

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provides that a solicitor who is a party to a proceeding and acts in person is entitled to solicitors' costs, should be repealed);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 (Nilu.Ariyaratne@lawsociety.org.nz).

Yours faithfully



Herman Visagie
Vice-President