NEW ZEALAND
BAR ASSOCIATION

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Tēnā koe Julia

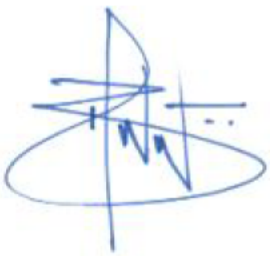
Rules Committee further consultation

We attach the New Zealand Bar Association's submission on the Rules Committee's further consultation paper on improving access to justice.

Thank you again for agreeing to extend the Association's time for this submission.

If you or the Committee have any questions, please feel free to contact me.

Nāku noa, nā



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NEW ZEALAND BAR ASSOCIATION

Submission on Rules Committee's Further Consultation on Improving Access to Civil Justice.

Introduction

1. The New Zealand Bar Association (the Bar Association) welcomes the opportunity to respond to the Rules Committee's further consultation on improving access to civil justice and is grateful for the extension of time given for the making of this submission.

2. The Bar Association places a high priority on this reform process. It has submitted on the Committee's previous consultation rounds. For this round, it has itself sought to consult widely. The Bar Association membership have been encouraged to make submissions directly to the Rules Committee or by contributing to these submissions. The preparation of these submissions was led by a working group of the Bar Association's Advocacy Committee. Members of the working group have reviewed written input from other members and have actively canvassed the views of the wider membership. Finally, a draft of these submissions was considered and discussed by the full Bar Association Council.

3. As has been widely recognised for some years, New Zealand has a significant and worsening problem with access to justice in the area of civil dispute resolution. A consensus has formed between government, the judiciary, and the profession over the urgent need for substantial reform to address this problem.

4. A consensus has yet to form, however, over exactly what those reforms should be. The Bar Association recognises that in the proposals set out in the Committee's consultation document represent an attempt at a framework around which such consensus might be built. The Bar Association broadly supports this attempt.

5. The purpose of these submissions is to record the Bar Association's support for the central proposals made in the consultation document, to contribute the Bar Association's views on the detailed questions raised in that document, and also to suggest some other avenues of reform that the Bar Association believes should be (or, in some cases, needs to be) further explored in concert with those proposals.

Disputes Tribunal reforms

Introduction to Dispute Tribunal reforms

6. During earlier rounds of this process, several proposals have been put forward suggesting that civil disputes could be more efficiently resolved with greater judicial involvement in the process. To a greater or lesser extent, these proposals moved the dispute resolution from New Zealand's tradition of an adversarial system towards an inquisitorial system.

7. The current proposal suggests making more use of the inquisitorial process that is already established and operating in New Zealand for the resolution of lower value disputes, rather than the introduction of entirely new systems or making radical changes to the way that the District Court handles civil cases in general.

8. The Bar Association has received positive reviews of how the Disputes Tribunal has been operating recently. This contrasts with generally negative feedback from members about how that Tribunal used to operate.

9. In this submission, the Bar Association supports extension of the use of the Disputes Tribunal model. Indeed, it is suggested that the scope of the Disputes Tribunal's jurisdiction should be extended further than the minimum proposed. However, in doing so the Bar Association suggests cementing, and building on, the developments in the operation of the Disputes Tribunal which the Association credits with this improved quality of service.

Proposal to increase the jurisdiction of the Disputes Tribunal to $50,000, or higher

10. The Bar Association supports the proposal to increase the jurisdiction of the Disputes Tribunal to $50,000, and advocates an increase to a higher level, up to $100,000.

11. The question of whether the jurisdiction should be increased beyond $50,000 was the subject of considerable debate among the Bar Association members. The Bar Association also understands that current referees are nervous about the prospect of the jurisdiction being increased beyond this level. Concerns were voiced that increasing it too high would put too much pressure on the Tribunal and would threaten its simple and efficient procedure.

12. The purpose for reform of the scope of the Tribunal's jurisdiction is to close a gap that otherwise exists in access to justice. Bar Association members agree that they would advise clients that bringing disputes worth less than $100,000 before the District Court is rarely worthwhile. The Bar Association does not think that other proposed changes to the District Court are likely to alter that advice.

13. For this reason, there was ultimately a consensus among members that an increase up to $100,000 was needed. This change necessitates other reforms to the Tribunal as discussed below. However, the efficient procedure followed by the Tribunal needs to be preserved.

Proposal to change the right of appeal from decisions of the Disputes Tribunal

14. Before addressing this issue directly, consideration needs to be given to the basis upon which the Tribunal is required to resolve disputes. This is presently set out in s 18(6) of the Disputes Tribunal Act 1988 which reads:

> "The Tribunal shall determine the dispute according to the substantial merits and justice of the case, and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities."

15. The Bar Association believes that the creation of this test was misguided. The idea that the law represents something other than the "substantial merits and justice of the case" is based on a misunderstanding of what the law is. It appears to represent a fear that the "technicalities" of the law are incompatible with the dispute resolution procedure used in the Tribunal. The Bar Association does not believe this is correct. It also notes that the law is capable of adapting. Fundamentally, the right to have a dispute determined according to the law is an indispensable feature of the rule of the law. Anything else is arguably inconsistent with s 27(1) of the New Zealand Bill of Rights Act 1990.

16. The negative feedback received from members about how the Tribunal used to operate often involved concern that, while striving for compromise, referees made arbitrary decisions in the face of clear legal rights. More recent feedback suggests this is now less common. Based on discussions with current referees it appears that they now see little, if any, difference between what they are required to do and the application of the law.

17. The Bar Association is of the view that with any extension of the jurisdiction of the Disputes Tribunal there should also be a repeal of s 18(6) and that Tribunal decisions should be made in accordance with the law.

18. If the Disputes Tribunal's jurisdiction is extended to $50,000 or beyond, the Bar Association supports the proposal to extend the right of appeal. Currently, under s 50 appeals are allowed only on the basis of an unfair procedure.

19. Some ability to have decisions reviewed on appeal is needed to give parties confidence in using the Tribunal for higher value claims. A right of appeal in some circumstances is also arguably required by s 27(2) of the New Zealand Bill of Rights Act 1990.

20. The Bar Association does not support a general right of appeal for all decisions of the Disputes Tribunal. Such a right would enable a better resourced party to defeat the cost benefit of the Tribunal. Nor does the Bar Association support a graduated right of appeal depending on the amount at stake. Such a rule would be too open to abuse with parties able to inflate their claim to avail themselves of wider appeal rights. Further, the monetary value of a claim is not always a fair determinant of the importance of the claim to the parties, or the damage done by an unjust decision.

21. The Bar Association considers that the balance is best struct if appeals are allowed for all decisions, irrespective of value, but on two limited grounds:

    21.1. the decision is based on an error of law that substantially affects the party's rights, or

    21.2. the decision is manifestly unreasonable.

22. The availability of an appeal based on error of law only makes sense if, as is submitted above, s 18(6) is repealed and replaced. Appeals on the grounds of an error of law carry some of the same risks identified above. To mitigate this risk, the Bar Association proposes limiting such appeals to cases of error of law that may substantially affect the rights of the parties which is intended to import the same considerations presently used with appeals under Schedule 2, Clause 5 of the Arbitration Act 1996 (as per the test in cl 5(2)).

23. Providing limited appeal rights of this kind requires some form of leave type procedure before the District Court which is capable of swiftly rejecting appeals that are not properly brought within the restricted grounds.

24. If the Disputes Tribunal decides matters on the same basis as the general civil jurisdiction of the District Court with appeals on question of law, then it will make sense to consider whether there should be an ability for the Tribunal and the Court to transfer cases between one another in a manner similar to Part 5 of District Court Act 2016.

Proposal to have legally qualified referees and to increase the daily fees for referees

25. The Bar Association considers that all referees should be legally qualified, but with transitional provisions which allow the expertise of any current referees who are not so qualified to be retained. Legal qualifications are an important feature for a Tribunal with the proposed extended jurisdiction. This also fits with the Bar Association's view that decision need to be made in accordance with the law. It is the Bar Association's understanding from speaking with current referees that the appointment of legally trained referees has been the preference for some time.

26. On this basis, the Bar Association supports the proposal to increase the daily fees for referees. For the proposal package as a whole to work well, the Tribunal will need to attract good referees able to deal with claims of a higher value while maintaining the Tribunal's procedural advantages.

27. Increasing referees' fees will help ensure a sufficient number of suitably qualified or experienced referees can be appointed to deal with the increased workload of the Tribunal. Consideration could be given to enabling the appointment of part-time referees, similar to the proposal to appoint recorders in the District Court. An increase in fees is also justifiable because disputes at the higher end of the Tribunal's extended jurisdiction would otherwise have fallen within the jurisdiction of the District Court.

Proposal to re-name the Disputes Tribunal

28. When considering the name to be used for the Disputes Tribunal with expanded jurisdiction and for its referees, the Bar Association considered that the most important thing was to assure the litigants before the Tribunal that their cases were being dealt with respect, with a ruling from an authoritative body.

29. Of the two options proposed, the Bar Association supports re-naming the Disputes Tribunal the "Community Court". The Bar Association's members thought that this struck a nice balance between maintaining local connection and having the authority inherent in the word "Court".

30. Members were not in favour of the alternative proposed name – "Small Claims Court". It was felt that the name belittles the claims, which may be of the utmost importance to the parties. The name is also inapt if the jurisdiction of the Tribunal is extended.

31. The Bar Association assumes, irrespective of the English name used, that consultation with iwi will take place to ensure that an appropriate Māori name for the Tribunal can be included in the final proposals.

Proposal to change the title of "referee" to that of "adjudicator"

32. The Bar Association supports changing the title of referee to better reflect that, in practice, the parties to Tribunal proceedings expect a judicial decision from the Tribunal, rather than a facilitated outcome.

33. The Bar Association suggests that the title "Community Judge" is simpler and better achieves the objective of this proposal than the title "adjudicator". The title "Community Judge" would also fit well with the proposed change of the Tribunal's name to "Community Court".

34. With all of the changes the Bar Association suggests, litigants come before the Community Court to receive decisions on their legal rights from legally trained Community Judges. The Bar Association believes that this will give the public confidence that this is an authoritative body available to all to address their civil disputes.

Proposal to better resource the Tribunal to make greater use of its powers to appoint investigators

35. Subject to the development of robust processes relating to investigators, the Bar Association supports the proposal that the Tribunal be resourced to make greater use of its powers to appoint investigators as Tribunal-appointed experts under s 41 Disputes Tribunal Act 1988. The Bar Association considers that greater use of such powers has the ability to enhance the speed and quality of decision-making if used well. It can ensure the relevant facts and supporting documents are before the referee on the day of the hearing.

36. In addition to increasing the resourcing for such experts, however, the Bar Association considers it desirable to ensure investigators have appropriate skills and experience to carry out the role properly. Care needs to be taken (as is already required under the Act) to ensure investigators act with due regard to natural justice and preserving the decision-making role of the adjudicator. Doing this requires skill and training. For parties to have confidence in this process there also needs to be transparency about the role, skills and experience of such investigators, perhaps through the creation of a publicly accessible panel of investigators, similar to the approach under the Motor Vehicle Sales Act 2003.[1]

Proposal to amend the requirement that the Tribunal proceed in private

37. Subject to the qualification noted below, the Bar Association supports the proposal to amend the requirement that the Tribunal proceed in private, enabling the conduct of public hearings unless the referee considered that it is proper to conduct the hearing in private, having regard to the interests of any party and to the public interest.

38. The Bar Association considers public hearing is appropriate only at the stage where the Tribunal proceeds to determine the dispute having concluded, in accordance with section 18(5) of the Disputes Tribunal Act 1988, that an agreed settlement is inappropriate, impossible, or not approved by the Tribunal. Privacy remains appropriate at the earlier stage of the process because parties are more likely to make concessions and reach a compromise in a confidential setting. The ability to facilitate this is an important feature of the Disputes Tribunal's jurisdiction and part of what makes it an affordable alternative dispute resolution process. To balance this against the public interest in open justice, the preliminary settlement discussion could be held in a 'chambers' setting and the hearing moved to an 'open' setting once the Tribunal determines that a settlement is not achievable.

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[1] Motor Vehicle Sales Act 2003, ss 82, 88 and Schedule 1, Clause 10.

39. The proposal notes that having hearings in public may also allow Tribunal decisions to be published in NZLII or a government website to improve the transparency of decision-making and assist parties preparing their submissions. The Bar Association is supportive of the publication of judicial decisions and would like to see greater funding generally being made available to facilitate free public access to decisions more generally.

Proposal to allow the Tribunal to make decisions to waive filing fees

40. The Bar Association supports the proposal to allow the Tribunal to make decisions to waive filing fees where appropriate. The aim is to have a system of civil justice that is available to all. If the payment of filing fees represents a genuine impediment for some litigants then the ability to waive those fees is necessary to ensure that access.

Further proposals in relation to the Disputes Tribunal

41. If the Tribunal's jurisdiction is to be increased to $50,000 or higher, then the prohibition in section 38(7) of the Disputes Tribunal Act 1988 on approval of current or former lawyers to represent parties should be revisited. Other Tribunals allow parties to be represented by a lawyer or another representative.[2] For some parties, representation is essential to ensure they can truly access justice - for example those for whom English is not their native language, or who may find the experience of appearing at a Tribunal hearing so daunting that they need support to be able to put their case. At the very least, the Bar Association believes that legal representation should be available to a party:

    41.1. where the value of the claim is greater than $30,000;

    41.2. where the parties consent; or

    41.3. where the other party is a current or formerly qualified lawyer or there is otherwise a disparity between the parties that could be addressed via legal representation.

42. It is noted that a claim size of $6,000 is used as a threshold for legal representation in other Tribunals, e.g. the Tenancy Tribunal (Residential Tenancies Act 1986, s 93). The Bar Association members considered this threshold too low.

43. The Bar Association is not proposing any concomitant amendment to the Tribunal's costs regime. The use of a qualified representative would therefore be at the party's own expense.

44. In order to maintain the quality and consistency of decision-making and support changes such as the ability to appoint an investigator to sit with the referee, consideration could be given to providing continuing professional development to referees. Where appeal rights are limited, and especially if no change is made to existing appeal rights but the jurisdiction of the Tribunal is extended, a process whereby a random selection of decisions that have been issued can be peer reviewed and feedback provided to the referee (without changing the finality of the decision) would serve to enhance public confidence in this jurisdiction.

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[2] Canterbury Earthquakes Insurance Tribunal Act 2019, s 23 and Schedule 2, Clause 3; Weathertight Homes Resolution Services Act 2006, s 68.

District Court reforms

Introduction to District Court reforms

45. The Bar Association agrees that there is a need to improve or rectify civil dispute resolution for claims in the District Court: it is not working.

46. We agree that the 2014 Rules are on the whole appropriate, noting that the Bar Association proposed that rules of this type now be introduced into the High Court. However, the Bar Association agrees that some potential amendment to allow flexibility to determine claims is advisable, as noted in this submission.

47. The Bar Association agrees that a major issue is that District Court judges have more urgent demands in the family and criminal jurisdictions which leaves the civil jurisdiction under-resourced.

Appointing a Principal Civil Judge of the District Court

48. The Bar Association supports the appointment a principal civil judge in the District Court jurisdiction to resource better the civil jurisdiction. The Bar Association also endorses the production and issue of best practice directions to restore civil registry expertise. However, the Bar Association anticipates that success is ultimately dependent on better resourcing the whole of the District Court's civil jurisdiction.

Introduction of part-time Deputy Judges/Recorders

49. In general, the Bar Association supports the proposal for the use of senior practitioners (at least 7 years PQE) as part time District Court judges. In discussing this proposal, several members suggested that it is a role that they would consider if given the opportunity. The Bar Association thinks that, done well, it is a scheme that could benefit the Court, the bar, and litigants as well as other stakeholders. The Bar Association agrees that the independent nature of the bar makes the potential issue of conflict for such part time judges surmountable. It would be more complicated, possibly too complicated, for senior practitioners in firms to fill this role.

50. The Bar Association has concerns, however, about the suggestion at paragraph 58 and footnote 38 of the consultation document that this is a role that could be filled by QCs or practitioners looking to become QCs as part of their access to justice commitment. To work, this would require a significant shift in the way both QCs and judges are appointed in New Zealand.

51. There are simply too few QCs to perform this role. The Bar Association also notes that most judges in this country are not appointed from the senior bar. Of the last 15 High Court appointments, only 3 were QCs. Most judges in the High Court and above were not QCs before coming to the bench. Even fewer of the District Court appointments have been from the senior bar, especially if the numbers are limited to civil practitioners.

52. This means that it is unlikely that these roles can be filled exclusively from people who are QCs or who are in the process of becoming QCs. Unless there is a change in approach to the appointment of QCs, such temporary judges would need to be drawn from the broader bar.

Pre-action protocols

53. The Bar Association agrees that the implementation of a requirement to adhere to pre-action protocols for debt collection would enable or better enhance access to justice – for example mandatory attempts by the creditor to secure an agreement to a payment plan, and a mandatory warning by the creditor that proceedings are to be issued. The Bar Association wonders whether even broader use of the UK's pre-action protocol regime might be worth considering.

Flexible process for determining substantive claims

54. Although the 2014 Rules are understood to be functioning well, the Bar Association supports amendment to allow for flexibility.

55. The flexibility envisaged has elements of the inquisitorial process adopted by the Disputes Tribunal and the Bar Association supports the suggested changes with some refinement, as set out below.

56. The Bar Association supports more intensive case management, with the purpose of refining the issues in dispute and the resulting evidence that is briefed for trial. An iterative process whereby judges would narrow and resolve issues in dispute at successive hearings can achieve efficiencies in some cases if used well. However, it can also have the reverse effect. There remains much to be said for the requirement that parties put their best foot forward in running their case without ready opportunity to adapt one's case over the course of several iterations of evidence or submissions.

57. The Bar Association supports the proposal to allow judges to direct that the proceeding be set down for determination on the basis of initial disclosure alone, and without any further interlocutories, given what is in issue as disclosed by the first judicial conference. The Bar Association anticipates this would be discretionary rather than mandatory.

58. The Bar Association agrees that, subject to our comments above, the proposed flexibility allows for the efficient litigation of disputes engaging smaller sums.

High Court reforms

Introduction to High Court reforms

59. The Bar Association agrees with the Committee that most cases should be able to be resolved through a more streamlined process than the default process currently used before the High Court. The Association agrees that to achieve this will require greater judicial involvement at an earlier stage in proceedings. It also agrees that this should be achieved without adopting a fully inquisitorial process and thereby preserving the freedom of parties to formulate their own cases before the Court.

60. The Bar Association recognises that some of the proposals are ones the Bar Association made as part of a suggestion for a short course procedure. The Bar Association noted during that submission that many of the elements of the short course procedure could be more generally adopted. The Bar Association supports the approach of making these procedures part of the general rules instead of a separate procedure.

Pleadings

61. The Bar Association agrees with the importance of retaining statements of claim and defence.

62. Indeed, the Bar Association observes that the approach of the New Zealand courts has increasingly been to diminish the importance of pleadings and to allow parties to take a case forward with vague pleadings and/or to diverge from their pleadings – both plaintiffs and defendants. Allowing this lowers the efficiency of the court process and tends to increase the cost of litigation.

63. The Bar Association therefore favours not only retaining pleadings but reaffirming the need for cases to be properly pleaded and for the procedure and determination of the claims to be led by those pleadings.

Proportionality

64. The Bar Association agrees that proportionality is important and must be a primary factor in determining the appropriate procedure. The Bar Association also agrees that proportionality includes a range of issues including subjective importance and not just issues like monetary value. However, the Bar Association believes the test for the kind of procedure to be adopted should include a question of what is most appropriate in the circumstances of the case. This idea is not fully captured by the Rules Committee's statement on proportionality.

65. For example, a case regarded as an early success of the UK's short course procedure had a monetary value of almost $70 million US.3 The case involved a difficult issue of contract interpretation. It could therefore be said to have been of high value, complex, and of significant importance to the parties. However, taking account of the nature of the issue and the evidence needed to resolve that issue, the parties benefitted from a short procedure leading quickly to a judicial decision on the interpretation issue.

Discovery

66. The Bar Association agrees with the proposal on discovery initial disclosure and discovery.

67. The issue of enforcement of the procedural rules below is of particular relevance to the issue of discovery.

Nature of the evidence

68. The Committee proposes evidence by affidavit by default with restricted use of oral evidence in chief to issues of significant factual conflict. The Bar Association is unclear from the consultation document as to what process will lead to the giving of oral evidence.

69. The Bar Association stands by the proposal it made for its short course procedure. The type of evidence that is appropriate depends on the circumstances of the case. This can include

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[3] It is noted that the case in question (*National Bank of Abu Dhabi PJSC v BP Oil International Limited* [2016] EWHC 2892; [2018] EWCA Civ 14; 2018) was overturned on appeal. However, the NZBA understands that it was still regarded as a success of the short course procedure. The basis upon which it was overturned was not a consequence of that procedure and the parties all benefited from the groundwork being laid for consideration by the appeal court in a short time and with relatively little expense.

affidavits, briefs or summary witness statements that lead to oral evidence. It may be appropriate for there to be a mixture of such evidence in a case and, subject to what is said below about the issues conference, the Bar Association supports a flexible procedure that allows for directions for the filing of evidence of the appropriate type in the appropriate circumstances.

70. The Bar Association supports the proposals on common bundles and experts.

Issues conference

71. The Bar Association agrees with the proposed issues conference.

72. It is not clear from the proposal, but the Bar Association is of the view that questions of the mode of evidence should be resolved, at least on a preliminary basis, at such a conference.

73. The Bar Association is conscious that the proposal is a significant departure from the current procedure. To be a success it needs significant judicial engagement. There needs to be a dedication of necessary judicial resources in terms of time and preparation, and in terms of training.

74. As the Bar Association has previously submitted, much of the potential benefit from a procedure of this type is lost unless the judge who sits for the issues conference is able to remain with the case until its conclusion. The Bar Association appreciates the challenge of resources in achieving this. Nevertheless, the Bar Association submits that there should at least be a commitment to attempt to do this so far as resources allow.

75. The parties benefit from appropriate judicial comments about the substance of a case made at an early stage. Such comments before final judgment should always be temperate and made with due regard for the possibility of evidence and or submission yet to be presented. As long as a judge does not misstep by making intemperate or inappropriately conclusionary comments, comment by a judge during an issues conference, or at any stage in a procedure, should be welcomed and should not prevent the judge from hearing and resolving the case.

76. The success of the issues conference proposal is also highly dependent on questions of implementation and enforcement as addressed below.

Implementation of new and existing rules

77. A comment on previous reform proposals has been that many of the proposals for more efficient procedures could already be achieved within the scope of existing rules. However, the experience of our members is that this does not occur in practice.

78. Indeed, to give one example of this point - the idea of an issues conference is not new. When the first case management conference procedure was reformed only a few years ago, the profession was told to expect these conferences to become a much more important aspect of High Court procedure. It was suggested that these conferences would almost always require attendance before the Court and that vacating them on the basis of a joint memorandum would be exceptional. The parties were to be required to take seriously the formulation of the issues list required under Schedule 5 with a view to genuinely refining the issues at that early stage.

79. The experience of members is that vacating the first case management hearing on the basis of a joint memorandum is the norm. Indeed, there is an expectation from the judiciary that such agreement should be achievable by diligent counsel. The list of issues is rarely discussed with the Court, and parties who seek at the first case management conference to instigate a discussion of the issues with a view to narrowing them are not supported by the bench. This attitude is perhaps understandable. The list of issues can often be contentious and finalising an agreed one can involve considerable time and effort. Under the present rules, little turns on the detail of those issues or prevents them from completely changing between the first case management conference and the trial.

80. The rules are drafted broadly to give the Court flexibility to treat each case appropriately. This is as it should be in principle, but it means that it is too easy for a party before the Court to follow an inefficient process. Judges, seeking to allow parties the fullest opportunity to prove their case, permit this to happen. Whatever new rules are introduced, the same inefficiencies will continue unless something changes about the way in which the rules are applied or enforced.

81. The Bar Association does not support more prescriptive rules. However, this issue does need to be addressed in other ways.

82. In terms of implementation, the Bar Association suggests that the commitment to judicial training should extend to teach all judges about the way that efficient procedures can be achieved within the existing rules as well as any new procedure. In addition to training, the Bar Association proposes the development of published guidance to judges (a civil bench book) about how best to utilise the rules for various types of cases or procedural stations. It proposes that the guidance would be available to practitioners also.

Consequences

83. The Committee has raised the possibility of stricter consequences for some procedural breaches. Our members have also highlighted the lack of significant enough consequences for procedure breaches under existing rules.

84. The Bar Association is aware that the UK has attempted imposing severe consequences for procedural breaches. Those reforms were not a success and were partially wound back. The Bar Association does not propose going down a similar path. Small procedural breaches that cause no material prejudice should not result in penalties to the parties or their lawyers.

85. The Bar Association believes that extreme caution should be exercised before any rule imposes likely consequences directly on counsel. A party's lawyers are required to obtain and act on instructions and our system depends on those instructions remaining confidential. Inflexibility leads to injustice.

86. Nevertheless, the Bar Association is of the view that there needs to be a change from the present situation. Our members have experienced situations where it appears possible to breach procedural directions and requirements under the rules with little risk of adverse consequences. Ultimately, procedural rules need to be enforced.

87. This is even more important when the rules are changed to put greater emphasis on the early performance of procedural duties by the parties. For example, if discovery is eliminated in favour of more complete initial disclosure there simply has to be a consequence for a party that fails to perform diligently their initial disclosure duties. Achieving efficiency without losing justice depends on the performance of these duties.

Costs

88. Costs can be a significant barrier to access to justice – both fear of adverse costs and inadequacy of costs making litigation ineffective even when successful. The current costs system has a significant benefit of being predictable and the Bar Association's members reinforce the importance of this to them and their clients. However, the Bar Association believes that there is room for reform that does not jeopardise this predictability.

89. Within the scope of this consultation – which has not raised the issue of costs - the Bar Association does not feel able to propose detailed new costs rules. The Bar Association is aware the Rule Committee has been recently looking at issues of costs – for example, with respect to costs for self-represented litigants. The Bar Association supports further work in this area and suggests that more progress on costs could carry a significant benefit to access to justice.

90. With reference to the submission above on enforcing the rules, the Bar Association notes that indemnity costs are currently almost impossible to obtain on the basis of breach of procedure irrespective of how bad or how flagrant the breach. The Bar Association believes that where a breach of procedure by one party has a cost implication for another, indemnity costs to cover those costs should be much more readily available.

91. The Courts have identified classes of cases – such as human rights cases or administrative law test cases – where different costs rules may be needed. The need identified by Courts for different costs rules in specified circumstances is amenable to the rules being changed to reflect this and to make this more predictable.

Concluding comments

92. The Bar Association supports significant reform for the Disputes Tribunal. If the Tribunal's processes – modified as suggested by the Bar Association – are, with appropriate resourcing, available for disputes of up to $100,000, then it believes that we will see transformational positive effects for access to justice issues.

93. Like the Rules Committee, the Bar Association sees the rules frameworks in the District and Higher Courts being, largely, fit for purpose. But, alongside the particular rule adjustments suggested, the Bar Association sees significant shifts as being necessary in the ways in which they are used by judges and practitioners. A truly focused, judge-led, process at the outset to resolve issues, direct disclosure and to determine the form of evidence to be given and the type of hearing process to be used is essential to deliver the change that is needed. A stitch in time will most certainly save nine.