

Morrissey Comments concerning draft report sent on 27 August 2012 at 5:46 PM

General Comment

The draft is well written, comprehensive and a pleasure to read. Justice Stratas and Professor Walker are to be congratulated for producing the document and thanked for the hard work required.

Although I have a few quibbles, comments and observations in the table below, my view is that the draft is pretty much ready to be sent to the translators.

Quibbles, Comments and Observations

Page of Report	Remarks
Page 2, Line 1	Change “every once and a while” to << every once in a while>>.
Pages 3 - 6	The description given of process of our committee is very important. First, it makes for transparency of the operation of the subcommittee. (e.g., the reference at page 6 to conflict of interest rules) Second, it spikes the guns of those who may later complain that they had no chance to make submissions to the subcommittee.
Page 9 – the terms determination and disposition in paragraph 5/ Recommendation 4(a) at Page 14	It is not for us to redraft Rule 3. This may be a premature comment. “Disposition” has a business or bureaucratic connotation whereby “dispositions” represent a number to be maximized. The word “disposition” is reminiscent of a factory concept like “throughput”. The word “resolution” might instead be used. Or, the words “on its merits” might be deleted from Rule 3 while retaining “determination”.
Page 15, Recommendation 6	The last sentence might be changed to read “However, the special needs ...can be met by developing practice directions within those <i>areas or ,if appropriate, through the case management process for individual cases.</i> ” New matter is in italics.
Page 18, Paragraph 4 – the Federal Courts belong to the community.	Thank you for including this observation in the draft report. I think this gets forgotten at times when parties ask for excessively long trials.
Pages 25 and 26 – Recommendation 10 – CAS to be authorized to apply for a vexatious litigant order.	I am in favour of giving CAS this power. Writing a rule to implement this recommendation is another matter entirely. I wonder, for example, whether CAS might be required to retain a Justice Department lawyer to handle such applications. I have a concern with giving this power to a non-lawyer civil servant, employee of CAS. The power conferred must be exercised judiciously and

	with care to avoid tossing people out of court. I realize that a judge must decide each case and that this is another safeguard for the public. Finally, in the light of section 40 of the Federal Court Act, I wonder whether the Rules Committee has the jurisdiction to enact such a rule.
Pages 27 – 29: Practice Directions / Recommendation 12	I have two comments about Recommendation 12: <u>First</u>, I wonder whether Recommendation 12 might be modified as it may appear to challenge the Chief Justices of our courts. Historically, the CJs have made practice directions and, in my experience, after consultation. At present, the procedure for making practice directions seems ad hoc. I have suggestions for Recommendation 12. (1) Change the first sentence to read “ The Federal Courts Rules should be amended to regulate the making of practice directions.” (2) Delete the last sentence. These changes preserve the essence of Recommendation 12 while giving it an agreeable flavour. <u>Second</u>, perhaps we need a total overhaul of practice directions whereby the Rules Committee has the final say on Practice Directions. I do not think that either CJ would be offended by such a suggestion.
Pages 30 and 35 /Access to Justice and extent of circulation of the report in respect of Recommendation 16	The persons to whom the report is circulated might include some of the poverty action or poverty advocacy groups. If a self rep does not have or cannot use a computer then a well organized and helpful website may not be of much use. Such groups may be able to assist with such questions. One such group that might be interested in our report may be PovNet in Vancouver, (www.povnet.org)
Page 28, Penultimate Paragraph and Page 32, final paragraph / Motions in writing or by personal appearance	I think the default position for motions in the Federal Court of Appeal is that of written submissions. The practice in the Federal Court seems different in view of,inter alia, Rules 34 and 35 which are unique to the Federal Court. In the Federal Court, motions require a personal appearance unless Rule 369 is invoked. My guess is that this is a point that escaped us when the former Federal Court was reconstituted in 2002 by sections 3 and 4 of the Federal Court Act. This may also illustrate a problem with the Rules. Motions in the Federal Court are the subject of Part 7 of the Rules together with, at least, Rules 30 – 37 !
Organization of the Report	The “Summary of conclusions and recommendations” might be moved from an Appendix at the end of the Report to an “Executive Summary” at the beginning.

