New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Sebastian Hartley
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By email: Sebastian.Hartley@justice.govt.nz

Dear Sebastian

Re: Rules Committee consultation paper: *Costs for Litigants-in-Person*

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 consultation paper *Costs for Litigants-in-Person* (**consultation paper**).

1.2 The Rules Committee is considering changes to the costs rules that apply to litigants-in-person in the District and High Courts. This review follows recent Supreme Court criticism that the prevailing rules – which prevent successful unrepresented litigants-in-person from being awarded costs but allow exceptions for lawyer-litigants or lawyers who are employed by a party – are difficult to reconcile, in principle, but are rules that ought to be considered at a legislative level, rather than by the courts.[1]

1.3 The Rules Committee has asked for responses to four questions:

a. Should the concept of "costs" be expanded beyond allowing partial recovery of amounts paid for legal services, thereby allowing litigants-in-person to receive an award of costs?

b. If so, how should the costs of litigants-in-person be determined?

c. If not, should costs be narrowed further, so that they must be out of pocket expenses, thereby preventing lawyer-litigants from recovering costs beyond disbursements?

d. Should an exception nonetheless still be made for employed lawyers acting for a party, and, if so, on what basis should their costs be determined?

1.4 While the Law Society has formed a general consensus as to key guiding principles, we have not agreed on a single set of recommendations; instead, we proffer alternative options for the Rules Committee to consider. As a general observation, this process has raised some

[1] *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

vexed issues and generated a dynamic discussion across our membership. It perhaps highlights the desirability of a broader, root and branch review of New Zealand's costs regime more generally.

1.5 This submission is structured as follows:

a. **section 2**: executive summary;

b. **section 3**: provides a background and some context to the current costs regime, both generally and as it currently applies to litigants who appear in person;

c. **section 4**: sets out relevant guiding principles and analyses different options against each of these principles;

d. **section 5**: considers the determination of scale costs for litigants-in-person; and

e. **section 6**: sets out the Law Society's recommendations.

2 Summary of the Law Society's submissions

2.1 The Law Society acknowledges a plurality of views within the profession. The existing costs regime reflects a compromise and an attempt to balance a range of competing policy considerations. It is inherently difficult to develop a single rule that reflects the policies underlying the costs regime, and it may be impossible to formulate a rule that achieves perfect consistency of treatment.

2.2 There is a general consensus that the treatment of lay litigants should promote the policies of: consistency with the principles underlying the costs regime; promoting access to justice; fair and equitable treatment of litigants; fairness between successful and unsuccessful parties; avoiding perverse incentives; protecting the integrity of the justice process and the deterrence of undesirable conduct. There is also a consensus that there is no principled justification for the lawyer-litigant exception.

2.3 Beyond that, there is a difference of views within the profession about what rule would best promote these policies. The following table summarises the different options for abolishing or retaining the primary rule, the rationale for each option, and the implications for the exceptions that currently apply to self-represented lawyers and employed lawyers.

	Abolish primary rule	**Retain primary rule**
Rationale	Only real basis for retaining rule is the indemnity principle – that awarded costs cannot exceed actual costs – but Part 14 is now based on a notional scale, so importance of actual costs is diminished.	Some utility in the indemnity principle as a way of ensuring that costs are reasonably incurred through appropriate use of professional legal representation.
Self-represented lawyer exception	Not needed.	Not justified.
Employed lawyer rule	Not needed.	Potentially still justified, but should not be unqualified.

Key policy change	If abolishing the indemnity principle, need to establish new ceiling for recoverability. This should be reasonableness / proportionality, in keeping with other aspects of Part 14 and the overriding objective. **Option 1**: • Where actual costs are incurred, recovery cannot exceed these; • Where no actual costs are incurred, recovery cannot exceed reasonable / proportionate costs for work, with an express power to reduce costs where the represented party has incurred additional expense as a consequence of the unrepresented party's approach. Acknowledge that this creates differential thresholds, but submit that difference is justified by fact that lawyers incurring actual costs are inherently disciplined by professional obligations not to charge more than is reasonable for the relevant work. **Option 2:** create a different scale for recovery of costs by litigants-in-person (eg Category 1A). This would recognise that the costs incurred by a litigant-in-person are not out-of-pocket costs.	Other than removing self-represented lawyer exception, no significant policy change required.

2.4 The Law Society also acknowledges a difference in views on the employed lawyer rule. The In-house Lawyers Association of New Zealand (**ILANZ**) remains of the view that costs should still be available to employed lawyers. The Law Society considers that if the primary rule is maintained, any exception for employed lawyers must be consistent with that rule and with the principles underlying the costs regime, and a universal rule may not be appropriate.

3 Context

Introduction

3.1 In New Zealand, while practising lawyers enjoy rights of audience in the courts, individual litigants are entitled to appear without legal representation in their own proceedings;[2] corporate litigants, however, are generally required to be represented by a practising lawyer in all senior court proceedings.[3]

3.2 The Law Society acknowledges from the outset that there is no universally agreed or perfect costs system to be adopted, and each system involves various trade-offs. Different common law jurisdictions have taken different approaches to the recoverability of legal costs and expenses. The consultation paper refers to New Zealand's "reasonable contribution" or notional model as sitting between the American "no costs" model and English "full costs" model.[4]

3.3 However, the framework for each system appears to rely on a similar dichotomy between the following:[5]

a. out-of-pocket expenses on account of legal professional costs ("**costs**");

b. out-of-pocket expenses on account of other necessary costs in the pursuit of litigation, such as court filing fees, service fees and counsel's travel and accommodation ("**disbursements**"); and

c. opportunity costs for the time of a litigant spent in connection with their pursuit or defence of a claim (including where the litigant is represented but is required to spend time in the preparation of their case, and where the litigant happens to be a lawyer).

3.4 Separately, New Zealand in common with most jurisdictions provides a separate regime for the reimbursement of witnesses' time and travel, which will at times apply to civil litigants. We refer to this further below.

Research and commentary on litigants-in-person

3.5 Litigants-in-person are an increasing feature of litigation before New Zealand courts and tribunals.

3.6 There is limited evidence as to the exact number of litigants-in-person appearing before the courts who are successful and would be potentially eligible for an award of costs. We have been aided by a 2009 Ministry of Justice commissioned report[6] and the 2015 PhD thesis of Dr

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2 Section 27(1)(a) of the Lawyers and Conveyancers Act 2006.

3 *Re GJ Mannix Ltd* [1984] 1 NZLR 309 (CA) which was recently followed in *Emborion International Ltd v Commissioner of Inland Revenue* [2018] NZHC 178; cf s.107(2) of the District Court Act 2016.

4 Consultation paper at [5]. However, it should be noted that this proposition is only strictly accurate at a high level of generality. The English model permits taxation of party and party costs at a "reasonable" level, which is generally below solicitor-client costs, with which party-party costs are often contrasted. There is significant variation between American jurisdictions, with substantial costs awards in a small number of state judicial systems. And the New Zealand reasonable contribution model, as set out in Part 14 and the relevant schedules, may in many cases amount to only a nominal contribution against actual reasonable legal costs.

5 See for example *Buckland v Watts* [1970] 1 QB 27, 37 per Sir Gordon Willmer (CA).

6 M. Smith, E. Branbury and SW Ong, "*Self-represented Litigants: a Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions"* (Ministry of Justice, July 2009).

Bridgette Toy-Cronin from Otago University.[7] We also draw on anecdotal evidence from the courts that the number of unrepresented litigants has been steadily growing over time.[8]

3.7 Dr Toy-Cronin has highlighted that the reasons for parties to litigate in person are complex and overlapping, and are influenced by problems in the legal market and misperceptions about legal services and the legal system. While costs appear to be a major factor in deciding to litigate in person, it was rare that litigants in persons' decisions were solely financial or driven by only one factor.[9] Dr Toy-Cronin therefore found it unhelpful to distinguish between litigants who "can't pay" and "won't pay" for a lawyer.

3.8 The Ministry of Justice study also highlighted the variety of factors influencing decisions by litigants to self-represent. These included cost, the unavailability of legal aid, a belief that the case was straightforward and the litigant knew their case better than a lawyer, and a previous bad experience with or distrust of lawyers.[10] The Ministry of Justice further highlighted the demographic make-up of litigants-in-person in Family Court proceedings in person.[11]

3.9 The Chief Justice (as she now is) delivered her Ethel Benjamin address on the issue of access to justice, with a particular focus on "who needs lawyers?".[12] In relation to unrepresented litigants, her Honour commenced with the following comments:[13]

> You might think that people arguing their own cases before courts is the system operating how it should, people are accessing the courts. But fundamental aspects of our system of justice are built upon the assumption that parties will be legally represented. This means that growing levels of unrepresented litigants are a challenge to the functioning of that system. Equally as important, is the fact that those who come before the courts unrepresented risk being disadvantaged by their lack of representation.

3.10 Her Honour also commented that:[14]

> Most judges and counsel would tell you that a trial with an unrepresented litigant will take far longer to hear than a trial where all parties are represented. Judges regard themselves as under a duty to do what they can to ensure that the unrepresented party understands what is going on in court and has a good and fair opportunity to present their case. Legal representation allows the hearing to proceed without this level of judicial intervention and also allows for more focused and direct production of evidence and argument of legal principle.

3.11 Several key themes emerge from this lecture:

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7 B. Toy-Cronin, "*Keeping Up Appearances: Accessing New Zealand's Courts as a Litigant in Person"* (University of Otago, PhD Thesis, 31 July 2015) https://ourarchive.otago.ac.nz/bitstream/handle/10523/6003/Toy-CroninBridgetteA2015PhD.pdf. See also B. Toy-Cronin "I Ain't No Fool: Deciding to Litigate in Person in the Civil Courts" [2016] NZ Law Rev 723.

8 Justice Winkelmann, "*Access to justice — who needs lawyers*?" (Ethel Benjamin address, 7 November 2014) (2014) 13 Otago L Rev 229 at 235; Justice Kós, "*Civil Justice: Haves, Have-nots and What to Do About Them*" (an address to the Arbitrators' & Mediators' Institute of New Zealand and International Academy of Mediators Conference, Queenstown, March 2016).

9 B. Toy-Cronin "*I Ain't No Fool: Deciding to Litigate in Person in the Civil Courts*" [2016] NZ Law Rev 723, 724.

10 Smith, Branbury and Ong, above n 6, at 11.

11 Smith, Branbury and Ong, above n 6, at 11 and 38.

12 Justice Winkelmann, above n 8.

13 Above n 8, at 237–238.

14 Above n 8, at 237.

a. An increasing number of litigants in New Zealand, and elsewhere, are unrepresented litigants;

b. The most common reason for the rise in the unrepresented litigant is because of a lack of money to pay a lawyer, particularly with the increasingly constrained remit of legal aid;

c. Some litigants appear before the courts in person because they want to, and some are "vexatious or querulant litigants, pursuing repeated and relentless litigation, ultimately without merit". The development of vexatious or querulant litigants in person should be discouraged;[15]

d. Court systems are not designed to support unrepresented litigants, who place great and disproportionate pressure on the courts in resolving them;

e. Representation for a party is central to the performance by a judge of his or her task; and

f. There is a tendency for judges to ask a represented party to assist the unrepresented party. But this raises its own issues, including the propriety of requiring the represented party to expend funds on legal fees for their lawyer to help the unrepresented.

3.12 Similarly, Venning J has commented extra-judicially:[16]

> While the overriding obligation of the Judge is to provide a fair trial, in doing so the Judge must maintain his or her impartiality. A Judge should not give the unrepresented litigant a positive advantage, nor should he or she give them legal advice or effectively conduct their case for them.

3.13 These issues are discussed further below.

The indemnity principle and the primary rule

3.14 The "primary rule" as referred to by the Supreme Court in *McGuire* is the basic rule that a successful litigant in person may recover disbursements but not costs. The Supreme Court recognised that this rule could be traced back many centuries, at least until Coke's Institutes explaining the Statute of Gloucester 1278.[17] The Court of Chancery appears to have had a wider discretion in relation to costs than the courts of law, including to award solicitor-client costs, but otherwise appears to have exercised its discretion on similar principles.[18]

3.15 The basis of the primary rule is often described as the "indemnity principle" which is applied to costs awarded at common law.[19] This principle was explained in the 1860 judgment of *Harold v Smith*:[20]

> Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the

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15 Not cited in the article, but see Joyce & Fotherby "*Dealing with Querulous Litigants – Part 1*" (2012) 1 JCivLP 66 and "*Dealing with Querulous Litigants – Part 2*" (2013) 2 JCivLP 185.

16 Geoffrey Venning, Chief High Court Judge "*Access to Justice – A Constant Quest*" (Address to New Zealand Bar Association Conference, Napier, 7 August 2015) at 5.

17 *McGuire,* above n 1, at [56].

18 See *Andrew* v *Barnes* (1888) LR 39 Ch D 133 (CA); AL Goodhart, *Costs* (1929) 38 Yale LJ 849, 854.

19 See *Malkinson v Trim* [2003] 1 WLR 463; *EMW Law LLP v Halborg* [2017] EWCA Civ 793, [2018] 1 WLR 52 (CA).

20 *Harold v Smith* (1860) 5 H & N 381, 385, 57 ER 1229 (Exch) per Bramwell B.

> damnification can be found out, the extent to which costs ought to be allowed is also ascertained.

3.16 In New Zealand, other relevant factors may impact on the extent of the indemnity, and (in the case of Calderbank letters) the party who bears them, but the indemnity principle to a greater or lesser extent continues to be recognised in most common law jurisdictions.

3.17 The corollary of the indemnity principle is that a party should not be able to recover expenses that have not been incurred. The indemnity principle was recognised and explained by the English Court of Appeal in 1910.[21] If a court orders a party to pay costs to a party who has not incurred any costs "*he would have been giving a bonus to the party receiving them*", which was said to be "*contrary to justice and common sense and also to the law as laid down in Harold v Smith*".[22] To put it another way:[23]

> The principle that party and party costs are only an indemnity – an imperfect indemnity, it is true, but never more than an indemnity – is so deeply rooted in our law that the proviso [of a provision] is put in for the purpose of preventing the earlier part of [the provision] from ever giving rise to a case in which costs could be made a profit.

3.18 The indemnity principle was summarised by the High Court of Australia in *Cachia v Hanes* as follows:[24]

> It has not been doubted since 1278, when the Statute of Gloucester introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant.

Policy reasons advanced for the indemnity principle and the primary rule

3.19 A number of policy reasons have been advanced for the indemnity principle and the primary rule. These were acknowledged by the Supreme Court in *McGuire*, which considered them "distinctly contestable".[25] We will return to the merits of each policy justification below.

3.20 First, as noted above, one key consideration of the courts is to prevent the costs rules being utilised in such a way that a litigant can make a profit from conducting litigation in person. For example, it has been said that "*the privilege accorded to lay litigants of making their own appearance was designed to save the litigants money, not to make them money*".[26] Just as the law of damages is limited to permitting litigants to recover actual loss suffered, it appears inconsistent to permit a litigant in person to obtain a windfall in the guise of a costs award.

3.21 Second, a key concern of the High Court of Australia in *Cachia v Hanes* was the equitable treatment of represented and unrepresented litigants. Litigants with legal representation are still required to undertake considerable work in the course of proceedings, such as in complying with their discovery obligations and working on their witness evidence:[27]

> If costs were to be awarded otherwise than by way of indemnity, there would be no logical reason for denying compensation to a litigant who was represented. That

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21 *Gundry v Sainsbury* [1910] 1 KB 645 (CA).

22 Above n 21, at p. 649 per Cozens-Hardy MR.

23 Above n 21, at p. 651 per Fletcher Moulton LJ.

24 *Cachia v Hanes* (1994) 179 CLR 403, 410-411 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

25 *McGuire,* above n 1, at [82].

26 P Lynch "*Cachia v Hanes*: *The Resurgence of the Indemnity Principle in Australia*" (1995) 13 Austl Bar Rev 177, 188 with reference to *Cachia v Hanes* (1991) 23 NSWLR 304.

27 *Cachia v Hanes*, above n 24, at pp 414-415 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

> would in some cases dramatically increase the costs award to a successful litigant. In corporate litigation of complexity, for example, a litigant may expend considerable time and effort in preparing its case. ….
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> … Putting to one side the question posed by the relatively rare exception of a solicitor acting in person, there is no inequality involved: all litigants are treated in the same manner. And if only litigants in person were recompensed for lost time and trouble, there would be real inequality between litigants in person and litigants who were represented, many of whom would have suffered considerable loss of time and trouble in addition to incurring professional costs.

3.22 Third, the courts have been alert to the possibility that unrepresented litigants impose additional burdens on the court systems and other participants, including opposing lawyers. As it was put in *Cachia v Hanes*, with reference to several articles and law reform papers:[28]

> Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognize that the presence of litigants in person in increasing numbers is creating a problem for the courts. It would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives. All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself. Even so, litigation involving a litigant in person is usually less efficiently conducted and tends to be prolonged. The costs of legal representation for the opposing litigant are increased and the drain upon court resources is considerable.

3.23 The High Court of Australia appears to have considered that the second and third factors could work particular injustice in combination: not only is a legally represented party unable to claim for their own time spent on litigation, but their lawyers can also be obliged to spend more time and charge the litigant higher fees if they are dealing with an unrepresented opponent.

Circumstances permitting a departure from the primary rule

3.24 *McGuire* recognised two traditional exceptions to the primary rule: the "lawyer in person exception" and the "employed lawyer rule". These are summarised below, together with additional circumstances where departures have been made from the primary rule on a case-by-case basis.

The "lawyer in person" exception

3.25 The lawyer in person exception is largely traced to the 1884 decision of the English Court of Appeal in *Chorley*.[29] *Chorley* has been the subject of detailed analysis in *Joint Action Funding* and *McGuire*, as well as by the High Court of Australia in *Cachia v Hanes* and *Bell Lawyers v Pentelow*.[30] The Law Society does not propose to repeat that analysis.

3.26 However, it is worth noting the observation of one commentator that the judgments in *Chorley* provide different and potentially inconsistent rationales for the exception and that there was no clear authority in support of the Court's conclusions.[31]

3.27 The lawyer in person exception has been subject to increasing criticism in recent years. It was doubted in Australia in *Cachia v Hanes*. It has been trenchantly criticised in Canada prior to

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28 *Cachia v Hanes*, above n 24, at p. 415 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

29 *The London Scottish Benefit Society v Chorley* (1884) 13 QBD 872 (CA).

30 *Joint Action Funding Ltd v Eichelbaum* [2017] NZCA 249, [2018] 2 NZLR 70; *Cachia v Haynes*, above n 24; *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29.

31 Lynch, above n 26, at pp 194-195.

the abolition of the general rule.[32] The New Zealand Court of Appeal sought to abrogate it in *Joint Action Funding* and the High Court of Australia definitively did so in *Bell Lawyers v Pentelow*.

3.28 In *Bell Lawyers*, the High Court dispatched the lawyer in person exception in emphatic terms:[33]

> [T]he Chorley exception is not only anomalous, it is an affront to the fundamental value of equality of all persons before the law. It cannot be justified by the considerations of policy said to support it. Accordingly, it should not be recognised as part of the common law of Australia.

3.29 The Supreme Court in *McGuire* felt constrained from taking a similar step in New Zealand as the majority considered there to be at least some rationale for the exception when compared to the primary rule.[34] The Court also noted, however, the importance of appropriate bodies (such as the Rules Committee) considering empirical evidence as to the consequential behavioural effects on litigants of reconsidering either the general principle or the lawyer in person exception.[35]

The "employed lawyer rule"

3.30 The "employed lawyer rule" predates *Chorley* and the "lawyer in person" exception.

3.31 The employed lawyer rule was recognised by the 1849 case of *Attorney-General v Shillibeer*, where it was held that the Crown would be entitled to costs even where it was represented by a salaried Crown solicitor (in this case a solicitor of Inland Revenue) rather than independent counsel.[36] The employed lawyer rule has been subsequently affirmed in a number of authorities.[37]

3.32 The rationale for the employed lawyer rule is that a salaried employed lawyer gives rise to genuine costs to a party in the same way as external counsel. While the costs arising from employing a lawyer are more difficult to quantify, this does not detract from the genuine existence of those costs.

3.33 The employed lawyer rule was endorsed by the New Zealand Court of Appeal in 1984[38] and again in 1998,[39] where costs were awarded in recognition of the costs associated with in-house lawyers.

3.34 The Supreme Court in *McGuire* doubted whether the employed lawyer rule could logically be maintained in the event that the lawyer-in-person exception was abolished, and thought this could create practical inconsistency.[40]

3.35 On the other hand, the employed lawyer rule has been defended as an application of the general rule rather than a true exception, because of the genuine costs incurred by a litigant

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32 R Flannigan "*Costs for Unrepresented Litigants: Principles, Interests and Agendas*" (2007) 33 Advoc Q 447 at 463.

33 *Bell Lawyers*, above n 30, at [3] per Kiefel CJ, Bell, Keane and Gordon JJ.

34 *McGuire*, above n 1.

35 *McGuire*, above n 1, at [86]-[88] and [94].

36 *Attorney-General v Shillibeer* (1849) 4 Ex 606, 154 ER 1356.

37 *Bell Lawyers*, above n 30, at [67], with reference to *Raymond v Lakeman* (1865) 34 Beav 584, 55 ER 761; *Registrar of Titles v Watson* [1954] VLR 111, *Commonwealth Bank of Australia v Hattersley* (2001) 51 NSWLR 333 at [11]-[12] and [17]-[25]. See also *Re Eastwood; Lloyds Bank Ltd v Eastwood* [1975] 1 Ch 112, 131-132 (CA).

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

39 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA).

40 *McGuire*, above n 1, at [85].

in employing in-house counsel.[41] And abolishing the employed lawyer rule on this basis, or requiring a detailed allocation of the employer's costs, expenses and overheads, has been described as "*to push abstract principle to a point at which it ceases to give results consistent with justice*".[42]

Other departures from the primary rule

3.36 In several exceptional decisions, some Australian and New Zealand judgments have permitted a non-lawyer litigant to claim costs. This has always been permitted by the general principle, although the precise grounds for departing from the general rule have not always been clearly articulated.

3.37 As noted above, witness allowances are provided for in a number of jurisdictions. In New Zealand this is provided for by the Witnesses and Interpreters Fees Regulations 1974, although this is widely considered to be out-of-date (not having been updated since 1988).

3.38 According to one article, several Australian first instance cases have permitted costs to litigants, whether represented or otherwise; however, in many of these cases it appears that allowances were made to the litigants by analogy with witness expenses for attending a hearing rather than by analogy with legal costs.[43]

3.39 One relevant development has been the development of "unbundled" services, whereby a lay litigant in person engages legal advice or assistance at key stages of the litigation. Where a litigant-in-person incurs such out-of-pocket expenses, these may be recognised as a cost or disbursement and recoverable.[44] One application was by Palmer J in the context of the *Stringer v Craig* litigation permitting the recovery of fees for legal advice and assistance on an indemnity basis.[45]

3.40 We also observe a partial erosion of the indemnity principle as a means of encouraging legal representation. The Court of Appeal has at times awarded scale costs in favour of litigants represented on a pro bono or "discounted" basis notwithstanding that the litigant has not paid and has no obligation to pay that amount of costs.[46] While such costs orders assume any shortfall in costs will be paid to the lawyers – and therefore technically comply with the primary rule – the cases create an expectation that legal fees that fall short of costs awards can be uplifted. The consequence of this development is that some parties may be already recovering more than their liability for actual costs. It also has the effect of setting scale costs as a guaranteed minimum fee for lawyers who represent litigants to a successful outcome.

3.41 While each of the exceptions above is outside the scope of this review, the Law Society considers it preferable that any exceptions be dealt with on a consistent and principled basis.

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41 S Hartley "Lay Litigants' Costs: Back to the Future? *McGuire v Secretary for Justice*" (2019) 25 AULR 263, 271; *Bell Lawyers*, above n 30, at [68] per Gageler J.

42 *Re Eastwood; Lloyds Bank Ltd v Eastwood* [1975] 1 Ch 112 (CA) at 132, with reference to *In re Doody* [1893] 1 Ch 129, 137.

43 Lynch, above n 26, at pp 181-184 and 197.

44 See *Working Capital Solutions Holdings Ltd v Pezaro* [2014] NZHC 2480.

45 *Stringer v Craig* [2020] NZHC 1021.

46 *Ye v Minister of Immigration* [2008] NZCA 191; [2009] 2 NZLR 596 at [360]; *NR v MR* [2014] NZCA 623 at [41]; *Marino v Chief Executive of Dept of Corrections* [2017] NZCA 2 at [3]; see too the High Court decision in *Chief Executive v Genet* [2016] NZHC 2541 at [26] where Williams J authorised a nominal amount of costs be paid to a lay advocate.

New Zealand costs regime

3.42 The term "costs" is not defined in the Senior Courts Act 2016 or the High Court Rules 2016. However, the Court of Appeal has referred to an award of scale costs in New Zealand as representing "a reasonable contribution to the costs actually and reasonably incurred".[47] The general principles underlying the costs regime are set out, for example, in rule 14.2 of the High Court Rules.

3.43 The current costs regime in New Zealand was introduced by the High Court Amendment Rules 1999. It differs from overseas systems because of its preference for awarding costs based on the estimated reasonable value of work undertaken in a case (subject to the indemnity principle) rather than by reference to actual expenses. In *Nomoi Holdings Ltd,*[48] Chambers J said of this system:

> I fully understand that, particularly in the last years of the old costs regime when the old scale had become increasingly out of date and parsimonious, it was reasonably common for the winning party, when seeking costs, to inform the court of the actual costs it had incurred. But it is no longer necessary, indeed it is inappropriate, for counsel to continue giving what is now irrelevant information on a costs application. To take into account a party's actual costs would be contrary not only to the principle enunciated in r 47(e) but also to the principle in r 47(g) which emphasises the importance of predictability and expedition in determining costs.

3.44 Costs are calculated notionally by reference to the complexity of the proceeding,[49] the categorisation of which then determines a daily rate.[50] A reasonable amount of time for items of work produced may be recovered, with "reasonableness" determined by reference to three "bands".[51] Once the complexity of a proceeding has been categorised and the bands for each procedural step are determined, the rules ignore who, in practice, has carried out the work.[52] Although in practice unlikely, a junior lawyer might undertake a 3C step or a Queen's Counsel carry out 1A work but in neither case would that change the notional value of the work for costs purposes.

3.45 The indemnity principle has continued to be applied in New Zealand. It is formally recognised in rule 14.2(1)(f) of the High Court Rules 2016 which provides that "*an award of costs should not exceed the costs incurred by the party claiming costs*". The indemnity principle would make it improper for successful parties to claim costs for work that was not undertaken. However, provided work was produced, its value is determined, notionally, by the rules.

3.46 While the New Zealand costs rules are primarily based on the premise that costs should be "predictable and expeditious" (r 14.2(1)(g)) there is an obvious tension with the anticipated proportionality of scale costs with reasonable costs anticipated by the rules (rr 14.2(1)(b) to (e)).

Developments in other jurisdictions

3.47 Other common law jurisdictions have varied in their treatment of the indemnity principle and the "primary rule":

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47 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [8].

48 *Nomoi Holdings Ltd v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC), at [34].

49 Rules 14.2(b) and 14.3.

50 Rules 14.2(c), 14.4 and schedule 2 to the High Court Rules (schedule 5 to the District Court Rules).

51 Rule 14.5 and schedule 3 to the High Court Rules (schedule 4 to the District Court Rules). The courts also have discretion to uplift under r.14.6(3)(a) if the work would have required significantly more effort than allowed under Band C.

52 Rule 14.2(1)(e).

a. In Australia, the primary rule has recently been re-affirmed by the High Court, albeit on the basis that the lawyer-litigant exception should be abolished;[53]

b. In the United Kingdom, the indemnity principle has been abrogated by statute insofar as it applies to the costs of unrepresented litigants, but otherwise remains a guiding principle in the rules as to costs. A similar approach has been adopted in Hong Kong.[54] The United Kingdom's statutory exception is itself limited, generally entitling litigants to a relatively nominal rate unless they can establish a genuine loss of income. The United Kingdom reforms have also occurred in a context where a represented litigant is permitted relatively full recovery of his or her legal costs. The English courts have also been willing to extend the *Chorley* exception to organisations such as law firms practising as limited partnerships; and[55]

c. In Canada, where the rule has been the subject of significant criticism,[56] it appears the courts have abrogated the primary rule preventing lay litigants recovering costs.

4 Policy, values, analysis

General principles

4.1 The Law Society considers that, in order to make meaningful reforms to the costs system, there ought to be an overarching set of goals which are accepted as the appropriate basis for a good costs system. Only once goals have been established can the various possible alternatives be evaluated in a systematic way. Any proposals should be tested against these goals to determine whether they would move the system closer to the ideal.

4.2 The current "general principles" set out in rule 14.2 of the High Court Rules represent the guiding values of the current costs regime.

4.3 In the Law Society's view, the ideal costs system should also consider:

a. The promotion of access to justice, or removal of barriers to justice;

b. Fair and equitable treatment of litigants;

c. Fairness as between successful and unsuccessful parties;

d. Avoiding the creation of perverse economic incentives; and

e. Protecting the integrity of the justice system by making provision for those whose conduct is unacceptable.

4.4 The Law Society also acknowledges the fundamental right of any litigant to have full access to the courts without the need for legal representation. This important right must and will continue to be respected by the courts and the legal profession regardless of which costs regime is ultimately favoured by the Rules Committee.

Consistency with the current general principles of the costs regime

4.5 Any amendment to Part 14 of the current High Court Rules 2016 must be assessed against the current guiding principles as to costs set out in rule 14.2.

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53 *Bell Lawyers*, above n 30.

54 E Kelly "*Litigants in Person in Civil Proceedings: Part III; Recovering Costs*" (2005) 35 HKLJ 309.

55 See *EMW Law LLP v Halborg* [2017] EWCA Civ 793, [2018] 1 WLR 52 (CA); permission to appeal refused [2018] 1 WLR 1189.

56 Flannigan, above n 32, at 463.

4.6 As set out above, the term "costs" is not defined in the Senior Courts Act 2016 or the High Court Rules. However, it is understood within the profession to mean a partial reimbursement of actual professional legal costs incurred. The only specific expression of this distinction in the rules is r 14.2(f) which provides that *"an award of costs should not exceed the costs incurred by the party claiming costs"*. Other examples serve to highlight this widely understood definition, however:

a. In terms of the High Court Rules:

(i) Rule 14.2(e) provides that *"what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs"*. This necessarily presumes costs are related to a lawyer having been paid to undertake work;

(ii) Rule 14.3 categorises costs by reference to the seniority and skill of counsel. Again, this presumes a lawyer was paid to undertake work;

(iii) Rule 14.6(1)(b) refers to an award of indemnity costs as being *"the actual costs, disbursements, and witness expenses reasonably incurred by a party"*; and

(iv) Rule 14.12 defines disbursement as meaning *"an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs"*. Again, this presumes that costs are for professional legal services.

b. In *Cachia v Hanes* the High Court of Australia referred to costs as being costs that are *"awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant"*.[57]

c. In *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*, the Court of Appeal referred to an award of scale costs in New Zealand as representing *"a reasonable contribution to the costs actually and reasonably incurred"*.[58]

d. In *Morton v Douglas Homes Ltd (No 2)*, Hardie Boys J stated that the aim of scale costs was "not to fix solicitors' and counsel's remuneration, but to impose on the unsuccessful party an obligation to make a reasonable contribution towards the costs reasonably and properly incurred by the successful party".[59]

4.7 New Zealand and English law generally prohibit the claiming of costs as damages. By this it is meant that a party to litigation cannot recover their legal costs as a head of damage. Instead such costs fall to be determined by the applicable rules of court, which is said to discourage overcharging by lawyers.

4.8 In *Chick v Blackwell*, Hansen J outlined that the policy rationale for not permitting costs to be recovered as damages is to encourage the exercise of restraint and to avoid undermining the costs regime.[60] There are exceptions to this regime, which are not relevant for present purposes.[61] In *Triezenberg v Mason*, Fitzgerald J referred to the legitimate distinction

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57 *Cachia v Hanes*, above n 24, at 409.

58 *New Zealand Venue and Event Management Ltd*, above n 47 at [8].

59 *Morton v Douglas Homes Ltd (No 2)* [1984] 2 NZLR 620 (HC) at 625.

60 *Chick v Blackwell* [2013] NZHC 1525.

61 See *Peters v Peters* [2013] NZHC 1061, (2013) 3 NZTR 23-004.

between *"a person entitled by contract to an indemnity for costs and one who is simply recovering costs as damages"*.[62]

Access to justice

4.9 The Law Society acknowledges the fundamental importance of encouraging access to justice, or removing barriers to access to justice. As was noted in the Law Society's earlier submission to the Rules Committee, the costs regime can have an important impact on access to justice.[63]

General comments

4.10 The Law Society acknowledges that access to justice is an issue around the Commonwealth. The phrase "access to justice" is also often uttered in the same breath as costs. For example, the Supreme Court in *McGuire* observed that *"[the] practice of awarding costs against a losing party disincentivises potential litigants and thus inhibits access to the courts*."[64]

4.11 Access to justice has been the subject of considerable debate in New Zealand recently. Venning J has remarked that *"unnecessary delay and cost impede access to justice"*.[65] Four years prior his Honour stated that *"the 800th anniversary of the sealing of the Magna Carta reminds us that the quest for access to justice has a long history"*.[66] He there echoed the sentiment that *"both cost and delay can lead to a denial of justice"* and went on to discuss the increase in the number of litigants in person and the difficulties they pose for judges.[67]

4.12 Lord Neuberger has sought to distil the essence of what is meant by access to justice as having:[68]

> … a number of components. First, a competent and impartial judiciary; secondly, accessible courts; thirdly, properly administered courts; fourthly, a competent and honest legal profession; fifthly, an effective procedure for getting a case before the courts; sixthly, an effective legal process; seventhly, effective execution; eighthly, affordable justice.

4.13 Further, Lord Woolf has remarked that:[69]

> [T]hroughout the common law world there is an acute concern over many problems which exist in the resolution of disputes by the … courts. The problems are basically the same. They concern the processes leading to the decision made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex.

4.14 These issues can be further explored in the context of New Zealand's current costs regime.

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62 *Triezenberg v Mason* [2019] NZHC 2125 at [43], citing *Beecher v Mills* [1993] MCLR 19.

63 See Law Society submission on *Improving Access to Civil Justice* dated 25 August 2020 at [2.10](g).

64 *McGuire*, above n 1, at [82].

65 Geoffrey Venning, Justice of the High Court of New Zealand "*Greater Efficiency in Civil Procedure*" (NZ Bar Association–Australian Bar Association, Joint Conference, Queenstown, New Zealand, 23–24 August 2019) at [45].

66 Geoffrey Venning, Justice of the High Court of New Zealand "*Access to Justice – A Constant Quest*" (NZ Bar Association Conference, Napier, 7 August 2015).

67 Venning J, above n 65, at 2 and 5.

68 Lord Neuberger "*Justice in an Age of Austerity*" (Tom Sargant Memorial Lecture, 15 October 2013).

69 Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Legal System in England & Wales* (Lord Chancellor's Department, London, June, 1995) at 4.

The costs regime and access to justice – two potential impacts

4.15 Legal costs have been recognised as a significant barrier to justice, as discussed in the Law Society's earlier submission on *Improving Access to Civil Justice*.

4.16 As the Law Society noted in that paper, the costs regime also can promote or impair access to justice in two divergent ways:[70]

a. First, the current costs regime can prevent access to justice by preventing a meritorious litigant from recovering their full legal costs from their opponent, as a result of which they will be obliged to bear a portion of those legal costs themselves. The lower the level of likely recovery – such as the low level of recovery under the current costs regime – the more acute this issue will be; and

b. Second, the risk of an adverse costs award can itself act as a barrier to justice. The higher the level of an opponent's potential recovery, the more acute this issue will be.

4.17 As will be apparent, these two factors pull in different directions – the ability of the successful party to more fully recover their costs can encourage access to justice, but the risk of being unsuccessful and facing a higher adverse costs award can at the same time discourage claims.

4.18 We will expand on each of these issues in turn in the context of the consultation paper.

Inability to recover costs as a barrier to justice

4.19 The extent of legal costs borne by a litigant impacts on their access to justice. Where a meritorious litigant can recover only a small proportion of their legal fees from their unsuccessful opponent – which can often be the case under the current costs regime – the litigant is left having to bear more of the legal costs themselves. This issue was highlighted by the Rules Committee in its recent *Improving Access to Civil Justice* consultation, using the example of lawyers telling potential clients that suing for $60,000 to $80,000 is "more trouble than it's worth".

4.20 Dr Toy-Cronin has noted that some lay litigants were unwilling or unable to instruct lawyers because they would be unable to recover their legal fees from the unsuccessful party:[71]

> It is not only the absolute cost of legal fees that is relevant, but the scale of the fees proportionate to the value of the claim. Where the stakes are low or of no monetary value, the litigant will lose money making their claim, even if successful. This is because the costs recovered are generally less than the actual costs incurred. They could perhaps afford some legal fees but cannot afford to lose money or do not want what would be at best a Pyrrhic victory – winning the case but losing money.

4.21 The inability to recover costs properly incurred is accordingly one way in which the costs regime can act as a barrier to access to justice and prevent litigants feeling able to obtain appropriate legal representation.

Threat of adverse costs as a barrier to justice

4.22 The prospect of an adverse costs award is sufficient to deter many potential litigants from going to court. As a result, they can be denied the opportunity to access the courts.

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70 See Law Society Submission on *Improving Access to Justice* dated 25 August 2020 at [2.10](g).

71 Toy-Cronin, above n 9, at 732-733.

4.23 Sometimes the level of costs is so high that litigation is uneconomic unless a substantial amount is at stake. While a party might be prepared to pay for legal assistance, the risks of adverse costs make the enforcement of rights impossible in many cases:

a. Lord Brooke posed the question "what are the obstacles to public access [to justice]"?[72] His Lordship answered with three "obvious" barriers, being *"the cost of courts …, the cost of lawyers … and, above all, the risk of having to pay one's opponent's costs if one loses, and the uncertainty at the outset of litigation as to how large those costs will be"*;

b. In *Hamilton v Papakura District Council*, Williams J commented on the *"desirability of ensuring that plaintiffs are not deterred from exercising their rights to litigate by the prospect of high costs awards in the event of their being unsuccessful"*.[73]

4.24 Against this, we acknowledge that a system based on scale costs that is agnostic towards actual costs (except where there is a contractual entitlement or egregious conduct by a party) allows prospective litigants to assess and plan for their potential exposure.

Discussion

4.25 To the extent that the costs regime is a barrier to accessing justice, the Law Society supports change. But it is necessary to consider whether a litigant-in-person being unable to recover costs is a barrier to access, or whether it is neutral. Conversely, whether abrogation of the primary rule would be likely to encourage those who would otherwise have legal representation to appear in person – or whether that too is neutral. In this regard:

a. The abrogation of the primary rule would increase the potential for adverse costs awards against represented parties in favour of litigants-in-person. If this increased risk were to disincentivise litigants (represented or otherwise) from pursuing or defending litigation against litigants-in-person, it may create a further barrier to justice, in the sense referred to above by Lord Brooke and Williams J;

b. The abrogation of the primary rule would not impact on the recoverability of expenses of litigants (in person or represented). We therefore see this factor as neutral; and

c. The Law Society agrees that litigants and the courts are generally better served when the parties have competent, independent legal advice and representation. We would not wish to see costs rules creating a perverse incentive whereby litigants opt to appear in person when they would otherwise have been represented. On the other hand, there is also a risk of reputational harm to the legal profession if cost rules designed by lawyers were perceived to be self-serving, which could make it more difficult, not less, to promote the value of legal advice and assistance to wary litigants.

4.26 Ultimately however, abrogation of the primary rule would not address the key contributor to the rising number of litigants-in-person, namely affordability. We do not see access to justice considerations as weighing strongly for or against the abrogation of the primary rule.

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72 Lord Justice Brooke "*Environmental Justice: The Costs Barrier*" (2006) 18(3) *Environmental Law* 341 at 345.

73 *Hamilton v Papakura District Council* HC Auckland CP391/95, 22 March 1999 at [8].

Fair and equitable treatment of litigants

4.27 A costs regime should treat litigants fairly and equitably. The legitimacy of the system is important. Any differentiation between litigants, including categories of unrepresented litigants, needs to be principled, transparent and grounded in common sense.

4.28 The Law Society agrees that there is no principled basis for maintaining both the primary rule and the lawyer-in-person exception. It creates an anomalous distinction between litigants that cannot be justified by principle or policy. As the High Court of Australia has said, it is an affront to the fundamental value of equality of all persons before the law.[74]

4.29 Subject to this qualification, the question whether the primary rule should be abrogated or maintained is more finely balanced.

4.30 One of the criticisms of the current system is that there are too many different costs regimes for various categories of litigants. That is said to lead to an uneven playing field, and perceptions of unfairness. A reformed system should strive to deal with all litigants even-handedly.

4.31 Some aspects of this principle favour abolition of the primary rule:

a. Inexperience and lack of independence already place many unrepresented litigants at a disadvantage. If they succeed in spite of this handicap, it is difficult to justify denying their efforts when determining an entitlement to costs. It is also inconsistent with a notional costs model to require evidence of actual opportunity costs;

b. The Law Society acknowledges that any change to permit litigants-in-person to recover costs (scale or otherwise) would likely require some definitional change from the status quo. That may require defining what is meant by "costs" generally and perhaps what is meant by "costs for litigants-in-person";

c. There would also need to be sufficient flexibility to ensure that unsuccessful litigants are not unduly penalised just because the opposing party appeared in person;

d. Opportunity costs are economic costs – whether they are incurred by a lawyer taking time out of their practice to pursue personal litigation, a corporate litigant deploying in-house resources instead of engaging external counsel, or a lay litigant devoting time to proceedings at the expense of paid work – even if they are not costs in an accounting sense (out-of-pocket costs), so are difficult or impossible to quantify; and

e. The costs regime is focused on the work produced or the steps undertaken, not who is completing that work. There are different perspectives on whether costs incurred in the engagement of in-house lawyers should be characterised as opportunity costs, or are better characterised as equivalent to the costs of engaging external counsel. This in turn reflects a spectrum of arrangements in the use of in-house counsel, from the redeployment of a corporate lawyer to assist with litigation preparation at one end of the spectrum to the maintenance of a dedicated litigation business unit (in-house "firm") at the other end.

4.32 Other aspects of this principle (relating to the fair and equitable treatment of litigants) favour maintaining the primary rule rather than risking even more unsatisfactory and unfair distinctions:

a. As discussed above, litigants in person are often inexperienced and conduct their proceedings inefficiently. The permitting of a litigant in person to recover costs may

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74 *Bell Lawyers*, above n 30, at [3].

itself create an asymmetry. Whether or not a client is represented by a lawyer, that client will nonetheless be required to commit significant resources to:

(i) instructing their lawyer;

(ii) reviewing and approving documents drafted by a lawyer;

(iii) undertaking discovery and providing documents to a lawyer for listing; and

(iv) preparing evidence and attending trial or hearings;

b. Unsuccessful legally represented litigants should not be penalised by having had an unrepresented party as an opponent. The costs system should strive for neutrality so that parties are left in the same or a similar position (both in terms of their own legal expenditure and any costs award for which they become liable) as they would have been had the other side had a lawyer acting for them;[75]

c. The current rule can therefore be seen as treating litigants fairly and equitably depending on the nature of the cost they have incurred. Costs rules are applied fairly and consistently to all litigants by limiting recovery to partial recovery of expenses actually incurred. In accordance with the indemnity principle, neither represented nor unrepresented litigants can recoup costs that have not actually been incurred. Further, no litigants can recoup opportunity costs for their time and effort spent in connection with litigation unless, as is currently the case, they are a lawyer litigant in person or they employ an in-house lawyer;

d. The abolition of the primary rule would risk permitting only litigants-in-person – but not represented litigants – to recover costs in respect of their time and efforts. There does not appear to be any principled basis for this distinction. Most litigants will incur considerable efforts in litigation, and it would not be fair or equitable to penalise litigants who instruct a lawyer by disallowing them costs that they would otherwise be entitled to if they were self-represented; and[76]

e. Permitting litigants-in-person to claim their opportunity costs also risks creating an unfair distinction with witnesses. Witnesses, who often have no stake in a case and may be giving evidence under legal compulsion, can also face significant opportunity costs in giving evidence. A witness's costs however will be limited to the relatively nominal sums permitted under the Witnesses and Interpreters Fees Regulations 1974. Why should a litigant be permitted to claim their opportunity costs but not a witness they have compelled to give evidence?

4.33 These factors are finely balanced. We will discuss the issues further below.

Fairness as between successful and unsuccessful parties

4.34 Related to the previous principle is the concern that some litigants face the prospect of adverse costs awards but are unable to obtain the benefit of costs awards in their favour. While there may be some cases in which this is justified (such as public interest litigation) these exceptions need to be based on sound principle.

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75 The particular risk is that a represented party may be put to additional cost when facing an unrepresented party who takes unnecessary steps, adopts an inefficient approach to litigation, or requires the represented party's assistance. Below in Part 5 we propose that if the primary rule is abolished, the Court should have a discretion to reduce scale costs awarded to a litigant-in-person to account for this problem.

76 See for example the comments in *Cachia v Hanes*, above n 24, at pp 414-415 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

4.35 Fairness between successful and unsuccessful litigants is a recurring factor in discussion of the current costs regime. The low recovery rates permitted by the current costs regime may result in a meritorious litigant recovering only a small proportion of their legal costs against a better resourced but unmeritorious litigant. This in turn may encourage self-representation.

4.36 While all litigants are entitled to claim disbursements, the table below sets out the differences in a party's ability to claim legal costs or risk in having them imposed, depending on the nature of their representation:

Representation	**Costs for**	**Costs against**
Legally-represented litigant	YES	YES
Litigant-in-person (LiP)	NO	YES
Unbundled services to LiP	PARTLY (as a cost or disbursement)	YES
Lawyer litigant	YES	YES
Legally-aided litigant	YES	NO

4.37 While these differences may be justified on the basis that costs can only be claimed by litigants who have incurred actual expenditure, they have also been the subject of criticism.

4.38 Costs can play an important disciplining role, albeit one that is also subject to the indemnity principle. In a seminal article published in 1929,[77] American Professor Arthur L Goodhart traced the history of cost awards in the English legal system and demonstrated how costs had evolved from their genesis as a means of compensation into an integral litigation management tool. He said:[78]

> The English law is essentially practical and is based on the pessimistic assumption that some litigants will resort to all possible technicalities and sharp practices to gain their ends if they are not prevented from doing so. It therefore makes adequate provision to see that a plaintiff will not find it profitable to rush into court with a groundless or trumpery claim on the chance that the defendant will prefer to pay this legal form of blackmail rather than incur the expense of fighting the case. It also makes provision so that it will cost a defendant dear to obstruct an action as long as possible, and, after judgment, to appeal to as many courts as are open to him, on the chance that he may tire out the plaintiff. It is true that under the English system a party is still free to raise a number of technical objections, refuse to admit anything, and force his opponent to prove facts which are not in dispute, but if he does so he will have to pay, and pay heavily. Substantial costs make it expensive for the party who adopts such tactics. These costs are an additional weapon of offense for the plaintiff with a just claim to present, and a shield to the defendant who has been unfairly brought into court.

4.39 Courts frequently use costs as a means of balancing conflicting interests (for instance, to compensate one party for late procedural changes made at the behest of another). The threat of costs can also encourage parties to make early settlement attempts either by insuring against an adverse costs order (defendants) or increasing the chance of indemnity

77 Goodhart, above n 18.

78 Above n 18, at p. 872.

costs (plaintiffs). In the current paradigm, however, the punitive use of costs remains subject to the indemnity principle – a party cannot be ordered to pay costs if the other side has not incurred at least the amount of costs being ordered.

4.40 The removal of the disciplinary influence of costs can create inequities by giving represented litigants an inequitable advantage over unrepresented litigants. It may also discourage genuine attempts at early settlement. According to Dr Toy-Cronin, the perception of some litigants-in-person was that their represented opponents were more willing to file appeals or interlocutory applications due to the absence of a risk of adverse costs.[79] While a represented litigant will still be deterred from bringing meritless interlocutory applications by the cost of legal fees and disbursements they will be obliged to incur, the disciplining influence of an adverse costs order can be reduced or avoided. On the other hand, the failure of the current costs regime to enable full cost recovery also limits the ability of represented litigants of limited means to recover their full costs in the case of repeated unmeritorious applications by a better-resourced opponent.

4.41 The Law Society also acknowledges that achieving symmetry is not an easy task and may require broader consideration. For instance, the threat of liability for disbursements alone can be oppressive when one party has the resources to engage expert witnesses or corporate litigation management services; this problem would not be solved by a change to the primary rule. There is also the vexed issue of querulous litigants who are often tempered by a requirement to pay security for costs – such an order would not be available if opposing parties had no right to recover scale costs against them.

Perverse economic incentives

4.42 It has been noted that "the privilege accorded to lay litigants of making their own appearance was designed to save the litigants money, not make them money".[80]

4.43 If the indemnity principle and the primary rule is to be abrogated, the ability to claim costs could generate a profit for litigants-in-person.

4.44 While the ability to claim costs will only apply to successful litigants, there are many circumstances where potentially minor infringements may occur that could give rise to litigation. These may include (for example) judicial review of low-level executive decisions or relatively minor breaches of privacy or human rights. The courts have the discretion to reduce costs in such circumstances (and parties to some extent can manage their exposure through Calderbank offers). Nevertheless, if the court system makes it profitable for parties to identify and institute proceedings for such breaches, this could impose a significant burden on the court system at the expense of litigants who have suffered more substantial harm or damage.

4.45 As well, there is a risk that the prospect of receiving a costs award may incentivise litigants-in-person to bring unmeritorious proceedings that they would not otherwise have brought. Lay litigants will often be less well placed to assess the merits of their claim if they are personally invested and do not have the benefit of legal training. Although costs may be awarded in the represented party's favour, that party will still bear a substantial proportion of their own costs, and the court may be reluctant to make an order of increased costs against a genuine if misguided lay litigant.

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79 Toy-Cronin, above n 7, at p.218.

80 P Lynch "*Cachia v Hanes*: *The Resurgence of the Indemnity Principle in Australia*" (1995) 13 Austl Bar Rev 177, 188 with reference to *Cachia v Hanes* (1991) 23 NSWLR 304.

4.46 There is a significant economic literature on the incentives provided by cost-shifting in litigation.[81] Consideration of these issues may be prudent in the context of the Rules Committee's current consultation and/or a broader consideration of the New Zealand costs regime.

4.47 It is also appropriate to consider the impact on access to justice should the rules encourage or incentivise numerous low-level lawsuits that could bring about a profit for their plaintiffs. The Ministry of Justice research paper on self-represented litigants in the Family Court found that many were self-employed or unemployed New Zealand European males with a corresponding capacity to dedicate time to litigating in person without sacrificing income.[82]

Unacceptable conduct

4.48 The other side of the access to justice coin is collective interests of the justice process. While costs should not be a barrier to litigants getting to court, all litigants also have a responsibility to conduct their litigation properly and in good faith.

4.49 The Law Society recognises that some unrepresented litigants are unnecessarily persistent or querulous; they consume vast resources, and cause unjustified costs and stress to others. They can also unfairly taint the reputation of other litigants-in-person and affect their reception by the courts and lawyers.

4.50 The courts and other stakeholders are entitled to be protected from vexatious claims and abuses of process and the Law Society supports the use of indemnity costs as a protective tool in such circumstances.

5 Calculation of costs for litigants-in-person

5.1 The second question posed by the consultation paper arises if the primary rule is abrogated. It asks how the costs of litigants-in-person should be determined.

Introduction

5.2 The Law Society acknowledges that a change to permit litigants-in-person to recover costs (scale or otherwise) would likely require some definitional change from the status quo. That may require defining what is meant by "costs" generally and perhaps what is meant by "costs for litigants-in-person".

5.3 If the primary rule is abrogated, care would need to be taken to preserve the indemnity principle where parties are represented. Otherwise, there would be no reason why a represented party could not seek an award of scale or increased costs that exceed indemnity costs. For example, a party could seek increased costs because another party took an unnecessary step or raised an argument that lacks merit. Without the indemnity principle, the increased costs would be payable and valid notwithstanding actual costs were less than the increased costs amount sought. Such an outcome risks equating costs with damages or penalties.

5.4 Care would also need to be taken as to how a proceeding conducted by a lay litigant would be categorised under r 14.3. There is some artificiality in categorising a case based on the

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81 See for example B Chen & J A Rodrigues-Neto "*Cost Shifting in Civil Litigation: A General Theory*" 2017 (https://www.rse.anu.edu.au/media/2023037/Ben-Chen-2017.pdf); C Helmers, Y Lefouili, B Love & L McDonagh "The Effect of Fee Shifting on Litigation: Evidence from a Policy Innovation in Intermediate Cost Shifting" (https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2016/wp_tse_740.pdf).

82 Smith, Branbury and Ong, above n 6, at 11 and 38.

experience of the counsel that would be required, if one or both parties is not represented. On the other hand, r 14.3 requires the proceeding to be categorised based on the nature of the case, and the actual experience of the lawyer who undertook the work is irrelevant; in principle the court could make that assessment even if one or both parties is unrepresented. That leaves the question whether a special category should be recognised for lay litigants, which we address below.

5.5 As a policy issue, there may need to be a conceptual distinction drawn between:

a. the general disentitlement of a represented litigant to recover more than actual legal costs (being out-of-pocket costs) on a policy ground; and

b. the proposed entitlement for lay litigants to recover scale costs akin to a head of damages where they have expended no out-of-pocket costs, while also recognising that the conduct of litigation is never completely costless.

Calculation method – Option 1: applying existing rates but with discretion to reduce costs

5.6 The costs awarded to litigants-in-person could be calculated using the existing rates, based on the ordinary categorisation of the proceeding. This proposal would ensure that unsuccessful parties are not unfairly prejudiced by having been on the opposing side of a litigant-in-person:

a. Decisions to categorise a proceeding and allocate time to be assessed against an objective standard (as the rules currently require) and not from the subjective vantage point of the litigant-in-person;

b. Represented parties who are liable to pay costs to a litigant-in-person to be entitled to seek a discount on costs payable where they can demonstrate they incurred excess costs due to their opponent's inexperience or lack of detachment, or where the approach taken by the litigant-in-person was not proportionate; and

c. The costs awarded to the litigant-in-person (which would otherwise be calculated according to the ordinary scale) would be capped at the level of reasonable or proportionate costs, as a substitute for the indemnity principle which otherwise caps costs at the level actually incurred.

5.7 The general principles already require costs to be measured against an external yardstick:

a. awards of costs must reflect the complexity and significance of the proceeding itself;[83]

b. what constitutes an appropriate daily recovery rate or reasonable time "*should not depend on the skill or experience of the solicitor or counsel or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs*".[84]

5.8 A similarly objective standard would make it immaterial whether a successful party was legally represented or unrepresented. It would assume that all work was undertaken by a lawyer having the requisite skills and experience required for a proceeding or step of that nature. The time actually taken by a litigant in person, or the complexity of the matter as seen through their eyes, would be irrelevant. This standard would ensure that an unsuccessful party was not penalised simply because the other side elected to self-represent.

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83 Rule 14.2(1)(b).

84 Rule 14.2(1)(e).

5.9 The inexperience of a litigant-in-person will also, at times, cause the other party to incur additional legal costs; for example, by pursuing meritless issues or introducing inadmissible evidence. Unsuccessful represented parties should have the amount of an adverse cost award reduced to compensate them for any legal fees over and above what they would have reasonably incurred had the other side been legally represented.

5.10 Rule 14.7(e) allows for costs to be refused or reduced in situations where –

> … the party claiming costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
>
> (i) failing to comply with these rules or a direction of the court; or
>
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or
>
> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules; or
>
> (v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding … .

5.11 In our view, these grounds do not comfortably fit the situation of an inexperienced litigant in person who has otherwise acted in good faith. We are concerned that the language expressed in r.14.7(e) could be misconstrued as criticising, or even implying misconduct on the part of, the unrepresented litigant.

5.12 We would favour a new sub-rule which recognises that proceedings can be more protracted when inexperienced litigants appear in person, but which does not attribute fault or blame. Courts should have the discretion to discount costs "*if satisfied that the unsuccessful party has incurred more legal costs than would have been the case had both parties been represented fully by counsel with the requisite skill and experience to conduct a proceeding of that kind*". For example, where lawyers representing a defendant have assumed procedural responsibilities that are usually undertaken by a plaintiff, the court should be able to reduce the unsuccessful party's costs liability.[85] This addition would be consistent with the spirit of the existing rules, but confer an express power to adjust costs without implicitly or explicitly criticising the unrepresented litigant.

5.13 We acknowledge a subsection of unrepresented litigants who bring vexatious or unmeritorious suits and support the existing grounds in r.14.7(e) continuing to apply to those situations. However, we also think it is important that the rules clearly differentiate between querulous litigants and litigants in person more generally.

Calculation method – option 2: different daily rate

5.14 Our preferred option would be to add a new category under r 14.3 which would then allow a discounted daily rate to apply to any costs recoverable by litigants in person:

> (1) For the purposes of rule 14.2(b), proceedings must be classified as falling within one of the following categories:

[85] In such a scenario, the unsuccessful represented-litigant would still be liable for the scale costs of undertaking that particular step (as they would be had the other party been represented and assumed responsibility for the work); however, to ensure neutrality, they would be able to recover any reasonable costs incurred above the notional amount for that step.

> Category 1A proceedings Proceedings in which a litigant appears in person in the High Court.
>
> Category 1 proceedings Proceedings of a straightforward nature able to be conducted by counsel considered junior in the High Court
>
> Category 2 proceedings Proceedings of average complexity requiring counsel of skill and experience considered average in the High Court
>
> Category 3 proceedings Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court

5.15 The new category could attract a recovery rate of $750 per day, which is equivalent to a salary of $180,000 per year (5 days x 48 working weeks x $750 = $180,000). This is generally consistent with the overall categorisation of proceedings which is based on skill and seniority of counsel.

5.16 We acknowledge that this proposal would involve a departure from the ordinary rule that costs are calculated based on the categorisation of the *proceeding* (which depends on an objective assessment of the experience required of counsel, and applies equally regardless of which party succeeds), and could be perceived as discriminating between represented and unrepresented litigants. On the other hand, it recognises that a litigant-in-person does not incur out-of-pocket costs.

Lawyer-litigant exception

5.17 There would be no need for this exception if the primary rule were abrogated, as all litigants-in-person would then be afforded the same entitlement to costs. However, if the primary rule is to remain, the lawyer-litigant exception should be removed. We agree that this outcome could be achieved by redefining "costs" to mean "out-of-pocket expenses", which would limit all litigants-in-person to recovery of disbursements only. Rule 14.17 of the District Court Rules 2014 would also need to be repealed.

5.18 If the primary rule is abrogated, costs for lawyer-litigants should be calculated on the same basis as all other litigants in person.

Employed lawyer rule

5.19 The Law Society does not have a consensus on this issue. (This is discussed in more detail at [6.10] – [6.20] below.)

5.20 The Rules Committee has also asked, if a distinction is to be made, on what basis employee lawyers' costs should be determined.[86] We would not support a method that relied on evidence of an employer's actual opportunity costs. For reasons already outlined in response to question 2, such an approach would be inconsistent with the current notional-costs model. If an exemption is to be retained, legal costs should be based on scale. And, if the primary rule is abrogated, costs for employed lawyers should be calculated on the same basis as all other litigants in person – for example Band 1 or Band 1A.

6 Recommendations

6.1 The Law Society recommends that one of the following two options be adopted.

[86] Consultation paper at [42].

First option– abolition of the primary rule

6.2 The first option considered by the Law Society is that:

a. The primary rule should be abrogated, so that all litigants-in-person (including lawyer-litigants and in-house counsel) can claim costs;

b. The same scale should apply to all litigants, whether represented or not, with greater flexibility to reduce costs to prevent inequities. Although, as an alternative, litigants-in-person, lawyer-in-person litigants and employed lawyers could be awarded costs at a lower rate prescribed by the amended scale, it would likely be sufficient to expressly confer a discretion to reduce costs awards if the steps taken are disproportionate to the proceeding.

6.3 We see the strongest arguments in favour of the first option as follows:

a. The current costs regime has already departed significantly from the indemnity principle, by limiting costs recovered in many situations to a notional or nominal contribution against legal fees;

b. The fundamental right of litigants to represent themselves in court proceedings should be recognised and encouraged by permitting them to recover costs where successful;

c. The primary rule creates unsatisfactory distinctions in principle between represented and unrepresented lawyers, which creates perceptions of unfairness concerning the legal system;

d. There may be legitimate reasons for litigants to act in person, often connected to their dissatisfaction with lawyers or the legal profession, that should be recognised by abrogating the primary rule;

e. Although abolition of the primary rule would mean that actual costs would not be in all cases an effective ceiling for costs recovery, an alternative ceiling of reasonable or proportionate costs could be substituted in circumstances where actual costs are not incurred;

f. The majority of litigants-in-person should not be penalised by reference to perceptions concerning a small minority of vexatious or querulous litigants-in-person; and

g. Existing exceptions and departures from the primary rule create further inconsistency which is undesirable as a matter of principle.

Second option – maintaining the primary rule and abolishing the lawyer-in-person exception

6.4 The second option is that:

a. The primary rule should be maintained.

b. The lawyer-in-person exception should be abolished.

c. The employed lawyer rule should be maintained in a refined form (albeit some members of the profession consider it should be abolished).

d. The indemnity principle should be maintained.

6.5 We see the strongest arguments in favour of the second option to be the following:

a. Abolition of the primary rule would create further unsatisfactory distinctions, by permitting litigants-in-person (but not represented litigants, and not witnesses appearing under compulsion) to recover their opportunity costs of being involved in litigation. It is inconsistent to severely limit the ability of parties to recover out-of-pocket legal expenses but permit the recovery of opportunity costs;

b. Abolition would create an unwarranted incentive for lay litigants to sue in order to make a profit for any infringement – however trifling – of their legal rights. While vexatious and querulent litigants may be a small minority of litigants-in-person, they consume a disproportionate amount of resources of the judicial system and represented parties;

c. Abolition could impose an unjustified burden on the court system by encouraging unmeritorious or minor suits by lay litigants.

d. The calculation of lay litigants' costs risks being either arbitrary or departing from the general principle that the determination of costs should be predictable and expeditious, both of which are at odds with the general principles underlying the current costs regime;

e. Introducing the risk of adverse costs awards in favour of litigants-in-person may create a further barrier to justice if it deters others from pursuing or defending an action;

f. Permitting the recovery of opportunity costs creates inconsistency with the law of contractual or tortious damages (limited to actual proven loss) and the refusal of the law to permit the recovery of "costs as damages"; and

g. The abrogation of the primary rule involves an unjustified and unprincipled interference with costs principles, which requires wider consideration and involves a serious departure from previously understood costs principles as they have stood for many hundreds of years.

Practical considerations

6.6 The benefit of consultation with the profession is that practical issues may be identified. In *McGuire*, the Supreme Court noted that the Court of Appeal in *Joint Action Funding* may have benefited from further consultation on several issues in relation to in-house counsel.

6.7 The Rules Committee may wish to consider two practical issues:

a. In relation to the employed lawyer rule, the position of Crown counsel. As employed lawyers, scale costs have generally been permitted to Crown counsel (including Crown Law) on the same basis as ordinary litigants under the employed lawyer rule.[87] But the Crown is one and indivisible,[88] regardless of whether Crown Law may issue invoices to other government departments. It is unclear if all costs to the Attorney-General or government departments would therefore fall under the employed lawyer rule, and the Rules Committee may wish to clarify this; and

b. Also in relation to the employed lawyer rule, the position of employed solicitors at law firms. This is addressed in more detail below.

87 *Attorney-General v Shillibeer* (1849) 4 Ex 606, 154 ER 1356.

88 *Commissioner of Inland Revenue v Wright* [2013] NZHC 476 at [34].

Lawyer-litigant exception

6.8 We concur with the High Court of Australia[89] and her Honour Ellen France J's dissenting view in *McGuire*[90] that there is no principled reason for treating lawyer litigants-in-person differently from other unrepresented litigants for costs purposes. The irrationality of this exception risks undermining the reputation of the legal profession and the integrity of the justice system more generally.

6.9 We do not read the majority of the Supreme Court in *McGuire* as being firmly in favour of retaining the status quo.[91] Although they pointed to some (contestable) public policy rationale for the lawyer-litigant exception,[92] the majority upheld the exemption primarily because, as it did not derive exclusively from the common law, any decision to repeal it was better left to the legislature or Rules Committee.[93]

Employed lawyer rule

6.10 Law Society members are divided on this issue.

6.11 ILANZ, which is a division of the Law Society, has not changed its position since this issue was considered in 2018. In summary, ILANZ concluded that:

a. In-house lawyers hold practising certificates like all other lawyers and are subject to the same regulatory oversight. While they 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 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 the case of an external counsel;

b. To differentiate between rules applied for in-house counsel in comparison with external counsel based only on their employment status is contrary to consistent rights and obligations across the profession;

c. The use of in-house counsel is a legitimate economic choice for entities, and it seems unreasonable for the rules to be interpreted in a way that punishes entities for what is essentially a commercial decision relating to how they are represented in court. This approach would in effect reduce competition and lead to inefficiencies across the market; and

d. ILANZ acknowledges that costs may be less than incurred through the use of external counsel and is not averse to the application of scale costs. However, ILANZ submits that not allowing recovery of any costs for the use of in-house lawyers appears to treat them as an inferior tier of lawyer. It notes the comments in *Commonwealth Bank of Australia* where it was expressly stated that in principle in-house lawyers should not be treated as second-class professionals, and that practitioners who carry on work as in-house lawyers are entitled to have their work assessed on the same basis as that of independent solicitors.[94]

6.12 The Law Society acknowledges that in *McGuire* the majority of the Supreme Court considered there to be a clear overlap between the primary rule exception that allows parties to recover the costs of in-house lawyers and the lawyer-litigant exemption; the Court saw no principled

89 *Cachia v Hanes*, above n 24, at 411; *Bell Lawyers*, above n 30.
90 *McGuire*, above n 1, at [90] to [93].
91 *McGuire*, above n 1, at [52] to [88].
92 *McGuire*, above n 1, at [82].
93 *McGuire*, above n 1, at [88].
94 *Commonwealth Bank of Australia*, above n 37.

basis upon which the employed lawyer rule could survive if the lawyer-in-person exception was abrogated.[95] However, despite its denouncement of the lawyer-litigant rule, the High Court of Australia in *Bell Lawyers* was satisfied that the rationale underpinning the employed-lawyer exemption was sufficiently distinguishable.[96]

6.13 If the primary rule is to remain, the employed lawyer rule should be consistent with both that rule and the underpinning principles of the existing costs system. We observe for instance that the use of in-house lawyers rather than external counsel raises similar cost considerations as the ones used to justify the primary rule. The cost of work undertaken by an employee of a party is also an opportunity cost to the litigant rather than an invoiced cost, which conflicts with one of the rationales for the primary rule.

6.14 The Law Society is also reluctant to support a universal rule. While some in-house legal teams operate independently from other parts of the business that is not always the case; many corporate lawyers assume multiple roles within an organisation and some hold key decision-making responsibilities.[97] It would be unprincipled for an employed lawyer to recover costs in circumstances that were not materially different from a lawyer litigant-in-person.

6.15 In our view, the test for when costs can be justifiably claimed by an employed lawyer should be consistent with the standard used to assess issues of privilege, where similar tensions can arise. These principles were outlined in *Miller* v *Commissioner of Inland Revenue*:[98]

> In my view the proper approach where such issue arises is to require the in-house practitioner to demonstrate affirmatively that he or she has been acting as a lawyer and not simply as an employee possessing specialist skills. If that is shown the purpose for which the document comes into existence will then be explored. But if not, there will be no occasion for considering [a claim of privilege].

6.16 If the employed lawyer rule is to be maintained, the Law Society recommends that this be formally recognised in the High Court Rules. The Rules should also specify the criteria required for the application of the employed lawyer rule, such as the employed lawyer holding a current practising certificate.

Employed lawyers of law firms

6.17 If the employed lawyer rule is to be maintained, we recommend that it should be clarified to exclude lawyers employed by law firms. Lawyers generally practice in partnerships or as sole practitioners and may use junior practitioners on such matters as firm debt collection. In these circumstances, law firms may seek to claim costs for their junior staff in reliance on the employed lawyer rule, rather than be caught by the litigant-in-person exception.

6.18 In the Australian context, this argument was considered by the Victorian Court of Appeal in the context of the High Court of Australia's judgment in *Bell Lawyers*.[99] The Court rejected the suggestion that a junior lawyer's costs fell within the employed lawyer rule. Its primary reason was that in cases where an employed lawyer represents (say) a government department, the party is separate and distinct from the solicitor on the record. That is not true of a law firm, where the firm is the solicitor on the record and the litigation is under the

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95 *McGuire*, above n 1, at [85]-[87].

96 *Bell Lawyers*, above n 30, at [50].

97 *R v Campbell (Alt sit R v Shirose)* [1997] 1 SCR 565 at [50].

98 *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC), 13,018 (per Baragwanath J); passage endorsed on appeal [1999] 1NZLR 275 (CA) at 296–297; also *Waterford v Commonwealth of Australia* (1987) 163 CLR 54; (1987) 71 ALR 673 at 683 (per Brennan J).

99 *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15.

control of one of the partners.[100] Further, allowing a law firm to recover fees when acting for itself would perpetuate the unequal treatment that *Bell Lawyers* sought to eradicate.[101]

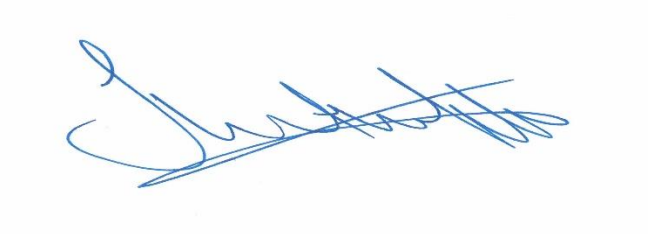
6.19 The Law Society supports this reasoning. The abolition of the lawyer-in-person exception should necessarily require the abolition of costs for law firms acting on their own behalf, including through junior staff.

6.20 Should the primary rule be abrogated, the costs for law firms acting on their own behalf should be treated in the same way as costs for litigants-in-person, rather than employed lawyers (if treated differently).

7 Next steps

7.1 The Law Society is grateful for the opportunity to provide feedback on the reform options and if the Committee has any questions, we would welcome the opportunity to provide further feedback. The convenor of the Law Society's Civil Litigation and Tribunals Committee, Daniel Kalderimis, can be contacted through the Law Society's Law Reform Adviser, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Yours sincerely



Jacqueline Lethbridge
NZLS Vice President

100 *United Petroleum*, above n 99, at [102].

101 *United Petroleum*, above n 99, at [108].