Regulatory Impact Statement

Discovery procedure: changes to the High Court Rules and District Courts Rules

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice. The RIS provides an analysis of options to reduce the cost and inefficiencies of the procedure of discovering documents during civil litigation in the High Court and District Courts. Discovery is the process of a party disclosing documents to the opposing side during litigation.

The RIS assumes discovery is beneficial because it allows parties to formulate their claim and consider whether it is worthwhile proceeding with litigation. A significant constraint is that the Ministry of Justice does not gather data on the total number of discovery orders made. Discovery costs to businesses and the government are also unknown. These factors make the size of the problem and comparisons between the options difficult to quantitatively assess.

The proposal to change the discovery procedure amends existing rules by introducing an initial disclosure regime and narrowing the usual test which determines how many documents need to be discovered, to ensure that the time and costs of discovery are more proportionate to the size of the dispute. The policy options are unlikely to:

- impose additional costs on businesses
- impair private property rights, market competition, or the incentives on businesses to innovate and invest, or
- override fundamental common law principles.

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Date:_____/_____/_____

Status quo and problem definition

Introduction

This RIS covers discovery in the High Court and District Courts. 'Discovery' is the procedure of sorting and listing certain documents and providing the list to the opposing side in litigation. The opposing side then inspects the listed documents (subject to confidentiality and privilege), to determine whether they are helpful to their case. Discovery is an integral part of modern day court procedure which applies to civil cases.[1] The current approach is that, subject to privilege and confidentiality obligations, each party must list all documents that are relevant to a matter in issue in the proceeding.[2]

The Rules Committee, which is responsible for the High Court Rules and District Courts, Rules, has initiated discovery reform. Court rules govern practice and procedure. The power to make rules regulating procedure in the High Court and District Courts is established by section 51C of the Judicature Act 1908 and section 122 of the District Courts Act 1947. High Court Rules are made by the Governor-General by Order in Council, with the concurrence of the Chief Justice and two or more members of the Rules Committee (including a High Court judge) established under section 51B of the Judicature Act. District Court Rules require concurrence from the Chief District Court Judge and two other members of the Rules Committee (including a District Court judge).

Status quo

The current obligation is to conduct exhaustive discovery, by requiring all documents that are relevant to a matter in issue in the proceeding to be disclosed. There is discretion for this test to be varied, but this is rarely used.

The status quo requires disclosure of all relevant documents, which is a time-tested and thorough response that is well understood by the legal profession.

Problem definition

Technological advances and resulting new methods of communication have led to an enormous increase in the volume of documents that could be considered relevant and therefore required to be listed.[3] Discovery can:

- be expensive and burdensome on parties
- result in disclosure of quantities of documents that are disproportionate to the size of the case
- be inefficient
- cause procedural delay
- mean litigation is protracted because the issues in dispute are not resolved early.

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[1] High Court Rule 1.4.

[2] High Court Rule 8.18(2).

[3] The current test for the type of documents that need to be disclosed dates back to 1882, when most documents were handwritten, and documents that were potentially relevant to the case would have been few in number.

Some parties may be deterred from taking a case to court, because of high costs from the discovery process. The current rules also do not facilitate electronic exchange of documents, so are out of date with changes in technology.

Because of the volume of documents, discovery can also be used to tactically 'flood' the opposing party with less relevant documentation, in order to prolong proceedings. The process can become very expensive and therefore impede access to justice.

Size of the problem

Generally speaking, discovery is a routine part of general civil proceedings and, to a lesser extent, applications for judicial review. Discovery can occasionally be required in other types of proceeding. The number of discovery orders made is unknown as orders are usually made at case management conferences, where this data is not recorded. However, in the year ending 31 July 2011, approximately 2000 general civil proceedings and 140 applications for judicial review were filed in the High Court. While not all of these cases would require discovery, the number of discovery orders made in the High Court each year is substantial. The quantity of discovered documents varies between cases.

The scope of discovery in the District Courts is much narrower than in the High Court, because a list or description of the essential documents that the party intends to rely on is already exchanged between the parties at an early stage. If a District Court case proceeds to a full trial, the High Court discovery rules apply. However, there have been only six full trials set down since November 2009 when the District Courts Rules 2009 came into force.

Anecdotal evidence suggests that the identified problems are large. This is supported by the Law Commission and the Rules Committee's conclusions after gathering and analysing comments from commercial litigants and the legal profession.

Objectives

The objective is to improve the discovery and inspection process to reduce costs and delays in civil cases, for the benefit of litigants and the government. This is in line with the Government's focus on improving the quality of public services, and the justice sector's goal of delivering trusted and accessible justice services. The options are assessed on the basis of whether there will be a reduction in costs for parties engaged in litigation, whether the options will reduce delays, and whether people's access to justice is protected.

Regulatory impact analysis

A variety of possible solutions to the problem were considered by the Rules Committee. This RIS groups these into options in a manner that provides the simplest comparison. The procedure for the status quo and the preferred option is illustrated in appendix 1. The status quo and the preferred option is assessed by cost, delay and access to justice in appendix 2.

Maintaining the status quo is not preferred because it does not address the identified problems as it is inefficient and creates unnecessary costs and delay for litigants and the courts. A risk of maintaining the status quo is the potential for abuse by parties who can

tactically flood the opposition with many documents. Although there is already discretion for more restrictive discovery orders to be made, few applications are made.

Option 1: initial disclosure, adverse documents, and electronic exchange (preferred option)

This option streamlines discovery processes by modifying the rules to require:

- initial disclosure
- cooperation between parties about the type of discovery
- a new 'adverse documents' test for standard discovery
- a new way to tailor discovery in particular circumstances, and
- a presumption that documents will be listed and exchanged electronically.

This option is preferred because it addresses the problem by combining a package of changes to reduce costs and delay.

Initial disclosure and cooperation

Initial disclosure requires disclosure of documents referred to in a pleading plus any additional principal documents used when preparing the pleading which are intended to be relied on in court. This means litigants will be informed of what they face from the outset.

Parties will also be required to cooperate with one another about the methods of discovery to be used, which will reduce court input.

Costs to parties will occur earlier under this option. During initial disclosure and document listing, it will take longer to determine which documents meet the "adverse documents" test (explained below). However, it will be cheaper to inspect smaller quantities of documents. As parties are deterred from proceeding with litigation unless these costs are worthwhile, early settlement is encouraged. Initial disclosure and cooperation may also help parties avoid litigation and settle early because the issues in dispute are clarified earlier. A risk of this option is that it may be difficult for lawyers to explain the duty on parties to cooperate, as litigation is usually adversarial in nature.

Standard discovery and tailored discovery

This option introduces an adverse documents test for standard discovery, and flexibility for tailored discovery orders in cases where the interests of justice require more or less discovery.

The "adverse documents" test would require disclosure of documents on which the party relies, those that adversely affect any party's case, and those that support another party's case. Under this option, the volume of disclosed documents will be more proportionate to the size of the case. The new test will reduce the total number of documents that need to be disclosed. The new test will also enhance access to justice by minimising the ability to tactically 'flood' an opposing party with unhelpful documents.

Tailored discovery orders introduce flexibility in cases where the interests of justice require more or less discovery than disclosure where the adverse documents test is used. There will be a presumption that tailored discovery is required when the costs of discovery using the adverse documents test would be disproportionately high in

comparison with the matters at issue in the proceeding, the case is on the swift track or commercial list, the case involves fraud or dishonesty, over $2.5 million is at stake, or the parties agree to use it.

Discovery always requires the disclosing party to determine which documents need to be discovered. This option contains a risk that some documents that may be useful to the party inspecting the documents may not be disclosed. This risk is mitigated by the lawyers' professional standards which require lawyers to ensure their clients understand and fulfil discovery obligations.[4] The risk of non-disclosure of documents is greater when litigants represent themselves. However, if there are grounds for believing a party has not discovered documents that should have been discovered, the judge can order further discovery. The judge can also punish a person for contempt of court, and order increased costs.

The adverse documents test may be difficult to apply in practice, which could result in litigants and/or lawyers either continuing to disclose all relevant documents in the same way as they have in the past, or spending more time trying to apply the new test. This risk could be mitigated by:

- Educational forums for the legal profession on the new rules.
- Use of the court's power to punish a person for contempt of court.

Electronic listing and exchange

This option also facilitates electronic listing and exchange of documents, which is likely to be more cost effective and efficient than exchange of hard copies. Most legal documents that are currently produced have an electronic source. Usually, handwritten notes or other documents that are not in electronic form can easily be scanned. Electronic exchange is intended to reduce storage and transportation costs, and it is better for the environment to reproduce and send documents electronically than to print and send hard copies. The risk of injustice is mitigated in this proposal by judicial discretion to order exchange of hard copies, or other types of electronic discovery.

Option 2: Limited change

The introduction of initial disclosure and cooperation, an adverse documents test, and electronic listing and exchange of documents could all be implemented in isolation from each other. However, this is not recommended, as shown in the following table.

Initial disclosure and cooperation	The proposal would be beneficial; however, greater benefit is delivered by combining it with the other initiatives in option 1.
Adverse documents test	This option is not recommended as a standalone option as it is unlikely to provide any benefit. Overseas experience shows that, despite narrowing what is required to be discovered to adverse documents, parties continue to disclose all relevant documents (even if they do not obviously support or undermine either party's case).[5]

[4] In particular, see rule 13.9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[5] *Civil Litigation Costs Review: Preliminary Report* (May 2009), Jackson LJ, volume 2, p 390.

	The proposals relating to initial disclosure and cooperation (and the ability to have tailored discovery) are intended to address this issue, by changing the behaviour of parties and their lawyers and supporting the use of the adverse documents test.
Electronic listing and exchange	The proposal would be beneficial, However, greater benefit is delivered by combining it with the other initiatives in option 1.

Option 3: Increased use of existing judicial discretion and enforcement mechanisms

It may be possible to improve the way discovery and inspection is carried out, within the existing rules. Existing ways this could be done are:

- Encouraging use of judicial discretion to modify the default 'relevant documents test' terms of a discovery order. The existing court rules provide that a discovery order will be subject to the relevant documents test, unless this is modified by the order.[6] However, it appears that this discretion is never used.
- Disciplining lawyers under the Lawyers and Conveyancers Act 2006 for breaches of professional conduct. Lawyers are subject to professional ethical rules, and can be disciplined under this Act if these are breached. In particular, the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 provide that:
    - a lawyer's primary duty is to the court
    - lawyers must advise their clients of the scope of the client's discovery obligations, and lawyers must, to the best of their ability, ensure their clients understand and fulfil those obligations, and
    - lawyers must not continue to act if, to their knowledge, there has been a breach of discovery obligations by a client and the client refuses to remedy the breach.
- Encouraging judges to punish parties who are in contempt of court. The existing court rules specify that failing to disclose a document is contempt of court.

This option is not preferred. These enforcement mechanisms rely on judicial decisions, or on complaints being initiated by either lawyers or parties. They are not likely to be used often, and are unlikely not result in significant improvements.

Consultation

The Law Commission released a discussion paper in September 2001.[7] The Rules Committee consulted publicly by releasing two consultation papers,[8] and met with the legal profession in Auckland and Wellington. The Rules Committee received submissions from the New Zealand Bar Association, the New Zealand Law Society, the Commerce Commission, Inland Revenue, barristers and solicitors and law firms. A

[6] High Court Rule 8.18(1).

[7] *Reforming the Rules of General Discovery* NZLC PP45.

[8] The first discussion paper was released on 11 September 2009 for two months consultation, and the second on 13 December 2010 for three months consultation. Both papers were available to the public on the Rules Committee website at www.courtsofnz.govt.nz

finalised version of the High Court amendment rules was available for one month on the Rules Committee website, with a request for submissions and comments from the profession. While consultation was primarily with the legal profession, in most cases, the legal profession acts for litigants.

The Ministry of Justice has consulted with Treasury, Crown Law Office, Ministry of Economic Development, and key government agencies that engage in civil litigation, by sending them a draft version of this RIS.

The Bar Association was concerned that there may have been too much reliance on anecdotal evidence from the judiciary in identifying the problem. However there was general consensus from submitters that discovery was costly and time consuming. Some submitters felt that costs and delay were inherently part of discovery and inspection procedure and therefore unavoidable without reducing access to justice. Many submitters supported the status quo, but many also supported an adverse documents test. Submitters were divided on whether electronic listing and exchange was beneficial – however the preferred option provides discretion for electronic discovery to be avoided.

Conclusions and recommendations

The Ministry has considered the status quo and three options in this statement and the preferred approach is option one.

The status quo requires disclosure of all relevant documents without initial disclosure or a presumption for electronic discovery. Maintaining the status quo will not address the problem of the time and expense of inefficient discovery processes.

None of the elements in option three achieve the benefits of the whole package. In particular, introducing an adverse documents test alone simply narrows the documents that need to be discovered down to documents relied on and documents that support or are adverse to any party's case. Overseas experience shows this requirement alone is usually unsuccessful in reducing costs and delays.

Option one requires initial disclosure, cooperation between parties about the type of discovery, a new 'adverse documents' test for standard discovery, a new way to tailor discovery in particular circumstances, and provides for electronic listing and exchange of documents. Option one is designed to be a proportionate response to the size of the case, and intends to reduce costs and delays to litigants and the courts.

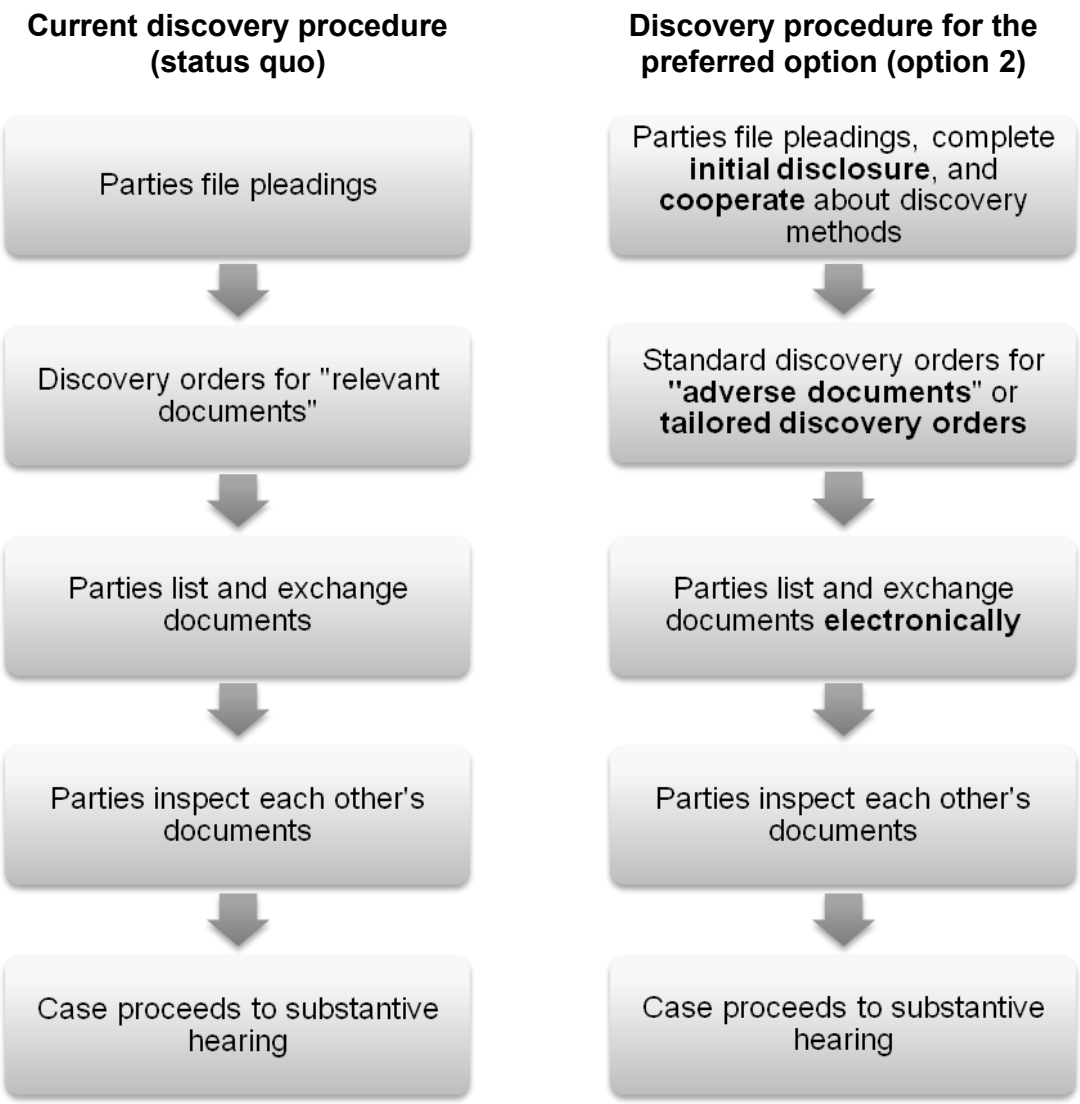
Implementation

The changes will be given effect through the High Court Amendment Rules (No 2) 2011. The District Courts (Discovery, Inspection, and Interrogatories) Amendment Rules 2011 will update the references to the High Court Rules that are contained in the District Courts Rules. The new discovery rules will commence on 1 February 2012, allowing time for textbooks and commentaries to be updated and lawyers and judges to become familiar with the new rules.

Monitoring, evaluation and review

The Ministry of Justice will monitor, evaluate and review the impacts of this proposal as part of its business as usual.

Appendix 1


Current discovery procedure (status quo)
Parties file pleadings
Discovery orders for "relevant documents"
Parties list and exchange documents
Parties inspect each other's documents
Case proceeds to substantive hearing
Discovery procedure for the preferred option (option 2)
Parties file pleadings, complete **initial disclosure**, and **cooperate** about discovery methods
Standard discovery orders for **"adverse documents"** or **tailored discovery orders**
Parties list and exchange documents **electronically**
Parties inspect each other's documents
Case proceeds to substantive hearing

Appendix 2

	Status quo	Preferred option
Costs for parties and the court system $	• Parties disclose all relevant documents. Costly to inspect large quantities of documents.	• Electronic listing and exchange of documents is likely to reduce printing and postage costs. • Longer to determine which documents need to be listed, which costs more • Less time listing documents costs less. • Quicker inspection costs less. • Cooperation reduces court costs as less time is spent determining appropriate orders. • Costs shift from the inspection stage to the initial disclosure and document listing stages.
Delays to litigants and the court system 	• Parties disclose all relevant documents. More diligent discovery takes longer. • Parties inspect large quantities of documents; many do not materially benefit anyone.	• Initial disclosure encourages early settlement, reducing the number of court hearings. • Parties attempt to cooperate about discovery methods, reducing court time determining appropriate orders. • Longer for parties to decide which documents meet the criteria for the adverse documents test, but quicker to list documents. • Party inspects fewer documents, quicker and easier to determine which documents are useful.
Access to justice 	• Expensive discovery deters people from going to court, which may diminish access to justice.	• Initial disclosure allows parties to assess the case earlier, when without this parties would have to go through lengthy discovery. • Adverse documents test is less expensive than status quo therefore increased access to justice.
Risks ?	• Not applicable.	• Some documents that should be disclosed may be withheld. • Parties disclosing documents are likely to revert to disclosing all relevant documents because this is quicker, cheaper and minimises risks of failing to disclose some documents.