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ADLS CIVIL LITIGATION COMMITTEE

COMMENTS AND OBSERVATIONS ON THE RULES COMMITTEE CONSULTATION PAPER ON COSTS FOR LITIGANTS-IN-PERSON

1. The ADLS Civil Litigation Committee ("committee") wishes to assist the preliminary deliberations of the Rules Committee on the Initial Consultation Paper: Costs for Litigants in Person with the following comments and observations.

2. The committee comprises eight practitioner members with a range of civil litigation experience and one student member at the University of Auckland. More information on the committee can be found on the Auckland District Law Society website. The following comments and observations reflect the majority views of the committee.

3. Diverse views on the topics have been expressed by several members but we are aligned on two fundamental points:

   3.1 any reform should be effected only by primary legislation (see *McGuire*[1] at [86]); and

   3.2 further research is necessary before advancing consideration of the proposed reforms to seek as much information and empirical evidence and data as possible from other relevant overseas jurisdictions as to consequential behavioural effects on litigants.

4. Other questions (or sub-questions) may need to also be considered in conjunction with the fundamental reform issue posed in Q.1 of the CP. For example:

   Q.1A: '*What are the anticipated likely or potential consequences for society at large and for the legal profession, of such a fundamental civil litigation reform?*'

   And, as a corollary:

   Q.1B? '*What is the prospect of there being unexpected and unanticipated consequences including behavioural changes of litigants, of such reform?'* (Perhaps to reflect on the potential for 'unknowns' as they are sometimes called.)

5. It is our preliminary view that inclusion of Q's. 3 and 4 in the CP potentially confuses two distinct topics. Whether the existing two exceptions to the ordinary rule (covered in Q's. 3 and 4) should be reformed is a distinctly different topic in our view from the fundamental issue posed in Q.1. Although certain principled arguments may be common to both topics recovery of a contribution towards 'actual' costs incurred in a civil case is distinct from whether there is justification for retention of the current two exceptions. We view the current two exceptions as quite different from the issue of whether NZ should grant a right to enable LIPs to seek costs for their own time and effort in representing themselves in Court.

6. It may be the current two exceptions should be removed, in which case it would be more difficult to justify the reform posed to enable LIPs to seek costs when none are 'actually incurred'. It is obvious no invoice for work or services such as when performed for someone else would actually exist in the case of LIPs. On the other hand, if LIPs are granted a right to recover 'costs' despite

[1] *McGuire v Secretary for Justice* [2018] NZSC 116.)

none being actually incurred then it would be more difficult to justify a removal of the current two exceptions. But they are distinctly different issues and we consider they should be considered separately on principle.

7. At present, in the absence of the further information, data, and empirical evidence, which we consider is needed first in order to justify a shift from the status quo, it appears the short answers to the four questions posed in the CP at paragraph 3 should be:

   Q.1: No.

   Q.2: as the answer to Q.1 is negative this question does not require a response.

   Q.3: No.

   Q.4: Yes.

8. The following points made clear by the Supreme Court in the *McGuire* decision at [87] and [88] are important to emphasise:

   8.1 as other jurisdictions have abrogated the primary rule already there may be empirical evidence as to consequential behavioural effects on litigants;

   8.2 any such effects might be material to whether NZ should follow suit;

   8.3 if there was such evidence then it should be used as the basis for legislative action;

   8.4 if there is to be reform then it should occur only following appropriate consultation;

   8.5 implicitly, it may be that reform is not necessary or justified;

   8.6 any reform should be evidence based and effected by legislation as distinct from judicial intervention;

   8.7 the Rules Committee has on a prior occasion expressed the view that any such reform should be effected only by primary legislation (*McGuire* at [86]).

9. It may be worth repeating what was said in *McGuire* at [87] (d):

   "*… given the abrogation of the primary rule by legislation in the United Kingdom and by judicial decisions in Canada, there may be empirical evidence as to consequential behavioural effects on litigants which might be material to whether New Zealand should follow suit…*".

10. And further, as observed, by the Court expressly, at [87] (c) :

    "…arguments may be advanced for retention of the law as it stands.

11. For example, we are concerned at the potential for an increase in the appearance and use of 'McKenzie Friends' (as we believe is occurring in the UK) through their development as a form of paid para-legal advisor for LIPs in Court, as one consequential development which may occur through such reforms. (We comment further on this point below at paragraph 19.)

12. Another argument against the reforms may be framed around the potential for consequences such as briefly noted at f/note 34 of the Consultation Paper. At f/note 34 an LIP in the UK was apparently allowed 10,000GBP in costs for 1200 hours of research. It needs to be borne in mind by those who are perhaps out of touch with the current realities of legal practice in NZ that routine targets for employed staff solicitors in NZ law firms for annual billable hours is around 1150-1300 hrs. Thus an allowance of 1200 hrs to a LIP for 'research' in conducting their own case is similar to allowing a full year of billable work for a staff lawyer in NZ. That seems to indicate an unexpected level of generous indulgence to a LIP being paid for self-interested work in conducting their own case.

13. The Supreme Court acknowledged the importance of more information and data on the topic to aid and inform consideration of the possible reform. This is implicit in its comments in [87] (d) regarding the need for empirical evidence as to consequential behaviour on litigants in other jurisdictions. The Court clearly considered such evidence would be 'material' before a policy decision was made about whether there is a need for reform. After such material evidence is considered, and then only if it indicates clearly such reform is needed, do we consider there would be a need to progress to consider what specific form that should take.

14. As a reminder also we wish to restate the obvious:

    14.1 lawyers are required to satisfy the standards imposed and required to be qualified and approved to practise law in New Zealand (under the Lawyers and Conveyancers Act 2006, the NZ Council of Legal Education, and the Lawyers: Conduct and Client Care Rules 2008).

    14.2 Only then do lawyers have the right to represent other people and parties in our Courts.

    14.3 In the current system in NZ qualified lawyers can be expected to have invested significant sums of money in their legal education and qualifications to be able to practise law in NZ.

    14.4 NZ lawyers in professional practise are then subject to, constrained by, and obliged to adhere to, the ethical standards of the profession and the regulatory and legislative duties and constraints imposed on them.

    14.5 They are also required to conform to established requirements 'rules' and standards of conduct when appearing in our Courts.

    14.6 LIPs have no such obligations, ethical standards or constraints, or requirements of knowledge, or of fitness to practise.

15. As a regulated profession it is elementary lawyers have the right to charge for their professional services. They are also the only people recognised by law as having the right to appear on behalf of others before our Courts. It is a serious duty and one which carries serious obligations. That is one of the fundamental premises underpinning the concept of costs awards – (excluding considerations of expenses and disbursements). Obviously, LIPs have no equivalent justification to claim a 'right' to be paid for their own legal work. If there is a reform to allow LIPs to be paid

for their own work and effort in conducting their own case we do not consider the value of such work and effort should even be close to the level of qualified practising lawyers.

16. There is already an acknowledged right for a successful LIP to obtain compensation or reimbursement for legitimate expenses actually incurred by them in the course of conducting a successful case. Do we in NZ need to go further? Hence the question posed by the Supreme Court: What will the potential or likely behavioural consequences and effects be on litigants; and we add to that – also on our society at large and on the legal profession?

17. If a simple reform approach was adopted of allowing LIPs to seek costs as per the existing scales then such a reform shift would effectively risk enabling LIPs being paid at a lawyer's allowable rate, for their time and effort in conducting their own case. That seems unjustifiable in our view. Thus, as the CP recognises, just at what rate should they be paid and exactly for what time and effort, all becomes a complex issue. This point and the list of 9 factors to be taken into account is made amply clear at paragraph 23 of the CP.

18. In addition, should NZ also value and cost the time and effort of a represented party in preparing a case in conjunction with their lawyer? If a non-represented party can recover payment for their own time and effort then why not also represented parties who also usually put considerable time and effort into preparing their cases - all in addition to the time and work of their lawyer? For instance, the time and effort involved in preparing their witness briefs. Again, a complex issue arises as to how to value and cost such self-interested work. These are serious factors which need careful consideration.

19. It appears the UK has a system whereby an LIP may recover an hourly rate to reflect their financial loss or, if there is no financial loss, a fixed flat rate per hour. We consider research needs to be done into how this has worked out in practice, and whether it has resulted in fair and just outcomes for LIPs. Another 'for instance' issue is: has this resulted in a fair outcome for such people as retirees or those who are self-employed, who may spend significant time in preparing their case or assisting to prepare their case?

20. We understand and support the aim that calculation of costs after a case has concluded is to be "predictable and expeditious" as far as possible – with 'expeditious' perhaps being the operative word. For NZ to adopt an approach similar to that in the UK would mean an LIP must establish by evidence what financial loss they have suffered. This would potentially lead to a second "mini hearing" to deal with an LIP's costs, which will obviously add further to the cost and time of litigation. Again – we refer to the list of 9 factors in paragraph 23 of the CP.

21. Another point of view is that such a reform will possibly encourage a DIY 'give-it-a-go' approach to litigation in NZ. Given the recognised but anecdotal 'classic' DIY attitude in NZ, we are concerned creation of such a right to seek remuneration by way of 'costs' for one's own work and effort would also create potential flow-on effects not readily foreseeable at this point. For instance: one possible effect may be to encourage such 'DIY' LIPs to then offer their services to others as 'McKenzie Friends' for payment in return. Such a development may have arisen to some extent already in the UK?

22. We consider it elementary some unexpected and undesirable consequential effects on litigants both represented and LIPs, and on the legal profession in general, are potential if not likely to result if the reforms proposed are pursued in the absence of more information, data and empirical evidence. Hence our view the proposal for reform and the request for any further submissions should be delayed while such further research is carried out.

23. At this stage we consider the fundamental reform of conferring on self-represented litigants a 'right' to seek payment for their 'work' (as distinct from reimbursement for actual costs and expenses) is to go too far in the absence of reliable information, data and empirical evidence to justify such a move. In our view, such a reform may result in encouragement for litigants to conduct their own case in Court, with the prospect of a serious growth in the number of LIPs, in conjunction with adding complexity and litigation time and costs regarding having to deal with potential 'costs' claims by LIPs. These are all factors NZ needs to first seek as much information about, before proceeding further.

24. We consider the correct course to follow for any further consideration of this potential reform would be for the Rules Committee to first seek, obtain and collate as much data/information/empirical evidence on the topic regarding the experience in relevant overseas jurisdictions before progressing consultation further. This would enable a much better informed debate and more detailed consideration of the potential ramifications for NZ society at large and for the effect on the legal profession (if any) and how that in turn might yet reverberate through NZ society.