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

The Government Response

February 2012

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The Government Response

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

February 2012

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Ministerial Foreword

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

An effective justice system is the cornerstone of a civilised society, and at its heart is our framework of civil law. While it is criminal justice that understandably attracts most media attention, it is the civil justice system upon which ordinary members of the public rely every day to resolve bread and butter issues that really matter to their lives. The system's significance is reflected in the volume of claims - more than 1.5 million in 2010 alone - and their subject – with concerns ranging from housing and consumer disputes to debt and personal injury.

Without effective civil justice, businesses couldn't trade, individuals couldn't enforce their rights, and government couldn't fulfil its duties. So it's important that the system helps people to resolve their problems quickly, efficiently and cost-effectively.

Despite many strengths, our system is not working as well as it should. Whether it's the individual that has a debt, or the business that is trying to get back what it believes it is owed, or the homeowner that might be facing repossession, too often disputes get bogged down in the legal system that could have been resolved outside it. Once in the system, cases are resolved too late, too expensively, with complex procedures and an adversarial climate imposing costs that sometimes dwarf the value of the contested claim.

This is the backdrop to the reforms that we are committed to introducing. Last year we announced plans to reform the current 'no win no fee' conditional fee agreements regime. At the moment, cases can be opened with very little risk to claimants and the threat of substantial cost to defendants, a lack of balance which has contributed to the risk of a compensation culture by making it too easy to bring weak claims. We are implementing proposals originally developed by Lord Justice Jackson that seek to restore balance in the way costs are allocated.

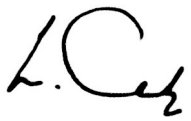
This paper builds on that work by setting out our plans to reform the administration of civil justice. The proposals it contains are based on the consultation paper we published in March. We are very grateful for the responses received, which we have considered very carefully.

Our aim is to deliver a system that prevents the unnecessary escalation of disputes before cases reach the court room; where courts offer quicker and more efficient services where they are needed; where judgments can be

enforced fairly; and where costs are borne in a fair way. The proposals we are taking forward include:

- Expanding mediation by building on the mediation service that has proved so popular with those who have small claims for less than £5,000. This service has received very high levels of customer satisfaction, and has been used to resolve almost 15,000 disputes over the past two years. And, since it is primarily a telephone-based service, that means up to 30,000 parties that have been able to resolve their disputes without ever having to travel to court. With the introduction of automatic referral to the small claims mediation service, we want to see this service expand to offer mediation to all 80,000 disputes that are currently allocated to the small claims track.
- Expanding the small claims track, initially to £10,000, since many of the cases that fell into the small claims track back in 1999, are now routinely treated as fast track cases with associated costs.
- Introducing a fixed-cost simplified claims procedure for more types of personal injury claims, similar to that which was introduced in 2010 for road traffic accidents under £10,000.
- Going ahead, as soon as is feasible with our proposals for streamlining enforcement processes, implementing some of the Courts, Tribunals and Enforcement Act provisions and to introduce a minimum threshold for Orders for Sale.
- Finally, there was widespread endorsement for all of the structural reforms we proposed in March – creating a better balance of work and resources between the county court and the High Court, as well as introducing a single county court jurisdiction for England and Wales.

Taken together with those reforms already announced, we believe these changes will bring benefits both to individuals and business, creating further opportunities for disputes to be resolved at less cost, and in many more cases, earlier, without the stress often associated with a court hearing. The ultimate objective is a system that delivers justice more effectively, and for more people to be empowered with the knowledge and tools required to resolve their own disputes. We commend these steps towards a modern and effective civil justice system.



Kenneth Clarke
Lord Chancellor and
Secretary of State

Jonathan Djanogly
Justice Minister

Introduction and Contact Details

This document is the post-consultation report for the consultation paper, 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system'.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Judith Evers** at the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

Alternative format versions of this publication can be requested from CivilTJ@justice.gsi.gov.uk/020 3334 3182.

Background

The consultation paper ‘Solving disputes in the county courts: creating a simpler, quicker and more proportionate system’ was published on 29 March 2011. It invited comments on a number of proposals to reform the civil justice system in the courts in England and Wales.

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. 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.

We want a new civil justice system where:

- disputes are resolved in the most appropriate forum, with processes and costs being commensurate with the complexity of the issues involved;
- citizens take responsibility for resolving their own disputes as much as possible, with the courts being focused on adjudicating particularly complex or legal issues;
- procedures are citizen and business friendly, with services focused on the provision of timely justice; and,
- citizens are aware of the options open to them so that, where possible, they can take action early, make informed decisions and more readily access the most appropriate services.

The consultation paper therefore set out a range of options to help meet this goal, including:

- 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;
- a dispute management process with 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);
- a requirement for all cases below the small claims limit to be automatically referred to mediation, before being considered for a hearing;
- mediation information sessions for claims above the small claims limit;

- providing a simpler and more effective enforcement regime;
- a number of jurisdictional changes in the civil courts, including the introduction of a single county court jurisdiction for England & Wales.

The consultation period closed on 30 June 2011 and this report summarises the responses, including how the consultation process influenced the final policy development.

The impact assessments accompanying the consultation document have been updated and are available at www.justice.gov.uk

A Welsh language version is available at www.justice.gov.uk

A list of respondents is at Annex A.

Summary of responses

1. A total of 319 responses to the consultation paper were received. Of these, 44% were from members of the legal profession and 11% from mediators/mediation provider organisations. Responses were also received from the advice sector, the judiciary, businesses, insurers, local authorities, banks, academics, and members of the public.

2. The responses have been analysed by question to determine whether there is agreement with the proposals set out in the consultation paper. Likewise, we were just as interested to read the reasons from those not wanting to see change in the specified areas, or having alternative proposals of their own.

3. The following summarises the responses according to the four themed chapters set out in the consultation paper.

Preventing cost escalation

4. This chapter covered methods of keeping court costs low through use of financial thresholds, pre-action protocols and fixed costs.

5. There was general support for extending the scheme for low value road traffic accident claims (RTA PI scheme), and for introducing a similar simplified claims procedure on a fixed costs basis for other personal injury claims. However, since the scheme only began operating in April 2010, and there was a lack of evidence as to its effectiveness, plus some initial problems with the industry's electronic portal, respondents advised caution in extending the scheme, or introducing similar schemes, too quickly.

6. There is no strong appetite for developing mandatory pre-action directions; but there is support for increasing the small claims limit.

Alternative dispute resolution

7. This chapter discussed methods to increase the use of mediation and the availability of information about it.

8. There was support for all small claims to be automatically referred to mediation, on the understanding that this was not compulsory mediation, but rather a requirement to engage with a small claims mediator with a view to considering mediation. However, there was rather less support for mandatory mediation information sessions.

Debt recovery and enforcement

9. This chapter set out a range of enforcement reforms aimed at improving the effectiveness of enforcement processes, reducing duplication and streamlining procedures.

10. The majority of respondents supported implementation of the provisions in the Courts, Tribunals and Enforcement Act 2007 ("the TCE Act"), which have already been approved by Parliament. A small majority were in favour of a minimum threshold for order for sale applications. A large majority supported many of the modernising proposals and the streamlining of other enforcement related processes.

11. The majority of responses expressed robust views about retaining the authority and protection of the court in the enforcement of debts, rather than allowing enforcement processes directly by third parties.

Structural reforms

12. This chapter discussed jurisdictional changes between the county and High Court and the creation of a single county court.

13. The structural reform proposals received strong support, in particular, the establishment of the single county court for England and Wales; an increase in the equity jurisdiction of the county court from £30,000 to £350,000; and, an increase in the financial threshold for cases to be commenced in the High Court from £25,000 to £100,000.

Conclusion and next steps

14. Following the responses to the consultation document, the Government has agreed a package of measures to reform the civil justice process.

Preventing cost escalation

Extending the financial limit of the RTA PI scheme, and introducing similar schemes for other personal injury claims

15. While the majority of respondents supported the principle of extending the RTA PI scheme, many advised caution in doing so too quickly. The scheme was only launched in April 2010 and there is limited management information available to enable an evaluation of its impact. Therefore, while the Government plans to increase the financial limit of the RTA PI Scheme to £25,000, consideration will be given to the timing of the extension, following a full evaluation of the existing RTA PI scheme, following which we will publish our final impact assessment of the proposed extension.

16. Concerning a similar scheme to cover employers' and public liability claims, the Government is aware of specific concerns raised in relation to issues of causation and contributory negligence. Consequently, while we plan to introduce a scheme for such claims, further consultation with key stakeholders will be required to agree the detail.

17. The Ministry of Justice also intends to work closely with the National Health Service Litigation Authority (NHSLA) and the Department of Health to evaluate their pilot scheme for clinical negligence claims before considering the introduction of a similar scheme for low value clinical negligence claims.

Developing mandatory pre-action directions

18. With regards to the development of mandatory pre-action directions for money claims under £100,000, many felt that the existing pre-action protocols were sufficient. On balance therefore, the Government does not recommend the development of mandatory pre-action directions until we have considered the effectiveness of the current pre-action protocols and whether and how these could be simplified to ensure a more streamlined and cost effective process.

19. Specifically, on the pre-action protocols for rent arrears and mortgages, it was felt that the remedy for non-compliance was not compulsion, but for the courts to use their existing powers more effectively.

Implementing a system of fixed recoverable costs, similar to that proposed by Lord Justice Jackson in his review of civil litigation costs.

20. The Government intends to extend the system of fixed recoverable costs, subject to further discussions with stakeholders about details of how best to extend, to include claims up to a higher value and across a broader range of personal injury.

Increasing the small claims track limit

21. Concerning the small claims limit, a majority of respondents either favoured no increase or an increase up to £10,000, rather than a figure as high as £15,000. Consequently, the small claims ceiling will be increased to £10,000. However, considering there was also significant support for increasing the small claims track limit to £15,000, the Government's aim is to further increase the limit from £10,000 to £15,000 in the future after full evaluation of the increase to £10,000. There will be no change to the current limit for personal injury and housing disrepair claims.

22. It is also proposed to change the Civil Procedure Rules (CPR Rule 26.7(3)), to allow the judiciary to refer business-to-business disputes and other suitable cases with a dispute value over £10,000 to the small claims track without requiring the consent of the parties. The judiciary will also have the option of referring more complex cases with a case value below £10,000 to the fast track if that is also considered appropriate.

23. Since the fast track limit was increased to £25,000 only in 2010, and respondents were evenly divided about whether it should be increased again, the Government does not recommend a further increase at this time.

Alternative dispute resolution

24. All small claims should be automatically referred to mediation, on the basis that this is not compulsory mediation, but rather a requirement to engage with a small claims mediator. Further analysis is required on how the service should best be delivered – probably by a combination of in-house Her Majesty's Courts and Tribunals Service (HMCTS) mediators, supplemented by civil and commercial mediation providers under contract with HMCTS. Given the further development that is required, it is likely that in the first instance, cases with a value of up to £5,000 will be automatically referred to mediation. Only once that has become established, will consideration also be given to automatically referring other cases up to £10,000 – the proposed new upper limit for the small claims track.

25. It is not proposed to introduce mandatory information sessions for higher value claims. However it is recognised that there remains a lack of

knowledge about the use of ADR and mediation as a mechanism for resolving disputes. It is therefore proposed that we should assess the effectiveness of mediation information delivered by various means, including telephone, face-to-face, web and hard copy formats at various stages of the pre and post issue process. The Ministry of Justice also plans to work with the Law Society to better reinforce the role of the legal profession, when discussing options with their clients, to explain whether mediation or some other ADR procedure may be more appropriate than litigation, since this is already stated in the 'client care guidance' of the Solicitors Code of Conduct (Rule 2.02(1) (b)).

26. It is proposed that parties in low value small claims cases should be given the opportunity to choose whether their small claim is determined on paper, but only if the judge agrees that the case is appropriate. The proposal to make greater use of telephone hearings in small claims cases should not be taken forward until more reliable technological options are available to courts.

27. Since the EU Mediation Directive only came into force in May 2011, it is too soon to introduce similar provisions for domestic disputes. A methodical review of the current domestic law, in consultation with the mediation and legal profession, is required to determine what types of provisions, if any, are needed.

28. The Ministry of Justice will continue to work with the Civil Mediation Council (CMC) to make the accreditation process for mediation providers more robust, together with possible measures to enable individual mediators to also be accredited by the CMC, or another body.

Debt recovery and enforcement

29. The Government will proceed with commencement of Section 93 of the TCE Act 2007 (allowing charging orders in applications where instalment orders are in place).

30. The Government will proceed with the commencement of Section 94 of the TCE Act 2007 to introduce a minimum threshold of £1,000 in applications for orders for sale, but will limit it to Consumer Credit Act debts.

31. The Government acknowledges the overwhelmingly positive response to the proposal to implement the provisions of Sections 91 & 92 of the TCE Act 2007 to commence provisions for Attachment of Earnings fixed tables and Tracing Orders. The Government agrees in principle that these reforms will save court resources and costs and should be implemented when resources are available to do so.

32. We will streamline the procedures for the obtaining of Third Party Debt Orders and Charging Orders.

33. The Government acknowledges the positive response to the proposals to introduce Information Orders and Information Requests, as outlined in Sections 95-105 of the TCE Act. It agrees in principle that these would be an important progressive step towards improving the effectiveness of enforcement options, and will implement these provisions when resources are available to do so.

34. We do not intend to continue with proposals to extend the authority of the court judgment order to third party providers at this time. This is due to the force of argument against removing the court's authority and protection from the enforcement process.

35. Concerning the devolution of all civil enforcement administration to the county court, we will continue to refine the policy around enforcement jurisdictions to allow the administration of all civil non-bailiff enforcement to be undertaken in the county court.

Structural Reforms

36. The Government will increase the financial limit below which equity claims may be commenced in the county courts from £30,000 to £350,000.

37. The financial limit below which non-PI claims may not be commenced in the High Court will be increased from £25,000 to £100,000.

38. The County Court Remedies Regulations 1991 will be amended to extend the power to grant freezing orders to suitably ticketed circuit judges in the county courts.

39. Specialist claims - for variation of trusts, 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, will be removed from the jurisdiction of the county courts and placed under the exclusive jurisdiction of the High Court. Further discussions between Ministry of Justice officials and the judiciary will determine the full range of specialist proceedings affected.

40. The requirement to obtain the authorisation of the Lord Chancellor before a High Court judge may be permitted to sit in the county court will be repealed, and a general provision introduced to enable High Court judges to sit as a judge of the county court, as the requirement of business demands.

41. A single county court, operating as a single national entity for England and Wales, will be established. The single county court will replace the current county court structure by removing the geographical and jurisdictional boundaries that enable county court houses to represent the district in which they are located and to operate with their own identity.

Responses to specific questions

Preventing cost escalation

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

42. This question was answered by 194 respondents, of whom 88 (45%) agreed, and 106 (55%) disagreed that the current RTA PI scheme's financial limit of £10,000 should be extended.

Against extension of RTA PI Scheme

43. Half of the respondents to this question argued that it was premature to extend the scheme given the lack of financial or management information on which to properly base any decision to extend. Many also said that 'teething' problems with the portal used within the scheme had yet to be resolved satisfactorily.

44. Many members of the legal profession opposed to the extension argued that the RTA PI scheme was inappropriate for cases over £10,000 as not only are they usually more complex, involve more defendants and require a greater volume of expert evidence but liability is more often in issue, meaning that they would drop out of the scheme in any event. Many also pointed out that the additional percentage of cases likely to be captured by extending the scheme would be marginal given that the current scheme captures upwards of 80% of the RTA market already. Some went on to say that an extension would be a disproportionate means of achieving the desired end. Others raised concerns about cases in an extended scheme being improperly handled by 'claims farmers' and bulk handling firms of solicitors. They also suggested that an extension could create significant unfairness for claimants, as premature settlement may be to their disadvantage, especially where the scheme does not adequately allow for proper investigation before settlement.

In favour of extension of RTA PI Scheme

45. Generally, support for an extension was on the basis that initial feedback has indicated that the existing scheme is working well and has had a positive effect on costs with a more proportionate cost to damages ratio. Many respondents (from all sectors) believed that the scheme is achieving its objectives as a more efficient claims handling process providing a structure to promote proportionality and predictability. They consider that it delivers benefits in straightforward disputes with reduced timescales, earlier payment of compensation at a lower cost and in a less adversarial

environment. Some also argued that the complexity of a case, rather than value, should be the only factor to make the scheme inappropriate in individual cases.

46. A quarter of all those in favour urged caution in extending a scheme that has only been in operation for just over a year and which has not been without significant problems including technical, practical and inconsistencies with the Rules. Some suggested a further 12-18 months were needed before a proper evaluation could be carried out whilst others proposed extension on an incremental basis.

47. Other respondents who were in favour of an extension in principle voiced concerns and pointed out potential pitfalls with rushing any extension. These included: IT issues, avoiding a repeat of the difficulties experienced when the current scheme was implemented by not subjecting an extension to excessively tight timescales, ensuring the evaluation establishes fairness to both sides and good planning.

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)?

48. Almost three-quarters of those responding to this question favoured extending the scheme's financial limit to £25,000, although some commented that an incremental increase with further reviews before extending to this limit (or even beyond) was more appropriate. The main supporters for an increase to this figure came from members of the legal profession (38%) and the insurance industry (22%).

49. 38% of all those agreeing with an extension to £25,000 considered that cases over that limit moved into an area of more complexity that would fall out of the process due to more in-depth investigation and negotiation being required. Many also referred to the fact that extending to this figure would capture around 95-97% of all RTA PI claims. Many respondents suggested that the £25,000 limit should be reviewed in any event after a suitable period of time and some believed it should be aligned with the fast track limit with these limits rising together in the future.

50. A few suggestions for increasing the limit to other figures included £15,000, £20,000 and £50,000 or just in line with the fast track limit.

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?

51. This question was answered by 174 respondents, of whom just 31% agreed and 69% disagreed. Almost two-thirds of those who disagreed were from the legal profession.

Against retaining same fixed costs regime if limit raised

52. There was a conflict of views from members of the legal profession and the insurance industry on this question. The legal profession was very strongly of the view that the current fixed costs regime is set too low with more than two-thirds arguing that cases over £10,000 involve more complexity of factual and legal issues requiring more work to be undertaken by more experienced and skilled lawyers. Many also argued that costs would be better assessed by the judiciary.

53. This argument was countered, however, by the majority of respondents from the insurance industry who expressed the view that the current level of fixed fees is too high and a case up to £25,000 does not require any more work than a case of £10,000 in value, certainly within Stages 1 and 3 of the RTA PI Scheme. There was also a strong call for abolition of referral fees in personal injury cases. A small number from the legal profession agreed with the insurers' view that the current level is set too high, acknowledging that additional work would be required for higher value claims within Stage 2 only, as the same level of work was likely to be required within Stages 1 and 3 whether the claim was for £10,000 or £25,000.

54. Views received from other respondents were split between those detailed above but there were some calls for a review of the actual cost and time involved in a typical RTA claim.

In favour of retaining same fixed costs regime if limit raised

55. The majority view of those in favour of retaining the same fixed costs regime was that work on higher value claims was not radically more complex than that on claims falling within the current scheme. However, some respondents were of the opinion that whilst the current rates are adequate to deal with straightforward claims, some modifications may be needed to deal with more complex evidential issues or in cases of more serious injuries where extra time and attention would be required.

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

56. Of the 111 who answered this question, 48% considered there should be a different tariff of costs dependent on the value of the claim. The legal profession was, however, equally split in their views for and against a different tariff of costs.

In favour of a different tariff of costs

57. The majority of respondents commented that costs should be set at a level that reflected the complexity of claims as well as the value, with many also sharing the view that a sliding or banded scale of costs may be most appropriate. A few minority views were as follows: some supported the idea that a tariff should have suitable exit provisions built in to provide for unreasonable behaviour or special circumstances, details of which could be agreed; others considered that a judicial objective individual approach is a fairer system; or that the government should support inter party negotiations, with stakeholders reaching agreement of what tariffs for higher value claims should be.

Against a different tariff of costs

58. There was a strong view that the value of a claim alone is not determinative of the complexity of issues involved and that the costs should reflect the actual activity required to process a claim.

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

59. Many responses to this question concentrated more on the industry portal set up to support the RTA PI process than the process itself but a great number of respondents provided very specific and detailed views on modifications they considered were required. All comments and suggestions will be considered in greater depth but some of the main points made included:

    - Increase £1,000 interim payment threshold for higher value claims,
    - Delay payment of stage 1 costs,
    - Allow more evidence/reports from experts and additional disbursements,
    - Reconsider timescales for higher value claims,

- Introduce sanctions and realistically achievable 'escape' mechanisms,
- Panel of agreed experts,
- Future proof and ensure system robust, with adequate piloting and testing.

Q6: Do you agree that a variation of the RTA PI Scheme should be introduced for employers' & public liability personal injury claims? If not please explain why.

60. This question was answered by 165 respondents, of whom 88 (53%) agreed and 77 (47%) disagreed.

61. The majority of those who agreed 30 (35%) were from the legal profession followed by 18 (20%) from the insurance industry. In particular those who agreed supported the notion of streamlining claims to obtain quicker compensation payments. However, extension should be limited to accident claims and certain claims (e.g. disease, abuse and multi-defendant) should be excluded. Some questioned whether to introduce any extension, unless there was some sort of guarantee that a large number of claims would remain in the scheme.

62. Those not in favour stated that compared to the standard RTA claims, which are relatively straightforward, this is not the case for Employers' Liability (EL) and Public Liability (PL) claims. The respondents point out, that EL and PL claims involve complexity and give rise to issues of causation and contributory negligence. One respondent stated, "No clear reasoning has been advanced as to what has changed in the complexity of EL/PL cases, or alternatively, in the inability of any scheme to deal with them effectively in light of their complexity." A common problem in PL cases is identifying the correct defendant or multiple defendants. These cases may prove to be difficult to shoehorn into any workable protocol.

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)?

63. This question was answered by 86 respondents, as follows:

- 36 (42%) considered that £25,000 should be the limit set as this would allow consistency of approach in line with the new proposed RTA PI limits. However, others suggested that it would be sensible to introduce a lower value first to identify any problems.

- 31 (36%) believe that £10,000 should be the limit as this would capture 80% of all EL and PL claims.
- 10 (12%) considered £50,000 should be the limit as a significant number of claims would be captured between the values of £25,000-£50,000 unlike those claims for RTAs.
- 9 (11%) stated some other figure should be set. Some of the respondents suggested that £20,000 should be introduced due to medical complexity. Others suggested that all EL and PL claims should start off in the portal.

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

64. This question was answered by 126 respondents, of whom 79 (63%) were from the legal profession.

65. Those who responded stated that there should be a database of insurers and attention should be given to timescales; particularly in stage one of the process. Concerns were raised that modifications will be significant and overly bureaucratic. Questions of causation may be frequently encountered and mechanisms in any proposed stage two will need to account for this. Others suggested that the portal lends itself to PL claims.

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.

66. This question was answered by 135 respondents with the majority 92 (68%) answering no and 43 (32%) answering yes.

67. Those who answered no, stated that in clinical negligence cases, the vast majority are complex and costs were high because reports and investigations are needed. Others pointed out that the test for the standard of care to prove negligence is much higher than that for personal injury claims.

68. Those who answered yes, stated that sanctions should apply to the NHS to provide information swiftly. Others questioned the volume of claims that would be captured by such a scheme, and that any proposed scheme should take account of complexity.

Q10: If your answer to Q9 is yes, should the limit for the new scheme be set at (i) £10,000, (ii) £25,000, (iii) £50,000 or (iv) some other figure (please state with reasons)?

69. This question was answered by 49 respondents, as follows:

- 13 (25%) suggested that £10,000 should be the limit stating that these types of claims are not straight-forward and that any scheme must take account of complexity and that any clinical negligence scheme should be limited to no more than £10,000. One respondent suggested that the limit should start at £10,000 in the first instance, in order to test the water, and if there are no major problems after a year long pilot trial, then it could be extended to £25,000 and possibly £50,000.
- 23 (48%) considered that a limit of £25,000 would cover a high proportion of NHSLA's clinical negligence claims. Others stated that such a scheme is likely to draw in additional claims, which would not otherwise have been made.
- 7 (14%) said that £50,000 was the appropriate limit, citing simplicity and parity with all other court based schemes.
- 6 (13%) responded by suggesting that the value should be set at around £10-£15,000 and stating that a pilot may be the best option and, if the pilot is successful, then the scheme could be extended to £25,000.

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

70. This question was answered by 98 respondents of which 61 (62%) were from the legal profession.

71. The majority of respondents expressed the view that any scheme designed to settle clinical negligence claims must take into consideration the very large volume of documentation required from the outset. Others pointed out that any scheme should have a pilot before it is introduced. Distinctions would need to be made between NHSLA defended claims and non NHS claims such as GPs, dentists and other medical personnel. One respondent pointed out that attempting to fix costs would also require both research into current cost levels and a matrix that would be sufficiently broad in scope to encompass the wide variety of cases within this category. A further modification suggested was that any scheme should have a longer period of time to allow the defendant to investigate liability prior to the deadline for making an admission of liability.

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.

72. This question was answered by 162 respondents. 94 respondents (58%) were in favour of the proposal and 68 (42%) were against.

73. The largest group responding were legal professionals who made up 90% of those who did not agree with the proposal and 30% of those who did agree. Those who disagreed cited the fact that no two cases were the same and that there were many variations of personal injury cases in the fast track. Many respondents supported retaining the current judicial assessment system and believed the courts already had the power to control costs. Others said that a fixed costs regime would only be viable if the rates were set at a realistic level to allow a solicitor to investigate and quantify a client's claim. Some mentioned that escape provisions should be factored in for cases where fixed costs are clearly not appropriate.

74. Those who supported the proposal were more broadly spread across several categories of respondent. Many who were in favour said it would bring proportionality and would avoid disputes over costs. Members of the legal profession said that the proposal would focus the mind on efficiency and would encourage greater use of technology. Again it was suggested that fixed costs not be set at levels where the overriding objective was to have a cheap and quick outcome at the expense of quality justice. It was suggested that the rates should be fixed on the amount of work involved rather than the value of the claim. The Association of District Judges support fixed recoverable costs for all fast track cases, highlighting that if there was anything unusual or complex about a case it would not be in the fast track.

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

75. There were 185 responses to this question. 94 respondents (58%) were in favour of the proposal with 68 (42%) against.

76. Again nearly 90% of those against the proposal were legal professionals, with 30% of those in favour from the same profession. Many of those against the proposal reflected on their answers to question 12. Additionally, a number of respondents said the proposal covered too wide a breadth of cases and that costs in these cases were not as predictable as in personal injury cases. There were concerns that fixed costs would lead to a fixed process which would impact on access to justice. A

concern was raised that fixed costs only work for bulk litigation where solicitors are able to cross subsidise between different cases. Some said they were against the proposal as there had been no consideration of empirical evidence to assess the level at which fixed costs could be set for suitably homogenous cases. It was said that if fixed costs are introduced in personal injury cases, these should be monitored and a full impact assessment prepared before extension to other areas is considered. It was suggested that any level of fixed costs should be reviewed in the future to ensure they are not eroded by inflation.

77. Many of those in favour also referred to their answers in question 12. Further comments, including from both claimant lawyers and the insurance industry, emphasised the need that any rate/rates of fixed costs should be set at levels appropriate to the work undertaken. It was pointed out that this would give certainty over costs for a claimant and defendant alike, forcing the parties to be proportionate and proficient. The senior judiciary support a system of fixed costs in the fast track and the Personal Injury Bar Association saw no reason why recoverable costs should not be fixed for all fast track cases, but that a 'one type fits all' approach to fixed costs in the fast track would not be appropriate. A local authority said that at times when such authorities are facing tight financial measures any ability to give certainty and predictability of claim values would be welcome. A financial institution pointed out that fixed costs should encourage settlements and ensure that costs issues do not get in the way of sensible commercial settlements being agreed in appropriate cases.

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

78. There were 93 responses to this question. Those commenting referred back to their responses to the previous two questions. However, a number of those responding added that in general there would be limited exceptions where fixed costs for fast track cases would not be appropriate.

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.

79. There were 175 responses to this question. 90 agreed with the proposal (51%) and 85 (49%) disagreed.

80. Those disagreeing expressed concerns that solicitors would be under remunerated in cases where considerable work was required pre-trial. Some respondents said that pre-action behaviours could drive up cost

and one suggested that, with limited funding pre-issue, more cases would end up at court that might have otherwise settled. Other respondents were concerned that fixing costs could limit the capacity to obtain expert evidence and more generally about obtaining justice for a party to a dispute.

81. Those agreeing with the proposal said that it would lead to more proportionality and would encourage the representatives of the parties to a dispute to deal with cases more expeditiously. It was suggested fixed costs would be effective in maintaining momentum in a case towards settlement. A strong view of those that agreed with the proposal was that it would increase certainty and predictability in a case. One respondent organisation put forward the proposal that costs should be fixed by reference to the number of hours of work rather than an overall fixed sum. Some respondents, although agreeing with the proposal, suggested that there should be a mechanism for escaping fixed costs in exceptional circumstances.

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

82. This question was answered by 211 respondents, 129 (61%) of whom were in favour of the proposal, whilst 82 (39%) were against it.

In favour of mandatory pre-action directions

83. All insurers and the majority of mediation providers supported mandatory pre-action directions. The common view expressed by insurers was that mandatory pre-action directions would reduce legal costs, particularly if the directions were underpinned by a fixed costs regime. Many also suggested that mandatory directions would promote effective case management, discourage non-meritorious cases and provide an early focus on the issues between the parties. However, whilst being in favour in principle, some were concerned about the level of detail required to ensure all eventualities were accounted for and that this may be counter-productive. There were also concerns about compliance, with many insurers keen to see robust sanctions for those who fail to comply.

84. 42% of the 112 legal representatives that responded were also in favour of this proposal. Many showed support for the current suite of pre-action protocols and considered that they could be strengthened to ensure compliance. A common reason for support amongst all categories of respondent was that mandatory pre-action directions would encourage early settlement.

85. Whilst almost all mediators who responded were in favour of the proposal, most included caveats, such as ensuring that the pre-action directions do not render the process disproportionate and that access to justice remains a right, not a privilege. One mediator suggested a pilot at a number of courts in order to test the benefits of such a prescribed process before it is rolled out more widely.

Against mandatory pre-action directions

86. Respondents who were against the introduction of mandatory pre-action directions included all of the judiciary and the majority of the legal profession. In addition, 5 out of the 7 financial institutions who responded were against the proposal. Their concern was that for money claims, admission of liability is often not the issue; it is the debtor's ability or willingness to pay. Therefore court action is usually used as a means of enforcing the debt. One respondent pointed out that where the debt is regulated by the Consumer Credit Act, there is a standard pre-action process which companies must follow.

87. A common view amongst all those against the proposal is that mandatory pre-action directions would place undue burdens on parties, particularly claimants, and this would introduce delay and increase upfront costs. Many were concerned that enforced mediation/ADR, particularly in debt cases where the debtor refused to pay, was inappropriate.

88. Many respondents, including members of the judiciary, were of the view that the existing pre-action protocols go far enough, but recognised that these could be strengthened, particularly around sanctions for non-compliance. The judiciary in particular said that cases should be managed by the court, with tailored case-specific directions and referral by a judge to mediation/ADR only where appropriate.

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)?

89. 109 respondents answered this question, of which 83 (76%) favoured pre-action directions applying for all claims with a value of up to £100,000. 26 respondents (24%) said that mandatory pre-action directions should not apply for cases up to £100,000, with 6 of these respondents also stating that they should not apply for any other figure either.

90. Of the respondents who said that another figure would be more appropriate, £25,000, or the current fast track limit was the most popular, with at least 9 respondents suggesting this.

91. Respondents were divided on whether the value of the claim is the best indicator for applying mandatory pre-action directions. Some said that 'one size does not fit all' and that directions should be based on the complexity, not value of the claim. Others commented that the amount of the claim is of little consequence and that the pre-action principles should be the same.

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

92. 194 respondents answered this question, of which 83 (43%) were in favour of a compulsory settlement stage and 111 (57%) were against.

93. Most notably in favour of this proposal were mediators. Most commented that this proposal would focus the parties on early resolution. However, almost all of the respondents who said 'yes' expressed concerns in their supporting comments, often supporting the principle of a settlement stage but questioning the value of making this compulsory.

94. 72% of the 104 legal professionals who responded were against this proposal, along with the majority of financial institutions. Almost all respondents who provided supporting comments said that the inclusion of a compulsory settlement stage would add an additional layer of cost and complexity, which would be wasted if one or both parties had no intention to settle. Many supported a 'stocktaking' stage, where parties would be encouraged to consider whether settlement may be reached and if mediation is the best way to achieve this, but were of the opinion that compulsory settlement was a step too far, particularly as some cases are not suitable. Several respondents commented that parties will often settle before trial if they can and that the introduction of a compulsory settlement stage will have little or no effect.

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

95. 109 respondents answered this question, of which 34 (31%) were in favour of a prescribed ADR process and 75 (69%) were against.

96. The majority of mediators who responded were in favour of this proposal, almost all of whom said that the prescribed ADR process should be mediation. Many did not give reasons for this but some said that mediation was most suitable for cases at such an early stage because it is not binding and parties are not forced to settle.

97. 85% of legal professionals and 89% of insurers were against a specified ADR process. Many respondents echoed their comments for Question 18, stating that a prescribed ADR process may add cost and delay. Many also

said that parties should be encouraged to explore all possible methods of resolution and that pre-action directions should allow for flexibility in settlement options. The general consensus, even amongst those who expressed support for this proposal, was that one size does not fit all and that it is not practical to prescribe an ADR process.

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.

98. 180 respondents answered this question, of which 88 (49%) were in favour of a system of fixed recoverable costs, whilst 92 (51%) were against.

99. The majority of financial institutions, businesses, insurers and mediators responded in favour of this proposal, whereas legal professionals were largely against it.

100. Those in favour of a system of fixed recoverable costs commonly cited proportionality and predictability of costs as the main reason. However, many stated that whilst they were in favour in principle, it may not be practical to apply this to some types of case. Some also expressed concern that a fixed costs system may lead to behavioural issues by claimants exploiting the certainty of costs.

101. A common reason given by those not in favour of this proposal was that 'one size does not fit all' and each individual case needs to be judged on its own merits. Many argued that the value of the claim is not an indicator of complexity and as such fixed costs should not be predicated on this. Some commented that costs should be assessed by a judge who can then consider the conduct of the parties and subsequent reasonableness of those costs. Another common concern was that the motivation for costs recovery may drive behaviour that is not in the best interests of the claimant and that the emphasis should be on keeping costs down, not driving them up. Finally, many objected to this proposal on the basis that they objected to a compulsory pre-action regime.

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?

102. 142 respondents answered this question, of which 43 (30%) were in favour of fixed recoverable costs based on the type of dispute, whilst 31 (22%) were in favour of costs based on the monetary value of the claim.

32 respondents (23%) said that both the type of dispute and monetary value need to be taken into account, whilst 36 (25%) said neither.

103. Almost all respondents who said 'neither' did so because they are not in favour of fixed recoverable costs. Many respondents that stated a preference in the yes/no section for one option or the other stated in their supporting narrative that fixed recoverable costs should be based on the type of claim, followed by a scale of costs relating to the value of the claim.

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.

104. 104 respondents answered this question, of which 68% agreed that the behaviours detailed in the Pre-Action Protocol for Rent arrears and the Mortgages Pre-Action Protocol could be made mandatory, and 32% disagreed.

105. Some respondents considered that it should be mandatory for landlords (including private landlords) to use the pre-action protocols before commencing possession proceedings. However, they did not see how tenants could be penalised if they failed to respond to the landlord's request. Financial penalties would clearly be inappropriate for a group which is already in debt. It is the most vulnerable tenants who are likely to have got themselves into rent arrears, to have failed to respond to any early approaches by the landlord and to be facing possession proceedings. They also argue that the same point applies to possession claims brought by lenders against borrowers.

106. Members of the Bank/Financial sector welcomed the recent changes that have strengthened the protocol but suggest that further improvements could be made. They consider that there should be consideration as to what sanctions are applicable for non-compliance with the protocol as they are concerned that the current protocol contains very little by way of sanctions for non-compliance, which mitigates its strength and effectiveness.

107. From the legal sector, 44% of respondents who opposed the proposal consider that it is better to leave this to the judgement of the individual claimant, as in certain cases there may be good reasons for not following the protocols.

108. Members of the judiciary were not in favour of making the behaviours mandatory, since "compulsion will not improve to any meaningful degree

the situation regarding lack of engagement by some tenants and mortgagors".

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.

109. 57 respondents answered this question, of which 60% agreed that there should be different procedures depending on the type of case.

110. Some of those in agreement considered that non-compliance with mandatory pre-action protocols and/or directions should result in automatic striking out where the non-compliance is by landlords or lenders. Provided the procedures remain as broadly based in the protocols, they do not believe there is any need for prescribed procedures in different cases.

111. Some members of the legal sector argued that if the protocols were to be made mandatory for landlords and lenders, failure to use the protocol should be an absolute bar to bringing a claim for possession.

112. A number of respondents from the mediation service sector considered that a mandatory settlement stage, so long as it involves some form of assisted negotiation through mediation or similar processes, should be embedded into every process.

113. There should be a range of options provided to give the parties some choice over what best suits them and the circumstances of each case. This can include the availability of telephone mediation.

114. Local authority respondents said that the claimant should be encouraged to write to the defendant to request payment at least twice before proceedings are issued and if possible to try to reach an agreement for a repayment plan.

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?

115. 166 responses were received to this question, of which 93 respondents (56%) came from the legal profession, 14 (9%) from the insurance sector and 10 (6%) from mediation providers. Responses were also received from the judiciary, businesses, academics, financial institutions, local government, members of the public and the advice sector.

116. The most common response was that there should be a greater reduction in on-line fees - 50 respondents (30%) commented on this with support from all categories of respondent. 30 respondents (18%) said that the channels already exist but better advertising and explanation of them is required in order to increase take up. 28 respondents (17%) favoured the idea of better quality IT to be available with increased functionality (including the ability to attach other documents to a claim), as envisaged by Lord Woolf. 6 members of the judiciary out of the 7 who responded were supportive of this view.

117. There was limited support for Lord Justice Jackson's proposal on restricting recoverable costs to the level available under electronic issue to applicants who choose to issue a claim manually. 8 responses (5%) supported this proposal, with the Association of District Judges recommending further consultation with court users over this question.

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

118. 206 respondents answered this question, 65% of whom agreed that the small claims financial limit of £5,000 should be increased. The majority of those who advocated an increase made no further comment, and of the rest, given that the current limit had remained unchanged since 1999, some advocated an increase at least in line with inflation, and some a higher figure for business-to-business disputes.

119. The other respondents (35%) considered that the current limit should remain unchanged. Some of these, which included members of the judiciary, commented that, for the average citizen, £5,000 is still a large sum of money. They stated that as most users of the small claims track are litigants in person, this often results in cases being poorly prepared, therefore presenting the District Judges with a heavy burden in dealing with matters fairly and speedily - problems which would be magnified should there be a substantial increase in the small claims track limit. They would rather prefer the current limit to remain, but state that should it be increased, it should only be in line with inflation.

120. Some respondents from the legal sector considered that there are too many claims being brought into the legal system inappropriately, with businesses in particular being exposed to high and disproportionate costs. They therefore believe that increasing the track limit would lead to an increase in litigants in person which would not be good for the court or the other party. They however support an increase in line with inflation.

121. The Civil Court Users Association, respondents from legal sector and the judiciary generally considered that the current small claims financial limit should remain. They felt that the upper limit of £5,000 is already much higher than in other jurisdictions, for example it is £3,000 in Scotland and Northern Ireland and in the Republic of Ireland and the European Small Claims Procedure it is €2,000. Any increase in the upper limit for the small claims track would increase the disparity between the position in England and Wales and that in other constituent parts of the United Kingdom.

122. Respondents opposing an increase of the small claims financial threshold argued that the current level already encompasses a huge number of claims. A further increase would only serve to reduce the number of people who can obtain access to justice because the no cost rule would mean they would be less likely to secure representation unless they have a private arrangement with their solicitor.

123. Many legal professionals and advice providers considered that increasing the limit would bring within the scope of the small claims track substantial numbers of higher value cases, and due to the costs restrictions within the small claims process, this is likely to increase the numbers of litigants in person dealing with more complex cases, requiring a greater level of judicial intervention. This in turn is likely to impact negatively on the small claims process, creating additional delays. Increasing the limit was likely to act as a barrier to access to justice, leaving large numbers of people without access to the legal help they may require given costs in the small claims track cannot be recouped.

124. Overall therefore, while the majority of respondents wanted an increase at least in line with inflation, those who did not, felt that increasing the small claims limit would not necessarily result in better justice as parties do not have the time, resource, or experience to conduct cases without legal representation and compromising justice for speed and cost is not appropriate at this level.

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)?

125. Of the 65% of respondents who said they favoured an increase, a slight majority agreed with £15,000 over any alternative figure. The other figures suggested ranged from £7,000 to £50,000 – although the majority of these preferred a lower limit than £15,000.

126. Many who answered yes to £15,000, did so on the basis that it would be a suitable limit for business-to-business disputes, on the grounds that small and medium sized businesses often prefer to conduct these cases in person in the county court and resent being forced into the more costly and complex fast track purely because the amount at issue is above £5,000.

127. There was also significant support for the judiciary to exercise their powers more often and divert simple cases of high value to the small claims track, whilst at the same time diverting complex but lower value claims to the fast-track process. They would like the judiciary to be able to take such decisions without the agreement of the parties. This could be achieved through a change in the CPR rule 26.7(3), which currently prevents the judiciary allocating proceedings to the small claims track if the financial value of the claim exceeds £5,000, unless the parties agree. If rule 26.7(3) were abolished, District Judges would be able to allocate simple business-to-business disputes to the small claims track in appropriate cases. This approach may be more effective than just relying on an increase in the small claims threshold.

128. Although a majority of respondents who wanted an increase advocated a figure of £15,000, 35% of respondents wanted no increase at all (Q25), and a significant proportion of the others who answered Q26 advocated an increase in line with inflation or a figure of up to £10,000. Some of those in favour of an increase to £10,000 commented:

    - "We feel the figure should be increased to £10,000 – above that it would be prudent for the client to have proper legal representation." (Advice sector);
    - "A value of £10,000 would not be unreasonable for even the smallest of organisations." (Insurer);
    - "An increase to account for inflation might work in favour of a limit to £10,000 at this stage." (Judiciary);
    - "An inflationary increase would see a value of £7,200 at the present date. £10,000 allows for this increase, and provides a measure of 'future proofing' against future inflation." (Legal profession);
    - "£10,000 may be more reasonable, in line with inflation/future inflation." (Legal profession)

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

129. 116 (36.5%) respondents answered this question, of which 63 (58%) agreed that the threshold should remain at £1,000, while 45 (42%) disagreed.

130. Of the 63 respondents in favour of retaining the current threshold, 33 answered yes but made no other comment. Of the remainder who did comment a clear majority (24) indicated that to change the threshold would disadvantage many vulnerable tenants and would act to restrict their access to justice. For example, a representative of the legal profession commented that, "Housing disrepair affects the most vulnerable adults and children. People have the right to live in decent housing, and are still being denied that right in 2011. This limit should remain unchanged. It is a powerful incentive to force landlords to repair homes." 44 of the 63 responses in favour came from the legal profession.

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

131. Of the 45 respondents who answered no to the financial threshold for housing disrepair remaining at the current limit of £1,000, 28 suggested a new threshold. Of these, 14 were in favour of a flexible or inflationary increase to cover increased repair costs. A national representative organisation stated, "It appears appropriate that this limit should be increased to take account of increased repair costs." A further 8 respondents favoured an increase to £5,000, but there was also limited support from respondents for increases to £2,000, £2,500, £3,000, £10,000, £15,000, £25,000 and £50,000.

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

132. Of the 204 respondents who answered this question, 99 (49%) were in favour of raising the fast track financial limit, with 91 (45%) against, and a further 14 (7%) commenting without indicating yes or no.

133. 6 responses were received on this question from members of the judiciary with 3 in favour of raising the threshold and 3 against. 68 of the 91 responses against raising the threshold came from the legal profession, with 34 of the 99 in favour also coming from this sector. There was also strong support for the proposal from the majority of insurers (15) and mediation providers (17).

134. Out of the 91 respondents who were against the proposal 31 (including the Law Society) highlighted the complexity of cases over £25,000 as the main reason for their objection to the fast track limit being raised. A further 19 respondents considered the current limit was appropriate and 12 had concerns over fixed and recoverable costs. 8 of these 12 respondents also suggested that any increase should be delayed to allow the recent costs reforms to 'bed in' properly.

135. Respondents opposing an increase commented that the current £25,000 limit is a substantial amount of money, and that cases of this value are inevitably more complex and not best dealt with in the fast track regime. They state that should the limit be increased, it would become harder to transfer complex cases to the multi-track, which could disadvantage claimants.

136. A number of respondents stated that as the fast track limit has only recently been increased, it should remain at its current level for now.

Q30: If your answer to Question 29 is yes, what should the new threshold be? Please give your reasons.

137. 81 respondents suggested a revised figure, of whom 35 (43%) supported the figure of £35,000 mentioned in the consultation document, whilst 36 (44%) suggested an increase to £50,000. There was also limited support for raising the threshold to £30,000 (7 respondents) or £40,000 (6 respondents).

138. Almost a third of respondents said it was sensible and/or reasonable to raise the threshold, particularly if the small claims limit was being raised. 21 respondents commented that there was little difference in the complexity of cases between £25,000 and £35,000 and by raising the limit most 'specified' claims would be covered by the small claims and fast tracks, leaving only the more complex higher value claims for the multi-track.

Alternative dispute resolution

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

139. 147 respondents answered this question. 84 respondents (57%) considered that the CMC accreditation scheme for mediation providers was sufficient, whilst 63 respondents (43%) did not.

140. Of the 84 respondents who believed the CMC accreditation process to be sufficient, 20 of these indicated that, though supportive of the scheme in general, a number of changes and amendments were required to the

scheme either now or in the future, especially in light of the proposals being made to increase the use of mediation being made as part of the consultation.

141. A number of respondents from the mediation sector indicated that whilst the scheme was sufficient for now it would need "evolutionary development to stay abreast of the wider application of mediation practice as public awareness and use of the process increases". Furthermore a significant number of respondents from the advice and insurance sectors highlighted that it would seem sensible for all mediators to be accredited, given the growing importance of their function. Reasons for this being to set clear standards across the mediation profession, given that currently it is confusing for litigants to have to choose between non-accredited and accredited providers.

142. The large number of those in support of the current CMC accreditation scheme, including mediators/mediation providers, legal professionals and insurers, agreed that overall the CMC's accreditation scheme was welcomed and supported and that the CMC should be congratulated for the work it had done in respect of accreditation, and provided a start towards self-regulation. However, given mediation is so central to this consultation and ongoing civil justice reforms, accreditation alone was insufficient and a regulatory framework was required.

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

143. Whilst 63 respondents had answered no, a further 20 respondents who answered yes then went on to suggest that changes were required to the current CMC accreditation scheme.

144. A general theme that emerged was that accreditation should be compulsory for all civil and commercial mediators (whether through the CMC or some other regulatory framework), to set clear standards of training and service delivery by which customers could be confident in the level of service they would receive. A number of respondents thought there was an urgent need for mediation to be put on a more professional footing and for it to be regulated.

145. Other respondents commented that the current system lacked "teeth" and was simply a tick-box exercise because there was no on-going monitoring of providers to ensure compliance with accreditation criteria. It was insufficient, as the accreditation scheme was voluntary and furthermore only covered mediation providers and not sole/independent mediators, so not representative of the mediation profession as a whole.

146. Several respondents from the legal profession and banking sector highlighted that compulsory accreditation is necessary to ensure that all practising mediators are properly trained and able to perform their role. If mediators are ineffective this will undermine the whole drive to encourage the use of mediation and ADR.

147. Views differed as to the type of regulatory framework that should be introduced, with some respondents recommending a code of practice or protocol, and others a more formal regulatory board. Many stated that any regulatory framework or accreditation scheme should not be too onerous or bureaucratic in nature, whilst establishing clear standards across all mediators. A number of respondents from the insurance and mediation sectors suggested that a mediation standards board should be created to provide regulation of all mediators, and separate from the CMC for independence and transparency.

148. Further suggestions included the need for the CMC to introduce a more tailored approach to training, via the introduction of continuous professional development (CPD) for all members. This would put the mediation profession in line with the legal profession and be of real benefit to those parties that use mediation because it would raise quality across the profession.

149. The Civil Mediation Council made a number of comments in relation to their current role and also in terms of possible further regulation. They stated that although the CMC consider that its accreditation scheme for mediation providers is sufficient for most purposes, the CMC and its committees are constantly reviewing the ways in which civil and commercial mediators may provide a better service to the public. The CMC is willing to continue adjusting, and when appropriate raising, the standards required from panel members of an accredited provider.

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

150. This question was answered by 211 respondents, 101 (48%) of whom agreed with the proposal to introduce automatic referral to mediation in small claims cases, and 110 (52%) disagreed. In addition, 17 respondents provided comments without actually confirming whether they agreed or disagreed with it. A large majority of mediators/mediation service providers (88%) agreed with the proposal, while from the responses received from the legal profession 67% were opposed to this proposal.

151. The majority of those who were in favour agreed that there were real benefits to litigants in that it would promote early settlement and reduce unnecessary delay and excessive cost. This reason was cited by a number of respondents, including businesses/commercial organisations, the advice sector, legal profession and mediators/mediation service providers. The judiciary supported automatic referral as long as it did not compel parties to undertake mediation. Instead, the judiciary were in favour of parties being referred to a mediator/mediation service provider, with a view to obtaining information on mediation. They cited the success of the Small Claims Mediation Service and are keen for it to be expanded, as long as it is provided and administered by HMCTS. Equally, other respondents agreed that this proposal would help alleviate the pressure on the judiciary and the civil justice system as a whole, so that the courts could concentrate on cases that genuinely need to be there. Also, if cases did not settle, the points of the dispute would be narrowed, thus speeding up the subsequent court or settlement process.

152. Of the 110 respondents against automatic referral to mediation in small claims cases, many argued that mediation by its very nature was a voluntary process and that not all cases were suitable for mediation; and therefore, no amount of compulsion should be introduced.

153. Many respondents, including the legal profession and business/ commercial organisations, stated that automatic referral to mediation would simply add another layer of costs and possibly delays to the overall process, especially if mediation fails and parties had to revert back to the court. In this instance, the process would not be any cheaper or quicker.

154. Furthermore, a number of respondents stated that when parties are forced to mediate, they are less likely to settle, citing the experience of other jurisdictions where compulsory mediation had been attempted.

155. Another reason put forward by the legal profession against compulsory mediation is that it risks bringing undue pressure on a party, particularly a vulnerable party, to settle a case, and at a much lower figure, regardless of whether it is in that party's interests to do so. The legal profession commented that not all small claims should be referred to mediation; suitability for mediation should be decided on a case-by-case basis by a judge.

156. The judiciary and several respondents from the legal profession highlighted that any introduction of compulsory mediation may potentially be in contravention of Article 6 of the European Convention on Human Rights.

157. A number of respondents also queried how such a proposal would be delivered, including how the service would be funded and how the additional capacity and volume of cases would be met.

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.

158. This question was answered by 112 respondents as follows:

- 57 (51%) agreed that disputes with a case value up to £15,000 should be automatically referred to mediation;
- 21 (19%) considered that automatic referral should be capped at £5,000; and,
- 34 (30%) claimed that it should be set at some other figure, which ranged from £1,000 to £50,000.

159. Those respondents who were opposed to raising the small claims financial threshold (Q25) reacted negatively to this question, repeating their arguments against raising the small claims financial threshold. The legal profession and judiciary stated that cases above £5,000 were generally not suitable for mediation because they involved a degree of complexity, which could not be resolved by mediation. The judiciary, in particular, were concerned that by increasing the threshold, the courts would be inundated with unrepresented litigants, which would create additional pressures on the courts and judiciary dealing with those cases. However, by contrast, mediators/mediation service providers stated that all cases, regardless of value, could be mediated because the value of the case does not necessarily reflect complexity.

160. Generally, respondents answering this question agreed that should automatic referral to mediation in small claims cases be introduced, it should be in line with the small claims financial threshold. Many considered there was no point in complicating the process by having different levels for small claims cases, as this would only hinder litigants and the courts.

161. There was, however, considerable support for piloting automatic referral to mediation in a number of courts, with disputes limited to £5,000. Only when that had been evaluated and lessons learnt should the final process be extended to cover all cases up to any new small claims limit.

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

162. This question was answered by 176 respondents, the responses provided can be divided into two broad categories:

    (i) **The medium by which small claims should be provided**, whether via telephone, using telephone conferencing, video link, Skype or other online technologies, or in person at court or another location such as a mediation provider venue, or a combination of delivery mechanisms; and

    (ii) **Who should provide small claims mediation**, whether this should be provided in-house by HMCTS, by external mediation providers or trained legal professionals or via a combination of both in-house and external mediation providers.

163. Of the responses received, 72 (41%) were from the legal profession, 32 (18%) were mediators/mediation providers, 22 (12.5%) from insurers, with 6 responses (3%) being received from the judiciary and the advice sector.

The medium by which small claims mediation should be provided

164. The vast majority of respondents who addressed this issue within their answer agreed that small claims mediation should be provided by telephone, or that provision via telephone should be the default position in the majority of cases. The majority said that telephone provision gave an effective service in most cases in an efficient, cost-effective and proportionate way, avoiding the need for the parties to incur the time and expense of travelling to court or other relevant location. However, many respondents were keen that face-to-face mediations should also be available, particularly where English was not a person's first language, or where a party is deemed to be vulnerable.

165. Many respondents suggested that provision by telephone could also be enhanced or supported via the use of video conferencing, Skype or other technologies where they were available and parties wished to use them, and where new technologies become more available and accessible in the future.

166. A number of respondents from both the legal profession and mediation sector highlighted that if the small claims limit was increased it would not necessarily be appropriate for the same model of provision of mediation to be used in all cases.

Who should provide small claims mediation?

167. The responses were fairly evenly split with 27 respondents indicating that it should continue to be provided in-house by HMCTS, through the Small Claims Mediation Service (SCMS), whilst 23 respondents considered that the service should be provided by external mediation providers or trained legal professionals. A further 14 respondents indicated that a joint approach to provision, utilising both in-house and external mediation providers should be adopted.

168. Of those recommending that the service should be provided in-house, the majority recognised that the existing service would have to be substantially expanded to cope with the amount of mediations that would be generated, whilst maintaining the required standard. This did however raise a number of concerns about the associated costs involved and how such expansion could be effectively funded.

169. The Lord Chief Justice and Master of the Rolls stated that any small claims mediation service should be provided in-house by HMCTS. They stated that they would not support a mandatory requirement to refer all small claims to mediation if the service were to be provided by outside agencies, whether commercial or not for profit. They stated that use of external providers would give rise to; (i) a need for accreditation, (ii) a need for training, supervision and administrative support and (iii) a need to charge a fee. This, in their view, would not be a proportionate response to the need for mediation services in this context.

170. 14 respondents, from both the legal profession and the mediation sector, indicated that small claims mediation should be provided jointly, through a combination of in-house provision via the SCMS and via external providers, either CMC accredited mediators, local panels or individual mediators. In light of the proposals to substantially increase the number of mediations, it was suggested by several respondents that the current in-house service could be used for cases up to a certain value, (suggestions of £2,500 - £5,000 being put forward), with external providers being utilised for cases above this value.

171. A number of respondents, including the Law Society together with respondents from the legal profession, suggested that mediation should be provided by a panel of trained, qualified, experienced and professionally accredited mediators or equivalents who are prepared to undertake the work for an appropriate fee. They suggested that this service could be provided by an independent body or individual providers contracted to HMCTS.

172. A large number of respondents raised concerns as to how this service would be funded, whether by additional fees to the user or through the existing fees structure. The majority of respondents did not consider that

parties should be charged an additional fee to undertake mediation, with this being seen as a substantial barrier in terms of access to justice. Several respondents highlighted that the economic issues in terms of the provision of small claims mediation need to be fully investigated and analysed in order to develop a process which is cost effective.

173. Several mediation providers highlighted that to successfully provide mediation on this scale, it is essential to provide parties with a seamless and efficient customer journey in terms of the administrative process and service delivery. Failure of any part of the administrative or delivery functions through lack of efficiency or effectiveness could have serious consequences on the uptake and success of the small claims mediation, and seriously compromise the government's objectives in reforming the civil justice system.

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

174. This question was answered by 162 respondents, 102 (63%) of whom agreed that some cases should be exempt from the automatic referral to mediation process, and 60 (37%) considered that no cases should be exempt.

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

175. The vast majority of respondents stated that undefended debt recovery cases, RTA claims, cases involving fraud, personal injury and clinical negligence cases should all be exempt from the automatic referral to mediation process.

176. Other types of cases put forward as being exempt included those cases which were either complex; or an expert opinion is required; or a point of law is at stake and requires judicial determination.

177. Furthermore, respondents from the legal profession, judiciary and insurers, stated that careful consideration had to be given to cases which were either not suitable for mediation, or had already attempted mediation pre-issue without success. They commented that there was no real justification in forcing parties to mediate, especially if they had tried it pre-issue; or there was no prospect of an agreement; or where a party had encountered difficulty in engaging with the other side. They said that this would simply raise the overall costs and delay the process further.

178. There was a general consensus that the right to apply for an exemption should be dealt with by the court, on a case-by-case basis. If the court refused exemption, parties would more willingly engage in the process, knowing full well that it had been considered by the judge.

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.

179. There were 204 responses to this question of which 79% were in favour of the proposal. 21% (42 responses) were against. Respondents in favour of the proposals come from a variety of backgrounds including legal professionals and members of the mediation and advice sectors. Those against came mainly from the legal profession along with the majority of the responses from members of the judiciary.

180. 6 out of the 7 judicial responses were firmly against the proposals, with most of their comments focussing on the use of telephone hearings. The biggest concern amongst the judiciary was that telephone hearings would significantly reduce the judge's ability to control and observe the parties/witnesses properly during the hearing. There were also a number of issues raised about litigants in person being under-prepared and having trouble submitting the appropriate evidence in time. Where members of the judiciary mentioned paper hearings in their responses, in the main, this was to state that the CPR already allows for paper hearings to take place.

181. The majority of the other respondents who answered no to this question also raised issues about under-prepared litigants and protecting vulnerable or disabled parties from using potentially unfair methods to resolve their cases. There were also comments regarding the need for parties to consent to or request the type of hearing they want (i.e. oral, held on paper or by telephone) but that the courts/judge should have the final decision on which type of hearing takes place.

182. Of those in support of this proposal, 51 commented that it would improve choice for litigants, thereby increasing access to justice and a further 18 commented on the savings on time and costs as a good thing. There was also support for the proposals 'as long as all parties are in agreement' or that 'vulnerable parties are not forced into an option that disadvantages them' and for judges to have the final say on whether to allow a case to be heard on paper rather than at an oral hearing.

183. A number of people had clearly interpreted this question as relating to mediations rather than small claims hearings, and based their answers on that interpretation.

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.

184. There were 209 responses to this question, of which 121 (58%) disagreed with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000. A total of 88 (42%) respondents, mainly from the mediation provider sector, suggested that compulsory mediation information sessions would be helpful to parties in court.

185. The Association of Her Majesty's District Judges expressed reservations, stating that there were already pre-action protocols which parties ought to be following to avoid litigation. They argued that if these were properly complied with, there would be no need for parties to incur further expense by convening additional mediation information sessions. The Civil Procedure Rules (CPR) already provide the court with the authority to encourage alternative dispute resolution at various stages of the litigation process in all relevant cases and therefore the information sessions would not add anything of value.

186. Respondents from the legal sector stated that the question implies that parties are not currently subject to mediation information sessions, and that this should be questioned. They suggest that it would be extremely rare for represented parties not to have already received information about mediation, probably on more than one occasion, in a number of different formats.

187. Other respondents from the legal sector stated that the requirement for a compulsory mediation information session is a step in a process that solicitors can adequately deal with. They added that solicitors can be expected to advise their clients appropriately and liaise with their opponents constructively and professionally. Some members of the legal sector see the introduction of compulsory mediation information sessions will duplicate what any lawyer should be doing in any event.

188. Respondents suggested that, as the aim of the proposal to introduce compulsory mediation information sessions is to make parties aware of the benefits of mediation, it might be more helpful if the court were to introduce a short document providing information on mediation and a short mediation suitability questionnaire, to be signed by the client on issuing a claim form. They also suggested that the allocation questionnaire could be amended to include a section requiring parties to explain why the dispute is unsuitable for alternative dispute resolution.

189. Respondents from the mediation providers' sector were overwhelmingly of the opinion that mediation information is an essential element in reducing the numbers of cases coming into court.

190. Overall, respondents generally agreed that it would be useful for parties to have information to enable them to engage in mediation or other forms of alternative dispute resolution, and that information as to mediation could be sent to each party as a matter of course during the pre-trial process. They are, however, concerned that an additional compulsory stage might result in further unnecessary costs and delays being incurred as part of the civil justice process.

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)?

191. The general view of the 88 respondents in favour of compulsory mediation sessions is that the content of sessions should cover basic information about mediation, such as what it is and the process involved. They suggest that the sessions should also include information giving an estimate of the duration and cost of mediation.

192. Respondents stated that the information could be delivered by telephone or electronically – by video conferencing sessions. Others considered that there should always be some direct human contact to allow some element of face-to-face discussions between the parties and whoever is leading the session.

193. Some respondents suggested an online tutorial that asks questions that might enable parties to consider the benefits of mediation might be useful. One respondent stated that it might be more helpful if the Ministry of Justice delivered a very short information film/podcast available on the HMCTS/Ministry of Justice website which could be coupled with an interactive website that answered many of the "Frequently Asked Questions" that could be anticipated to occur on a regular basis.

194. A number of respondents also said that there are costs issues to be considered, as the question arises as to whether a proportionate and affordable fee from the parties' perspective will provide sufficient resources to fund an appropriate level of service. Also, because there is payment involved, the mediator could be perceived to be recommending mediation even where mediation is not appropriate or where the parties do not believe it to be appropriate.

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

195. 146 respondents answered this question, of which 85 (58%) considered that there should be exemptions from compulsory mediation information sessions, while 61 respondents (42%) considered there should be no exemptions.

196. Respondents from the legal sector who stated that there should be exemptions argued that the court must assess whether mediation would be useful, otherwise it becomes a waste of time.

197. Respondents in support of exemptions also commented that, as the stated objective of the mediation information session is to sell mediation, if this is truly what is intended, there must be "a voluntary opt-out" for those who lack confidence in mediation as being appropriate for their case. One respondent stated, "Mediation cannot be considered a universal panacea for securing justice". They considered that mediation information sessions should not be forced on people and that parties should be given the option of opting out of them.

198. Respondents in support of exemptions also argued that mandatory alternative dispute resolution in every case is not appropriate for personal injury cases. Where, for example, a defendant has a good case that they are not liable in law, or where they doubt the honesty of the claimant, no amount of ADR would resolve the dispute, and a mandatory process will only add significantly to the overall costs incurred. They suggested that joint settlement meetings with barristers representing the parties work far better and can be cheaper, as barristers chambers are equipped to deal with such cases and a mediator would only add to the cost.

199. Respondents who commented that there should be no exemptions to compulsory mediation information sessions for cases up to a value of £100,000 considered that everyone should understand the basics of mediation, even if they ultimately do not agree with going ahead with the process. Whilst some respondents argued that there will always be cases that are inappropriate for the mediation process, the mediator can identify those cases during the course of the mediation information sessions.

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

200. Of the 85 respondents who stated that there should be exemptions to mandatory information sessions, the majority maintained that, as not all cases are suitable for mediation, unsuitable cases should be exempted.

201. Some respondents stated that, within the housing field, there are a range of cases for which compulsory mediation information would be unsuitable. Unlawful eviction claims where the landlord's behaviour has been aggressive, intimidating, threatening or actually violent or cases where repairs are urgently required to prevent a risk to the tenants' safety or wellbeing were cited as examples.

202. A number of respondents from the legal sector suggested that there should be exemptions for all parties who have obtained legal advice/ representation, as there are professional obligations resting on advisors to inform parties of the alternatives, the risks of not agreeing to these when offered, as well as the advantages of offering to engage in 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.

203. This question was answered by 166 respondents. 133 (80%) agreed that provisions required by the EU Mediation Directive should be similarly provided for domestic cases, while 33 (20%) disagreed. Mediators/ mediation service providers (93%), the legal profession (70%) and insurers (94%) all agreed with the proposal, while the judiciary (60%) were against it.

204. Many of those respondents that said 'yes' agreed with it in principle only. They also pointed out a number of drawbacks with the existing provisions, which needed careful consideration before anything could be introduced domestically.

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

205. Responses from the mediators/mediation service providers were split as to whether similar provisions should be available in domestic cases. In particular, whilst the vast majority agreed that introducing some of the provisions, especially around confidentiality, would be beneficial, there is no real consensus on what form they should take. Instead, they suggested that a thorough review of current domestic law be undertaken to determine whether anything further is needed.

206. The majority of responses from the judiciary indicated that they strongly disagreed with introducing domestic provisions arguing that these provisions were already adequately catered for in domestic cases and, in respect of confidentiality, domestic law already provided the

necessary safeguards. It would introduce an unnecessary layer of rules and over complicate matters.

207. Mediators/mediation service providers, the legal profession and the advice sector all agreed with creating a fast track enforcement procedure, so that agreements can be enforced much quicker, without the need to bring a fresh claim to court. However, the judiciary disagree with this as they argue that adequate rules already exist and, because it was rare for the terms of an agreement to be broken, this provision was unnecessary.

Debt recovery and enforcement

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.

208. This question was answered by 128 respondents, 95 (74%) of whom supported implementation of the provisions, and 33 (26%) disagreed. The majority of legal professionals, judiciary, insurers and respondents from the financial sector were keen to see the provisions introduced. The main opposition came from the debt and advice sector.

209. The majority of respondents were of the view that the provisions would offer protection to the creditor – in allowing an application for a charging order which is usually the only effective long-term remedy a creditor has for the liability – and, at the same time, to the debtor who knows the debt itself can be repaid by monthly instalment, whether agreed or determined by the court.

210. It was acknowledged that being able to secure a judgment debt by charging order converts the debt into an asset on a debtor's account, thereby allowing creditors to adopt a longer-term approach to debt management. This would also reduce the need to write off the debt. This would hopefully result in a less aggressive singular attitude on the part of creditors to individual debts and allow for a more accommodating debt management system between creditors. It may also reduce the current problem with multiple applications to the court to vary instalment agreements in order to force debtors to breach court orders, thereby allowing creditors to apply for charging orders. These responses therefore argued that the provision provides a real benefit for debtors as well as security to creditors.

211. A number of respondents pointed out that a charging order provides the judgment creditor with security in the face of the debtor's insolvency. This is particularly the case where the debtor is paying over the long-term by instalments, allowing a chance of recovery of the debt even if the debtor goes bankrupt or into liquidation. One insolvency trade body argues that the current system actively discourages creditors from accepting instalments which is why charging orders are increasingly becoming the first port of call.

212. One respondent commented that there was an important distinction between the obtaining of security and respecting an agreed repayment regime. They argued that, subject to there being safeguards to ensure that the charging order is not enforced if the debtor is in compliance within the agreed payment regime, there could be no reason why creditors should have to wait for default before being allowed to apply for a charging order.

213. Those opposed were concerned at the potential increase in charging order applications in an already "overly-burdened" court system, and the fact that it will become easy to convert irresponsible unsecured lending into secured debts. Some viewed the possession of a charging order as a step nearer an order for sale, despite assurances in the consultation paper of the protections in place here. Others considered that the potential for judicial consideration to be removed at this stage was wrong.

214. Respondents from the advice sector argue that the proposals would mean that the granting of charging orders would become the norm and, as such, an automatic process. This in turn would provide an even greater incentive for creditors to commence legal action as a first resort, rather than being patient with debtors and negotiating a mutually acceptable and sustainable solution. These respondents highlighted potential impacts of increased charging orders including:

- a fall in the number of indebted consumers being able to access Individual Voluntary Arrangements (IVAs), which are a vital source of debt relief for many people;
- potentially trapping people in negative equity, preventing them from selling their home and rendering them immobile for the life of the debt – particularly if the court was unable to check whether a debtor's property was either in or near negative equity;
- despite warnings issued by the OFT in its Irresponsible Lending Guidance and its withdrawal of trading licences from some over-zealous creditors in 2010/11 to curb the practice, some creditors still use the threat of charging orders to force indebted consumers into paying more than is reasonable in their circumstances.

215. Other respondents say the provision will allow creditors of unsecured (and perhaps irresponsible) lending at premium interest rates to ultimately gain security without the debtor having been notified at the time of contract that this was possible. (OFT now stipulate in their Irresponsible Lending Guidance that such notification must be given.) They argue that the lender concerned should bear some of the risk when charging higher rates for unsecured lending. They also argue that this would lead to the perverse result that unsecured creditors who have lent at commercially high interest rates could take priority over secured creditors.

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.

216. This question was answered by 115 respondents, 66 (57%) of whom agreed that a threshold should be introduced, and 49 (43%) disagreed.

217. Views were split polemically between creditors (and their representatives) and debtors (and their representatives or advice agencies). A small minority was in favour of a threshold. However the strength of respondents' arguments against the introduction of a threshold raises a question as to whether this issue justifies regulation.

218. A core of stakeholders, including the judiciary, strongly opposes a threshold highlighting the court's broad discretion which can take into account all the circumstances of each individual case. They stress that this is the only method which is flexible enough to assure that the circumstances of each case are considered. Some argue that anything more prescriptive could result in inequitable results; and that any threshold would only be arbitrary.

219. They also point out that there is a large body of case law protecting both creditors' Article 6 ECHR rights to recover monies owing to them and debtors' Article 8 ECHR rights to not lose their homes. These include provisions under the Trustee of Land and Appointment of Trustees Act 1996 (TOLATA 1996), protecting joint owners and any dependants living in properties purchased with the intention of being a debtor's main home. Many proffered suggestions for different ways of considering whether applications should be granted (i.e. whether the property is a primary residence, secondary or investment purchase; taking into account the number of dependants, number of properties, equity in the assets, based on the principal credit debt only and excluding accumulated interest and other charges).

220. Many others opposing or harbouring reservations about a threshold focused on the potential risks and unintended consequences of introducing one. Some of these common concerns include the following:

- Several warned that should a threshold exceed the level for bankruptcy (£750) then creditors would be tempted simply to make debtors bankrupt rather than seek enforcement measures.
- Others warned of the impact a threshold would have on the cost and availability of unsecured lending and the ability – and rights - of creditors and small businesses to recover smaller business debts.
- A threshold on orders for sale may constrain businesses (including small businesses) in terms of their ability to recover (small) trade debts legitimately owed.
- If a threshold is set, any debt over this amount may be viewed by creditors as 'legitimate' for an application for an order for sale to be made.
- Setting a threshold may also lead to an incentive for creditors to allow debt to increase prior to judgment in order to optimise enforcement options post-judgment.
- If a statutory threshold is set, the judiciary may view its discretion to refuse an order for sale, where a debt is at or above the threshold, as being somewhat fettered, taking the view, by reference to the legislation, that if debts reach a certain level, it is likely to be appropriate to grant the order.
- Whilst requests for orders for sale for amounts under the threshold would no longer be made, the granting of orders at/above the threshold may increase.

221. Those who supported the introduction of a threshold highlighted the impact on a consumer of a charging order/order for sale being granted against their home, and submitted that a minimum threshold was appropriate in relation to low-value consumer credit debts. Several respondents commented that it was disproportionate for a consumer to be threatened with losing their home for a debt which is a fraction of the value of the property concerned. They make the further point that as the debt was originally unsecured, the consumer is very likely to have paid a higher rate of interest on the loan, but crucially, is also unlikely to have been warned of the possibility of their home being at risk when the debt was originally incurred. It was suggested that pre-action requirements, similar to those available in mortgage possession proceedings, should be introduced to protect consumers facing applications for charging orders or

orders for sale. The majority of those advocating a threshold were of the view that consumers deserved greater protection from unscrupulous lenders, particularly in Consumer Credit Act regulated debts.

222. Another respondent called for a complete ban on the ability of creditors to apply for orders for sale on Consumer Credit Act debts, with the exception of cases where credit has been obtained fraudulently or where a consumer has wilfully neglected to engage with the creditor in the absence of the suitable threshold.

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)?

223. Views were extremely diverse ranging from no threshold and maintaining the status quo of judicial discretion to a complete ban on all orders for sale. Some respondents did not use the questionnaire format of the consultation and this meant that their preferred options for Q47 had to be extracted from text responses. Additionally, some respondents who answered no to Q46 also answered Q47 on the basis of 'but if a threshold were to be introduced…' .

224. Overall, the number of respondents rejecting a threshold, abstaining from proposing a threshold level, or proposing a level of £1,000 or lower, amounted to 93 respondents - 75% of those answering questions 46 and 47.

225. Of those who expressed a preference for one of the six options, those indicating yes were as follows:

(i)	£1,000	9
(ii)	£5,000	12
(iii)	£10,000	14
(iv)	£15,000	7
(v)	£25,000	16
(vi)	some other figure:	14, of which 6 suggested figures lower than £1,000; and 2 at £50,000

15 respondents argued that judicial discretion is the only system flexible enough to take all circumstances into account. Some argued that it should be set at the same level as bankruptcy. One suggested that the threshold be flexible and proportionate to the percentage of debt owed; others that it should be the same as the Consumer Credit Act (CCA) lending limit at the time. One proposed that the level should be set on

the level of the principal debt only and not on any accrued interest, arguing that this would prevent creditors artificially augmenting debts to surpass the threshold. Some argued the threshold should apply to all CCA debts; and more than one stated that any threshold would be arbitrary because of the different circumstances in each case.

226. Responses were highly polarised, with the majority of creditors preferring the present system of judicial discretion as being the most flexible option to determine each case on its own merits; or low thresholds. Several warned that should a threshold exceed the level for bankruptcy (£750) then creditors would be tempted simply to make debtors bankrupt rather than seek enforcement measures. Others warned of the impact a threshold would have on the cost and availability of unsecured lending and the ability – and rights - of creditors and small businesses to recover smaller business debts.

227. The majority of debtors, debtors representatives and advice agencies, including Citizens' Advice, preferred a higher threshold, or even a complete ban on charging orders in unsecured debt cases.

228. The majority of respondents emphasised the key importance of judicial discretion, at whatever level a threshold may be set, as the prime protection against disproportionate homelessness where the debtor is paying what they can afford.

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

229. There were 95 responses to this question (50 abstentions), of which 51 (54%) stated that the threshold should be restricted to CCA debts while 44 (46%) thought the threshold should not be restricted to CCA debts.

230. Further elaborations to this response suggested that different consideration and different thresholds should apply to different types of debt. Some thought, for example, that the threshold should only apply if the order for sale application was in respect of a debtor's primary residence, rather than in respect of stocks, unit trusts or investment properties. Others acknowledged the importance of utility debts (water, gas, electricity) where debtors may have less choice; and public policy debts such as child support arrears and council tax debts.

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

231. The general view from the majority of respondents (78%) (87 out of 111 respondents) was that fixed tables would bring much more uniformity and certainty into the attachment of earnings system. There was call from some quarters for a system to be introduced similar to that in Scotland, where the amount deducted is not changed by the number of creditors with Attachment of Earnings Orders, ensuring adequate protection for debtors.

232. Many described the current system as unsatisfactory for many reasons, not least the fact that the court requires, and waits for, debtors to provide information about their financial circumstances before the order can be made. Where debtors choose not to co-operate with the court process or do not answer the means form honestly this can lead to delays and an unreliable process. Notably the Federation of Small Businesses supports the introduction of fixed tables.

233. Other respondents, whilst in support, recommended that debt counselling charities, such as the CCCS or Citizens' Advice should be consulted on the form of any fixed table given their extensive experience of the relative income and expenditure of indebted consumers.

234. Those who objected to fixed tables being introduced were generally of the view that they were not a fair or reasonable system of determining ability to pay, as they do not take account of a debtor's financial circumstances, including priority debts. Others commented that the fixed tables system was not sufficiently flexible to accommodate those with particularly heavy expenditures (e.g. debtors with disabled dependants). Others expressed the view that fixed tables would force debtors into insolvency, which can be costly and would result more often in the creditor receiving less money than under the present system.

235. Some respondents wanted reassurance that a protected earnings threshold would be built into fixed tables. Others feared the provisions would result in debtors being forced into further indebtedness with priority expenditure falling into arrears, in order to service unsecured debt repayments. One respondent commented that if a disproportionate amount is deducted on an attachment of earnings order for one debt, this will reduce the amount available for other creditors in a multiple debt situation, and may result in further debt if the deduction is such that payments for essential expenditure, such as rent or council tax, become unaffordable.

236. One advice sector respondent, whilst not objecting in principle to the proposal, was concerned that adopting fixed tables may breach the

requirements of the Equality Act 2010. They suggested that, as fixed tables would not take into account differing levels of need, particularly when it comes to people with disabilities, they would have serious implications in terms of compliance with section 19.1 of the Equality Act 2010.

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.

237. There was widespread support (93%) (114 of the 120 respondents) for the commencement of these tracing order provisions. The current system was seen by many as being overly cumbersome leading to considerable delays in the court process and depending too much on the provision of information from the debtor without sufficient independent verification. The general consensus was that independent sources of information such as tracing orders would provide more certainty to the judgment creditor. Respondents also thought it would prevent debtors from escaping their liabilities by not responding to court documents, or moving employment and residence frequently.

238. The major concerns expressed by those opposed to the proposals were in respect of privacy and data protection issues; or in relation to Attachment of Earnings linked to job losses.

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

239. A large majority of the respondents 106 (94%) expressed support for these proposals. It was considered that any proposals to make the current process quicker and more straightforward are to be welcomed. The view from the judiciary was that judicial consideration was only necessary at the interim stage and that it was only where the defendant objects to the making of a final order that the merits need to be considered afresh. It was also noted that most final hearings, being unopposed even if the debtor attends, take on an administrative rather than judicial nature.

240. Those respondents who disagreed argued that final orders should be made at hearings when a debtor's full income and expenditure can be properly assessed. There was also concern at the possibility of defendants having no knowledge of proceedings until it is too late.

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.

241. 107 respondents answered this question. There was general support for the proposals with 99 (93%) respondents agreeing and 7% disagreeing.

242. The majority of those respondents who agreed stated that this was long overdue, and were keen to see them introduced. However, there was a general consensus for the need to examine the detail of the proposal including consideration of the proposed process and its safeguards.

243. Those respondents not in support commented that there were varying degrees of concern about the scope for possible injustice and unfairness to third parties by reason of the proposed presumption (debtor's share being 50%), which is considered a legal fiction by some.

244. Several respondents from the banking sector held reservations, suggesting that the application of this proposal would result in banks facing adverse legal, administrative and financial costs. They were also concerned with whether debtors or bankers themselves would be forced to break the terms and conditions of fixed rate deposit accounts, resulting in penalty charges.

245. One respondent suggested that consideration be given to the equivalent power of bank arrestment in Scotland, which includes the concept of a protected minimum balance. Concerns were also raised by banks about the impact on their legal relationship with their customers (e.g. in fixed rate deposit accounts) and how the proposition might extend to other assets held by banks.

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.

246. 122 respondents answered this question, with 106 (87%) of those agreeing to the introduction of deduction orders and 16 (13%) answering 'no'.

247. The majority of respondents were, in principle, supportive of the concept of deduction orders, as it could potentially fill the gap in circumstances where creditors are self employed. However, it was highlighted that more information about how this would work in practice was required, as many could foresee practical problems with its implementation.

248. Most of the respondents who disagreed with the proposal argued that they were unworkable in the long-term given the fact that most account

holders would simply ensure that payments do not continue to be paid into the account – which in turn may be detrimental to both the creditor and the bank. Others disagreed on the basis of lack of detail.

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.

249. The majority of respondents 106 (87%) agreed to these proposals. It was widely recognised that the proposals involve a delicate balance between respective rights of creditors and debtors and therefore adequate safeguards are crucial, particularly in relation to the Data Protection Act. Most considered that Information Orders and Requests are an appropriate and essential independent verification of a debtor's financial status and fill a loophole which is easily exploited by those debtors who deliberately evade payment of their debts by failing to provide sufficient information of their financial details to the court. Most respondents stated that the provisions would be a welcome addition to strengthen the enforcement process and the power of the courts against 'won't pay' debtors.

250. Those opposed to the proposal or harbouring reservations (13%) raised issues of data protection, privacy, competing Human Rights issues, confidentiality and security of data. Bankers held reservations, suggesting that the proposal would create new obligations and burdens on banks.

251. The majority of judicial respondents declined to answer questions 54-56 on the grounds that they might be called upon to consider any challenges to such legislation under the Human Rights Act 1998.

252. A number of respondents also commented that allowing the court access to additional information from other sources will be intrusive and disproportionate to the debt recovery process in many cases. Others noted that the courts and other third parties might face increased administrative burdens and costs.

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.

253. A total of 120 respondents answered this question. 104 (87%) agreed whilst 16 (13%) disagreed.

254. Few comments were received for this question. Among those who agreed, there was general consensus with the proposal. Several stated that government departments should be able to share information for such purposes as a matter of course. Others made the point that without such access to information many of the other enforcement processes will not be able to operate as effectively as would otherwise be the case.

255. Many of those who disagreed were concerned about data protection and confidentiality issues. It was suggested that information from government departments could also be unreliable and out of date, which could lead to wrong and unenforceable measures taking place.

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

256. There were 106 responses to this question, of which 52% expressed no reservations or concerns with the proposal. 48% of respondents admitted to concerns.

257. While bankers agreed with Question 54 that courts should be able to obtain information about debtors, they had reservations about these orders in relation to banks. Their concerns were about disclosure of debtors' financial information to creditors and additional administrative and legal burdens on banks.

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.

258. This question was answered by 121 respondents, the majority (54%) of whom agreed with the concept of direct enforcement by third party providers following judgment. However, despite the specific exclusion of bailiffs set out in the consultation paper, many mistook the concept as applying specifically to the jurisdiction limits between High Court Enforcement Officers and county court bailiffs (the question specifically excluded bailiffs/enforcement agents). In actual terms therefore, the number of respondents answering the question was affected by this misunderstanding and the force of argument ranged against the proposal.

259. The majority of respondents stated that it was essential for the courts to act as a safeguard between the creditor and the debtor and as such should continue to play its role in the debt recovery process. Many questioned the rationale of such a proposal. They argued that many of the reforms being proposed elsewhere in the paper are already a considerable extension of the current tools available to the creditor, and will make enforcement more effective and efficient.

260. Although the question clearly excludes enforcement agents, a number of respondents who support the concept argue that creditors should be able to utilise High Court Enforcement Officers with particular reference to debts incurred under the Consumer Credit Act 1974, thus expanding the choice for creditors (this question is due to be consulted upon in a future consultation).

261. A number of responses strongly opposed the privatisation of civil enforcement maintaining that regulated service providers do not exist; it would open up the process to unscrupulous creditors & private enforcement agencies and would fail to protect vulnerable debtors from abuse, thereby contradicting the coalition commitment against aggressive creditors. The judiciary argued that it overlooked Part 14 of the Civil Procedure Rules in relation to admissions and whether it would not be preferable to revisit the existing process rather than to create a wholly new process. Banks and employers argue it would impose unreasonable additional burdens and costs on them in terms of validating judgment orders and legitimate creditors, and would introduce disputes with their clients or employees.

262. Those that agreed with the proposal argued that it would greatly enhance debt recovery and reduce costs for creditors. It would incentivise debtors to co-operate, so long as reasonable and proportionate action is undertaken, and regulation is in place. Others noted that the concept would, more than anything else, reduce the burden on the courts, speed up the whole enforcement process and, critically, greatly increase the creditor's chances of recovering a judgment debt.

263. Concerns were, however, that such a proposal would not be suitable in all circumstances and that it could also open up a whole new range of opportunities for the debtor to appeal or vary judgment debts.

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

264. Not all respondents who agreed with Q57 answered this question. Most of those that did said that if the proposal was to be introduced regulations would be required to ensure compliance and safeguards.

265. One respondent highlighted the effective and economical way in which High Court Enforcement Officers were successful in enforcing both High Court and transferred-up county court judgments. Others pointed out that Civil Procedure Rules would need to be revised to cover third party providers.

266. There were concerns expressed that allowing third party enforcement would inevitably create additional burdens on organisations but that this could be offset by improvements in collections.

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

267. Although the majority of responses to this proposal (91%) indicated some level of support, the comments provided were a mixed bag. Where the question had been understood in relation to non-bailiff or enforcement agent applications, there was clear support to enable all administration of the Part 4 enforcement methods to be undertaken at the lower court level, reflecting the more administrative role of enforcement procedures and paralleling the set up in the magistrates' courts.

268. Notably the judicial respondents all agreed with the devolution of civil enforcement to the county court level.

269. However, there appears to be some misinterpretation of the question's intent. Some respondents were of the view that such proposals would, in effect, allow High Court Enforcement Officers (HCEOs) to be able to enforce county court judgments (although the question clearly excludes enforcement agents).

270. However, others had the impression that they would effectively end the use of HCEOs and their associated high costs. A large number of respondents expressed concerns about potential impacts on county court workload, which they perceive as already under-resourced. They warned that any increase in workload in the lower courts would require a parallel increase in resources. They state that the current lack of resources and increasing backlogs has resulted in unnecessary costs and delay being added to the enforcement process, and most keenly felt by creditors.

Structural reforms

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.

271. This question was answered by 122 respondents, of whom 109 (89%) agreed and 13 (11%) disagreed.

272. The majority of respondents in support of this proposal said that county court judges should be able to deal with cases within the proposed financial limit of £350,000 and that the current limit of £30,000 is unrealistically low. Those in support of the proposal noted that the current financial limit has become detached from contemporary property values and has not kept pace with inflation and the rising value of properties, which has risen dramatically since the limit was imposed in 1981. One respondent said that experience has shown that it is already commonplace for such cases to be transferred back to the county court to be dealt with even if they are over the county court limit. Where such cases are not transferred back to the county court, the current limit results in a number of cases being heard in the High Court unnecessarily. Some respondents said that many cases of low complexity could be dealt with at a reduced cost in the county courts freeing up valuable High Court time to deal with more complex cases. One respondent made the point that relying on the fact that such cases, if required, can always be transferred to the county court if the current limit is retained is not appropriate because transfer between courts takes time and they can be costly. One respondent suggested that any increase should include a caveat that specialist judges will be required to deal with these cases.

273. Some of the few respondents against an increase in the current financial limit suggested that there should be no limit at all. One respondent said that it is not always the case that claims of higher value are more complex because very often low value claims have a high degree of complexity. Another respondent suggested that complexity, rather than financial value, should be the driving factor.

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)?

274. This question was answered by 129 respondents of whom:

(i) 80 agreed to an increase to £350,000 and 11 disagreed.

(ii) 14 disagreed that there should be an alternative figure and 24 agreed to an increase to the following figures:

- 1 suggested £500,000
- 4 suggested £300,000
- 2 suggested £250,000
- 8 suggested £100,000
- 1 suggested £50,000
- 3 suggested an unlimited figure
- 3 suggested that other mechanisms, such as average house prices, should be used to assess increase to ensure that the limit is always current.

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.

275. This question was answered by 141 respondents, of whom 98 (70%) agreed and 43 (30%) disagreed.

276. The majority of respondents who agreed that the financial limit is too low said that there is sufficient expertise and ability within the county court jurisdiction to resolve disputes in excess of £25,000 and therefore the limit should be raised. In supporting the proposal, one respondent made the point that if for any reason a county court judge feels that the matter ought to be escalated to the High Court, then it is within his powers to do so. There is no need for a High Court judge to be dealing with a matter with a value of less than £100,000 unless it involves a particularly complex or novel point of law. Some respondents made the point that an increase in the limit would ensure that straightforward claims are not escalated to the High Court unnecessarily. Another respondent said that section 66(1) Taxes Management Act 1970 gives county courts unlimited jurisdiction in respect of HMRC debt claims and that such claims are no longer issued in the High Court. A number of respondents said that at the current level some non complex cases, for example, debt and contract cases, are being started in the High Court with a subsequent transfer to the county courts thus creating inefficiencies and that an increase would reduce unnecessary litigation costs in many cases. One respondent supported the proposal with a caveat that complex cases should still be referred to the High Court if necessary. Another said that cases with a value below £100,000 started in the High Court are capable of being dealt with in a relatively standard way and are not usually particularly complex, consequently such cases should be allowed to start in the county courts.

277. Of those that disagreed with an increase in the current limit, some respondents said that there should be no limit at all and that the complexity of the matter does not necessarily relate to the amount involved. One respondent suggested that, “where a matter is of low financial value but is complex on the facts, or indeed a matter of public interest then the High Court should have jurisdiction to deal regardless of the amounts involved.” Another respondent suggested that cases over £25,000 should remain in the High Court and that if a case is inappropriately issued in the High Court the case should be transferred to the county court with sanctions.

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)?

278. This question was answered by 107 respondents of whom:

(i) 72 agreed to an increase to £100,000 and 8 disagreed.

(ii) 14 disagreed that there should be an increase to an alternative figure and 13 agreed to an increase to the following figures:

- 2 suggested £250,000
- 1 suggested £250,000 for cases in the Technology and Construction Court
- 1 suggested an increase to £250,000 for clinical negligence cases.
- 1 suggested £75,000
- 1 suggested an increase between £50,000 and £100,000
- 6 suggested £50,000

Q64: Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the county courts? If not, please explain why.

279. This question was answered by 120 respondents, of whom 108 (90%) agreed and 12 (10%) disagreed.

280. The majority of respondents in support of this proposal agreed on the basis that county court circuit judges can handle applications for freezing orders but some emphasised that only suitably experienced and qualified circuit judges of the county courts should be given the jurisdiction. Some respondents made the point that the proposal is overdue and eminently sensible and that it would save time in the High Court allowing High Court judges to deal with more complex cases. It

was argued that many circuit judges who sit as Deputy High Court judges are familiar with freezing orders which are not complex applications to warrant the need for a hearing by a High Court judge. One respondent said that the proposal is long overdue and cited the case of Schmidt v Wong to emphasise the point that the "artificiality of the present situation is well demonstrated" in the case. Another respondent said that the current position is disproportionate and that unnecessary costs are incurred where litigants have to apply to the High Court for a freezing order that is in relation to ongoing county court proceedings (where the opposing party appears to be disposing of assets). Another respondent made the point that, "any power to help enforcement is a good move. Having to apply to the High Court often many miles away or in London can be wasteful in costs and time. There is no reason for a Circuit Judge not to deal with these."

281. Very few respondents disagreed with this proposal and, of those, some respondents were of the view that they were draconian orders which needed the expertise of a High Court Judge. One respondent in particular said that, "freezing orders are by their very nature draconian and applied for invariably without notice to the defendant. It follows that they should be dealt with very carefully and with the highest levels of experience and expertise". Another respondent considered that, "such orders should only be given by High Court judges save where the sum sought to be frozen by such an order is within the jurisdiction of the county court."

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.

282. This question was answered by 85 respondents, of whom 76 (89%) agreed and 9 (11%) disagreed.

283. A majority of respondents that supported this proposal agreed that such claims should come under the exclusive jurisdiction of the High Court. Some respondents suggested that these cases are highly specialist in nature and emphasised that specialist issues need specialist judges and that High Court judges will normally have the requisite experience for such cases. However they suggested that the High Court should have the power to transfer appropriate cases to the county court, thereby giving that court jurisdiction. Other respondents said that since such cases are usually transferred to the High Court, they may as well start there, as this would save the added paperwork of arranging the transfer.

One respondent said that these are complicated matters that could affect members of a company and should therefore be dealt with by the High Court alone. Given that the body of expertise for dealing with such claims exists almost exclusively within the High Court, it makes sense that these claims are dealt with by the most suitably qualified tribunal. One respondent made the point that there is no sense in claims being issued in the county court if they are almost inevitably going to be transferred to the High Court for case management and trial.

284. Of the few respondents that opposed this proposal, some said that it would "deny access to justice due, in particular, to the speed in getting matters disposed." Another respondent stated that there would be no need to make the changes as long as there are suitably trained and qualified specialist judges at the county court. The respondent made the point that the proposal would result in increased journeys to the High Court, even with the regional nature of the High Court, which provides hearings at District Registries.

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.

285. The following types of claims were suggested for inclusion in the proposals:

    a. Shareholder unfair prejudice petitions under section 994 of the Companies Act 2006.

    b. All Companies Act claims should be started in the High Court but all should be capable of being transferred to the county court where appropriate. One respondent considered that, as a general point, the complexity and potential consequences of Companies Act matters do require judges with the experience and expertise developed in the Companies Court and the Chancery Division.

    c. Claims under the Insolvency Act 1986 (IA) should fall within the High Court's exclusive jurisdiction. This should include misfeasance under section 212 IA; fraudulent and wrongful trading under sections 213 & 214 IA respectively; phoenix claims under sections 216 & 217 IA; and various remedies available to liquidators. The respondent made the point that such claims arise from the running of a company and require specialist insolvency knowledge and that claims under section 15 of the Company Directors Disqualification Act 1986, which may be brought in conjunction with section 216 & 217 IA claims, are in the same category.

    d. Restoration of companies.

e. Any proceedings to which Part 49 of the Civil Procedure Rules applies.

f. Any other specialist claim arising from a variation of trusts and applications under the Companies Act and any other specialist legislation.

g. Unfair prejudice and derivative claims under the Companies Act 2006, together with claims under section 90A of the Financial Services and Markets Act 2000 should fall within the exclusive jurisdiction of the High Court.

h. Applications under Section 606 of the Companies Act 2006 'Power to grant relief' and Derivative Actions. The argument for this view is that applications under Section 606 are few but they are most likely to be dealt with in the High Court. It was further argued that the rarity of the applications and their importance justifies the applications being in the High Court and that given the provision for close judicial supervision and the developing jurisprudence in the High Court, Derivative Actions should be commenced in the High Court. After the initial applications, the High Court could then decide that further proceedings should be adjourned to the county court.

i. Companies Act claims that involve other specialist legislation and are of a complex nature.

j. Disputes between shareholders and Derivative Actions, directors' disqualification procedures and company insolvency related matters.

k. Minority shareholder actions under s994 of the Companies Act 2006.

l. One respondent commented that, "on the basis that the reference to insurance transfer schemes is intended also to extend to banking business transfers and reclaim fund business transfers under Part VII of the Financial Services and Markets Act 2000 (FSMA), we should point out that Section 107 of FSMA gives jurisdiction to the High Court in England and Wales in these matters. These provisions are not part of the Companies Act and should not therefore fall to be dealt with under this question."

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.

286. This question was answered by 153 respondents, of whom 151 (99%) agreed and 2 (1%) disagreed.

287. An overwhelming majority of respondents supported this proposal with some commenting that the current process does not promote effective use of administrative and judicial resources and that this aspect of the civil justice system needs to be modernised, as it would ease the current arrangements and provide greater efficiency. Some respondents said that the current arrangement is an unnecessary restriction on the ability to administer court resources efficiently and effectively and that a High Court judge should be fit to sit in a case in which a county court judge is fit to sit. Respondents made the point that the proposal would enhance flexibility in the use of judicial resources and that requiring such authorisation seems unnecessary. One respondent said that the proposal would "reduce the burden on county courts when listing matters, and provide more flexibility, particularly where the factual and/or legal issues are complex, and it is decided to increase the value threshold for bringing cases in the High Court." It was also felt that the current process is too unwieldy and anachronistic for a modern civil justice system to be effective. One respondent supported the proposal on the basis that High Court judges out on circuit are generally content to assist if their own lists have collapsed and they do not have other commitments (e.g. a reserved judgment) and there is a suitable case in the county court for them to hear. Other respondents supported the proposal provided that there is spare capacity within the High Court bench and, if so, such a change could support more efficient disposal of county court cases. Consideration would also need to be given to the priorities of the High Court and, provided that High Court listings and waiting times are not adversely affected, High Court judges should be permitted to move between the High Court and county court without undue bureaucracy.

288. A respondent who disagreed with the proposal said that it was a matter for the judiciary.

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.

289. This question was answered by 163 respondents, of whom 161 (99%) agreed and 2 (1%) disagreed.

290. The majority of respondents who supported this proposal said that it would enhance flexibility and administrative convenience. They considered that the current system creates delay and additional cost that could easily be avoided and suggest that where there is availability, High Court judges could provide vital resources leading to increased flexibility and efficiency. One respondent said that the proposal is a fantastic idea

and suggested that the "High Court is less busy these days, and without question the Greater London County Courts struggle with the volume of work coming through them, with often a Circuit Judge sitting 1 day a week. This means that DJ's have too much box work that is not processed as they have to sit and hear all cases - which means that all court users suffer". Another respondent said that, "it would be ludicrous to have a judge sitting idle when there was a judicial need available". However, it was considered that the consent of the High Court judge should be required, in the same way that the consent of a circuit judge is required, to try a claim allocated to the small claims track. One respondent made the point that consideration should be given to the destination of any appeals under the proposals. Another respondent said that, in the event that the financial limit of the county court is increased, there would be an essential business requirement that a High Court judge presides over appropriate cases in the county court where the technicalities and/or complexities of such a case require their deployment in this capacity. However, they made the point that it is also essential that where such redeployment is needed, the High Court judge has full knowledge and is able to apply the specific rules and processes that apply specifically to that court's jurisdiction. One respondent who agreed in principle suggested that there would need to be safeguards introduced to ensure that the provision of High Court judges to the county court did not result in a shortage of judges available to carry out High Court work, resulting in a corresponding backlog. "It would be anomalous for there to then be a need to use deputy or assistant High Court judges to help clear the backlog. A balance needs to be struck between the two jurisdictions."

291. One respondent was more cautious suggesting a proviso that "no High Court judge should sit for more than a quarter of the year in the county court. Otherwise, the expertise of a highly qualified individual is squandered and the public pays for a higher salary than is required. If the county court needs more judges they should be hired and if the High Court requires less then they should be retired".

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

292. This question was answered by 161 respondents, of whom 136 (84%) agreed and 25 (16%) disagreed.

293. The majority of respondents suggested that there was no need to retain the geographical distinctions between courts in the present day and that the amalgamation of the county courts into a single entity could provide greater administrative efficiency. One respondent said that the current

"geographical and jurisdictional boundaries creates inefficiencies and enable parties to 'forum shop' to a degree". Some respondents agreed that the proposal made administrative sense and it would enable great improvements to the administration of justice. Others suggested that the current system is archaic, unwieldy and expensive. Respondents also considered that attachment to the current system was 'sentimental' and not for business reasons, and that streamlining the system would lead to costs reductions. One respondent said that the proposal was a sensible way of making best use of reduced resources by ensuring that work could be distributed throughout the country, thereby helping to reduce backlogs in some parts of the country while in others there is spare capacity. Some respondents said that the intended benefits of business centres are hampered by the need to maintain the individual jurisdictions of each county court and that by having just one county court, much of the current duplication could be done away with.

294. Of those that disagreed with this proposal, one suggested that a single civil court amalgamating all the levels of civil courts should be introduced instead of a single county court. Another respondent considered that the idea of having a local court is important to litigants because justice is likely to be delivered more effectively. Others said that they were not convinced that a single county court will enable a more efficient administration in the county courts.

Impact assessments

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.

295. 115 respondents answered this question and 29 (25%) disagreed. Most of these said that there was a lack of detailed statistics in certain areas, such as the likely impact on the legal profession. Some were concerned that because the Road Traffic Portal had not yet fully bedded-in, it was premature to consider extending its impact. Others considered that, unless court administration was improved, some of the identified efficiencies were unlikely to be achieved. A number also used this question to identify those proposals in the consultation where they did not feel persuaded by the arguments for change.

296. Since the consultation, the impact assessments have been amended to include further evidence and statistics, where these are available.

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

297. This question was answered by 113 respondents, of which 51 (45%) disagreed. A range of comments were provided. Some considered that the proposals underestimated the costs required to bring about the level of change envisaged, in particular that significant investment was required to court IT to bring it up to standard. Other comments included:

- other ADR options, besides mediation, ought to have been considered;
- there was a lack of specific costings on the impact to small businesses;
- there was concern that more parties would need to represent themselves if the small claims track was extended.

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?

298. Just 14 respondents answered yes to this question, and only a handful made specific comments on the equality impact of the proposals. Some concerns were expressed that the proposals might have a disproportionate impact on the low paid (which affects more female claimants), on those with a disability, or those who do not have English as a first language. One claimant in particular drew attention to the difficulty in being able to make adequate equality assessments when HMCTS was not required to collate demographic statistical information about court users.

Annex A: List of respondents

The respondents who gave details included individual members of the judiciary, individual solicitors and barristers, academics, members of the public and the following organisations:

218 Strand Chambers

Action Against Medical Accidents

Administrative Justice & Tribunals Council

Advice Service Alliance

Ageas Insurance Limited

AJAG

Alarm-UK

Alimar

Allen & Overy LLP

Allianz Insurance plc

Amey LG Limited

Amlin UK

APIL

ARAG plc

Asda Stores Ltd

Association of British Insurers

Association of Northern Mediators

Association of Welsh Mediators

Atlantic Chambers

Aviva UK General Insurance

AXA Insurance

Bailiwick Bailiff Services Ltd

Barnet County Court

Beachcroft LLP

Berkeley Square Mediation

Berrymans Lace Mawer

Bond Pearce LLP

Brachers LLP

Bradford & Airedale CAB

Bradford Council

British Bankers' Association
British Retail Consortium
British Safety Council
Browne Jacobson LLP
Calderdale Citizens Advice Bureau
Canterbury Christ Church University
CCUA
CEDR
Centre for Peaceful Solutions
Chartered Institute of Arbitrators (CIArb)
Chartered Institute of Loss Adjusters
Chartered Institute of Payroll Professionals
Chartis Europe
Christians against Poverty
City of London Law Society Litigation Committee
Civil Legal Aid Subcommittee The Bar Council
Civil Mediation Council
Clifford Chance LLP
Clinical Disputes Forum
Cluttons LLP
Collect UK
Commercial and Medical Dispute Solutions
Commercial Litigation Association (CLAN)
Complete Cost Consultants Ltd
Consumer Credit Counselling Service
Conwy Borough Council
Co-operative Group Ltd (Group Risk & Insurance Department - Claims Department)
Council of Mortgage Lenders (CML)
CPD Training
Credit Services Association
CSC Computer Sciences Corporation Ltd
CW Law Solicitors
DAS UK Holdings Ltd
Davies & Partners Solicitors
Dispute Mediation Consultancy LLP
East Riding of Yorkshire Council

ECIA
e-disclosure Information Project
EEF the Manufacturing Organisation
Expedite Resolution
Express Solicitors
Financial & Leasing Association
Financial Ombudsman Service
Fisher Meredith LLP
Forum of Complex Injury Solicitors (FOCIS)
Four Seasons Health Care
Freshfields Bruckhaus Deringer LLP
FSB
Gard & Co
Garden Court Chambers
Garden Court Mediation
Garwyn Group
Glaisyers Solicitors LLP
GMB
gocompensate.com
GOLDWATERS
Grant Thornton UK LLP
Greater London & East Anglia Mediation LLP
Greenwoods Solicitors
Groupama
Guildford Chambers
Hansen Palomares
Harvey Ingram LLP
Herbert Smith LLP
Herrington & Carmichael LLP
HFC Bank Limited
High Court Judge
Hill Dickenson LLP
HM Revenue & Customs
HMCTS
Horwich Farrelly Solicitors
Housing Law Practitioners Association

HSBC
Hutchison3G UK Ltd
IDRS Ltd
Independent Mediators Limited
Innovate Legal
Institute of Credit Management
Institute of Legal Executives
Institute of Revenues Rating and Valuation
Integrum Law
InterMediation
InterResolve Holdings Limited
Irwin Mitchell LLP
J B Leitch LLP
J E Baring & Co
JUSTICE
Keeble Hawson LLP
Kennedys
Keoghs LLP
Kings Chambers
Kirklees Citizens Advice
Langleys Solicitors
Law Reform & Research Committee Association of Women Solicitors
LawWorks
Litigaid Law
Liverpool Law Society
Liverpool Victoria Insurance
Lloyds Market Association
London Borough of Ealing
London Borough of Hackney
London Solicitors Litigation Association
Lovetts plc
MASS
Manchester Law Society
Mary Ward Legal Centre
MDDUS
MDU

Michael Dawson Limited
Midland Circuit Response
Mills & Reeve LLP
MND Law
Money Advice Trust
Moorish Solicitors LLP
Morgan Cole LLP
Motor Insurers Bureau
MPS
National Accident Helpline
National Australia Group
National Planning Forum
Network Rail
Newcastle Citizens Advice Bureau
NFU Mutual
No 5 Chambers
Norfolk County Council
Norton & Co
OFT
Oldham Law Association
Ombudsman Services
Oriel Chambers
Osbornes Solicitors
Pannone and Co Solicitors
Parliamentary & Health Service Ombudsman
Philcox Gray & CO
PIBA
Pikes limited
Police Action Lawyers Group (PALG)
Prime Professions
Prolegal Solicitors
Property Litigation Association
PSR Solicitors
QBE Insurance Group
Quality Solicitor Howlett Clarke
R3, the insolvency trade body

RBS
Registry Trust
Remploy
Residential Landlords Association & Association of Residential Letting Agents
Resolve Your Dispute Mediation
Restons Solicitors
Rodgers & Burton
Ropewalk Chambers
Rossendales
Rougemont Chambers
Royal Institute of Chartered Surveyors
RSA Insurance plc
RTA Portal Co Ltd
Scott-Moncrieff Harbour & Sinclair Solicitors
SDK Law
Secretary to the Civil Sub Committee Council of Her Majesty's Circuit Judges
Shakespeares Legal LLP
Shelter
Shergroup Limited
Shoosmiths
Simpsons Solicitors
South Holderness Technology College
Southern Water Services Ltd
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