LSLA

1. This document sets out the response of the London Solicitors Litigation Association ("LSLA") to the CJC's request for Feedback on the impact of certain aspects of the Jackson Reforms 12 months on and in advance of its conference on 21 March 2014.

2. The programme for the CJC conference on 21 March appears to focus primarily on the issues which are of importance to and affect those conducting personal injury litigation.

3. One of the LSLA's continued concerns about the identification of the issues that needed to be addressed, the solutions and the implementation of the reforms is the focus on a one size fits all and/or on personal injury litigation.

4. Even within the LSLA the impact of the Jackson reforms differs between work types and courts. The impact of the reforms on Complex Heavy Commercial Litigation is different to the impact of the reforms on SME's with claims which fall in the range of £250K - ££2m. For those with lower value cases and/or cases in the county court the experience is different again.

5. In 3000 words we can do no more than identify some of the issues which members have raised. It is recognised that within the LSLA there are a variety of views.

6. The LSLA and the NLJ surveyed its members 6 months after implementation and the results of that survey were widely reported. A key finding of that survey was that civil litigators believed that the Jackson reforms had increased legal costs. The survey is being repeated at 12 months but we will not have the final results by the time of the conference on 21 March.

<u>Has there been any change to the types of cases being taken on?</u>

7. For the higher value and complex heavy commercial claims there is little change to the types of cases being taken on although the effect of the Jackson reforms is to increase the costs of pursuing those claims. Those costs are incurred at an earlier stage and are greater in any event particularly if costs budgeting applies.

8. There is a concern that insofar as costs budgeting tinkers with costs shifting so that the recovery of costs is reduced and/or parties spend more time and money dealing with costs budgets in large cases, then there will be an adverse impact on some international appetite for the Commercial Courts. Some members report that overseas clients and those who are also bringing claims in other jurisdictions particularly notice the heavy costs of getting claims started.

9. There has been an adverse impact on SME's and lower or modest value commercial claims. The increased costs delay in progressing claims is a disincentive to incur the

costs in the first place. In order to meet the new requirements for case management the front loading of claims has increased. SME's feel they have incurred large fees for little benefit/progress to their claims.

10. For the mid range or lower value commercial claims fewer cases are being taken on and/or clients are less likely to pursue claims. This is due to a myriad of factors connected to the Jackson reforms but primarily focussed on increased cost, difficulties with funding and the consequent reduction in potential benefit of outcome. Claims that would have been viable pre 1 April are less likely to be viable now. This can be the difference between success and failure for an SME business.

11. The Jackson reforms have adversely affected access to justice for the "squeezed middle" for whom the reforms were supposed to have the most beneficial impact. The "squeezed middle" is also the most adversely affected by the additional costs involved in implementing the Jackson reforms and now the Mitchell fall out.

12. This is only likely to be exacerbated if court fees are increased and guideline hourly rates are imposed on detailed assessment and/or cost budgeting.

13. However a benefit of the Jackson reforms is that LSLA members do report that there has been a discernible, but not profound as yet, shift away from weaker cases being brought. It remains to be seen how significant that shift is.

<u>What is the practical impact on the funding of civil litigation in light of the changes to CFA's and DBA's?</u>

14. Client awareness of alternative funding structures has increased with clients often leading the discussion on alternative funding n relation to all types of cases. However, the heavy marketing particularly in the area of Personal Injury claims of CFA's as "no win no fee" has produced an unrealistic understanding of what in fact CFA's are and how they work and an unrealistic expectation about what funding structures might work or might be economic and solicitors might be prepared to offer either directly or with funders.

15. Sourcing or exploring alternative funding increases costs and delay at the outset of any dispute.

16. In relation to heavy and complex commercial disputes there is a greater awareness of CFAs. This has meant that discounted CFAs are becoming more commonly used in heavy commercial disputes. There is a issue about whether the attempts to recover the discounted element at the end of the case is being properly factored in by

way of disclosure to the potential paying party at the costs estimates and interim assessments stages.

17. TPF is slowly growing as a funding model for larger claims. The use of TPF and other alternative funding models that can allow larger clients with larger claims to lay off the costs of disputes is increasing. Funders and solicitors are becoming increasingly creative about funding structures for the largest cases where the amount likely to be recovered justifies the time and cost of exploring these structures and the outcome is such that all parties would be able to benefit.

18. However, in lower value or modest commercial disputes fewer cases are CFA' able. Fewer clients want CFA's once they understand the combination of increased costs and the success fees are paid from damages. More clients are prepared to privately fund if they can. There is of course no cap on the success fee for commercial disputes. Unless the commercial dispute is large the change in the recoverability of the success fee has acted as a deterrent to clients who would previously have entered into a CFA.

19. For some clients this means that unless they can fund privately their claim is not viable. Clients with good lower value claims are most adversely affected by this. This is resulting in some potential claimants going to smaller firms who may offer unrealistic % success fees or costs information. This will result in more complaints to LeO and more small firms suffering financially. The recent LeO report on CFA complaints in the area of Personal Injury together with the recent increase in the number of mid range firms closing for financial reasons highlights the issue.

20. The absence of affordable ATE for lower value of modest commercial cases continues to be a problem. In many cases clients are pursuing claims without ATE. There has been no immediate discernible reduction in ATE premiums as a result of the Jackson reforms in commercial litigation. It is possible that the premiums may reduce over time.

21. There is a difficult balance for legal representatives in the lower value/more modest claims where if alternative funding is used they will often recover the majority of the damages to meet both the success fees and the shortfall in costs. It is not clear how this will be approached by the courts or the LeO even if the client has been given clear advice.

22. Overall there is a reduction rather than an increase in CFA's for SME's with modest claims.

23. TPF is not generally available for the more modest claims with a value of less than say £2M. It is therefore not available to most SME's with modest claims who must

therefore find an alternative form of funding. The absence of an effective TPF model for these types of claims has an adverse impact on the SME's access to justice which the Jackson reforms were intended to address.

24. The majority of firms have not taken up DBA's in a civil context. Their structure remains uncertain and there are issues about recoverability and hybrids. Most practises are not prepared to take the risks inherent in such an uncertain set of regulations and will not offer DBA's unless and until the MOJ/Government provides revised regulations and greater clarity.

25. Interestingly outside the heavy complex commercial cases the number of privately funded claims has increased and there is an increase in the number of clients seeking fixed fees or greater certainty over costs.

What experiences – positive or negative do you have of costs budgeting

26. Form H is not user friendly and what is intended to be included in each phase and whether assumptions and inclusive or exclusive varies. The N260 for summary assessment has now been amended so that it is no longer phased in the same way as the Form H. This is frustrating.

27. Most of the judiciary have received very limited training on costs budgeting and many come from either a non civil litigation background or a bar background. Few are given sufficient judicial time to prepare for case and costs management hearings properly. .

28. Both in the High Court and the County Courts there is a Diaspora of judicial opinion and attitude. The outcome of a costs budgeting hearing varies from rubber stamping to slashing with little possibility of predicting in advance how it will come out. There is a temptation to seek to agree budgets when Judges are under pressure and resources (in various forms) are being cut.

29. The experience of our members is that the majority of the judiciary are nervous of it and there is inconsistency of approach. Some of the judiciary treat the budgeting process as a mini detailed assessment - others take a broad brush approach. Some judiciary engage with costs budgeting setting hearings specifically to deal with costs budgets – others are unconcerned and simply encourage or hope that the parties will agree something. Some take the view that if the costs of both parties combined exceed the value of the claim the costs are automatically disproportionate. Others take a more measured approach.

30. There is not yet any clear guidance on what is and is not considered proportionate with some arguing that “you know it when you see it” but with different judges seeing different things.

31. Cost Budgeting as a process is a cumbersome and expensive and there is a significant variance of approach in terms of content and quality of costs budgets between firms. It does only apply to claims with a value of < £2m at this stage so the additional costs of the cost budgeting process are currently focussed on the SME’s with modest or lower value claims. This increases their legal costs and decreases their net recovery yet further. The need to apply back to amend costs budgets increases costs further.

32. Already costs budgets are a source of additional costs and a tool for litigation. Budgets are kept low by those who think they may be unsuccessful with a view to persuading the court to reduce/not agree the other party’s budget - many of the judiciary do not have the skill or experience to identify this or deal with it.

33. With costs budgeting due to be introduced for claims up to £10m we may find more judicial scrutiny and more challenges as better funded litigants pursue arguments about costs budgets in satellite litigation.

34. This will of course have a further adverse impact on the time and resources that the courts have to devote to the general administration of cases.

<u>What experience – positive or negative do you have of case management.</u>

35. There is a concern that claimants are being deterred by increased costs and the decrease in the availability of funding from bringing claims resulting from the reforms.

36. Case management overall has become more inflexible, more cumbersome and more costly. The active case management proposed by Jackson requires judicial time and court resource which is not currently available. The biggest obstacle to the success of the Jackson reforms on case management is the lack of court resource. From a wider perspective, the debate about Mitchell (although important) does not really address the issue of case management and the need for resources to enable it to be done properly (as it so effectively can be done by many Judges, if not indeed almost all Judges).

37. For heavy and complex cases the problem is acute. The principal resources that are needed are more time for Judges to get on top of cases at the first CMC and

subsequent CMCs in heavy and complex cases. This needs more Judges and docketing. Judges need time to read into the complex cases and to take control of them. They need sufficient time allocated to hearings to enable them to properly address any costs issues and disclosure issues. In taking an informed and active part in the case management the Judges can have a substantial and positive impact on the cases. At the moment resources do not seem to allow for this.

38. In the less complex cases there is still a need for better preparation and understanding to enable the judiciary to take control of case management as intended. Again more time and ideally docketing would assist with this.

39. One of the problems identified by LSLA members is the impact on the clients. The number of different documents and different steps that have to be taken before a case management conference are so complex and difficult for many clients to understand that substantial additional costs are being incurred to explain the new processes and why so much more work and cost has to be done.

40. Despite the new imperative of public justice by which the court resources should shared amongst the court users in a proportionate way – case management is so complex with some many issues to be resolved that many more hearings have to be listed even in more modest claims where pre 1 April the court would seek to try to avoid having a case management hearing at all if possible.

Mitchell:

41. The lack of flexibility in case management and procedures has been exacerbated by Mitchell and subsequent decisions. It is having an adverse impact on the management of cases.

42. Mitchell provides an opportunity for robust client focused behaviour to be expressed in a way that has not been encouraged in recent years. It needs to be dealt with strongly by the Judiciary using the part of Mitchell which is focuses on trivial breaches not being exploited. Whilst this may settle down over time the decisions since Mitchell have be extending its application not narrowing it and the definition of trivial breach is very uncertain.

43. As a consequence litigation is slowing down and costs are increasing and the ability to advise any client on the potential costs and outcome or approach of the court is more uncertain than it was pre April 2013.

44. Where parties agree extensions or such would be reasonable there should be no requirement for active court intervention. Many cases were conducted on this basis prior to 1 April 2013 with almost no court intervention prior to trial.

45. Parties should be allowed to work together for the benefit of their clients to progress claims to trial. There is inconsistency in the court's approach and an increasing view that some judges are being over-zealous in the application of the rules.

46. The judicial approach following Mitchell is often overly robust and draconian without any real consideration of the merits or justice. Some of the more extreme decisions are not only nonsense but out of all proportion to the minor infringements to which they are applied. They do damage to the reputation of the civil justice.

47. Mitchell and its aftermath has caused a significant increase in court work. The already overstretched resources of the courts are being deluged with applications for extensions of time, variations to directions timetables by consent or otherwise, applications for relief from sanctions, applications to strike out or for sanctions.

48. Court lists particularly in the county court are now so full with these types of application that other court work is being delayed further. With limited resources there are fewer judges of any type to deal with the increased work load and it is therefore taking longer for applications to be listed.

49. Far from improving access to justice for all at proportionate the effect of Mitchell has been the reverse. It is taking longer and costing more to progress any aspect of the case. This appears to be a retrograde step and it remains unclear how it was ever thought that this approach would improve the smooth running of a civil justice system.

50. There are an increased number of notifications and claims on PII and that is likely to increase in the short term. That may have an adverse impact on premiums and on smaller firms in particular.

51. The position could be substantially improved if there were some further judicial clarity provided about what is and is not a trivial breach. In any event parties should be able to agree changes to the case management timetable without adverse penalty. We note that one option that has been considered in clinical negligence cases is that the parties could agree extensions of up to 28 days.

52. This seems modest and sensible and provided such extensions did not impact on key dates this would have an immediate and positive impact on the case management of cases after Mitchell and significantly reduce the number of applications that were being made to the court for extensions of time.

Other aspects of case management:

53. Most participants in the mid to low value commercial claims are not seeking to use the new rules on disclosure in any creative way but just proceed on the basis that

standard disclosure is appropriate and avoid e-disclosure where possible. Certainly in these types of claim the judiciary is not interfering either because it too has not got to grips with the issues or because it does not have the judicial time to review cases in that depth.

54. Conversely in heavy complex commercial cases disclosure is proving a continuing area of dispute with the courts regularly dealing with complex disclosure applications.

55. It is probably too early to say whether this will improve over time.

56. The option to have a stay for mediation before filing all the case management documentation is being taken up with a keenness not previously seen but it remains to be seen if these early stays and mediations do actually produce settlements given the stage at which they are taking place.

Conclusion

57. Whilst the LSLA remains generally supportive of the intention behind the Jackson reforms the concerns that the LSLA and others expressed 12 months ago about the unseemly haste with which the reforms were brought into effect appears to have been well founded.

58. There should be a revision of the rules and regulations including those in relation to costs budgeting and funding to enable the underlying intention of the Jackson reforms to be realised.

59. Consideration needs to be given to how the rules properly formulated can ensure effective case and costs management with limited resources.

Schedule 1

The LSLA was formed in 1952 and represents the interests of a wide range of civil litigators in London. It has over 1,400 members throughout London ranging from the sole practitioner to major international firms including all the major litigation practices.

The LSLA Committee responds to consultations on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change. It members are involved in the CJC, the Rule Committee, the various court users groups, the Law Society committees focusing on civil litigation and representatives from the City of London Law Society and the City of Westminster and Holborn Law Society also sit on the LSLA Committee.

See website: www.lsla.co.uk