



The Law Society

**Solving disputes in the county courts: creating a simpler,
quicker and more proportionate system**

A consultation on reforming civil justice in England and Wales

**Response by the Law Society
of England and Wales**

June 2011

supporting
solicitors

Contents

Introduction 3

Executive summary 5

The Law Society's response 9

Introduction

The Law Society, which is the representative body for over 140,000 solicitors, welcomes the opportunity to respond to this consultation. In addition to representing solicitors, the Society strives to maintain and promote access to justice. It is this consideration which forms the basis of this response. This means also that we have to express our serious concerns with a number of the proposals and the comments made by the Government, particularly some of those made in the Ministerial foreword.

The Law Society does not agree that there is such a thing as “the phenomenon of individuals suing companies for disproportionately large sums, often for trivial reasons and without regard to personal liability”. This disregards the thousands of victims who have suffered injury or some other loss or damage due to the negligence or other breach of duty of another. In our Society people have rights to expect others to take reasonable care and, where others disregard those rights, we see no reason why citizens should not be able to obtain redress in accordance with the law.

The Law Society is very disappointed to note the references to the development of a compensation culture in the Ministerial foreword of the consultation paper. Quite simply, such a culture does not exist and this has been confirmed on many occasions. For example:-

In May 2004, the BRTF released its report *Better Routes to Redress* which examined the “compensation culture” in the United Kingdom. Reports in the media and advertising by claims management companies are cited as creating an inaccurate perception that large sums of money are available for those that have suffered a wrong through the negligence of others. The report argues that it is this perception that is at issue. The report examined the causes of the perception of a “compensation culture”; how that perception is fuelled and the damage that the perception will do for the prosperity and well-being of the UK. The report of the completely independent Better Regulation Task Force concluded that “the compensation culture is a myth”.

On 26th May 2005 Tony Blair, the then Prime Minister, gave a speech to the Institute of Public Policy Research, during which he stated:-

“Often the most outlandish cases that are brought are dismissed but the headlines live on, create a myth and that myth is acted upon”.

“People are entitled to sue”.

“Government cannot eliminate all risk but too often our reflex as a society is to regulate and to introduce new rules”.

“... there should be a common sense culture not a compensation culture”.

In October 2010, in his report *Common Sense, Common Safety*, Lord Young of Graffham concluded that “the problem of the compensation culture prevalent in society today is, however, one of perception rather than reality. In appendix A to the report Lord Young confirmed that amongst the many stakeholders who had responded to his call for evidence “there was a general

agreement that the rise of a compensation culture is largely a myth perpetrated by the national press".

Figures published by the NHSLA show that 6652 claims were made against the NHS in the year ended March 2010. This is nearly 5% less than the number of claims issued in 2000 and 11% less than those issued in 2001.

Making reference to a compensation culture enforces the myth and ignores the reality. Worse, it suggests that Government would rather people with legitimate claims did not make them

We do not accept that there is evidence to support the Secretary of State's contentions, that there are problems which have been brought to the court room which should have no place there and note that none is provided in the consultation paper.

Similarly, It cannot be more than an assumption that in 2010 there was a potential for "87,000 claims to have been resolved earlier if mediation had been used more widely". First, mediation could well have been used unsuccessfully to resolve a proportion of these claims in any event. Secondly, mediation is not suitable in all cases. For example, the NHSLA will not usually agree to mediate a claim before most of the evidence, and consequently a significant amount of legal costs have been incurred, has been obtained. This will invariably mean that legal proceedings will have been issued by that stage in order to protect the client's interest. It also ignores the fact that a substantial number of cases are resolved before proceedings were issued through negotiation between the parties, facilitated by solicitors.

We are pleased to note that the Government acknowledges that the courts are not able to offer quick and efficient services that meets the needs of the user. This is a result of many years of underfunding of the courts system by successive Governments, despite increases in court fees far exceeding the rate of inflation.

The fact is that more people have access to methods of funding legitimate and successful legal action than ever before. In a society that prides itself on being fair, on respecting the rule of law and on protecting the rights of solicitors it is unacceptable that even "a minority" will be worse off under these proposals or the reforms proposed by Lord Justice Jackson. We cannot accept any proposal which results in a derogation of access to justice or an uneven playing field due to the financial ability or inability of one or more of the parties to continue with the claim.

The UK considers itself to be a world leader in ensuring that citizens rights are recognised – rights which can be enforced by and against individuals, businesses and the state. Recently the Government unveiled plans to "strengthen the UK's reputation as a world leader in legal services". The Government's action plan for this actually promotes international dispute resolution. Why then is the Government on the other hand doing so much to

reduce access to justice and attempting to decimate the domestic legal services market?

Executive summary

Preventing cost escalation

Extending the RTA PI Scheme

There may be scope to extend the financial limit of the existing scheme but there needs to be a full assessment of its operation before any further consideration is given to that.

The existing scheme commenced on 30th April 2010 and despite "teething" problems and an inadequate IT platform it does appear to be serving the purpose for which it was created although not always as efficiently as envisaged.

Increasing the financial limit at this time will result in an increase usage of the existing Portal which we do not consider will be able to cope.

The existing scheme was developed by stakeholders and the associated fixed costs were negotiated and agreed by them based upon an assertion that it would be limited to claims with a value of £10,000 or less. Any change to the financial limit should only be undertaken after a full review of the existing process and, if necessary, a review of the associated fixed costs. It should be borne in mind that the proportion of injury RTA cases valued at above £10,000 is very small

Any variation in the existing scheme or its extension to other areas of personal injury must have the full support of all stakeholders and must embody sufficient safeguards, escapes and regular reviews of the fixed costs.

Fixed recoverable costs

In response to the original proposals on fixed costs by Lord Justice Jackson the Law Society's was that it "does not oppose the principle of the wider introduction of fixed costs provided that:

- the rates are fixed so that the required work can be profitably undertaken by sufficiently qualified and experienced staff;
- the rate is reviewed annually in line with inflation and any changes to procedure taken into account;
- there are sufficient escape routes where complexity increases the costs;
- any fixed cost regime must avoid the risk of satellite litigation;
- since it is unlikely that they can apply to all personal injury claims, it will be simpler and more appropriate for some categories (e.g. disease and clinical negligence claims) to be excluded rather than relying on escape mechanisms; and
- any further implementation of fixed costs in fast track litigation should be staged and subject to piloting, including consideration of the effect of the new RTA claims process."

Unless these conditions can be met a wider introduction of fixed costs will not gain the confidence of those solicitors who undertake fast track personal injury work. This will lead to fewer solicitors undertaking the work and access to justice will be detrimentally affected as a consequence".

The Law Society has not changed its views since then and we are willing to work with the Ministry of Justice and other stakeholders in order to achieve a mutually satisfactory resolution.

Mandatory pre-action directions

The Law Society does not support the introduction of mandatory pre-action directions without further debate. We consider that there is a significant risk of unfairness in the proposals.

Electronic channels

Encouragement of the use of electronic channels depends heavily on the cost to users compared to non-electronic channels. However, there needs to be further investment in IT in the Courts and the introduction of fully integrated communications, filing and document and case management systems which will support the introduction of mandatory use of electronic channels by the legal professions and businesses.

Small claims

The Law Society does not agree that the existing small claims track limit should be increased. The amount of the current small claims track limit of

£5000 (excluding personal injury and housing disrepair) is a significant sum of money for most consumers. Increasing the limit will mean that many will fall into a "claims value" trap which will restrict their ability to seek legal advice.

Despite being of lower value many claims can still be too complicated for consumers who are reticent about representing themselves in court. Many, including the more vulnerable in society, therefore turn to solicitors to ensure that they receive justice. This is essential to ensure a level playing field.

The average waiting time between issue and a small claims hearing has hardly fluctuated over the last three years (between 29 and 31 weeks), whilst between 20 and 21 weeks is the average time taken by the courts to allocate matters to a track after issue of proceedings. The Government should therefore be concentrating their efforts on reducing these delays and not suggesting an increase in small claims limits which will undoubtedly exacerbate the backlog of work in the system. This is because many more cases will involve litigants in person (LIPs) and the hearings in such cases tend to take longer than when both parties are legally represented.

Alternative dispute resolution

There is a perception that ADR is not supported enough by solicitors but this is far from being the case. All solicitors engage in attempts to settle cases by negotiation from the outset, which is a form of ADR in itself. Many solicitors are trained mediators. In order to achieve a successful outcome by means of mediation, both the claimant and the defendant have to be willing to come to terms. Regrettably this is far from being the case, despite the recommendations of those who are advising them.

Steering litigants to compulsory mediation in small claims is unlikely to sufficiently resolve this problem. Most have already attempted to represent themselves by seeking to resolve any dispute directly with the business or individual concerned. However, when this unsuccessful, as is often the case, they turn to the courts. Moreover formal ADR is more expensive than a negotiation between legal representatives. There should be encouragement for negotiation at that stage first

The Law Society fully supports the views of the Association of District Judges who have previously stated¹, "whilst we support the objective of the court being a last resort for resolving civil disputes, in our view Alternative Dispute Resolution should not be regarded as a panacea. It undoubtedly has a part to play, but in our view as part of a civil justice system and not in place of it." .

Debt recovery and enforcement

¹ Future of Civil Justice - April 2005

Generally speaking we are in agreement with most of the Ministry of Justice's proposals on debt recovery and enforcement. However, we do not support the proposals to allow creditors to apply for charging orders routinely or that they should not need further permission of the courts with regard to third-party enforcement providers.

Structural reforms

In principle we agree with all of the proposals contained in this section.

The Law Society's response

How is the RTA PI scheme working?

Question 1

Do you agree that the current RTA PI Scheme's financial limit of £10,000 should be extended? If no, please explain why.

We consider that, in time, there may well be scope for development of the RTA PI scheme to cover a wider range of cases. However, it is important to note that the scheme has been in operation for a little over one year and has suffered from teething problems, to a great extent as a result of an inflexible IT system which was hastily introduced due to the eagerness of the previous Government to introduce the scheme to a fixed deadline. Moreover, there are a number of concerns about the governance of the scheme which need to be addressed if the scheme is to become a major part of the system.

There are a significant number of qualifying claims which fall out of the current system and reasons need to be ascertained as to why this is happening. There have also been instances where claims which fall within the scheme have been too complicated and which the IT Portal is unable to cope with.

Any extension of the limit must depend upon the success or otherwise of the existing scheme and this can only be assessed after a full review has been undertaken.

Question 2

If your answer to question 1 is yes, should the limit be extended to (i) £25,000, (ii) £50,000 or (iii) some other figure (please state with reasons)?

Should it be the Government's intention to increase the financial limit despite the serious reservations of many stakeholders then the limit should correspond to the financial limit for fast track claims.

Question 3

Do you consider that the fixed costs regime under the current RTA PI scheme should remain the same if the limit was raised to £25,000, £50,000, or some other figure?

No. The fixed costs regime must be reviewed in those circumstances. The value of the claim will depend upon the severity of the injuries. Consequently,

increasing the financial limit will mean that claims involving far more serious injuries than the existing scheme will fall to be dealt with.

The existing scheme was designed to deal with lower value claims where, in most cases, only one medical report would be required and the injuries would be resolved over a relatively short period of time. Thus it was developed to be a simple process dealing with simpler lower value claims and that was the basis upon which the fixed costs were negotiated and agreed.

Claims involving more serious longer term injuries, possibly with a necessity to obtain several medical reports, will therefore involve more extensive work than the current fixed costs allow for. The costs will therefore need to be greater.

Question 4

If your answer to question 3 is no, should there be a different tariff of costs dependent on the value of the claim? Please explain how this should operate.

It could be that a tariff based upon claim value will be the answer but such tariffs can only be considered after full and up to date research has been undertaken. The Law Society would be happy to engage with the Ministry of Justice in discussing how this could be achieved to the satisfaction of all stakeholders whilst maintaining user confidence and reasonable profitability for those engaged in the work.

Question 5

What modifications, if any, do you consider would be necessary for the process to accommodate RTA PI claims valued up to £25,000, £50,000 or some other figure.

There would need to be a complete redesign of the current scheme to take into account the more serious nature of the claims and, which will occur in many cases, injuries which cannot be resolved at an early stage. Any redesign must be with the full co-operation and agreement of all stakeholders.

The IT Portal will also need to be completely remodelled and this must be undertaken, developed and controlled by the Government. We cannot continue to have a mini justice system as the IT Portal is entirely funded by the insurance industry, albeit with representatives of claimant solicitors on its board.

Public and employers' liability claims

Question 6

Do you agree that a variation of the RTA PI Scheme should be introduced for employers' and public liability personal injury claims? If not, please explain why.

This would be possible in theory but it will be fraught with difficulties, some of which may be insurmountable (particularly disease claims and claims based on accidents overseas), from the outset.

Disease cases will frequently involve disputes on liability and invariably will involve a number of parties, insurers and defendants. On that basis, on the whole, disease claims (both EL and PL) are not suitable to be dealt with via a portal. In the rare cases where there is unlikely to be a dispute on liability and there is joint and several liability then a portal could be designed to meet the needs of that particular disease but we query whether this will be viable for the number of cases involved.

Any variation of the existing scheme must have the full support of all stakeholders and must include sufficient safeguards, escapes and regular reviews of the fixed costs to ensure that solicitors are able to undertake an appropriate job. Those costs will also need to be initially negotiated by stakeholders. One of the advantages of the RTA scheme is that the defendant community is relatively small and well defined. It will be far more difficult to achieve in other areas of law, where a number of employers are not insured.

The existing Portal is not the correct platform to deal with these claims and if the Government is intent on taking this proposal forward then it must invest in an efficient and flexible IT platform which will be able to cope with the additional work.

Question 7

If your answer to question 6 is yes, should the limit for that scheme be set at (i) £10,000. (ii) £25,000, (iii) £50,000 or (iv) some other figure (please state with reason)?

In similar way to the RTA PI Scheme, the limit should be set at £10,000 to begin with and only after a full assessment of the scheme's success or otherwise should consideration be given to increasing the limit.

The assessment should include full data on the impact or otherwise of the level of damages which is being achieved by claimants. We are concerned that levels of damages may be eroded under "streamlined" schemes and this is not, and should be, the intention of such a scheme.

Under no circumstances should any scheme limit exceed the limit for fast track matters.

Question 8

What modifications, if any, do you consider would be necessary for the process to accommodate employers' and public liability claims?

The Law Society does not consider that this a question which can be answered in a response to a consultation. The existing RTA PI scheme was negotiated and agreed by stakeholders and this is the reason for what appears to be a generally successful launch. The scheme was intended to deal with less complex matters such as RTA matters where in most cases it is relatively easy to establish liability.

Whilst the RTA PI Scheme can be the starting basis, in our view, in order to decide what modifications may be necessary which will result in a successful process from the outset, it will require consideration of each type of potential claim and discussion/negotiation amongst all stakeholders who may be involved in the process. See also 6 above.

Clinical negligence claims

Question 9

Do you agree that a variation of the RTA scheme should be introduced for lower value clinical negligence claims? If not, please explain why.

This is possible in theory but we repeat our comments in relation to question 6 above. Furthermore, clinical negligence claims are, by their very nature, more complex than other personal injury claims. The issue of causation is a factor which will also distinguish these claims from the simpler and less complex RTA claims. There will be a major risk that the Portal will simply add costs without saving time.

Question 10

If your answer to question 9 is yes, should the limit for the new scheme be set at (i) £10,000, (ii) £25,000, (iii) £50,000 or (iv) some other figure (please state with reasons).

See our answer to question 7 above.

Question 11

What modifications, if any, do you consider would be necessary to the process to accommodate clinical negligence claims?

See our answer to question 8 above.

Fixed recoverable costs

Question 12

Do you agree that a system of fixed costs should be implemented similar to that proposed by Lord Justice Jackson in his Review of Civil Litigation Costs:

Final Report for all fast track personal injury claims that are not covered by any extension of the RTA PI process? If not, please explain why.

Yes - provided an appropriate framework is developed with the cooperation of stakeholders but excluding some such as Disease cases. However, again, this will be fraught with difficulty.

Most, if not all, of the cases which Jackson LJ used as costs data will be included in the proposed expanded RTA PI scheme. Consequently, a new costs data set will need to be prepared. Any fixed costs will need to reflect the amount of work involved at each stage of the process and the level of seniority and expertise of those who will deal with the claims, including their supervision.

The calculation of the fixed costs, which has been attempted before unsuccessfully, will not be an easy task due to the differing views of stakeholders.

Appropriate "escape" mechanisms will need to be considered and criteria developed for use by the courts to ensure consistency.

There is also a potential for injustice in that defendants may "outspend" claimants in defending claims which would make it uneconomic to continue. This situation could arise even more frequently if insurers' profits increase due to the Government's proposals regarding the non recoverability of success fees and ATE premiums.

Another important factor to bear in mind is that if the RTA PI scheme is expanded to include employer and public liability personal injury claims, only the more complex and disputed matters will be allocated to the fast track.

It should be noted that we do not consider that personal injury disease claims can be dealt with as part of a streamlined fixed costs process due to issue of complexity.

Question 13

Do you consider that a system of fixed recoverable costs could be applied to other fast track claims? If not, please explain why.

Yes - subject to an appropriate framework (see 12 above) although this will be fraught with even more difficulty.

If the Government's proposals to increase the small claims limits go ahead then only the more complex claims will fall into the fast track criteria. The calculation of the fixed costs could therefore be very difficult and complicated.

The review of civil litigation costs by Lord Justice Jackson did not contain any costs data which could be considered for these fast track claims so new data sets will need to be obtained.

The additional concerns we refer to in our answer to question 12 above are also relevant.

Question 14

If your answer to question 13 is yes, to which other claims should the system apply, and why?

Other than it being subject to an appropriate framework, the difficulties to be faced and the additional concerns we have (see our answers to questions 12 and 13 above) we can see no compelling reason at this stage which would exclude any type of claim from this process.

Question 15

Do you agree that for all other fast track claims there should be a limit to the pre trial costs that may be recovered? Please give reasons.

No.

Specific details of this have not been included in the consultation and we must therefore presume that it is a reference to the recommendation of Lord Justice Jackson that there should be a limit of £12,000 upon pre trial costs in non personal injury fast track claims.²

This amount has not been subject to sufficient scrutiny or consultation and there will be many occasions when pre trial costs (which are heavily dependent on the attitudes of defendants to the conduct of the litigation) will exceed that amount.

Many claimants may therefore be faced with a costs limitation which may not be sufficient to prepare for trial and which defendants may take advantage of which could result in a claimant discontinuing a perfectly valid and meritorious claim.

Mandatory pre-action directions for money claims under £100,000 in the county courts

² Part 3, Chapter 15, sections 6.2 and 6.3 of the Review of Civil Litigation Costs: Final Report

Question 16

Do you agree that mandatory pre-action directions should be developed? If not, please explain why.

No - assuming this is a proposal to introduce a (non-portal) streamlined system for non-personal injury claims up to £100,000. We consider that such a proposal will be fraught with great difficulty and potential unfairness to those who have a dispute. In the interests of justice it would therefore be wrong to agree to such a proposal without further detailed debate and consideration of the impact that it would have.

The success of pre action protocols which were introduced under the Woolf reforms and the current RTA PI streamlined process have been achieved as a result of extensive stakeholder involvement, negotiation and agreement from the outset.

If Government assures us that such a pre-action process would only be introduced with the full involvement of stakeholders then the Law Society is prepared to fully engage in the negotiation process and assist the Ministry of Justice in so far as we can. The Society represents all solicitors (whether claimant, defendant or both) and is therefore in the ideal position to represent all members of the solicitors' profession as part of, and assisting with the facilitation of, that negotiation process as we have successfully done in the past (e.g. drafting of the original pre action protocols and assisting the Civil Justice Council in their recent review of them).

Question 17

If your answer to question 16 is yes, should mandatory pre-action directions apply to all claims with a value up to (i) £100,000 or (ii) some other figure (please state reasons)?

If the Government intends to introduce mandatory pre-action directions for money claims then they should only apply to claims within the financial threshold of the fast track.

Question 18

Do you agree that mandatory pre-action directions should include a compulsory settlement stage? If not, please explain why.

No. The courts have consistently upheld the right of parties to a dispute to refuse to compromise where they believe they have no liability (subject, of course, to paying costs if that belief turns out to be incorrect). It seems hard to imagine how that could be otherwise in a civilised and democratic society.

However, where quantum only is in dispute, it may be helpful to require a compulsory attempt at settlement, as long as the format and the timing of that is not prescribed. So, for example, to say that it must take place at allocation stage or must be via a mediator will simply lead to parties in situations where this is not suitable seeking to evade or pay lip service to the provisions. A

simple requirement for the parties to certify, prior to the final hearing, that they have both made attempts to settle the matter would be useful. We do not agree, however, that this should be a compulsory pre-action direction.

Question 19

If your answer to question 18 is yes, should a prescribed ADR process be specified? If so, what should that be?

N/A

Question 20

Do you consider that there should be a system of fixed recoverable costs for different stages of the dispute resolution regime? If not, please explain why.

Yes - in principle. We presume this is in relation to mandatory pre action directions only and not, as appears to be implied, all stages of a claim up to and including trial where there is claim for money of less than £100,000.

See our answer to question 12 above regarding a framework for fixed costs and our other concerns about fixed costs.

Question 21

Do you consider that fixed recoverable costs should be (i) for different types of dispute or (ii) based on the monetary value of the claim? If not, how should this operate?

For different types of disputes.

Question 22

Do you agree that the behaviours detailed in the Pre-Action Protocol for Rent Arrears, and the Mortgage Pre-Action Protocol, could be made mandatory? If not, please explain why.

Yes. However, we have our doubts that tenants and borrowers will be persuaded to participate. It is very important to recognise that human emotions and behaviours may well find ways of frustrating proposals which seek to impose specific behaviours with delay and further costs arising as a result.

Question 23

If your answer to question 22 is yes, should there be different procedures depending on the type of case? Please explain how this could operate.

Yes. How this could operate should be the subject of further constructive debate and agreement by relevant stakeholders.

Electronic channels

Question 24

What do you consider should be done to encourage more businesses, the legal profession and other organisations in particular to increase their use of electronic channels to issue claims.

One way to achieve this would be to reduce the fee for issue of claims electronically.

However, in order to achieve a modern and efficient 21st century court system and dispute resolution process, the Government must invest in improving information technology across the board. In his final report³ Lord Justice Jackson made recommendations about the requirements for the civil courts. These were:

- (i) Electronic filing for claim forms, statements of case, witness statements, expert reports and other documents lodged.
- (ii) The ability to maintain all documents lodged by the parties to a case or created by the court in a single electronic bundle relating to that case.
- (iii) The electronic bundle for each case should be accessible to the parties, court staff and the judge by means of an extranet with unique password.
- (iv) Digital signature technology to authenticate documents and correspondence sent by parties to the court or to each other.
- (v) A facility for online payment of court fees and all other payments into court.
- (vi) Scanning equipment at all courts, so that parties without IT equipment can lodge documents at court.
- (vii) A national database on which the electronic bundles for each case are held (so that cases or hearings can be transferred).

The previous Government undertook a feasibility study into electronic filing and document management (EFDM) in 2005/2006 but, regrettably, plans to introduce such a system were shelved, presumably because of the expense. This, we believe, was a very short sighted view as the introduction of EFDM would have resolved many issues regarding court resources and delays as

³ Review of Civil Litigation Costs: Final Report - December 2009

well as achieving a significant increase in claims issued electronically and potentially reducing delay and costs.

Increasing the small claims track limit

Question 25

Do you agree that the small claims financial threshold of £5,000 should be increased? If not, please explain why.

No.

In their report, the Future of Civil Justice⁴, the Association of District Judges stated "£5000 is a substantial sum for many litigants and depriving litigants claiming costs above that, or defending such claims, of an entitlement to recover costs is unreasonable". As far as the Society is aware their views have not changed and we fully support them.

In a Law Society survey⁵ of its members 97% of those responding indicated that more than 8 out of 10 of their clients required advice on claim value. Over 74% of its members considered that less than one fifth of their clients would have proceeded with their claim without the benefit of a solicitor.

Increasing the financial limit will result in an increase in litigants in person (LIPs) who already form a significant percentage of claimants and defendants in the County courts. We suspect that they are involved on at least one side of the vast majority of small claims. According to Government statistics, in 2010 small claims made up approximately 70% of all contested hearings in the county Courts.

Many of these LIPs will face legal representatives appointed by the other party who may not be under the same financial constraints (e.g. businesses and insurers). This will create an "uneven playing field" for many and access to justice is likely to suffer considerably for many consumers involved in those cases.

Hearings involving LIPs generally tend to take longer than those where both of the parties are legally represented. Increasing the small claims limit will result in a significant increase in LIPs which will place an additional very heavy burden on an already overstretched and under resourced County Courts system,

⁴ April 2005

⁵ June 2006

Question 26

If your answer to question 25 is yes, do you agree that the threshold should be increased to (i) £15,000 or (ii) some other figure (please state with reasons)?

i) Should the Government choose to ignore our views on increasing the financial threshold, then £15,000 is far too high. Claims of this value are unlikely to be simple and, again, will result in many businesses paying for legal representation to defend claims to the detriment of litigants in person who will face an uneven playing field.

Whilst we appreciate the role that District Judges play in ensuring justice is seen to be done in small claims hearings, many individuals will, nevertheless, feel threatened and placed at an unfair advantage when confronted by an opponent who is legally represented (or represented by a highly trained and skilled claims handler).

ii) Whilst we cannot support any proposal to increase the existing small claims financial threshold any increase beyond an amount equivalent to inflation since the last increase would be a travesty for many thousands of consumers.

Question 27

Do you agree that the small claims financial threshold for housing disrepair should remain at the current limit of £1,000?

Yes. Housing disrepair claims can be complex as they will usually involve the interpretation of expert evidence and most defendants will be represented either by solicitors or very experienced housing disrepair specialist employees (e.g. Local authorities). Most people with housing problems will have significant difficulties in paying for a solicitor and the legal aid reforms will mean that few cases will be eligible for legal aid. The result will either be that the tribunals are clogged up with litigants in person who are unable to engage with the technicalities of the procedure or with tenants living in squalid conditions, with the resultant social consequences, because they are unable to bring claims.

Furthermore, the existing procedure which was introduced to deal with these claims in the courts has been successful having resulted in a significant reduction in hearings.

The answer to reducing the burden of legal costs, particularly on local authorities and housing associations, is to ensure that they comply with their statutory duties as social landlords to undertake housing repairs. This can only be done with the support of adequate Government funding.

Question 28

If your answer to question 27 is no, what should the new threshold be? Please give your reasons.

N/A

Increasing the fast track limit

Question 29

Do you agree that the fast track financial threshold of £25,000 should be increased? If not, please explain why.

No. This is not necessary. Many claims which exceed the current financial threshold are already heard as fast track claims at the discretion of the judiciary. The issue is not value but complexity.

The fast track was introduced to deal with less complex lower to medium value claims where expert evidence and trial length is limited. There are set procedures regarding pre-trial hearings and the listing of a trial date with a set time limit to ensure speedy resolution of claims.

Such time limits have not always been achieved due to the lack of court and judicial resources. Increasing the fast track threshold without a sufficient increase in court resources, especially judicial time, will increase delays which are already frequently unacceptable, and delay results in higher costs.

Furthermore, increasing the threshold will mean that many more higher value and/or more complex cases will fall to be dealt with in the fast track which may not necessarily be the most appropriate track. For example, they may be too complex to comply with the requirement of limited expert evidence and a maximum trial length of one day.

One perceived advantage of the fast track is the provision for summary assessment of costs which was also introduced under the Woolf reforms. Regrettably, many judges choose to refer the question of costs in such cases to detailed assessment or deal with the summary assessment in a cursory manner. This is due to a lack of judicial training in respect of costs. Increasing the financial threshold of the fast track will exacerbate this problem for both claimants and defendants.

Finally, the savings to be made by this controversial change would be small as there will be relatively few cases which will fall within the bracket proposed.

Question 30

If your answer to question 29 is yes, what should the new threshold be? Please give your reasons.

N/A

Question 31

Do you consider that the CMC's accreditation scheme for mediation providers is sufficient?

No.

Article 4 of the Mediation Directive provides as follows:

"Ensuring the quality of mediation"

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.
2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties."

Crucially, the CMC's accreditation scheme does not govern any independent mediators or panels of mediators who do not come within the CMC's scheme. As there is no universally accepted code of conduct or regulation of mediators, there is a risk that quality may vary and it is difficult for clients to complain about an unregulated mediator. Therefore, it cannot be considered to be sufficient. There is a need for existing professional codes such as that which governs solicitors to be recognised as meeting the criteria.

Question 32

If your answer to question 31 is no, what more should be done to regulate civil and commercial mediators?

In order to comply with Article 4 and to encourage the development and adherence to voluntary codes of conduct, consideration should be given to making registration compulsory with a professional regulation and accreditation body. Otherwise, there is no way of ensuring that mediators abide by the same high standards of conduct and service.

Question 33

Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not, please explain why.

No - unless the small claims financial threshold remains unchanged, in which case we can see that there could be advantages to this proposal for litigants in person involved in very low value claims who are reticent about having their claims heard in court without the advice and/or assistance of a solicitor. However, it needs to be stressed that many litigants will still need advice about their rights and the value of the claim in order to be satisfied that the result in a mediation claim is fair and appropriate for them.

Whilst it may be considered to be appropriate for the most simplest and low value claims to be automatically referred for mandatory mediation it is not appropriate in all claims. Those claims with a higher value and, frequently a higher degree of complexity, may not be appropriate unless it is with the full and voluntary agreement of all the parties involved in the case.

We are also concerned with the ability of the court service to provide a proficient small claims mediation service which would be able to cope, particularly if the small claims financial threshold is increased.

Furthermore, in order to achieve a successful mediation both parties have to be willing and it is unfair to force mediation on those who are not. Many people seek justice through judicial decision and not mediation by non judicial personnel. The system must avoid encouraging a situation whereby time and costs are wasted by litigants "going through the motions" simply because they are required to and who have no intention of compromising.

We are also extremely concerned that training of the small claims mediators prior to them taking up their duties needs to be thorough. We very much suspect that the success of the existing schemes may well have developed over the course of time due to training by experience rather than ability from the outset.

Question 34

If the small claims financial threshold is raised (see Q25), do you consider that automatic referral to mediation should apply to all cases up to (i) £15,000, (ii) the old threshold of £5000 or (iii) some other figure? Please give reasons.

If the Government is to ignore our views about automatic referral (see answer to question 33) then such referrals should not be made in cases where the value exceeds £5,000.

Question 35

How should mediation be provided? Please explain with reasons.

Mediation should be provided by a panel of trained, qualified, experienced and professionally accredited mediators or equivalents who are prepared to undertake the work for an appropriate fee which recognises that and the time spent in preparation of cases and the necessity of continuing professional education and development.

We can see no reason why such services could not be provided by an independent body contracted to H M Courts and Tribunals Service or by individuals. However, much research will need to be undertaken to substantiate the anticipated numbers of mediations and how payment for the service would be achieved. We are concerned that payments by way of court

fees will continue to mean that one or more parts of the court service cross subsidise others.

Furthermore, if the Government is so intent on promoting mediation to reduce the number of litigated claims we see no reason why this should not be a public service funded by the taxpayer rather than the existing policy of full costs recovery for the courts.

Question 36

Do you consider that any cases should be exempt from the automatic referral to mediation process?

Yes.

Question 37

If your answer to question 36 is yes, what should those exemptions be and why?

If automatic referral is to be introduced despite views to the contrary, claims involving children and other protected parties should be exempt.

We also have serious concerns about the imbalance between the parties where an individual and a large company or local authority is concerned or where a defendant is represented by an insurer. We consider, therefore, that automatic referral should only apply where all the parties are individuals who are representing themselves or where all of the parties are legally represented.

Question 38

Do you agree that parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper? Please give reasons.

Yes, but with serious reservations. Many litigants in person lack confidence in their ability to put forward their case. We therefore suggest that litigants who request paper mediations should also be available on the telephone at an appointed time in the event that clarification on any point is required.

Question 39

Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

No.

This appears to add an additional layer of cost to the process if the parties' representatives are to be involved, and the mediator will also charge a fee. It

is completely unnecessary in civil cases where the parties' representatives are able to advise on the merits of mediation. Some disputes will clearly not be suitable for mediation and so this would only amount to a waste of time and cost as civil law cases are multifarious in nature and one size cannot fit all.

Question 40

If your answer to question 39 is yes, please state what might be covered in these sessions, and how they might be delivered (for example by electronic means).

N/A

Question 41

Do consider that there should be exemptions from the compulsory mediation information sessions?

Yes

Question 42

If your answer to question 41 is yes, what should those exemptions be and why?

We believe that exemptions should include cases where parties are currently represented by solicitors, who will themselves be able to advise, cases which are inherently unsuitable for mediation (for example because the circumstances of the parties are such that there is a danger of intimidation or of one party being in a particularly vulnerable position and so at the mercy of the more powerful party), and where mediation has already been attempted but has failed. There may well be others. There is already an obligation to consider mediation at the allocation stage. This could be imported into the Claim Form and acknowledgment of service stage.

Question 43

Do you agree that provisions required by the EU Mediation Directive should be similarly provided for domestic cases? If not, please explain why.

No, for the following reasons:

Agreements reached in mediations are already usually enforceable by the Court if they are competently drafted.

It is impractical to provide mediators with immunity from having to give evidence in civil proceedings regarding information arising out of or in connection with the mediation process. There may be a need for the mediator to give evidence concerning the terms of an agreement reached and also it is conceivable that a party may bring a claim against a mediator regarding the conduct of a mediation, or dispute the fees incurred. If a mediator cannot be compelled to give evidence, this would be likely to breach the article 6 right to

a fair trial pursuant to the Human Rights Act. It would also be out of kilter with the removal of barristers' and experts' immunity from suit.

In respect of extending the limitation period to allow for mediation to take place, this would require an amendment to the Limitation Act 1980. There is no reason why the parties to a dispute cannot agree to a limitation standstill agreement in order to stop time running so that they can take part in mediation under the current system. There would be practical problems with this proposal as it would need to be clear when the stay of the limitation period expired following the mediation. Also, parties might take advantage of the mediation process as a tactic in order to prevent time running for limitation purposes.

Question 44

If your answer to question 43 is yes, what provisions should be provided and why?

N/A

Debt recovery and enforcement

Question 45

Do you agree that the provision in the TCE Act to allow creditors to apply for charging orders routinely, even where debtors are paying by instalments and are up to date with them, should be implemented? If not, please explain why.

No. We can see no reason why a debtor who is fully complying with an order to pay a judgment by instalments should have the additional burden and expense of a charging order being made on his/her property. However, we can see a case for a charging order to be routinely granted on a subsequent application if the debtor has defaulted on more than one instalment consecutively and without the consent of the judgment creditor. This would give some protection against the more robust judgment creditors in the event that a debtor defaults on one or two payments due to a change in financial circumstances such as loss of job for example.

We also consider that routine applications as proposed will cause great difficulty in relationships where the property is jointly owned but only one of the owners is the judgment debtor.

Question 46

Do you agree that there should be a threshold below which a creditor could not enforce a charging order through an order of the sale to debts that originally arose under a regulated Consumer Credit Act 1974 agreement? If not, please explain why.

Yes - there should be a threshold to protect debtors. However, we appreciate that many debtors use a number of tactics to avoid payment and this can

have a detrimental effect on businesses. We therefore consider that the threshold could be disapplied on application to the court in circumstances where the debtor regularly defaults on instalments or has made no effort to comply with any debt enforcement order made by the court.

Question 47

if your answer to question 46 is yes, should the threshold be £1000, £5000, £10,000, £15,000, £25,000, or some other figure (please state with reasons)?

The threshold should be £25,000.

Question 48

Do you agree that the threshold should be limited to Consumer Credit Act debts? If not, please explain why

Yes

Question 49:

Do you agree that fixed tables for the attachment of earnings should be introduced? If not, please explain why.

Yes. We agree that the process will benefit from being quicker and more reliable by the introduction of fixed tables for use by employers.

Question 50:

Do you agree that there should be a formal mechanism to enable the court to discover a debtor's current employer without having to rely on information furnished by the debtor? If not, please explain why.

Yes. We agree that there should be a mechanism to enable the court to identify the judgement debtor's current employer. Any process that relies on a judgement debtor to enable it to work effectively is flawed, since the interests of the parties are, by definition, divergent.

Question 51

Do you agree that the procedure for TPDOs should be streamlined in the way proposed? If not, please explain why

Yes - in principle. However whilst we support the attempts to make these orders more effective the paper itself is not entirely clear as to the process that will be adopted. Also the more widespread availability of TPDOs could result in injustices. The freezing of a business's bank account is likely to result very quickly in collapse of the whole undertaking. There does therefore have to be some kind of judicial process involved.

We would not object to interim orders becoming final after a set period of time without the introduction of a further judicial process. We are unaware of what proportion of applications for final orders are uncontested. The information is

not available in the paper. Careful attention would need to be given to questions of service.

Question 52

Do you agree that TPDOs should be applicable to a wider range of bank accounts, including joint and deposit accounts? If not, please explain why.

Yes. The current strictures on the operation of TPDOs are so great that the process is virtually useless for enforcing a judgement against a deliberately defaulting debtor. The restrictions on banks providing information as to where the assets have gone, or to provide any assistance in tracing, mean that for the vast majority of cases the process is of little value. Its effectiveness will only be increased if the bank is permitted to provide much more information

Question 53

Do you agree with the introduction of periodic lump-sum deductions for those debtors who have regular amounts paid into their accounts? If not, please explain why.

Yes - in principle. However, there is no current explanation as to how the periodical sum should be calculated. We can anticipate many circumstances in which the judgement creditors would consider that a standard scale sum deducted from a bank account would be an injustice to them. There is also a tendency for scale fees of whatever nature to fail to keep place with commercial realities. Before we can comment finally on this point, we would need to know more about the process that would be adopted in calculating the periodical deductions. If something along these lines were to be introduced, then we think there should also be a clear system in place to enable the judgement debtor to set aside the scale periodical payment order, and to obtain an alternative order commensurate both with the quantum of the judgement itself and the financial position of the respective parties. There would also have to be a readiness on the part of the courts to exercise this process speedily and cheaply.

Question 54

Do you agree that the court should be able to obtain information about the debtor that creditors and may not otherwise be able to access? If not, please explain why

Yes.

Question 55

Do you agree that government department should be able to share information to assist the recovery of unpaid civil debts? If not, please explain why.

Yes. We support the introduction of appropriate processes to enable the courts to obtain information from other government departments which would

enable the more effective execution of judgements and court orders. Indeed we would say this is a process that was long overdue. Without the availability of these orders, we believe that some of the other enforcement processes will not be able to operate as effectively as would otherwise be the case.

Question 56

Do you have any reservations about information applications, departmental information requests or information orders? If so what are they?

Yes. We do not follow the logic in paragraph 209 of the consultation which contemplates that government departments will only be requested rather than ordered to provide information. The information that the courts will ask for is by definition only that which may assist in the enforcement of a judgement already made by the court as an agency of the State/Crown. We cannot therefore see why government departments should not be obliged to provide the information reasonably requested.

The introduction of this process would place some demands on court staff. It is essential that appropriate arrangements are put in place before such powers are put into operation. Failure to do so would simply further discredit the court process, and the purpose of the consultation paper would be thwarted.

Question 57

Do you consider that the authority of the court judgement order should be extended to enable creditors to apply directly to a third-party enforcement provider without further need to apply back to the courts for enforcement processes once in possession of a judgement order? If not, please explain why.

No. One of the advantages of the court being involved throughout a process is that it can prevent unfair or unacceptable practices of creditors in pursuit of money. The impact on the judgement debtor varies, depending upon the form of enforcement used and can be very serious and unjustifiable in certain circumstances.

This question and question 58 below as currently formulated appear to be raised in an attempt to reduce court processes and therefore court costs. The consideration of the value and impact on both judgement creditors and judgement debtors appears to be secondary.

We believe that the questions should be viewed the other way round. Consideration should therefore be given to ensuring that there are sufficient facilities available within the county court system to enable the current and future framework of enforcement processes to operate in a manner which enables the judgement creditor to enforce court orders effectively, but at the same time providing appropriate redress for judgement debtors were necessary to ensure that there are no apparent injustices as a result.

Question 58

How would you envisage the process working (in terms of service of documents, additional burdens on banks, employers, monitoring of enforcement activities, etc.)?

See answer to question 57 above.

Question 59

Do you agree that all parts for enforcement should be administered in the county court? If not, please explain why.

Yes. However, our concern is that existing court resources are such that this may be a challenge.

Structural reforms

Proposal 1: Increase the financial limit on the equity (i.e. chancery) jurisdiction of the county courts from £30,000 to £350,000

Question 60:

Do you agree that the current financial limit of £30,000 for county court equity jurisdiction is too low? If not, please explain why.

Yes the current financial limit for county court equity jurisdiction has become detached from contemporary property values.

Question 61

If your answer to Q60 is yes, do you consider that the financial limit should be increased to (i) £350,000 or (ii) some other figure (please state with reasons)?

For London a new financial limit of £350,000 would be in line with property values but for other parts of the country it might seem a little too high. In the eyes of some a dispute over, for example, £250,000 might appear to be of such moment as to merit being heard by the High Court.

Proposal 2: Increase the financial limit below which claims may not be commenced in the High Court from £25,000 to £100,00

Question 62

Do you agree that the financial limit of £25,000 below which cases cannot be started in the High Court is too low? If not, please explain why.

Yes the financial limit of £25,000 below which cases cannot be started in the High Court has become over time far too low. Cases involving sums of that

order need not be dealt with by the High Court and should be dealt with by the county courts.

Question 63

If your answer to Question 62 is yes, do you consider that the financial limit (other than personal injury claims) should be increased to (i) £100,000 or (ii) some other figure (please state with reasons)?

Yes we agree £100,000 seems a reasonable financial limit for cases to be started in the High Court (personal injury cases aside).

Proposal 3: Extend the power to grant freezing orders to county courts

Question 64

Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the county courts? If not, please explain why.

Yes provided that the Circuit Judges are suitably qualified and trained there is no reason why they should not grant freezing orders, saving the time of the High Court.

Proposal 4: Remove certain types of proceedings from the jurisdiction of the county courts.

Question 65

Do you agree that claims for variation of trusts and certain claims under the Companies Act and other specialist legislation, such as schemes of arrangement, reductions of capital, insurance transfer schemes and cross-border mergers, should come under the exclusive jurisdiction of the High Court? If not, please explain why.

Yes - these are complicated matters affecting, for example, the many members of a company and should therefore be dealt with by the High Court alone.

However, on the basis that the reference to insurance transfer schemes is intended also to extend to banking business transfers and reclaim fund business transfers under Part VII of the Financial Services and Markets Act 2000 ("FSMA"), we should point out that Section 107 of FSMA gives jurisdiction to the High Court in England and Wales in these matters. These provisions are not part of the Companies Act and should not therefore fall to be dealt with under this question.

Question 66

If your answer to Q65 is yes, please provide examples of other claims under the Companies Act that you consider should fall within the exclusive jurisdiction of the High Court.

There are two particular provisions of the Companies Act which could usefully be given exclusive High Court jurisdiction: (a) Applications under Section 606 and (b) Derivative Actions. Applications under Section 606 and its predecessors are surprisingly few and far between. However, they are most likely to affect PLCs and, for that reason, should be dealt with in the High Court. We are not aware of what the new limits in the form of capital are proposed to be in the County Courts, but the rarity of the applications and their importance justifies the applications being in the High Court.

Although derivative actions could be commenced in the County court, we are not aware of whether any and, if so, how many have been commenced there. Given the provision for close judicial supervision, not least in the opening stages of derivative actions, and the developing jurisprudence in the High Court, we suggest that derivative actions should be commenced and the initial stages brought in the High Court. After the initial applications, the High Court could then decide that further proceedings should be adjourned to an appropriate County Court

Proposal 5: Abolish the need for the Lord Chancellor's agreement to High Courts Judges sitting in the county court.

Question 67

Do you agree that where a High Court Judge has jurisdiction to sit as a Judge of the county court, the need for the specific request of the Lord Chief Justice, after consulting the Lord Chancellor, should be removed? If not, please explain why.

Yes. There is no logical need for a specific request from the Lord Chief Justice and consultation with the Lord Chancellor for the administrative convenience of allowing a High Court Judge with jurisdiction to sit as a Judge of the county court. One caveat: there is evidence that having to sit outside of London is a factor which deters some lawyers from applying for the High Court, particularly those with family responsibilities. Administrative flexibility and efficiency may be achieved at the price of the best candidates for appointment to the High Court.

Question 68

Do you agree that a general provision enabling a High Court Judge to sit as a Judge of the county court as the requirement of business demands, should be introduced? If not, please explain why.

Yes this will be a sensible administrative convenience.

Single county court for England and Wales

Question 69

Do you agree that a single county court should be established? If not, please explain why.

In principle we agree that there should be a single county court. It is an historical anomaly that county courts may be limited to the type of cases that they may hear and the geographical area which their jurisdiction covers. Uniform jurisdiction across county courts will clearly allow for better use of judicial resources and greater flexibility on the listing of cases.

However, this must not be at the expense of the users of the courts. It would not be appropriate to use administrative convenience to erode the local nature of the county courts. As the recent furore over the proposed closure of courts has revealed, the public want to have access to justice at a local level. It will not serve the public if cases are listed miles away from those who are party to the case when there is a county court closer to home.

Among legal practitioners there is considerable concern over the centralisation of administrative functions in civil business centres. Solicitors report being unable to keep track of cases, being unable to reach the appropriate staff who may know about the case and the imperfect transfer of documentation between the local courts and the business centres. Inevitably there is a demand for a return to the old days when an official at the local county court could be approached in person or by telephone. Service standards at civil business centres need to be improved considerably.