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Feedback on draft High Court (Improved Access to Civil Justice) Amendment Rules

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the draft High Court (Improved Access to Civil Justice) Amendment Rules (**draft Rules**), which amend the High Court Rules 2016 (**principal Rules**).

1.2 In providing this feedback, the Law Society acknowledges the significant work undertaken by the Rules Committee since 2019, which has culminated in its *Improving Access to Civil Justice* report,[1] and these proposed amendments to the principal Rules.

1.3 This submission has been prepared with feedback from members of the Law Society's Civil Litigation & Tribunals Committee, as well as the wider profession:

(a) Section 2 of the submission provides feedback regarding necessary amendments to the costs regime;

(b) Section 3 sets out the Law Society's views on using costs consequences as incentives for completing relevant steps in a proceeding in a timely manner;

(c) Section 4 addresses the desirability of providing timeframes for completing steps in the new process, which are triggered by the completion of a previous step; and

(d) The Appendix contains feedback on the drafting of specific rules.

2 Amendments to the costs regime

2.1 The draft Rules will not amend the costs regime in order to give effect to the proposed changes,[2] and in particular, the significantly different 'weighting' of where time will need to be spent by counsel in order to act in accordance with the proposed scheme.

2.2 In weighting the proposed amendments, we presume the allocation of time will need to be significantly more front-loaded than it is at present, and recognise that the precise

1 Rules Committee | te Komiti mō ngā Tikanga Kooti *Improving Access to Civil Justice* (November 2022).

2 The minutes of the Rules Committee's meeting of 27 November 2023 note (at page 4) the Committee agreed it would be "appropriate to review the costs schedules to reflect the proposed changes".

weighting of different steps will be a matter of some detail, on which reasonable minds can differ.

2.3 We invite the Rules Committee to progress any amendments to the costs regime in advance of the proposed reforms coming into force, so parties receive an appropriate contribution to the costs incurred in complying with the new front-loaded obligations.

3 Consequences for non-compliance

3.1 Some members of the profession believe it could be desirable for the Rules Committee to consider whether costs consequences should be used to incentivise parties to complete required steps in the proceeding in a timely manner as expected under the amendments, whether by amending rule 9.5A(2)(c) (which produces costs consequence for objecting to the admissibility of documents in a manner contrary to the objectives of the amendments), rule 7.48(2) (enforcement of interlocutory orders) or otherwise. Others thought it unnecessary as these consequences are already provided by existing case law or the general rules on costs in Part 14.

3.2 It appears desirable for the Rules Committee to consider the extent to which reference to costs consequences is considered necessary or helpful for the purposes of promoting changes in behaviour by parties and counsel, and giving judges the confidence to take a more robust approach to enforcing the ethos of the new scheme.

3.3 In addition to costs consequences, the Rules Committee could also consider amending rule 7.48(2) to explicitly allow for the making of 'unless orders', which would allow the Court to strike out a party's claim or defence, or disallow other steps in the litigation, unless the party complies with an order by a given date. This would provide an additional mechanism for enforcing, and incentivising parties to comply with, the new Rules. While such orders would necessarily be a last resort, it would formalise the position in *SM v LFDB*.[3]

4 Timeframes for completing steps in the new process

4.1 The draft Rules set out some timeframes for the completion of particular steps in the new process following completion of the Judicial Issues Conference (**JIC**), by working backwards from the trial or hearing date (with steps prior to the JIC provided for in the new rule 7.4, working forward from the date of issue of the statement of claim). As a result, there are likely to be gaps in the new process which would allow (as happens now) timetables to be extended at the request of the parties, and erode any time savings which could be gained by the new Rules.

4.2 We would recommend all steps after the JIC also work forward, and for the draft Rules to include presumptive timeframes for all steps after the JIC (noting, for instance, there is currently no default expectation as to when expert reports would be filed).

4.3 The Rules Committee could therefore consider amending the Rules by extending the timeframes in new rule 7.4 to each step of the new process after the JIC, with each step being triggered by the completion of a previous step in the process. This approach would:

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3 *SM v LFDB* [2014] 3 NZLR 494.

(a) enable parties to more easily demonstrate whether any delays were unreasonably caused by the other party to the proceeding;

(b) allow for those delays to be factored into costs awards (by reducing costs for the successful party, or increasing them for the unsuccessful party);

(c) encourage the progression of cases before a hearing date is allocated, and avoid cases from falling into abeyance in that time; and

(d) increase the likelihood of cases settling before the hearing date, or becoming ready to be heard if a backup fixture becomes available.

4.4 If the draft Rules are to be revised as recommended, the Registry could also be empowered to update relevant timeframes as the case continues, so parties have the opportunity to get back on track even where exceptions are made to certain timeframes.

5 Next steps

5.1 We would be happy to answer any questions, or to discuss this feedback further. Please feel free to get in touch with us via the Law Society's Senior Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā

David Campbell
Vice-President

Appendix – feedback on draft Rules

Rule	Comments
New rule 1.2	New rule 1.2 states "the overriding objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application by proportionate means". The "just, speedy, and inexpensive" formula risks setting up three conflicting objectives, and in the event of any conflict between the three, justice must prevail.[4] 'Justice' has been interpreted as avoiding the possibility of error by ensuring every procedural avenue is available to the parties to put all relevant material before the trial court.[5] This interpretation creates tension between 'justice' as a matter of maximalism in litigation, and 'speed' and 'inexpensiveness' as favouring minimalism. The reference in new rule 1.2 to achieving these three objectives 'by proportionate means' does not negate that view. It in fact tends to suggest there is such a tension, with proportionality being how the balance is struck. It would be more appropriate, for the purpose of giving effect to the spirit of these reforms, to view inexpensiveness and speediness (access to justice) as an ingredient of justice, together with facilitating the determination of claims according to law by a tribunal of fact seized of relevant evidence.[6] We therefore suggest amending new rule 1.2 to state "the overriding objective of these rules is to secure the just determination of any proceeding or interlocutory application by proportionate means, including by securing its speedy and inexpensive determination". This reformulation clarifies there is no tension between 'justice' and 'inexpensiveness' and 'speedy determination', but rather, that these are facets of enabling access to 'justice' that are – to a degree – in tension. While new rule 1.2(2) clarifies that the concept of justice should be read in this manner, a reframing of the overriding objective in rule 1.2(1), which more clearly spells out the change in ethos sought by these reforms, and which more expressly dovetails with rule 1.2(2) is desirable (particularly given the Rules now contain more extensive references to the "overriding objective in rule 1.2").

4 See Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters, New Zealand) at HR1.2.02.

5 *McGechan on Procedure* at HR1.2.02, citing *Halsbury's Laws of England* (4th ed, 1998) vol 37 Civil Ligation at [3].

6 This was a view present in earlier work by the Rules Committee on these Access to Justice reforms: see Clerk to the Rules Committee "Alternative Models of Civil Justice" (Access to Justice Working Group, Wellington, 29 August 2019) at [3]-[17].

Rule	Comments
Revocation of rule 7.1AA	The revocation of rule 7.1AA, which provides a useful statement of what case management does and does not apply to, could be seen as a backwards step in promoting the accessibility of the Rules (particularly for self-represented litigants). It could also lead to arguments by implication that these reforms intended for case management under Part 7 of the Rules to apply more broadly than it does presently. An amendment to rule 7.1AA to reflect the changes to the Rules is therefore preferable from an accessibility perspective.
New rules 7.4(3) and 7.5B(6)	New rules 7.4(3) and 7.5B(6) state that if there are "1 or more third or other parties" involved in a proceeding, the references to the "defendant" in subclause (1) of those rules apply to each additional party. However, it is unclear whether the timeframes in new rules 7.4(1) and 7.5B(1) would be suitable for third or other party claimants, as well as parties to representative proceedings. For example, a third party would need to see a defendant's pleadings and evidence before filing its own, and a third party plaintiff would want to see the pleadings and evidence of the primary plaintiff before filing theirs. We therefore invite the Rules Committee to give further thought to whether these timeframes should be revised in relation to third or other party claimants, and for representative proceedings.
New rule 7.4(5)	New rule 7.4 allows parties to apply for any of the matters listed in subclause (5) between the filing of pleadings and the scheduling of the JIC. However, we note the matters in subclause (5) would typically need to be determined before a statement of defence (**SOD**) is filed (for example, a Protest to Jurisdiction would typically be filed in lieu of a SOD, rather than after the SOD is filed). We therefore recommend amending new rule 7.4 to allow for the matters listed in subclause (5) to be determined before requiring a SOD to be filed.
New rule 7.5(6)	The Law Society supports the ability to have a JIC at the parties' request, or if the Court considers it desirable (as allowed under rule 7.2), and considers it would be preferable to amend rule 7.5(6) to ensure it is more closely aligned with existing rules 7.2(1)-(2).

Rule	Comments
New rule 7.5A	The Law Society supports the requirement in new rule 7.5A for the Court and the parties to consider settlement, or to minimise the issues in dispute through facilitation or mediation, noting the United Kingdom has also recently taken a significant step towards judicial encouragement of mediation and other forms of out-of-court dispute resolution.[7] However, it is unclear why the language in rules 7.5A(b) and (c) is inconsistent. We suggest amending these rules as follows: (b) whether any steps should be taken to settle the dispute ~~consider settlement~~ by means of facilitation, mediation or otherwise: (c) whether ~~there are~~ any steps ~~that can~~ should be taken to minimise the matters in dispute through facilitation, mediation, or otherwise:
Rule 8.4	We suggest amending the draft Rules in order to provide a mechanism for the Court to resolve challenges to claims to privilege or confidentiality in the context of initial disclosure, which would otherwise be dealt with under the Court's inherent jurisdiction.[8] Such an amendment could build in adequate time to resolve such challenges before witness statements are filed, and allow for matters to be heard on the papers by default. A document similar to a Scott Schedule could be used to reference any evidential disputes.
New rule 8.4(1A)	It would be helpful to clarify whether an objective test applies when determining whether a document is a "known adverse document", in order to capture documents on which reasonable minds may differ.
New rule 8.4(1C)	We understand the Rules Committee has previously considered whether the definition of "known adverse documents" should include a sentence which clarifies a party "is not required to engage in a general search for documentation". The Rules Committee ultimately decided to exclude this phrase from the definition because of concerns such a change will impose quasi-discovery obligations on parties at the beginning of a proceeding.[9] The Law Society nevertheless queries

7 These reforms are discussed in: Tony Allen "Amending the CPR to Accommodate the Impact of Churchill" (8 August 2024), available at https://learn.cedr.com/blogs/amending-the-cpr-to-accomodate-the-impact-of-churchill.

8 See *McGechan on Procedure* at HR8.4.04 and *Drive NZ Classic v LVVTA* [2020] NZHC 396, (2020) 25 PRNZ 289.

9 See the minutes of the Rules Committee's meeting of 9 October 2023, at pages 6-7.

Rule	Comments
	whether a qualification along these lines could assist in reducing the time and cost associated with disclosure. Without such a qualification, there is a risk that parties may revert to current discovery practices, contrary to the intention of the new scheme.
New rule 8.4A	As currently drafted, there is a likelihood that rules 8.4(1A)-(1C) and 8.4A(2) (and in particular, the reference to "specific documents") could completely foreclose wider searches for documents which are not likely to be within the knowledge of either party (as defined in the new rule 8.4). In this regard, we note the current discovery regime plays an important role in cases (such as complex fraud cases) where the plaintiff is required to prove an omission or absence of something, by helping to create a full picture of the relevant dealings between the parties. We therefore query whether rule 8.4A(4) should be amended to clarify that, despite the wording of rule 8.4A(2), the Judge may order further disclosure of any particular documents, including a category of documents, where it is necessary to enable the fair disposal of the issues before the Court. Such an exception could help ensure the Rules remain appropriate in the small category of cases (such as fraud cases) where it is necessary to cast a reasonably wide net. However, in providing for such an exception, a careful balance would need to be struck in order to avoid further disclosure orders becoming the norm, rather than the exception.
New rule 8.4A(2)	It would be helpful to clarify whether the 'good reason to believe' test in new rule 8.4A(2) is intended to be separate from the 'grounds for believing' test in rule 8.19.
New rule 8.15	The Law Society agrees with new rule 8.15. However, it is worth noting the early filing of an affidavit for disclosure will impose a significant burden upfront – this may prove to be challenging in cases filed under urgency (such as cases with pending limitation deadlines).
-	Consideration should be given to the interaction between the reformed disclosure regime and interrogatories. In the Law Society's view, the Rules should discourage the use of interrogatories as a means of obtaining the disclosure of documents or their contents in a more directed manner (as is done under the current Rules).

Rule	Comments
	The Rules Committee could consider amending the rules regarding interrogatories to: (a) Clarify that an interrogatory in the nature of a request for further disclosure is to be treated as a request for further disclosure, and need not be answered; or (b) To prohibit the use of interrogatories to obtain statements as to the contents of documents, and to clarify there is no requirement to respond to such interrogatories on the basis that they are vexatious or oppressive in terms of rule 8.40(1)(b).[10]
New rule 8.15(2)(d)	New rule 8.15(2)(d) should enable bulk listing by referring to a "class of document". This will allow parties to bulk list, for example, privileged legal files, which will significantly reduce costs.
New rule 8.15	It is important to have common numbering conventions in view of the need to file chronologies early in the proceeding. It would be helpful for the Rules to provide guidance about listing documents which clarifies, for example, whether the numbering conventions in the listing and exchange protocol of the High Court Rules apply,[11] or whether a convention similar to the Senior Courts Civil Electronic Document Protocol 2019 should be applied.[12]
New rule 9.5A(2)(a)	We presume new rule 9.5A(2)(a) seeks to address evidence which may be subject to some dispute as to its admissibility, but is not clearly inadmissible (rather than to suggest that evidence contrary to the Evidence Act 2006 could be admitted). If so, rule 9.5A(2)(a) could be reframed as requiring the parties to give serious thought to the use of section 9 of the Evidence Act as a means of admitting evidence and avoiding admissibility arguments, while reserving the right to submit on weight. The Rules Committee could also consider whether the Rules should assume some evidential objections as a trade-off for the efficiency gains in having a common bundle. If so, we would recommend a streamlined process for dealing with

10 We acknowledge this is already confirmed in case law (*Hirschfield v Clarke* (1856) 11 Exch 712), but we recommend expressly clarifying this point in the Rules in order to improve the clarity of the Rules.

11 In Schedule 9 of the High Court Rules 2016.

12 Senior Courts Civil Electronic Document Protocol 2019 (16 September 2021). While this Protocol would not apply to the requirements of the new scheme in its current form, we consider it provides a useful starting point.

Rule	Comments
	objections, for instance, by having all evidential arguments heard together and requiring the parties use a document akin to a Scott Schedule to list each objection with accompanying reasons/responses. Time should also be allocated to address any such objections before the hearing.
New rule 9.15	It could be useful to clarify the principles the Court should bear in mind when providing guidance under new rule 9.15 (which should include the overriding objective of the Rules, and the narrowing of the issues in dispute through the JIC, briefing, and chronology procedures).
New rule 9.36AAA(1)	New rule 9.36AAA(1) provides that a party may call only one expert witness on each particular topic identified at the conference. We assume this rule seeks to avoid a 'battle of the experts' (particularly where well-resourced parties are able to call multiple exert witnesses against a party with less resources). We nevertheless query whether expert witnesses should be limited by discipline, rather than by topic, as some cases could involve more than one discipline of experts opining on a particular topic, depending on how the 'topic' is formulated.
New rule 9.44	New rule 9.44 provides the Court "must" direct expert witnesses to confer (unless it considers the overriding objective in rule 1.2 is best achieved by a different direction). We suggest amending this draft Rule to provide the Court "may" make such a direction, so it is not required to do so in circumstances where conferral is unlikely to be helpful. It may be best to assess whether conferral could be helpful on a case-by-case basis, without a presumption in favour of requiring conferral.
New rule 18.4A	It is unclear why Part 18 proceedings should not be subject to case management in accordance with the proposed amendments to Part 7 (with necessary modifications to reflect the particular characteristics of Part 18 proceedings).[13] We acknowledge some types of Part 18 proceedings are closer to originating applications (i.e., in terms of the issues being well-defined and the proceeding being susceptible to summary case management). However, the fact that Part 18 applies to a wide range of cases, with a variety of procedural requirements, means it is difficult to assume a significantly different procedure should apply by default. Given Part 18 proceedings will, under these reforms, look similar to other proceedings

[13] We note the materials referred to in the 9 August 2024 letter from the Clerk to the Rules Committee do not specifically deal with Part 18.

Rule	Comments
	(given the emphasis on early identification of issues, and de-emphasis on oral evidence present in Part 18 proceedings), it could be argued that Part 18 proceedings should be treated in a similar manner to Part 5 proceedings. We invite the Rules Committee to give further thought to this point, and to consider whether Part 18 proceedings should in fact be subject to case management (via a JIC).
Schedule 1AA, new Part 2	Clause 3(2) of Schedule 1AA states the court may direct that 1 or more, or all, of the amendment rules apply in particular proceedings commenced before these new Rules come into force. We query whether this provision would then allow the Court to make such directions without the consent of the parties. In our view, there should be, at the very least, a clearer presumption in favour of the new rules applying only to cases filed after the commencement date. The Law Society is mindful parties may have commenced litigation (and may have budgeted and agreed on fee arrangements) on the assumption that one form of procedure applies. In such circumstances, the litigation strategies and any arrangements made by the parties could be undermined if the revised Rules are to apply partway through the proceeding. We do acknowledge this concern may not be so significant in practice – i.e., if a proceeding has commenced at the time the amendments come into force, it is unlikely the parties would suddenly be subject to the significant front-loading of obligations under the amendments. However, if there is to be an education campaign about the changes, and a lengthy lead in period, parties could be expected to make a choice about bringing their cases under the new or old procedure. It is also possible that some of the new duties arising from the amendments may not sit well with proceedings which are well-advanced at the date the amendments come into force. While Judges can be trusted to consider these issues sensibly and fairly, and the suggested wording directs attention to these considerations, a clearer presumptive steer is desirable. Thought should also be given to cases which are decided partly under a new costs regime, and partly under the existing costs regime. While costs should be decided based on the steps taken in the proceeding, it would be helpful to have more express guidance on this by way of transitional provisions.