Proposals for a Disclosure Pilot for the Business and Property Courts in England and Wales

1. In May 2016, the previous Chancellor of the High Court, Sir Terence Etherton, now the Master of the Rolls, established a Disclosure Working Group ("the Working Group") in response to widespread concerns expressed by court users and the profession regarding the perceived excessive costs, scale and complexity of disclosure.

2. The Working Group, chaired by Lady Justice Gloster, 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) Neither the profession, nor the judiciary, has adequately utilised the wide range of alternative orders under CPR 31.5(7). In practice, standard disclosure has remained the default order for most cases.

   (iii) Searches are often far wider than is necessary, and disclosure orders are not sufficiently focused on the key issues. This often results in the production of vast quantities of data, only a small proportion of which is in fact referred to at trial.

   (iv) There is inadequate engagement between the parties and their advisers prior to the first CMC in relation to disclosure.

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

3. The Working Group, which comprised a wide range of lawyers, experts, judges, representatives of professional associations and users of the Rolls Building jurisdictions, was tasked to identify the problems and propose a practical solution.

4. The Working Group met on a number of occasions over an 18-month period, and delegated to a small subcommittee the task of drafting the recommended proposals. The subcommittee comprised Master Marsh (Chief Master of the Chancery Division), The Hon. Mr Justice Robin Knowles CBE, (Commercial Court, London); Ed Crosse (partner at Simmons & Simmons and President of the London Solicitors Litigation Association) and Vannina Ettori (Legal Adviser and Private Secretary to the Chancellor of the High Court).

5. During its review, the Working Group, through its members, consulted with a range of interested parties and received extensive feedback, much of which is now reflected in the proposed scheme.

6. The unanimous view of the Working Group is 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 on disclosure which will apply for the majority of cases proceeding in the Business and Property Courts.

7. In summary, the key changes proposed for the Pilot are:

   (i) The principles upon which disclosure is based should be clearly stated in the Practice

Direction.

(ii) What has been termed "standard disclosure" should disappear in its current form; its replacement should not be ordered in every case and will 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 expressly set out. These include a duty to cooperate with each other and assist the court over disclosure. They also include a duty to disclose known adverse documents, irrespective of whether an order to do so is made.

(iv) Save where the parties agree to dispense with this (and subject to several 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 will be given with statements of case. A search should not be required for Basic Disclosure, although one may be undertaken.

(v) For some cases, Basic Disclosure may obviate the need for any further disclosure (in whole or in part). It is not intended to be an onerous process and there are a number of exceptions where the provision of Basic Disclosure can be dispensed with entirely.

(vi) After close of statements of case, and before the Case Management Conference, the parties should be required to discuss and jointly complete a joint Disclosure Review Document ("DRD") (which would replace the existing Electronic Disclosure Questionnaire) to:

  (i) List the main issues in the case for the purposes of disclosure (and the matters of common ground);

  (ii) Exchange proposals for "Extended Disclosure" (and if so on what Disclosure Model for which issue(s)); and

  (iii) 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).

(vii) The DRD is intended to provide a mandatory framework for parties and their advisers to co-operate and engage prior to the first Case Management Conference with a view to agreeing a proportionate and efficient approach to disclosure.

(viii) 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 models range from an order for no disclosure in relation to a particular issue, through to the widest form of disclosure, requiring the production of documents which may lead to a train of enquiry.

(ix) 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 Practice Direction, 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 will be obliged to co-operate and engage 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.

(xii) Form H Cost Budgets in relation to disclosure should be completed after an order for disclosure has been made rather than before, by which time the parties should have a much better sense of what the actual costs are likely to be. Parties will, however, be required to give estimates of the likely costs of disclosure when filing the completed DRD in order that the question of proportionality may be considered at the CMC before an order for disclosure is made.

8. Other provisions include:

(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) There are express sanctions for non-compliance;

(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).

Timing, scope and operation of the proposed Pilot

9. With some limited exceptions, the proposal is that the scheme will be piloted across the Business and Property Courts in the Rolls Building and in the centres of Bristol, Cardiff, Birmingham, Manchester, Leeds, Newcastle and Liverpool for a two year period.

10. The proposed scheme is expected to be submitted to the Civil Procedure Rules Committee for review and approval in March/April 2018. As soon as reasonably practicable thereafter, the Pilot will be published and commence. In the meantime, further consultation and feedback on the proposals will be sought from the judiciary, professional associations and user groups in London and the circuits on an open forum basis.

Comment on the proposals

Rt Hon Sir Terence Etherton, Master of the Rolls said:

"Disclosure is one of the key procedural stages in most evidence-based claims. It 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 is, and is seen to be, highly efficient and flexible, reflecting developments in technology. Having effective and proportionate rules for disclosure is a key attraction of English law and English dispute resolution in international markets.

I am very grateful to the members of the Working Group for all the considerable time and effort they have devoted to produce these proposals, which have involved engagement with a number of interested parties, and which are now to be the subject of wider consultation."

Rosemary Martin, Group General Counsel & Company Secretary, Vodafone Group, UK and Chair of the GC100 said:

"The GC100 members are delighted that the Working Group has taken the task of revising the disclosure rules so seriously and with a much more radical attitude than many were expecting. If, collectively, we can get behaviours to change too (the difficult bit) then this initiative will be enormously valuable for the future."

11. For drafts of the proposed Practice Direction, Disclosure Review Document and Guidance Note, please see:

    (i) Guidance Note on the draft Practice Direction;

    (ii) Draft Practice Direction; and

    (iii) Draft Disclosure Review Document.

Important Note: These are draft versions only. They have not been considered or approved by the Civil Procedure Rules Committee, and may therefore be subject to change, including as a result of the feedback given prior to submission to the CPRC. They are provided for information and comment only at this stage.

1 November 2017

The Rt Hon Lady Justice Gloster, Vice-president of the Court of Appeal, Civil Division,

Chair of the Disclosure Working Group