29 January 2015

Principal Registrar Michael Gething
Registrars' Chambers
Supreme Court of Western Australia
Stirling Gardens
Barrack Street
PERTH WA 6000

Dear Principal Registrar Gething

DISCUSSION PAPER – RULES OF THE SUPREME COURT 1971 ORDER 36B SUBPOENAS

The Law Society of Western Australia (Society) appreciates the invitation to contribute to the review of Order 36B of the *Rules of the Supreme Court 1971* (RSC) relating to the issue of subpoenas.

The Society's answers and comments in response to the questions in Parts 2 to 6 of the Discussion Paper are set out below.

Part 2 **Should there be any limits in the rules on when an early return subpoena may be issued?**

Question 1 *Should the RSC contain any limits on when a party can issue an early return subpoena?*

Answer: Yes.

Question 2 *Should a party be prevented from issuing a subpoena against another party?*

Answer: Yes.

Question 3 *Should a party be prevented from issuing a subpoena until the filing of the first defence? Is there a more appropriate limit?*

Answer: Yes. This is the appropriate limit.

Comments

Orders for discovery pursuant to RSC O 26A, and in particular O 26A r 5, require an application supported by an affidavit and a hearing. However, subpoenas can be issued against anyone at any time. The Society concurs with the comment in the Discussion Paper *"that in some instances it is hard to resist the conclusion that there is an element of 'fishing' and that the subpoena process is being used in lieu of pre-action or non-party discovery"*.

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The Society considers it appropriate that a party should be prevented from issuing a subpoena until after the filing of the first defence, to know what issues are in dispute.

Part 3 **Should the forms be revised?**

Question 1 *Should the Court modernise its forms?*

Answer: Yes.

Question 2 *If so, are the District Court forms an appropriate precedent?*

Answer: Yes.

Question 1 *Have there been any issues in practice with the District Court forms?*

Answer: The Society is not aware of any issues.

Comment

The Society supports the two forms of subpoena utilised in the District Court of Western Australia as appropriate for use in the Supreme Court of Western Australia. However, some of our members believe that where a witness is subpoenaed to both give evidence and produce documents, a third form could be developed for both courts.

Part 4 **Are there requirements in the Consolidated Practice Directions that should be in the rules?**

Question 1 *Should the timing provisions of the CPD (4.3.7.9 to 4.3.7.12) be inserted in the RSC?*

Answer: Yes.

Question 2 *Should CPD 4.3.7.21 to 4.3.7.25 be inserted into the RSC?*

Answer: Yes.

Question 3 *Are there any other aspects of the Practice Direction relating to early return subpoenas which could be incorporated into the RSC?*

Answer: The Society is not aware of any.

Part 5 **Other amendments**

The following further proposals are noted:

5.1 To amend RSC O 36B r 3(6) to formalise an arrangement where the issuing officer may refer the question of whether permission should be granted by a Registrar, where it appears to the issuing officer that issuing a subpoena may be an abuse of process, that the scope of the subpoena is not appropriate etc.

5.2 To allow the requested documents to be 'in any electronic form that the issuing party has indicated will be acceptable'.

5.3 To amend RSC O 36B r 9(5) to also require the addressee to serve a copy of the objection on the issuing party and provide an address for service, and require the issuing party to confer with the addressee prior to the objection being listed pursuant to r 9(8).

5.4 To allow legal practitioners to uplift and copy documents without the need for approval by a Registrar.

5.5 To include in the Rules a requirement that parties seeking to inspect or uplift documents or things, to first contact the Central Office and arrange an appointment.

Question 1 *Are these amendments appropriate?*

Answer: Yes.

Question 2 *Are there any other changes which ought to be made?*

Answer: Yes. (Please see below under Part 6.)

Part 6 **District Court initiatives which the Supreme Court does not propose to adopt**

The Discussion Paper states that there are two District Court initiatives that the Supreme Court does not propose to adopt. These two initiatives, introduced to the *District Court Rules 2005* (DCR) in 2013, are:

Rule 48AF - Subpoenas to produce addressed to health professionals

(1) This rule applies to a subpoena to produce —

(a) issued in a personal injuries action; and

(b) addressed to a health professional, a hospital, or a person that manages the records of a health professional.

(2) *Unless the Court otherwise directs under the RSC Order 36B rule 8, a document produced in response to a subpoena may —*

(a) *be inspected and copied by the plaintiff; and*

(b) *after 7 days from the date for production specified in the subpoena, be inspected and, with the approval of a registrar, copied by each other party.*

Rule 48AH - RSC Order 36B rule 11 modified: losses and expenses incurred in compliance

(1) *The RSC Order 36B rule 11 applies, subject to this rule.*

(2) *Unless the Court orders, or the issuing party and the addressee agree, otherwise, when serving a subpoena to produce, the issuing party must pay to the addressee the amount of $80 for any loss or expense incurred in complying with it.*

(3) *This rule does not —*

(a) *affect the Court's power to make an order under the RSC Order 36B rule 11(1); or*

(b) *limit the amount that may be fixed under the RSC Order 36B rule 11(2).*

Question 1 *Is this proposed difference in practice between the Supreme Court and the District Court appropriate?*

Answer: No, for the reasons set out below.

Comments

In the Discussion Paper, in relation to rule DCR r 48AF, it states that "*there is no equivalent rationale in the Supreme Court*". In relation to DCR r 48AH it states that *"this rule does not make sense in the Supreme Court where there is no equivalent 'standard' type of subpoena."*

Personal injury cases are also heard in the Supreme Court. It is preferable that there be uniformity of practice in the District and Supreme Courts, as far as is practicable, and any amendments to the RSC should not have unintended consequences in relation to the DCR.

The rationale for giving the plaintiff first opportunity still applies.

The $80 payment serves as a disincentive for issuing frivolous subpoenas and would be useful in both jurisdictions.

The Society supports the adoption by the Supreme Court of DCR rules 48AF and 48AH in relation to any personal injury litigation in the Supreme Court.

Some of our members believe that the 7 days for inspection by the plaintiff should, in both courts, run from the date of certification of service of the subpoena by the issuing party on the plaintiff due to instances where the defendant has failed to notify the plaintiff that a subpoena has been issued.

Thank you for allowing the Society to provide input to your review of these matters.

Yours sincerely

Matthew Keogh
President