PROPOSED DISCLOSURE PILOT
BRIEFING NOTE

Background

1. A working group ("the Working Group") was established in 2016 by the previous Chancellor of the High Court, Sir Terence Etherton, now the Master of the Rolls, as a result of widespread concerns expressed by court users (and in particular members of GC100) over the excessive costs, scale and complexity of disclosure.

2. The Working Group, chaired by Lady Justice Gloster, and comprising a wide range of judges, lawyers, experts and representatives of professional associations and court users in the Rolls Building jurisdictions[1], including GC100, was tasked to identify the problems and propose a practical solution. The Working Group met on a number of occasions and delegated to a small subcommittee[2] the task of drafting the recommended proposals.

Key defects in the current disclosure scheme

3. After extensive discussion about policy, practice and technology, in which various differing views were exchanged, the Working Group identified the following key defects in the current disclosure regime:

   (i) Since the CPR came into force 18 years ago the volume of data that may fall to be disclosed has vastly increased, often to unmanageable proportions. The hope that the standard disclosure test introduced in the CPR would reduce the volume of disclosure, and its cost, has not been fulfilled.

   (ii) Although the 2013 Jackson reforms set out a broad menu of disclosure options, which range from no disclosure at all, to disclosure by issue, through to very wide disclosure, the reality is that neither the profession, nor the judiciary, has adequately utilised the wide range of alternative orders added as CPR 31.5(7). Standard disclosure has remained the default for most cases.

   (iii) The existing rule is conceptually based on paper disclosure and is not fit for purpose in dealing with electronic data.

   (iv) Disclosure orders are not sufficiently focused on the issues.

   (v) There is often inadequate engagement between the parties before the first CMC in relation to disclosure; and

   (vi) Searches are often far wider than is necessary.

[1] For a list of members of the Working Group, please see annex 1.

[2] The drafting subcommittee comprised Chief Master Matthew Marsh, Mr Ed Crosse, partner Simmons & Simmons and President of the London Solicitors Litigation Association, Mr Justice Robin Knowles CBE and Ms Vannina Ettori, Legal Adviser to the Chancellor of the High Court. They have been assisted by David Bridge and Kirsty Oliver at Simmons & Simmons.

Why it is necessary to address these concerns

4. It is important to address these concerns. Disclosure is one of the key procedural stages in most evidence-based claims, which enables claims to progress to trial and facilitates settlement. The ability to obtain an order for a party to disclose documents that are adverse to its claim helps to make litigation in this jurisdiction attractive. It is imperative that our disclosure system should be, and should be seen to be, highly efficient and flexible, reflecting developments in technology. That is not only so as to afford litigants the certainty of a cost proportionate means of dispute resolution but also to bring out the strengths of English law and English dispute resolution in international markets. The dissatisfaction of users with the current approach needs to be recognised.

The Working Group's recommendations in outline

5. The unanimous view of the Working Group was that a wholesale cultural change is required and that this can only be achieved by the widespread promulgation of a completely new rule and guidelines. There will need to be a change in professional attitudes and a shift towards more pro-active case management by judges. The proposal (in very broad summary) is that there would be no automatic entitlement to search based disclosure and the court would only make an order for what is to be termed 'extended disclosure' if there has been full engagement between the parties before the CMC. An order for extended disclosure would be tailored to the issues in the claim. The new approach is designed to be more flexible than the current Part 31 and to reflect developments in technology.

6. To achieve this cultural change the Disclosure Working Group has recommended that CPR Part 31 and the associated Practice Directions should be rewritten, reordered, and simplified, into a single rule.

Piloting a new rule 31 subject to further consultation

7. The new proposals – which comprise a draft new rule 31 and a 'disclosure review document'("DRD") - have already been considered in detail by the members of the Working Group and extensively road-tested by leading law firms[3], both large and medium sized. Initial views have also been provided by some professional associations and account taken of them. The proposals will now be subject to wider consultation, with a view to setting up a pilot in the Business and Property Courts in London, Birmingham, Bristol, Cardiff, Leeds, Manchester, Newcastle and Liverpool.

8. For the purposes of any pilot, however, the scheme would need to take the form of a Practice Direction, rather than the introduction of a new rule. Following the pilot there will need to be a process to assess its impact in practice, before implementation of any rule change.

[3] See annex 2 for a list of names of the firms who participated in the road-testing.

9. This note provides an introduction to the proposals. The draft PD and the DRD can be found in the Announcement section of the Judiciary website.

The specific proposals put forward by the Disclosure Working Group

10. The Disclosure Working Group has prepared a draft Practice Direction ("PD") (in effect incorporating a draft new rule) and a draft DRD. These are draft documents which may be subject to change and have not yet been reviewed and approved by the Civil Procedure Rules Committee. They are provided for information and comment only.

11. In summary, these proposals envisage that:

(i) The principles upon which disclosure is based are to be clearly stated.

(ii) What has been termed "standard disclosure" will disappear in its current form; its replacement should not be ordered in every case and should not be regarded as the default form of disclosure.

(iii) The duties of the parties, and of their lawyers, in relation to disclosure should be set out. A duty to cooperate with each other and assist the court over disclosure should be included. The duty of the parties to preserve relevant documents should remain.

(iv) One of the core duties is the requirement to disclose known documents that are adverse to the disclosing party. The PD makes it clear that this duty must be complied with regardless of the type of disclosure order the court makes and applies even if the court makes no disclosure order. The duty has been drafted in this form to meet the concern expressed by the Working Group and consultees about what may be seen as a watering down of the duty to disclose adverse documents.

(v) Save where the parties agree to dispense with this (and subject to a number of other exceptions), "Basic Disclosure" of key/limited documents which are relied on by the disclosing party and are necessary for other parties to understand the case they have to meet should be given with statements of case.

(vi) A search should not be required for Basic Disclosure, although one may be undertaken. It is expected that Basic Disclosure will often not be suitable in the largest cases but, in the more moderate sized claim, it will provide both information to assist in an early understanding of the parties' positions and will inform cultural change by requiring the parties to consider whether the documents they have are sufficient. In some cases, the initial disclosure that has been provided will be sufficient to enable the claim to go forward without further disclosure being ordered.

(vii) Basic Disclosure does not require a party to disclose at the outset of a claim documents that are adverse. This limitation was the subject of much debate. However, the current draft leaves Basic Disclosure in a deliberately limited form because the duty discussed at (iv) above proves adequate protection against a party 'sitting on' known adverse documents.

(viii) After close of statements of case, and before the Case Management Conference, the parties will (using a joint DRD as a framework): (a) list the main issues in the case for the purposes of disclosure (and the matters of common ground); (b) exchange proposals for "Extended Disclosure" (and if so on what Model for which issue(s) (see paragraph 9 and following below); and (c) share information about how documents are stored and how they might (if required) be searched and reviewed (including with the assistance of technology, and if so which). The DRD should be kept updated through the case. It replaces the EDQ. The DRD has been subjected to 'road-testing' with a number of law firms by reference to real cases and adjustments have been made to it to take account of feedback.

(ix) At the Case Management Conference, the Court should consider by reference to the DRD which of five "Extended Disclosure" models (Model A to E) is to apply to which issue (or to all issues). The Court should be proactive in directing which is the appropriate Model and should not accept without question the Model proposed by the parties.

(x) The fundamental yardstick for the parties and the Court, throughout, should be what is appropriate in order fairly to resolve the issues in the case. The well-recognised test of reasonableness and proportionality will be applied by reference to defined criteria in the PD which are relevant to disclosure. This test builds upon the overriding objective.

(xi) In order to inform the Court's decision on Extended Disclosure, the parties should liaise before the Case Management Conference so that the Court can be informed: (a) of any joint view as to the disclosure model that should apply; and (b) of the estimated work and cost of using any disclosure model that is proposed by one or more of the parties.

12. The new models are as follows:

(i) Model A is no disclosure.

(ii) Model B requires disclosure of the documents on which a party relies. It is similar to Basic Disclosure with the important distinction that it requires adverse documents in the hands of the disclosing party to be provided. .

(iii) Model C adds to Model B a facility for each party to request from the other any specific disclosure it requires with a requirement to carry out a search and to produce adverse documents.

(iv) What was "standard disclosure", requiring a reasonable search for documents that support or adversely affect either side's case, will now be "Model D". Where Model D is proposed the Court will require to be satisfied that (taken with any further directions: see (vi) below) the model is reasonable and proportionate and appropriate in order fairly to resolve the issue(s).

(v) Model E should be exceptional. It extends the reasonable search required for Model D to documents that may lead to a train of enquiry that may support or adversely affect either side's case on the issue(s).

(vi) In an appropriate case the Court should be prepared to give more detailed directions in relation to Models D and E, so as to direct where searches should be undertaken, and whether, for example, sampling should be used. The parties may convene a Disclosure Guidance Hearing which will be informal, short and generally attended by the lawyers with conduct of the disclosure process.

(vii) A bespoke Model (outside A to E) may be ordered in an individual case, but this will be exceptional.

13. Other provisions include the following:

(i) In an appropriate case the Court should be prepared to order that the question of which party bears the cost of disclosure is to be given separate consideration at a later stage.

(ii) Generally speaking the separate concept of "inspection" should be dispensed with.

(iii) Other more detailed provisions of CPR 31 will remain unchanged (e.g. pre-action disclosure, subsequent use of disclosed documents, orders for disclosure against persons not a party, and others).

The way forward

14. Views about the draft PD and the DRD are sought from members of the judiciary, professional associations and court users.

15. Arrangements are being made for open events for court users to be held in Birmingham, Bristol, Cardiff, Leeds, London, Manchester, Newcastle and Liverpool. These will provide an opportunity for discussion and comments. If court users wish to make comments outside those events, they are requested, where possible, to pass their comments through one of the professional associations. All comments are requested by 28 February 2018.

2 November 2017

The Rt Hon. Lady Justice Gloster

Mr Justice Robin Knowles CBE

Chief Master Matthew Marsh

Mr Ed Crosse, partner at Simmons & Simmons LLP and
President of the London Solicitors Litigation Association

Ms Vannina Ettori, Legal Adviser to the Chancellor of the High Court

Annex 1 – list of members of the Disclosure Working Group

Gloster LJ	
Birss J	
Phillips J	
Knowles J	
Chief Master Marsh	
Ed Crosse	Simmons & Simmons, President of the London Solicitors Litigation Association
Vannina Ettori	Legal Secretary to the Chancellor
Richard Dickman	Pinsent Masons
Tom Coates	Lewis Silkin
David Waldron	Morgan Lewis
Marie-Clare O'Hara	Bevan Brittan LLP
Tim Brown	RPC LLP
Steven Cromie	Government Legal Department
Vijay Rathour	Grant Thornton
Richard Susskind	IT expert
Richard Blann	Lloyds Banking Group
Alex Hickey QC	4 Pump Court
Matthew Lavy	4 Pump Court
Rosemary Martin	Vodafone Group -GC100
Hodge Malek QC	39 Essex Chambers
Beverley Barton	Thomson Reuters
Lesley Anderson QC	Hardwicke Chambers

Annex 2 – list of firms which participated in the road testing exercise

- Herbert Smith Freehills
- Freshfields Bruckhaus Deringer
- Berwin Leighton Paisner
- Fox & Partners
- Hogan Lovells
- RPC

In house lawyers involved were from:

- Barclays Bank Plc
- Government Legal Department (two separate sections)
- Lloyds Banking Group, UK
- Practical Law Magazine (for comment)