I had against the University's. It needs to be properly costly so the government is properly incentivised to put things right by internal complaints resolution or timely out of court settlement thereby freeing court time for other matters. Presently the University's are all 'sue us then' (snort, chortle, guffaw). They don't respect justice. What's next? They take the Degrees back and then nobody gets paid? Everybody's degree expired. No money for you. Let's just feed you micro-doses of LSD can call you psychotic and indefinitely detain you voluntarily involuntary-like. Keep you on supported living life-support 2 people sign off you aren't going to be on life support but voluntary euthanasia drugs are here...

?

Kelly Roe.

And of course there is various mis-speaking. Schedule costs (e.g., 2B) vs legal fees.

It is hard for me to care when you don't pay me you don't pay me you don't pay me you don't pay me you don't pay me.. And so on.

I was never in it for the money.

But it seems most everyone else was.

Always forcing everything to be all about the money always.

Nasty. Bruitish. Short.

"not a team player, really'

I mean you can all console yourselves that the University of Otago gets another year of enrolling all and only those students who they have carefully selected on the basis of 'who is your Daddy' to be Dr Leeks 2.1 and 2.2 and 2.3 and so on...

The issue with it, really, is thinking that those people can have one face to everyone else and another face... For you. I mean.. The legal profession gets actual proper healthcare. Right? Some segment of y'all?

Yeah, right.

Submission from Lisa and Peter

Hi this is great but no good to me right now. the environment court is about to be undermined as the buller district council committed criminal offences twice breach of a trespass notice and one of those was whilst ignoring court instruction. The building inspector is currently in contempt and thanks to the council the police refused to do anything stating that is not for me. 2 court staff have been dismissed over this and council has spent 6 figures on lawyer to get this to the mess it is in currently. So really this is too little too late for me sadly

Feedback on the Second Consultation Paper.

Thank you for the opportunity to provide feedback/comments on the Second Consultation Paper.

My feedback is given in my personal capacity as a lawyer, not as an employee, nor on behalf of my employer.

ILANZ, a section of the NZLS, asked for comments on the Second Consultation Paper for ILANZ to provide comments to the NZLS Law Reform and Advocacy team, who are (I presume) providing a submission from the NZLS to the Rules Committee.

I was advised by ILANZ that my comments were valid and good comments, but not all would be adopted by the NZLS. ILANZ suggested that I provide them direct to the Rules Committee.

To that end, please find enclosed my comments on the Second Consultation Paper (updated slightly from the version I sent to ILANZ).

……

1. My feedback is on two points:

   Costs for in-house lawyers:

   1.1. I submit:

      1.1.1. It should be the same for Crown Law and in-house lawyers.

      1.1.2. The rates should be the same.

   r 14.2(1)(f) – costs should not exceed the costs incurred.

   1.2. I submit the rule should remain

2. I also submit that the Committee should explicitly clarify that it did not mean to say, or imply, that in-house lawyers do not somehow have the same ethical relationship with and independence from their clients as Crown Law Office lawyers (or private practice lawyers). In-house lawyers have the same legal duties and ethical obligations as all lawyers under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and, in fact, practice law with the same ethical relationships and independence.

Costs for in-house lawyers

3. My feedback is that the differentiation between Crown Law and in-house counsel is flawed and they should be treated the same. That is, if costs are able to be claimed for Crown Law, then costs should be able to be claimed at the same rate for in-house lawyers (whether government or the private sector).

4. At paragraph 32 of the Second Consultation Paper, the Committee notes:

> Moreover, an in-house lawyer is in a different position from external counsel. An in-house lawyer has only one "client", and that person is the party to the litigation, and the lawyer has duties to that party as an employee. They are more closely aligned with the stance of the party than external counsel.

5. That is, with respect, both offensive to in-house counsel and a misunderstanding of the role of in-house counsel.

6. Firstly, in-house counsel are governed by the same rules as external lawyers. In fact and in law, the first duty of in-house counsel is to the Court, the second duty is to their client. That their client happens to be their employer does not change their duties as a lawyer, both in law and in practice.

7. As specifically noted in Rule 15.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008:

> 15.2 When an in-house lawyer provides regulated services to the non-lawyer by whom he or she is engaged, he or she must do so pursuant to a lawyer–client relationship.

8. Rule 15 then goes on to make it explicit that the in-house lawyers must not enter contracts or accept any instructions or directions that undermines any obligations on them as a lawyer (i.e. under the Act or Rules).

9. It is clear that an in-house lawyer is not in a different position from external counsel when it comes to their practice of law and their appearing in Court for their client. Both are required, after their first duty to the Court, to fulfil their duties (which are the same duties) to their client. To suggest otherwise, particularly as a simple, bald statement without any evidence to back it up, is incorrect.

10. As an illustration of my point, it would never be a defence to a complaint to a NZLS Standards Committee of unsatisfactory conduct or misconduct to say "oh, as an in-house lawyer I'm in a different position to an external lawyer and because I'm 'more closely aligned with the stance of' my client I did not have to comply with the Rules like an external lawyer".

11. Secondly, paragraph 42 notes an "alternative view" that:

> Secondly, for the reasons outlined above in relation to in-house lawyers, there is a material difference between lawyers employed in-house by the Government Department or other Crown body and those conducting practice more broadly. **Such lawyers have duties as an employee to their employer, and their employer is the party. They will also be more closely aligned with the interest of the party in the litigation itself. These features still exist even though the employer is the Crown.**
> [emphasis added]

12. For the same reasons as above, this seems to say that somehow in-house Government lawyers are not independent, are somehow "captured" and somehow the Rules (which specifically apply to them) are somehow watered down or something.

13. This is, with respect, simply not correct and, importantly, for a body as prestigious as the Rules Committee to somehow suggest that in-house government lawyers are not independent and do not diligently and properly seek to abide by the Rules and their ethical obligations as lawyers in discharging their duties to the Court and to their client is, at the very least, disappointing.

14. Thirdly, as noted in paragraph 43:

> A majority of the Committee was of the view, however, that parties represented by Crown Law should be entitled to an award of costs

> as if represented by external counsel (that is, at the present daily recovery rates). This is because Crown Law, under the leadership of the Solicitor-General, has the same ethical relationship, and degree of independence, from its client - the Government - as do independent counsel from their clients.

15. The majority, with respect, misunderstands the correct position. In-house lawyers have the same ethical relationship and degree of independence as Crown Law Officer lawyers.

Same ethical relationship and degree of independence

16. As noted above, all in-house lawyers have the same ethical relationship and degree of independence from their client. That is mandated as a matter of law (see the Act and the Rules) and as a matter of fact (what happens in practice). I see no evidence cited (and am not aware of any) that in-house lawyers do not have the same ethical relationship and degree of independence as any Crown Law Office lawyers.

17. If one considers that in-house lawyers are somehow compromised in their practice of law, then Crown Law Office lawyers are as compromised by being in-house lawyers of the "Crown".

18. However, that in-house lawyers (whether in government or otherwise) are required to have the same ethical relationship and independence, and in fact do have the same, means any rationales that apply for Crown Law, or private practice lawyers, also apply for in-house lawyers.

Leadership

19. It is not correct to say/imply that an in-house lawyer, under the leadership of a Chief Legal Counsel, is in anyway compromised but Crown Law Office lawyers are not because of "the leadership of the Solicitor-General". The leadership of Chief Legal Counsels is just as valid.

Charging

20. The reason why Crown Law charge is because of managing demand, not because they are like externally instructed lawyers.

21. Crown Law is subject to an appropriation and it cannot spend more than the appropriation. How the money (i.e. the cash) is received, though, by Crown Law is a different issue from the authority to spend it.

22. Some of the money (i.e. the cash) comes from Treasury (e.g. for the criminal work) and some from government departments (by payment of invoices for hours worked).

23. The reason though for issuing invoices is not because of some independence or ethical relationship – it is to control the demand for Crown Law Office services.

24. The Government could just fund Crown Law's appropriation from Treasury, but if it did that then every government department would be incentivised to send all their legal work to Crown Law - this is because it would be a Crown Law budget problem, not a department budget problem. So a department could simply shift its legal costs to Crown Law if the "cash" for the appropriation came from Treasury. However, by charging (i.e. issuing invoices), it means that if the demand for services goes up, then the payments from government departments go up, which means Crown Law can employ more lawyers – although that has to be within the

cap of the appropriation (which is the authority to spend). It also means that government departments are able to control their expenditure and make decisions (within the confines of the conduct of Crown legal business) how to spend its legal spend – on in-house lawyers or to Crown Law.

25. The significant point is that Crown Law does not charge because of any ethical relationship or degree of independence, it charges to control demand from government departments. It is, in that sense, just a government department, subject to an appropriation, with a single client (the Crown) and, in that sense, is the same as any entity with in-house lawyers.

One Client

26. The other context here is that the client of Crown Law is the Crown (that is given effect to by the individual agencies) – but the client is the Crown. If it were the individual departments, then this would raise a number of issues including monopoly/anti-competitive ones (for much legal work departments must use Crown Law and the rationale is that it is the one "Crown" that is the client) and Rule 4 of the Rules (which gives the client the right to terminate their retainer and chose another lawyer – departments cannot terminate their retainer of Crown Law).

27. The way around these, and other complex issues, is that the client of Crown Law is the Crown (one client) [it is outside scope to consider whether the Crown, in its constituent parts, as a client is entitled to terminate Crown Law as its lawyer under Rule 4] and, as such, Crown Law is no different from any entities that have in-house lawyers.

28. The significant point is that Crown Law has one client – the Crown - just like other in-house lawyers and, as such, the same rationales apply to both.

Same type of charging

29. On charging, how in-house lawyers (whether government or the private sector) charge differs. For some it is like Crown Law charging government departments. The in-house legal team charges back to the cost centre of the part of the entity an hourly rate for the work done – this is the equivalent of "issuing an invoice" although in practice it will be done by journal entry.

30. The point is that this is the same as Crown Law – it is about managing demand (and if demand goes up, then "charging back" goes up so the legal team can employ more lawyers).

31. For some it is not like Crown Law – there is simply a budget allocation to the legal team and it provides legal services. However, it is the same in that the entity (private or government) has to pay for its legal services – whether funding a legal service directly, funding cost-centres in the entity who pay the in-house legal service or paying externally (whether Crown Law or private practice lawyers).

Rate

32. The Second Consultation Paper suggests that a different rate should apply for in-house lawyers and Crown Law; see paragraphs 37.b and 43.

33. I submit that the same daily rate should be used for in-house lawyers as for Crown Law:

33.1. They are effectively the same thing – lawyers who have a single client.

33.2. To the client, they still have the expense of legal services (whether by paying for the in-house lawyers or by paying the Crown Law invoices).

33.3. Crown Law hourly rates are, in theory, less than the private sector to "compensate" for the monopoly that Crown Law has on government legal services. That is, in theory at least, Crown Law "charge" less than a private law firm because government departments are unable to reduce their legal costs (particularly for litigation) by using a competitive process of going to either the private sector or in-house.

33.4. As such, either Crown Law should not get the "private lawyer daily rate" and should get the lessor proposed "in-house lawyer daily rate", or all lawyers should get the same daily rate. Given that (at last in theory) Crown Law is less expensive than private lawyers, if the Crown gets the "private lawyer daily rate" then, percentage-wise and possibly actually, the Crown is getting reimbursed/compensated more court costs than a client who uses a private lawyer.

33.5. To remove any conceptual and actual difficulties or inequities, lawyers (whether in-house, private practice or Crown Law) should have the same daily rates and, as long as r 14.2(1)(f) is retained, no client will not be "over-reimbursed/compensated" for their legal costs in being represented.

r 14.2(1)(f) – costs should not exceed the costs incurred.

34. The Paper proposes that the rule be repealed. I submit it should not be.

35. Without going into a detailed analysis of what the paper says at paragraph 47 and footnote 31 (not all of which I agree with), as specifically noted by (then) Associate Judge Osborne in *Dunedin Catering Supplies v Mr Chips Ltd* [2013] NZHC 1815, where he cites the UK Court of Appeal in *General of Berne Insurance Co v Jardine Reinsurance Management Ltd* [1998] 2 All ER 301 (CA):

> [31] … May LJ observed that on such an approach:
>
> > ... the receiving party would either make a profit on the costs to which they were entitled or would be recovering part of the costs to which they were not entitled. That would offend the indemnity principle.
>
> Sir Brian Neill said simply:
>
> > The receiving party is not entitled to a bonus.

36. With respect, in my submission, repealing r 14.2(1)(f) will result in some receiving parties receiving a bonus and offending the indemnity principle, and they will receive more than their legal costs were.

37. Also, as noted above, if external, in-house and Crown Law lawyers have the same daily rate applying to them (and thus removing many conceptual and actual issues), then r 14.2(1)(f) will prevent the client from receiving a bonus and offending the indemnity principle, i.e. it would stop a client receiving more costs than what their lawyer (whatever the status of the lawyer) actually cost them.

Concluding remarks

38. I am conscious that "offensive", which I opened with, is a strong word. However, this is because at paragraph 7 the Committee notes:

> This is due to the Solicitor-General's constitutional responsibility as a Law Officer to ensure the Crown's litigation is properly conducted, and to exercise this duty independent from political direction or influence.

39. Read in the context of the Paper as a whole and particularly the context of paragraph 7 (which begins by referencing "Crown lawyers, ie government lawyers, should be treated different from other in-house lawyers", but then concludes with the Crown Law Office and the "independence from political direction or influence"), the Paper seems to imply that in-house government lawyers who are not employed at Crown Law may not, somehow, be independent from political direction or influence.

40. That is, the Paper says that its preliminary view is Crown Law, because of "constitutional responsibility … to ensure … litigation is property conducted" and this is exercised "independent from political direction or influence", should be treated like an external lawyer. However, it does not appear to be the preliminary view for government in-house lawyers as the Committee only "seeks the views of submitters". By implication that means the Committee, at least on its preliminary view, does not see government in-house lawyers as having the same responsibility to ensure that "the Crown's litigation is conducted properly, and to exercise this duty independent from political direction or influence".

41. This is, with respect, simply wrong and, with respect, offensive to us in-house government lawyers.

42. I set out above some of my reasons why this is wrong (for example, at law us in-house government lawyers are subject to the same legal and ethical obligations and in practice we also practice law independently free from political direction and influence).

43. I submit that the Rules Committee should clarify that it did not in any way mean to say or imply that in-house government lawyers (or any lawyers) were somehow not independent from political direction or influence, nor are in-house lawyers somehow not independent or do not have the same ethical relationship and independence from their employers as Crown Law or private practice lawyers.[1]

Mike Cook
(in his personal capacity as a lawyer)

[1] As noted above, that the same ethical relationship and independence applies to in-house lawyers removes much of the rationale for treating them differently from Crown Law Office lawyers.

11 February 2022

Anna McTaggart
Clerk to the Rules Committee
c/- Wellington High Court
Wellington

By email: RulesCommittee@justice.govt.nz

Re: Rules Committee further consultation paper: *Costs for Self-Represented Litigants*

1. Introduction

1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Rules Committee's *Costs for Self-Represented Litigants* further consultation paper (**Consultation Paper**).

1.2. The Rules Committee has determined that self-represented litigants should be eligible for costs awards if they succeed in their litigation. The Committee is now considering amendments to the Rules for the District Court, High Court, Court of Appeal and Supreme Court to empower the courts to make such costs awards.

1.3. To that end, the Committee has made the following preliminary decisions:

a. **New daily recovery rate**: costs for self-represented litigants should be calculated using a new daily recovery rate which would be prescribed in the schedules to the Rules, and would be lower than the rate applicable to category one proceedings under rule 14.3 of the High Court Rules;

b. **Categorisation of proceedings**: a single rate would apply to all categories of self-represented litigants (with potential exceptions for in-house lawyers and Crown lawyers);

c. **Self-represented lawyers**: lawyers who are party to the litigation are to be treated as self-represented litigants and are only eligible to recover costs at the new rate prescribed for self-represented litigants (and District Court Rule 14.17, which provides that a solicitor who is a party to a proceeding and acts in person is entitled to solicitors' costs, should be repealed);

d. **Lawyers representing their firm or incorporated firm:** lawyers who are the sole principal or director of their firm or incorporated firm are to be treated as self-represented litigants when they represent their firm or incorporated firm; and

e. **In-house lawyers**: a blanket daily rate is appropriate.

1.4. The Committee is now seeking further feedback on the following issues:

a. The appropriate daily recovery rates for self-represented litigants and lawyer-litigants;

b. Whether in-house lawyers should be treated differently from other self-represented litigants and whether there should be a further new daily recovery rate prescribed for in-house lawyers;

c. Whether Crown lawyers should be treated differently from other in-house lawyers;

d. Whether the references to actual legal expenditure within the regime, including the principle that a party should not recover more than external legal expenditure,[1] should be revoked or amended; and

e. Whether any amendments should be made to the Court of Appeal (Civil) Rules 2005 and Supreme Court Rules 2004 in a consequential way.

1.5. This submission has been prepared with input from the Law Society's Civil Litigation and Tribunals Committee, Employment Law Committee and the In-house Lawyers Association of New Zealand (**ILANZ**).[2] The submission does not address issues in respect of which preliminary decisions have already been made by the Rules Committee, or matters which are covered in the Law Society's submission on the Rules Committee's initial consultation paper.[3]

2. The indemnity principle and its relevance to determining costs

2.1. The Rules Committee has sought feedback on whether the existing references to actual legal expenditure, at rule 14.2(1)(f) of the High Court Rules 2016, should be repealed, or whether they should be amended to recognise that 'costs' could include opportunity costs.[4]

2.2. The Law Society supports the repeal of rule 14.2(1)(f) for the reasons set out in paragraphs 49 and 50 of the Consultation Paper.

2.3. An alternative option would be to repeal rule 14.2(1)(f) and provide the ability for self-represented litigants (and in-house lawyers) to recover costs in accordance with a new prescribed rate. As the Consultation Paper notes,[5] this would mean rule 14.2(1)(f) only applies to situations where a party retains an external lawyer to conduct the litigation.

2.4. We do not support this alternative proposal. If the indemnity principle is to be abrogated in respect of self-represented litigants, it should not continue to apply to parties who engage external lawyers, for the reasons set out in paragraph 50 of the Consultation Paper.

2.5. However, we do note that the indemnity principle would continue to apply to indemnity costs under rule 14.6(1)(b) of the High Court Rules.

1 High Court Rules 2016, r 14.2(1)(f).

2 ILANZ is a section of the Law Society which represents 3500 in-house lawyers in New Zealand, who make up 25% of the legal profession.

3 A copy of that submission is available here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/I-Rules-Committee-Costs-for-Litigants-in-Person-30-10-20.pdf.

4 At paragraph 47.

5 At paragraph 48.

3. Feedback on proposed daily recovery rates

3.1. The Rules Committee has proposed different daily rates for self-represented litigants, self-represented lawyers, in-house counsel and Crown counsel.

3.2. The Law Society agrees that different daily rates are an appropriate means of accounting for the different types of cost 'incurred' by a party in relation to litigation, the expected level of skill and independence brought to the proceeding by each category of advocate, and the other factors listed in paragraph 21 of the Consultation Paper. The High Court Rules of course already allow proceedings to be categorised for cost purposes on the basis of complexity and the experience of counsel.

3.3. Our feedback regarding each daily rate set out below.

Self-represented litigants

3.4. The Law Society supports the Rules Committee's reasons for proposing a $500 daily rate for self-represented litigants.

3.5. We acknowledge that this blanket rate would be an under-recovery for some litigants, and a windfall for others.[6] However, in our view, a $500 daily rate is an appropriate compromise which provides some compensation for any opportunity costs that would have been incurred.

Self-represented lawyers (including lawyers who appear on behalf of their firm or incorporated firm)

3.6. The Law Society agrees that there is no principled basis for allowing a self-represented lawyer to recover costs at a different rate to another self-represented litigant.

3.7. Although many lawyers have daily rates that exceed $500, the purpose of the costs regime is not indemnity, but fairness. Given that, in each case, out of pocket costs are not incurred, it would be fair to treat self-represented litigants (lay or lawyer) alike in this respect.

In-house lawyers and Crown lawyers

3.8. In-house lawyers and Crown lawyers are bound by the same conduct and ethical obligations and rules as an external counsel when providing litigation services. They are required to exercise independent and professional judgment when conducting litigation on behalf of their client.

3.9. While in-house lawyers do not offer their services to the public more widely, the regulatory approach is to treat their client employer as a single client, but a client, nonetheless. In contrast, a self-represented litigant or lawyer has no identifiable client, there is no separation of the roles, and the litigant or lawyer is not bound by the duties to their client under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**RCCC**).

[6] Matters before the Employment Court, for example, often involve self-represented litigants who are former employees. In that context, opportunity costs would include any income they would have earned if they had remained in their former employment, or secured new employment. A question would then arise as to whether these litigants would be over- or under-recompensed for any loss of opportunity (particularly if they have not secured new employment while litigation is underway).

3.10. We accept that ordinary categories of costs should apply when Crown Law acts for the Attorney-General or other public entities, and whenever an in-house lawyer instructs external lawyers or counsel – even if that lawyer is the solicitor on the record and the litigation file is managed internally.

3.11. The situation becomes more complex when an in-house lawyer runs all the litigation. From a regulatory perspective, in-house lawyers are required to comply with the same standards and professional obligations as external lawyers. They are required to provide any regulated services to their employer pursuant to a lawyer-client relationship (RCCC, rule 15.2), and be independent and free from compromising influences or loyalties (RCCC, chapter 5).

3.12. Law Society members continue to be divided on the issue of whether there should be a new, separate daily recovery rate prescribed for in-house lawyers.

3.13. Some practitioners have observed that employed litigation lawyers will only ever act for one 'client', or group of related clients and as the Consultation Paper notes, in this sense it may be more analogous to self-representation. In their view, there may be a public perception risk in treating all in-house lawyers in a similar manner to external lawyers for cost purposes, and this approach could lead to inconsistencies (for example, in a case where two businesses are on opposite sides with neither having appointed an external lawyer but with one side being able to use a higher multiplier than the other solely because its representative holds a practising certificate).

3.14. Further, it would be reasonable to award costs at a lower scale to parties represented by in-house lawyers on the basis that, like lay litigants, their legal costs may be less than what they would have been had they engaged external lawyers (and, in some cases, cost-saving would be a primary reason for keeping litigation in-house). Members are not able to provide details of in-house costs and arrangements for the purposes of a public consultation. As the Consultation Paper notes, this information could inform the Committee's consideration of the costs of engaging an in-house lawyer. It may be that examples of these costs could be obtained confidentially.

3.15. ILANZ is of the view that in-house lawyers should be entitled to costs awards at the same daily recovery rate as external counsel, for the following reasons:

a. As noted above, in-house lawyers are bound by the same conduct and ethical obligations and rules as external counsel.

b. In acting for their employer, in-house lawyers do not act for their own interest or profit, but rather for that of their client. This is not materially distinct from external counsel, who are also required to protect and promote the interests of their clients.[7]

c. Litigants who are represented by in-house counsel also incur actual costs (in addition to opportunity costs), in the form of in-house lawyers' salaries, practising fees and operating costs (including lease payments and costs of employing legal support staff).

d. It cannot be assumed that the cost of engaging an in-house lawyer will always be less than the cost of engaging an external lawyer. These costs will depend on the in-house

[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 6.

lawyers' salaries and overhead costs associated with employing and training in-house lawyers.

e. The use of in-house counsel is a legitimate business decision for entities, and cost is just one of many factors which would be considered when hiring and instructing in-house lawyers. Specialist knowledge is likely to be another factor. It would therefore be unreasonable for the rules to be interpreted in a way that punishes entities for what is essentially a business decision relating to how they are represented in court. This approach would, in effect, reduce competition and lead to inefficiencies across the market.

f. Creating two separate cost regimes – one for in-house lawyers and one for external counsel – based only on their employment status creates an unjustifiable two-tier standard within the legal profession. This is contrary to consistent rights and obligations across the legal profession.

g. To the extent that a Court considers a proceeding is straightforward, or counsel conducting the matter is considered to be junior (or the converse), the High Court Rules already provide for the categorisation of proceedings to reflect this.

h. If in-house lawyers are only able to recover costs at a lower daily rate, their employers may be incentivised to instruct external counsel, and this could increase the opposing party's costs exposure.

3.16. We note that the Rules Committee will also be assisted by other in-house organisations such as Crown Law and the Government Legal Network, and corporations who make use of in-house legal services.

4. Amendments to the Court of Appeal (Civil) Rules and Supreme Court Rules

4.1. The Law Society supports equivalent changes being made to the Court of Appeal (Civil) Rules and Supreme Court Rules.

5. Next steps

5.1. We are grateful for the opportunity to provide feedback on the proposed daily rates. If the Committee has any questions, or if further discussion would assist, please feel free to contact me via Law Society Law Reform & Advocacy Advisor, Nilu Ariyaratne s9(2)(a) .

Yours faithfully

Herman Visagie
Vice-President

Peter Gerard Stockman
s9(2)(a)

27 May 2021

The Rules Committee
C/- Sebastian Hartley
Clerk to the Rules Committee
By Email to: Sebastian.Hartley@justice.govt.nz

RE: Costs for Litigants-in-Person (Supplementary Submission)

Tēnā koe Mr Hartley and tēnā koutou katoa to the members of the Rules Committee,

1) Thank you for receiving my submissions dated 25 November 2020. I have now had the benefit of reading the advice to the Rules Committee dated 15 March 2021 and as a comeuppance feel compelled to write again to clarify some important matters.

2) For the very most part I agree with the recommendations but I strongly disagree with the advice at 9.1 e (that a non-category responsive rate be applied) and 9.1 f (that a rate should be set at a level below category one proceedings). Now clearly my view on that matter is but one of fifteen various views submitted, but despite that I have temerity to write this supplementary submission. I am emboldened to do so because:

   a) Any change that the Rules Committee makes will have a profound impact on access to justice for ordinary New Zealanders.

   b) In regards to establishing a procedure to pay costs to successful litigants-in-person, you have listened to the view of the other self-represented submitter (the anonymous one who proposed paying at a rate of $25 per hour) (para 3.25) and, correctly in my opinion, dismissed this option as being, among other things, unwieldly, subjective and unpredictable. What has not been done however is noting or discussing my position on that matter.

   c) As a result, the only viable views being considered are those presented by people who have trained as lawyers and any changes will decided upon by people who have similarly formed their views in the crucible of law schools.

   d) Critically important decisions for all the people of Aotearoa New Zealand are going to be made by the lawyers and judges (who started out as lawyers) of the Rules Committee - after only listening to other lawyers. Therefore, the decision will be made after an insufficiently broad consultation. The process, as it stands, is too incestuous to produce a

149 well-considered outcome. There is too great a risk that the interests of lawyers and judges may not align with what is in the best interests of ordinary New Zealanders.

e) As the only viable view of a non-lawyer, my submissions must be put before the Rules Committee for their consideration. By all means discard my submissions if they lack cogency, but it is not okay, in these particular circumstances, to simply ignore my submissions.

3) There is a recurring theme reported in the advice to the Rule Committee of lawyers valorising themselves and vilifying the self-represented. It would appear that most lawyers think other lawyers are truly wonderful and think all the rest of us are quite woeful. However, is that position evidence based, or is it nothing much more than professional hubris generated by mutual back-slapping in a self-congratulatory echo chamber?

4) Dr Toy-Cronin, who has conducted empirical studies into litigants-in-person, suggests (at para 3.8 a) that concerns about the disruptive effect of the self-represented are based on stereotypes of the worst of the self-represented - and the idealised lawyer.

5) Due to some unfortunate circumstances beyond my control, I have ended up as a relatively experienced litigant-in-person. I suggest that my, albeit anecdotal, but quite extensive experiences somewhat undermine the legal profession's (perhaps myopic) views about how wonderful lawyers are for our justice system. For example:

a) When I ended up in a dispute with a professional body, the body (sensibly) sought the opinion of a lawyer, being "Barrister A". The adamant and non-negotiable opinion of "Barrister A" was ultimately determined by the High Court in (Case 1) to be completely wrong.

b) In an attempt to negotiate with "Barrister A", I engaged "Barrister B". When the negotiations went nowhere, "Barrister B" gave me a formal legal opinion on my options. I could commence judicial review proceedings but that was going to cost north of $60,000 and according to "Barrister B" had I a very limited (about 5%) chance of success. "Barrister B" was proven incorrect about that because I won the judicial review (Case 1) and did so as a self-represented litigant. (I could not afford the fee so had to represent myself.)

c) At a case management conference, I suggested that a 1-day hearing would be sufficient. "Barrister C", representing the professional body, said a 2-day fixture would be required because self-represented litigants "waste a lot of time". In the event, the hearing lasted for just one day.

d) In Case 1 "Barrister C" deliberately and persistently refused to comply with the Court's timetabling orders, such that the first time I saw the authorities that the professional body were relying on was when I collected them from the letterbox as I was driving out the gate

150 on the way to the substantive hearing. This despite my repeated emails begging to be provided with PDF copies of the authorities on the date ordered by the Court, which was several weeks prior to the fixture. "Barrister C" simply ignored my many emails begging to be provided with the professional body's authorities so I could study them prior to the hearing.

e) In the course of the hearing, it came to light that the professional body used some documented procedures that breached natural justice rights. The Judge verbally instructed "Barrister C" to tell their client that these procedures must change. "Barrister C" said they would do that, but to this day the body's procedures have not changed.

f) At the hearing an interested party was represented by "Barrister D". After the hearing "Barrister D" approached me and asked if I'd had a lot of court experience. I replied that it was my first ever day in any Court. "Barrister D" suggested I change my career, because I had discharged myself very well and seemed to be "a natural."

g) After winning Case 1 the professional body commenced an appeal. "Barrister C" then engaged in all manner of delaying tactics such that the hearing of the appeal was delayed for almost 2 years. Just prior to the Court of Appeal hearing, the professional body abandoned the appeal. "Barrister E", who had replaced "Barrister C" at the firm representing the professional body, later told me that the appeal was abandoned because they knew all along that the Body had no chance of winning!

h) While waiting for the Court of Appeal hearing my solicitors wrote to the professional body asking them to apply natural justice to the outstanding matters between myself and the body – as per the verbal obiter dicta of the Judge in Case1. "Barrister E" and another senior partner ("Barrister F") co-wrote back saying there were no natural justice deficiencies with the body's processes.

i) With the appeal abandoned, I submitted my claim for the disbursements awarded to me in Case 1. "Barrister E" wrote a brief email to the registrar disputing my claim for the cost of some 'unbundled' legal advice as part of my disbursements. In researching the authorities on that matter, I found that "Barrister E" was counsel for a party in one of the leading cases where the Court had found that legal advice is a legitimate disbursement claim for successful litigants-in-person. "Barrister E" must have known that the argument put before the registrar was incorrect, but did so anyway. It then took 18 months (the Registrar was loath to disagree with a lawyer in a dispute with a litigant-in-person) but eventually I was awarded every last cent that I had claimed.

j) The professional Body was then required to comply with the Court's orders in Case 1. I insisted that when they do so they must also apply natural justice principles as ordered by the oral obiter dicta of the Judge. The Body went back to seek the advice of "Barrister A".

151 In essence the advice was that the Body could not change their written procedures (that breached natural justice principles) and in not being able to do so, the Body could effectively ignore the orders of the Court. The body put the advice of "Barrister A" into practice and blithely ignored the directions of the Court in Case 1.

k) That decision led to me commencing a second proceeding (Case 2) against the body. "Barrister E" commenced interlocutory proceedings seeking a stay in proceedings due to alleged inadequacies in my pleadings. On hearing this interlocutory matter, the Judge suggested I should seek some professional legal advice. I was reasonably confident that I had thoroughly researched my legal position but to humour the Judge I sought an opinion from "Barrister G". The opinion of "Barrister G" mostly vindicated my position but they went on to comment on many things beyond my brief and sent a bill for over $9,000. Most of these additional opinions were completely wrong. For example, "Barrister G" opined that I should considerably reduce the number of causes of action. "Barrister G" stated that if I won 7 of my 8 causes of action but the other party won the eighth action, I would have to pay all of the other party's costs! I, naturally, refused to pay for such glaringly erroneous advice. "Barrister G" sheepishly blamed the errors on their junior and agreed to reduce the bill by 50%.

l) On another matter related to Case 2. I sought the advice of one on New Zealand's most senior and respected QCs. I was told that my written submissions on the matter were of an exceptionally high standard and he was amazed that it was written by a lay litigant.

m) There were some further delays but eventually Case 2 recommenced with a different Judge and new counsel ("Barrister H") representing the professional body. The extant stay of proceedings application was denied but with costs left to lie where they fall due to some fault on both sides. "Barrister H" (similarly to "Barrister C") took a very cavalier attitude towards timetabling orders and due dates were missed by many weeks. The Judge ordered standard discovery and "Barrister H" point bank refused to comply. I had to petition the Court and after a special case management conference the Judge issued a minute insisting on full discovery. The body responded by providing some, but not all, of the discovery ordered by the Court.

n) I won the judicial review (Case2) and was vindicated that the advice of "Barrister A", "Barrister E" and "Barrister F" was completely wrong and there were natural justice breaches in the procedures of the body that had to be rectified. It was further found that the Body had no basis for not complying with the Court's directions in Case 1.

o) Meanwhile the body had referred the matter to a Crown Entity. "Barrister D" wrote on behalf of the interested party to the Crown Entity. In that letter "Barrister D" deliberately provided false and highly misleading information.

152 p) I was dissatisfied with the ultimate decision of the Crown Entity and commenced proceeding against the Crown Entity (Case 3 – which is still in train). The Crown Entity is being represented by "Barrister I", who is, I am pleased at last to report, a person of impeccable integrity. I would trust "Barrister I" with my life. I would not, however, trust "Barrister I" with providing legal advice outside of their particular specialist field. "Barrister I" argued one (of several more worthy) legal points, without any statutory or precedential basis. "Barrister I" was simply shooting from the hip and hoping they might be right. I, on the other hand, don't go to Court without thoroughly researching the law on the matters in contention. On presenting "Barrister I" with the overwhelming weight of authorities that showed their 'shot in the dark' to be completely unsustainable they had the good grace to admit the error and drop that position.

q) After losing Case 2 the association replaced "Barrister H" with "Barrister J". Because I was awarded disbursements, I sent "Barrister J" an itemised claim along with copies of the receipts for all the disbursements. Eight weeks went by and there was no response. so I sent a reminder email requesting, as a minimum, acknowledgement of my correspondence. Two weeks later and still there was still no response. In my third email to "Barrister J", I noted the statutory requirement for lawyers to facilitate the administration of justice. It was only then that "Barrister J" bothered to respond with an agreement to pay my claimed disbursements in full.

6) Barristers "A" to "J" are ten, essentially randomly selected, barristers that I have had dealings with in relation to my three Court proceedings. Although "Barrister I" comes close, none of them measure up to the idealised lawyer who assists the Courts in facilitating the administration of justice by being objective, and well-informed, and efficient, and ethical.

7) On the other hand, I have worked very hard to maintain as much objectivity as possible. I assiduously study the law relating to my proceedings. I never waste the time of the Court or opposing parties, and I conduct myself with an integrity that meets or exceeds the duties of an Officer of the Court.

8) Perhaps the Rules Committee are thinking that I've just had a run of bad luck. That most lawyers are jolly-good people and the ten barristers I've mentioned are not at all representative of the profession. That may be so. However, many of those 10 barristers are quite senior and "Barrister B" went on to become a QC and is currently a member of the Rules Committee. Sure, "Barrister B" just made an error of judgment… and we all do that. But the lawyers and law firms making submission to the Rules Committee are inferring that lawyers are inherently better than the laity (such as myself) in ensuring meritless cases are not commenced or defended. In my oft repeated experience - that simply isn't so.

9) There is no doubt that the Courts are well-served when parties are represented by objective, well-informed, efficient and ethical actors. Lawyer submitters would have the Rules

153 Committee believe that admission to the Bar is a proxy for such noble attributes. My, albeit anecdotal experiences, point to that belief being false. Barristers "A" to "J" have shown themselves to be lacking (to varying extents) in objectivity, or diligence, or knowledge, or efficiency, or honesty, or integrity, or all the above.

10) It must also be noted that what serves the Courts is not necessarily the same at what serves the interests of justice. It may well suit judges to be addressed by highly deferential counsel speaking with well-rounded vowels and elegantly constructed sentences. However, the interests of justice demand that the Courts are both open and welcoming to all, including the 'hoi polloi' who could never even imagine being wealthy enough to pay competent counsel to represented them should they become embroiled in a civil dispute.

11) No doubt some barristers are paragons of virtue, but no empirical evidence has been put before the Rules Committee that admission to the Bar guarantees such virtuousness. Nor is there any evidence of self-represented litigants consistently failing to discharge themselves adequately, or as well, if not even better, than barristers. The judges on the Rules Committee will, all no doubt, have experienced occasions when self-represented parties have been grossly incompetent, but as Dr Toy-Cronin points out, rules should not be based on a minority of the worst held up in comparison to an idealised lawyer.

12) I suggest that such glorification of barristers is founded much more in professional hubris and in-group bias than in fact. One barrister suggested to me that representation in Court is akin to brain surgery and as such should never be attempted by the untrained. Sorry, but that's just nonsense. Competent representation requires no more than some research skills, a modicum of intelligence, a degree of reasonableness, and a passing competence with reading comprehension, writing, listening and speaking.

13) As it currently stands, we are not all equal in the eyes of the law. The rich (who can afford counsel) have considerably less disincentive in commencing or defending proceedings than do the poor (who cannot afford counsel).

14) The advice to the Rules Committee is to lessen, but not completely eliminate, that inequality. That is an entirely inadequate, and frankly unprincipled response. Why would the Rules Committee wish to pay greater 'costs' to rich parties who may be represented by ill-informed, time-wasting and unethical counsel and pay less 'costs' to self-represented litigants who may be well-informed, efficient and ethical? (Perhaps the only reason is that it 'sticks in the craw' of lawyers to think that anyone other than a barrister could do a job as good as what they do?)

15) Much has been made about the predictability of costs, but of course costs are at best only partially predicable. They are always awarded at the discretion of the Court. Sometimes costs are reduced or increased. Sometimes costs are awarded on an indemnity basis. Sometimes

154 costs claimed in one category are awarded in another category. Sometimes costs lie where they fall.

16) It seems to me that the only equitable way forward is to assume the best of both barristers and non-barristers alike. Set an equal disincentive (i.e., costs) for all categories and bands of proceedings and for all categories of litigant. The Courts can then (as is usual practice) reduce or increase the costs awarded after having regard to the peculiarities of the case and the practice of the representatives, whether they be self-represented or independently-represented.

17) Aside from the obvious deficiencies in listening to lawyers telling the Rule Committee about how wonderful lawyers are, it must further be noted that lawyers have a vested interest in maintaining the status quo. Simply put, lawyers make a handsome living out of being seen as the exclusive, or at least highly preferred, path to curial justice. Much of the disparagement spouted by lawyers about litigants-in-person is nothing more than a thinly veiled attempt at maintaining the income that derives from such a privilege.

18) Moreover, the incessant repetition of the "Lawyer Good - Litigant-in-Person Bad" mantra has an impact on the judiciary whereby it is very hard for judges to avoid bias in favour of parties represented by lawyers. (I, most regrettably, have some experience of that bias being put into practice.)

19) Some parts of the advice to the Rules Committee needs special mention:

a) The "almost unanimous support" for employing a modified scale approach as noted in 0.5 is nothing more or less than a group of lawyers arguing that lawyers are worth more than non-lawyers. That, simply put, is an expression of hubris. Sorry, but before the Rules Committee decides how wonderful lawyers are and how woeful everyone else is, it might pay to listen to what the rest of our society thinks about lawyers.

b) At 0.13 it is suggested there are forcible policy arguments relating, "… *Primarily, to the desirability of incentivising those who can possibly obtain fully independent legal representation to do so, for both their own benefit and that of the justice system.*"

i) How is it a benefit to litigants, when "Barrister B" encouraged me not to take an action that I eventually won? And "Barrister A" twice encouraged their client to take vexatious and querulous actions that they eventually lost?

ii) The presumption that the justice system benefits by ethical professionals before the courts only holds true if barristers are in fact routinely ethical. Barristers, "C", "D", "E", and "H" did not act ethically. The justice system is benefited by ethical people. Some lawyers will be ethical and some litigants-in-person will be ethical. It would seem entirely fallacious to assume that lawyers will be more ethical than non-lawyers.

c) At 0.14 it is suggested that, "… *where in-house counsel are involved, counsel acting in accordance with professional ethical responsibilities are present before the Court*." I have had only limited experience with in-house counsel, but here again, it is entirely

155 presumptuous to suggest that counsel will act in accordance with professional and ethical responsibilities just because that is what they are supposed to do.

d) At 0.15 it is noted the Courts' "… *general preference for independent counsel to appear in proceedings*." If what is said here is true (and in my experience it is true), that must change. Judges must actively put aside any such preferences, and in the interests of more equal access to justice, be more welcoming and open to hearing from the poor and the underprivileged who cannot afford independent counsel.

e) At 3.13 (b) Crown Law opine, "… *there are policy reasons to encourage people to use lawyers, in particular the obligations on lawyers as officers of the court to contribute to the expeditious and reasonable conduct of cases*." These alleged policy "reasons" lack any empirical underpinning. Do Officers of the Court routinely meet their professional obligations? Are barristers routinely more expeditious and reasonable than the laity? In my experiences with 10 randomly selected barristers the answer to both of those questions is a resounding "No!"

f) At 3.13 (c) Meredith Connel opine, "… *as self-represented litigants do a level of work comparable to an instructing lay person, rather than a lawyer*." And go on to suggest, "*Self-represented litigants, it was further submitted, generally lack the skill or legal knowledge to identify the relevant issues for the court and put their case in a succinct way*." Once again, where is the empirical evidence to support such bold claims? Lawyers seem to enjoy making and hearing disparaging comments about litigants-in-person. However, baseless slurs made by an 'in-group' about people from an 'out-group' is no basis for making Court rules that perpetuate those in the out-group having less equitable access to justice.

g) At 3.13 (g) Wyn Williams submit, "… *the legal system is built on the assumption parties are represented, and it places a disproportionate burden that is placed on the represented party when their opponent is a litigant in person…*" A legal system built on the assumption that parties will be sufficiently wealthy to employ counsel is an inequitable legal system that, it would seem, needs to be deconstructed and rebuilt. In my experience the disproportionate burden is on the litigant-in-person. Barristers, in my experiences, seem to relish the opportunity to get away with acting unethically when opposing a self-represented party.

h) At 3.15 (a) Meredith Connel suggest that, "*…incentivising self-representation would encourage frivolous litigation which they submit would crowd out other litigants' access to the courts…"* Awarding costs equitably cannot be said to "incentivise" self-representation. Being a litigant-in-person is an exceptionally difficult thing to do and most people, who can afford it, would prefer to engage a barrister. Meredith Connel has considerable hutzpah in suggesting that litigants-in-person would engage in more "frivolous" litigation than would wealthy litigants who use barristers. Are the poor morally inferior to the wealthy

and morally inferior to lawyers? Where's the data on that, it would seem preposterous, proposition? And what a horror it would be should the poor be made equally welcome in our courts. The "other litigants" who might be "crowded out" are the very wealthy and therefore deemed morally superior litigants who are willing and able to pay Meredith Connel's (no doubt eye-watering) fees. That submission by Meredith Connel is lacking in evidence, balance and therefore I suggest, merit.

i) At 3.15 (c) the Law Society observe, "…*some, albeit certainly not all, unrepresented litigants are unnecessarily persistent or querulous, consume significant resources, and cause unjustified costs and stress to other court users."* I don't doubt the Law Society's observation is correct. The germane question however is comparative. Are some, albeit certainly not all, represented litigants unnecessarily persistent or querulous, consume significant resources, and cause unjustified costs and stress to other court users? In my experience, they are.

j) At 3.15 (d) (iii) the Law Society posit, "*Litigants and the courts are generally better served when the parties have competent, independent legal advice and representation*." That may be true, but in my experience it is false.

k) At 6.74 the advice agrees, "… *with those submitters who emphasised that it is strongly desirable that all litigants who can obtain legal representation be incentivised to do so."* And go on to suggest. "*It would therefore be highly undesirable to have self-represented litigants be able to recover at the same rate as represented litigants, as that would produce a disincentive to seeking representation."* As set out previously, the strong desirability for all litigants to pay large sums of money to lawyers to represent them in court is not established empirically and may (if my anecdotal experiences are normative) be strongly undesirable. There is already an enormous disincentive to seeking representation, that being that it is beyond the purse of all but the very wealthy. There is no principled reason, in a system of justice where purportedly all are equal in the eyes of the law, to add to that already significant disincentive. The desirable disincentive should be for all potential litigants to avoid litigation. If the current advice is accepted by the Rules Committee there will remain a greater disincentive for the poor than for the rich. That is simply untenable.

l) At 6.77 it is stated. "*However, it is my assessment that, in most cases, incentivising representation in this manner is nonetheless appropriate, having regard to broader concerns of promoting the efficient administration of justice and, in that sense, ensuring all court users have access to justice."* That assessment is based on barristers promoting the efficient administration of justice. If my experiences were normative the opposite would hold true. The efficient administration of justice would be enhanced by disincentivising legal representation and encouraging parties to represent themselves. (I'm not suggesting that as a viable option but saying so simply to point out that justice is for the people and not for the lawyers and the judges and as such needs to be viewed through

157 the lens of ordinary folk and not through the lens of legal professionals.) If the Rules Committee really cares about all court users having access to justice, then the rules must not discriminate against those who can not or will not engage counsel.

m) At 9.3 it is suggested, "… *it might be appropriate to attach different weighting to the various considerations relevant to this issue in the context of appellate proceedings (particularly second appellate proceedings) in those courts than it is in the trial courts. In particular, the role of appellate proceedings in these courts in shaping the development of the common law, in which task objective independent counsel are particularly suited to assist, might justify further incentivising parties to seek external representation when undertaking proceedings in these bodies compared to in the trial courts*." Like stealing cars from a high-rise carparking building… that suggestion is wrong on so many different levels…

i) It is comparable to designing a public building and not including a wheelchair ramp because you believe it is justified to further incentivise paraplegics to walk up the stairs. The poor could never dream of paying a barrister to represented them in court, any more than a paraplegic could walk up stairs - if incentivised to do so! You may as well hang up a big sign outside the appellate courts saying "Only the Wealthy are Welcome Here."

ii) Again, suggesting that objective independent counsel are particularly suited to assist in shaping and developing common law is devoid of supporting evidence. On what basis can it be said that an intelligent, articulate, reasonable and well-researched litigant-in-person, who can maintain a relatively high degree of objectivity, would be any less suited in assisting an appellate court in shaping common law?

iii) The suggestion takes no account of the well-documented reports of bias against the self-represented that is perpetrated by trial judges. The self-represented will more commonly have need to appeal the decisions of primary courts.

iv) With the all the current obstacles in place, common law has indeed been shaped and developed by counsel representing the interests of their client litigants. In short common law has developed in accordance with the interests of the wealthy. Isn't it time to ensure that the common law develops in response to hearing about the interests of all people – the rich and the poor?

n) Footnote 134 is incorrect. I did include my name on my submissions and I did not express a desire for confidentiality.

20) In summary:

a) Lawyers have a vested financial interest in maintaining an entrenched (common law and/or Rules Committee endorsed) advantage over those who come to court self-represented.

b) Lawyers are nowhere near as wonderful as what lawyers would like the Rules Committee to believe.

158 c) Self-represented litigants are nowhere near as woeful as what lawyers would like the Rules Committee to believe.

d) The Rules Committee is comprised exclusively of lawyers and judges (who used to be lawyers). It is nothing more than human nature to tend towards having affection for people like you and ill-will (or at least, less good-will) towards those that are different. However, that in-group bias must not be the basis for establishing or maintaining discriminatory rules.

e) It is unprincipled and unacceptable for the Rules Committee to establish a costs structure that additionally disincentivises poor litigants from proceeding with meritorious claims or defences against wealthy parties, while providing less disincentives for wealthy litigants to proceed with frivolous, or vexatious, or meritless claims or defences. (Only a somewhat delusional belief in the impeccable ethics of barristers would see barristers turning down the handsome fees on offer from wealthy, but otherwise morally and/or legally bereft clients.)

f) The only principled approach is to have a starting point where all litigants are deemed equal in the eyes of they law (regardless of the category or band of the proceedings) and to leave Judges (in both trail and appellate courts) to determine costs with reference to the peculiarities of the case and the performance of the representative – be that a barrister or a litigant-in-person.

21) Thanks for listening.

Nāku iti noa, nā

Peter Stockman

Peter Gerard Stockman
s9(2)(a)

11 February 2022

The Rules Committee
C/- Anna McTaggart
Clerk to the Rules Committee
By Email to: RulesCommittee@justice.govt.nz

RE: Costs for Litigants-in-Person (Third Submission)

Tēnā koe Ms McTaggart and tēnā koutou katoa to the members of the Rules Committee,

1) I made submissions dated 25 November 2020 and after having the benefit of reading the advice to the Rules Committee dated 15 March 2021, felt compelled to write again to clarify some matters. I did so on the 27 May 2021. On receiving that letter then clerk Sebastian Hartley advised a further consultation paper was going to be released and suggested he would forward that paper once released. Unfortunately that didn't happen, and I only recently found out about the second consultation paper. Most graciously, Ms McTaggart has advised that I can make a late submission, and this is it.

2) I'll try not to repeat myself and assume the Rules Committee will view my previous two submissions in conjunction with this submission. Unlike most other submitters I have, on two occasions, been a successful self-represented litigant and hope that unique experience will motivate the Committee to give a modicum of additional weight to my submissions.

3) At paragraph [12] in the second consultation paper the Committee notes the submissions of Dr Toy-Cronin and concludes, "*This illegitimately disadvantages the unrepresented party and undermines the Court's policy of promoting settlement*."

4) The current costs rules clearly create an inequality and the proposed daily recovery rates go some way to righting that inequality. The gist of this submission is that it is wrong to correct an inequality only partially when there is no principled reason not to correct it entirely.

5) I submit that the daily recovery rates should be exactly the same for self-represented lay litigants, in-house lawyers, self-represented lawyers, Crown lawyers, and any party represented by counsel, regardless of the categorisation of the proceeding or if the proceeding is in a Court of first instance or an appellate Court. By having complete equality in those regards the illegitimate costs disadvantages are completely removed.

160 6) Obviously, there will be counter arguments to that position, otherwise the Committee could not have arrived at the draft rates of $500 and $1,000 per day respectively for self-represented litigants and in-house counsel. However, I submit that these lesser recover rates are not supported by sound legal principles or sound policy considerations. For Example:

a) The consultation paper suggests that work undertaken by trained lawyers with professional obligations justifies a higher rate for in-house lawyers.[1]

i) The training of lawyers doesn't justify a higher rate. If I engage a LLB or a PhD in law to represented me, it makes no difference to a costs award. I don't get greater costs on account of the training or qualification of the lawyer. Both an in-house lawyer and a self-represented litigant may know almost nothing about an area of law and will need to do extensive study to educate themselves. If the award of costs is now going to be for the time and effort in winning a meritorious case or defence,[2] then a deficit of training will tell for considerably more time and effort than would be required by a barrister with experience in that area of law.

ii) As I noted in my second submission having professional obligations is not the same as meeting them. There is no principled basis for higher costs for a lawyer when the lawyer may act unethically and lesser costs for a litigant-in-person whose conduct may be exemplary.

b) It makes no sense going back to actual costs[3] to determine the daily rate. If this happens the principle behind an award of costs goes back to out-of-pocket only expenses which undoes the reform which now considers time and effort expended i.e., opportunity costs.

c) The Committee considers that the nature of the costs[4] needs to be taken into account but doesn't expand on what consideration or weighting needs to be given to different natures of costs. I suggest it is axiomatic to say time is money. A highly remunerated medical professional works on a Wednesday (when she normally plays golf) to earn money to pay her barrister. A drainlayer's labourer researches law for four weekends in a row (when he normally goes fishing with his grandchildren) because he can't afford a barrister to represent him. Both have suffered opportunity costs. It is wrong to suggest the doctor's opportunity costs are worth more than the labourer's simply because the doctor's costs are seen as out-of-pocket.

d) The committee suggests that all parties receive an allowance for the nominal amount of work done and the recovery should be on the same objectively calculated basis.[5] But how

[1] At [6] (a) of the second consultation paper issued 16 September 2021
[2] At [2] of the second consultation paper issued 16 September 2021
[3] As at [6] (b) of the second consultation paper issued 16 September 2021
[4] At [10] of the second consultation paper issued 16 September 2021
[5] At [11] of the second consultation paper issued 16 September 2021

161 exactly would such an objective calculation be undertaken? It is submitted that by paying everyone the same amount of costs elegantly reimburses parties for their work in a fair and entirely equitable manner.

i) If an independent barrister charges $300 per hour and takes 3 hours for a litigation step and wins the case, then costs that are supposed to be set at about 2/3rds, would see the client being awarded $600 for that step.

ii) If an accountant represents herself and already knows a bit about the law, then she might take 6 hours for the same step and if successful is awarded $600 that could be fairly considered a 2/3rds payment for 6 hours of her time at her normal rate of $150 per hour.

iii) An engineer who knows nothing much about the law, but has some good research skills, might take 18 hours to complete the step. An award of $600 costs would see the engineer getting 2/3rds of her normal salary rate of $50 per hour.

iv) A person with no tertiary education might be able to complete the step in 36 hours. The $600 costs award would recompense them at 2/3rds of their wage of $25 per hour. The Committee is proposing to reimburse at about 40% of the lowest recovery rate which would see this person reimbursed $240 for that step i.e., $6.66 per hour. That is too low.

The committee quite correctly doesn't want non-lawyers to be paid the same as lawyers. However, I respectfully submit that the Committee is made up entirely of lawyers, or judges who were lawyers, and as such does not have a realistic appreciation of how much time it takes a lay person to successfully win at Court. Paying $500 per day for steps that a party represented by counsel would receive $1,270[6] is entirely inadequate.

e) The Committee justifies the proposed costs regime to incentivise parties to obtain representation.[7] This is based on an acceptance, in short, that lawyers are wonderful for our justice system and self-represented parties are woeful. That is somewhat at odds with the Committee agreeing with Dr Toy-Cronin[8] that such depictions are based on stereotypes which may well not be accurate. However, for the purposes of my point let's assume it is true that all lawyers are fantastic, and all lay litigants are horrid. That would mean that as a matter of policy the Rules Committee are mostly leaving in place a regime that still mostly inoculates a wealthy litigant from an unfavourable costs award in circumstances where that wealth represented party might otherwise settle or not proceed with an unmeritorious claim or defence. I suggest that position is morally indefensible. Such a policy is to the

[6] Category 1 in the District Court
[7] At [15] of the second consultation paper issued 16 September 2021
[8] At [18] of the second consultation paper issued 16 September 2021

advantage of the legal profession but to the disadvantage of all the rest of us. Moreover, trying to incentivise parties to obtain representation in that manner is a futile endeavour. The majority of New Zealanders simply cannot afford competent counsel to represent them in Court. Placing those people at further disadvantage will do absolutely nothing to change their financial situation. The Rules Committee can incentivise as much as it likes in that way, but that won't make one iota of difference to the affordability problem. If the Rules Committee wants to incentivise representation, then advocating for changes to civil legal aid, funding for community law centres, and encouraging low or pro bono work would all help. Maintaining most of an inequity, helps nobody and perpetuates the harm of many. But let's suppose the policy occasionally works. Say a man of very modest means becomes embroiled in a dispute with a public authority. The man threatens judicial review action but the lawyers for the public authority, although on very weak ground, aren't inclined to settle because the downside risk of paying his modest costs doesn't incentivise them to settle. The man is advised to employ a lawyer because he will win a much higher costs award. He does so by going into debt. He wins the case but finds that his legal bills amount to $100,000. He then realises that his costs award, that is supposed to be 2/3^{rds} actually only reimburses him $40,000. The man is left with $60,000 in debt that he can ill afford and now struggles to repay his debt and pay his bills. In the alternative he could have won the case as a litigant in person but would have presented some irrelevant evidence that wasted an hour of the Court's time. Maintaining an inequity as a policy to incentivise representation in Court is bad social policy and bad justice policy. The only people who actually benefit are lawyers who might earn handsome fees from those who can't really afford to pay. Had the man gone to Court as a self-represented litigant, the taxpayer would have to fund a little more for the Court's time and the judge would have to deal with some minor frustrations. Those are small prices to pay to ensure everyone is welcome in our Courts - the rich and the poor, the privileged and the underprivileged.

f) The Committee doesn't want to apply different rates to different categories for reasons of conceptual consistency and practicality.[9] That's doesn't seem to make any sense. Practically speaking, Courts routinely set categories. There can't be any problem continuing with that under the new regime. If a Court deems a proceeding to be category 2 then a losing self-represented litigant will pay for losing a proceeding of average complexity. But if the self-represented litigant wins that proceeding, he or she is only to be recompensed at the same rate as for a straightforward proceeding. There is no conceptual consistency with that approach unless the consistent concept is one of deeming the litigant-

[9] At [20] (b) of the second consultation paper issued 16 September 2021

163 in-person incapable of expending the time and effort necessary to reach the giddy heights of an average lawyer.

7) The Committee was seeking views on rule 14.2(1)(f). My view is that the rule should stand as it is. Costs are supposed to be a partial recompense and are never to act as a windfall. The same principle should apply to opportunity costs as to out-of-pocket costs. Cases will arise when a party wins without making much effort. Should a party happen to win with a paragraph of written submissions, no bundle of documents, no authorities cited, and a single sentence at the hearing, then represented or not, that cries out for an award of significantly reduced costs.

Thanks for listening.

Nāku iti noa, nā

Peter Stockman

28 January 2022

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COSTS FOR SELF REPRESENTED LITIGANTS

Starting point

1 I recognise that the Committee has determined that lay-litigants should be entitled to an award of costs when successful. Respectfully, there are compelling reasons for that and I need say no more about that.

2 I also agree that it is appropriate that there be a single rate payable to self-represented litigants. There is no conceptual basis for the introduction of categories for that would, as the rules are presently structured, demand something of a sliding scale whereby the requisite skill and experience of the "notional" lay litigant must, somehow, be recognised. That presents obvious difficulties at both conceptual and practical levels.

3 Further, I agree that the introduction of a costs category for lay, or self-represented, litigants does not require any adjustment to the time allocations. Those are set by reference to the time considered to be reasonably required for each step. In that sense, the allocations set the benchmark irrespective of who is attending to the steps in question. The actual time spent by a self-represented litigant is of no more relevance (in the ordinary run of things) than that of a solicitor or counsel engaged on the matter.

Daily recovery rate

4 I agree with the Committee's view that the daily recovery rate for self-represented litigants should be the same in each court. While there is a difference between the recovery rates in the District Court and the High Court, as presently enacted, that reflects the different jurisdictions of those courts and that High Court matters, generally, will demand the attention of more experienced lawyers who will, for that reason, cost more in the ordinary course of things.

5 That distinction does not arise in the case of self-represented litigants.

6 As emerges from the Committee's consultation paper, a balance must be struck between adequate compensation to self-represented litigants that satisfies the Committee's objectives but that, also, ensures that any award serves a purely compensatory purpose.

7 It is submitted, as the Committee has already recognised, that the daily recovery rate must be lower than category 1 in the District Court Rules. The reasons for that are, no doubt, obvious.

8 It is at the point of quantification that it becomes difficult. I have in mind:

(a) The principle that the recovery rate is designed to deliver no more than a contribution to reasonable costs actually incurred (although the concept of actual costs is, by necessity, expanding) which means that whatever the notional reasonable cost of attending to litigation by a self-represented litigant might be, it is only a contribution to that cost that should be recovered;

(b) It is extremely difficult to identify a benchmark, or reference point, for the actual cost of litigation to the notionally reasonable self-represented litigant is likely to vary markedly (and, of course, one of the traditional justifications to the lawyer-litigant exception to the "no costs" rule was that the reasonable cost of lawyers attending to certain work could be identified[1]; and

(c) It is, I expect, equally difficult to generalise litigants in person and identify a point whereby a daily recovery rate set at a certain point will not extend beyond compensation into "profit".

9 I would say that the stress and emotional commitment required of litigation is not a relevant factor in determining the appropriate daily recovery rate. Litigants who are represented are under the same pressures. I submit that they are not relevant considerations in this context.

10 Nor do I think the average or median wages to be of great assistance. They do not reflect what I expect to be a truly diverse range of litigants in person to whom the costs, particularly opportunity costs, will vary widely.

11 Some assistance might be derived from the daily rate paid to jurors under the Jury Rules 1990, namely $400 for every day after the first, and the Witnesses and Interpreters Fees Regulations 1974 which, for a day exceeding five hours, should not exceed $305.

12 The roles are very different, but all connote a degree of responsibility to the court and each is a participant in the civil justice process. Notable differences might be:

(a) The fees for jurors and witnesses contemplate actual presence in court, where there is no capacity to attend to other matters and no ability to prioritise other commitments, whereas the vast majority of attendances to most civil proceedings occur outside of the court;

(b) Jurors, arguably, assume greater responsibility to the court and are subject to greater scrutiny;

(c) Witnesses, similarly, are generally subjected to cross-examination and, again, intense scrutiny by the other parties and the court whereas a litigant does have a wide discretion in terms of how his or her case might be conducted (and to what standard); and

(d) The rates paid to jurors, or witnesses for that matter, are not required to accommodate a two thirds recovery only.

13 It is perhaps also relevant that few witnesses, other than experts, are paid a fee and in almost all civil cases the rules will not provide the basis upon which they are paid. It will be by private arrangement with the party calling that expert. The $305 provided for under the Witnesses and Interpreters Fees Regulations 1974 can, perhaps, be discarded for present purposes.

[1] *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 at 877 (CA)

14 That leaves, as a possible comparator, the rate paid to jurors of $400. For what it is worth, that might be compared to the median weekly wage for men to June 2021 (the median wage, generally, appears to be lower due to gender disparity) of $1,247 according to Statistics New Zealand[2]. Divided by five that would give a daily recovery rate of $250 and that would still have to allow for the notional two thirds contribution.

15 On that basis, a daily recovery rate is low as $165 could be justified (being two thirds of $250) but, instinctively, that does not seem realistic not least of all due to the difficulty applying median wages from a statistical point in this particular context.

16 My submission is that the appropriate daily recovery rate for self-represented litigants is properly set at $300 per day. That is going to seem niggardly to some people – but not all – and is a compromise that is consistent with the daily rate presently paid to jurors.

17 It is hard to predict how such a rate (or one of $500 for that matter) would affect litigant behaviour (for better or worse). I doubt it would encourage unmeritorious litigation for there would be unlikely to be any real expectation of "profit" at that rate nor any discouragement to the retention of counsel where that is a viable option. Conversely, it might not be high enough to discourage unreasonable behaviour by adversaries nor encourage settlement, but I do not agree that the process of fixing a daily rate, at legislative level, should take into account punitive or deterrent considerations. Beyond consistency with the policy concern that, usually, all that is recoverable is a contribution to actual costs, a costs scale, of itself, should not be seen as a means of influencing litigant behaviour. That, I submit, is the role of the courts by application of the set regime once it is enacted.

18 I note the reference in the consultation paper to the decision of Grice J in *Accident Compensation Corporation v Carey*[3] but submit that the adopting a percentage of the existing daily recovery rates does not recognise that an award of costs to a self-represented litigant is designed to compensate very different costs from the professional fees paid by a represented party.

In-house lawyers

19 I do not feel suitably qualified to make any meaningful submissions on the approach to corporate litigants represented by in-house counsel. For my part, having recent experience in a firm, I do struggle to see the distinction between representation of a corporate employer by in-house counsel and representation of a law-firm employer by an employed lawyer (as will usually be the case in the cited example of debt recovery). Both are likely to be paid salaries that are a built in, fixed, expense of the organisation.

20 It also occurs to me that, irrespective of the nature of the client, employed lawyers (and in fact those representing themselves as principal) owe certain inescapable obligations to the court and are liable to disciplinary response should their conduct of litigation fall short of professional expectations. Other than exposure to increased or indemnity costs, lay litigants do not bear the same obligations. None of which is said to detract from the abolition of the lawyer-litigant exception, but to underscore that there may not be any principled reason to treat in-house counsel, employed by a non-lawyer, differently to "in-house counsel" employed by a lawyer or firm of lawyers.

21 In some respects, it may be that this aspect of the discussion, namely the nature of duties owed by lawyers depending upon whom they are representing, is an unhelpful distraction. It is certainly the case that an aspect of professional fees charged by lawyers is the responsibility, and risk, assumed by the lawyer. To that extent, and to that extent only, those professional obligations are relevant to the discussion. I submit that they are not, beyond

[2] www.stats.govt.nz/information-releases/labour-market-statistics-income-june-2021-quarter
[3] [2021] NZHC 748

that, for in this context we are not concerned with the professional fees charged by retained counsel, but how a notional two thirds contribution to the actual costs of a proceeding might be awarded to self-represented litigants within the existing costs regime. I agree with that alternative view noted by the Committee at paragraph 42 of the consultation paper.

Crown lawyers

22 Primarily for the reasons provided in paragraph 43 of the consultation paper, I agree that Crown Lawyers are in a different category. If it is the case that the Crown Law Office does charge other government departments for its services, then, even if that is not universal, it is more akin to the relationship between external lawyer and client than an in-house one.

23 I do not think that the responsibilities borne by Crown Lawyers are such as to justify any difference in approach. To my mind, it comes down to the fact that, even though the litigant in question will often simply be named as the Attorney-General, the Attorney will be sued, or be suing, on behalf of a particular ministry or department of the Crown that Crown Law charges for its services.

24 In those circumstances, it seems to me that an award of costs would continue to be in accordance with the existing scale.

Rule 14.2(1)(f)

25 I submit that, with the proposed amendments to the rules, r 14.2(1)(f) be repealed:

(a) With the recognition that all kinds of costs are recoverable, as opposed to just those appearing in an external lawyer's bill of costs, the rule becomes very difficult to apply in practice and, to the extent it was always designed to do no more than identify an important principle underpinning the costs regime, is no longer necessary;

(b) In my experience the rule seldom requires consideration in practice given the rules are not designed to, and seldom do, lead to an award approaching actual costs[4]. If a relatively low daily recovery rate for self-represented litigants is adopted, that will continue to be the case (even if what actual costs comprise is a far more amorphous concept going forward); and

(c) All litigants incur costs greater than simply those appearing in lawyers' bills. Those additional costs take the form of opportunity costs (to greater or lesser degree), stress and, as put in the consultation paper, emotional commitment. Rule 14.2(1)(f) has the effect of limiting represented litigants to one kind of cost only whereas self-represented litigants are not. Going forward, the rule is likely to be anomalous.

26 In summary, I submit r 14.2(1)(f) has, and will continue to have little, practical effect and – at a policy level – may be becoming increasingly anomalous.

Partial representation

27 I agree with the proposal articulated in paragraph 52 of the consultation paper.

28 I expect this could be accommodated by a new r 14.3(2) (in additional to the necessary amendments to r 14.3(1)) that would, in effect, provide that notwithstanding the categorisation of a proceeding, at any stage of that proceeding the daily rate applicable to any steps

[4] In my experience, it was occasionally raised by a losing party to try and justify a reduction in costs by forcing the successful party to disclose its actual costs. I have no experience of that ploy succeeding.

undertaken by a self-represented litigant will be the "self-represented" category (be that a new category 4 or something else).

Appellate proceedings

29 It seems to logically follow that the enlargement of the reach of costs awards must extend to all courts including the Court of Appeal and the Supreme Court.

30 The Court of Appeal (Civil) Rules 2005 would require relatively amendment given they already utilise the daily rates provided for in the High Court Rules. The continuation of that approach is sensible and could be accommodated by amendment to r 53B whereby a new category of "self-represented appeal" is introduced and r 53C(1) would also be amended whereby the daily recovery rate for "self-represented appeals" is that provided for in schedule 2 of the High Court Rules.

31 For the same reasons that there is no need to alter the banding in the High Court, there is likely to be no need to alter the time allocations provided for in schedule 2 of the Court of Appeal (Civil) Rules.

32 Depending on what the Committee ultimately decides on r 14.2(1)(f), r 53A(1)(f) of the Court of Appeal (Civil) Rules must be similarly adapted.

33 The Supreme Court Rules 2004 do not contain prescriptive rules as to costs and it may well be preferable that it continues the same approach in the case of self-represented litigants by adopting a standard approach to costs in favour of self-represented litigants informed, but not prescribed, by the legislative amendments the Committee is presently contemplated. However, if it were thought desirable to prescribe for costs in such cases in the Supreme Court Rules, then there would be no reason that I am aware of to apply a different daily recovery rate (for the same costs are being compensated irrespective of the court in question).

34 Any introduction of time allocations in the Supreme Court Rules would, presumably, apply to all cases, not just those involving self-represented litigants.

Yours faithfully

Sean McAnally

3. Excerpt from 3/11/2022 - Meeting material - Materials for the Meeting of 28 November 2022

3. Costs for lay-litigants

For consideration – Returning Item: Refer Meeting of 23 March 2020 at Item 4, Meetings of 21 September 2020 and 30 November 2020 at Item 3, Meeting of 21 March 2021 at Item 4, Meeting of 28 June 2021 at Item 3 and Meeting of 27 June 2022 at Item 3.

Chair to lead the discussion

a. Costs awards for self-represented litigants.

b. Costs awards for in-house solicitors.

c. Amendment or repeal of r 14.2(1)(f).

4. Excerpt from 27/03/2023 - Meeting material - Materials for the Meeting of 28 March 2022

3. Costs for lay-litigants

For consideration – Returning Item: Refer Meeting of 23 March 2020 at Item 4, Meetings of 21 September 2020 and 30 November 2020 at Item 3, Meeting of 21 March 2021 at Item 4, Meeting of 28 June 2021 at Item 3, Meeting of 27 June 2022 at Item 3 and 28 November 2022 at Item 3.

Chair to lead the discussion

- Consideration of Draft Rules.
- Application in other Courts.