JUDICIARY OF
ENGLAND AND WALES

Solving disputes in the county courts[1]

Response of the Lord Chief Justice and the Master of the Rolls on behalf of the Judiciary

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This response, which is submitted by the Lord Chief Justice and the Master of the Rolls on behalf of the Judiciary as a whole, has been prepared with the assistance of judges at every level. It contains a synthesis of views from a variety of judicial perspectives, but has drawn heavily on the experience of those whose day to day professional experience lies in the county courts.

[1] *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system (Ministry of Justice CP6/2011)*

Chapter 1: Introduction

We agree that there is a compelling case for changes to be made in the structure and procedure of the county courts. The reforms to civil procedure introduced by Lord Woolf have been successful in creating a new climate for the conduct of litigation across the civil justice system. That has been achieved principally by putting the judges in control of proceedings rather than allowing the parties to dictate the manner in which they are conducted and the pace at which they progress. However, we agree that in too many cases parties find themselves embroiled in proceedings unnecessarily, largely because they are unaware of alternative methods of resolving their disputes. We also agree that in too many cases the costs incurred in litigation are disproportionate to the amounts in issue, a problem that has been considered in depth by Lord Justice Jackson in his Final Report.

We share the Government's desire to improve the functioning and efficiency of the civil justice system and for that reason we support many of the proposals set out in the consultation paper. Some, however, we do not support, in some cases because we do not consider that they will lead to the suggested improvements, in others because we think they are likely to affect adversely the operation of the civil justice system.

With those general comments we turn to consider the questions posed in the paper.

Chapter 2: Preventing cost escalation

Road traffic personal injury claims

Q1: Do you agree that the current RTA PI Scheme's financial limit of £10,000 should be extended? If not, please explain why.

The RTA PI scheme was introduced in April 2010 and has not yet had sufficient time to establish itself fully. The judiciary has limited experience of hearings under the scheme because only a relatively small number of cases have reached Stage 3 (a paper hearing on quantum). Difficulties encountered so far include:

(i) problems with the portal, including incomplete paperwork;
(ii) a failure to file sufficient evidence to enable damages to be assessed, including up to date medical evidence and satisfactory evidence of special damage.

The experience of the District Judges who have dealt with these cases is that the parties file a minimum of information, often limited to a few sentences, together with a medical report. The consensus is that it is too early to consider an extension of the financial limit, which would draw in cases of greater complexity. Such cases could not be dealt with properly on the basis of such limited information as is currently provided. It must also be doubtful whether parties to higher value claims would be willing to make use of the scheme. Please refer also to our answer to Question 5.

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

In view of our answer to Question 1 this question does not arise.

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?

We do not support an increase in the financial limit at this time for the reasons given in answer to Question 1. However, any extension of the scheme in future should include a fixed costs regime to ensure that the parties are aware of the costs involved. We support the proposal for tariff costs made by Lord Justice Jackson in his Final Report, chapter 15 and appendix 5.

Q4: If your answer to Q3 is no, should there be a different tariff of costs dependent on the value of claim? Please explain how this should operate.

In view of our answer to Question 3 this question does not arise.

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

It is too early to tell what modifications would be required if the upper limit on claims were raised. However, the experience of those who have dealt with these claims is that in many cases insufficient information is filed to deal with matters in issue. The judges who have dealt with cases are concerned that short summaries of the kind currently filed in support and response would be inadequate to enable the court properly to assess an award in relation to claims above the current limit. The parties would need to file further evidence, such as witness statements, to assist the court. In addition the court would need an up-to-date medical report with a statement dealing with the prognosis and evidence supporting any claim for special damage. It would be necessary to consider whether the defendant should be allowed to respond to any statement, which could defeat the object of the scheme.

Public and employers' liability personal injury claims

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.

We agree that a similar scheme should be introduced in respect of employers' and public liability personal injury claims these claims, subject to the existing financial limit, since the assessment of quantum is unlikely to be any more complex than in a personal injury claim. The parties have to agree to the scheme applying.

Consideration would have to be given to whether the court would be assisted by the filing of additional evidence. Please see the answer to Question 5 above.

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)?

We consider that the limit should be set at £10,000 for the reasons already given. When there has been time for a full evaluation of the scheme it would be appropriate to consider increasing the financial limit. Please also refer to the response to Question 5 in relation to the information that the court needs to assess damages in these cases.

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

We do not think that any modifications would be necessary.

Clinical negligence

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.

We agree that a scheme should be introduced for lower value clinical negligence claims, although it is less likely to be widely used because these claims often give rise to contentious issues of causation and prognosis.

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)?

We consider that the limit should be set at £10,000 for the reasons already given.

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

We do not think that any modifications would be necessary.

Fixed recoverable costs

For the reasons given below we consider that:

(i) a system of fixed recoverable costs should be introduced for all fast track claims that are not covered by any extension of the RTA PI scheme similar to that proposed by Lord Justice Jackson in his Final Report; and,

(ii) there should be a limit to the pre-trial costs that may be recovered.

The Civil Procedure Rules 1998 came into force in April 1999 but there is still no fixed costs regime for designated fast track cases. A fast track case may be defined as a relatively straightforward case of limited financial value (CPR 26.6) If there is anything unusual or complicated about it, the case should be re-allocated to the multi-track.

Litigation can be conducted fairly and profitably under a properly constituted and fair fixed costs regime. At present the recoverable costs often exceed, sometimes by many times, the amount of damages recovered. Moreover, the detailed assessment of costs causes additional expense for the parties and occupies a significant amount of judicial time. Summary assessment, whilst cheaper than detailed assessment, has clearly failed to control costs in fast track cases.

A fixed costs regime achieves certainty and consistency of approach to the benefit of the parties and the saving of court time. A draft “fixed costs table” should be prepared and submitted for separate, but limited, consultation with the relevant professional associations. Once approved it should be reviewed annually. Such a

table should set out the level of costs and the maximum number of hours that will be allowed in relation to each preparatory task and the costs of the hearing and also the maximum number of hours that will be allowed for experts' reports of different disciplines.

It is unnecessary to include a "just exception" clause in such a regime in the light of allocation principles set out in CPR 26 and CPR PD 26A.

We therefore answer questions posed in this section as follows:

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.

We agree with this proposal.

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

We consider that a system of fixed recoverable costs could be applied to all fast track clams.

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

Such a system could be applied to all fast track claims.

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.

We agree that there should be limits on recoverable pre-trial costs for the reasons given above.

Mandatory pre-action directions for money claims under £100,000

Paragraph 86 of the consultation paper asks whether a new dispute resolution regime should be introduced for money claims under £100,000 with mandatory pre-action directions imposed by primary legislation. The object would be to encourage parties to resolve their disputes themselves by means of various forms of alternative dispute resolution ("ADR") procedures to which a fixed costs regime would be applied. We assume that the new process would be compulsory in relation to the claims to which it applied.

It is not clear to what types of claim the procedure is intended to apply, but it should be borne in mind that an apparently simple claim for a sum of money can mask a much more complex dispute, for example, about the quality of goods or workmanship. It may provoke a counterclaim which contains the essence of the dispute. The nature of the claim may therefore give little guide to the true nature of the issues which divide the parties.

Stage 1 of the procedure described in paragraph 87 appears to involve the identification of a non-judicial person or body with responsibility for ruling on the dispute in question, but in a non-binding form. (The ruling would not be binding unless the reference had statutory or contractual force and the existence of stages 2-4 assumes the absence of statutory force.) Stage 1 also appears to envisage a mandatory reference to the person identified as having the necessary authority and is therefore little more than a statutory requirement to engage in alternative dispute resolution.

Stages 2 appears to involve two rather different processes: evidence-gathering and negotiation between the parties or their legal advisers.

Stage 3 involves a further, more formal, requirement to attempt to resolve the dispute by ADR. It proceeds on the assumption that the parties will have complied fully with their evidence-gathering obligations. It is not clear whether the procedure would involve any form of disclosure of documents. In this context it should be noted that arbitration (assuming that expression is used in its usual sense) is a form of adversarial process which is intended to result in a binding award enforcing the parties' legal rights. Although there is scope for more informal procedures, it is in practice an alternative form of litigation rather than another form of mediation and the costs incurred are generally no lower than those incurred in connection with proceedings in court.

Stage 4 is a trial, presumably one conducted in accordance with current procedures and with evidence and argument being deployed in the usual way.

We envisage great difficulties in implementing a scheme of this kind. Putting aside questions of costs, to which we return below, it appears to us to require the parties to engage in ADR of one kind or another at each of stages 1, 2 and 3 as well as to prepare the materials required for a trial at stage 4. Although one attempt at ADR is to be encouraged, it can add significantly to the costs if it is unsuccessful. Two formal attempts (stages 1 and 3) and one informal attempt (stage 2) are likely to add significantly to the costs. In our experience it is preferable to make one attempt at ADR under the overall direction of the court, either before the expense of gathering evidence is incurred or after it has been obtained, as the judge thinks best depending on the nature of the case.

The process as a whole is designed to culminate in a trial (stage 4) and rests on two major propositions: (i) that the parties themselves should be in charge of the pre-trial process (subject to the statutory provisions); and (ii) that they can be relied on to comply fully with their obligations relating to preparation. The first of these is wholly at odds with the philosophy of the Civil Procedure Rules ("CPR"), which are designed to put the judges in charge of cases from an early stage. The reason for doing so was to enable directions to be given that are appropriate to the individual case, to control costs by directing the parties' attention to what really needs to be

done and to eliminate unnecessary delays. By and large the reforms in case management introduced by the CPR have worked well and have led to a beneficial change in professional culture. Many claims for sums well below £100,000 call for careful preparation tailored to the needs of the case, including, for example, directions in relation to expert evidence, witness statements and the preparation of skeleton arguments.

Parts 3 and 24 of the CPR, which provide for summary disposal of the claim or defence by one means or another, provide a valuable means of ensuring that claims or defences that do not have real merit do not go to trial. They require the involvement of the court, as do applications for interim relief. It is not clear whether the procedure is intended to accommodate procedures of that kind, and if so, how.

The assumption that each party can and will prepare adequately for trial without the supervision of the court will almost certainly be falsified in a large number of cases. The consultation paper does not explain how failures to comply with the statutory procedures and time limits are to be controlled, or by whom, if not by the court. Failure to control them can lead to wasted costs and injustice to one or other of the parties. Much preparation requires co-operation between the parties or their advisers. It is not clear how failures to co-operate will be controlled, or by whom. Disclosure is often of great importance, even in relation to claims of modest value. It is not clear whether it is to be given, or how disputes about disclosure are to be resolved, if not by the court. If the parties present themselves for trial without having carried out proper preparation the court may have to adjourn the matter and give further directions.

We doubt whether a mandatory procedure could be made to work properly, but in any event it would be extremely unwise in our view to introduce any new procedure which removed the oversight and control of the preparatory stages of the case from the court.

Costs should become contentious only if the case goes to trial; if it settles at stages 1, 2 or 3 the parties should bear their own costs, unless they agree otherwise. A fixed costs regime would be relevant only if the matter were to go to trial and the court were asked to award one or other party its costs. Our views in relation to the introduction of a fixed costs regime in the fast track are set out in answer to Questions 13-15. We do not think that it would be desirable to introduce a separate fixed costs regime for a particular category of claims.

We therefore answer the questions posed in this section as follows:

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

We do not agree with this proposal for the reasons given 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)?

In view of our answer to Question 16 this question does not arise.

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

In view of our answer to Question 16 this question does not arise.

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

In view of our answer to Question 18 this question does not arise.

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.

In view of our answer to Question 16 this question does not arise. However, if such a regime were to be introduced, we do not think it would be sensible to impose a system of fixed recoverable costs before evaluating its operation.

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?

In view of our answer to Question 20, this question does not arise.

Housing repossession

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.

We agree that both protocols could be made mandatory, but we think it unlikely that that would solve the problem identified in the consultation paper. It would be unlikely to cause many more defendants to comply without the intervention of the court and so would be likely to result in more pressure on judicial resources.

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.

We do not think that different procedures would be required for different types of case.

Electronic channels

We support the Government's aim of encouraging the wider use of electronic channels for the issue of proceedings. Two principal factors are likely to influence the behaviour of claimants: the efficiency of the process and its cost. If electronic channels are easy to use and robust (i.e. not prone to failure) and at least as flexible

as paper process, they will be attractive to claimants. If in addition they are cheaper to use, either because the fees themselves are reduced or because the overall economic burden associated with using them (e.g. the costs associated with the time required to complete the online form, cost of delivery or postage etc) is no greater than that of issuing paper process, they will be even more attractive. A simple and reliable means of paying fees electronically is also essential.

In order to bring about a change of culture we think it would be more productive to concentrate on making the electronic channels more attractive rather than to impose penalties for using paper process. A greater reduction in issue fees for those using electronic channels is the most obvious way of influencing regular users. We would not oppose limiting the recoverability of issue fees to the level of the fees payable for issuing electronically, as proposed in paragraph 103 of the consultation paper, and it might be said that it would do more to protect revenue. However, we think that in this instance the carrot is likely to be more effective than the stick. Since it may be difficult to distinguish effectively between different classes of claimant, there will also be less of a danger of penalising deserving claimants.

The Government through HMCTS should be investing in software that will create an electronic file and enable proceedings of all kinds to be conducted through electronic channels. The e-working system currently operating in parts of the Royal Courts of Justice provides an example of the kind of system that should be under active consideration.

We therefore answer Question 24 as follows:

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?

Improve the efficiency of the service and keep the cost of issuing process electronically below that of issuing by paper process. Develop software to enable the creation of electronic files and the conduct of proceedings by electronic means.

Increasing the small claims track limit

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

There is no doubt that the introduction of the small claims track has been a considerable success, providing a relatively simple, informal, procedure for the resolution of low-value claims, with the district judge being able to assist both sides with an interventionist approach and with the costs (save in cases where a party has behaved unreasonably) being fixed.

However, at £5,000 the upper limit of the small claims track is much higher than the ceiling applying to comparable systems in other jurisdictions. In Scotland, the small claims limit is £3,000; in Northern Ireland the limit rose from £2,000 to

£3,000 on 2nd May 2011. Any increase in the upper limit of the small claims track would therefore increase the disparity between the position in England and Wales and that in other constituent parts of the United Kingdom. In the Republic of Ireland the limit for the small claims procedure is €2,000. The European Small Claims Procedure is also available up to a limit of €2,000. When the arbitration scheme (the predecessor to the small claims track) was introduced in England and Wales in 1973, the limit was £75; allowing for inflation, the equivalent is now £759.

There are already instances of claims being allocated to the small claims track on the basis of value which are in reality inappropriate for that track. £5,000 is, for example, the 2.5% final retention on a £200,000 building contract. By limiting the use of experts, especially any oral expert evidence, with limited disclosure and with restrictions on cross-examination and with many District Judges often feeling that they are struggling to ascertain the real merits of a particular case, the small claims track remains appropriate only for what are genuinely low-value, relatively straightforward cases.

Furthermore, £5,000 is itself a significant sum for most citizens. To increase the limit would be to bring within the scope of the small claims track claims the outcome of which would have a potentially life-changing effect on those involved.

In his Final Report Lord Justice Jackson observed that small and medium-sized businesses often like to conduct their litigation in the county court "in person" and resent being forced into the fast track just because the amount in issue is over £5,000. At the moment, CPR rule 26.7(3) prevents the court from allocating proceedings to a track if the financial value of the claim, as assessed by the court, exceeds the limit for that track, unless all the parties agree. Obtaining the consent of all parties involves either correspondence with all concerned or a hearing to determine the matter. It is therefore a provision normally reserved for the final trial itself when businessmen, conducting their litigation in the fast track as unrepresented parties, are invited to agree, there and then, to an immediate allocation of the case to the small claims track in order to enable the judge to be more interventionist in his conduct of the trial itself.

If rule 26.7(3) were abolished, District Judges would be able to allocate simple business-to-business disputes to the small claims track in appropriate cases with all the advantages that would then give company directors in the presentation of their cases. Accordingly, instead of increasing the small claims limit we consider that the present restriction on allocating claims to a track lower than that determined by the amount in issue should be abolished.

We do not support an increase in the small claims track limit, but, if the limit is raised, it should not exceed £7,500.

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)?

In view of the answer to Question 25, this question is not applicable.

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

The question appears to assume that all claims for housing disrepair over £1,000 are allocated other than to the small claims track. Although that is the case in relation to disrepair claims in which an order for specific performance is sought, the limit of the small claims track in all other housing disrepair claims is £5,000.

In any event, there is no perceived need to amend the provisions of CPR rule 26.6(1)(b) which sets out the present small claims track limits for housing disrepair claims. Such claims were common when the Civil Procedure Rules were introduced and therefore specific provision was made for them, but since the introduction of the Pre-Action Protocol for Housing Disrepair Cases in December 2003 these claims have largely been resolved through the procedures set out in that protocol and very few now trouble the courts. The case for any amendment to the CPR is therefore not made out.

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

In view of our answer to Question 27 this question is not applicable.

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

We consider that the ceiling (not the threshold) for the fast track should be increased from £25,000 to £50,000.

The latest figures currently available in "Judicial and Court Statistics" relate to 2009. They show that in that year:

(i) there were 1,281,105 specified money claims issued, of which 10.4% were valued at between £5,000 and £15,000, only 3.4% were between £15,000 and £50,000 and only 0.5% were above £50,000. "Specified money claims" are, in the main, contractual disputes about debts said to be due by from the defendant to the claimant. The available figures suggest that increasing the fast track limit to £50,000 would bring almost all specified money claims within either the small claims track (if under £5,000) or the fast track (if under £50,000). There are, of course, exceptions to every rule: the expectation that any claim in the fast track would be tried in less than five hours (CPR r.26.6(5)) would ensure that only relatively simple cases, irrespective of value, were allocated to the fast track. Cases involving several witnesses or complicated issues of law would naturally continue to fall into the multi-track;

(ii) so far as unspecified claims were concerned, 49.1% were said to be between £1,000 and £5,000, 30.2% between £5,000 and £15,000, 10.7% between £15,000 and £50,000 and 3.7% over £50,000. There was an "unknown" category of 4.4%. These figures suggest that less than 5% of unspecified claims, most of which are personal injury claims, would fall into the fast track rather than the multi-track if the limit were raised to £50,000. However, in reality the number is likely to be much smaller, bearing in mind the limitations on expert witnesses (CPR r.26.6(5)(b)) and the hearing time in the fast track;

(iii) there were a total of 315,934 defences filed. Of those, 93,073 were allocated to the small claims track, 61,415 to the fast track and 25,495 to the multi-track, a total of 179,983. Whilst these figures are somewhat questionable, they would suggest that 43% (135,951) of all defended cases settled or were otherwise resolved between the filing of the defence and allocation to a track. In terms of trials, there were 20,306 trials in the fast track and multi-track (being 23% of the cases allocated to those two tracks) and 46,963 hearings in the small claims track (being 50% of the cases allocated to that track). These figures suggest that there is a very considerable falling off of cases between issue and trial, especially in the fast track and multi-track, and that, if the ceiling were raised, the number of additional trials in the fast track would be limited.

Any proposed increase in the scope of the fast track must be considered in the context of other changes to the civil justice system. An increase in the number of cases in the fast track would increase the number of cases to which a fixed recoverable costs regime would apply (see Question 12). Equally, an increase in the scope of the present RTA Personal Injury scheme ought to bring forward a more timely admission of liability in cases where that is appropriate.

Finally it must be borne in mind that an increase in the limit of the small claims track without any increase in the limit of the fast track would have the perverse consequence of narrowing the band of cases in the fast track.

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

We support an increase in the ceiling of the fast track to £50,000.

Chapter 3: Alternative Dispute Resolution

Introduction

Chapter 3 of the Consultation Paper deals with Alternative Dispute Resolution and sets out the effect of the Woolf reforms on civil justice noting that "*Under these changes the courts were given a clearly defined role in providing information about ADR and encouraging its use in appropriate cases*"

As a general proposition we accept that ADR has much to offer as part of the dispute resolution process. That is as true in the civil jurisdiction as elsewhere and it quite properly enjoys considerable judicial support. It is not however a suitable means of resolving all civil disputes; there are classes of litigation where ADR is wrong in principle (some claims by and against the state) or wrong in practice (claims other than road traffic personal injury claims where insurers are acting; they will have their own ADR pathways). There will be disputes where the strengths of the parties are so unequal that ADR, and particularly mediation, could lead to injustice. In some cases there is not time for ADR, for example, where the claimant seek urgent relief by way of injunction.

The judiciary do support the drive to encourage parties to engage in ADR whenever appropriate, but it must be recognised that ADR has its limitations and is inappropriate for many disputes. It is therefore essential that the court remain in control of the progress of the proceedings and although a trial may be viewed as a last resort, recourse to the court itself need not be. ADR must not be allowed to be used by one party as a process to delay resolution of the dispute.

We note the Government's support for ADR, as explained in paragraphs 132 and following. We also note the change in emphasis in paragraph 135 and following from "ADR" to "mediation", which we support. We consider that for any ADR procedure to be effective and not merely cause delay it must be properly resourced. Of equal importance is the choice of the point at which mediation is to take place. Often it should be at an early stage before significant costs have been incurred, but in some cases mediation is likely to be more successful if the parties are in possession of at least some disclosure and witness statements. An ability to be aware of, and to assess the strength of, the evidence on both sides is likely to lead the parties to have a greater degree of confidence in the process and therefore increase the chances of success. It is sometimes appropriate for ADR to be undertaken in parallel with preparations for trial.

Finally, although the consultation paper does not expressly say so, there is clearly a link between the proposals relating to pre-action protocols (which include ADR) and the proposals in this chapter.

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

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

It is essential that there is a proper and rigorous system of accreditation. We do not think that it is appropriate for us to comment on which organisation, commercial or otherwise, should provide it. If there is to be increased use of mediation, there must be a body of mediators of sufficient numbers, properly resourced, trained to an appropriate level and with the necessary administrative support, in order to avoid delay in the operation of the system. The cost of providing such a service will inevitably fall on the parties and if the process is unsuccessful it will add to the overall costs, in some cases significantly. We consider it vital that the court retain ultimate control over the progress of proceedings, notwithstanding any reference to mediation.

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

Although many small claims are susceptible to settlement, whether or not through mediation, the success of the small claims mediation service cannot be ignored. Without ignoring the skill of the mediators themselves, we believe that that is because;

(i) the service is free,
(ii) it is provided by, and so administered and supported by, HMCTS,
(iii) it takes place within the context of the court process and often with a trial date fixed,
(iv) it assists parties who either were unaware that they could discuss settlement or lacked the means for doing so and,
(iv) given the financial limit of the small claims track (£5,000), the nature of the claims and litigant are particularly suited to "low level" mediation.

Although we have no statistical evidence, it appears that individuals are more likely to reach agreement than, say, commercial organisations, who may themselves have tried informally to reach agreement before the commencement of proceedings.

We assume that "automatic referral to mediation" means requiring the parties to speak to a court-based mediator with a view to considering mediation rather compulsory participation in the mediation process. We support automatic referral of small claims to mediation in that sense, provided the conditions for a high rate of success remain in place and provided certain types of litigant are exempt (see our response to Question 37). We agree that there should be "a presumption of engagement".

We would not, however, support a system of compulsory mediation for the reasons set out above and because it would be unworkable and potentially time-wasting. Compulsion to mediate might also engage Article 6 of the European Convention on Human Rights.

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.

Any change to the threshold would change the current mediation environment that we have described as a result of which the benefits of the present scheme would be lost. We do not therefore support automatic referral for claims above the current limit of £5,000.

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

Although telephone mediation is not ideal, it is proportionate and does achieve results within the current system. We would therefore support the continuation of telephone mediation as being an appropriate means of providing the necessary service. We would also support more traditional face to face mediation where that may be possible.

We would not support the introduction of a mandatory requirement to refer small claims to mediation if the service were to be provided by outside agencies, whether commercial or not for profit. That would give rise to

(i) a need for accreditation,
(ii) a need for training, supervision and administrative support and
(iii) a need to charge a fee,

none of which would be a proportionate response to the need for mediation services in this context. To require a small claim litigant to engage with a commercial mediator as a compulsory alternative to using the small claims track which has been designed solely to meet the needs of that type of litigant would in our view be wrong.

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

Yes.

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

The proposals relate only to small claims and therefore the nature of claims to be exempted are likely to be limited. In those circumstances we consider that exemption should be based on classes of litigants rather than classes of claims, in particular where the litigation is effectively being conducted by two insurance companies. It would be disproportionate to require formal mediation in such cases and therefore claims such as those arising out of road traffic accidents, where insurers are routinely involved on both sides, should be excluded. Insurers will already have explored ways of settling the claim and any compulsory reference to mediation in those circumstances will only serve to increase costs and cause delay. We agree that some claims involving the state should also be excluded.

Small claims hearings

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

We do not agree with this proposal. At the hearing itself the judge must be able

(i) to control the proceedings efficiently and fairly to both parties;
(ii) to decide (in most cases) which witness's or party's evidence is to be preferred, taking into account demeanour and reaction; and
(iii) to have sight of documents on which a party relies and ensure that the other party has a fair opportunity to consider them.

Control of a full hearing without direct mutual view and by voice only is difficult, especially with litigants in person, who constitute one or both parties in most small claims hearings. Save in exceptional cases the judge cannot assess a witness fully and fairly without seeing him or her. Litigants in person almost invariably bring documents to court for the hearing which the other party has not previously seen and must have a chance to consider. When the parties are present in person that can usually be achieved with fairness to both sides and without an adjournment. Justice often demands no less.

There is also a risk that effective control by voice only would defeat the informal structure which a judge can manage in the presence of the parties. Moreover, it is not possible satisfactorily to establish the identity of a party or witness when communication is by voice alone; nor is it possible to tell whether a witness is receiving assistance while giving evidence.

This proposal has encountered strong and uniform resistance from judges at all levels, particularly those who sit in the county courts.

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.

We see little point in this proposal which the consultation paper itself seems to introduce in something of a half-hearted manner as a short term information gathering process and to promote mediation.

We are firmly of the view that the appropriate way to ensure speedy resolution of disputes, whether by ADR or trial, is for the court to remain in control of the process rather than the parties. As the consultation paper notes, the CPR provide the court with the authority to encourage ADR at various stages of the litigation process in all relevant cases and we do not think that the proposed information sessions add anything of value. They would simply introduce an

unnecessary process which is likely to do nothing but cause delay and increase costs. We accept that there would be no harm in judges being reminded of the means at their disposal to encourage ADR.

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

Although we answered "No" to Question 39, we wish to make this comment: the content of these sessions would cover the topics judges currently raise with parties at CMCs (whether in the course of a telephone or personal hearing or in writing) as to the process and benefits of ADR.

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

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

There should be no such sessions.

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

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

We do not support the introduction of these provisions into domestic law. Whilst we understand the need to ensure enforceability of agreements arising from mediations across national jurisdictions, that is not relevant in relation to agreements reached through domestic mediations. It would therefore introduce an unnecessary layer of legislation to cover situations that are in our view adequately regulated by existing law and procedure. These enable agreements to be enforced without undue delay or cost by summary process. We do not consider that the introduction of these provisions is a necessary or proportionate response to what is no more than a rare occurrence.

Chapter 4: Debt recovery and enforcement

We agree that effective enforcement of judgments is vital and that steps should be taken to improve the speed and efficiency of the procedures for enforcement.

Improving Enforcement

Charging Orders

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.

We support the implementation of section 93 of the Tribunals Courts and Enforcement Act 2007, primarily for the reasons stated at paragraph 192 of the consultation paper. Most creditors are prepared to take a realistic long-term view in relation to the repayment of a debt once they have the benefit of a charging order, knowing that it will either be discharged by regular instalment payments or (usually) covered by the equity arising on any sale of the debtor's property. For his part, the debtor has the benefit of a co-operative, patient, creditor, without the fear of any subsequent application for an order for sale, as creditors know that such an order would not be granted where the debt is being discharged by regular instalment payments.

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.

There are arguments in favour of having a threshold below which a creditor cannot enforce a charging order by way of an order for sale. The entitlement of a creditor to recover his money has to be balanced against the rights of the debtor under Article 8 of the European Convention on Human Rights to respect for his private and family life and his home. To lose one's house, with the consequent disruption to one's family and with potential consequences in terms of employment, education and so on, might be seen as requiring a statutory threshold.

However, in practice judges exercise their discretion so as to ensure that orders for sale are granted only in the clearest cases. In the year from September 2009 to September 2010 there were (according to the Impact Assessment) only 566 orders for sale, representing a mere 0.5% of all charging orders made during the same period. Furthermore, many of such orders would have been suspended and some would have related to second homes. The number of families losing their homes as a result of the enforcement of charging orders will have been small.

We think that it would be preferable not to establish any formal threshold but to leave the matter to judicial discretion. Unless the threshold were set very low, it might encourage creditors to institute bankruptcy proceedings (see our answer to Question 47).

Q47: 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)?

Having regard to our answer to Question 46, this question does not arise. However, we offer the following comments. It is essential that creditors should be able to recover debts and although some debtors need to be protected against over-zealous creditors, the threshold must not be set so high that recovery is made unduly difficult. It is significant that, according to the Impact Assessment, in the year to September 2010 only 6.5% of charging orders were for sums in excess of £25,000. It follows that if there were a £25,000 threshold, creditors would be unable to enforce charging orders in 93.5% of cases.

At the moment a debtor can be made bankrupt in respect of a debt in excess of £750. If the threshold for orders for sale were set significantly higher than that, many creditors would be likely to apply for a bankruptcy order to obtain an order for the sale of the bankrupt's property. Accordingly, if it were thought appropriate to introduce a threshold at all, it should not significantly exceed the minimum amount in respect of which a debtor can be made the subject of a bankruptcy order.

Q48: Do you agree that the threshold should be limited to Consumer Credit Act debts? If not, please explain why.

No, we do not agree that the threshold should be restricted to debts that originally arose under regulated Consumer Credit Act 1974 agreements. Debts arise for many reasons. There is no logical reason to treat a regulated Consumer Credit Act debt as different from any other consumer debt. The same principle should apply to all personal indebtedness.

Q49: Do you agree that fixed tables for the attachment of earnings should be introduced? If not, please explain why.

The present process for making attachment of earnings orders is unsatisfactory for many reasons, not least the fact that the court requires information from debtors about their financial circumstances. For understandable reasons, many debtors do not wish to co-operate with the court in providing that information and are equally unco-operative in advising the court of any change of employer. We therefore support the implementation of sections 91 and 92 of the Tribunals Courts and Enforcement Act 2007. The legislation provides for a much more streamlined process for making attachment of earnings orders, as well as for the ability to track a debtor where there is a change of employment, whilst still preserving the debtor's entitlement, if he believes the order has been set at too high a level, to seek a speedy judicial re-determination.

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.

Yes, for the reasons set out at paragraph 201 of the consultation paper. We support the implementation of section 92 Tribunals Courts and Enforcement Act 2007.

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

We support the proposed streamlining of third-party debt orders for the reasons set out in paragraph 203 of the consultation paper. There is a judicial consideration of the application when the interim order is made; it is only where the defendant objects to the making of a final order that the merits need to be considered afresh. Most final hearings, being unopposed even if the debtor attends, take on an administrative rather than judicial nature.

When the interim, without notice, order is made the debtor should be invited to indicate whether he objects to a final order being made. On receipt of such an indication, the application for the final order could be transferred to the debtor's home court.

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.

We support the proposal that half the funds in a joint account at the date of the order should be deemed to belong to the judgment debtor and therefore available for attachment by way of a Third Party Debt Order. At the moment it is easy for a debtor with a significant cash balance to avoid the imposition of a third party debt order by ensuring that the relevant account is held in the joint names of himself and another.

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.

A process whereby a debtor is ordered to pay periodic sums might appear superficially attractive in those instances where a debtor is self-employed, or where the identity of his employer is unknown. However, any such procedure would effectively rely on the continuing co-operation of the debtor. Any debtor opposed to the imposition of such an order could seek to defeat it by the simple expedient of moving his bank account elsewhere. The practical value of such a procedure is therefore questionable, particularly if it were merely to substitute the involvement of banks (with the expense of that involvement) for a voluntary agreement between creditor and debtor for the payment of sums on a monthly basis, supported (if appropriate) by a standing order or direct debit arrangement.

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.

Sections 95 -105 of the Tribunals Courts and Enforcement Act 2007 involve a delicate balance between the respective rights of creditors and debtors. As it is possible to envisage a challenge to such legislation under the Human Rights Act 1998, it would be inappropriate for us to respond to this question.

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.

See the answer to question 54 above.

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

See the answer to question 54 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.

Lying behind this question is the assumption that the enforcement of judgments is often a long drawn out and expensive process for creditors and debtors alike.

Paragraph 213 of the consultation paper asks whether it would be possible to reform the civil justice system in such a way as to ensure that debtors understand that their chance to make representations about their (in)ability to pay their debts comes before the judgment is entered rather than at the stage of enforcement. What the question overlooks, however, is the procedure set out in Part 14 of the Civil Procedure Rules in relation to admissions, which enables a debtor to admit the whole or part of the claim and to provide the creditor both with information about his financial circumstances and with his proposals for payment of the amount admitted to be due.

CPR Part 14 itself replicated what had been in place for many years in the County Court Rules. It might therefore be appropriate to consider whether the procedure operates as efficiently possible and whether the questions asked by the prescribed forms remain appropriate. However, we do not support the creation of a wholly new process.

Much of the present debate is designed to make the enforcement of judgments as efficient, cheap and speedy as possible. However, it is necessary to distinguish those who will not pay their debts from those who cannot. With the proposed reforms in place, the enforcement processes will be as effective and efficient as possible while retaining that element of judicial supervision necessary to

protect those who cannot pay their debts from the overzealous efforts of third parties to recover monies from them. We do not, therefore, support the proposal that the authority of the judgment should be extended to enable creditors to apply direct to a third party enforcement provider without the need to obtain the court's permission.

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

In view of the answer to question 57, this question is not applicable.

Q59: Do you agree that all Part 4 enforcement should be administered in the county court? If not, please explain why.

The Impact Assessments provide no information about the number of enforcement processes in the High Court, particularly in the specialist jurisdictions, in which a stronger case can be made for enabling judgments to be enforced without the need for registration in a county court.

However, implicit in the question is the much more significant question whether High Court Enforcement Officers should effectively become County Court Enforcement Officers and whether there is a continuing role for county court bailiffs in the enforcement of county court judgments. Such questions go beyond reform of the enforcement process and affect the lives of many hundreds of people. We consider that they call for a separate consultation exercise.

Chapter 5: Structural Reforms

The proposals in Chapter 5 reflect recommendations made by Sir Henry Brooke in his report entitled *'Should the Civil Courts be Unified?'*. They were endorsed by the Lord Chief Justice on behalf of the Senior Judiciary and by the then Lord Chancellor, The Rt. Hon. Jack Straw MP, in 2009 and a working group composed of judges, a representative of Her Majesty's Courts Service and officials from the Ministry of Justice was established to implement them. We therefore welcome their inclusion in the consultation paper and strongly support their adoption in full. The financial limits attached to some of the proposals are those which we previously supported for reasons set out in the report sent to the Lord Chancellor. We think they remain appropriate, but should be kept under review.

The arguments set out in the consultation paper in relation to each of the proposals speak for themselves. Nothing would be served by repeating them, but they have gained additional force with the passage of time and the increased pressure on resources, both administrative and judicial.

We therefore answer the Questions posed in this chapter as follows:

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.

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)?

We agree that the equity jurisdiction of the county court is far too low. It should be increased to £350,000 for the reasons given in the consultation paper.

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.

We agree that the threshold of £25,000 for starting claims in the High Court is too low for the reasons given in the consultation paper.

Q63: 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)?

The threshold should be raised 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.

For the reasons set out in the consultation paper we agree that the power to grant freezing orders should be extended on an individual basis to Circuit Judges sitting in the county courts, as and when a need arises.

Q65 & 66: 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.

We agree that the types of claim to which this question refers should come under the exclusive jurisdiction of the High Court. Shareholder unfair prejudice petitions under section 994 of the Companies Act 2006 should also be removed from the jurisdiction of the county court.

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.

It should be possible for a High Court Judge to sit in the county court whenever the demands of work and the efficient use of judicial resources make that desirable. The current legislation should be amended to enable that to take place without involving the Lord Chief Justice or the Lord Chancellor.

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, for the reasons set out in the consultation paper. It would enable more efficient use of judicial resources. However, it will be necessary to give consideration to the destination of any appeals.

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

Yes. It would enable great improvements to be made in the administration of justice.