New Zealand Law Society
Te Kāhui Ture o Aotearoa

lawsociety.org.nz

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By email: RulesCommittee@justice.govt.nz

Re: Rules Committee further consultation paper: *Improving Access to Civil Justice*

1. Introduction

1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Rules Committee's *Improving Access to Civil Justice* further consultation paper (**Consultation Paper**).

1.2. In that paper, the Rules Committee has proposed:

a. **Disputes Tribunal**: recommending a legislative amendment to increase the jurisdiction of the Tribunal to $50,000 (or more), expanding appeal rights and making further reform to the Tribunal's procedures.

b. **District Court**: improving the institutional capability of the District Court to hear civil claims, including by appointing a Principal Civil District Court Judge and making use of part time Deputy Judges/Recorders and by introducing pre-action protocols for debt collection.

c. **High Court**: introducing a new framework for the High Court civil jurisdiction, including early and comprehensive engagement by Judges at issues conferences, presumptive determination of interlocutories on the papers, reforms to discovery/disclosure, and placing greater emphasis on the documentary record.

1.3. The Law Society recognises the significance of the current consultation process to the future of access to justice and the conduct of litigation in New Zealand and acknowledges that this is a "once in a generation" opportunity to contribute to meaningful change to Court processes and litigation culture.

1.4. The Law Society has consulted its members,[1] and sought feedback on the following matters (in relation to each proposal):

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[1] The Law Society's Civil Litigation and Tribunals Committee sought feedback from the profession via Zoom consultation sessions held on 15 and 16 June 2021. All members of the profession were invited to attend. At each session, Law Society representatives summarised the key reform proposals and invited questions and feedback from participants. Across the two sessions, 57 lawyers attended. Direct written feedback was also encouraged.

a. The conditions necessary for the proposal's success;
b. Ideas for operationalising the proposal;
c. Comments on specific aspects of the proposal; and
d. Any perceived "fatal flaws" in the proposal.

1.5. This submission sets out the Law Society's views on each proposal. We do not address broader policy issues outside the scope of the Rules Committee's remit (including civil legal aid), or matters covered in the Law Society's submission on the Rules Committee's initial consultation paper.

2. Executive summary

2.1. The Law Society generally supports each of the Rules Committee's proposals (as they are summarised at [8] of the Consultation Paper). We believe that implementation of the proposals will greatly assist in ensuring a "right sized" approach for most, if not all, litigation and encouraging any necessary cultural changes to ensure proportionality becomes a guiding principle in practice as well as in the Rules.

2.2. The Law Society recognises that the three proposals rely on the availability of scarce judicial resources and on there being sufficient resourcing in each court's civil registries. The Law Society also acknowledges submitters' (and the Committee's) concerns regarding the perceived 'maximalist' approach being taken to litigation and that for the proposals to succeed, it will be necessary for the profession to adapt and to embrace proportionality. The Law Society is committed to playing its part in encouraging cultural change amongst legal practitioners to adapt to and capitalise on any reforms ultimately adopted.

2.3. The Law Society's response to each proposal is summarised below.

Disputes Tribunal

2.4. The Law Society supports increasing the Disputes Tribunal's jurisdiction to $50,000. Given concerns that the safeguards necessary at any higher level could lead to 'over-lawyering' of the Tribunal process, the Law Society does not favour a greater increase at this stage if the District Court proposals are to be implemented.

District Court

2.5. The Law Society supports strengthening the institutional competency of the District Court's civil jurisdiction and does not see potential conflicts as a fundamental barrier to the introduction of part-time judges. We support measures to improve debt collection for both debtors and creditors in the District Court and Disputes Tribunal, including (in principle) pre-action protocols, but need to understand what is proposed in further detail, including how it will sit alongside the Credit Contracts and Consumer Finance Act 2003.

High Court

2.6. The Law Society supports replacing a default requirement for discovery with enhanced disclosure rules. We observe that elaboration on the scope of the obligation to provide

adverse documents, and the 'duty of candour', would be desirable if the disclosure regime is not to become discovery by proxy.

2.7. The Law Society supports the proposal for a more expanded role for an issues conference. The Law Society considers that this conference should remain in the Chambers jurisdiction but should not be formally without prejudice.

2.8. The Law Society agrees that most interlocutories can (presumptively) be dealt with on the papers, but considers that there should be an exception for interlocutory applications that may finally determine a party's claim or defence.

2.9. The Law Society generally supports the proposed changes in relation to documentary evidence and expert evidence. We share the Committee's reservations regarding the introduction of page limits for briefs/affidavits, and favour the possibility contemplated at [75(c)(iv)] of the Consultation Paper, of empowering the Court to refuse to read inappropriately argumentative briefs or affidavits and/or potential costs consequences.

3. Disputes Tribunal proposals

3.1. The profession was generally supportive of the idea of expanding the role and enhancing the status of the Disputes Tribunal. In particular:

a. **Jurisdiction**: most members considered that the jurisdiction should be increased to $50,000. Some suggested keeping the default jurisdiction at $30,000 with ability to increase with all parties' consent. Given the widespread support for an increase, the Law Society does not consider this necessary. If the monetary limit is increased, there is some support for also reviewing the scope of the Tribunal's subject matter jurisdiction.

b. **Appeal rights**: most members of the profession agreed that if the jurisdiction is increased beyond $50,000, expanded appeal rights will be appropriate. There was also some support for graduated rights. One member observed that the broader appeal rights from the Tenancy Tribunal have not led to a large number of appeals to the District Court.

3.2. Some members were concerned that any further increase to the value of claims being determined in the Tribunal would lead to the process becoming more influenced by lawyers. While this has its merits, it risks undermining access to justice by putting more vulnerable users of the Tribunal at a disadvantage as more well-resourced parties increase their use of lawyers to assist in the preparation of evidence and submissions.

3.3. Some members were also concerned that:

a. Making hearings presumptively public would undermine the inquisitorial 'arb-med' process that is usually a feature of Tribunal hearings.

b. Introducing costs in the Disputes Tribunal would be a barrier to access to justice for many who rely on the Tribunal for justice and could be seen as a retrograde step in light of the proposed costs reforms.

3.4. On balance, if all three broad proposals are to be pursued, the Law Society's preference is for the Tribunal's jurisdiction to be increased to $50,000. This recognises the risk that any further increase will erode the features of the Tribunal that make it suitable for the resolution of lower-value claims. We anticipate that the impetus for a further increase may go away if the District Court reforms are successful.

3.5. If the jurisdiction is to be further increased (whether by consent or otherwise), the Law Society supports a 'two-tier' framework, with the following features:

a. expanded rights of appeal for disputes worth more than $50,000;

b. a requirement that disputes worth more than $50,000 be adjudicated in accordance with the law; and

c. Tribunal members being empowered to award costs (subject to the concurrent Rules Committee consultation regarding costs for litigants-in-person) but,

i. only for disputes worth more than $50,000, and

ii. subject to a cap.

3.6. In principle, the Law Society also supports provision for more efficient and straightforward measures for enforcing awards. For example, the Tribunal's powers in sections 19(1A) to (1E), 46 and 47 of the Disputes Tribunals Act 1988 could be expanded or a more streamlined registration process could be introduced. Given that the Tribunal is a division of the District Court, there is sense in the District Court Registry continuing to have responsibility for enforcement of Disputes Tribunal awards.

3.7. If the Tribunal is to become the primary trial court for minor cases or its enforcement role is to be expanded, a related point is whether the requirement for a 'dispute' should remain, or whether the same enforcement procedures could be made available for undisputed debts within the Tribunal's monetary jurisdiction.

3.8. The Law Society agrees that the mechanisms to enforce smaller undisputed debts through the District Court pose cost and access problems for creditors who are individuals and small businesses. We also recognise that low-cost enforcement processes intended to assist individuals can equally be used by commercial entities or debt collectors and that making such processes more streamlined and more readily available may increase the risk to vulnerable people who are reliant on third-tier lenders. There is a risk that further expansion of the Disputes Tribunal's jurisdiction could lead to the Tribunal being flooded with debt collection work and that, if resourcing is not scaled up sufficiently, this could be counterproductive to the overall objectives of the Rules Committee's proposal. Again, if the District Court proposal is implemented, the process from filing to default judgment may become quicker and cheaper, possibly obviating the need for the Disputes Tribunal to take on this function.

3.9. In relation to the other areas upon which the Rules Committee have sought comment, the Law Society:

a. Supports improved enforcement processes for Disputes Tribunal awards.

b. Is neutral as to whether a name-change is needed. Some feedback suggested that the general familiarity of the public with the Disputes Tribunal under its current name warranted retaining the name. Others agreed that a new name could articulate the enhanced authority intended.

c. Supports the proposed changes directed to enhancing the status of Referees, including:

   i. increasing daily rates for Disputes Tribunal Referees;

   ii. requiring Referees to be legally qualified;

   iii. changing the title "Referee" to "adjudicator."

d. Supports empowering the Tribunal to waive filing fees.

e. Does not support making hearings public by default, given the effectiveness of the arb-med process that is presently applied.

f. Does not agree that it is necessary for Referees to be encouraged to make greater use of their powers to appoint investigators, and is concerned that this could be a disproportionate approach given the size of disputes resolved through the Tribunal.

4. District Court proposals

4.1. The Law Society supports the Rules Committee's proposals, and our views on each proposal are set out below.

Rehabilitating the civil jurisdiction

4.2. We agree with the Committee's assessment of the current state of neglect within the District Court's civil jurisdiction, and support the proposal to strengthen its institutional competency. We would welcome the appointment of a Principal Civil Judge to lead this process. There is however, concern that, without a corresponding commitment across Government to provide the necessary resources, such efforts may be frustrated. While the civil expertise in the Courts and Registries is being restored, there is no desire for change to the 2014 Rules. We would, however, welcome a review of the Rules' fitness for purpose when they are operating as intended in a better system.

4.3. The changes touted at [63] of the Consultation Paper would need to be developed further before we can accurately gauge whether there is support for the use of more inquisitorial processes in the District Court. That proposal may be better left on the backburner until the institutional reforms are implemented.

Deputy Judges/Recorders

4.4. The Law Society is open to this idea and would welcome further information about how the system works in other jurisdictions and how it may be adapted here. Conflicts of interest should be capable of being managed, and do not currently prevent senior lawyers from sitting on quasi-judicial tribunals.

Pre-action protocols

4.5. We also support, in principle, the proposal to introduce a pre-action protocol for debt collection; however, the devil may be in the detail. There is concern to ensure that this system would, in fact, serve the most vulnerable. It would also be useful to have a breakdown of debt recovery actions in the current system; for instance, the extent to which it is dominated by institutional creditors who are already regulated under the Credit Contracts and Consumer Finance Act.

5. High Court proposals

5.1. The Law Society acknowledges the significance of the changes proposed to the High Court Rules, and related legislation, as set out in the proposals.

5.2. In particular, the Law Society acknowledges the importance of the current dialogue between the Rules Committee and the Attorney-General and Minister of Justice to ensure necessary reforms can be made on a system-wide basis, regardless of whether these changes technically fall within the scope of the Rules Committee, Parliament or the Executive (as noted at [7] of the Consultation Paper). Changes to the Evidence Act 2006 will also be particularly important.

5.3. The Law Society welcomes and supports the proposed changes, subject to the comments and reservations set out below. In particular, the Law Society recognises and supports the need to address unnecessary barriers to justice associated with costs arising from the current High Court Rules.

5.4. Moreover, and regardless of the ultimate approach adopted by the Rules Committee, the Law Society is conscious of the fact that effective changes cannot just be left to the Rules but will also require a different approach amongst members of the profession. This is referred to as a "practice culture among litigators" in the Consultation Paper.[2] We are conscious that many worthy legal reforms (whether in the justice system or otherwise) face challenges if those involved in the system do not adapt their culture and practices to ensure those changes can work effectively in practice.

5.5. The Law Society is committed to playing its part in encouraging cultural change amongst legal practitioners to adapt to and capitalise on any reforms that are ultimately adopted.

5.6. The Law Society notes one important issue at the outset. The Consultation Paper relies on counsels' 'duty of candour' in relation to discovery,[3] and their obligation to their clients and the Court "to pursue a proportional approach in litigation".[4] If these duties are intended to be relied on to effect cultural change, they could be made clearer in the Rules or in relevant professional obligations. In the absence of such express obligations, lawyers may feel obliged to emphasise their client obligations or more traditional obligations to the Court at the expense of these important duties.

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2 Consultation Paper, at [14(b)].

3 Consultation Paper, at [69(b)].

4 Consultation Paper, at [14(b)(ii)].

Commencement

5.7. We agree with the Rules Committee's approach as set out at [67] and [68] of the Consultation Paper.

Discovery

5.8. We support the proposal for the replacement of discovery rules with disclosure rules.

5.9. In particular, we agree with the requirement for parties to disclose all of the key documents they rely on at the time of filing their first pleading.

5.10. As we noted earlier in the consultation process, the number of electronic documents held by most parties grows exponentially, year on year. While the current discovery rules were a welcome amendment when implemented, they predated the continued growth of electronic data generated and held on (for example) email servers, hard drives and cloud-based document systems. This imposes an increasing burden on any party to litigation when providing discovery, especially parties who are businesses with their own servers and electronic document management systems.

5.11. As noted above, the Law Society's key reservation regarding the current proposal is a practical one regarding the duty to provide adverse documents pursuant to the parties' 'duty of candour'. The 'duty of candour' is not clearly elaborated on in the Rules or professional obligations, except in the context of counsel's obligation to disclose adverse legal authorities to the Court (rule 13.11 of the Client Care Rules). If this duty is to be relied on (particularly when a solicitor or counsel has countervailing duties to a client), it will be important for this to be clarified.

5.12. Further, if 'adverse' documents are to be disclosed with a statement of claim, before receipt of any statement of defence, this will require significant judgment calls to be made. Documents that undermine the pleaded causes of action may not be readily identified. At the time of the statement of claim, will a plaintiff also be required to disclose any 'adverse' documents related to a potential affirmative defence (and if so, no matter how tenuous)? What extent of searching for 'adverse' documents is required?

5.13. Accordingly, the Law Society supports the proposal but invites further consideration of some of the points noted above.

Issues conference

5.14. The Law Society supports the proposal for a more expanded role for an 'issues conference'.[5]

5.15. The Law Society recognises that an 'issues conference' will front-load some costs, and this may impact on access to justice by creating a cash-flow pinch-point. However, this could ultimately facilitate settlement and decrease litigation costs over time by enabling early decisions that will ensure a proportionate approach is taken to timetable steps leading to trial.

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[5] The Law Society's consultation with the profession indicated there is wide support within the profession for an expanded role for the 'issues conference'.

5.16. There is no clear consensus amongst members of the profession on whether a 'strong steer' on the merits should be provided by the presiding Judge, in addition to the 'procedural right-sizing' that is the main purpose of the conference:

a. Some considered it helpful, in applying an objective perspective to disputes, especially where a lawyer has not fully apprised their client of countervailing arguments.

b. Others considered it risked Judges entering "into the arena".

5.17. There was no general consensus in favour of 'without prejudice' issues conferences, which may be better dealt with under existing procedures for a Judicial Settlement Conference, or referrals to extra-judicial mediation.

5.18. The Law Society suggests that any issues conference should remain in the Chambers jurisdiction, but not formally 'without prejudice'.

5.19. The degree to which Judges may provide indications of the merits may be better worked out as a matter of practice once the reforms are implemented.

Proportionality

5.20. The Law Society supports the inclusion of proportionality as a guiding principle in rule 1.3 of the High Court Rules (or equivalent).[6]

Interlocutories

5.21. Feedback received by the Law Society generally favoured the proposed reforms to interlocutory procedures.

5.22. However, the Law Society considers that interlocutory hearings that may dispose of a party's claim altogether – such as summary judgment and strike-out applications – should be heard in open Court and the party should be entitled to have an in-person hearing as of right. It would raise concerns if a litigant could have (for example) summary judgment entered against them on the papers without having their 'day in court'. Exemptions to the general rule may be developed by analogy with section 56(3) of the Senior Courts Act 2016, and those interlocutory applications that are considered sufficiently important to warrant leave to appeal being available as of right.

5.23. On the other hand, the Law Society agrees that most interlocutory applications (for example, in relation to costs, security for costs, discovery and leave to appeal) can best be dealt with on the papers.

Trial

5.24. The Law Society generally endorses the Rules Committee's proposals. No particular objections were raised to these proposals during the course of our consultation.

5.25. In particular, the Law Society supports the intended approach of:

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6 The Law Society did not receive any feedback from the profession on this issue.

a. Witnesses' evidence being taken as read; and

b. The renewed focus of the evidence on contemporaneous documents.

5.26. However, we do note some minor qualifications or caveats:

a. We agree that documents in the common bundle should be admitted into evidence as of right. However, should they be admitted as to evidence of the truth of their contents as opposed to the veracity of the document? This may raise some evidential issues as to whether all statements of opinion contained in documents should be accepted as evidence of the truth of their contents. Overall, the Law Society accepts that such matters can be treated as a matter of weight rather than admissibility.

b. We think it may be slightly more convenient for witness evidence to be given by written briefs that are then confirmed by oath at the outset of the witnesses' evidence (rather than by affidavit). This is likely to save time and reduce formality in preparing witness evidence, and cause less consternation if (as often happens) small details require correction by the time of the trial.

c. Trial lawyers advise that cross-examination preparation takes significant time, most of which can be achieved during trial. If the Court is to remove the time given during evidence-in-chief to prepare cross-examination, this should be reflected in long trials being interspersed with 'reading days', or breaks between some witnesses. We understand this is consistent with English practice. If all briefs are to be taken as read, we suggest that long trials (over five weeks) may, in suitable cases, be scheduled to sit for only four days a week to permit a reading day (most likely Friday).

d. The Consultation Paper also considers page limits for briefs. In the Law Society's view, this raises significant issues, and may be problematic depending on the areas in which page limits are intended (for example, factual or expert witnesses). Instead, the Law Society favours the possibility contemplated in the Consultation Paper, of empowering the Court to refuse to read inappropriately argumentative briefs or affidavits and/or potential costs consequences.[7]

Expert evidence

5.27. The Law Society supports changes, similar to the English Civil Procedure Rules, encouraging greater use of Court-appointed experts, a presumptive limitation on experts per topic, and potentially a requirement for leave to be granted for expert evidence.

5.28. However, the Law Society has concerns regarding the proposal of court-appointed experts to be paid for by the parties, rather than the Ministry of Justice.[8] This would pose another barrier to access to justice for parties with limited financial resources, by incentivising well-resourced defendants facing meritorious claims to apply for a number of court-appointed experts, the cost of which would have to be equally shared with an impecunious plaintiff.

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7 Consultation Paper, at [75(c)(iv)].

8 Consultation Paper, at [76(d)(i)].

5.29. This potential practical flaw could undermine several of the more positive proposed changes that the Law Society supports. We therefore suggest this proposal is carefully considered before the Rules Committee or the Ministry adopts this model.

6. Conclusion

6.1. The Law Society strongly supports the general direction of the changes proposed in the Consultation Paper. The matters set out above relate to points of detail, and should not overshadow the generally positive response of the profession to the proposed reforms.

6.2. In particular, as made clear in its earlier submission on the Rules Committee's initial consultation paper,[9] the Law Society supports a culture change to encourage and require early, substantive and flexible case management that is tailored to the nature of the issues in dispute and aims to minimise the procedural steps required to resolve them fairly and effectively.

6.3. The Law Society's position is that access to justice is a right, not a privilege. It acknowledges that the cost of civil litigation has become prohibitive for many individuals and small-to-medium businesses, effectively depriving them of a practical ability to enforce legal rights. The integrity of the justice system should be protected from any perception that the quality of justice is determined by financial means and socio-economic status.

6.4. If the Committee has any questions, or if further discussion would assist, the convenor of the Law Society's Civil Litigation and Tribunals Committee, Daniel Kalderimis, can be contacted through Law Society Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Yours faithfully

Tiana Epati
President

[9] A copy of the Law Society's submission on the initial consultation paper can be found here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/I-Rules-Committee-Improving-Access-to-Civil-J.pdf.