



**A Response on behalf of the CIVIL JUSTICE COUNCIL
to**

**‘Solving Disputes in the County Courts: creating a
simpler quicker and more proportionate system’**

**A consultation on reforming civil justice in England
and Wales**

June 2011

A.The Council

1. The Civil Justice Council (“CJC”) is an advisory body established under section 6 of the Civil Procedure Act 1997. Its functions include keeping the civil justice system under review, considering how to make the civil justice system more accessible, fair and efficient, and advising the Lord Chancellor and the judiciary on the development of the civil justice system. Its members are appointed by the Lord Chief Justice or the Lord Chancellor.

B.Principles

2. Paragraph 24 of the Consultation Paper (“CP”) says that the proposals are “designed to respond to what matters to citizens and are based around” four principles. These are “Proportionality”, “Personal Responsibility”, “Streamlined Procedures” and “Transparency”. “Personal Responsibility” is defined as meaning “that wherever possible citizens should take responsibility for resolving their own disputes, with the courts being focused on adjudicating particularly complex or legal issues”.
3. Although at least three of the four principles have their broad merits (the second is more open to question), it is important to recognise that they do not provide a comprehensive framework for the CP’s aim of civil justice reform.
4. A more comprehensive framework can be found in the eight principles which Lord Woolf set out in the first Chapter of his 1995 Interim report, as follows:

“the basic principles which should be met by a civil justice system so that it ensures access to justice:

a) It should be just in the results it delivers.

b) It should be fair and seen to be so by:

-ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;

-providing every litigant with an adequate opportunity to state his own case and answer his opponent’s;

-treating like cases alike;

c) Procedures and costs should be proportionate to the nature of the issues involved.

d) It should deal with cases with reasonable speed.

e) It should be understandable to those who use it.

f) It should be responsive to the needs of those who use it.

- g) It should provide as much certainty as the nature of particular cases allows.
 - h) It should be effective: adequately resourced and organised so as to give effect to the previous principles”
5. The CJC would commend the continued use of Lord Woolf’s more comprehensive framework of principles, when the proposals in the CP are further considered alongside responses to the CP.

C.The concept of mandatory pre-action directions

6. Mandatory pre-action directions are the subject of paragraphs 85 and following of the CP. The CJC regards the proposals there discussed as raising issues of fundamental importance. Answers to the individual questions posed are set out later in this response, but in summary the CJC views the proposals with considerable concern and strongly recommends that they are not implemented.
7. The objections include objections of principle and practical objections.
8. The main points, which are common ground across the range of perspectives available within the CJC are these:
- (1) The proposal involves a constitutional principle of fundamental importance: the citizen is entitled to access to justice, access to the civil courts. Lord Woolf began his Interim Report with the words:

“A system of civil justice is essential to the maintenance of a civilised society. The law itself provides the basic structure within which commerce and industry operate. It safeguards the rights of individuals, regulates their dealings with others and enforces the duties of government. The administration of civil justice plays a role of crucial importance in maintaining this structure Effective access to the enforcement of rights and the delivery of remedies depends on an accessible and effective system of civil litigation. Lord Diplock drew attention to the constitutional role of our system of civil justice *and the constitutional right which individuals have to obtain access to it* (emphasis added) in *Bremer v South India Shipping Corporation Ltd* (1981)A.C. 909, 917 : ‘Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlements of disputes between them as to their respective legal rights. The means provided are the courts of justice to which every citizen has a constitutional right of access”
 - (2) The introduction of compulsory pre-action directions the aim of which is to divert claims from the courts will, as a matter of principle and of fact, undermine the constitutional framework and the constitutional settlement as it will place a fetter on access to the courts.
 - (3) Mediation and other forms of dispute resolution have an important role but where a civil dispute needs to be decided there must be no doubt that the principal

arbiter of civil disputes will be the courts and that access to the courts must be unfettered.

- (4) Mandatory pre-action directions, involving a “one size fits all” approach and delayed access to judicial involvement, are contrary to the active judicial case management principles encouraged by Lord Woolf in the civil procedure reforms. Judges have a fundamental role to play in case management and costs management.
 - (5) The consequences of delayed access to judicial involvement can be particularly serious for litigants in person unfamiliar with process. The consequences can also be particularly serious in terms of cost as matters proceed without judicial focus on their direction, their management, or the proportionality of what is being done.
 - (6) There is scope for further use of mediation in appropriate cases, but that can and should be achieved by active judicial case management. It is recognised that examples can be given of judicial case management that has not been active, but the solution is not to be found in taking judicial case management out of the system. Instead it is by continuing to develop its active use.
9. The last of these 6 points is addressed further in the next section. Before turning to that three further points should be made in light of what is said in the CP.
10. The first is that it is important to examine carefully the premise on which the proposals are based. Mandatory out of court dispute resolution procedures would, it is stated, leave “the judiciary to focus on legal disputes that cannot be resolved by the parties themselves” (paragraph 87). The proper province of the civil courts, and of the right of access to them, is far wider. Few cases coming before the civil courts involve “legal disputes” in the sense in which the term is here used. The great majority of cases involve resolution of factual disputes, assessment of credibility, analysis and assessment of expert evidence and the application of the law, as to which there is often little or no significant dispute, to the particular facts.
11. The second point arises in light of the CP making reference to pre-action protocols. The greatest care is needed here, before any parallel is drawn or proposal developed by reference to the protocols. Views on the effectiveness of protocols are of course divided. The CP expresses the view that “Pre-Action Protocols are generally effective”. The protocols were a novel concept when they were introduced. There are ways of seeing them as a positive development but they front load costs. The personal injury protocol has been a success but there the front loading of costs generated by it has been at least offset by earlier and better informed settlements. By contrast there have been objections in commercial, chancery and construction cases, on considered, reasoned grounds. Sir Rupert found “a high degree of unanimity concerning the general protocol. One size does not fit all and that protocol serves no useful purpose. Court users do not want it.” (Final Report page 345, para 1.11). “In many instances, the general protocol is productive of substantial delay and extra cost. I recommend that the general protocol (sections 111 and 1V of the PDPAC) be repealed” (ibid. page 353, para 6.1)

12. The third point is that it is in any event simply unrealistic to have, as the proposal contemplates, mandatory directions without any contemporaneous judicial control and judicial sanctions.

D.Mediation and judicial case management

13. The effective and just answer to the issues the CP seeks to tackle would be to build upon what has proved successful to date, simplify procedures and introduce effective measures to reduce costs. As part of that process, ADR should be promoted but without rule change, again as Sir Rupert Jackson recommends (ibid Page 363, para. 4.) Mediation and other forms of ADR have an important role to play in the justice system. And as Sir Rupert Jackson has observed “ADR is, however, under-used. Its potential benefits are not as widely known as they should be.”¹
14. This approach leads neither to mandatory pre-action directions nor to compulsory mediation. It in fact emphasises the importance of active judicial case management, addressing the case in hand. As pointed out in the responses below to the individual Questions posed by the CP, existing practice enables a Judge, in an appropriate case, to require the parties and their lawyers to attend a Case Management Conference and raise mediation and its benefits and suitability in that case. Judicial assistance on early definition of issues is another important example of how case management can actively assist. However the corollary is that it is of real importance that judicial case management is indeed used actively, authoritatively and robustly, including in encouraging the use of mediation in appropriate cases at an appropriate stage, and including in the use of appropriate sanctions where a protocol exists and should have been followed but has not been followed.
15. There is ample scope within the approach commended above to enable and encourage the parties to give genuine consideration to settlement where the case warrants that and where it appears the parties have not given that consideration. At the same time the fundamental right of access to the courts must not be put at risk, and the risk must be avoided of imposing an additional layer of costs by the parties “going through the motions”. Compulsory mediation carries both risks. Active judicial case management does not.
16. It is recognised that there can be different forms of compulsion by rules: from compulsion to receive information about mediation, to compulsion to attempt mediation, to compulsion to resolve the dispute through mediation. The first two do not exclude the ability to proceed to litigate if necessary, although the second may delay it. It can be argued that there are parallels between some forms of compulsion and requirements to follow other procedural steps pre-trial. But it should be common ground that great caution is needed in the formulation and imposition of any rules because of the inherent risks, present in almost any procedural reform but perhaps especially here, that costs and delay might be increased rather than decreased. The risks are at their most acute if rules are applied too widely or indiscriminately without sufficient consideration of when they are likely to be most beneficial to the majority

¹ “Review of Civil Litigation Costs: Final Report” Jackson LJ Paragraph 6.3, Executive Summary.

of clients, and to clients who face particular challenges, and in the class of case in question.

17. It is useful to keep in mind that by and large mediation works as part of the litigation system and will not work without it. Mediation is as much part of the litigation and civil justice system as that other effective dispute resolution tool, negotiation. It can be conducted prior to the commencement of proceedings but more commonly, it takes place during and in the context of the conduct of litigation. In a sense the description “alternative” is ambiguous.
18. More generally, the CJC draws attention to the analysis by Lord Neuberger MR in the 2010 Gordon Slynn Lecture. At paragraphs 17 – 20 of that lecture, he set out how mediation could properly be an adjunct or complement to an accessible justice system, but that if mediation is pressed to too great an extent that it would amount to a denial of access to justice.
19. As he put it,

“[17]. . . [Mediation and ADR’s] proper role is one which focuses on its proper function as an adjunct to justice, as a complement to the justice system and not as a substitute for effective access to justice. If it is conceived of as a substitute for securing effective access to justice, the risk is run that we will institutionalise the denial of effective access to justice for some citizens. And as US Chief Justice Fuller put in, in the context of the fourteenth amendment of the US Constitution, in *Caldwell v Texas*, ‘no state can deprive particular persons or classes of persons of equal and impartial justice under the law.’ If we expand mediation beyond its proper limits as a complement to justice we run the risk of depriving particular persons or classes of person of their right to equal and impartial justice under the law. Citizens are bearers of rights, they are not simply

or merely consumers of services. The civil justice system exists to enable them to secure those rights. It does not exist to merely supply goods or services, like a bar of chocolate, a motor car, or even accountancy services or medical care.

[18] Requiring all individuals to mediate before gaining access to the court door will necessarily have a greater impact on some classes of litigants than others. Some litigants will have the resources to afford both mediation and litigation. Others will not. Those who do not will then be faced with a choice. Accept a mediated solution, which may well not reflect their legal rights, because they cannot afford to first mediate and then litigate, or accept no solution at all. Financial pressure on some litigants may well mean that a mediated solution becomes a substitute for justice because the requirement to mediate is a fetter on access to justice. Such financially based fetters run the risk of depriving some citizens of their right of access to justice; they run the risk of depriving all citizens of an equal right of participation in government. We must be careful to ensure that this does not occur.

[19] The points of principle which it seems to me should limit the expansion of our commitment to mediation are therefore twofold. First, that the justice system is part of our constitutional framework; it is part of government. The delivery of justice is not a service. On the other hand, the provision of mediation and other forms of ADR is a service. To conflate or confuse the two is to make a profound constitutional mistake. Secondly, our constitutional settlement is predicated on

equal participation in government, which includes equal participation in justice, in other words it includes access to justice. Mediation should support that noble aim by helping to ensure that those disputes that can and should properly result in a mediated settlement do so. Insofar as it places a fetter on equal participation it cannot properly be supported. Our support for mediation and the benefits it can and does bring to many cannot be allowed to blind us to possibility that too great a faith in its benefits may result in the creation of a partial system of justice. If that occurs we undermine our constitutional framework and our constitutional settlement.

[20] Those are issues of principle which should, it seems to me, guide us in developing mediation in the future. They provide absolute limits to its development. Within those limits it can properly develop. . .”

20. Giving the annual Bentham Lecture, Lord Neuberger MR said that while the development of mediation had been ‘valuable’, it ‘cannot be the norm, or approach the norm’. He said: ‘Access to the courts is not a privilege but a fundamental right. ‘But it is not merely fundamental principle which requires citizens to have access to the courts. Practicality demands it as well. ‘You cannot force people to mediate, and what if the party in the wrong refuses to mediate, or refuses to do so in good faith, or declines to be reasonable, or is simply badly advised, or takes an over-optimistic view of his case? ‘The only way the party in the right can get what he deserves, can vindicate his rights, is to go to court, and any civilized system should ensure that he is able to do so. ‘If he cannot, then justice is either not done or he must resort to violence to achieve a sort of justice. Either way, the rule of law dies.’ Lord Neuberger continued: ‘If there is no effective access to the courts, the fundamental underpinning to all forms of dispute resolution systems, such as mediation, and even arbitration, falls away. ‘The only reason the strong and the rich will negotiate, arbitrate or mediate with their weaker and poorer opponents is the knowledge that ultimately there is the authority and power of the justice system standing behind the arbitration and mediation systems. ‘Furthermore, unless there is a healthy justice system, with judges developing the law to keep pace with the ever accelerating changes in social, commercial, communicative, technological, scientific and political trends, neither citizens nor lawyers will know what the law is... if the law is to be effective it must be known and must be equally accessible to all.’
21. Council members of the CJC with particular experience of mediation have assisted the CJC with the assembly of a number of discussion points, including comparative materials, in connection with mediation. Although it is the work product of the individuals concerned, rather than that of the CJC as a whole, the material can be made available to the Ministry on request.

E.Litigants in Person

22. The proposals in the Consultation Paper (“CP”) should be considered in combination with the Ministry’s response to Lord Justice Jackson’s report and the Ministry’s own proposals to reduce the scope and availability of civil legal aid. Taken together these will have a substantial effect on the numbers and circumstances of litigants in person.

23. The CP includes no question specifically asking for views on the effect on the numbers and circumstances of litigants in person, and the issues are dealt with only very briefly in Chapter 1.
24. It is urged that the development of more streamlined and citizen friendly procedures, including pre-action procedures, should be preceded and informed by a detailed examination of the type of litigants and the issues they present. This should include focus on those issues which are most easily capable of “standardisation” and “commoditisation” as Professor Susskind has argued, and on those litigants who are most capable of using expert self help systems. At the same time, it has to be recognised that the increase in the numbers of litigants in person will increase the need for access to free legal advice and education.
25. More generally, the Civil Justice Council has established a Working Party to examine the position of Litigants in Person. The resulting advice of the Council will be submitted to the Secretary of State for Justice in due course.
26. The CP contains a heavy emphasis on self-help, on alternatives to face-to-face legal services, and on mediation. This approach needs to be tested against the following in particular:
 - (1) Research (for example by the Legal Services Research Centre) shows that the poorest and most vulnerable members of society find it difficult to access advice services and have a particular need for face-to-face services as they lack the skills and ability to present their problems and deal with telephone and web enabled services. The needs of the most vulnerable for face to face expert legal advice and assistance should be recognised and prioritised. The system should accept responsibility for meeting those needs.
 - (2) Consultation responses to the consultation paper on Legal Aid (for example by Mind and Rethink) draw attention to the particular needs of those with mental health problems and the way in which justiciable issues and mental health problems can create a vicious downward spiral.
 - (3) Many people are not web-enabled and otherwise internet-aware. For those who are, the new pages on Directgov are presented in a way which really requires an existing understanding of the legal landscape.
 - (4) Mediation should be seen as part of the potential toolkit for resolving justiciable issues; it should be one door within the multi door courthouse and litigants should be free to choose it and supported in making that choice by legal expertise. Effective mediation will often require legal or expert advice to assess the position. The lawyer can explain the law relevant to the problem, evaluate the evidence against the law, and assess the chances of success. Without legal advice and support, unrepresented litigants, who are often first time players, are exposed to the greater expertise of institutional players and a heavy and inappropriate burden is laid on the mediator.

F. Enforcement reform

27. The CP contains a number of proposals in relation to enforcement. This is an area of great importance, but also an area in which the consequences of change can be wide ranging and complex.

28. The area is one in which reform is due. It is however important to bear in mind throughout that the main problem is the inability of many debtors to pay, rather than their refusal. There are obvious and striking examples of refusal to pay, but the enforcement regime must also work as regards the far higher number of those who are in serious financial difficulty.
29. In these circumstances the CJC would encourage further research into and discussion of the proposals, and a detailed and comprehensive look across the subject of enforcement as a whole to ensure that a fair, effective and coherent modern scheme resulted.

G. Structural reform

30. In general the CJC fully supports all the proposals made for “structural reform”. They have been the subject of earlier consultations and the CJC welcomes their implementation. Although these are matters that should be kept under review, generally speaking the case for implementation has been made and increased with the passage of time.

H. Answers to individual Questions

Q1 Do you agree that the current RTA PI Scheme’s financial limit of £10,000 should be extended?

As a starting point, the CJC would recommend that a full detailed analysis should be undertaken of the risks and the benefits of any extension to the financial limit, supported by publication of a full suite of evidence about the performance of the RTA PI Scheme and Portal delivery. Any decision to extend the financial limit should be informed by consideration of that detailed analysis.

The CJC’s 2005 Report “*Improved Access to Justice - Funding Options & Proportionate Costs*” made the following recommendation in respect of the cost effective handling of RTA claims:

Recommendation 4

RTA Claims below £10,000

The vast majority of RTA Claims fall below the £10,000 value threshold. The CJC recommends that in the vast majority of such claims where liability is not an issue speedy and prompt resolution would be assisted by a less resource intensive pre action protocol that would reduce unnecessary transactional costs. This should include:

- 1. the presumption that the claimant’s lawyer will obtain a medical report from an appropriate medical practitioner at a fixed fee, to be paid promptly by the third party insurer.*
- 2. the development of a “tariff” database for the valuation of general damages*
- 3. in cases where a police report is necessary, the agreement of a national standardised format, fixed fee and target timescale for delivery*

4. *a priority objective that all professionals involved in the claim should have regard to rehabilitation of the injured claimant in accordance with the APIL/ABI Rehabilitation code*

The recommendation of a £10,000 threshold was to ensure that only simple cases capable of “speedy and prompt resolution” would enter and remain in such a process, thereby delivering a saving on unnecessary transactional cost to the paying party whilst maintaining access to justice for meritorious claimants.

Broadly speaking the proposals were adopted and embodied in the RTA PI Scheme, which sets out a prescriptive and detailed process. Delivery of the process was then backed by an industry agreed electronic Portal to maximise efficiency for suitable cases.

The CJC believes that an extension of the financial threshold for RTA cases proceeding in the Scheme and via the Portal should be approached with caution for the following reasons:

- (1) The vast majority of low value RTA PI cases relate to straightforward soft tissue injury (i.e. whiplash) or to simple orthopaedic injuries. Such cases tend to settle with one simple GP medical report or, in a minority of cases where additional reports are required these are usually obtained from an orthopaedic specialist. Such cases lend themselves to “speedy and prompt resolution”.
- (2) Cases between £10,000 and £25,000 in value have injuries of a more serious nature, often with complex financial losses. They are broader in terms of injury type and do not fit the prescriptive management of the RTA Protocol. By their medical nature they are often not capable of speedy and prompt settlement.
- (3) The vast majority of RTA claims fall below £10,000. In broad terms, over 80% of low value RTA PI cases have a value of less than £5,000 and over 90% have a value of less than £10,000. So, with no more than 10% of cases being captured by ‘vertical’ extension of the Scheme there is a risk that in the higher value claims set out at 2 above that the detriment to the claimant outweighs the likely cost saving benefit to the paying party.
- (4) Whilst the RTA PI Scheme appears to be an effective solution to achieving cost and time saving objectives, the use of an the electronic Portal is groundbreaking and still in its infancy. We are not so far aware of any evidence connected with cases settling at the higher end of the value bracket or within Stage 3 proceedings. Furthermore, just over a year after the RTA PI Scheme was introduced may still be too early for cases requiring more than one medical report and/or reports from more than one discipline to have settled.
- (5) The RTA PI Scheme does not accommodate the full costs of dealing with the claimant’s needs at the top end of the current bracket. This may be acceptable on a ‘swings and roundabouts’ basis where only a low percentage require further work than the costs allow. Should however the financial limit be extended, the percentage of cases that are incapable of settling quickly, owing to medical need, will increase creating a potential reluctance by claimant representatives to take on these cases.

Q2. If your answer to Q1 is yes, should the financial limit be extended to £25,000, (ii) £50,000 or (iii) some other figure (please state with reasons)?

Please see answer to Q1.

Q3. 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?

Please see answer to Q1.

If the limit were extended the level of fixed costs should be reconsidered following analysis of the increased work required to service claims which would be caught by the extension.

It may be that in very broad terms stages 1 and 3 of the RTA PI Process might be similar to the present Scheme even if higher value claims were introduced. So it could be that stage 2 is where the work required and costs associated with it may differ most from the present Scheme.

However this is a complex area, and there is more to it than the point just recognised. The current Scheme works because of the percentage of claims settling quickly following a single medical report. On extension, the percentage of claims taking longer, requiring more medical attention and consideration of more (or more complex) special damages would increase and consequently the costs of conducting a claim would increase. Not to recognise the increased costs of these transactions could run the risk of adversely affecting behaviour and could result in the unintended consequence of narrowing access to justice. Claimant lawyers would be under pressure to work only on cases with adequate cost provision or settle cases prematurely.

Q4 If your answer to Q3 is no, should there be a different tariff of costs dependent on the value of the claim?

Fixed costs (or tariffs) work best for simple cases capable of quick resolution. If the Scheme is extended, consideration should be given to any appropriate increase in fixed costs. This would need to be based on independent evidence.

It may be necessary to consider whether “predictable costs” might apply if the Scheme is extended. We encourage the obtaining of independent research to ascertain what would best achieve the objectives of the RTA PI Scheme.

Q5. What modifications, if any, do you consider would be necessary for the scheme to accommodate RTA PI claims up to £25,000, £50,000 or some other figure?

Should fixed costs be considered appropriate for higher value claims brought into the Scheme as a result of its extension, then a number of modifications may need to be put in place to cater for these cases. Any modifications should encourage efficient handling and early settlement of cases.

In outline the modifications might include some or all of the following:

- (1) Further refinement of the procedural rules to create a bespoke process for cases of a more complex nature, for example more defined steps relating to obtaining medical evidence and to stage 3 hearings
- (2) Increased “escape” mechanisms to ensure cases are in the appropriate system relative to the complexity of the issues.

There may further need to be functional development of the Portal to accommodate the modifications and to support the Rules.

Q6: 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 is a matter on which views differ. However there is broad common ground that the signs are promising that there are significant benefits from the approach adopted in the RTA PI Scheme. This warrants at least further study and consideration of the question posed. The Scheme drives good behaviour by encouraging early admissions, it is reducing costs and it is providing claimants with their compensation earlier.

It must however be recognised, on the basis of experience of the time required to develop the RTA PI Scheme, that a variation or extension of the Scheme would take a substantial amount of time to develop and introduce.

Employers’ Liability (EL) cases

In the 2008 Government response to the consultation which preceded the introduction of the RTA PI process and which had raised the prospect of EL claims being similarly treated noted that

“The Government considers that EL cases in particular involve a different dynamic in terms of the economic and power relationship that exists between an injured employee making a personal injury claim against their employer, and two parties contesting a road traffic accident.”

This relationship can impact on the claimant and his or her witnesses, who may be discouraged from pursuing or assisting with a claim. This discouragement has taken the form of threats and intimidation in some cases. Further, in an EL case there may be a legitimate need for the claimant’s representative to seek preservation of the “locus in quo”, or to arrange an early site inspection. Such considerations do not apply in the same way in RTA cases. In RTA cases the locus is a public place and the claimant often has a car available for inspection (even if efforts are made to repair the defendant’s car).

Nevertheless, it is appropriate to add that the majority of the CJC takes the view that this of itself should not preclude extending the scheme to cover EL cases in principle. It does, however, draw attention to an issue to be considered in the event that a decision is taken to work towards extending the scheme to cover EL cases.

Further, it is relevant to note the development of the Employers’ Liability Tracing Office (ELTO), now being operated under the Motor Insurers’ Bureau (MIB) umbrella, as it may be possible to develop this further to assist with the identification of EL insurers, particularly in the context of extending the Scheme and the Portal to EL cases. The CJC would firmly recommend that The MIB and its technology partners should be asked to comment on the logistics of this.

Any extension to EL cases ought generally to exclude claims arising from occupational diseases. That general position should not rule out consideration of including specific conditions in due course if further research were to show their suitability to processing via a liability-admitted model (for example, scheme relation to compensation for industrial deafness).

Public Liability (PL) cases

Particular features of PL cases should be noted, including the absence of compulsory liability insurance, the absence of an ELTO equivalent, the differences between cases and the differences within the market.

A CJC-facilitated process in the mid 2000s was unsuccessful in encouraging key stakeholders in PL cases to agree standard success fee uplifts. It is unlikely that PL cases are yet ready or suitable to bring within a variation of the Scheme.

Q7: If your answer to Q6 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 reasons)?

For reasons expressed in answer to questions 1 to 5 above and having regard to the reasons why the RTA PI Scheme was set at £10,000 at least initially, if there is to be any extension of the scheme to cover EL and/or PL cases that extension should be limited to claims with a value of £10,000 at this stage. This should be subject to reconsideration following a further comprehensive and evidence-based review at a later date.

Q8: What modifications, if any, do you consider would be necessary for the process to accommodate employers' and public liability claims?

It is envisaged that there will be discussions to examine the work required and the associated costs. The CJC would support an approach involving inclusive and thorough discussion, in the event that it is decided to extend the Scheme.

It is probably unlikely that there would be changes required at stage 3 of the process specifically to accommodate EL and/or PL cases, if the threshold for these claims was set at £10,000. However, there may be an opportunity to put in place any improvements that experience has indicated are required.

At Stage 2, there would appear to be few changes required, but we should point out that there may be more cases where causation is raised under any provision for EL and/or PL claims which would be equivalent to the present RTA Protocol at 7.32:

The claim will no longer continue under this Protocol where the defendant gives notice to the claimant within the initial consideration period (or any extension agreed under paragraph 7.29) that the defendant—

- (a) *considers that, if proceedings were started, the small claims track would be the normal track for that claim; or*
- (b) *withdraws the admission of causation.*

This is relevant to the issue of the economic and power imbalance in EL cases, as it is anticipated that proportionately more admissions could be withdrawn at a later stage in the procedure.

Modifications in relation to the extension of the Scheme to EL and PL cases will be required in relation to stage 1 (and to the associated CNF held on the Portal). The CJC would anticipate that this would be accepted by all stakeholders within the CJC. The detail of those changes should be considered further with stakeholders and the RTA Portal Co (which represents stakeholders and which is integral to the operation of the RTA Scheme in practice.)

At Stage 1 in EL cases, the issue of the economic and power imbalance should not be ignored and it may be that action can be taken to prevent or ameliorate the problem, without encouraging a routine claimant position at the outset that a site inspection is required, for example. A legitimate request to preserve the site and equipment for inspection should be covered. Consideration will need to be given to making provisions in the Protocol and rules as under the existing Scheme in relation to costs and limiting costs.

There is a clear definition of EL cases in the current RTA PI Scheme, but there may be cases that are both EL and PL cases. For example, on a construction site the employee of the main contractor may be injured by the same faulty equipment as a "labour only subcontractor" (and the latter will have a PL claim). This is among the 'scope' questions which will need further consideration if a positive decision is taken to extend the scheme to cover EL, but not PL cases.

Q9: Do you agree that a variation of the RTA PI scheme should be introduced for lower value clinical negligence claims? If not, please explain why.

There should be a detailed analysis before any decision is made to introduce this type of change to this complex area of work.

The issues raised in adopting an RTA Portal-style procedure and fixed costs for clinical negligence cases will tend to be more complex than those in mainstream personal injury claims.

The practical consequences of an extension will need to be discussed fully with relevant stakeholders. If the Ministry would find it helpful, the CJC would be prepared to assist with discussions in this area and to seek to bring stakeholders together to discuss defined issues and proposals.

In Wales there are presently two schemes: the Speedy Resolution scheme and Redress. Developed by the Welsh Government, combined they are schemes to deal with low value clinical negligence claims. The former is for claims up to £15,000 and has been running since 2005. The latter is for claims up to £25,000 and has been running since April. Whilst there has been cross stakeholder broad support for the workings and outcomes of the Speedy Resolution scheme, there are significant concerns being expressed by patient groups and their lawyers in relation to the new scheme, Redress, that go to the questions of independence, client legal privilege, and whether claimants may be under compensated. On any view these concerns affect confidence .

The CJC would strongly urge that there is close, objective, study of the experiences of the Welsh schemes over a reasonable period of time before moving to vary or extend the RTA PI scheme to this complex area of work.

Q10: If your answer to Q9 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)?

Please see answer to Q9 above. It is to be noted that a £25,000 limit would include some serious cases.

Q11: What modifications, if any, do you consider would be necessary to the process to accommodate clinical negligence claims?

Please see answer to Q9 above.

Q12: Do you agree that a system of fixed recoverable 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, but subject to what follows below.

The development of fixed costs for fast track claims (not covered by any streamlined process) was first proposed by the CJC in 2005 as follows:

Recommendation 3 - Personal Injury Cases in the Fast Track

The Predictable Costs Scheme (CPR Part 45 Section II), currently restricted to RTA cases below £10,000, should be extended to include all personal injury cases in the [increased level] fast track and should include fixed costs from the pre-action protocol stage through the post issue process & including trial with an escape route for exceptional cases. Fixed success fees, fixed/guideline ATE premiums and fixed/guideline disbursements should also be part of the scheme.

The CJC stands by this recommendation, although it may now require some modification to reflect the MoJ's policy goal of reversing the recovery between the parties of success fee uplifts and ATE insurance premiums. It is to be noted that fixed costs regimes may be related to the type of claim and to the value (as is the case with CPR 45 Section II), to procedural stages (as in the RTA PI process), or to both (see Sir Rupert Jackson's matrices).

The development of the amounts of costs to be associated with any general fixed recoverable costs regime(s) should proceed as far as possible from sound and objective evidence gathered from stakeholders and should where possible be achieved by consensus. This broad approach has proved generally successful in the development of CPR 45 Section II fixed recoverable costs and in defining the costs under the RTA PI process. It is of central importance to use clear and consistent terms when describing how costs may be fixed or prescribed in fast track claims or in RTA PI Scheme claims (as extended).

It is of central importance to use clear and consistent terms when describing how costs may be fixed or prescribed in fast track claims or in RTA PI Scheme claims (as extended).² It is

² CPR 45 Section II provides for costs to vary by the amount of damages recovered and applies to road traffic cases settling for under £10,000 without proceedings having been issued. The base costs allowable under these rules are termed "fixed recoverable costs". However, they are commonly known in the market as "predictable costs" (and sometimes as "predictive fees").

helpful to keep separately in mind the ideas that by “fixed costs” we mean invariable set amounts, such as in the RTA PI Scheme, and by “predictable costs” we mean costs which may vary with damages (for example via pre-set percentages of damages at pre-set thresholds) even if the same includes a fixed core element (as is the case under CPR 45 Section II).

In principle fixed recoverable costs should cover the two types of cases described in paragraph 83 of the CP, that is claims:

- (i) *that were not within the scope of the new process or*
- (ii) *which left the process because, for example liability was not admitted,”*

Q13: Do you consider that a system of fixed recoverable costs could be applied to other fast track claims? If not, please explain why?

Yes, in principle.

Q14: If your answer to Q13 is yes, to which other claims should the system apply, and why?

The provisional view held by the CJC is that that any expansion of fixed recoverable costs is likely to be suitable only to categories of fast track claims in which individual cases show a fairly high degree of homogeneity.

Q15: 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.

Yes, in principle.

Any limit in this context may need to take account of any increase in the upper threshold of the fast track.

It is for further discussion whether there would be an ‘escape’ from the limit set.

Q16: Do you agree that mandatory pre-action directions should be developed? If not, please explain why.

CPR 45 Section VI provides for fixed costs to apply to low value road traffic injury cases under the 2010 protocol and portal (known as the RTA PI Scheme in the consultation document). These costs do not vary with the amount recovered.

Sir Rupert Jackson in his report at paragraph 1.2 of chapter 15 says “*I use the phrase ‘fixed costs’ as a general term to embrace (a) costs for which figures are specified and (b) costs which can be calculated by a predetermined means, such as the formulae in CPR Part 45.*”

No, but this is on the basis that judicial case management is used actively, authoritatively and robustly, including in encouraging the use of mediation in appropriate cases at an appropriate stage. Please see Sections C and D above.

Q17: If your answer to Q16 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 with reasons)?

Not applicable, but please see the answer to Q16 above.

It is worth adding that money claims up to £100,000 include matters of considerable significance and importance even in today's values. To some individuals and small and medium size enterprises, such claims can be literally of life changing significance.

Q18: Do you agree that mandatory pre-action directions should include a compulsory settlement stage? If not, please explain why.

There should not be mandatory pre-action directions, but there should be active judicial case management which can help bring genuine consideration to settlement wherever appropriate. On this, and on the issue of compulsory mediation please see Sections C and D above.

Q19: If your answer to Q18 is yes, should a prescribed ADR process be specified? If so, what should that be?

Not applicable, but please see the answer to Q16 above and see also Sections C and D.

Q20: 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.

There is scope for a system of fixed recoverable costs. As the CP recognises, the cost matrix would differ depending on factors including the nature and value of the dispute.

Q21: 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?

Fixed recoverable costs may be related to the type of claim and to the value, to procedural stages, or to both.

This question should be considered as part of a general review; but in principle fixed costs would need to vary with the type of dispute and also with monetary value. Some types of dispute inevitably will involve more work than others; and in general terms the greater the

monetary value, the more proportionate will it be to incur greater expense in pursuing or defending it.

Q22: 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.

No.

Please see generally Sections C and D above.

Q23: If your answer to Q22 is yes, should there be different procedures depending on the type of case? Please explain how this should operate.

N/A.

Q24: 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?

The CJC would be pleased to assist the Ministry with an examination of how awareness of electronic channels for claims issuing can be improved.

Q25: Do you agree that the small claims financial threshold of £5,000 should be increased? If not, please explain why.

Yes.

Q26: If your answer to Q25 is yes, do you agree that the threshold should be increased to (i) £15,000 or (ii) some other figure (please state with reasons)?

This is a matter on which views differ, but an increase to account for inflation might work in favour of a limit of £10,000 at this stage.

Q27: Do you agree that the small claims financial threshold for housing disrepair should remain at the current limit of £1,000?

Yes.

Q28: If your answer to Q27 is no, what should the new threshold be? Please give your reasons.

N/A.

Q29: Do you agree that the fast track financial threshold of £25,000 should be increased? If not, please explain why?

No.

There is more still to do to develop and maximise the benefits of the fast track. Until that work is complete an increase in threshold is neither timely nor appropriate. £25,000 is a large amount of money to most individuals, and thus the dispute potentially very serious even if measured only in money terms.

Q30: If your answer to Q29 is yes, what should the new threshold be? Please give your reasons.

N/A.

Q31: Do you consider that the CMC's accreditation scheme for mediation providers is sufficient?

In pragmatic terms the CMC's accreditation scheme is a most respectable start and the CP acknowledges that the CMC is continuing to build on its initial scheme. The work of the CMC should be welcomed and supported. Mediation might be described as an embryo profession and the work carried out by the CMC to date can be viewed as evidence of a start towards self-regulation.

Consideration might be given, say in 3 to 5 years, to whether self-regulation is working, whether there is evidence of problems or evidence that, say, compulsory membership of an accreditation scheme is necessary or desirable.

The justification for this cautious approach to regulation is that

- mediation is a flexible concept that needs time to develop,
- there is a risk that accreditation at this early stage might be a bureaucratic straitjacket that would stifle such development,
- there is a risk that the cost of accreditation in a small and emerging market would be prohibitively expensive and
- there appears to be little evidence of user complaints or consumer problems at this stage.

All of these factors, of course, have to be balanced against the need to protect consumers and give reassurance to potential consumers and referrers (such as the legal profession and the judiciary) that adequate safeguards are in place.

At a future point the vision and mission of the International Mediation Institute, involving certification of competency, may warrant study and discussion. There has been some recent Australian work on this subject. Again further details can be supplied on request.

Q32: If your answer to Q31 is no, what more should be done to regulate civil and commercial mediators?

Please see the answer to Q31 above.

Q33: Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not, please explain why.

The CJC recognises the value of the Small Claims Mediation Service. The principle of proportionality justifies consideration being given to the further encouragement of mediation in small claims cases.

It is possible to see the positive aspects of “automatic referral” if what is meant is referring the parties to speak without charge to a court-based mediator about mediation, rather than requiring a compulsory attempt at mediation.

However for reasons given earlier, there should not be mandatory pre-action directions, although there should be active judicial case management which can help bring genuine consideration to settlement wherever appropriate. On this, and on the issue of compulsory mediation please see Sections C and D above.

In any event there is a strong argument for liaison over the Norgrove proposals in the Family Courts, and possibly waiting to see and evaluate how mediation progresses in the Family Courts before reaching a decision on any radical change in the Civil Courts.

Q34: 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 £5,000 or (iii) some other figure? Please give reasons.

A cautious approach of piloting any “automatic referral” at the current level of £5,000 would provide evidence upon which to make a thorough assessment of whether an appropriate level should be as high as £15,000.

It will be important to assess carefully whether there is the resource to meet the demand on court-based mediators in this sector of the market. Further an important feature is the identification of exempt cases.

Q35 : How should small claims mediation be provided? Please explain with reasons.

By (a) the mediators employed by the Small Claims Mediation Service and (b) mediators in private practice.

The reason for suggesting (b) is an assumption that the Government will not employ additional mediators in the Small Claims Mediation Service.

However there will be a cost in involving mediators in private practice. The Consultation Paper mentions this and says “in the majority of cases (the fee for using the service) should be more than offset by savings that parties make from earlier settlement and the costs and fees associated with a small claims hearing.”

The parties may see it differently. They may feel that:

- they have (or one of them has) paid a fee for bringing a claim

- that fee includes the fee for a hearing
- they are now being asked to pay an additional fee.

But beyond these points, it is of fundamental importance as a matter of principle that the parties to a particular case are not required to undertake mediation at a price as the price of obtaining access to the courts. Access to the courts is not a privilege but a fundamental right.

Further, blanket provisions give rise to the risk of the result being one of adding an unnecessary layer of additional cost. The suggestion made by the Association of Her Majesty's District Judges in paragraph 146 of the CP refers: "Perhaps the cost to HMCS of this service could be met at least in part by a partial (as opposed to a complete) refund of the hearing fee that the Claimant will in any event have paid."

A further question arises as to whether a proportionate and affordable fee from the parties' perspective will provide sufficient funds to fund an appropriate level of service for those cases where the matter does proceed to mediation. The service will have to bear the ancillary costs of administration and coordination. The economic issues here need not rely entirely on speculation: as the cost of the Small Claims Mediation Service and the number of claims that the SCMS deals with are known factors the unit cost per mediation will also be known.

As an extended Small Claims Mediation Service would, probably, be mainly delivered by telephone/electronic means there is scope for giving consideration to a specialist approach. Although it is often argued, quite legitimately, that it is not necessary for a mediator to have specialist knowledge of the subject matter of the dispute it may well be the case that possession of such knowledge might make for a swifter mediation.

Q36: Do you consider that any cases should be exempt from the automatic referral to mediation process?

Please see the answer to Q33 above.

The question of exemption in any system of "automatic referral" is an important one. Any system and its exemptions requires a careful approach.

If there were "automatic referral" the CJC envisages that there will be a range of cases that are not appropriate for various reasons and some comprehensive work will be required to identify these. The body of people best placed to advise on the category of claims where ADR is most unlikely to be successful is probably the cadre of mediators employed by the Small Claims Mediation Service. District Judges, consumer bodies, solicitors with experience of dealing with small claims and National Mediation Helpline mediators with experience of dealing with small claims are also in a position to provide input on the basis of experience.

Paragraph 55 of the Consultation Paper suggests that disputes between taxpayers and the Government over tax liabilities and debt should be exempted. Mediation has been used, however, by the Internal Revenue Service in the USA for many years. (See <http://www.irs.gov/pub/irs-pdf/p3605.pdf>). At the Civil Mediation Council Conference in May 2011 a speaker outlined how mediation was now being used by HMRC.³

³ Tax Journal/2011/Issue 1059, 10 January/Articles/Analysis - View from HMRC: dispute resolution – Tax Journal, Issue 1059, 14 10 January 2011 Analysis - View from HMRC: dispute resolution Anthony Inglese is the General

It may also be useful to mention that research into court integrated mediation in the Netherlands has demonstrated that factors such as the identity and attitude of the parties, and the degree of escalation that the dispute has reached are as important, or probably more important, than the type of case.⁴ Other jurisdictions where court related mediation schemes have been established for some time also demonstrate that a simplistic approach can lead to problems.⁵

Q37: If your answer to Q36 is yes, what should those exemptions be and why?

Please see the answer to Q36.

Q38: Do you agree that the parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper? Please give reasons.

No. The approach compromises the ability of the judge to conduct the hearing, and to do so in a way in which there can be confidence that justice is done and seen to be done. There are particular challenges with small claims which can be best and most efficiently addressed and overcome by a face to face hearing. It is to be remembered that this is an area in which litigants can be least experienced and least supported.

Even when the matter in question is not a (final) hearing but a directions hearing the judge must be allowed to determine the appropriate means for conducting the hearing (on paper, by telephone or face to face) so that the judge can properly fulfil his or her task of active judicial case management.

Q39: 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.

The CJC repeats the key points that access to the courts is not a privilege but a fundamental right and that blanket provisions give rise to the risk of an unnecessary layer of additional cost.

Counsel and Solicitor to HMRC. He is a barrister and is a Bencher of Gray's Inn. Geoff Lloyd is Director, Dispute Resolution, at HMRC, where he leads the development of HMRC's strategy for improved dispute resolution.

⁴ See Machteld Pel

http://books.google.co.uk/books?id=kvIwj6VadZ0C&pg=PA30&lpg=PA30&dq=Machteld+Pel+mediation+ladder+of+escalation&source=bl&ots=rDjb43GPTL&sig=8GNRySw3_XoxIIUExEYFMnYFmHo&hl=en&ei=XM0BTpeQJ4az8QOEmP3EAq&sa=X&oi=book_result&ct=result&resnum=1&sqi=2&ved=0CBsQ6AEwAA#v=onepage&q&f=false and Customised conflict resolution: Court-connected Mediation in The Netherlands 1999-2009 <http://www.rechtspraak.nl/English/Publications/Documents/Customized%20conflict%20resolution%20Court-connected%20Mediation%20in%20The%20Netherlands%201999-2009.pdf>

⁵ "See for example "Is That All There Is?: "The Problem" in Court-Oriented Mediation" Leonard L. Riskin and Nancy A. Welsh

[http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=nancy_welsh&sei-redir=1#search="Machteld+Pel+mediation+ladder+of+escalation](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=nancy_welsh&sei-redir=1#search=)

It is recognised that proponents of ADR may welcome this proposal and equally that many involved in the delivery of civil justice will have misgivings about it. This is not because of misgivings about mediation (which deserves support and respect, as emphasised above); it is about whether this proposal will help, and help in an appropriate way.

The proposal should be evaluated against the fact that existing practice incorporates the following:

- (1) A Judge, in an appropriate case, can require the parties themselves as well as the lawyers to attend a Case Management Conference and raise mediation and its benefits and suitability in that case.
- (2) An unreasonable refusal to mediate can be visited with an appropriate penalty in terms of costs.

It may well be that greater use should be made of the existing facility at (1).

However the proposal advanced in the CP needs, in addition, to be examined against the following points:

- (1) Except for clinical negligence, in virtually every P.I. case (and such cases form the major part of the day to day work of the courts) the defendant is only a nominal party: the substantive defendant is the insurer. Even in clinical negligence, the defendant is usually the relevant Health Authority or Trust. In every fast track P.I. case (of which there are many thousands) and every multi track case up to £100,000, the presence of the nominal defendant achieves little and it is questionable whether much is achieved by causing the claims manager to attend, or by providing information packs time and again. The implications in terms of manpower and administration, and therefore (ultimately) premium cost warrants consideration. In clinical negligence cases, again even if the doctor is named as the defendant the effective decision making will lie with his employer or insurer. The question is what would be achieved by a system that contemplated repeated attendance at information sessions.
- (2) Even in cases where the named parties have control of the litigation, there may be a variety of good reasons for them not to attend an "information or assessment session".
- (3) The question of sanction for non-compliance would need to be addressed. That cannot sensibly be one of contempt, but it would seem that condemnation in costs and/or some other sanction would have to follow every refusal unless there were a sufficiently wide exemption provision.
- (4) The question arises whether lawyers should or should not attend the sessions. If they do not, the parties may not feel they are equipped to deal with or make the most of the sessions, and it is in any event a strong thing to deny a party the option of involving their lawyer at any stage. If they do attend, then costs increase.

If delivery of an information pack about mediation to all litigants (perhaps electronically – see Q40), rather than attendance at a session (see paragraph 166), is what is meant by compulsory provision of information about mediation, then many of these points do not arise or are easily dealt with. It still needs to be recognised that this may involve insurers receiving many copies.

Evidence of research in countries such as Ireland, the Netherlands and Australia, assembled for the assistance of the CJC by Council members with particular experience in mediation, is available on request.

Q40: If your answer to Q39 is yes, please state what might be covered in those sessions, and how they might be delivered (for example, by electronic means)?

Please see the answer to Q39.

If such sessions are to be introduced the items to be covered might broadly be as described in the CP. However attention should be given to the lessons learned in the Netherlands and the pitfalls that will be apparent from studying the available research.

It is noted that the CP envisages that these sessions would be delivered by mediators. (Paragraph 166 "We are confident that civil mediation practitioners will be able to use their skills to impart the necessary information to the parties, sell the benefits of mediation and its suitability to the dispute in hand, and thereby convert many of these information sessions into actual mediation appointments.")

There are cost issues here and, as we previously commented with reference to small claims mediations, a question arises as to whether a proportionate and affordable fee from the parties' perspective will provide sufficient funds to fund an appropriate level of service. A comment made by the Jonathan Djanogly MP, Justice Minister at the Civil Mediation Conference in May 2011 was to the effect that, as foreshadowed by the passage quoted above, it was to be expected that mediators would be pleased to conduct such sessions, on an economic basis, because this would be a source of mediation work. We are concerned that this approach may put the mediator in a position of conflict, or at least in a position whereby one or more of the parties or one or more of the lawyers perceives the mediator to have a conflict.

Q41: Do you consider that there should be exemptions from the compulsory mediation information sessions?

If there were compulsory mediation information sessions, exemption should apply to any party that had filed a statement asserting that they had taken genuine steps to consider settlement.

Q42: If your answer to Q41 is yes, what should those exemptions be and why?

See our answer to Q41 above.

Q43: Do you agree that the provisions required by EU Mediation Directive should be similarly provided for domestic cases? If not, please explain why.

There is common ground that agreements reached through mediation should be enforceable. Domestic law is already able to enforce agreements, and (although it is recognised that this is an area in which views differ) that point argues strongly that more is not required.

Article 7 addresses the confidentiality of the mediation process. Given the increasing importance of mediation and recent case law developments it is important to clarify, and

perhaps develop, mediation confidentiality. (With reference to confidentiality there is recent Australian research by NADRAC.)

Q44: If your answer to Q43 is yes, what provisions should be provided and why?

Please see the answer to Q43 above.

Q45: 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. For the following principal reasons:

- (1) The proposal singles out homeowners from other judgment debtors.
- (2) The proposal will have adverse implications for the volume of court work, which will increase.
- (3) The proposal will have effects on other creditors of the debtor, because it will affect priorities between creditors including in any insolvency. Indebtedness, county court judgments and enforcement are often part of a more complex multiple debt situation.
- (4) It will advantage the quicker and more sophisticated creditor, to the disadvantage of those unfamiliar with the courts or who have shown more forbearance.
- (5) It risks increasing existing examples of enforcement by charging order being used by creditors to put pressure on judgment debtors to pay more than they can afford.
- (6) It may encourage existing problems where judgment debtors borrow more, and expensively, to avoid the consequences of a charging order.

Citizens Advice in its evidence briefing "Out of Order"⁶(quoted in the consultation paper at paragraph 194) concluded that the use of charging orders on consumers' homes in this way has the following serious implications:

- It exposes people in financial difficulties to additional costs and charges which increase the overall debt and thus make it more difficult to resolve
- Court action for charging orders will restrict debtors' options to resolve their situation. "The existence of a charging order may also make it more difficult for a mortgage borrower to remortgage with another lender.."
- The threat of more easily obtained charging orders adds considerably to the stress and anxiety experienced by people in debt.

⁶ "Out of Order" CAB evidence on the use of charging orders and orders for sale in debt collection, Citizens Advice, June 2009

The current charging order procedure raises important access to justice issues for judgment debtors, and this review of enforcement would be an opportunity to rectify that. Currently, the hearing to determine a final charging order is not automatically transferred to a debtor's home court. It is heard in either the judgment court or a bulk charging order centre, and will only be transferred to the debtor's court if requested. This excludes litigants in person who do not know and are not told that this is the case (no information is provided with interim charging orders). Many charging orders are made without attendance by the judgment debtor, sometimes because they cannot attend court a long distance away. If the venue for a final charging order hearing was the court for the district where the property is situated (as is the case for charging orders to enforce council tax liability orders) more debtors might engage in the process, and this could have a knock on effect of reducing post charging order applications where debtors feel they have not been given the opportunity to take part in proceedings.

Q46: Do you agree that there should be a threshold below which a creditor could not enforce a charging order through an order for sale for debts that originally arose under a regulated Consumer Credit Act 1974 agreement? If not, please explain why.

The wider case for close study and reform in the area of charging orders is referred to in answer to Q45.

The problems with an approach that introduces a threshold include calculation (note here that if a calculation includes fees, charges and interest accrued, the creditors with the most onerous contract terms may be put at an advantage), increased use of proceedings (itself adding to cost), the disincentive effect for creditors with debts close to or above the threshold to engage with debtors and show forbearance and an increased risk of exposure to predatory creditors. The position may be quite different as between a home and a holiday home or business premises.

Different considerations and different thresholds may apply to different types of debt. These thresholds may need to be smaller but nonetheless proportionate to the final effect if the property charged is a home. For example, there may be public policy concerns with some debts for example Child Support Arrears. There are some debts that neither creditor nor debtor have any choice but to incur such as water, and council tax. In these cases a smaller threshold might apply, but nonetheless there should be protection against disproportionate homelessness where the debtor is paying what they can afford.

There is a case for the matter to be left to judicial discretion in the particular case.

In circumstances where existing protections for judgment debtors in relation to orders for sale are already not strong, the consequences in that regard may be more serious in a future more buoyant market. The CJC notes the Citizens Advice, Out of Order briefing⁷:

As set out in the 2003 *Effective Enforcement* White Paper, these safeguards at least appear to be extensive. But on closer inspection, they seem to provide debtors with only weak protection that may not stand up to concerted legal challenge by creditors. The case which sets out the circumstances in which courts will grant an order for sale

⁷ "Out of Order" ibid June 2009

is the Court of Appeal decision in *Bank of Ireland Home Mortgages Ltd v Bell*.⁸ This confirms an earlier High Court ruling that section 15 of the Trusts for Land and Appointment of Trustees Act 1996 requires courts to consider the interests and the welfare of the debtor, other members of the debtor's household, and dependent children in particular, when considering a creditor's application for an order for sale.⁹

There are, however, a number of prior legal authorities stating that 'save in exceptional circumstances, the wish of the person wanting the sale [that is, the creditor]... would prevail...'.¹⁰ The effect of the 1996 Act was to *rebalance* the competing interests of creditor and debtor towards the debtor; but this arguably starts from a very low base of protection given the presumption that the creditor's interests should prevail. So the effect of the judgment in *Bell* is to set out the limited nature of the safeguard for debtors provided by the 1996 Act. This is stated by Lord Justice Gibson as follows:

"The 1996 Act... appears to me to have given scope for some change in the court's practice. Nevertheless, a powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue... In the present case it is plain that by refusing sale the judge has condemned the bank to go on waiting for its money with no prospect of recovery... That seems me to be very unfair to the bank".

As a result, a single homeowner without dependent children may have very little protection under the law. For other owner occupiers, including non-debtors and dependent children, protection is at best contingent on the interests of creditors. This suggests that the main safeguard for debtors is not an absolute or even conditional right, but rests on the discretion of the court to make or not make a charging order or order for sale based on the facts of each case.

Here it is clear that both the Charging Orders Act 1979 and Section 71(2) of the County Court Act 1984 give the court wide discretion to refuse an order for sale or suspend it on terms that the debtor repays by instalments. Guidance on the Civil Procedure Rules advises judges that ordering sale is 'an extreme sanction' and a 'draconian step to satisfy a simple debt' and all circumstances would have to be considered. But the guidance then goes on to state that sale is likely to be ordered 'in a case of the judgment debtor's contumelious neglect or refusal to pay or in a case where in reality without a sale the judgment debt will not be paid'.¹¹

It is the last part of this that concerns us, as bureaux see many cases where people who have fallen into financial difficulties are only able to make relatively small or even token payments towards their debts that might take many years to clear as a result,

⁸ Bank of Ireland Home Mortgages Limited v Bell [2000] EWCA Civ 426

⁹ Mortgage Corporation v Shaire [2000] EWHC Ch 452

¹⁰ Ibid

¹¹ Supreme Court Practice – guidance on Civil Procedure Rules at paragraph 73.10.1

as highlighted in the recent Citizens Advice report, *A life in debt*.¹² People in these circumstances might be doing their best to deal with their debt problem by seeking the help of a money adviser and offering to pay their creditors as much as they can afford. Yet the law appears to offer them almost no protection should a creditor make a determined effort to enforce the debt against their home. As a result the very low number of orders for sale currently granted by the court is probably more the result of creditors considering possible reputation damage and the understandable reluctance of judges to take people's homes away for unsecured debt."

In other areas rules and guidance that apply to secured lenders¹³, require possession proceedings to be treated as a last resort and the exploration of all other avenues for settlement first. It is any irony that in some cases at present, it may be easier to obtain a charging order and an order for sale as a result of failure to pay, for example, a credit card debt, than to take and enforce possession proceedings for arrears under a mortgage or secured loan.

This works against all the measures that have been put in place over the last few years to try and prevent homelessness and repossession as a result of unsustainable and problem debt¹⁴.

Question 47 If your answer to Q46 is yes, should the threshold be (i) £1,000, (ii) £5,000, (iii) £10,000, (iv) £15,000, (v) £25,000 or (vi) some other figure (please state with reasons)?

Please see the answer to Q46 above.

As there indicated, there is a case for the matter to be left to judicial discretion in the particular case. It is to be noted that if a threshold is use then although arguments can be made for the threshold to be higher rather than lower, the matter needs to be considered in conjunction with the minimum debt for petitioning in bankruptcy. It is important that the system takes an overall view rather than find that there has been an unintended consequence in the form of creating incentives to choose bankruptcy (and orders for sale in bankruptcy, with all the related costs of bankruptcy).

Question 48 Do you agree that the threshold should be limited to Consumer Credit Act debts? If not, please explain why.

Please see answers to Q45 to 47 above.

¹² "A life in debt": The profile of CAB debt clients in 2008, Citizens Advice, 2009.

¹³ See FSA Mortgage Code of Business Rules, Council of Mortgage Lenders Guidance, OFT guidance for secured lenders.

¹⁴ For example, Mortgage Rescue Schemes, the pre-action protocol, and changes to welfare benefit housing costs entitlement with the aim of keeping people in their homes.

More generally different considerations and different thresholds may apply to different types of debt. There may be public policy concerns with some debts for example Child Support Arrears. There are some debts that creditor and debtor have less choice but to incur such as water, and council tax.

Throughout it is of key importance that there should be protection against disproportionate homelessness where the debtor is paying what they can afford. This may be best achieved through judicial discretion.

Question 49 Do you agree that fixed tables for the attachment of earnings should be introduced? If not, please explain why.

No. For the following principal reasons:

- (1) Fixed percentage deductions take no account of need. A single debtor in good health with no dependants will have the same deduction made as a lone parent with children who may also have disability.
- (2) Other creditors may be harmed. If a disproportionate amount is deducted on an attachment of earnings order for one debt, this will both reduce the amount available for other creditors in a multiple debt situation, and may result in further debt if the deduction is such that payments for essential expenditure, such as rent or council tax, become unaffordable.
- (3) Providing a safeguard of allowing application to court in cases of hardship will put the onus on the most vulnerable and increase the demands on court staff.
- (4) There is a better alternative. The stated reasons for making the changes to attachment of earnings is that the information provided by the debtor on the N56 is often inadequate, and takes time to receive. It is proposed that by implementing a fixed percentage deduction this would speed up the process and rely less on debtors providing the information. However there is already an alternative procedure to collect information, which is to ask the employer for the information. An enforcement or debt process portal, using a common financial statement model, would allow information of this nature to be collected and verified early in the process and held on record.

Q50: 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

No. No evidence is provided of the incidence of attachment of earnings failing for this or other reasons.

Research elsewhere has identified for example, that attachment of earnings and job loss is connected¹⁵. Responsible judgment debtors who may be at risk of an attachment of earnings

¹⁵ "Helping hand" – Impact of Debt Advice on Peoples lives. Legal Services Research Centre

order may be able to manage the risk of job loss if they are given the opportunity to volunteer the information first.

Any formal mechanism to discover a debtor's new employer in this way should be confined to HMRC or other government departments.

Q51: Do you agree that the procedure for TPDOs should be streamlined in the way proposed? If not, please explain why.

No. There is a case for reform, but not on the basis and in the manner proposed.

It is helpful to distinguish the use of this procedure against individual judgment debtors and other defendants, such as commercial and trade defendants in small claims procedures.

For most individual judgment debtors, who are likely to be multiple debtors as discussed above, the third party debt order fails because they have no funds in their bank. This is not because they have deliberately transferred the funds to another bank after judgment, as suggested in paragraph 203 of the CP, it is because their funds are fully committed. Once the salary or benefits has been paid in to their account it is paid out again for essential living expenses.

This is entirely different from someone familiar with the system that chooses to change bank accounts to avoid a third party debt order. There is no evidence provided to indicate the incidence of this behaviour. Reform should not be based on the potential behaviour of a small minority without providing protection for the majority.

If implemented without providing additional protection, these proposals will cause hardship and will not protect vulnerable debtors. If the procedure is simpler without a hearing, and with an order that reaches into new accounts and for longer time spans, it will cause hardship and further indebtedness, and as noted elsewhere with regard to other proposals will prejudice other creditors.

A genuine attempt to protect the "can't pay" and the vulnerable could be achieved by ensuring that certain funds are exempt from third party debt orders. For example, benefit income, student loan/grant income and some earned income. Such a protection to be effective would need to combine elements of the source of the funds (for example, any benefits), the purpose of funds (for example, to pay rent) and the amount (for normal living expenditure).

Q52: 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.

To the question as framed, no, but please see generally the answer to Q51 above. A careful and comprehensive reform could make a careful choice between accounts of different types. The issues involved for each type are different.

Q53: 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.

No. Please see generally the answer to Q51 above. The periodic lump sum for self employed is difficult to administer. For those who are employed it is not appropriate as it conflicts with attachment of earnings.

Q54: Do you agree that the court should be able to obtain information about the debtor that creditors may not otherwise be able to access? If not, please explain why.

In principle the concept is not objectionable, but the real question is how best information is obtained.

It is fully recognised that information is the key to enforcement. However this is an area that requires close research before any change is made or formulated. Underlying the proposals as framed is the contention that the existing procedure for Orders to Obtain Information do not work. However no evidence is given to support the contention that the reason (paragraph 205 of the CP) Information Orders are declining is because debtors do not disclose information or provide verification. It is noticeable that the use of Information Orders have not increased significantly since the changes that strengthened them were introduced in 2004. There may be other reasons that they are not used, for example, the fee, or that since the changes strengthening the procedure, judgment creditors are expected to serve the order, or, because in fact for any debtor being assisted by an advice service, the information is given anyway without the need for the application.

The proposed application and order provides an alternative to the current Information Order process and could help enforcement against those who fall into the “won’t pay” minority. It could help those small claimant judgment creditors who need support with regard to enforcement decisions. There would need to be very clear rules on what information could be collected and what disclosed. Whilst the exchange of information from government departments may be reasonable, requests for information from other third parties raises other issues. There would need to be a clear identifiable list of third parties, and protection provided to ensure that a client debtor was confident in the confidentiality of his or her engagement with solicitors and advice agencies.

However, at a time when the courts are under extreme pressure of work, these proposals appear to be quite work intensive. Also, such a system is likely to require quite a high fee because of the work involved, and this in itself may act as a deterrent to the very judgment creditors it would most assist and who are most likely to use it.

In any event an alternative to introducing new information gathering powers is further to strengthen the Information Order process. If the information gathered via an Information Order, or via the a debt or enforcement portal, were to be held on record and accessible by application from other judgment creditors, this may have a deterrent effect on those who seek to avoid payment. It also avoids each individual creditor to make successive applications, protects them from enforcement. For the “won’t pay” debtor such a system may be an incentive to pay. Other judgment creditors, especially consumer small claimants, could request an order to search the record of information before taking enforcement action. This would give them insight into the likelihood of success.

Q55: Do you agree that government departments should be able to share information to assist the recovery of unpaid civil debts? If not, please explain why.

Yes, subject to safeguards.

Q56: Do you have any reservations about information applications, departmental information requests or information orders? If so, what are they?

Please see the answer to Q54 above.

Q57: Do you consider that the authority of the court judgment order should be extended to enable creditors to apply directly to a third party enforcement provider without further need to apply back to the court for enforcement processes once in possession of a judgment order? If not, please explain why.

No. This proposal is strongly opposed, for the following main reasons:

- (1) At present the private enforcement sector is not in a position to provide an adequate service.
- (2) Advice agencies deal daily with complaints about the private enforcement sector.
- (3) The vulnerable debtor and the “can’t pay” debtor will be at risk of lacking protection and safeguards.
- (4) It is not clear that individuals in debt will retain the same ability to make applications to suspend warrants in the county court and to vary instalment order, and these are crucial provisions for their access to justice. Particularly at risk are those who are unaware of the legal consequences, did not understand or were incapable of understanding the paperwork, or who sought advice too late, or those who had a change in circumstances through no fault of their own, such as losing their job or being sick, which subsequently reduces their income.
- (5) In many cases the information provided by claimants and judgment creditors about the defendants is incorrect. It is very common in advice to hear that a defendant did not receive the Claim Form.
- (6) It has to be remembered throughout that for the majority of judgment debtors in the county courts where the main issue of concern is not that they are avoiding payment but that they are unable to pay.

Q58: How would you envisage the process working (in terms of service of documents, additional burdens on banks, employers, monitoring of enforcement activities, etc)

N/A. Please see generally the answer to Q57 above.

Question 59 Do you agree that all Part 4 enforcement should be administered in the county court? If not, please explain why.

This area too requires careful examination and research.

Generally speaking, the case for more remaining with the county court seems sound, but the detail of any arrangements need to be closely examined.

Certainly the current provision to transfer judgments over £600 to the High Court for enforcement should be removed. The advice sector has recently seen more creditors enforcing county court judgments in the High Court, including unpaid funeral charges, nursery fees, water charges, and charges for heating oil, as well as trade debts arising from previous businesses. It is worrying that in some of these cases, the debt is initially quite small.

For a creditor with an appropriate judgment, using the High Court to enforce a county court judgment is cheaper than using the county court. Since the county fees were increased in July 2009, to issue a warrant of execution in the county court is £100 (or £70 in the bulk centre), but is £60.00 to use the High Court. However, for debtors affected by enforcement in the High Court, it is much more expensive as the debt always attracts statutory interest and High Court Enforcement Officers can add charges in excess of those in the county court.

When creditors use the High Court for enforcement, debtors can find themselves in what appears to them to be an intimidating and complex procedural world. Making an application to stay a writ is far more complex and time consuming for all parties, than the equivalent county court procedure. The more that small consumer type debts are enforced in the High Court in this way, the more applications to stay the writs are going to be made thus involving the court in the time and resources to administer and determine these applications.

Q60: 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.

Q61: 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)?

Yes.

This figure should be reviewed from time to time and there should be a mechanism for considering a review.

Q62: 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.

Q63: If your answer to Q62 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)?

To £100,000.

Q64: 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.

The reference to “suitably qualified” is important. The exercise of this jurisdiction should only be exercised by suitably trained and authorised Circuit Judges, and there should be appropriate safeguards to ensure this.

Q65: 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.

Q66: 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.

Minority shareholder actions under s994 of the Companies Act 2006.

Q67: 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.

Q68: 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.

Q69: Do you agree that a single county court should be established? If not, please explain why.

Yes.