THE BAR of NORTHERN IRELAND

Developing Modern, Efficient and Effective Employment Tribunals

Bar Council – Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.

2. The Bar Council welcomes the opportunity to contribute to the Department for Employment and Learning's consultation on developing modern, efficient and effective employment tribunals. We recognise that the draft rules have taken inspiration from the revised employment tribunal rules in Great Britain following the review by Mr Justice Underhill in 2012. We welcome the Department's approach to taking account of a number of specific issues that are considered to be of particular importance for Northern Ireland.

3. The Bar's response to the consultation is structured according to our comments on the substantive proposals outlined in each of the summary questions contained in the document.

Q1. Are the new rules less complex and easier for non-lawyers to understand?

4. The Bar Council notes that the draft rules are intended to improve the efficiency and effectiveness of tribunal processes, setting out in a single, simpler set of regulations, duties and powers previously contained in two separate provisions under Industrial Tribunal and Fair Employment Tribunal rules which were last revised substantially in 2005.

5. The Bar commends the Department's efforts to promote a clearer understanding of employment rights and responsibilities by simplifying the rules to make them shorter and more clearly structured. However, it is important to recognise that this is a complex area of law which can only be simplified to a certain degree as tribunals often adjudicate on multifaceted legal issues. The tribunal system exists to adjudicate upon extremely important workplace rights and responsibilities and a perceived need to simplify the system must not dilute that framework. A balance must therefore be struck between the need for tribunals to be able to function efficiently but also effectively. We would also emphasise that the participants involved in the process undoubtedly benefit considerably from

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obtaining legal advice and assistance from counsel on what to expect beforehand and during the various procedural stages of the tribunal process.

Q2. Can the language or style of the rules be improved and, if so, how?

6. In terms of the drafting of the rules, the Bar Council offers some suggested improvements:

a) In Rule 3 (alternative dispute resolution) it would helpful to replace *"shall"* with *"may"* as this would recognise that tribunals should be given the discretion to encourage dispute resolution based on what is necessary and appropriate in a particular case.

b) Rule 8 (Presidential Guidance) should be amended to highlight that *"tribunals may have regard"* to Presidential Guidance rather than *"tribunals must have regard"* as this will provide for flexibility depending on the particular circumstances of a case.

c) Rule 27 which provides for early case management is another area where the language of the rules should be amended. We believe that the use of *"shall"* in 27(1) should be replaced with *"may"* to reflect that there must be discretion around the use of early case management based on the circumstances of a particular case.

Q3. Do any of the rules appear ambiguous or create confusion? If so, please explain any improvements you feel could be made.

7. The Bar Council takes the view that the provisions around early conciliation contained in Rules 9 and 11 will create confusion for claimants in entering into the tribunal system with unsure about whether they are initially expected to approach the LRA or the OITFET (see our detailed comments under question 6).

8. Futhermore, Rule 12 details other circumstances around the reasons for rejecting a claim. We note that 12(1)(b) refers to rejection based on the lack of an EC certificate or a *"form which cannot sensibly be responded to"*. We consider that this requirement is overly prescriptive and may lead to a prospective claim being rejected for not using the correct form which does not fit with the objectives of simplifying the rules and making them less complex.

Q4. Does the overriding objective in rule 2 set out the most important objectives of the tribunal process? If not, please explain.

9. The Bar notes the overriding objective contained in Rule 2 which highlights:

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2. The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –
(a) ensuring that the parties are on an equal footing;
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues, the financial position of each party and the amount of money involved;
(c) allotting to cases an appropriate share of the tribunal's resources, while taking into account the need to allot resources to other cases;
(d) avoiding unnecessary formality and seeking flexibility in the proceedings;
(e) avoiding delay, so far as compatible with proper consideration of the issues;
(f) enforcing compliance with rules, practice directions and orders; and
(g) saving expense.

A tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules or any other statutory provision. The parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the tribunal.

10. The Bar Council is content with the overriding objective as stated in Rule 2. We particularly welcome the explicit provision for dealing proportionately with the financial position of each party and avoiding delay where feasible. Furthermore, the emphasis on seeking flexibility in the proceedings is particularly important and we believe our proposed amendments around Rule 3 on early conciliation and Rule 27 on early case management will help to ensure that this aim is reflected throughout the rules.

Q5. Do the rules do enough to encourage the appropriate use of alternative means of resolving disputes? If not, please explain.

11. The Bar Council takes the view that the rules do enough to encourage the appropriate use of alternative means of resolving disputes. Furthermore, we believe that tribunals should be given the flexibility and discretion to encourage dispute resolution based on what is practical and appropriate in a particular case. The rules must recognise that the use of alternative means of resolving disputes may not be feasible in every case. We would reiterate the importance of employment rights to individuals in every sector of the labour market in Northern Ireland. Individuals must not be unduly pressured into resolution if there is no genuine desire to enter such a process.

Q6. Please identify any potential issues with the proposed interface between early conciliation and the tribunal system.

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12. The Bar Council notes that the draft rules will link to a proposed new Labour Relations Agency system developed to support early intervention. In Great Britain, a mandatory early referral to ACAS conciliation has been in operation since May 2014. Following this initiative, the Labour Relations Agency (LRA) has developed proposals for a new early conciliation (EC) service which the Department intends to introduce under new Rule 3:

    A tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of the [Labour Relations] Agency or other means of resolving their disputes by agreement.

13. The Bar makes a number of technical observations below. However, we would initially like to make clear our concerns that the concept of early conciliation does not become another panacea, resulting in employment rights which were hard-won over many years in Northern Ireland being diluted. The Department will recall the experience of the Statutory Grievance Procedure which was introduced in 2005 to much fanfare only to be repealed in 2011 because of the confusion and difficulty it caused to parties, the tribunals and their administration. Lessons should be learned from that episode if an early conciliation model is to be enshrined in these rules. We believe that the concept of early conciliation and any mechanism upon which it is built must be genuinely motivated to foster an alternative to the tribunal. It cannot simply become a means of diverting and off-loading the assertion of important rights by individuals which are seen to be a nuisance by some employers.

14. The Bar understands that under Rule 3 most potential employment tribunal claims will be routed to the LRA with a view to attempting to resolve them and claimants will no longer be able to have a claim accepted by a tribunal without providing evidence that the LRA has offered early conciliation. We take the view that *"shall"* in Rule 3 should be replaced with *"may"*, thereby providing tribunals with discretion to encourage dispute resolution based on what is practical and appropriate in a particular case.

15. The Bar also has a number of concerns around how the EC process will work in practice. We would query how potential claimants will become aware of the new process with this representing an additional hurdle for anyone navigating the tribunal process. Rule 9 (1) states:

    A claim shall be started by presenting a completed claim form (using the prescribed claim form) to the tribunal office.

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Meanwhile Rule 93(1) provides for the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET) to inform parties around the LRA services available:

Where proceedings concern a statutory provision which provides for conciliation, the Secretary shall send a copy of the claim form and the response form to an Agency conciliation officer and the parties shall be informed that the services of an Agency conciliation officer are available to them.

16. The Bar takes the view that this also links to Rule 11(1)(c) which provides *that "the Secretary shall reject a claim if it does not contain... (i) an early conciliation form".* The addition of this provision means that it is unclear as to how claimants will initially be expected to enter into the system. They create potential confusion around the timeframe for the beginning of a claim as the rules suggest that an EC form must be presented before a viable claim technically exists. We consider that the rules may result in claimants being unsure about whether they are initially expected to approach the LRA or the OITFET to begin the process. The Department must provide further clear guidance on how prospective claimants can fulfil this obligation to first contact the LRA before presenting a complaint to a tribunal.

17. The potential that this new approach creates for time delays raises further issues around the interface between EC and the tribunal system. The Bar notes that at present the time limit for lodging a complaint is typically three months. The Department comments in the consultation document at 2.18 that *"during a limited period to allow for EC, the normal time limit for lodging a tribunal claim will pause, giving parties an opportunity to focus on conciliation".* However, we consider that the addition of this hurdle and the unspecified time *"limited period to allow for EC"* will inevitably lead to delays for prospective claimants.

18. The Bar also has concerns around the Department's note in the consultation at 2.18 that: *"Parties will be under no obligation to accept the LRA offer, and no negative inference will be drawn if parties choose not to engage".* This renders the imposition of the EC process at the beginning of all claims (notwithstanding the undefined exemptions) ineffective as it is entirely optional. However, we would also question whether failure to engage with the LRA will result in no negative inferences being drawn, particularly for those who are vulnerable applicants.

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19. We also note that the regulatory impact section of the consultation at 4.26 in which the Department restates figures from the *'Public consultation on employment law review: partial regulatory impact assessment'* (Department for Employment and Learning, July 2013) that the introduction of EC in Northern Ireland will result in envisaged net benefits across all employees of £580,000 and all employers of £1.220m a year. However, we would caution that these figures may not be accurate as they are merely estimates and specific work to quantify the potential savings to the tribunal service has not been undertaken in Northern Ireland.

20. Table 1 at 4.33 in the consultation considers the estimated costs of tribunal proceedings by outcome envisaged by the Department. DEL claims that effective case management which leads to a case not proceeding to a final hearing will result in savings being realised for claimants and respondents. For example, the total estimated cost of a tribunal hearing is £1,800 whilst this is £1,100 for an LRA conciliated case. Specifically, the costs for advice and representation post ET1 are £1,017 and £558 for a tribunal hearing and an LRA conciliated case respectively. This implies that the retention of legal representation is only resulting in increased costs for tribunal proceedings. We would highlight that these figures are based on a different jurisdiction and therefore they are highly subjective and incongruous in the context of a consultation on new tribunal rules. We question the basis for the inclusion of these figures in the document and hope that it is not to suggest the notion that legal representatives only add to costs rather than achieve savings. The Bar would contend that barristers bring value for money to the process and can help to reduce costs by facilitating resolution where possible whilst also ensuring the effective and efficient conduct of hearings when this is necessary.

21. The Bar also highlights that the figures used in table 1 on the estimated costs of tribunal proceedings by outcome are based entirely on the operation of the tribunal system in Great Britain. The Department has designed table 1 using figures taken from the *'Employment tribunal rules: review by Mr Justice Underhill – impact assessment'* (Department for Business, Innovation and Skills, September 2012) which is specific only to Great Britain. We take the view that these figures have not been tailored appropriately for the tribunal system in Northern Ireland. In addition, we believe that the Department must ensure that it does not overestimate the monetary savings that effective case management will ultimately result in for claimants and respondents based on figures that are relevant to another jurisdiction with a different tribunal system.

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22. Furthermore, the Bar takes the view that the best circumstances in which effective case management can be achieved in complex and challenging claims is where both sides are properly legally represented. We note that even in circumstances involving a party that does not have legal representation, the barrister is under a clear professional duty to assist the tribunal. This extends to cooperating with the tribunal to ensure that an unrepresented party to proceedings is not unfairly impeded or obstructed in the conduct of his or her claim.

23. In summary, the Bar welcomes the principle of conciliation contained within the new rules as barristers typically play a key role in the resolution of claims in providing client services. However, we take the view that the early conciliation provisions as drafted are unnecessarily complex, unduly procedurally difficult and presuppose a familiarity with the rules which is non-lawyer would not possess. Consequently, these violate the aim of the rules in seeking to make the tribunal system more simple and understandable. We expect that the Department will be mindful of the risks presented by attractive 'quick-fix' solutions.

24. We are supportive of efforts to encourage conciliation but any move towards formal provision in legislation must be done coherently and provide clarity for all users of the tribunal system. The rules as drafted do not achieve this and the capacity for ambiguity and misunderstanding which will be created by this amongst users is exactly what the rules are meant to avoid. We also believe that more work needs to be done to consider the level of extra resources required by the LRA to cope with the increased demand for services that will result from these provisions as drafted.

Q7. Do you support the concept of Presidential guidance being issued under rule 8 and, if so, how might it be used?

25. The Bar Council notes that Rule 8 introduces the new concept of Presidential guidance:

    The President may publish guidance as to matters of practice and as to how the powers conferred by these Rules may be exercised. Any such guidance shall be published in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.

26. We take the view that this guidance will be helpful in seeking to give all parties in a dispute a better idea of what to expect from the tribunal process. In addition,

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this will be useful in ensuring that employment judges across the system are managing cases in a consistent manner and providing clarity to all parties which is to be welcomed. However, the use of *"tribunals must have regard"* should be amended to read *"tribunals may have regard"*. This amendment will help to ensure that flexibility remains a key element in proceedings, as identified in the overriding objective (Rule 2).

27. However, the Bar requests that the Department provides clarity on the sort of matters which would be covered by Presidential Guidance.

Q8. Should any changes be made to the grounds for rejecting a claim under rules 11 and 12? If so, which changes and why?

28. The Bar highlights that Rule 11 may cause confusion for claimants entering the system, particularly given the interface that this has with early conciliation. Rule 11(1)(c) deals with the rejection of claims and states that:

    The Secretary shall reject a claim if any of the following applies –
    (c) it does not contain one of the following –
    (i) an early conciliation form;
    (ii) confirmation that the claim does not institute any relevant proceedings; or
    (iii) confirmation that an early conciliation exemption applies.

29. The Bar takes the view that this does not make it clear for claimants as to how they will initially be expected to enter into the system as this suggests that an EC form must be presented before a viable claim exists as it represents grounds for a rejection. As mentioned above in response to question 6, the Department must provide further clear guidance on how prospective claimants can fulfil this obligation to first contact the LRA before presenting a complaint to a tribunal. Further detail is also necessary around the exemptions from EC referred to in Rule 11(1)(c)(iii).

30. Meanwhile Rule 12 details other circumstances around the reasons for rejecting a claim. We note that 12(1)(b) refers to rejection based on the lack of an EC certificate or a *"form which cannot sensibly be responded to"*. We consider that this requirement is overly prescriptive and may lead to a prospective claim being rejected for not using the correct form. We believe that it should be removed.

31. Furthermore, in relation to this Rule 13 provides for the reconsideration of rejection if a notified defect can be rectified with 13(2)(b) stating that *"the*

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application shall be presented to the tribunal office within 14 days of the date that the notice of rejection was sent". This is a particularly tight timeframe and appears to make it difficult for a legitimate claim to be submitted on time if there is a defect in the application. The Department should give consideration to extending this. In addition, Rule 13(4) states that *"if the chairman decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified".* However, we take the view that that once a defect has been rectified the original submission date should be reverted to as this provision does not fit with the overall objective of the rules in simplifying matters for potential claimants.

Q9. Do you support developments in the early case management process and can you suggest any improvements?

32. The Bar generally welcomes in principle the statutory provision for early case management which is provided for in Rule 27:

(1) As soon as possible after the time limit for presenting a response has expired, early case management shall proceed in accordance with Presidential guidance.

(2) In early case management, having reviewed the documents held by the tribunal that are relevant to the claim, the chairman –
(a) may provide the parties with an assessment of –
(i) the issues to be determined;
(ii) the arguments and evidence upon which the parties propose to rely;
(iii) opportunities that may exist for the parties to resolve the matters in dispute without the need for a hearing.

33. However, we have some concerns around how this early case management will operate in practice. We believe that the use of *"shall"* in 27(1) should be replaced with *"may"* to reflect that there must be discretion around the use of early case management based on the circumstances of a particular case.

34. In addition, the provisions in 27(2) allowing for a *"chairman"* to provide an assessment of the issues to be determined along with the arguments and evidence on which the parties propose to rely appears to provide for too great a degree of intervention. Despite the benefits of some level of case management, we take the view that this provision could result in an employment judge being able to encroach too greatly on the role of a barrister in guiding a client and elucidating the issues in a case. The Bar highlights that the rule as drafted is too prescriptive and allows for the development of an interventionist approach which

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could potentially undermine the role of barrister acting in any case in carrying out her or his duty to protect the interests of the client and the will of the parties involved.

Q10. Are the case management powers provided for in the rules sufficiently clear and flexible? Please explain.

The Bar Council takes the view that the Part 7 of the Rules provides adequately for case management powers. We particularly welcome the powers around lead cases (Rule 33), striking out (Rule 35) and deposit orders (Rule 37) which are explored in greater detail below.

In relation to Rule 35, we note that a tribunal can strike out all or any part of a claim *"at any stage of the proceedings"*. We particularly welcome 35(1)(a) which states that this can be on the grounds that the claim is *"scandalous or vexatious or has no reasonable prospect of success"*.

Q11. What are the advantages and disadvantages of the lead case mechanism for dealing with multiple claims in rule 33?

35. Rule 33 sets out a mechanism for dealing with situations where *"two or more claims give rise to common or related issues of fact or law*". In these situations, the tribunal or the President can specify one of these as the "lead" case and postpone the hearing of the related cases until the lead case is dealt with. The Bar commends the Department's move in this direction and the advantages that this brings in terms of the efficiency and effectiveness of decision making for the tribunal process. We note that the use of lead cases typically requires an identifiable class to be defined and a claimant which is typical of this class.

36. We would also point to the use of class action lawsuits in the United States of America as a model of best practice in this area. This mechanism allows courts in the USA the power to join parties in a class and serve notice on those individuals affected who will be bound by any judgement unless they object. Detailed guidance and rules have been provided to practitioners in the USA on the operation of class actions contained in the US Manual of Complex Litigation 4th Edition 2004. This provides a detailed overview of the various federal rules which deal with the many difficulties of such claims. The Department should consider how this mechanism has worked in another jurisdiction and whether similar provisions around this would be appropriate or necessary in Northern Ireland.

Q12. Are the strike out mechanisms set out in rule 35 reasonable and proportionate? Please explain, proposing any alterations.

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37. The Bar Council welcomes the Department's provisions around cases having little or no merit as this will create the provision to allow the tribunal system to address unmeritorious claims deals in a timely and robust fashion. We believe that Rule 35 will be particularly useful as it permits a tribunal, on its own initiative or following an application by a party at any stage, to strike out all or part of a claim or response that is *"scandalous", "vexatious"* or *"has no reasonable prospect of success".* However, we would stress that tribunals must be prepared to use these powers to ensure that they work effectively in dealing with cases having little or no merit.

38. The Bar also takes the view that in order to truly emphasise the employment judge's power to strike a claim out at an early stage it would be helpful for this to be provided for expressly in Rule 35. Therefore the Bar Council recommends that this is amended to the effect that notice of strike out may be given on an initial sift of papers before any hearing takes place or representations have been made.

Q13. Should tribunals have power to require one deposit per issue identified as unlikely to succeed?

39. The Bar notes Rule 37 on deposit orders which stipulates:

> *(1) Where at a preliminary hearing under rule 50 the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £500 as a condition of continuing to advance each such allegation or argument.*
> *(2) The tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

40. We welcome the Department's provision that Rule 37 will now explicitly empower a tribunal to require more than one deposit if more than one issue is identified as unlikely to succeed if further pursued. We would highlight that this will give a tribunal more nuanced powers to deal with weak aspects of claims and responses without preventing other matters from proceeding.

Q14. Should tribunals have power to require claimants to pay deposits per named respondent in order to proceed?

41. The Bar is in favour of tribunals having the power to explicitly require claimants to pay deposits per named respondent in order to proceed. A tribunal should then

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have the flexibility to decide how the provisions for one 'deposit per respondent' and one 'deposit per issue' could operate in conjunction with each other based on the particular circumstances of the case and the financial situation of the claimant involved. Tribunals would also be required to act *"fairly and justly"* in doing this as per the overriding objective detailed in Rule 2.

Q15. What should be the maximum level of an individual deposit?

42. The experience of practitioners working in this area suggests that a £500 limit may not be enough to deter some parties from making unmeritorious claims, or defences as the case might be. Therefore we believe that the limit should be increased to a maximum of £1000, following the level established in Great Britain since 2012. However, we recognise the current economic situation and concerns that claimants on low incomes might not be able to pay such a deposit. Consequently, we acknowledge the need for Rule 37(2) which means that an order cannot be made until the tribunal has made *"reasonable enquiries into the paying party's ability to pay the deposit"*.

Q16. Should there be a maximum cumulative deposit if multiple deposits are permitted?

43. We take the view that the Department should implement a maximum cumulative deposit if multiple deposits are permitted in a case and provide clarity on how this will operate.

Q17. Should a party who has lost a case for the reason(s) identified in a deposit order forfeit the relevant deposit even where no costs order is made?

44. The Bar Council is in favour of provision being made for a party to forfeit the relevant deposit in such a case. We consider that this could act as a strong deterrent in preventing a party from bringing a claim which is *"scandalous or vexatious or has no reasonable prospect of success"*. Consequently, such a provision could work in conjunction with the other rules in part 7 to help improve the efficiency and flexibility of the tribunal system.

Q18. Do the rules give sufficient protection to vulnerable people? Please explain.

45. The Bar Council recognises that vulnerable individuals can face a variety of challenges when bringing a claim through the tribunal system. We consider that Part 8 of the rules sets out a number of important requirements which will help to

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ensure that vulnerable parties have access to an effective means of redress. The Bar has a specific point to make in relation to Rule 43 on Electronic Communication which provides that:

A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the tribunal hears and see any witness as seen by the tribunal.

46. The Bar is opposed to allowing for a hearing to be conducted solely by electronic means as we believe that this could potentially be exploited by individuals with unmeritorious claims, or indeed responses. The words *"in whole"* should be removed from Rule 43.

Q19. How might Presidential guidance address the needs of vulnerable parties?

47. The Bar Council welcomes the Department's provisions around special measures for vulnerable people contained in Part 8. However, it is difficult to hypothesise around what Presidential guidance might add to this. The requirement for any special measures will depend on the circumstances of a particular case and therefore this must be a matter of individual judicial discretion having regard to the interests of both parties. The Bar invites the Department to provide clarity on what Presidential Guidance is intended to cover.

Q20. Does rule 47 make the privacy and restricted reporting regime sufficiently flexible? Please explain.

48. The Bar considers that Rule 47 makes the privacy and restricted reporting regime sufficiently flexible in order to protect the rights of any vulnerable party. We have no further comment to make on this.

Q21. What additional measures or rules should the Department consider implementing, to support vulnerable parties?

49. The Bar welcomes the possibility of the use of video link and other special measures provided for under Rule 43 and recognise the benefits that this can provide for vulnerable people in certain circumstances. We consider that the measures outlined will provide adequate protection and have no comment to make on additional measures.

Q22. What, if any, quantifiable evidence do you have of failure to pay tribunal awards and its impacts?

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50. The Bar Council does not retain this information.

Q23. What additional measures, if any, are necessary to address nonpayment of awards?

51. We have no comment to make on this.

Q24. Are there any drawbacks to the approach adopted in rule 50, which enables pre-hearing reviews and case management discussions to proceed as part of one or more preliminary hearings?

52. The Bar Council does not envisage any drawbacks provided that adequate notice is given to the parties.

Q25. Are there any potential interface issues between preliminary hearings under rule 50 and early case management under rule 27? If so, please explain.

53. The Bar Council does not believe that there will be any interface issues between these two areas. However, the Department must clarify the distinction between preliminary hearings and early case management, particularly for non-lawyers, in order to achieve the aim of ensuring that the new rules are simple and accessible. There is a need to ensure that guidance is given to tribunal users so that they have a clear understanding about the preparation required for the different stages of the tribunal process.

Q26. Do you agree with the proposed approach to giving reasons in rule 60? Please explain.

54. The Bar Council has no comment to make on Rule 60.

Q27. Does Part 14 make appropriate provision in respect of costs, preparation time and wasted costs? Please explain.

55. The Bar notes that Part 14 of the rules deals with provisions related to costs, preparation time and wasted costs. The Department highlights that the maximum amount of costs that a tribunal can itself determine, without agreement between the parties or an assessment by a court, will remain at £10,000. This differs from the position in Great Britain where the maximum figure is now £20,000. Rule 78 states:

(1) A costs order may –

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(a) order the paying party to pay the receiving party a specified amount, not exceeding £10,000, in respect of the costs of the receiving party;
(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined by way of detailed assessment in a county court;

56. Meanwhile we note that the relevant provisions under Rule 78 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 in England and Wales which states:

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;
(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993(23), or by an Employment Judge applying the same principles.

57. However, the Bar has concerns around the power of the County Court to assess costs in Northern Ireland. The County Court in England and Wales has a much greater power to do this with the Taxing Master able to adjudicate on any costs assessment which is referred to them. However, this does not translate into the NI context where no receiving power from tribunals exists for the Taxing Master. We believe that the Department has not given adequate consideration to this provision as if the Underhill rules have been used as a model then these have not been translated in such a way as to fill this void. Consequently, we suggest that the Taxing Master should be given the necessary powers by modification to The Rules of the Court of Judicature (NI) 1980 for Rule 78 to be effective.

58. Furthermore, we also note that there is provision under Rule 80 for a tribunal to make an order for wasted costs against a legal or other representative who is acting for profit in respect of *"improper, unreasonable or negligent"* behaviour. However, we consider that there is a wider need for the

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Department to consider the role of representatives acting for profit who are not legal representatives and not subject to any form of regulation at present. The users of such services are unprotected at present and have no formal means of redress. Consequently, this is an important issue of consumer protection and public interest which we believe must be addressed by the Department.

Q28. What are your experiences of 'costs threats'?

59. The option to send a costs warning letter to a party is an important tool for any legal representative. This is not to be used tactically or punitively but instead must be deployed to protect the interests of a client. This is a matter of discretion for an individual representative when appropriate. We acknowledge that some representatives may issue these letters routinely as a matter of habit. However, we are unclear as to how this can be discouraged as the option to issue a costs warning letter often represents a protective measure when costs awards are an exception rather than the rule.

Q29. What changes, if any, should be made to deal with the issue?

60. The Bar Council takes the view that no changes should be made as this is a matter for the discretion of a tribunal. The judge has the authority to censure a legal representative if a costs warning letter has been issued inappropriately. We consider that it is sufficient for judicial discretion to be retained in this area.

Q30. Should legislation formally provide for reference to be made to the position of "employment judge"? Please explain.

61. The Bar Council is content with the term "employment judge" being formalised throughout the tribunal system.

Q31. Taking into account the sources of information already available, is there a need for further guidance on the tribunal process? If so, what type(s) of information and guidance should be developed, and what issues would benefit from a particular focus?

62. The Bar Council takes the view that considerable guidance is already available from OITFET along with additional publications from Citizens Advice, Law Centre (NI) and the Human Rights Commission. However, we believe that resources must also be developed around early conciliation and the role of the LRA for tribunal

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users. More information around the distinction between early case management and preliminary hearings could also be useful.

Q32. Do you support the suggestion of a multimedia familiarisation resource and, if so, what should be its focus?

63. The Bar Council is supportive of the development of an interactive online tool for tribunal users. Online video material could communicate in a direct way what to expect and illustrate to potential users the roles of tribunal members and staff. This video could also show how a case is prepared, the role of evidence in the hearing and how the hearing is likely to proceed.

Q33. How else can users be helped to understand the nature of the process, including the value of particular claims?

64. We have no additional comment to make on this.

Q34. How can engagement between the tribunal system and its users be improved?

65. The Bar Council highlights that the Tribunal Users Group represents the forum through which engagement can be considered. The Group generally meets twice annually to discuss a range of issues concerning tribunal practice. However, we believe that this is no longer fit for purpose due to the dwindling attendance levels, poor circulation of information and an unsuitable plenary format. Members feel that the current setup is not conducive to constructive and open dialogue.

66. The Bar believes that improvements can be made to the current arrangements. A roundtable format would be more suitable with meetings required on a quarterly basis. The Chair must be impartial with consideration being given to the possibility of a judge from another jurisdiction filling the role. Efforts must also be made to diversify the membership of the group as this could be broadened out beyond lawyers. Furthermore, space for technical committees could still be provided on an ad hoc basis with the expertise of experienced legal representatives being drawn on in this forum.

Q35. Do you concur with the Department's assessment of the impacts of the proposals set out in the consultation?

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67. The Bar Council considers this question in relation to deposit orders. We outlined the rationale for the imposition of deposits per issue and respondent fully in questions 13-16. We take the view that these are necessary and proportionate with a tribunal also having regard to the financial situation of the claimant involved under Rule 37(2) and the overriding objective contained in Rule 2. Furthermore, the new provisions around early case management in Rule 27 will be useful in managing any impact and giving individuals a realistic appreciation of their case and allowing them to make an informed judgment as to whether and how to proceed. We believe it is vital that tribunals have at their disposal tools to lend weight to efforts which discourage claims and responses that have little merit.

Q36. What, if any, additional impacts need to be considered?

68. We have no comment to make on this.

Q37. Do you have any other views on how the tribunal process could be improved?

69. No.

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