Ministry of JUSTICE

Solving disputes in the county courts: creating a simpler, quicker and more proportionate system

A consultation on reforming civil justice in England and Wales

Consultation Paper CP6/2011
Consultation start date 29 March 2011
Consultation end date 30 June 2011

March 2011

Solving disputes in the county courts: creating a simpler, quicker and more proportionate system - a consultation on reforming civil justice in England and Wales

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

March 2011

Cm 8045 £16.25

Any enquiries regarding this document should be sent to us at defamation@justice.gsi.gov.uk.

This document is also available from our website at www.justice.gov.uk

ISBN: 9780101804523

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID P00 2420715 03/11

Printed on paper containing 75% recycled fibre content minimum.

About this consultation

To:	This consultation is aimed at the public, the legal profession, the judiciary, the advice sector, insurance companies involved in civil litigation, and all with an interest in this area in England and Wales.
Duration:	From 29 March 2011 to 30 June 2011
Enquiries (including requests for the paper in an alternative format) to:	Judith Evers Ministry of Justice Postpoint 4.12 102 Petty France London SW1H 9AJ Tel: 020 3334 3182 Email: CivilTJ@justice.gsi.gov.uk
How to respond:	Please respond online at www.justice.gov.uk/consultations/consultations.htm by 30 June 2011. Alternatively please send your response by 30 June 2011 to: email: CivilTJ@justice.gsi.gov.uk or by post to: Judith Evers Ministry of Justice Postpoint 4.12 102 Petty France London SW1H 9AJ
Welsh language version:	A Welsh language version of the Introduction to this consultation paper is available at www.justice.gov.uk/consultations/consultations.htm
Response paper:	A response to this consultation exercise is due to be published during October 2011 at: www.justice.gov.uk/consultations/consultations.htm

Contents

Ministerial Foreword 4
1. Introduction 7
2. Preventing cost escalation 19
3. Alternative dispute resolution 39
4. Debt recovery and enforcement 52
5. Structural reforms 66
6. Impact assessments 78
7. Next steps 79
About You 80
Contact details/How to respond 81
The consultation criteria 82
Consultation co-ordinator contact details 83
Glossary 84
Annex A - Delivery of Civil Justice in England and Wales 86

Ministerial Foreword

By the Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, and Jonathan Djanogly MP, Justice Minister.

If asked, many members of the public probably wouldn't be able to tell you a thing about the UK's system of civil justice. Nevertheless, in its own quiet way, it stands as a cornerstone of a civilised society. This branch of law deals with problems like debt, housing, consumer disputes, personal injury and clinical negligence – critical everyday issues. The reason it ultimately matters is that it is the basic structure within which business operates, the rights of individuals are protected and the duties of government are enforced.

What business, individuals and government need from the system is straightforward to state: just results delivered fairly, with proportionate costs and procedures and cases dealt with at reasonable speed. The core aims of the system haven't changed since Lord Woolf introduced reforms to its administration over 15 years ago.

Sadly though neither have some of the problems. Despite significant improvements following the Access to Justice reforms, it remains the case that there are too many claims being brought in to the legal system inappropriately. Once in the system they are being resolved too late, too expensively, with business in particular exposed to high and disproportionate costs. Civil justice administration and processes have once again become overly complex, bureaucratic and inefficient.

A newer burden on the system is the move towards a compensation culture, driven by litigation. Lord Young's recent review of health and safety has drawn attention to the phenomenon of individuals suing employers and businesses for disproportionately large sums, often for trivial reasons and without regard to personal responsibility. This has been fuelled by Conditional Fee Agreements (CFAs) that mean cases can be opened with very little risk to claimants and the threat of very substantial costs to defendants. Partly as a consequence, we have seen problems being brought to the Court room that should have no place there.

But the problems also relate to the administration of justice itself.

Once a claim is brought, the system doesn't work as well as it could to prevent unnecessary escalation. Last year, more than three quarters of claims in the civil system were settled after allocation but before trial. That's 87,000 cases that could potentially have been resolved earlier if mediation had been used more widely and committedly.

Then, when judicial intervention does prove necessary, courts aren't always able to offer quick and efficient services that meet the needs of the court user – slow administration increases the cost burden of all parties and make cases expensive to defend.

The next stage is enforcing a court judgment. But the process for dealing with debtors who avoid payment is slow and burdensome, requiring creditors to pay further fees and wait months without any guarantee of success. The Government believes the time has come to modernise the enforcement system to give those with court judgment orders more chance of recovering the money owed to them.

Finally, costs aren't always borne in the right way. We believe that those who can afford to pay for services in the civil justice system should do so and funding from the taxpayer should be focused where it is needed most.

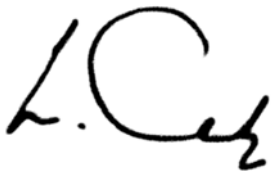
All this explains why we are proposing significant reforms to the system of administration in the county courts including:

- expanding significantly other appropriate forms of dispute resolution by requiring all cases below the small claims limit to have attempted settlement by meditation, and introducing mediation information/assessment sessions for claims above the small claims limit;
- a simplified claims procedure on a fixed costs basis, similar to that for road traffic accidents under £10,000, for more types of personal injury claim; and,
- a simpler and more effective enforcement regime.

Together, these and the other proposals outlined in this paper should mean fewer cases coming to court unnecessarily, more rapid resolution, lower costs to participants and thus a system that delivers justice more effectively. Business, which has found the current system a real burden, stands particularly to benefit.

But this document also needs to be read alongside wider changes we are bringing forward including root and branch reform of legal aid, and recommendations on civil funding and cost arrangements originally set out in Lord Justice Jackson's review of the Costs of Civil Litigation. These include measures to radically reform CFAs and restore the balance between claimants and defendants – a shift that should start to challenge one of the roots of the developing compensation culture.

What unites all our legal reforms is our ambition to equip people with the knowledge and tools required to enable them to resolve their own disputes, by working problems through in a non-adversarial manner. We want them to be better able to craft durable solutions that avoid further conflict. What we are ultimately aiming for is a shift from a culture where we look to the law to resolve conflicts to one where we take more responsibility for addressing them ourselves in the first instance. The prize is a less litigious society and one where justice is affordable for those who do need to litigate – in other words, a modern and effective civil justice system that is fit for the 21st Century.



Kenneth Clarke
Lord Chancellor and
Secretary of State for Justice

Jonathan Djanogly
Justice Minister

1. Introduction

1.1. The case for change

1. This Consultation Paper sets out proposals to reform the civil justice system in the courts in England & Wales, significantly contributing to this Government's plans to tackle the perceived compensation culture, restore proportionality in costs for court users - particularly businesses, and promote quicker, cheaper alternative dispute resolution where appropriate.

2. Civil justice is the area of law that deals with everyday problems such as recovering and enforcing unpaid debts, resolving civil disputes across a range of areas including debt, consumer and contract law and personal injury, and protecting individual liberties. It affects the lives of millions of people every year.

3. Expenditure on the High Court and county courts in England and Wales for the year 2009/10 was £363 million, largely paid for through court fees which meet the cost of the administrative, judicial and estate infrastructure.

4. Getting the civil justice system process right so that people and businesses can deal with their problems quickly, effectively and at proportionate cost makes a significant contribution to economic confidence and social well-being. Reform is long overdue - the current system has not kept pace with the major economic and social shifts that have taken place over the last fifteen years since Lord Woolf published his recommendations for civil justice reform in his Access to Justice Report. The result is a system that needs to focus more on dispute resolution and debt recovery for the majority of its users, rather than the loftier ideals of 'justice', that cause many to pursue their cases beyond the point that it is economic for them to do so.

5. The proposals in this paper relate particularly to claims proceedings in the county court which is where the bulk of civil claims are dealt with. However, they are part of a much wider package of reform, which aim to radically improve the experience of court users.

6. In particular, these reforms complement, and should be read in light of, the direction set out in Lord Young's report 'Common Sense – Common Safety', (which amongst other recommendations proposes extending and

expanding the fixed cost scheme for road traffic accident personal injury claims to other areas of personal injury, including clinical negligence) as well as the recent Ministry of Justice consultations on legal aid and civil litigation funding and costs reform. The recommendations for reform of civil litigation funding and costs in England and Wales are of key relevance to this consultation paper. The Government's response to that consultation confirms that it intends to, in particular:

- abolish the general recoverability from the losing party of conditional fee agreement success fees and after the event insurance premiums;
- support an increase in general damages (for non pecuniary loss such as pain, suffering and loss of amenity) by 10% in all civil wrong claims;
- introduce qualified one way costs shifting (so that a losing claimant only pays such of the defendant's costs as is reasonable to pay in all the circumstances) in personal injury claims;
- increase the prescribed hourly rate recoverable by litigants in person.

7. Lord Justice Jackson's 'Review of Civil Litigation Costs' also made a number of recommendations for changes to court procedures for case and costs management. Most of these relate to procedures in the High Court or the specialist county courts and so will have no impact on the proposals in this consultation paper. However, other initiatives have a wider application – such as, for example, the pilot for assessing disputed costs under £25,000 on paper rather than at a hearing, which is underway at Leeds, Scarborough and York County Courts; and proposals for standard case management directions and costs budgeting. We are liaising with the Judicial Steering Group on the interaction of the proposals contained in this consultation paper with Lord Justice Jackson's wider recommendations on costs and case management, to inform implementation decisions on those recommendations.

1.2 The current civil justice landscape: What has gone wrong?

Court a last resort?

8. In 1996 Lord Woolf published his Access to Justice Report. We can praise Lord Woolf's reforms for providing a clearer structure and promoting a culture of openness; and for creating the expectation that litigation and court should be a last resort.

9. The premise of Lord Woolf's reforms was that going to court was not always the best or most appropriate choice or route and that greater emphasis could and should be placed on taking action before applying to court. This resulted in the introduction in 1999 of the Civil Procedure Rules and the pre-action protocols.

10. However, despite improvements in some areas, there are still far too many cases where parties find themselves going to court unnecessarily, and faced with disproportionately high costs when they get there. For example, more than three-quarters, or 87,000 of all claims allocated to the fast and multi-tracks are still settling between allocation and trial (see Annex A) – this means significant unnecessary cost for the parties involved and a waste of court resource and judicial time. Late settlement is something on which Lord Justice Jackson commented on in his Review of Civil Litigation Costs[1]:

    "A number of cases, which ought to settle early, in fact settle late in the day. Occasionally these cases go to trial. The cause of such futile litigation is (a) the failure by one or both parties to get to grips with the issues in good time or (b) the failure of the parties to have any effective dialogue."

11. In some instances it is also the case that parties turn to court too early - before trying to resolve their differences in other less formal ways. Low awareness of appropriate alternative dispute resolution methods and services, coupled with a perception that such routes lack the formality to produce results, exacerbates this problem.

A simple and efficient service?

12. Where people do genuinely need or want access to court, court processes must be as quick, simple and efficient as possible. There is much more to be done in this regard - too often the time and cost of dealing with problems or issues is disproportionate to the issue or problem that is at stake.

13. We are taking up many of the key recommendations made in both Sir Rupert Jackson and Lord Young's reports which set out how court processes for road traffic accident claims, personal injury and low value clinical negligence claims can be simplified.

[1] Review of Civil Litigation Costs: Final Report, December 2009 – Page 49

14. We are also revisiting some of the Lord Woolf reforms. A key change he initiated was the introduction of a new case management approach - 'the track system' - to deal with cases according to their level of complexity. The small claims track in particular has been welcomed as a simpler, cheaper and quicker route to resolution by individuals and businesses since it was introduced. However, due to inflation, many of the cases that would have fallen into the higher end of the small claims track in 2000 are now falling into the fast track. This has cost implications, particularly for small and medium sized businesses, and our proposals address this problem.

15. For a number of years we have provided Money Claim Online (MCOL) and Possession Claim Online (PCOL), which are web-based services, enabling claims to be issued over the internet. We want to encourage more actions to be commenced electronically, since it is both cheaper and more efficient.

16. We also want to modernise the way that services are provided through public counters in the county courts, maintaining a face-to-face service for those that need it, but increasingly making use of online facilities and telephone appointments.

Confidence in the system to deliver outcomes?

17. In recent years, there is also evidence to suggest that confidence in the system to enforce court judgments and deliver compensation has been eroded through debtors not engaging and delaying the effect of judgment.

18. Confidence in the system also comes from being proportionate through safeguarding the consumer on the high street and vulnerable groups who genuinely cannot pay. In May 2010, the Coalition Government made clear its commitment to look at issues such as aggressive bailiffs and processes for orders for sale in order to ensure that the system is equitable.

A value for money system?

19. We believe a successful civil justice system must be driven by a desire to achieve a high standard of justice at proportionate cost to both the parties involved, and the taxpayer. Yet, many, who find themselves

forced to litigate and seek a court resolution, can often spend disproportionate sums in time, expense and legal representation. We therefore want the new civil justice system to be one where many more avail themselves of the opportunities provided by other less costly dispute resolution methods, such as mediation - to collaborate rather than litigate.

20. Furthermore, current jurisdictional arrangements are creating serious anomalies in the system which means we are not making the most effective use of judicial resources and expertise. For example, in some matters the jurisdiction of the county courts is limited to cases valued at £30,000 and below – this means that many very simple cases have to be referred to the High Court, with all the time and expense this incurs.

So what will it cost?

21. In 2009/2010, the cost of running the civil and family courts in England and Wales was £619m. Of this, almost 82% was funded through court fees worth around £507.2m. Court fees are prescribed by the Lord Chancellor under statutory powers and must comply with the general policy principles for statutory fee-charging services, as set out in Treasury's 'Managing Public Money – Charges and Levies'. Court fees should be set, so far as possible, at levels that reflect the full cost of the services being provided whilst a scheme of fee waivers (remissions) exists to ensure that access to justice for the less well-off is protected.

22. We remain committed to delivering a simpler and more sustainable fees regime, with the support of HM Treasury that delivers full cost recovery for civil and family business. The benefits of a more streamlined and efficient system will be shown in the cost of providing the services and reflected in the level of fees in the medium and longer term and ensure value for money to the users of the services provided. Transparency about costs of services provided will allow users to make rational decisions about whether to issue cases in court, or to pursue other alternatives, such as mediation where appropriate.

23. Any proposals taken forward from this consultation, that impact on the running costs of providing our services and court fees, will be subject to future public consultation to ensure that they recover the full cost of the services being provided.

1.3 Our proposals: A new vision for civil justice

24. Most individuals, small businesses and large corporations want to resolve their problems quickly, cheaply and in a confidential way. Our proposals are designed to respond to what matters to citizens and are based around the following principles:

- Proportionality – that disputes should be resolved in the most appropriate forum, so that processes and costs are commensurate with the complexity of the issues involved.
- Personal Responsibility – that wherever possible citizens should take responsibility for resolving their own disputes, with the courts being focused on adjudicating particularly complex or legal issues.
- Streamlined Procedures – that procedures should be citizen and business friendly with services focussed on the provision of timely justice.
- Transparency – to ensure that there is clear information on the dispute resolution options open to citizens so that they can take action early, make informed decisions and more readily access the most appropriate services

25. This paper sets out a range of options to help achieve this goal. These include:

- Introducing a simplified claims procedure on a fixed costs basis, similar to that for road traffic accidents under £10,000, for more types of personal injury claim; exploring the possibility of extending the framework of such a scheme to cover low value clinical negligence claims; and examining the option of extending the upper limit of those simplified claims procedures to £25,000 or £50,000;
- Introducing a dispute management process and fixed recoverable costs by specific case types up to £100,000;
- Increasing the upper jurisdiction threshold for small claims (excluding personal injury and housing disrepair) from £5,000 to £10,000, £15,000 or £25,000;
- Requiring all cases below the small claims limit to have attempted settlement by mediation, before being considered for a hearing;
- Introducing mediation information/assessment sessions for claims above the small claims limit;

- Encouraging greater use of online services;
- Providing a simpler and more effective enforcement regime;
- Implementing reforms on enforcement already approved by Parliament in the Tribunals Courts & Enforcement Act 2007, in Orders for Sale, Charging Orders, Attachment of Earnings and Information Requests and Orders processes;
- Introducing streamlining and efficiency reforms to the Third Party Debt Order and Charging Order processes;
- Testing the public appetite for further enforcement reforms and jurisdictional changes;
- Introducing a number of jurisdictional changes in the civil courts, including the introduction of a single county court jurisdiction for England & Wales.

Improved public information

26. Information has an important role to play in our reform programme. We want to ensure that people have ready access to early information and assistance when they need it, so that problems can be solved and potential disputes nipped in the bud long before they escalate into formal legal action. We have a duty to ensure that parties realise the consequences of their actions and that debtors understand the need to engage in the court process from the onset.

27. Alongside these proposals, we are improving the information we offer to members of the public through enhanced online content available through Directgov[2], the Government's central website for the citizen. Our new content is designed to inform the public about the full range of civil dispute resolution options available to them, including mediation, use of Ombudsmen, industry arbitration schemes and where appropriate, use of statutory regulators. It also aims to demystify the court process itself, rendering it more navigable to the public, and provide upfront information and warnings about the time and costs involved in pursuing a path of what could be protracted litigation. This new resource also includes a series of short audio-visual clips, which explain what happens at a court hearing; what happens at mediation; and what may happen as a result

[2] www .direct.gov.uk

of a judgment being enforced. They also include short pieces to camera which help to explain the benefits of mediation over litigation, as well as testimonies from members of the public who have used the mediation process.

28. In the consultation document 'Proposals for the Reform of Legal Aid in England and Wales' we set out proposals to establish the existing Community Legal Advice (CLA) helpline as the primary gateway to civil legal aid services. This service routes callers to the source of advice most appropriate to them, and will act as a reliable one-stop shop for callers looking for assistance to deal with legal problems. All callers can access the first tier of the service (the Operator Service) while the second tier will offer specialist advice to those who are eligible for legal aid in a wider range of categories of law remaining within the scope of civil legal aid. The consultation closed on 14 February 2011 and a response is expected in Spring 2011.

29. We also recognise that businesses of all sizes need to be aware of the opportunities to resolve disputes without going to court. The recent consultation paper on Resolving Workplace Disputes showed that the impact of conflict in the workplace alone cost the UK economy £24billion in 2008[3].

30. The impact of commercial disputes would increase this cost still further. That is why we are also keen to get information to business on the full range of dispute resolution options available to them.

1.4. What will our proposals mean in the future?

31. The everyday problems of civil justice have the potential to hamper the everyday lives of individuals and successful businesses. Principally, these proposals seek to bring benefits to those who use the civil justice system.

32. These proposals will help us to contribute to the economic and social recovery through making sure we make the best use of resources, and target our resources to support those with the most complex problems.

[3] http:// www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-workplace-disputes-consultation.pdf - Page 19

Benefits for businesses

33. Small and medium-sized enterprises (SMEs) are some of the heaviest users of the civil justice system. Proposals to increase the threshold of the small claims track; to simplify key processes; and to streamline enforcement will help SMEs to resolve problems more quickly and at the same time keep their costs down.

34. Commercial disputes are an inevitable part of business life, and a key objective is to resolve them as quickly and cheaply as possible. Businesses now recognise that, properly used, dispute resolution mechanisms such as mediation can resolve disputes efficiently and quickly at a fraction of the cost of litigation, while minimising potential damage to business relationships.

35. We believe more SMEs could take advantage of the benefits offered by mediation and other appropriate dispute resolution services, and that the package of proposals in this paper represent good news for business.

Benefits for individuals

36. Our proposals will help the public to access our civil justice system. While we need to deliver value for money for the public, we will ensure that the needs of the citizen determine how we design our services. That means providing an effective, transparent and responsive system that delivers the type of civil justice that the citizen and communities expect.

Benefits for public service

37. Many more disputes will be resolved earlier without parties becoming entrenched in costly litigation, and where court remains the best option, the court process will be more streamlined and customer-focussed.

1.5. Chapter summary

38. The next four chapters of the paper address the following key questions:

What can be done to restrict the escalation of the dispute so that it is resolved more quickly and at lower cost?

39. Chapter 2 describes our plans to introduce a simplified claims procedure for personal injury claims; considers the introduction of a dispute

management process for other claim types up to £100,000; and proposes an increase in the small claims track limit.

What is the role for alternative dispute resolution mechanisms such as mediation, and when should parties use them?

40. Chapter 3 describes proposals to require all small claims cases to have attempted mediation before being considered for a hearing, while introducing mediation information/assessment sessions for cases above the small claims limit.

How can the authority of the judgment order be restored and the debt recovery and enforcement process be improved?

41. Chapter 4 describes proposals to provide a simpler and more effective enforcement regime by implementing reforms on enforcement already approved by Parliament in Part 4 of the TCE Act; introducing streamlining and efficiency reforms; and testing the public appetite for further reforms.

What can be done to ensure that work in the civil justice system is dealt with at the most appropriate level?

42. Chapter 5 describes proposals to rationalise the jurisdictions of the High Court and the county court, and the creation of a single county court for England and Wales.

1.6 Consultation process

43. This paper sets out consultation proposals on the transformation of how civil claims are dealt with in the county courts and on improving the claims process for lower value personal injury cases. This consultation is aimed at the public, at business, and all those who have an interest in the civil justice system in England & Wales.

44. This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria, which are set out on page 82**,** have been followed.

45. The partial regulatory impact assessments, which are published alongside this document, indicate that the legal profession, insurers and parties making claims for personal injury are likely to be most affected by

these proposals. However, they are unlikely to lead to additional costs for businesses, charities or the voluntary sector, or to the public sector. Comments on the partial impact assessments are welcome.

46. Copies of the consultation paper are being sent to various stakeholders, including:

Advice Services Alliance

Advice UK

Action against Medical Accidents

Association of British Insurers

Association of HM District Judges

Alarm – The Public Risk Management Association

Association of Personal Injury Lawyers

Bar Council

British Bankers Association

British Brands Group and Anti Counterfeiting Group

British Medical Association

Centre for Effective Dispute Resolution

Citizens Advice

Chartered Institute of Arbitrators

Civil Mediation Council

Confederation of British Industry

Civil Court Users Association

Consumer Direct

Civil Justice Council

Equality and Human Rights Commission

Finance and Leasing Association

Forum of Insurance Lawyers

HM Council of Circuit Judges

Institute of Legal Executives

Institute of Money Advisors

InterResolve

Judges Council of England & Wales

The Law Society

Legal Services Commission

Motor Accident Solicitors Society

Motor Insurers' Bureau

NHS Litigation Authority

R3 (Association of Business Recovery Professionals)

RTA Portal Co Ltd

The Trades Union Congress

Which?

47. However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subjects covered by this paper.

2. Preventing cost escalation

48. In April 1999, wide-ranging reforms were introduced into the civil courts of England and Wales. New Civil Procedure Rules (CPR) were designed to combat problems identified by Lord Woolf in his review of the civil justice system, in particular the problems of cost, delay and complexity brought about by a perceived overly adversarial culture.

49. So have the Woolf reforms worked? This was a question raised in a research study commissioned by the Law Society and the Civil Justice Council, 'More Civil Justice – The Impact of the Woolf Reforms on pre-action behaviour'[4]. This early report found that most practitioners regarded the Woolf reforms as a success. The reforms were liked for providing a clearer structure, greater openness and making settlements easier to achieve. Those involved in personal injury and clinical negligence work felt positive about the pre-action protocols – these were thought to focus minds on the key issues at an early stage and encourage greater openness. This smoothed the way to settlement.

50. However, there was some criticism. The first was the lack of sanctions on those who failed to act reasonably in their pre-action negotiations. Another area of concern was the perceived failings within the courts, which were criticised for their inefficiency and delay. Case management was considered patchy with apparently inconsistent decisions. Finally, and importantly, defendants complained that the Woolf reforms had failed to reduce the cost of litigation.

51. Subsequently, specific measures have been taken to control costs, in particular the introduction of fixed recoverable costs for road traffic accident claims which settle without trial and fixed success fees in road traffic accident and employers' liability claims[5].

---

[4] Research Study 43 (2002); Tamara Goriely, Institute of Advanced Legal Studies Richard Moorhead, Cardiff Law School Pamela Abrams, University of Westminster

[5] CPR Part 45 Sections II - V. It should be noted that the Government has announced its intention generally to abolish recoverability of success fees (and ATE insurance premiums) in all civil claims.

52. However, there was still a need to control costs over a range of other disputes within the civil justice system. In late 2008, Lord Justice (Sir Rupert) Jackson was commissioned by the then Master of the Rolls to undertake a review of the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations to promote access to justice at proportionate cost. Sir Rupert published his report, 'Review of Civil Litigation Costs: Final Report', in January 2010. His independent and comprehensive report makes a broad range of recommendations for reducing costs in the civil justice system in England and Wales.

53. Sir Rupert commented in Chapter 4 of his report that:

"Access to justice is only practicable if the costs of litigation are proportionate. If costs are disproportionate, then even a well-resourced party may hesitate before pursuing a valid claim or maintaining a valid defence. That party may simply drop a good claim or capitulate to a weak claim, as the case may be."

54. Sir Rupert received a number of examples of disproportionate costs. One major supermarket supplied data in respect of personal injury claims against itself. It explained that where the compensation paid was between £2,000 and £3,000, the claimant's costs amounted to on average 160% of the compensation paid. The costs to damages ratio reduced to on average 115% where the compensation paid was between £3,000 and £5,000, and further reduced to on average 85% where compensation amounted to between £5,000 and £10,000.

55. Another example of disproportionate costs was raised by District Judges at Cardiff. Their comments were as follows:

"We all feel that the issue of costs is out of control and that the costs incurred in pursuing a claim are invariably wholly disproportionate to the amount in issue. This applies to both fast track and multi-track cases but is more pronounced in fast track cases because of the amounts involved. In standard fast track cases, where the facts are uncomplicated and straight forward it is not uncommon for the claimant's bill to be 10 or 15 times the amount of the damages recovered, e.g. damages of £2,500 with the claimant's bill being £30,000."

56. Overall, Sir Rupert found that the average costs to damages ratio for litigated cases in the fast track was 130%, and non-litigated cases in the

fast track had costs of 90% of damages. However, in high value multi-track litigated cases (where claims were issued), the average costs were 11% of the damages, compared to 9% for non-litigated cases. He considered costs in fast track claims to be particularly problematic.

57. Sir Rupert therefore proposed a regime of fixed recoverable costs for personal injury cases[6] in the fast track, and a dual approach to non-personal injury fast track cases: first, an overall limit on recoverable costs in all cases up to trial of £12,000; and second, matrices of fixed costs for other specific categories of fast track cases, including road traffic accident claims not involving personal injury.

58. He said[7] that fixed costs would give parties certainty as to the costs they would recover if successful, or the expense they faced if unsuccessful; and satellite litigation over costs issues would be avoided.

59. "It will achieve a genuine reduction in the costs of fast track litigation and it will ensure the costs are more proportionate to the sums at stake, at the same time it will be fair to lawyers involved on both sides".

60. His final report sets out matrices of fixed costs[8] based on actual costs incurred in fast track personal injury claims, adjusted to remove the costs of maintaining documentation on and arguing about costs and to take account of reduced management overheads.

Changing pre-action behaviour

61. Following Sir Rupert's report, it is clear that changes are needed to the current civil justice process, with a greater focus on improving the experience of those who use the justice system, making costs more proportionate to the issue at stake and targeting cases towards the most appropriate means of resolution. As noted above, we have separately announced key proposals to reduce the costs of litigation, including in particular the reform of conditional fee agreements. However, there is more that can be done to streamline and improve processes and thereby further reduce costs.

---

[6] Review of Civil Litigation Costs final report – Chapter 15.
[7] Review of Civil Litigation Costs final report – Chapter 15.
[8] Review of Civil Litigation Costs – Appendix 5 and discussed at Chapter 15

62. Since Sir Rupert produced his report in December 2009, Lord Young of Graffham in his report 'Common Sense – Common Safety'[9] set out a series of recommendations regarding the operation of health and safety laws and incentives to claim compensation. He strongly supported the proposals put forward by Sir Rupert in his report, but also said:

"To my mind, the current system is too costly, and it takes far too long for some medical negligence cases to be resolved. Unfortunately, the adoption of the Jackson proposals will not in itself substantially shorten the process."

63. Lord Young recommended extending the recently introduced scheme for low value road traffic accident claims (the RTA PI Scheme[10]) to cover higher value road traffic accident claims valued up to £25,000 and other personal injury and lower value clinical negligence cases, since this would simplify the claims process, reduce the time taken to agree damages and result in reduced costs for all parties.

64. Sir Rupert also recommended introducing a streamlined process for all fast track personal injury claims which fall outside the RTA PI Scheme. However, he suggested that the process should be simpler than the RTA PI process, which he considered to be too complex[11].

65. The RTA PI Scheme provides a model of what generally appears to be an effective and efficient process (a detailed summary of the scheme is set out in Annex A). It aims to deliver fair compensation to claimants making a personal injury claim by way of a simple procedure with fixed recoverable costs[12]. It has the advantage of being accessible online through an industry-led web portal, allowing the secure exchange of electronic information. This represents a significant shift from the previous paper-based process and provides cost and resource benefits for both the insurance and claimant industries.

---

[9] Report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture, October 2010

[10] Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents; www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rta.htm

[11] Review of Civil Litigation Costs: Final Report – December 2009 – Chapter 22; page 224

[12] It should be noted that the Government has announced its intention generally to abolish recoverability of success fees (and ATE insurance premiums) in all civil claims, which includes claims proceedings under the RTA PI process

66. In line with Lord Young's recommendation, which the Government supports, we believe the time is right to consider extending the scope of the scheme. We are therefore proposing to extend the monetary threshold of the RTA PI Scheme from £10,000 to £25,000 or £50,000. Extending the scheme to £25,000 would capture around 90% of all RTA PI claims, and an extension to £50,000 would capture approximately 95%. It is clear that the scheme would require some modification in order to accommodate higher value claims, which by their nature are often more complex and we would look to work closely with the industry to ensure that the scheme is fit for purpose.

67. We believe that extending the principles underlying the RTA PI Scheme to other areas of personal injury would help reduce costs, as it would involve fixing recoverable costs and would speed up the overall claims process. It would also introduce a clear and user-friendly scheme that would minimise the amount of time people spend off work and in receipt of benefits while awaiting payment of damages.

68. We recognise that the RTA PI Scheme may need some modification if it is to be extended to a wider range of compensation claims. It will also be necessary to monitor any extension of the scheme to ensure that it is working to encourage settlements, and to provide fair compensation more quickly and efficiently.

69. The extension of the RTA PI Scheme to other areas of personal injury will not require a change in primary legislation and could be introduced by extending existing protocols or introducing new ones.

So how is the RTA PI Scheme working?

70. The RTA PI Scheme is still relatively new, and has experienced some teething problems – mostly connected with the electronic portal. However, early findings appear positive. Those firms that have signed up to the new electronic portal have reported significantly improved response times from the other party. A major insurer recently reported that the RTA claims portal has enabled them to gather quality information provided through the portal, allowing them to investigate and admit liability for some cases on the same day of receipt. The new process significantly speeds up the compensation process, with some claimant practitioners reporting that average case lengths have been reduced from around 12 months to around 4 under the new scheme – in

particular liability is being admitted much more quickly. The scheme is also more cost effective, fixed costs provide greater certainty and insurance premiums are dropping - e.g. typical After The Event (ATE) premiums have fallen from £400 per case to under £100 per case.

71. It is evident that the scheme has continuing support from both claimant and defendant representative groups who maintain a collaborative approach to making it work. An indication of this is the recent creation by stakeholders of a Behavioural Committee, comprised of representatives from claimant law firms and insurance companies. The aim of the Committee is to encourage best practice for both the protocol and portal and to identify behaviours which do not support the aims of the protocol. Responses to the consultation paper 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales' also indicated strong support for the scheme, however many respondents felt that the scheme needs more time to mature before its success can really be measured and a meaningful evaluation can take place. We are currently undertaking an early evaluation of the scheme. However, there are gaps in the data due to the immaturity of the scheme and the fact that cases are only just starting to reach court at Stage 3. We will use our findings along with responses to this consultation to decide if and when any extension should be introduced.

72. The RTA PI process is much more detailed than any of the other pre-action protocols, a criticism which Sir Rupert expressed in his review. However the protocol represents a process on which agreement was reached after lengthy discussions with both claimant and defendant representatives, who were concerned that it should encourage the right litigation behaviours by both parties.

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

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)?

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?

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.

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?

73. Lord Young also recommended extending the principles that underpin the RTA PI Scheme to other personal injury areas. In particular, public and employers' liability claims and low value clinical negligence claims, since these are areas like RTA cases, where liabilities are generally covered by insurance or indemnity. A brief explanation of these types of claim is set out below.

Public and employers' liability personal injury claims

74. Employers are responsible for the health and safety of their employees while they are at work, since their employees may be injured at work or they, or former employees, may become ill as a result of their work while in employment. The Employers' Liability (Compulsory Insurance) Act 1969 ensures that employers' have at least a minimum level of insurance cover against any such claims.

75. Public liability insurance is different. It covers businesses and public authorities for claims made against them by members of the public or other businesses, but not for claims by employees. While public liability insurance is generally voluntary, employers' liability insurance is compulsory. Businesses can be fined if they do not hold a current employers' liability insurance policy which complies with the law.

76. In the former Department for Constitutional Affairs consultation paper 'Case track limits and the claims process for personal injury claims'[13] it was proposed that a new claims process (now the RTA PI Scheme) would apply to all personal injury claims with a value of less than the fast track limit, other than clinical negligence claims. However, post consultation it was decided to focus the new scheme on RTA PI claims

[13] www.justice.gov.uk/consultations/cp0807.htm

up to £10,000 only (which we estimate constitutes around 75% of all RTA PI claims) – and previous plans to include public and employers' liability claims were dropped as they constitute a small percentage of PI claims and can be more complex than RTA PI claims, which are often fairly straightforward, particularly where the value is less than £10,000. However, in line with Lord Young's recommendations, we now believe the time is right to expand a system similar to the RTA PI Scheme to public and employers' liability claims, so that claims in these areas become more streamlined, cost effective and efficient.

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.

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)?

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

Clinical negligence

77. For the purpose of this paper, "clinical negligence" is initially defined as claims against the National Health Service Litigation Authority (NHSLA).

78. The NHSLA is a Special Health Authority with the primary roles of managing clinical and other liability claims made against NHS organisations in England and promoting good risk management. It was established to indemnify NHS Trusts in respect of both clinical negligence and non-clinical risks. It manages both claims and litigation and has established risk management programmes against which NHS Trusts are assessed. Membership of the NHSLA schemes is voluntary and open to all trusts and Primary Care Trusts. Each scheme is a mutual pool, funded on a pay-as-you-go basis, by annual contributions from its members.

79. In 2009/10, the NHSLA received 6,652 claims and potential claims (where an individual states their intention to claim but does not do so at that point) under its clinical schemes. It should be noted that the NHSLA does not deal with claims against GPs, dentists or other medical personnel not employed by the National Health Service. Statistics from the compensation recovery unit indicate that 10,308 clinical negligence claims

were notified to them in 2009/10[14]. Total legal costs incurred in connection with NHSLA clinical claims closed in 2009/10 amounted to £163.7 million.

80. Lower value clinical negligence claims received by the NHSLA (£1–£25,000) have an average settlement time of just over six months, although around 4% of cases received by the NHSLA go to court.

Sir Rupert's recommendations for clinical negligence claims

81. Sir Rupert made a number of specific recommendations in relation to clinical negligence cases. Sir Rupert proposed that in respect of any claim (other than a frivolous claim) where the NHSLA is proposing to deny liability, the NHSLA should obtain independent expert evidence on liability and causation during the four month period[15] for the response to the letter of claim. As a result, the NHSLA has now implemented a policy whereby it obtains independent expert evidence on liability and causation from the outset for such claims. But more needs to be done, particularly in relation to lower value claims.

82. We therefore propose to explore the principle of extending a similar system to the current RTA PI Scheme to cover lower value clinical negligence claims. To test this proposal the NHSLA is setting up a pilot for low value NHSLA clinical negligence claims, in consultation with clinical negligence stakeholders across England and Wales. If successful, the scheme would be expanded to also capture claims against GPs, dentists or other medical personnel not employed by the National Health Service, subject to the agreement of other representative bodies in the clinical negligence field. How such an expansion is funded will need further consideration.

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.

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

[14] Figures include claims in Scotland and Wales
[15] Following Sir Rupert's recommendation the Clinical Negligence Pre-Action Protocol was amended with effect from 1 October 2010 to extend the time for the defendant to reply to a letter before claim from 3 – 4 months.

(please state with reasons)?

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

Fixed Recoverable Costs

83. As noted above, Sir Rupert has recommended that a system of fixed recoverable costs (sometimes referred to as 'predictable costs') be introduced for all fast track personal injury claims. As noted in the consultation paper 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales', it is our view that this recommendation must be considered in conjunction with our proposals to extend the scope of the RTA PI process. If our proposals to extend the RTA PI Scheme are accepted, we would expect a significant proportion of claims (within the value range of the new process) to be covered by its fixed costs. Only claims that were not within the scope of the new process or which left the process because, for example liability was not admitted, would fall to be covered by any separate scale of fixed recoverable costs as recommended by Sir Rupert.

84. As mentioned above, the system of fixed recoverable costs already in operation for RTA PI claims[16] which settle before trial has proved very successful in ensuring certainty and predictability of litigation costs and in controlling those costs. We therefore wish to seek views on whether a system of fixed recoverable costs for all fast track claims not covered by the RTA PI Scheme or any extension of it, should in principle be implemented. For the purpose of this consultation, we envisage a matrix of fixed costs similar to that developed by Sir Rupert, as discussed at Chapter 15 and Appendix 5 to his report. However, we appreciate that further work would need to be done on the figures to be included in that matrix.

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.

[16] CPR Part 45 (II)

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

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

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.

Mandatory pre-action directions for money claims under £100,000 in the county courts

85. Pre-action protocols are generally effective (the RTA PI Scheme is a particular example of how a protocol should work); however, since they ultimately depend on provision in rules for their force, they are reliant on the behaviour of the parties, and rarely lead to sanctions by the court if they are not followed.

86. Could we therefore go further? Can we improve on Lord Woolf's desire that litigation and court action should be a last resort, while at the same time restricting the escalation of costs as envisaged by Sir Rupert? Could we introduce a new dispute resolution regime with mandatory pre-action directions given full force under provision made in primary legislation?

87. Similar to the RTA PI Scheme described above, we want to be able to put the management of a dispute into the hands of those involved and clearly signpost options to resolve the issues without the need to come to court. Parties would be encouraged to use alternative dispute procedures such as mediation, conciliation or early neutral evaluation, rather than resorting to court proceedings. The court would be the last resort in the dispute process, allowing the judiciary to focus on legal disputes that cannot be resolved by the parties themselves. We therefore envisage a staged process with fixed costs applying at each stage, with those costs relating to different dispute values and/or different case types. As an example, these stages might be:

    1. **Triage** – what are the initial options available? For example, could the dispute be resolved by referral to an Ombudsman, a Regulator, or a trade association scheme? Or, does the matter require legal advice?

2. **Evidence gathering –** if stage 1 has not resolved the dispute, the parties/solicitors would attempt to resolve the matter and to strictly adhere to the timetable and directions set out in the relevant Dispute Management Process.

3. **Negotiation/settlement –** essentially a stocktaking stage, where most of the evidence has been gathered and the parties will be required to try to settle the claim via mediation or another dispute resolution process, which could be conciliation, arbitration or the parties arranging a settlement conference.

4. **Trial -** where the issue could not be resolved at the settlement stage, the parties would produce joint evidence packs (setting out the efforts made to settle the dispute and the evidence they wish the court to consider), and apply to the court for a final hearing.

88. In the same way that there are currently a range of pre-action protocols for different dispute types, we would envisage different pre-action directions, and different cost matrices, depending on the nature and value of the dispute.

89. These could apply to all cases that currently fall in the fast track (up to £25,000), or alternatively up to £100,000. Concerning the latter, it is worth noting that in response to Sir Rupert's proposals, Lord Justice Dyson (the former Deputy Head of Civil Justice) supported the introduction of fixed costs or scale costs for multi-track claims up to at least £100,000.

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

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)?

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

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

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.

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?

Undefended debt claims

90. Currently, 75% of specified debt claims are not disputed – they are issued but undefended.

91. Annex B to the Practice Direction on Pre-Action Conduct[17] sets out certain information which should be given in debt claims where the claimant is a business and the defendant is an individual. Sir Rupert, in chapter 35 of his Report, has recommended that this sort of information ought to be included in a protocol specifically dealing with debt claims where the claimant is a business and the defendant is an individual.

92. Consequently, whatever pre-action directions are introduced in the future, we agree with Sir Rupert that since claims of this nature "constitute a huge swathe of the business of the courts", they would need their own specific process.

Housing repossession

93. Having considered how mandatory directions could be used to influence pre-action behaviour and encourage earlier engagement through a compulsory settlement stage, it is worth considering how these might be applied to other case types such as housing arrears and repossession.

94. Housing repossession represents one of the largest areas of civil business with 230,000 repossession claims in 2009.

95. Currently there are two pre-action protocols that aim to ensure that parties act fairly and reasonably towards each other, encourage more pre-action contact, and enable the efficient use of the court's time and resources.

[17] Practice Direction – Pre-Action Conduct: www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm

96. The Pre-Action Protocol for Rent Arrears was introduced in October 2006 and the Mortgage Pre-Action Protocol in November 2008. The former has resulted in many local authorities and social landlords reviewing their in-house procedures, and the latter has had a significant impact on the industry with possession numbers noticeably dipping whilst lenders amended their systems and procedures in order to comply with its requirements.

97. The Mortgage Pre-Action Protocol (MPAP) was reviewed in November 2009, following its first year of operation, and although it was not possible to draw any robust conclusions on the impact of the MPAP, it is clear that the number of repossessions was less than might otherwise have been expected. It has been strongly suggested that this was almost certainly due to a combination of factors, including sustained historically low interest rates, which has enabled lenders to exercise forbearance, but anecdotal feedback from users (advice providers and court agents) also suggests that the MPAP has played an important part in encouraging this.

98. Nevertheless, lack of engagement remains an issue, particularly on the part of the defendant (the tenant or borrower). Both protocols tend to put the onus of compliance on the claimant (the landlord or lender). For example, it is the claimant that must complete the mortgage pre-action protocol checklist and produce it on the day of the hearing. By contrast, the defendant is often absent on the day of the hearing: evidence from recent court visits suggests that only 50% of tenants attend rent arrears hearings and just 30% of borrowers attend mortgage arrears hearings. Consequently, the majority of cases are decided without any defence being presented.

99. Ideally, we want both parties to engage throughout the process, and where cases reach the courts they should be those where the parties have fully engaged and on which they are unable to come to an alternative course of action.

100. However, individuals in debt are a group that is difficult to access, and they behave in unpredictable ways; they rarely seek advice and information from the sources that can help. Consequently, a change in behaviour is difficult to elicit. However, if engagement could be improved, it is likely that significantly fewer claims would need to be issued in this area.

101. A mandatory settlement stage, which brings the parties together earlier, is the most obvious way of getting both sides to engage pre-court.

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.

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.

Electronic channels

102. For those claims that come to court, we want to encourage more actions to be commenced electronically, which is not only cheaper and more efficient but also supports the Government's Channel Shift Strategy, which aims to shift government services to online channels wherever practical.

103. In his report, Sir Rupert recommended[18] that where a landlord could use Possession Claim Online (PCOL) to issue possession proceedings but chooses to issue manually, he should only be able to recover an amount equal to the PCOL issue fee (currently £100). This could be similarly applied to Money Claim Online (MCOL), where it is also cheaper to issue online.

104. In view of Sir Rupert's recommendation, what more could be done to encourage businesses, the legal profession and other organisations in particular, to increase their use of online channels?

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?

[18] Chapter 26

Increasing the small claims track limit

105. Currently cases allocated to the small claims track are those with a monetary value of less than £5,000. There are two exceptions to this general rule. The first is personal injury claims where a limit of £1,000 applies (this amount relates to the damages sought for pain, suffering and loss of amenity only and excludes any other damages claimed). The second exception is housing disrepair where the limit of £1,000 applies for the cost of the disrepair and £1,000 for any other damages arising from the disrepair.

106. The purpose of the small claims procedure has always been to provide an informal environment in which disputes can be resolved in a simple, straightforward way that is accessible and proportionate to their low value. This means that the normal procedural rules and the strict rules of evidence do not apply (for example witnesses do not have to give evidence on oath). The presence of expert witnesses is subject to the agreement of the court and hearings are conducted in an informal manner, often with parties sitting around a table.

107. The cost rules relating to recoverable costs for the small claims differ greatly from those of the fast track and multi-track. In the latter two tracks the successful party is generally able to recover their costs, including the cost of legal representation, from the unsuccessful party. In the small claims track the costs that can be recovered from the other side are strictly limited. The usual rule is that the court may only award fixed costs attributable to issuing a claim, any courts fees, reasonable travelling expenses for a witness or party and limited costs for loss of earnings for a party or a witness. In addition, fees of any permitted experts, and a limited amount for legal advice and assistance in claims including an injunction or specific performance can be claimed. No costs can be claimed for legal representation or for the services of a lay representative.

108. The small claims procedure was first introduced in 1973, and evolved out of a Judge's statutory power to refer a case to arbitration. The limit was originally set at £75 but this has increased over time. In 1991 it was set at £1,000. In 1996, the limit was raised to £3,000.

109. In April 1999 the track limits for small claims were examined again. Research had indicated that the rise to £3,000 was generally considered

to have been successful and the decision was taken to raise that limit again to £5,000.

110. There has been no increase since then. Consequentially, many of the typical cases that would have fallen into the higher end of the small claims track in 2000, are now, due to inflation, falling into the fast track, with consequent cost implications.

111. Although it was agreed following a Department for Constitutional Affairs consultation report 'Case track limits and the claims process for personal injury claims'[19] (published in April 2007) that the time was not right to increase the small claims limit, we believe that the time is now right to revisit that decision.

112. The small claims track was designed to be less formal and allow people to resolve disputes themselves without professional legal representation and with little or no recoverable costs. More consumers and small businesses would therefore benefit from the small claims procedure if the financial limit was increased. Many claims that are dealt with in the fast track at disproportionately high costs could be dealt with more quickly and more effectively using the small claims procedure. An increase in the small claims limit would also facilitate a more efficient use of judicial resources.

113. In his report on the cost of civil litigation, Sir Rupert recognised that the vast majority of business disputes that go to court are between small and medium-sized enterprises, or are for lower value amounts which are nevertheless significant to the businesses involved. He stressed that it was important that the litigation environment for such cases is streamlined, accessible to non-lawyers and cost-effective. He met with representatives of the Federation of Small Businesses. They made the point that their members avoid litigation "like the plague" because of the costs involved[20]. They urged that, in relation to disputes between businesses, claims up to £15,000 should proceed on the small claims track, as any competent business person should be able to represent his

[19] www.justice.gov.uk/consultations/cp0807.htm
[20] Chapter 25 of Lord Justice Jackson's Review of Civil Litigation Costs, www.judiciary.gov.uk/about_judiciary/cost-review/index.htm

firm in disputes up to that level. They also pointed out that many small businesses are like individuals and should be treated as such.

114. In those cases where claimants or defendants choose to represent themselves, the availability of support and assistance has radically improved since 1999. There are numerous websites offering information to consumers which were unavailable ten years ago, and since 1999, internet usage in England and Wales has increased from 20% to 80% of the population. Her Majesty's Courts Service provides information, specifically designed for the claimant in person, about the small claims track, containing advice on the eligibility of cases for the small claims track and preparation for a hearing. Furthermore, new online information on Directgov will inform the public about the full range of civil dispute resolution options available to them, including the court process itself, with short audio-visual clips, explaining what happens at a court hearing, and what may happen as a result of a judgment being enforced.

115. In view of these matters, we propose to increase the current small claims financial threshold from April 2012. The current upper limit is £5,000. There are a number of options for the level to which this might be increased - £10,000, £15,000 or £25,000. We consider that an increase to £15,000 would be most appropriate. By way of illustration, if the threshold is increased to £15,000 statistics show that up to 83% of all defended cases currently allocated to a case management track would fall within the new £15,000 limit.

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

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)?

Personal injury and housing disrepair – small claims track limits

116. The question of increasing the small claims limit for personal injury and housing disrepair was raised in the consultation report 'Case track limits and the claims process for personal injury claims' (published in April 2007). The consultation referred to a report, 'The courts: small claims' (published in December 2005), by the Constitutional Affairs Select Committee (CASC), which considered the small claims limit. CASC was

concerned that many of the injuries originally intended to fall within the small claims bracket (minor injuries with no long-term effects) no longer do so, due to inflation in damages. It was on this basis that the Committee recommended that the limit be raised to £2,500. The report also recommended that in order to ensure consistency of approach, it would be sensible if the limit for housing disrepair cases was raised by the same amount. It added that when considering the housing disrepair limit, however, it would be essential to ensure that vulnerable tenants were not unduly disadvantaged by any change.

117. Insurers were also concerned that the fast track system was not working well for personal injury claims with a value at the lower end of the scale. They cited the disproportionately high costs that have been recorded as proof of this. This has been echoed in Sir Rupert's report 'Review of Civil Litigation Costs'.

118. The majority of respondents to the consultation on 'Case track limits and the claims process for personal injury claims' agreed that the small claims limit for personal injury claims and housing disrepair claims should remain at £1,000. Consequently the response to the consultation published in July 2008 recommended no change at that time.

119. Similarly, Sir Rupert concluded that now was not the right time to review the limit for personal injury claims. Instead, he felt that the priority should be to establish an efficient and fair process for handling such claims, as recommended earlier in this chapter. Consequently, in line both with the earlier consultation in 2007/08, Sir Rupert's conclusions in his final report, and also acknowledging the early promise of the RTA PI Scheme we do not propose to raise the personal injury small claims limit at this stage.

120. Similarly, we have no plans at this stage to increase the small claims limit for housing disrepair. However, we would welcome your views on this matter.

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

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

Increasing the fast track claims limit

121. If the small claims financial threshold is increased, it may be necessary for similar reasons to increase the upper limit of the fast track, which currently stands at £25,000, by a similar amount. For example, if the small claims threshold is increased to £15,000, the fast track threshold could be increased from £25,000 to £35,000.

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

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

3. Alternative dispute resolution

An overview

122. Alternative dispute resolution (ADR) is often described as the resolution of a problem or dispute by any means other than a formal trial process. In reality, there are some common formal methods of ADR which are used by the public and businesses. These more formal mechanisms include mediation, arbitration, adjudication, early neutral evaluation and expert determination. Of all of these processes, mediation and arbitration are most common and are well established and sit parallel to the legal and judicial framework in England and Wales.

The Woolf reforms and ADR

123. Earlier in this paper, we have referred to the step change delivered as a result of Lord Woolf's review of civil justice and his subsequent Access to Justice Reports of 1995 and 1996[21], however it is worth stating once more that these signalled a significant change in the handling of civil court cases. Under these changes the courts were given a clearly defined role in providing information about ADR and encouraging its use in appropriate cases. Lord Woolf's Final Report stated "the court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR."[22]

124. Lord Woolf's vision for a greater push towards the use of ADR, along with the introduction of judicial case management was enshrined formally into the court process through the Civil Justice reforms of 1999. The Civil Procedure Act of 1997 provided for the establishment of a new code in the form of Civil Procedure Rules (CPR) governing the practice and procedure to be followed in the Court of Appeal, the High Court and the county courts.

[21] Access to Justice Final Report, 1996: www.dca.gov.uk/civil/final/contents.htm
[22] Access to Justice Final Report, 1996 , Ibid

125. In respect of ADR, the new CPR set out an overriding objective of enabling the court to deal with cases justly, a key part of which required the court actively to manage cases and to play a role in "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such a procedure."[23]

126. The CPR also introduced the possibility of the Judge imposing sanctions on one or both of the parties on the basis of their conduct in respect of ADR and efforts to resolve the dispute. The Rules outlined the factors to be taken into account in deciding the amount of costs to award: the court must have regard to "the efforts made, if any, before and during the proceedings in order to try to resolve the dispute".[24] Therefore, if a winning party had previously refused a reasonable offer of mediation, the Judge could decide that the losing side would not be required to pay the costs of the winning side, or to pay only a reduced amount.

127. In addition to the references in the Rules themselves, Lord Woolf introduced a series of pre-action protocols. These protocols contain standard wording on ADR as follows:

> "The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and the Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if this paragraph is not followed then the court must have regard to such conduct when determining costs."

[23] The overriding objective of the Civil Procedure Rules (1.4(e)): www.justice.gov.uk/civil/procrules_fin/contents/parts/part01.htm#rule1_1
[24] Civil Procedure Rules 44.5 (3)(a)(ii): www.justice.gov.uk/civil/procrules_fin/contents/parts/part44.htm#rule44_5

ADR related case law

128. The Senior Courts, notably the Court of Appeal, have given their support to ADR in making orders which reflect the spirit and the letter of the pre-action protocols and the Civil Procedure Rules.

129. In 2002 in 'Dunnett v Railtrack'[25] the Court of Appeal held that a party to an appeal could not ignore the court's recommendation that mediation should be attempted without providing an explanation.

130. In 2004 in 'Halsey v Milton Keynes General NHS Trust'[26], Lord Justice Dyson, made clear that the Court had no power to order the parties to participate in the mediation process, and identified a number of factors which could be entertained as justification for a refusal to mediate when determining whether a party who has been successful in litigation should not be awarded costs.

131. In 2005 there was another Court of Appeal Judgment which went to the issue of the reasonable nature of a refusal to mediate; this was the case of 'Burchell v Bullard'[27]. This was a building dispute from August 2000 where the builder had issued proceedings for approximately £18,000 and the defendants counterclaimed for a sum over £100,000. The builder, following the trial, was awarded £18,327 and the owners £14,373 on their counter-claim. The trial Judge observed that at around £185,000 the costs had "swamped" the litigation. Here, the home owners had declined to mediate. The Court of Appeal held that this kind of dispute lent itself to ADR and that the merits of the case favoured mediation. As a result they went on to hold that the householders had behaved unreasonably. However, no costs sanction was imposed as the offer to mediate had been made in 2001 when "the law had not become as clear and developed as it is now…"

[25] Dunnett v Railtrack PLC [2002] EWCA Civ 303
[26] Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576
[27] Burchell v Bullard [2005] EWCA Civ 358

Government and ADR

132. Traditionally, the Ministry of Justice and its predecessors (the Department for Constitutional Affairs and the Lord Chancellor's Department) have led on ADR related policy across Government.

133. ADR has been a feature of Government policy over the last decade, building on the momentum of the Lord Woolf reforms, Court of Appeal judgments and on the growth of mediation in the commercial sector as a means of resolving high value disputes.

134. In 2001, the Government introduced the ADR Pledge, which was a significant step forward in terms of support for ADR as it made a commitment that all Government departments and their agencies would use alternative forms of dispute resolution, where appropriate and with the consent of the other party in dispute. The ADR Pledge is currently being renewed and extended, by encouraging both local authorities and businesses to make a similar commitment to using ADR in appropriate cases.

135. Another key area of activity has been in the development of court-based mediation. When court-based mediation began to be introduced in some larger county courts (such as Central London and Birmingham), it was primarily targeted at cases in the fast and multi tracks, where parties are generally represented and legal costs likely to be significant.

136. It became clear, however, that only the largest courts would be able to establish their own mediation schemes – many courts were simply too small to be able to provide the administrative support necessary to manage a court-based scheme. Therefore towards the end of 2004, the Department set up the National Mediation Helpline to form the basis of a national mediation service for all county courts, served by panels of commercial mediation providers, accredited by the Civil Mediation Council (CMC).

137. The CMC was founded in April 2003 to represent the common interests of mediation providers and mediators in promoting mediation and similar forms of dispute resolution.

138. It is now recognised as the organisation which represents the interests of civil, commercial and workplace mediation in England and Wales, with

links throughout the United Kingdom and Europe. It has more than 80 provider members and over 300 individual members. It provides an accreditation scheme for mediation providers, and acts as the first point of contact for the Government, the judiciary, the legal profession and industry on civil mediation issues.

139. The Ministry of Justice has used the accreditation scheme provided by the CMC as a mark of quality assurance. This is very much in line with Article 4 of the EU Mediation Directive[28], which encourages Member States to develop effective quality control mechanisms. The CMC's accreditation scheme for civil and commercial mediation providers[29] sets requirements in such matters as training, supervision, insurance and complaints handling. It is currently strengthening the training, practice and continuing professional development requirements for mediators who are members of the panel of an accredited provider, but it has no jurisdiction over mediators who practice on their own account or through the panel of a provider which does not seek CMC accreditation. Is this sufficient for the purposes of quality assurance, or should anything more be done, for instance to accredit or register individual mediators, or to place greater emphasis on the value of seeking a mediator from an accredited CMC panel?

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?

Small claims mediation

140. In 2007-08, following a successful small claims pilot at Manchester County Court, the Small Claims Mediation Service (SCMS) was rolled out to cover all of England and Wales with the aim of providing access to mediation in all defended small claims cases (with a monetary value of £5,000 or less). Although initially set up as a face-to-face service, it soon became clear that the vast majority of cases could be settled over the

[28] EU Directive on certain aspects of civil and commercial mediation: www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF
[29] CMC Provider Accreditation Scheme: www.civilmediation.org/downloads.php?f=50

telephone, with the small claims mediator ‘shuttling’ between the parties, phoning one party and then the other until agreement is reached.

141. Over each of the past two years, more than 10,000 small claims mediation appointments have been conducted. The settlement rate for these was 73% with users of the service stating very high levels of satisfaction. Of over 7,500 users that have completed the on-line survey, 98% are satisfied or very satisfied with the professionalism and helpfulness of the mediators, with 95% saying that they would use the service again.

142. A few of the users’ comments are set out below.

“Very fair and impartial. I hope I never have to use it again, but would recommend it to anyone. I had been trying to sort out my case for 12 months. It was all done in less than one hour to both parties' satisfaction.”

“Initially very sceptical due to the intractable stance of the other side. It proceeded well via telephone conversations and quickly resolved to my satisfaction.”

“I am very happy. I am only a small business and over the last few years I have lost a lot of money through the courts long-winded system. This mediation has given me back a fighting chance to put my side of the case. I don't expect to win just achieve a fair hearing, you have done this for me. Thank you very much.”

“I would recommend this procedure to anyone who finds themselves in a similar circumstance. The courtesy and understanding I received was refreshing to say the least.”

“As I am 68 years old, it would have been difficult for me to travel from London to Manchester. The settlement was accepted. Very easy to get in touch with the service, the mediator was extremely helpful & pleasant.”

143. Furthermore, since around 96% of mediations are conducted by telephone, parties are saved the time and expense of having to attend a court building, which has transformed the civil justice landscape for low value small claims disputes.

Judicial encouragement of ADR

144. The judiciary has always had a crucial role in encouraging and promoting the use of ADR in civil disputes. Judges have made a significant contribution to the development of ADR through their formal court role and also in their wider responsibility for maintenance and development of the civil justice system as a whole.

145. In Chapter 36 of his report on costs[30], Sir Rupert has made a number of recommendations to promote and embed a better understanding of ADR in general, and mediation in particular: "Alternative dispute resolution (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be".

146. In the same report, Sir Rupert quotes from a submission received from the Association of Her Majesty's District Judges. On small claims mediation, the Association said: "The Small Claims Track Mediation Service provided by HMCS has assisted in resolving claims in advance of the final hearing listed before the District Judge. We take the view that consideration should be given to a system of compulsory referral to the HMCS mediation service where all the parties in a small claims track case are unrepresented. There is a high settlement rate. Where claims do not settle by such mediation, the parties can have their day in court. 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. More referrals to this mediation service will free up more District Judge time."

Proposals for greater use of mediation

147. We have already set out in Chapter 1 how there is still much to be achieved before Lord Woolf's vision is fully realised. What needs to be addressed is the fundamental question of how the courts and the wider legal framework can do more to assist people to access the most appropriate, effective and proportionate dispute resolution mechanism for their case.

[30] Lord Justice Jackson's Review of Civil Litigation Costs, www.judiciary.gov.uk/about_judiciary/cost-review/index.htm

148. Also, given the existing approach to pre-action behaviour and the clear expectation on the parties to attempt to resolve their issues before court proceedings and the fact that despite these expectations cases still unnecessarily enter the court system, it is reasonable to consider the need to create a mechanism or a step in the process to ensure that those attempts at resolution are made and that disputes only progress to a hearing when absolutely necessary. Such an approach would build on the framework created by Lord Woolf and ensure compliance with the expectations placed on parties in a more robust and serious way, where the current arrangements for compliance have not always worked.

149. In our view there are many cases which could be better resolved through mediation and do not necessarily require judicial intervention. It is these cases that fall into the court system often for the wrong reasons, sometimes because people are unaware of alternatives and have not been informed of any alternatives when receiving legal advice or information, or sometimes because people pursue cases with an intention of punishing the other side, rather than actually being focused on resolving the problem at the heart of the conflict.

Mediation in small claims cases

150. We believe that mediation offers an appropriate, effective and proportionate way of resolving a dispute between parties. Ideally, this should take place as early as possible, and before any claim is issued. The previous chapter described our longer term proposal for pre-action directions, containing a mandatory settlement stage, which could include mediation.

151. Until then, a mediation stage could be introduced as part of the current court process. This would provide not only an assurance to the court that serious attempts at resolution had been made, but also, it would give an opportunity for the parties to take a step back and to talk through the problem with the assistance of a neutral third party.

152. We propose that this mediation stage should involve the parties in small claims cases being automatically referred to a mediation service. This means that for the first time mediation will be seen as part of the actual court process.

153. The nature of the automatic referral to mediation would mean that there is an element of compulsion. However, we believe that this is the best way of promoting mediation in small claims, by exposing the parties to the benefits of the process. We cannot of course compel parties to settle, but we can create a better environment within which settlement can be explored, with the help of a mediator, so that the parties do not have to proceed to what is often seen as a stressful final hearing.

154. Once the parties have responded to the automatic referral, there would be a presumption of engagement with the process and an expectation on the parties to behave reasonably both towards the mediator and to each other. That said, there may be a point within the mediation process when the mediator, or indeed the parties, realise that there is little prospect for settlement, and that it would be reasonable for the mediator, one of the parties, or all of the parties to come to the decision to exit the mediation process and proceed to a hearing. Similarly, the mediator will also have a key role in making an early assessment as to suitability of the case for mediation, as is the practice currently both in our in-house service and within the commercial mediation sector. A mediator who believes the dispute is not suitable for mediation will be able to recommend to the parties that the case should proceed to a hearing.

155. Clearly therefore, some provision will have to be made for exemptions to the automatic referral process (for instance disputes between taxpayers and the government over tax liabilities and debt) but, at the same time these exemptions should be tightly drawn so as to be rare and infrequent in practice, otherwise the robust nature of the automatic referral would be undermined.

156. While we know that a telephone mediation service – like the model offered by the current small claims mediation service – is viable and popular, there may be a range of potential delivery models. This might include the current in-house service working alongside private sector and even not-for-profit organisations.

157. Although there would be a fee for using the service, in the majority of cases that should be more than offset by savings that parties make from earlier settlement and the costs and fees associated with a small claims hearing.

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

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.

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

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

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

Small claims hearings

158. Small claims that do not settle at mediation will still be able to proceed to a hearing to be decided by a Judge. At present, small claims hearings are conducted face-to-face at a court. However, there is potential for these hearings to be dealt with in other ways.

159. For example, the European Small Claims Procedure (ESCP)[31] provides consumers and businesses all over Europe with a uniform, speedy and affordable debt recovery process for low value claims in cross-border cases. This procedure applies in civil and commercial matters where the value of a claim does not exceed 2,000 Euros. The procedure is a written one, unless the court considers an oral hearing is necessary. The court may hold a hearing or take evidence through a videoconference or other communications technology if the technical means are available.

160. Furthermore, in the pre-action protocol for low value personal injury claims in road traffic accidents (RTA)[32], where quantum cannot be agreed at the end of Stage 2, an application is made to the court, and the hearing will be determined on paper unless the Judge otherwise directs or either party requests an oral hearing.

[31] For more information about the ESCP see the HMCS Leaflet EX725 Making a cross border claim in the EU : www.hmcourts-service.gov.uk/courtfinder/forms/ex725_e.pdf
[32] www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rta.htm

161. There are clear advantages to parties if cases can be determined on paper or heard by telephone, since very often, one of the parties may live at a distance from the court. For both parties and, if they have them, their legal representatives, to have to attend court in person, could constitute a considerable additional expense, both in terms of travel and time.

162. The Civil Procedure Rules already allow for cases to be determined on paper, and in limited circumstances, for hearings by telephone (teleconference or videoconference), and, we believe that this has the potential to be extended and applied in many more cases. We therefore propose that for small claims, parties should be given the opportunity to request that their case be heard by telephone or determined on paper. In proposing this, we accept that, in common with quantum hearings for low value RTA claims, the Judge may direct otherwise, or one of the parties may request an oral hearing.

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

Mediation in higher value claims (fast & multi-track)

163. As described in the previous chapter, our longer term proposal for pre-action directions envisages a mandatory settlement stage before parties enter the court process. In the shorter term though, for county court cases in the fast and multi-tracks up to a case value of £100,000, we propose the introduction of compulsory mediation information or assessment sessions.

164. These information sessions would provide an opportunity for the parties themselves, not just their representatives, to be given information about the mediation process and its benefits from a mediator. We want to ensure that parties have given the use of mediation as a form of ADR some serious consideration. Currently, this is often not explored with the parties throughout the court process and the principles behind the pre-action protocols are at times ignored by parties and their legal representatives.

165. We believe that the appropriate point to stage these sessions would be at the allocation stage, replacing the current process which allows the parties to request a stay for settlement. There would be an obligation to

report back to the Court, as is currently the case, with possible sanctions for failing to do so.

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. Consequently, while there may be a cost attached to an information session, it would be more than offset by savings that parties make from earlier settlement.

167. We also recognise that mediation may not be suitable for certain types of disputes, for example disputes between the government and taxpayers over tax liabilities or debt, but are there any other exemptions?

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.

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)?

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?

The European Union mediation directive

168. Mediation is sometimes seen as less definitive than a court order because the agreement that is reached at the end of the mediation process does not have the same force as a judicial order and cannot be enforced in the same way. Reforms shortly to come into force will address that concern for some cases, and we propose that they should be extended to cover a wider range.

169. The reforms give effect to the EU mediation directive[33], which is due to be implemented on 21 May 2011 and makes a number of provisions for mediations in cross-border disputes[34], in particular:

- ensuring that, with certain limited exceptions, the content of written settlements negotiated at mediations can be made enforceable;
- protecting mediators and mediation provider organisations from being compelled to give evidence, subject only to very limited specified exceptions; and
- ensuring that no party can be prevented from initiating proceedings because a limitation or prescription period expired "during the mediation process".

170. We propose to apply similar provisions to domestic disputes, so for instance, parties in civil disputes would have the certainty of knowing that they have an enforcement route available should one side not comply with the agreement reached at the end of the mediation.

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?

[33] EU Directive on certain aspects of civil and commercial mediation (2008/52/EC): www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF

[34] a cross-border dispute is one "in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party"

4. Debt recovery and enforcement

171. Confidence in the justice system is diminished if the decisions of the court cannot be effectively enforced. Our aim is to reaffirm the authority of judgment orders by improving the efficiency and speed of enforcement processes. In particular we will address wider questions about how to improve confidence in the enforcement process overall. This will include consideration of which enforcement mechanisms need to be linked to a judicial process at all.

172. In all this, we fully recognise that a balance needs to be struck between the legitimate right of the creditor to enforce their court judgment by means of a wide ranging and robust enforcement system against those who won't pay or seek to ignore their judgment debts and the need to understand the position of debtors who genuinely cannot immediately pay. In May 2010, The Coalition Government Commitment set out the following:

    "We will provide more protection against aggressive bailiffs and unreasonable charging orders, ensure that courts have the power to insist that repossession is always a last resort, and ban orders for sale on unsecured debts of less than £25,000."

173. To this end we are consulting on how we can improve enforcement mechanisms in the courts by reaffirming the authority of the court, helping business and providing the appropriate safeguards for the consumer.

Improving Enforcement

174. In civil cases, people ordered to pay a court judgment have little or no incentive to do so if they know there is no effective means of enforcing it. Unless there is prompt and effective enforcement the authority of the courts, the authority of the court order and public confidence in the justice system are all undermined. The effective operation of enforcement is therefore crucial to a successful civil justice system.

175. Similarly, unless there is confidence in the enforcement procedures offered by the civil courts then claimants/creditors will seek alternative

methods for the recovery of monies owed. We want to encourage early engagement and good practice in the enforcement process.

176. A number of research studies conducted during the past decade have indicated that "ineffective enforcement processes"[35] are a particular weakness of the small claims system. Creditors have complained that the system allows the debtor to evade engagement with the creditor or court processes without penalty up to and beyond judgment. There is also an increasing media focus on the ineffectiveness of court judgment orders.

177. It has also become relatively easy to delay the effect of a judgment order, by applying for a stay of execution or application to vary an order. In certain circumstances where this results in a hearing, it effectively revisits the pre-judgment process, adding considerably to the costs and effort incurred by the creditor. It is important that we address the imbalance in court processes and reaffirm the authority of the court order so that the judgment creditor has a higher expectation of redress when using and paying for court enforcement procedures.

178. Getting this balance right is particularly important in tight financial times to ensure citizens and business can enforce debt owed by those who can afford to pay. Furthermore, ignoring the difficulties of creditors in recovering their debts, even through the last resort of the courts, will make securing credit even more difficult and, is likely to raise the cost of unsecured credit, thereby stunting economic recovery.

179. In common with the other civil justice reforms within this paper, these reforms aim to be proportionate in helping business whilst containing appropriate safeguards for the consumer on the high street and the vulnerable (can't pay) debtor. We need to protect individuals' rights to privacy while recognising that controlled access to information about debtors' circumstances is desirable since there will always be those who seek to avoid payment.

---

[35] Baldwin, J, *The abandonment of civil enforcement reform*, Civil Justice Quarterly, vol 29, part 2 at pp159-174; *Small Claims, Big Claims*, Consumer Focus, Oct 2010 at p.32; John Baldwin, *Evaluating the Effectiveness of Enforcement Procedures in Undefended Claims in the Civil Courts*, London: Lord Chancellor's Department Research Series 3/03 (2003); District Judge Monty Trent in his appointment address as President of the ADJ, 2010 and speech at CCUA conference, 28 Sept 2010; www.guardian.co.uk/money/2010/nov/20/small-claims-court-enforce-judgment The Guardian 20/11/10; *You & Yours*, BBC Radio 4 17/1/11; BBC Look East, Radio Cambridgeshire 28/1/11.

180. Whilst a review[36] of civil enforcement was completed in 2003 and resulted in the inclusion of a number of enforcement reforms in the Tribunals, Courts and Enforcement Act 2007 ('the TCE Act'), many of the changes have yet to be implemented. We are aware that some of these measures have been on the Statute Book for some time and want to determine whether stakeholders still consider that they are appropriate and necessary in the current economic climate.

181. The TCE Act sets out powers to simplify and streamline enforcement measures to effect a better, quicker service. The process is aimed at reducing costs and lapse of time for claimants and debtors in enforcing their judgment orders by restricting the intervention of the court where unnecessary, removing duplication of procedural stages and the need to attend hearings where the debtor does not engage.

182. To this end, we are consulting on implementing the enforcement related provisions of Part 4 of the TCE Act; charging orders, third party debt orders and attachment of earnings orders.

183. We are also interested in views as to whether we can go further than this, and whether these enforcement processes could become purely administrative functions or allow different providers to offer services in an open and accountable way.

184. Implementation of Part 3 of the TCE Act Bailiff reforms will be put to public consultation in Spring 2011. That paper will look at protection against aggressive bailiffs and how to encourage more flexibility on bailiff collections. In this Civil Justice consultation we are concentrating on those reforms relating to non-bailiff enforcement which are contained in Part 4 of the TCE Act.

Proposals for reform

185. When looking at the reform of enforcement, we want to ensure that we are delivering services that:

- enable creditors to recover the monies they are owed effectively;

[36] Report of the First Phase of the Enforcement Review, July 2000; Effective Enforcement (LCD White Paper) March 2003

- protect vulnerable debtors;
- improve customer service and effectiveness

186. Combined with the work already underway in the county courts to improve the efficiency, effectiveness and responsiveness of the civil court, we propose more streamlined and less bureaucratic procedures. We will cut out duplication of checking processes and judicial hearings where possible to allow the judgment creditor speedier access to justice via a range of more up to date and modernised enforcement processes. We also aim to extend the range of enforcement mechanisms in order to fill loopholes against certain types of "won't pay" debtors.

187. We are looking at implementation of the enforcement related provisions of Part 4 of the TCE Act which have been approved by Parliament, namely:

- whether to allow applications for charging orders on all judgment debts regardless of whether or not the debtor is paying by, and up to date with, instalments
- introducing a minimum threshold on applications for orders for sale in Consumer Credit Act debts (the Coalition Government Commitment)
- introducing fixed tables to the attachment of earnings process, similar to those used for criminal fines and council tax recovery
- introducing a mechanism to trace a debtor's current employer in attachment of earnings applications
- introducing a new enforcement mechanism for information applications, requests and orders for information on debtors

188. Further proposals concern the streamlining of internal processes for charging orders and third party debt orders with the aim of making these mechanisms more effective and administrative (and therefore less judicial) functions but with the appropriate safeguards still in place.

Charging orders

189. A charging order is a means of securing payment of a sum of money ordered to be paid under a judgment or order of the High Court or a county court by placing a charge on the debtor's property (usually a house or land or securities such as stock, unit trusts registered in the UK or funds in court). A charging order can be made absolute or subject to

conditions. Once an order is in place, a creditor can apply subsequently to court seeking an order for sale of the charged property.

190. At present, the court cannot make a charging order when payments due under an instalment order made to secure that same sum are not in arrears. In certain instances this can prejudice the creditor, allowing, for example, a debtor with large judgment debts, who is meeting his regular instalments, to benefit from the sale of a property without paying off the debt.

191. Section 93 of the TCE Act removes this restriction and enables access to charging orders in circumstances where a debtor is not yet in arrears with an instalment order. Creditors would not, however, be able to apply for an order for sale to enforce the charging order where the debtor has not defaulted on an instalment order.[37]

192. A charging order, once in place, will also protect a debtor from further enforcement by attachment of earnings. Similarly, allowing a creditor to obtain a charging order on an unpaid judgment debt will prevent aggressive creditors from continually seeking to vary judgment instalment orders in order to force the debtor into default. We are testing the waters at this stage to ask whether the instalment provision is still favoured.

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.

Orders for sale

193. The TCE Act contains the power to introduce a threshold on applications for orders for sale.

194. Following a report by the Citizen's Advice (CAB) called 'Out of Order'[38], the MoJ published a consultation paper on 5 February 2010:

[37] Section 4C of the Charging Orders Act 1979 (inserted by section 93(3) of the TCE Act which is yet to be implemented).
[38] 25 June 2009

'Consultation on whether a minimum threshold should be imposed on orders for sale applications in relation to Consumer Credit Act debts only'[39]

195. The consultation sought views on whether the Government should use powers contained in Part 4 of the TCE Act to amend the Charging Orders Act 1979 to introduce a threshold to restrict applications from creditors in respect of previously unsecured debts which were made under Consumer Credit Act 1974 (CCA) agreements. The Consultation asked if a threshold was favoured, at what level it should be set. The consultation proposal, restricted to CCA debts, was narrower than the coalition proposal and did not propose a set level for a threshold.

196. The responses to the order for sale consultation showed that debtors and advice agencies perceived there was a problem to be addressed in this area and recommended either a threshold or a complete ban on orders for sale for unsecured debts. However, all creditors and members of the legal sector and judiciary rejected the need for further restrictive legislation and considered judicial discretion an adequate protection and the only solution flexible enough to take account of all scenarios. In short there was no overall consensus and views remain highly polarised, with a small majority opposing the imposition of a threshold.

197. In March 2010 the Office of Fair Trading (OFT) published its 'Irresponsible Lending Guidance'[40] which addressed two issues of concern raised by the CAB in relation to orders for sale. This guidance directed creditors, firstly not to threaten and harass debtors with losing their homes if the creditors have no intention of applying for orders for sale, as in the majority of cases. Secondly, it directed that "adequate explanation" should be made at the time of the contract of the fact that unsecured credit, when not recovered, could be "secured" on the debtor's property by means of a charging order; and a subsequent order for sale could, in certain circumstances, mean that the debtor loses their property.

198. In May 2010 the Government published the Coalition Agreement Commitment to introduce "more protection against aggressive bailiffs and unreasonable charging orders, ensure that courts have the power to

[39] www.justice.gov.uk/consultations/docs/orders-for-sale.pdf
[40] www.oft.gov.uk/shared_oft/business_leaflets/general/oft1107.pdf

insist that repossession is always a last resort, and ban orders for sale on unsecured debts of less than £25,000." Since the publication of the Coalition Agreement, Ministers and officials have been approached by various stakeholders all wanting to impress their concerns about the proposed threshold in the coalition agreement and the adverse impact of a threshold on the credit market and their businesses. We consulted on the proposed threshold in the BIS Call for Evidence on Credit Debt and Personal Insolvency which was published in December 2010. The question has attracted a fair amount of interest, eliciting this time more response from government debt recovery agents and insolvency practitioners. Responses to the previous two consultations led us to believe that the level of the threshold now needs to be assessed and we aim to test various different levels including a base (no change) level.

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.

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)?

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

Attachment of earnings orders

199. An attachment of earnings order (AEO) is a means of securing payment of certain debts by requiring an employer to make deductions direct from an employed debtor's earnings. Currently, the rate of deductions under an AEO made to secure payment of a judgment debt is calculated by a county court using information provided by the debtor.

200. 'Effective Enforcement'[41] identified weaknesses in the current system and in particular the fact that information provided by debtors is often unreliable. Section 91 of the TCE Act tackles this by making provision for

[41] Effective Enforcement - Improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents (Lord Chancellor's Department, March 2003, Cm 5744); www.dca.gov.uk/enforcement/wp/index.htm

a new method of calculation of deductions from earnings based on fixed, tables for calculating attachments of earnings. This would enable employers to use the same system they currently use for council tax and fines recovery to deduct employment earnings for civil debts at a fixed rate. It will avoid the need for court staff to complete Protected Earnings Rates (PER) and Normal Deduction Rates (NDR) calculations and will rely less on debtors to furnish employment information, thus speeding up the whole process of attachment of earnings.

201. Another weakness of the AEO system is that if a debtor changes job and does not inform the court of his new employer's details, the AEO lapses. Section 92 of the TCE Act enables the High Court, county courts, magistrates' courts and fines officers to request the name and address of the debtor's new employer from Her Majesty's Revenue and Customs (HMRC), for the purpose of redirecting the AEO. This should allow for quicker repayment of debts in circumstances where debtors currently change employers and where an application would fail, thereby forcing the creditor to restart the process of enforcement. It closes a loophole to allow the debtor to avoid paying simply because he has changed jobs and allows the court and creditor alike independent confirmation of a debtor's employment status.

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

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.

Third party debt orders

202. The main policy objectives of the proposed reforms to third party debt orders (TPDOs) are to reduce duplications in court processes, streamlining and improving the efficiency of the processes, and to make it easier for creditors to enforce their debt through TPDOs by extending the range of accounts to which they will apply. Courts will also be able to trace debtors' accounts when they are moved. This should lead to quicker and potentially more successful payment of the judgment debt enforced by a TPDO, and greater confidence in the civil justice system. At the same time the proposals should retain safeguards from the

aggressive pursuit of debts for debtors who are complying with judgment orders. In 2009 approximately 2,100 TDPOs were issued. This enforcement method is therefore the least common compared to the other types, the reasons for which are explored below.

203. The way the system works currently is that upon receiving an application for a TPDO court staff will pass the file to the Judge to consider whether an interim order should be made. Where an interim order is granted, this is sent to the third party or bank. At the point of service of the order the amount of the judgment sum owing is effectively frozen, or as much of the judgment debt as is in the account, thereby preventing the defendant from having access to or disposing of that sum until the court makes a final decision about whether or not the money should be paid out to a creditor. However, if there is no money in the debtor's current account at the point of receipt of the order, the bank notifies the court of this fact and the interim order is discharged. There are currently no obligations upon the bank to inform the court whether, or to where, a debtor has transferred their monies or account. Consequently it is easy for a judgment debtor facing enforcement action simply to transfer the monies to another account either online or by telephone. The TPDO process is often defeated simply by being too antiquated to compete with modern banking facilities.

204. We propose to:

- Streamline the TPDO process. Interim orders will become 'Final' through the lapse of time unless the judgment debtor raises objections, in which case the matter will be considered at a hearing before a Judge. Currently a hearing date is set in all cases. This option requires changes to rules of court and regulations.

- Expand the application of TPDOs across a wider range of bank accounts. Currently TPDOs can be placed on current bank accounts solely in the debtor's name. We propose expanding accessible bank accounts to include all accounts (including clarification around deposit and joint accounts) except trust funds. Up to 50% of a joint account will be deemed as belonging to the judgment debtor, as is the situation in Scotland, other EU countries and the USA. The remaining 50% will be deemed as belonging to the joint account holder and will be protected. However the joint account holder will be able to make representations to the court if their contribution to

the joint account exceeds half. Upon requisite proof the court will be able to determine how much of a joint account can be utilised to pay the civil debt.

- Make provision for periodical lump sum deduction orders to allow prescribed lump sums to be deducted from debtors' bank accounts at prescribed intervals. For example, to allow for monthly attachments of salaries. This process will effectively be a merger between TPDOs and attachment of earnings orders and is intended to fill a loophole for those creditors who are trying to recover debts from debtors who are self-employed or whose employers are unknown. It will also allow those TPDOs which currently fail due to lack of funds in an account at the time that the third party receives the order, to endure so that when funds are transferred into the account (for example, at the beginning of the month) they may be utilised to pay the debt. This provision may require a degree of compliance from the debtor but may be useful in helping a debtor pay off a debt without having to administer payments themselves.

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

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.

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.

Information requests & orders

205. There is currently no court process by which creditors are able to receive advice from the court regarding the best method for them to enforce a judgment order, or request the court to require additional information to be provided about the debtor from third parties. Instead the creditor needs to rely on information collated at the point of contract or subsequently, or where the debtor's circumstances have changed, apply to the court for an order to obtain information, which may involve the debtor attending court. This is problematic if the debtor is not co-operating with the court. The order to obtain information process is

largely dependent upon the debtor's compliance and, although backed up by committal powers for non-compliance, allows those debtors who seek to avoid paying their debts or disclosing information about their circumstances to do so with little independent verification. For this reason it is suffering declining use by creditors.

206. The provisions in sections 95 – 105 of the TCE Act include legislation on applications by judgment creditors for information about what kind of action would be appropriate to recover judgment debts. Such applications are dealt with by the court by way of departmental information requests and/or information orders. These new enforcement provisions will allow creditors to apply to the court for information about the best course of action to recover their judgment debt and empower the court to request information from a government department or order prescribed persons to disclose information if it would help deal with the creditor's application.

Applications for information about action to recover judgment debts

207. Section 95 of the TCE Act enables a judgment creditor to apply to the High Court or a county court for information about what type of court based enforcement action would be appropriate to take to recover the debt.

Action by the court

208. Upon receipt of the application the court may make a departmental information request, which is made to a government department; or an information order, which orders a person or third party to provide information to the court to assist with the creditor's information application. The debtor will be notified that the court intends to make an information request or order to give them the opportunity to object.

Departmental information requests

209. Section 97 of the TCE Act specifies the information that may be requested by the court from a government department (HMRC/DWP) and the information that may be requested. Government departments

will be requested rather than ordered to provide information. Section 99 enables a government department in receipt of an information request to disclose the information to the court that it considers is necessary to comply with the request and also enables disclosure of information where it is held on the department's behalf by, for example, a government contractor.

Information orders

210. Section 98 of the TCE Act enables the court to make information orders requiring third parties to provide prescribed information about the debtor. It is envisaged that third parties and banks are likely to be recipients of information orders.

Using the information about the debtor

211. Section 101 specifies that information obtained via an information order or departmental information request can be used by the court:

- to enable it to make a further departmental information request or order in relation to the debtor (for example, to disclose further information to enable a recipient of a request or order to identify the debtor more easily from records, such as date of birth);
- to provide the creditor with information about what court based action it would be appropriate to take to seek to recover his judgment debt;
- to enable a court to carry out its functions in relation to action that is initiated by the creditor to recover the judgment debt (for example, to enable the court to make an AEO in relation to the debtor), and to enable information to be disclosed between courts for enforcement purposes.

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.

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.

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

212. Further to the enforcement related provisions of Part 4 of the TCE Act, we are interested in views as to whether we could go further to improve enforcement in the civil courts.

213. For example: would it be possible to reform the system in such a way as to ensure that debtors understand that the chance to make legal representations about their ability to pay their debt comes before the judgment order is made, rather than during the enforcement phase of proceedings. At the moment creditors with a judgment in their favour must return to court to enforce a debt, seeking fresh court approval for each enforcement process. This not only devalues the authority of the judgment order itself but makes the enforcement of judgment orders a drawn out and expensive process for creditors and debtors alike.

214. We would also like views as to whether it would be possible to empower the creditor in possession of a judgment order to apply directly to the third party enforcement provider instead of applying to the court for further authority to enforce in a particular way; and if so, what safeguards should remain in place to protect vulnerable consumers. Such a change would streamline and curtail the enforcement process radically and would save costs for business and the court in unnecessary processing and judicial intervention.

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.

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

215. We would also like opinions as to whether all enforcement should be administered in the lower civil courts. A reform of enforcement jurisdiction would bring the civil court system into parallel with the

criminal courts where all financial penalties are administered in the magistrates' courts. We welcome feedback from consumers and court users as to the specific impacts this would have for them.

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

5. Structural reforms

216. The Government is committed to providing an effective and efficient justice system with a flexible judiciary that is deployed in the most appropriate way. This objective is hindered by structural inflexibility and inefficiency between the jurisdictions of the High Court and the county courts. The proposals contained in this section are for structural reform, designed to ensure that cases are determined at the most appropriate level of court, thereby ensuring the most efficient use of judicial resources.

217. Today's civil and family court system has evolved over many years. It is comprised of different types and levels of court. Each different court deals with different types of business (although many of the boundaries overlap). Within the separate types and levels of court, different tiers of judiciary preside over cases and different practices and procedures are employed. The system is accordingly complicated; but it is also inflexible.

218. In recent years, much has been done to try and simplify the system as a whole. Reviews and their subsequent reforms have had a significant impact on both civil and family business. In the main, practice and procedure across the different courts have been made more uniform and its complexity has been reduced. But major hurdles to flexibility and efficiency remain, and the system needs further structural reform if these are to be removed. The reforms proposed are of two sorts: a series of proposals to rationalise the division of jurisdiction between the different tiers of civil court; and a proposal to restructure the county courts as a single county court with a national jurisdiction like the High Court.

Rationalisation of the jurisdiction of the civil courts

219. Civil cases in the High Court are commenced in either the Queen's Bench Division (QBD) or the Chancery Division (ChD). Claims issued in the High Court are either issued at the Royal Courts of Justice (RCJ) in London or at one of the District Registries of the High Court based at county courts around the country.

220. The QBD deals mainly with actions in contract and tort (civil wrongs). It contains within it the Administrative Court, which hears applications for judicial review challenging decisions of public bodies, the Commercial Court, which deals with contracts relating to banking, insurance and international trade (including the carriage of goods by sea), the Admiralty Court, which deals with other kinds of shipping matters, such as collisions and salvage, and the Technology and Construction Court, which deals with construction disputes and other cases involving prolonged examination of technical issues.

221. The ChD deals principally with cases relating to property, including disputes over land, mortgages, trusts and estates, insolvency, companies and partnerships, intellectual property and similar matters.

222. There are currently 216 county courts in England and Wales. While all have unlimited jurisdiction to deal with claims for breach of contract or tort, their jurisdiction is otherwise limited in three ways:

- in some other cases their jurisdiction is subject to a financial limit;
- certain types of claim must be heard by the court for the area in which the claim arises; for example, housing possession cases must be heard in the county court which covers the district where the property is situated; and
- a county court is not able to grant certain remedies.

The proposals

223. The boundaries between the jurisdictions of the High Court and the county courts have largely remained unchanged for 30 years in respect of the cases that may be dealt with[42], and 20 years in respect of the remedies which a county court may grant[43]. Over that time, however, there have been major changes in the way that the courts operate with the implementation of the Woolf reforms, including, in particular, the introduction of the Designated Civil Judge. This has provided a crucial element of local leadership, critically examining the handling of cases and the allocation of work at a local level, resulting in a much greater

[42] See the High Court and County Courts Jurisdiction Order 1981
[43] See the County Court Remedies Regulations 1991.

emphasis on case management, ensuring that each case is handled in the most cost effective and proportionate way.

224. In August 2008[44], Sir Henry Brooke, a retired Lord Justice of Appeal, published a Report entitled: 'Should the Civil Courts be Unified?'. In the Report, Sir Henry concluded that while it was not necessary to unify the civil courts, there were a number of areas in which the administration of civil justice could be improved. He proposed a series of recommendations which included certain alterations in the jurisdiction of the High Court and county courts.

225. This part of the consultation paper is not concerned with all of Sir Henry's recommendations, but only those recommendations which relate (a) to the range of cases that should fall within the jurisdiction of the High Court and county courts respectively and hence to determining where proceedings should be started; and (b) to the administration of the High Court Judiciary in the county courts.

Proposal 1: Increase the financial limit on the equity (i.e. chancery) jurisdiction of the county courts from £30,000 to £350,000

226. In some matters, principally certain types of claims relating to property, the jurisdiction of the county courts is subject to a financial limit of £30,000. Cases involving property of greater value must be started in the High Court[45]. The types of proceedings to which this limit applies include the equity proceedings listed in section 23 of the County Courts Act 1984, contentious probate proceedings under section 32 of the County Courts Act 1984, most applications under the Law of Property Act 1925, the Trustee Act 1925, and applications under section 1(6) of the Land Charges Act 1972.

227. This limit is set by the High Court and County Courts Jurisdiction Order 1981. The intention behind it was to enable the county courts to deal with the vast majority of claims relating to property, enabling the High Court to deal with claims that were sufficiently complex to require the particular skill and experience of a High Court Judge.

[44] The Report "Should the Civil Courts be Unified" can be found at: www.judiciary.gov.uk/publications_media/general/brooke-report.htm
[45] Proceedings for tax debts can be commenced in the county courts regardless of value

228. In 1981, when the limit was set, average house prices were only £23,730[46] and there was relatively little variation across the country. As a result the county courts were able to deal with most cases involving domestic property. However, by May 2010 average house prices in the United Kingdom had risen to over £169,162[47] and in the second quarter of 2010 the average house price in London was £290,249[48]. As a result, few cases involving domestic property can now be dealt with by the county courts, although there has been no increase in the intrinsic complexity of such cases. The current £30,000 limit is far too low and results in many cases of relatively low complexity being heard unnecessarily in the High Court. This has contributed to the increasing pressures on the High Court.

229. To remedy this problem, we agree with Sir Henry's proposal to increase the financial limit on the equity jurisdiction of the county courts to £350,000.

230. Judicial & Court Statistics indicate that about 200 cases a year are likely to be affected by this proposal so as to come within the jurisdiction of county courts. The county courts could undertake the additional work without difficulty and the removal of the work from the High Court would play a useful part in enabling High Court Judges to concentrate on heavier cases. The existing provisions in Part 30 of the Civil Procedure Rules (CPR) enabling cases to be transferred between the county courts and the High Court are adequate to ensure that more complex cases in which lower amounts are involved could be transferred to the High Court, where appropriate.

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)?

[46] Nationwide house price index, quarter, 1981, based on average UK property
[47] Nationwide house price in May 2010, based on average UK Property
[48] Nationwide house price index, quarter 2, 2010, based on average London property

Proposal 2: Increase the financial limit below which claims may not be commenced in the High Court from £25,000 to £100,000

231. The High Court and the county courts generally have concurrent jurisdiction in claims for the recovery of a sum of money. However, unless a claim is for more than £25,000 (£50,000 for a claim for damages for personal injury), it may not be started in the High Court.

232. These limits were set by the High Court and County Courts Jurisdiction Order 1991, and raised to their present levels by an amendment to that Order in 2009. The intention behind the levels chosen was to ensure that only cases requiring the particular skill and experience of a High Court Judge were started in the High Court and that most claims were started and heard by the county courts, unless they were of unusual complexity. In such cases, the county courts could transfer the matter to the High Court after issue.

233. Despite the 2009 increase, the lower financial limit of the High Court remains at a fairly low level which means that many simple money claims that could and should be handled in the county courts are started in the High Court. It is not clear why parties choose to take this option. In practice, most cases valued at less than £100,000 will never be seen by a High Court Judge. Case management is undertaken by a District Judge sitting as a District Registrar (if the case is started in a District Registry) or a High Court Master (if the case is started in the RCJ) before it is allocated for trial before a Circuit Judge sitting as a High Court Judge under section 9(1) of the Senior Courts Act 1981. This can often be the same Circuit Judge who would have heard the case had it been started in a county court, meaning that such cases will almost invariably receive the same level of judicial consideration regardless of the venue in which they are heard. Where such a case is issued in the High Court, it can, of course, be transferred to a county court but that involves the use of judicial and administrative resources that could be better deployed in other ways and will add potentially unnecessary cost and delay to the proceedings.

234. We believe that the increase in 2009 simply did not go far enough to address these issues, and propose to ensure that lower value claims are started in the most appropriate venue by increasing the general financial limit below which money claims may not be started in the High Court to £100,000. It is proposed to retain the existing limit for personal injury

claims rather than increase it in line with that for money claims generally, because personal injury claims above £50,000 often involve a degree of complexity that makes them appropriate for hearing by the High Court.

235. Judicial and Court Statistics indicate that fewer than 500 claims for amounts between £25,000 and £100,000 were issued in the QBD in 2009. The proposal to increase the limit to £100,000 is expected to result in 500 fewer claims being heard at the High Court. Very few of these were actually resolved at trial and we consider that while such a change would have a minimal impact on the county courts, it would both reduce pressure on the High Court and potentially reduce the cost of such litigation.

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.

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)?

Proposal 3: Extend the power to grant freezing orders to county courts.

236. Freezing orders are used to prevent people from disposing of their assets or removing them out of the country pending judgment. They can be sought in any case in which the claimant has good grounds for asserting that the defendant is likely to dispose of assets before trial in order to prevent the claimant from obtaining satisfaction of a judgment. At present only the High Court can grant such orders.

237. Although section 38(1) of the County Courts Act (CCA) 1984 provides that a county court may make any order which could be made by the High Court if the proceedings were in the High Court, the County Court Remedies Regulations 1991 specifically prevent county courts granting freezing orders. As a result, relatively simple cases are often started in the High Court simply because the claimant wishes to seek a freezing order. This is inconsistent with the objective of the proposals set out in this paper.

238. We therefore propose to extend the power to grant freezing orders to the county courts. However, in view of the potentially significant adverse effects a freezing order can have, particularly on a small business, we are determined to ensure that such orders should be confined to cases in which they are really justified. To that end we intend to work with the senior judiciary to ensure that only those Judges with the necessary expertise and experience are authorised to grant such orders and that before being authorised to do so they receive appropriate training from the Judicial Studies Board.

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.

Proposal 4: Remove certain types of proceedings from the jurisdiction of the county courts

239. 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, often raise difficult questions in what are specialist areas of practice. Such cases are usually handled by specialist practitioners and are usually heard by specialist High Court Judges in the ChD who are familiar with this area of the law. Given the nature of such claims, it is unlikely that they would normally be started in the county courts but, where they are, they will invariably be transferred to the High Court in view of their inherent complexity. However, other proposals in this paper[49] could potentially lead to more claims of this kind being started in the county courts. Although the current provisions would enable such claims to be transferred to the High Court, that would involve the use of judicial and administrative resources that could be better deployed in other ways and will, potentially add delay and cost to the proceedings.

240. To ensure that those cases which are of a specialist nature continue to be handled by Judges with the appropriate experience in the most cost effective way, we propose to give the High Court exclusive jurisdiction to

[49] The proposals to increase the financial limit of the equity jurisdiction of the county courts and the lower financial limit for the High Court.

hear claims for variation of trusts and claims under the Companies Act and other specialist legislation of the kind mentioned above.

241. Given that such matters are now almost invariably heard by the High Court, this proposal will not have any adverse implications for workload of the High Court. However, it could have a marginal impact on the workload of a county court as a result of courts no longer having to transfer such cases.

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.

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.

Proposal 5: Abolish the need for the Lord Chancellor's agreement to High Court Judges sitting in the county court

242. Every High Court Judge already has the necessary jurisdiction to sit as a county court Judge, but their deployment in that capacity requires: their consent; and a designation of the times and occasions on which they are to sit. Such designation is given by the Lord Chief Justice only after consultation with the Lord Chancellor.

243. This is an unwieldy procedure which can unnecessarily delay the proceedings particularly as High Court Judges already have the jurisdiction. In order to streamline and simplify the procedure the government proposes to remove the need for the specific request of the Lord Chief Justice, after consulting the Lord Chancellor and introduce a general provision which would enable High Court Judges to sit in the county court as the requirements of the business demands. This would enhance greater flexibility and efficiency in the use of judicial resources.

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.

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.

Single county court for England & Wales

244. The current county court structure contains different types and levels of jurisdiction with each county court dealing with different types of business (although many of the boundaries overlap). Different tiers of judiciary also preside over cases and a variety of practices and procedures are employed.

245. Each individual county court has its own separate identity and serves a defined geographical district and in some cases, jurisdiction to act is limited to that geographical area. All county courts can deal with any claim in contract and tort and actions for recovery of land. In such cases their jurisdiction becomes national and is not limited to their geographical areas. In other cases jurisdiction must be conferred on a county court before it can hear certain types of cases. For example, only designated county courts can deal with divorce petitions, equity and contested probate actions not exceeding £30,000 and bankruptcy claims. The result is that fewer courts exercise these jurisdictions making the geographical boundaries for these types of cases different from those with general county court work.

246. The jurisdiction of a county court is limited in three ways. The first is a financial limit beyond which a county court has no jurisdiction to hear the case. The second is a geographical limit and the third limitation is on the powers of the county courts to grant remedies. In some cases, courts are specifically designated to hear certain types of cases in addition to their national or geographical jurisdiction.

Problems with the current system

247. Geographical and jurisdictional boundaries create inherent inefficiencies in that they limit the court's jurisdiction to the geographical area in which the court is located or in some cases the particular jurisdiction which they possess. The implication is that cases are sometimes allocated or

transferred to a particular court simply because that court exercises jurisdiction over that geographical area.

248. One example of the inefficiencies caused by geographical jurisdiction is in the operation of civil business centres. Business centres have been established at HMCS sites at Haywards Heath in West Sussex and Salford, Greater Manchester. These centres process money claims for courts in London and parts of the South East and North West regions. The purpose of the business centres is to allow removal of certain elements of administrative processing from the courts enabling county courts to better concentrate on providing support for the judicial process.

249. However, the current county court geographical jurisdiction requires business centres to issue and progress claims in the name of the many courts that are served by them. This leads to inefficiencies, the most obvious of which is the requirement to seal every claim form with the individual seal of the county court being represented.

250. A review of the current business centre operations has concluded that a centralised processing model would be simpler and far more efficient than the current model. This can in part be achieved by processing all claims in the name of a single designated court rather than multiple courts but by removing jurisdictional boundaries from county courts to establish a single county court, a wider range of administration can be carried out at business centres.

Aims and objective of the proposal

251. The establishment of a single county court, with the full range of county court jurisdiction, including all civil and family jurisdiction, will seek to remove these inefficiencies by simplifying the task of allocating case to courts for listing before a Judge, and transferring cases between court centres. It would also assist in providing flexibility in the deployment of High Court Judges to the county courts.

252. A single county court would ensure that there is increased ability to process more administrative work both in the county courts and at business centres and simplify the task of allocating those cases that require judicial intervention to the appropriate courts. The effective

operation of business centres is key to the delivery of a more efficient and sustainable operating model for civil business. It would:

- reduce delays in the hearing and determination of cases by removing high-volume bulk work from the individual county courts;
- make economies of scale through the elimination of duplication that currently takes place in the back offices of individual county courts;
- remove some aspects of money handling from the courts; and
- provide opportunities for the rationalisation of the HMCS estate.

253. It is anticipated that the overall benefits of a single county court would be:

- better use of judicial resources;
- improved flexibility on listing and transferring work between courts;
- better use of estates; and
- improvements in, and increased scope of, administration at business centres.

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

Modernising county courts

254. Work is already underway in the short-term to improve the efficiency, effectiveness and responsiveness of the civil courts by:

- centralising the processing of the early stages of court claims;
- optimising the opportunities for users to resolve their disputes without the need to personally attend court; and
- transferring non-core areas of business to other agencies better placed to deliver the service. For example, The Insolvency Service has consulted on replacing the current court route into bankruptcy with a more efficient administrative process for debtors seeking their own bankruptcy; and repealing early discharge. It is clear from the responses to that consultation that interested parties see benefits in removing the court from the process in circumstances where it is unnecessary for a court to take a decision. We are working with The Insolvency Service to explore how best to realise those benefits to produce a bankruptcy system that is suitably accessible and

affordable, as well as providing an efficient service for all those who need to use it.

255. The proposed future structure of the civil courts will reflect the distinction between 'debt management processes' that are essentially administrative and do not require judicial involvement, and 'dispute resolution services' that require judicial intervention. Debt management work will be centralised into dedicated business centres, thereby freeing up courts to focus on more streamlined dispute resolution services.

Courts and tribunals integration

256. The proposals in this chapter need to be seen in the context of our wider efficiency drive, which includes a rationalisation of the court estate and integration with the Tribunals Service.

257. Last year we conducted a number of consultations[50], in recognition of the fact that on average a county court courtroom was used for only 180 days a year. Following the consultations, 49 county courts will close and courtroom utilisation will increase to 200 days a year.

258. Furthermore, bringing together Her Majesty's Courts Service and the Tribunals Service into a new single organisation in April 2011, will enable a more flexible use of the combined estate, and deliver significant benefits:

- For the public, it will be able to provide a streamlined service which maximises the use of staff and buildings and delivers the best service to customers.
- For staff, there will be more opportunities to gain experience and develop careers across the wider unified service.
- For the taxpayer, it will be able to provide a more efficient justice system delivering even better value for money.

[50] www.justice.gov.uk/consultations/consultations.htm

6. Impact assessments

259. The Government is mindful of the importance of considering the impact of these proposals on different groups, with particular reference to users and providers of legally aided services. We have therefore considered the impact on client groups and on providers in both the private and not for profit sector of all the measures in the package in line with the existing duties on gender, race and disability. Our assessments of the potential impact of these proposals have been published alongside this document.

Q70: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

Q71: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

Q72: Do you have any evidence of equality impacts that have not been identified within the equality impact assessments? If so, how could they be mitigated?

7. Next steps

260. The consultation will close at 12:00 noon on 30 June 2011. Following consultation, we intend to publish our response by the end of October 2011 setting out those proposals we intend to take forward.

About You

Please use this section to tell us about yourself

Full Name	
Job Title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	(please tick box) ☐
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please respond online at: www.justice.gov.uk/consultations/consultations.htm

Alternatively please send your response by email to:

CivilTJ@justice.gsi.gov.uk

or by post to Judith Evers at:

Ministry of Justice, 4.10, 4th Floor, 102 Petty France, London SW1H 9AJ

The deadline for responses is 12:00 noon on Monday 30 June 2011.

Publication of response

A response to this consultation is due to be published in October 2011 and will be available online at www.justice.gov.uk/consultations/consultations.htm

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, among other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. When to consult: formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. Duration of consultation exercises: consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. Clarity of scope and impact: consultation documents should be clear about the consultation process, what is being proposed, the scope to influence the proposals and the expected costs and benefits of the proposals.

4. Accessibility of consultation exercises: consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. The burden of consultation: keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. Responsiveness of consultation exercises: consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. Capacity to consult: officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation co-ordinator contact details

If you have any complaints or comments about the consultation process rather than about the topic covered by this paper, you should contact Sheila Morson, Ministry of Justice Consultation Co-ordinator, on 020 3334 4498, or email her at consultation@justice.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Sheila Morson Consultation Co-ordinator Ministry of Justice 6.36, 6th Floor 102 Petty France London SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the ‘How to respond’ section of this paper at page 81.

Glossary

ADR	Alternative Dispute Resolution
AEO	Attachment of Earnings Order
ATE	After The Event (insurance)
BIS	Department for Business, Innovation and Skills
CAB	Citizens Advice Bureau
CASC	Constitutional Affairs Select Committee
CCA 1974	Consumer Credit Act 1974
CCA 1984	County Courts Act 1984
CFA	Conditional Fee Agreement
ChD	Chancery Division
CMC	Civil Mediation Council
CNF	Claims Notification Form
CPC	Claim Production Centre
CPR	Civil Procedure Rules
DJ	District Judge
DWP	Department for Work and Pensions
ESCP	European Small Claims Procedure
GP	General Practitioner
HCEO	High Court Enforcement Officer
HMCS	Her Majesty's Courts Service
HMRC	Her Majesty's Revenue and Customs
MCOL	Money Claim Online
MPAP	Mortgage Pre-Action Protocol
NDR	Normal Deduction Rate
NHS	National Health Service
NHSLA	National Health Service Litigation Authority
OFT	Office of Fair Trading
PCOL	Possession Claim Online
PCN	Penalty Charge Notice
PER	Protected Earnings rates
PI	Personal Injury
PSLA	Pain, suffering and loss of amenity
QBD	Queen's Bench Division
RCJ	Royal Courts of Justice
RTA	Road Traffic Accident
SCMS	Small Claims Mediation Service

SMEs	Small and Medium-sized Enterprises
TCE Act	Tribunals, Courts and Enforcement Act 2007
TDPO	Third Party Debt Order
TEC	Traffic Enforcement Centre

Annex A - Delivery of Civil Justice in England and Wales

The delivery of Civil Justice in England and Wales at present is achieved mainly via the High Court and a network of county courts. High Court work is delivered through the Royal Courts of Justice (RCJ) in London and the 132 District Registries (local branches of the High Court) that are co-located with county courts across England & Wales, the largest of these District Registries have specialist jurisdiction such as Chancery, Mercantile, Technology & Construction and Administrative Court claims. In total there are currently 216 county courts, all of which have 'basic' jurisdiction covering money claims, recovery of land and goods, and other claims. They deal with defended claims and enforcement. Of these, 131 also have bankruptcy (insolvency) jurisdiction.

Supporting the civil court network is a range of systems that allow specific types of claims to be submitted online. This removes repetitive, resource intensive pressures from the courts, reducing cost and improving efficiency:

- The Claims Production Centre (CPC) enables the automated bulk production of debt claims for high volume issuers. Enforcement processes and defended claims are transferred to the defendant's local county court for further action. Over 674,000 claims (53% of all specified money claims) were issued in this way in 2009.
- Money Claim Online (MCOL) is a web-based service that enables the issue of debt claims over the internet. Fees are paid via a secure debt/credit card facility with some 154,000 claims (12% of all specified money claims) issued via this route in 2009.
- Possession Claim Online (PCOL) is a web-based service that enables the issue of single or multiple housing claims over the internet. Fees can be paid by card or direct debit. PCOL went live on 30 October 2006 and currently accounts for around 80% of all simple rent and mortgage arrears cases.
- The Traffic Enforcement Centre (TEC) offers an automated registration service to local authorities seeking to enforce payment of decriminalised parking penalty charge notices (PCNs). TEC dealt with almost 1.5 million PCNs in 2009.

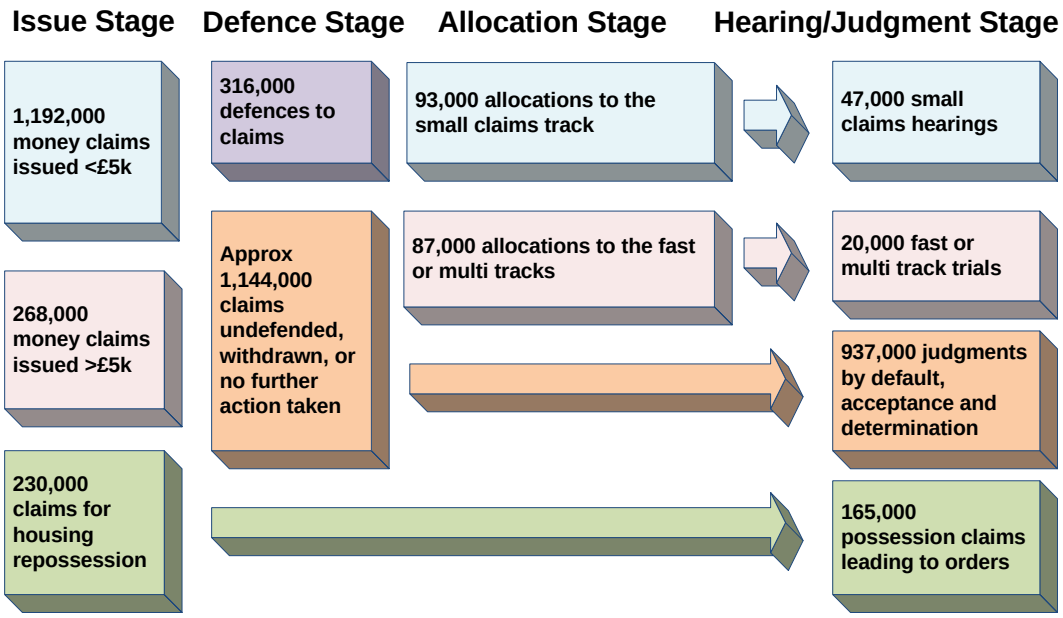
Outside the main civil court network, a substantial volume of civil cases are handled in the Magistrates' courts. This is largely public debt recovery, such

as Council Tax and other tax arrears cases. These cases can be transferred into the civil court for enforcement by charging orders and third party debt orders which are not available in the criminal courts' enforcement system.

The civil court process in the county courts

In 2009, some 1,460,000 money claims were issued in the county courts (see Figure 1). Of these, 1,281,000 were for a specified amount of money, and 179,000 were for an unspecified amount.

Figure 1: The current civil court process (figures for 2009)[51]



Before a dispute comes to court, parties are advised to follow the relevant pre-action protocol depending on the type of dispute. There are currently ten protocols covering various specialist areas of the court process. Having followed a particular protocol, and having been unable to settle the dispute, the claimant will ask the court to issue a claim to the defendant.

When a claim is defended, both the claimant and defendant are sent an allocation questionnaire, which the Judge uses to allocate the case to one of three tracks: the small claims track, the fast track or the multi-track. Claims in

[51] Judicial and Court Statistics 2009: http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm

each track follow a different procedure suited to the complexity and value of the claim

There are several factors that the court can take into account when allocating a claim to a certain track, for example, the views of the parties and the nature and complexity of the claim. However, the most straightforward way for the courts to distinguish between cases is on the basis of monetary value, so each different track has a financial limit, which determines what the normal track for a claim will be.

Small Claims

Small claims for the purpose of this consultation document are defined as civil claims that are defended and have been allocated to the small claims track. Typically they have a value of £5,000 or less. There are exceptions in the specific legal areas of personal injury and housing disrepair which have an upper value limit of £1,000. The small claims track is designed to be accessible by litigants in person. It has a simplified process and special rules on the costs that one party may have to pay to the other.

In 2009, 93,000 allocations were made to the small claims track. 7,300 cases settled via the small claims mediation service, there were 47,000 small claims hearings, with a further 38,700 claims being settled or withdrawn between the allocation process and the date of the hearing.

At the moment small claims are disposed of in two ways. The first route is via a small claims hearing before a District Judge (DJ). These hearings are conducted on a face-to-face basis with parties usually travelling to the county court nearest to the defendant (following the principle of automatic transfer to the defendant's home court). If all goes well an average small claim case takes approximately 6 months from issue to hearing.

The second route is the HMCS Small Claims Mediation Service which is accessible via judicial referral at the allocation stage or by the parties contacting the mediation service direct. In the vast majority of cases the DJ makes the referral rather than a direct self-referral by the parties. The mediation service sets up an appointment with both parties and approximately 98% of all appointments are conducted on the telephone. If mediation is unsuccessful the claim goes back into the small claims system for disposal by

a DJ. In the past two years, there have been some 10,000 mediations each year with a settlement rate of 73%.

Claims outside the small claims track

Claims outside the small claims track will usually be allocated by a Judge to either the fast track or the multi-track.

Typically, fast track claims have a value between £5,000 and £25,000. Multi-track claims are either more complex or have a monetary value over £25,000. Multi-track cases can be heard in either the High or county court – depending on the choice of court and the nature of claim. In 2009, 87,000 allocations were made to either the fast or multi-track, but there were only 20,000 trials. It is usual for both parties to be represented in higher value claims.

Fast track

The fast track is the normal track for cases with a financial value of between £5,000 to £25,000, and which can be disposed of by a trial which will not exceed a day. The following cases are also normally allocated to this track:

- Personal injury cases with an overall value under £5,000, but where the damages for pain, suffering and loss of amenity are likely to exceed £1,000;
- Claims by residential tenants for orders requiring their landlords to carry out repairs or other work to the premises where the financial value of the claim is between £1,000 and £25,000.

The trial will usually take place in the county court where it is proceeding. Usually the trial Judge will control the trial and the way the evidence is presented. The trial is expected to be completed within a day. A fast track trial can be heard by either a District or Circuit Judge.

Multi-track

The multi-track is intended for more complex and important cases. Any case not allocated to either the small claims track or fast track will be dealt with on the multi-track. The courts are expected to adopt a flexible approach to ensure that each case is dealt with in an appropriate way. Multi-track cases are managed by a procedural Judge, normally a DJ in the county courts or a

Master in the High Court. In more complex matters such as complicated commercial cases or group litigation, a Circuit Judge, or even a High Court Judge, will manage the case. Apart from specialised claims, most multi-track case management will normally be undertaken at a Civil Trial Centre. This management activity is largely carried out in case management conferences and pre-trial reviews.

The trial will normally take place at a Civil Trial Centre but it may be at another court if it is appropriate having regard to the needs of the parties and the availability of court resources. Like fast track trials, usually the trial Judge will exercise the power to order witness statements to stand as evidence in chief, and otherwise control the evidence to be presented. The trial usually lasts more than a day. Multi-track trials in the county courts are usually heard by Circuit Judges.

Default judgments

There are different types of county court judgments. In specified money cases the vast majority follow either no response from the defendant within the allotted time period (a default judgment), or the claimant accepts the defendant's offer to pay all or part of the amount owed (a judgment by acceptance or determination). These judgments are entered as an administrative function and generally don't involve a Judge. Overall, 937,000 judgments by default, acceptance and determination were made in 2009.

Enforcement

At present, in most cases, once judgment is entered against a party, the terms of the judgment are complied with and the money owed is paid. However, approximately one million judgment orders per annum are still not paid. The majority of judgment creditors seek to enforce their judgment orders by means of a warrant of execution (or writ of fieri facias in the High Court). However, in approximately a quarter of a million cases the judgment creditor needs to resort to another form of enforcement mechanism and it is the scope and range of these other methods that we are considering in this consultation.

The civil courts offer several different enforcement methods that a judgment creditor may apply for to recover money or property owed on a court order or judgment. These methods include Warrants of Execution, Attachment of Earnings, Third Party Debt Orders and Charging Orders. The processes are

individually designed to address different financial circumstances; and collectively they aim to make it as difficult as possible for judgment debtors to avoid their responsibilities. It is for the creditor to decide what method of enforcement to pursue, but additional costs of having to pursue unpaid judgment debts, such as court enforcement fees may be added to the outstanding sum due. There is, however, no guarantee that a judgment debtor will have the money or goods to pay the amount owed, or that they will co-operate with the court process.

Types of enforcement procedures

- Warrants of Execution - the most common method of enforcement which allows the judgment to be enforced by seizing the goods of the judgment debtor, for sale. A High Court Enforcement Officer (HCEO) or county court bailiff can be instructed to seize and sell the debtor's goods in order to satisfy the debt, legal costs and the costs of enforcement.
- Charging Orders – the second most highly used enforcement mechanism; a judgment debt is secured as a charge on a debtor's property, land, shares or unit trusts and recovered at the point of sale. Charging orders are subject to case law and judicial discretion.
- Orders For Sale – this mechanism is rarely used (approximately 700 orders per year) and is usually restricted to certain types of debts, as it requires a judgment debt already subject to a charging order. It compels the sale of the debtor's property. Like orders for sale it is subject to restrictive case law and judicial discretion.
- Attachment of Earnings - often the most effective method of enforcement where debtors are employed but without assets. This order can be made against income, except in the case of self-employed income and requires an employer to regularly make deductions from a debtor's salary and make payments to the court directly. There are currently some 77,000 attachment of earnings orders being managed by the Central Attachment of Earnings Payments System (CAPS), part of the County Court Bulk Centre.
- Third Party Debt Order – freezes the debtor's funds to the amount of the judgment debt to stop the judgment debtor taking money out of their bank or building society account until the money owed to the judgment creditor is paid from the account. A third party debt order can also be made against anyone (a "third party") who owes money to the judgment

debtor. Subject to judicial discretion, but currently only applies to single current accounts and is little used by creditors (approx 7,000 pa) due to not having kept up to date with digital and modern banking practices.

In the event that creditors are uncertain about the most effective means by which the judgment can be enforced they can apply to the court for an Order to Obtain Information. This is not a form of enforcement; it is a way of getting information from the debtor. These oral examinations have proven to be effective in establishing details of assets which may be enforced against.

It is important to note that it is for the creditor to decide what method of enforcement to pursue and to apply to the court and pay the appropriate fee. The onus is also firmly on the creditor to find out any information required by the court to issue any of the enforcement proceedings. In the case of companies, the debtor's registered company address is obviously key to all of them but the public at large are often unaware of company laws and get caught out by loopholes and devices which debtors can employ to avoid meeting their responsibilities. We would particularly like, therefore, to close some of these loopholes and to extend the range of enforcement mechanisms to apply to those debtors who seek to avoid repaying their judgment debts. We aim to make the enforcement system more relevant to today's commercial practices with quicker, more efficient processes for creditors and debtors to use.

Housing repossession

Apart from money claims, repossessions represent one of the largest areas of civil business. In 2009, there were 94,000 mortgage repossession claims, 98,000 social landlord repossession claims and 38,000 private landlord repossession claims – a total of 230,000 repossession claims.

Current rules state that such claims must be started in the county court for the district in which the land is situated. The standard procedure is for the claim issued to be given a hearing date before a DJ. Because of the very low level of engagement and attendance for both mortgage and rent matters, each case is allocated approximately 5 minutes of court time. Overall, 165,000 claims led to possession orders being made in 2009, with 53 per cent (88,000) of all claims leading to orders being made that were not suspended (possession given immediately or by a given date).

The Road Traffic Accident Personal Injury Scheme

The RTA PI Scheme was implemented on 30 April 2010. It provides for early notification of claims; promotes early admissions of liability and early settlements; and removes duplication of work from the process. It introduces fixed time periods and fixed costs which are recoverable by the successful party to reduce the time and costs involved in settling disputes. This in turn means that the claimant receives compensation more quickly. The Ministry of Justice worked with a balance of key claimant, claimant solicitor and insurer representatives to agree the process and the associated fixed costs for each stage. A key element of the process is that it mandates the electronic exchange of information and the industry has therefore developed a secure IT portal system to allow for this. This system is currently funded by the insurance industry; however it is likely that claimants using the portal will be required to pay a small fee in the future.

Presently, the process applies to RTA personal injury claims valued between £1,000 and £10,000 and is split into three stages:

Stage 1 - Providing early notification of claims to defendants and insurers

A claims notification form (CNF) is sent electronically to the defendant's insurer. Where the CNF has been correctly completed, the defendant's insurer has 15 business days in which to respond - electronically - with the exception of the Motor Insurers' Bureau, who have 30 days to respond.

Fixed recoverable costs of £400 are paid at the end of Stage 1 where liability is admitted (whether or not contributory negligence is alleged).

Stage 2 - Medical evidence, offers to settle and negotiation

Once the defendant's insurer has made an admission of liability, the claimant solicitor obtains a medical report. Where it is clear from the outset that an additional medical report is necessary from a medical expert in a different discipline, a second report may be obtained from a medical expert in that discipline. There is no fixed timetable for obtaining the medical report.

Within 15 business days of the report being confirmed as factually accurate, the claimant solicitor completes the Stage 2 settlement pack form. This is sent electronically to the insurer, together with the medical report and any receipts/evidence of special damages claimed.

The insurer has 15 business days from receipt of the settlement pack to consider and either accept the claimant's offer or make a counter offer. Where the defendant's insurer makes a counter offer, there is a further 20 business days for consideration and negotiation between the parties.

Where agreement on quantum has not been reached at the end of the 20-day consideration and negotiation period, the claimant will prepare the Stage 3 version of the settlement pack form. Where the parties have not reached agreement to settle the case by the end of the negotiation period, the next step will be a Stage 3 hearing to determine quantum.

Fixed recoverable costs of £800 apply to all claims taken forward under this process from the beginning to the end of Stage 2. The costs are payable at the end of stage 2 together with disbursements and where the case settles the standard fixed success fee for road traffic accident claims on stage 1 and stage 2 costs[52].

Stage 3 - Where quantum cannot be agreed

Where quantum cannot be agreed by the end of Stage 2, an application is made to the court to determine quantum. There are separate fixed recoverable costs for claimant solicitors for Stage 3 of the process for paper (£250) and oral hearings (£500). If the claim concludes at trial a fixed success fee of 100% applied to Stage 3 costs only.

Where an offer is made and settlement is reached between the issue of the claim and before the trial commences, fixed recoverable costs of £250 will apply and there will be a fixed success fee of 12.5%. The agreed damages and fixed costs are paid within 10 days of a settlement being reached.

[52] 12.5% as set out in CPR Part 45 Section III where the claim is funded on a conditional fee arrangement. It should be noted that the Government has announced its intention generally to abolish recoverability of success fees (and ATE insurance premiums) in all civil claims.

Published by TSO (The Stationery Office) and available from:

Online
www.tsoshop.co.uk

Mail, Telephone Fax & E-Mail
TSO
PO Box 29, Norwich, NR3 1GN
Telephone orders/General enquiries 0870 600 5522
Order through the Parliamentary Hotline Lo-Call 0845 7 023474
Fax orders: 0870 600 5533
E-mail: customer.services@tso.co.uk
Textphone: 0870 240 3701

The Parliamentary Bookshop
12 Bridge Street, Parliament Square,
London SW1A 2JX
Telephone orders/General enquiries: 020 7219 3890
Fax orders: 020 7219 3866
Email: bookshop@parliament.uk
Internet: http://www.bookshop.parliament.uk

TSO@Blackwell and other Accredited Agents

Customers can also order publications from:
TSO Ireland
16 Arthur Street, Belfast BT1 4GD
028 9023 8451 Fax 028 9023 5401

ISBN 978-0-10-180452-3

9 780101 804523