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Re: Accessing Court Documents in Civil and Criminal Proceedings

The New Zealand Law Society (Law Society) is grateful for the opportunity to comment on the Rules Committee's consultation paper, *Accessing Court Documents in Civil and Criminal Proceedings, May 2015* (consultation paper). The consultation paper analyses the current regime for accessing court documents in both civil and criminal proceedings, identifies where reform may be needed, and sets out proposed reforms. Comments are invited on the effectiveness of the current rules and the proposed rules.

The Law Society has consulted its national Civil Litigation and Tribunals Committee and Criminal Law Committee, and invited feedback from the profession via its weekly e-bulletin *LawPoints*. The Law Society's responses to the Rules Committee consultation questions are set out below.

A. The existing rules (civil and criminal proceedings)

Issues identified with the existing rules
Issue 1: Structure and ease of understanding relationship between rules The Rules Committee considers the current rules are complicated and there is unnecessary repetition, and has formed the view that the rules can be simplified to provide a more streamlined structure that is easier to understand and apply [paragraphs 28, 32]. **Question:** Is the existing scheme in both the civil and criminal access to court documents rules easy to understand and apply? What improvements to structure would you suggest?
NZLS comment: Consolidation and simplification of the rules is welcomed. The draft rules are a significant improvement on the existing regime. The structure is appropriate.

Issue 2: The automatic release mechanism in the substantive hearing stage

The current 'fast track' mechanism in civil and criminal proceedings puts the onus on the parties and their lawyers and in practice may not adequately protect their (and third parties') interests in practice.

If the parties do not object, the rules do not reserve residual discretion for the registrar/judge to decline an application – the fast track mechanism thus bypasses application of the normal considerations [set out at paragraph 16 – including protection of confidentiality, privacy interests, privilege] for determining whether access should be granted [paragraph 36].

For these reasons the Rules Committee considers that the automatic release mechanism should be removed. All requests to access court documents should be determined by a judge with reference to the matters including the principle of open justice but also the fair and open administration of justice and the protection of privacy and confidentiality. The fact that a party has not objected is relevant to, but not determinative of, whether access should be granted [paragraph 37].

Question:

During the substantive hearing stage, should requested documents be automatically released unless a party objects to the request or unless there is an existing order restricting access?

NZLS comment:

No, the discretion reserved to a judge in the draft rules is appropriate. The points at paragraph 35 of the consultation paper are well made and the Law Society endorses them.

Issue 3: The different ways to apply for permission to access court documents

There are currently three application pathways, depending on timing, which are substantially the same.

The Rules Committee considers that it would be preferable to have one process to request permission to access court documents, regardless of what stage the proceeding is at. This would only apply to requests where permission is required. Any person would still have the right to access the formal court record, and parties would still be able to request the court file at any time (subject to restrictions by the judge). However, where permission is required to access the court file the Rules Committee proposes a single process to request access to the documents. This would simplify the structure of the rules and also make the rules easier to understand [paragraph 40].

Question:

Should the three separate request mechanisms be retained or should there be a single way to request permission?

NZLS comment:

The Law Society agrees that a single process is preferable, to streamline and simply the process.

Issue 4: The role of the registrar in deciding whether to grant access

While the existing civil rules provide that a judge generally determines an application, and a registrar will only determine an application if a judge directs, experience has shown that even where such a direction is made registrars tend to seek judicial involvement to determine the application. Therefore the Rules Committee considers that all requests for permission to access the court file should be determined by a judge [paragraph 43].

Question:

Should registrars be able to determine applications for permission to access the court file or should this decision be the sole preserve of judges?

NZLS comment:

There are often important balancing exercises involved in these applications. They should only be determined by a judge.

Issue 5: Lack of guidance for balancing of the matters to be taken into account

Neither the civil nor criminal rules provide any guidance as to the weight to be accorded to the matters that must be considered [set out at paragraphs 16, 44] in determining whether to grant access to the court file – it is a balancing exercise.

The Rules Committee has formed the view that while this approach to the balancing exercise should be maintained, and the weight given to each factor will depend on the nature of the request and the reasons for it, some guidance should be given as to what weighting may be applied to each factor at different stages of the proceeding. This is not intended to circumscribe the judge's discretion but rather provide an indication to applicants of the likelihood of permission being granted depending on the stage of the proceeding and what types of documents are requested [paragraph 46].

The consultation paper sets out the emphasis typically placed on the various factors – protecting parties' privacy and confidentiality interests, the orderly and fair administration of justice, the principle of open justice, etc – at the different stages of proceedings [paragraphs 47 – 51].

Question:

Should the rules include guidance regarding the weighting of the matters to be considered in granting permission at the different stages of a proceeding?

NZLS comment:

The Law Society considers that it would be useful to provide general guidance as suggested in the consultation paper, but does not support the proposed wording of draft rule 8(2). The Law Society is concerned that the strong language used in draft rule 8(2) ("must have particular regard to ...") will be taken by the judges as a directive and is likely to impact on the exercise of discretion. This goes further than the guidance suggested in the consultation paper. This issue could be addressed by removing the word "particular". The suggested weighting for different factors at different stages is however appropriate.

Issue 6: Freedom of expression as an explicit consideration

Conceived of as fostering the 'marketplace of ideas', it is not immediately clear how the freedom to seek, receive and impart information applies to the release of court documents [paragraph 54]. Just because the court possesses the documents does not automatically mean that the freedom to seek, receive or impart information requires the court to grant access [paragraph 55]. However, the Rules Committee is mindful that there can be issues of public interest where the freedom may apply to a greater degree than in many situations – where freedom of expression is aimed at fostering legitimate public interest, debate and further scrutiny [paragraph 56].

The Rules Committee has formed a preliminary view that the freedom to seek, receive and impart information is a matter that should continue to be considered in relation to applications for permission to access the court file, and is seeking comment on this.

Question:

Should the freedom to seek, receive and impart information continue to be a matter that is considered when determining applications for permission to access court documents?

Are there any other matters that should generally be considered?

NZLS comment:

The Law Society agrees that this freedom should continue to be taken into account. As the Supreme Court held in *Siemer v Solicitor General* [2013] 3 NZLR 441 at [156]-[158], the freedom protected by section 14 of the New Zealand Bill of Rights Act 1990 to seek, receive and impart information supports the freedom to contemporaneously report and discuss events in the criminal justice process. The Law Society considers that this also applies to civil proceedings. It is appropriately included in draft rule 8(1).

Issue 7: The application and content of the principle of open justice

Although the principle of open justice is often the starting point for an application to access court documents, there is no consensus as to what the principle actually entails. The media often uses the term to signify a right to know. However, the Rules Committee considers that, when used in relation to court proceedings, the principle has a more limited meaning [paragraph 58].

Although the principle of open justice may require different things and carry more or less weight at different stages of proceedings, and depending upon the competing interests at stake, the Rules Committee considers that it could be useful to try to give the concept some meaning in the rules rather than just referring to the concept generally [paragraph 61].

Question:

Should the principle of open justice continue to be a matter to be taken into account when determining applications for permission to access court documents?

Should the rules try to define the content of the principle, and, if so, how should this be defined?

NZLS comment:

The principle of open justice is a fundamental principle of our justice system and should be taken into account. While the Law Society agrees that it is of less importance when considering access to court documents before trial, rather than at the trial or judgment stage, it nevertheless deserves consideration at all stages. The suggestion in the draft rules at 8(1)(c) is sufficient and this approach is preferable to any attempt to define the principle further. There is an existing body of case law in New Zealand and overseas on what the principle of open justice means (see, for example, *Scott v Scott* [1913] AC 417) and reliance on case law, rather than including a definition in the rules, will enable the principle to be adapted to the demands of individual cases and to continue to evolve if appropriate.

Issue 8: The protection of private information and commercially sensitive information

Disclosure of private facts and commercially sensitive information is considered to be the price that is paid for having the court determine legal disputes [paragraph 62]. However, the Rules Committee considers that private facts about individuals or commercially sensitive information that are not directly relevant to a proceeding should not unnecessarily be disclosed before or after a proceeding. This is not an absolute principle and must be balanced against the other factors, including open justice and freedom of expression. However, the Rules Committee considers it appropriate to include this additional factor to make it clear that the effects of the disclosure of the type of information on the general court system should be borne in mind [paragraph 64].

Question:

Should the protection of private facts and commercially sensitive information be an additional principle?

NZLS comment:

The Law Society agrees that the protection of private facts and commercially sensitive information should be an additional principle. It is relatively common for the courts to facilitate the protection of privacy interests and commercially sensitive information through orders that the court file not

be searched, as well as restrictions on disclosure of discovered documents, evidence, submissions and the full judgment.[1] These interests have a value deserving of protection in their own right.

Another reason to protect such interests is to encourage confidence in the court process and to reduce the role that concerns about the protection of commercially sensitive and private information play in the decision to use private arbitration instead of the court process. It is important to our legal system that sufficient cases are determined by our courts to provide an adequate body of case law to guide businesses, the public and the profession, and protecting private information is an important part of that.

In addition, litigation allows damaging and/or embarrassing allegations and information, which may ultimately be found to be untrue, to be publicly ventilated, without the risk of liability. Not all litigants behave responsibly and this has the potential to cause serious harm and distress to parties as well as non-parties, irrespective of the ultimate outcome. It is appropriate to prevent the court process from being used to cause unnecessary harm, by recognising and giving weight to privacy issues.

Issue 9: The right to a fair trial as an additional consideration in the criminal context

One of the significant aspects of the criminal rules re access to court documents is the need to consider the defendant's right to a fair trial [paragraph 65].

The courts have drawn a distinction between fair trial rights, which relate to the fairness of the procedure, and the open and fair administration of justice, which is concerned more generally with the operation of the proceeding, with court proceedings generally and the maintaining the functioning of the justice system. Conducting a trial in the media is inimical to the proper operation of the justice system and the determination of legal rights by the courts [paragraph 67].

While in civil proceedings the principle of orderly and fair administration of justice may encompass rights to a fair trial, in the criminal rules there is a distinction between the right to a fair trial and the orderly and fair administration of justice. Consequently, the Rules Committee is of the view that the right to a fair trial should continue to be a separate matter to be considered in requests to access criminal documents, and is seeking comment on this [paragraph 68].

Question:

Should the right to a fair trial continue to be a matter that is considered when determining applications for permission to access criminal court documents?

Are there any other matters that should generally be considered?

[1] *Catley v Waipa Corporation Ltd* HC Auckland, CIV-2004-463-494, 16 November 2010 at [22]; *Muir v Judicial Conduct Commissioner* [2012] NZHC 3155 at [46]; Wide ranging confidentiality orders have been made in cases such as *Todd Pohokura Ltd v Shell Exploration NZ Ltd* HC Wellington CIV 2006-485-1600, 12 August 2009 and *Pernod Ricard NZ Ltd v Lion-Beer Spirits & Wine (NZ) Ltd* HC Auckland CIV-2011-404-1664, 1 December 2011. See also *Port Nelson v Commerce Commission* (1994) 7 PRNZ 344 (CA).

NZLS comment:

The Law Society agrees that the right to a fair trial should continue to be a matter considered when determining applications for permission to access criminal court documents. However the Law Society notes that the issue of media having access to information that, if published, would be detrimental to a fair trial can be dealt with by restrictions on publication rather than by denying media access. During criminal trials, news media are permitted to be present even when the public is excluded.

From a civil perspective, the inclusion of the right to a fair trial as a relevant matter in draft rule 8(1)(a) is useful: there are circumstances in which civil proceedings are commenced but criminal proceedings are also possible or likely (for example, where interim orders are sought on the basis of evidence that may also be relevant to later criminal proceedings).

Issue 10: The existing list of enactments

The High Court and District Court Rules contain a non-exhaustive list of enactments (such as the Adoption Act) where access to court documents is restricted and non-parties must seek permission to access – with a presumption of refusing access. (The Court of Appeal and Criminal Procedure Rules contain no such list of enactments.)

Question:

Is the list of enactments in the District Court Rules and the High Court Rules restricting access comprehensive or should other enactments be included?

NZLS comment:

The Law Society is not aware of any other enactments that should be included, but considers that the list should remain non-exhaustive.

Issue 11: Transferring to Archives New Zealand and regulating requests

The Rules Committee considers that the rules should be made clearer as to their application to requests made to Archives New Zealand for access to court documents, after the documents have been transferred to Archives. The various rules should be amended to state that the access rules apply to 'documents while they are in the custody or control of the court'. Control would include determining whether to grant access even where the court does not have physical custody over the documents because the restricted status of the documents means that only the court can decide to release the documents [paragraph 75].

Question:

Should the rules apply to requests made to access documents held by Archives New Zealand?

Should the rules be amended to make this clearer?

NZLS comment:

The rules should apply to documents held by Archives New Zealand. This should be made clear in the rules to ensure consistency.

B. The proposed rules

A single set of rules - differences between civil and criminal rules

The Rules Committee proposes introducing a single set of rules covering access to documents in both civil and criminal proceedings.

Question:

Do you agree with the proposal to have a single set of rules in the civil procedure rules of each court covering access to documents in both criminal and civil proceedings?

NZLS comment:

Yes. The Law Society supports the establishment of a single, coherent set of rules as proposed. While the balancing of interests will differ between the jurisdictions, the applications themselves should be covered by the same processes and notice requirements, etc.

C. Further questions

1) Do you agree with the issues identified in the current access to court document rules?

Yes.

2) Are there other issues that exist in relation to accessing court documents and the rules that regulate this?

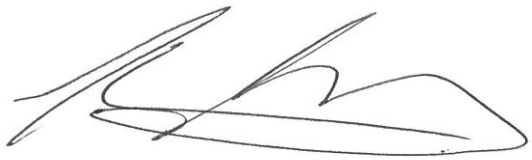
Yes. In accordance with the principles of natural justice, the rules should be amended to enable an applicant for access to be made aware of the reasons for any objections to the application, and to respond to the objections. The Law Society understands that in practice, applicants seeking access are often not informed of objections by other parties and no advice is given about when a determination will be made; a determination is often made at the next teleconference about the matter, with the judge hearing only from the parties and not the applicant.

The Rules could also usefully address whether parties to litigation are permitted to provide court documents to third parties and identify any restrictions on such disclosure.

Conclusion

We hope the foregoing comments are helpful to the Rules Committee. If further discussion would assist, please contact the convenor of the Law Society's Civil Litigation and Tribunals Committee, Andrew Beck, via the committee secretary Jo Holland (jo.holland@lawsociety.org.nz / 04 463 2967).

Yours sincerely,



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