16 September 2022

Chief Environment Court Judge D Kirkpatrick
Environment Court
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By email: judge.kirkpatrick@justice.govt.nz

RMLA acknowledges the Herculean effort by the Court to update the Practice Note, and we are grateful for the opportunity to provide comment on the draft. RMLA appreciates the opportunity to provide input. The Association consulted its members in the preparation of this feedback. Responses received were from lawyers and expert witnesses, and each response was detailed, so while only a small number of members responded we are confident that this feedback provides the views of a range of practitioners from different backgrounds.

From a practitioner perspective, it is a welcome refresh, which has simplified the existing Practice Note 2014, and made it more user-friendly. There are no surprises in the document, which addresses a range of practice-related matters. We have identified the following issues as potentially relevant, but acknowledge that some of these issues would require further consideration (and consultation) before being adopted (and this should not delay the new Practice Note taking effect).

(1) Marae-based hearings

It would be helpful to have some default protocols that apply, such as powhiri, formal transfer of control of the Marae to the Court (within tikanga), scope for te Reo translation, related matters. Likely to require further consultation, but could be identified for future consideration.

(2) Requests for Alternate Environment Judges from the Māori Land Court

Where a case raises tikanga-based issues, there is scope for a request to be made for appointment of a Māori Land Court Judge, who holds a warrant as an Alternate Environment Judge. While this is identified by the legislation, it may be worth noting this in the Practice Note.

(3) Costs

It would be helpful if the practice note confirmed that costs will not normally arise on **direct referrals**, absent unreasonable conduct under the "Bielby" factors (or similar wording). This would integrate with MFE advice on cost issues.

Cl10.7 costs could refer to public interest factors being relevant to the Court's discretion on costs, for example, "..the proceeding raises relevant matters of public interest or importance.."

A more long-term project, and potentially more controversial, is whether the Court should adopt a schedule on quantum of costs, to create more certainty about cost (and litigation) risk for parties.

(4) Electronic hearings / Teams hearings

The Court may wish to address whether it is necessary (for virtual hearings, or for witnesses appearing virtually) for a witness that is giving evidence to confirm that they will not communicate with any person while giving evidence, and will not refer to any document or information source, except what is being referred to in the course of giving evidence. (Or similar wording.) This would address potentially inconsistent practices on this.

(5) New tech

Probably outside the scope of the Practice Note, but it would be good to see more use of technology to allow Counsel and representatives to refer witnesses to documents on screen (so that all participants can see the document referred to).

(6) Section 7 – ADR

Section 8(b) and (c) of Appendix 2 to the Practice Note 2014 provided examples of ranges of documents, correspondence, and communications that are subject to confidentiality and privilege of mediation. Such guidance was considered useful for lay participants that are not legally represented.

(7) Appendix 1 Practice Note 2014

A separate protocol could be included with guidance on the format of electronic bundles, including default format, folder structure, and naming conventions. This could be included as an Appendix, as was the case for the 2014 Practice Note.

(8) Planning instruments

While not strictly necessary, the Practice Note could include a direction to planning witnesses to identify both relevant and material (i.e. important) planning provisions, either by a statement in the witness brief, or by reference to some other document (such as an agreed statement under Cl8.2(b).

(9) Consent orders

Practitioners have noted some variance as to the extent to which affidavit evidence is required in support of consent orders sought by parties, for different Panels. This to some extent reflects variance in complexity and factual issues. May be worth guidance.

(10) Remote attendance at mediation

A default ability for parties and experts to attend mediation remotely is supported (unless otherwise directed by the Mediator). This would reverse the position identified at Cl7.4(a). This approach saves parties cost and may be more efficient. We recognize that some mediations must be attended in person, but this is recognized by the residual discretion.

(11) New exhibits

For cross-examination, a default requirement to provide advance notice of documents being put to witnesses at least 1 working day prior to the relevant witness giving evidence (otherwise requiring leave), unless the document is an agreed bundle, or otherwise produced in evidence.

(12) JWS

A requirement for experts to record reasons, even where matters are agreed, for example, at Cl9.4(g) "..including where agreement is reached.."

(13) Minor drafting

Cl 10.1(c) should refer to a "policy statement, plan or change.." (not just a plan change).

Two references to "Memorandum of Counsel" should preferably be amended to "Memorandum", to allow for representatives and lay parties that are not legally represented: at paragraphs [5.6](b)(i) and [5.7].

(14) Signed briefs

To avoid doubt, it would assist to confirm that witness briefs do not need to be signed as they will be confirmed by the witness on giving evidence. This promotes consistency with the HCR.

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Association for Resource Management Practitioners