

25 March 2015

Harriet Bush
Clerk to the Rules Committee
Auckland High Court
PO Box 60
Auckland 1010

Email: harriet.bush@justice.govt.nz

Dear Ms Bush

Definition of “solicitor” in relation to the authority to take affidavits

Thank you for the Rules Committee’s letter of 25 February 2015.

The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the potential amendment of the High Court and District Court Rules, to limit the ability to take affidavits to a person holding a current practising certificate rather than the current definition of “a person enrolled as a barrister and solicitor of the High Court”.

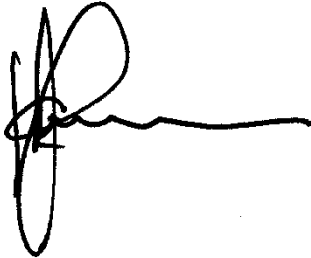
The Law Society has consulted members of the profession (via the *LawPoints* e-bulletin) as well as its national Civil Litigation and Tribunals Committee. There appears to be a clear divergence of views amongst the profession, with responses received both for and against the proposed change. The responses are summarised in the attached appendix.

The Law Society has considered and discussed the matter at length. We acknowledge there are good arguments both for and against the proposed change (as outlined in the appendix), but given the divergence of views the Law Society considers it is appropriate that it remains neutral. However if the proposed change is to proceed, we note two points of clarification:

- a) That the amended definition should be “practising as ...” (rather than “*enrolled and practising as a barrister and solicitor of the High Court*”, as noted at [3] in the Rules Committee Clerk’s memorandum); and
- b) That barristers sole should be explicitly included as being permitted to take affidavits. This might be dealt with by replacing the reference to “barrister and solicitor of the High Court” with “a lawyer” (defined in section 6 of the Lawyers and Conveyancers Act 2006 as “a person who holds a current practising certificate as a barrister or as a barrister and solicitor”).

The Rules Committee may wish to canvass proposal (b) above with the New Zealand Bar Association. And, in light of the potential access to justice issues raised by the proposed change, there may need to be wider consultation (in particular with community law centres) before a final decision is taken on the proposed change.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a horizontal line extending to the right.

Chris Moore
President
Encl (1)

Definition of solicitor in relation to the authority to take affidavits

Appendix: summary of comments from the profession

The Law Society notified the profession via a *LawPoints* e-bulletin on 5 March 2015 of the Rules Committee's consultation regarding a potential change to the Rules' definition of "solicitor" for the purpose of taking affidavits.

Five responses (including an email from a Mr Chris Chapman, which was addressed directly to the Rules Committee Clerk and copied to NZLS) were received, and have been summarised below. In addition, one enrolled solicitor enquired about the reasoning for the proposed change, but did not make a submission.

Three of the respondents were against the proposed change (preferring the status quo, i.e. that those who are enrolled but without a current practising certificate may take affidavits). Two of the respondents were in favour of the proposed change (prohibiting non-practising solicitors from taking affidavits).

Arguments advanced by those **against** the proposed change included:

- This is a long-standing practice and there is no good reason to make a change.
- Convenience for workplaces such as community law centres, where enrolled solicitors without practising certificates may be working; allowing them to take affidavits relieves pressure on other staff.
- People don't charge for the service.
- Taking oaths or declarations does not depend upon an entitlement to practise. It is not engaging in practice: the deponent is not a client, there is no transactional activity, and no advice is given.
- The number of enrolled barristers and solicitors taking affidavits is probably low.

The Law Society has also seen the ADLSi Civil Litigation Committee's submission to the Rules Committee, which opposes the change and prefers retaining the status quo.

Arguments advanced by those **in favour** of the change included:

- Potential lack of current knowledge of the court rules around signing and witnessing affidavits.
- If an affidavit needs to be re-signed then finding the unenrolled solicitor to tidy up name, initialling, signature etc is harder and possibly more costly for the client.
- There is no way to check if someone is admitted as a solicitor (or has been admitted but subsequently struck off), whereas there is a way to check if the person is a practising solicitor.

The Law Society also notes there are other arguments both for and against the proposed change (as outlined in the memorandum by the Clerk to the Rules Committee), and for ease of reference summarises them here:

Arguments **against** the change include:

- ‘Access to justice’ problems in small/remote centres:
The amendment would reduce the pool of people available to take affidavits in smaller centres. We also note that although JPs and Registrars would still be able to take affidavits, recent court closures in smaller centres mean there are fewer Registrars available in some areas.
- Possible opposition by people enrolled and still actively engaged in the profession who don’t have a current practising certificate (as noted at [31] of the Rules Committee Clerk’s memo).

Arguments **in favour** of the change include:

- Affidavits are filed in court – to ensure the integrity of court documents, they should be witnessed by a lawyer.
- A practising certificate provides a range of quality controls re the integrity of the person taking affidavits:
 - Fit and proper test – re-certified annually
 - Subject to disciplinary oversight and sanctions
 - Required to undertake ongoing legal training
- It would eliminate confusion about who is qualified to take an affidavit. (There is no historic central Court index for enrolled persons, for ease of checking validity of the witness.)
- Section 378 of the Criminal Procedure Act requires a practising certificate for affidavits taken for proceedings under that Act:

“An affidavit required for the purposes of this Act may be sworn or affirmed before any judicial officer or Registrar or before any lawyer not engaged in the proceedings.”

[The s 5 definition is a person who holds a current practising certificate as a barrister or as a barrister and solicitor under the Lawyers & Conveyancers Act.]