



Jackson in Detail

*An in-depth summary of the preliminary report of Lord Justice Jackson
on civil costs and a request for comments and views from FOIL
members*

May 2009



Having been appointed by the Master of the Rolls in November 2008 to undertake a year long review of civil costs Lord Justice Jackson spent four months gathering information and research and talking to the numerous interest groups involved in the civil justice process. His preliminary report – a hefty document - was published on 8 May. It sets out the information he has uncovered and the views he has gathered. It also sets out some of his preliminary views, although he confirms that his mind is still very much open and he includes his views to give those who disagree a chance to put their case.

In short, everything is on the table. During the consultation period, from 8 May to 31 July, all interest groups have an opportunity to put their views before His Lordship – to agree, or to take issue.

This document summarises the main parts of the preliminary report to enable FOIL members to marshal their thoughts and make comments on the issues outlined, prior to the drafting of FOIL’s response to the report.

Please forward views and comments to Shirley Denyer at shirley.deny@foil.co.uk by Friday 12 June. A draft response will be circulated by Friday 24 July prior to submission at the end of July.

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INTRODUCTION

There are two principles which Lord Justice Jackson takes as a starting point:

"The proper functioning of the civil courts is essential to the well-being of society"

And, secondly;

"If the processes of the civil courts are so onerous that the parties cannot reasonably afford to litigate, the courts are not functioning satisfactorily".

Whilst the Woolf reforms have been a considerable success costs in civil proceedings continue to rise, due in no small part to CFAs and also, to some degree, as a consequence of the changes Woolf introduced. Insurers complain that costs paid to claimants become ever more disproportionate. Claimant lawyers complain of costs being run up by insurers' procrastination. There has also been an explosion of litigation on costs issues.

Lord Justice Jackson is "caught up in a maelstrom of conflicting arguments". Whatever he may recommend (and he still has an open mind) the final report will "generate protest from at least some directions and quite possibly from all directions".

THE BASIC FACTS

How much Civil Litigation is there?

Judicial Statistics

In the County Court approximately 10% of cases (around 200,000) are seriously contested and, at least potentially, give rise to significant costs orders.

By far the largest category of contested claims giving rise to significant costs orders are personal injury claims.

In the High Court, in 2007, out of 18,505 claims in the QBD:

1,157	were personal injury
578	were clinical negligence
205	were other negligence, including professional negligence

Other data

Lord Justice Jackson received information from a liability insurer. The insurer has 8% of the market in personal injury cases, except disease. In 2008 it received notification of 22,726 personal injury claims including 12,795 RTA claims and 9,771 EL and PL claims. Proceedings were served in 6.22% of cases (which may be a low figure looking at other data)

By extrapolation: 284,000 personal injury claims annually

56% - RTA

44% - EL and PL

The significant number of companies and organisations which self insure are not included in the above picture.

Looking at the UK Bodily Injury Awards Study, insurers representing 90% of the motor insurer market provided data. By extrapolation the number of RTA claims in 2006 was 258,309.

Looking at CRU records, for 2007-8 the following numbers of claims are shown (2006-7 figures in brackets):

Clinical Negligence	8,876 (8,575)
Motor Accidents	551,905 (518,821)
Employers' Liability	87,189 (98,478)
Public Liability	79,472 (79,841)
Other	3,449 (3,522)
Liability not known	1,850 (1,547)

Court Fees

The civil courts are predominantly self financing, costing currently £650m pa. Court fees pay 80% of this with the remaining 20% coming from the tax payer via the MOJ budget. The tax payer element pays for fees remissions and also for circumstances where courts are not self financing such as civil cases in magistrates' courts.

Under the current policy it is intended that fees should be at a level which covers the full cost, known as 'full-cost pricing'. A further policy is that some tax payers' money is needed to pay for remissions and ensure access to justice. The MOJ is working currently on a strategy to develop and reform the court fee system to ensure that it meets its targets and protects access to justice.

Many submissions have been put forward that full-cost pricing is fundamentally wrong. Strong views have been expressed that the function of the State is to provide and fund the machinery for dispute resolution. Lord Justice Jackson sees considerable force in those submissions. He suggests that it is wrong in principle to move most or all of the cost of civil justice from taxpayers to litigants.

THE FUNDING OF CIVIL LITIGATION

Before the Event Insurance

The information in this chapter was given to Jackson LJ by BTE insurers and intermediaries.

BTE normally comes as an add-on to some other insurance or service. There is no imminent prospect that individuals will be willing to pay substantial sums for stand-alone policies.

10-15 million households have BTE cover. 22.7 million adults have taken out BTE cover as an add-on to motor or household insurance.

There is a wide range of cover, usually of one of two types:

- (1) a solicitor is paid to represent the insured
- (2) the claim is sold and the solicitor represents the insured under a CFA.

Overall, due to referral fees BTE insurers receive more money than they pay out on RTA claims.

BTE does bring benefits and serves the public interest. The insured is able to bring and defend claims that otherwise could not be afforded. Insurers provide a stream of work and they have an interest in bringing down costs.

Type (2) above is less beneficial – work on a CFA simply increases costs. However, the free legal advice on the telephone which most policies provide is a valuable service.

It appears to Lord Justice Jackson that it is in the public interest to promote a substantial extension of BTE insurance especially type (1) above. By this means the cost of litigation by the few is shared by the many.

As part of its submission to the review the Bar Council has suggested a compulsory BTE insurance scheme which Jackson considers “merits serious consideration”.

It would work as follows:

- (i) Motorists should be required to take out BTE in addition to third party cover, to cover themselves, their passengers and any pedestrians they may injure.
- (ii) Employers, occupiers of business premises, operators of trains and others required to have public liability insurance should also be required to take out compulsory BTE cover in respect of personal injury claims suffered by themselves, employees, visitors, or customers
- (iii) The BTE would cover legal expenses only, not damages
- (iv) BTE insurers would recover their costs but no success fee or ATE premium in cases won. BTE insurers would pay the defence costs in cases lost.

1. In Phase 2 comments are sought on:

- (i) Whether stake holders and court users agree with the above analysis**
- (ii) The feasibility and merits of the proposal put forward by the Bar Council on compulsory BTE cover.**
- (iii) Further suggestions from the insurance industry and others as to how a substantially more extensive take-up of BTE insurance (in particular type (1) above) may be promoted.**

ATE Insurance

ATE insurance was developed during the 1990s. It became very widespread after 2000 when the premium could be recovered as a disbursement.

An issue which is sometimes raised is whether ATE premiums generally are unduly generous to ATE insurers. The demonstration of the reasonableness of the premium through a statement as in *Rogers v Merthyr Tydfil* is a separate issue to the wider question of whether ATE premiums generally are too high or about right. Insurers contend that the market is competitive – this may have more force in personal injury and clinical negligence litigation. It has been argued that *Callery v Gray* has for all time set a figure as a reasonable premium for RTA cases and this has removed downward pressure on the market, and that in practice, a *Rogers* statement does not ensure that premiums are competitive.

Third Party Funding

There is no TPF for personal injury claims. Rule 9.01(4) of the Solicitors' Code of Conduct prohibits a solicitor from acting in personal injury cases in association with a funder who will receive a percentage of the damages. However, this rule is under review currently by the Law Society and the Solicitors' Regulation Authority.

CFAs

The report contains a review of the ethical issues and the legislative path to the current CFA regime.

CFAs with non-recoverable success fee and premium are described in the report at Style 1 CFAs. There can be little doubt that Style 1 enable the 'MINELAS' (Middle Income Not Eligible for Legal Aid Support) sector of society to gain access to justice. There do not appear to have been complaints over deductions of up to 25% of damages. The link between ATE and CFAs was established from the outset, when CFAs were introduced.

CFAs were extended to nearly all cases by the Access to Justice legislation of the late 1990s, to enable ordinary people of modest means to start legal actions without risk, to encourage lawyers to weed out weak cases and to resolve the problem of an increasing legal aid bill. The decision to make additional liabilities recoverable reflected the desire to enable claimants to recover 100% of damages, as they had under the legal aid regime. These 'recoverable' CFAs are described as Style 2.

The changes in the late 1990s caused a cultural shift in the role of CFAs as a core method of funding litigation, leading to entrepreneurial organisations advertising for clients and developing complex networks of financial arrangements. The litigation relating to Claims Direct and TAG tarnished the image of no win, no fee. The principle of recoverability provided the ammunition for the 'Costs War'.

There are two clear views on CFAs:

- (the majority view) CFAs have become adsorbed in legal culture and provide access to justice to individuals who would otherwise be without a remedy;
- (the minority view) CFAs are injurious to the fabric of civil justice and should be abolished.

Jackson LJ's provisional view is that following the retraction of legal aid either CFAs or some other system of payment by results (contingent fee arrangements, CLAFs, SLASs, Third Party Funding etc) must exist in order to facilitate access to justice. A new generation of lawyers have grown up with CFAs – the principle is becoming embedded. The real issue therefore is how CFAs or other no win, no fee arrangements should be structured, not whether they should exist. The system as far as possible should provide incentives:

- For lawyers to get the best possible results for their clients whilst discharging their duties to the court and to other parties;
- For clients to accept or propose reasonable settlements; and
- For all parties to keep costs to proportionate levels.

CFAs are criticised on the basis that clients have no interest in costs being incurred and therefore an important discipline is missing. Another criticism is that they have increased the costs of litigation massively. A separate issue is whether success fees are set too high; this needs to be considered by reference to individual categories of cases rather than in general.

2. Views and comments are sought on the following:

- (1) Are CFAs in their present form satisfactory?**
- (2) If not, what reforms might be made in order to create appropriate incentives for all involved in the litigation process?**
- (3) What is the impact of CFAs on particular categories of litigation?**

Self-financing

The entitlement of the litigant in person to recover costs was established by the Litigants in Person (Costs and Expenses) Act 1975, currently regulated by CPR rule 48.6. Costs must not exceed two-thirds of the amount which would have been allowed if the litigant in person had been represented; £9.25 an hour is permitted for time reasonably spent.

The point has been made in submissions that this creates an imbalance as one side faces a full costs order whilst the other side faces a much lesser risk of a rate of £9.25 an hour. Whilst Lord Justice Jackson can see the force in this point he

doubts that the rules could sensibly provide for litigants in person to recover at "lawyer" rates.

3. Evidence is sought concerning the operation of the rules concerning awards of costs to litigants in person.

CLAFs and SLASs

This chapter considers self-funding schemes under which the costs of funding claims are recycled by means of a levy of some kind on successful claims, enabling a population of cases to be funded on a broadly costs-neutral basis. Such a mechanism has never operated in this jurisdiction.

'CLAF' stands for 'Contingency (or Contingent) Legal Aid Fund

'SLAS' stands for 'Supplementary Legal Aid Scheme.

Jackson refers to CLAFs as 'free-standing' – once established they are self-funding. A SLAS is built onto an existing publically-funded legal aid scheme.

Calls from various bodies for a CLAF date back to 1978. None of the proposals has been implemented, the Government instead choosing to focus on CFAs. Provisions were however included but not implemented in Sec 28 of the Access to Justice Act 1999, to provide for a CLAF or SLAS system. In June 2007 the CJC published its second report on funding, including a detailed evaluation of CLAF and SLAS options, which recommended a SLAS operated by the Legal Services Commission. This has not been implemented.

There are various policy issues:

- Should a self funding scheme be a CLAF or a SLAS and where should the 'seed' (initial) funding come from?
- From where should the levy on successful cases come and how should it be calculated? It could be a levy on damages or on inter parties costs.
- Who should be liable for the other side's costs? This can be highly material. A potential advantage can be to make use of the legal aid costs protection.
- What should be the remuneration of lawyers operating under the scheme? For a SLAS the obvious answer would be existing legal aid rates.

Details of schemes in Hong Kong, Canada, Australia and Northern Ireland are set out in the report. For example, the Hong Kong SLAS was set up in 1984 to cover a range of personal injury claims. The levy is 10% of damages on cases that go to trial and 6% on cases which settle before trial. The fund was started with \$1m Hong Kong dollars from the Jockey Club (similar to lottery funding in this country). Only a modest number of cases are supported, dropping in recent years from a high of 268 in 1999 to 95 in 2008. In 2007-8 the success rate was 87%.

Is there a case for a CLAF or SLAS in England and Wales?

In the right context CLAFs and SLASs are clearly viable in theory. They are also workable in practice although this is only apparent for small scale or specialist jurisdictions.

Would the Government want to introduce them? What is the access to justice problem for which they are a solution?

In a system dominated by CFAs the benefits of self-funding can be difficult to sell to clients, but this environment could change. A key obstacle is seed funding although to some extent seed funding is just a symptom of the greater problem of adverse selection (the danger of strong cases being diverted away from the scheme). If a CLAF is viable in the face of competition start up funding should be available.

CFAs are currently the dominant life-form in funding. The individual profitability of a CFA will tend to outweigh the communal risk-taking of a CLAF or SLAS. Almost all proposals assume that in successful cases claimant lawyers will take and retain full inter parties costs. If the costs principles changed to adversely affect claimants that could affect the viability of a CLAF/SLAS. A key policy issue is who should be liable for adverse costs orders, the main contenders being the fund or the client, both protected by insurance. If the client remains fully liable access to justice will be affected. If the fund is liable its exposure on losing cases is doubled. A possible solution is to use a SLAS with legal aid costs protection. To maximise the chances of a CLAF or SLAS being viable it would help to abolish costs shifting against claimants by one mechanism or another.

The pros and cons of the schemes vary enormously as between different case types. Key variables are the availability of CFAs and other funding mechanisms and the existence of evidence of access gaps/unmet need. This makes it hard to see a role for self-funding of main stream personal injury cases at the present time however it is uncertain whether or not the current costs regime will survive.

The CJC identified group actions as perhaps the most promising area to consider for such reforms. This is an area where Third Party Funding is already active and where, if allowed, contingency fees would have an active part to play. The inter relationship between different types of funding must always be considered. Group actions could be affected substantially by procedural reforms on which the CJC have been active.

The Bar Council has put forward proposals for a CLAF (full details are available on the Bar Council website). Their report proposes that CLAFs should be set up to operate in tandem with legal aid and CFAs. It proposes that the levy will come from damages either as a percentage or calculated as a success fee. The former is easier to understand and by definition the levy is proportionate. It may also be appropriate to require a losing defendant to make a contribution to a CLAF on top of normal assessed costs, which would be "markedly less" than the success fee and premium paid at present. Success fees and premiums must cease to be recoverable for a CLAF to work. Personal injury and clinical negligence cases give rise to particular policy issues: there is the serious question of whether any funding regime is acceptable which creams off more than a small proportion of general or special damages.

In its report in 2007 the CJC recommended that a CLAF should not be established. The reasoning was as follows:

"Although there is considerable merit in the concept of a CLAF, there is insufficient evidence from other jurisdictions that a CLAF style scheme could be transported to this jurisdiction. CLAFs can be successful, but suffer variously from insufficient seed funding, adverse selection, and (even where successful) expansion into higher risk (losing) cases that reduce income and threaten the scheme. It is unlikely that a CLAF would be successful in England and Wales due

to adverse selection in a system where conditional fee agreements are operating successfully.”

At first blush Jackson sees some attraction in the Bar Council proposal, but “a great deal of detail still needs to be worked out”.

4. Comments are invited on:

- **The Bar Council’s proposal for CLAFs**
- **Any alternative proposals for setting up a CLAF or SLAS**
- **Any objections to setting up a CLAF or SLAS, beyond the CJC’s argument above.**

Contingency Fees

In common parlance the term ‘contingency fees’ is used in a narrow sense, to mean fees which are payable if the client wins which are calculated as a percentage of the sum recovered. At present solicitors cannot enter into contingency fees for contentious business. There have been a number of calls over recent years for this ban to be lifted. Prof. Zander’s comments are quoted to the effect that under contingency fees lawyers do not have an incentive to pad their costs to recover a bigger success fee. They are easier to explain to clients than CFAs although in Prof Zander’s view the regulation requiring that the CFA be explained to the client is “completely unrealistic” and now that the success fee and premium are recovered from the loser “completely pointless”.

The CJC has produced two reports on funding options. In the first the CJC recommended that American style contingency fees requiring the abolition of costs shifting should not be introduced but that consideration should be given to regulated contingency fees similar to those permitted in Ontario. In the second report the CJC recommended that contingency fees should be permitted in multi-party cases where no other form of funding was available. The Law Society has acknowledged that there are pros and cons to contingency fees and has invited the views of its members on the issue.

Looking at how contingency fees work in other situations, in Employment Tribunals, for example, overall, they make a modest contribution to access to justice and they are popular with some clients. On the other hand they can give rise to conflicts of interest and may give the solicitor an excessive interest in settlement negotiations.

The regime in Canada is particularly important for present purposes as, unlike in the United States, there is costs shifting in Canada. Under their regime in so far as the contingency fee or success fee exceeds normal costs it is borne by the successful litigant. The regime is generally thought to work satisfactorily and promotes access to justice.

The overwhelming view in the submissions is that the total US system with no costs shifting should not be adopted. If costs shifting is retained views on contingency fees are more evenly divided.

Arguments in favour

- The principle of no win, no fee has already been established

- Contingency fees are simpler than CFAs
- They offer less scope for conflicts of interest
- Most clients prefer contingency fees to CFAs
- If contingency fees are permitted in addition to the present regime access to justice will be improved.
- Under contingency fees the lawyers' fees are always proportionate
- There is a direct incentive to maximise recovery for the client.
- There is no danger of a US style system here as juries do not assess damages and judges are not elected
- Contingency fees would "remove from a reluctant judiciary the difficult task of seeking to regulate costs on a case by case basis."
- They work well in Employment Tribunals and the VAT and Duties Tribunal.
- There can be no objection to their use by "sophisticated" clients i.e. large plcs.

Arguments against

- Contingency fees are liable to give rise to greater conflicts of interest
- It is wrong in principle for a lawyer to have an interest in the level of damages
- If contingency fees existed lawyers would conduct low value cases on CFAs and higher value claims on contingency fees. This would maximise recovery for lawyers and give rise to a conflict of interest with clients.
- If part of the contingency fee is not recoverable clients will lose part of their damages. This is unacceptable in personal injury cases especially where the damages are for future care.
- They create an incentive to settle too early.
- They are only viable if general damage levels increase. "That is not going to happen, as is apparent from the non-implementation of the Law Commission's 1998 report."
- Contingency fees are only acceptable in the US as damages are very high
- The introduction of contingency fees would damage the solicitors' profession.

It appears to be generally accepted that if contingency fees are to be introduced they have to be regulated.

5. Views and comments are sought on:

- **Should contingency fees be permitted in England and Wales?;**
- **If so, and if costs shifting remains, what form should the shifting take? Should the losing party pay the additional element of costs? (the amount by which the contingent fee exceeds costs assessed on the conventional basis)**
- **If contingency fees are permitted what form of regulation should be introduced?**

Fixed Costs

Should there be a comprehensive Fixed Costs Regime in the Fast Track?

A system of fixed recoverable costs in all cases allocated to the fast track was recommended in the Woolf report. He advocated a matrix giving fixed figures for claimant and defendant depending upon the value of the case and stage reached.

The proposal was controversial. There was considerable opposition from practitioners and it was felt that the new rules should 'bed down' first. In the event it was not implemented except with regard to fast track trials.

In 2001 the CJC held an inaugural costs forum which concluded that moves should be made to produce fixed recoverable costs in RTA claims within the fast track. Sec II of Part 45 was introduced for RTA claims with a value of less than £10k. No further agreement was possible. The figures have not been amended since 2003 although the Advisory Committee on Civil Costs has announced its intention to do so by October 2009.

There have only been two further developments in fixed costs. The costs for fast track trials were increased in line with inflation in 2007 and a new bracket introduced for cases worth more than £15k was introduced following the rise in the fast track level in April 2009.

It is the unanimous view of Jackson LJ and his assessors that they should take forward this work and try to achieve a fixed costs system in fast track cases. An illustrative matrix has been produced but not agreed: the figures are purely illustrative. The matrix is reproduced as Appendix 1.

In addition to the matrix some supporting 'rules' would be needed:

- Advocacy fees remain as a 'bolt-on'
- The costs of interim applications and injunctions should be assessed summarily
- Add-ons need to provide for cases involving children and protected persons, expert evidence from more than one person, multiple claims or defendants, or clients not able to give adequate instructions in English.
- There may be scope for capping some standard disbursements
- There needs to be provision to deal with unreasonable conduct by the paying party possibly by allowing the receiving party to apply for an order for summary assessment of fixed costs outside the matrix
- There must be an incentive for both parties to make good offers to settle. Allowance must be made for the operation of Part 36.

The sub-committee felt that separate fixed costs should be applied where liability is admitted at an early stage from those in which liability is disputed. This reflects different costs and provides an incentive to admit liability early. Illustrative results are shown in the matrix.

The sub committee was not able to agree the matrix. There is an inevitable tension between the need for fairness to practitioners and the need for certainty and simplicity. For a matrix to be uniformly fair more boxes are needed than can easily be accommodated.

As an alternative to the matrix in Appendix 1 another version has been produced with just one post issue stage before trial. This is attached as Appendix 2. This has its own drawbacks, for example, the possibility of claimants issuing simply to increase revenue. This matrix is offered as an illustration of the options.

It has been a justified criticism of the existing fixed costs regime that no mechanism was built in to review and make adjustments to reflect inflation. Uncertainty over reviews is unsatisfactory. Any system of fixed costs needs a mechanism built in for review ideally on an annual basis.

Provision needs to be made within the system for exceptional cases as found in the 'escape clause' in CPR 45.12.

6. Comments are invited upon seven matters:

- (1) **whether some form of matrix of staged fees is the preferred solution**
- (2) **Whether there are other types of case that should be included in addition to those in the illustrative matrix**
- (3) **Whether there should be more or other stages in the matrix**
- (4) **Whether the proposed 'rules' adequately address the additional factors that would need to be built in.**
- (5) **Whether it is agreed that there should be a reduction for early admission of liability**
- (6) **How any counsel's fees other than for advocacy should be accommodated in a fixed costs regime**
- (7) **What steps might be taken, with the assistance of the CJC, to fix expert fees in fast track cases.**

Additional data will be sought during Phase 2 – the co-operation of claimant and defendant firms is requested.

Should there be a fixed costs regime above the fast track?

This chapter addresses type 2 fixed costs – costs which are deliberately fixed at less than the actual (reasonable) costs of the winning party. The policy issues are as follows:

In favour

- Some litigants may regard the risk of a costs order against them as worse than the risk of failing to recover all their own costs if they win.
- Such a regime achieves certainty where type 1 fixed costs cannot be established (type 1 costs are designed to pay the winning party's lawyer without further recourse to the client)
- If both parties know they will be paying part of their own costs win or lose there will be an incentive to be economical.

Against

- It is unjust that a vindicated party should bear any of their own costs
- In fixed costs regimes the wealthier party can generate expense and grind down the other side which will not recover all its costs.

The position in other regimes is outlined:

Germany – fixed costs regime for all types of litigation and all sizes of claim. The successful claimant bears the costs above that recovered. It works well. The system cannot be directly transferred to this jurisdiction due to differences in the systems.

Other continental jurisdictions – recoverable costs are reasonably predictable and substantially below actual costs.

Australia – some states have scale costs but NSW does not. Practitioners in both regard their own system as superior.

New Zealand – the system is part-way between fixed costs (as in continental Europe) and the England and Wales 'recovery of reasonable costs' regime.

Canada – is in the throes of civil justice reform, partly to control costs.

East Caribbean – operates a system of fixed recoverable costs using a costs matrix. The rules appear less efficacious than in Germany as there is much satellite litigation on costs.

Scotland - no fixed costs regime as such. However, the fees recoverable are prescribed in tables and regulations. The whole of the civil justice system is currently under review by Lord Gill.

By way of overview it is clear that most civil justice systems around the world award successful parties a much lower proportion of actual costs than we do. It may be, as a matter of policy, that we are right and the rest of the world is wrong but it is at least relevant to examine how other jurisdictions tackle these problems.

7. What approach should be adopted in England and Wales

The first and fundamental question (assuming that fast track costs are fixed) is whether all costs above fast track should continue to be at large. Should the successful party recover costs assessed retrospectively and subject to current restrictions?; or should some limit be placed on recoverable costs so that (a) the winning party bears more of its own costs (b) the burden on the losing party is reduced? and (c) the costs risks of each party can be more accurately assessed?

Lord Justice Jackson's distinct impression from submissions is that for commercial litigation, court users wish to maintain a system of costs at large.

In respect of personal injury claims over £25k particular policy considerations apply. It is generally regarded as unacceptable for any part of damages for future care to be diverted to the claimant's solicitor. Whether all damages should be sacrosanct is an issue on which views differ. Jackson's impression from the submissions is that the general view is that the present regime of recoverable costs at large should continue. If this impression is confirmed in Phase 2 it would be inappropriate to introduce fixed costs or similar for higher value personal injury claims.

An alternative approach – benchmark costs

This alternative to fixed costs has been floated. It was raised by Lord Woolf and taken forward by Senior Costs Judge Hurst in 2000 and 2001. He produced calculations of benchmark costs for 14 different events in proceedings.

Is this an approach court users and practitioners would favour for multi-track proceedings in the event that no form of fixed costs are introduced? It should be noted that they can only apply to a limited number of applications (e.g. appeal on quantum, simple appeal from Master to High Court judge, simple application without notice).

8. Views are sought on the principle of benchmark costs.

Personal Injuries Litigation

Deductions from damages

It is normal in litigation for successful claimants to suffer some deductions (items disallowed on detailed assessments) and personal injury claimants are no different. Pre 2000, claimants were liable to lose up to 25% of damages in unrecoverable success fees/premiums.

It has been argued by APIL that 100% recovery is now an established principle from which there should be no retreat. The alternative view is that personal injury claimants should not be treated any differently from any other. It can also be argued that costs rules can impose appropriate incentives to encourage reasonable conduct.

One intermediate view is that general damages for pain and suffering and special damages for past losses could be subject to deductions but damages for future care and future accommodation should never be subject to any deduction.

9. A policy issue – is it ever right that claimants should suffer deductions from damages in order to recover costs?

The Small Claims Track

The small claims track is the normal track for personal injury claims where the damages do not exceed £1,000. It has been suggested that the upper level for small claims cases should be increased substantially above £1,000. By increasing the level to £5,000 a substantial number of cases would be taken out of the fast track. This is not without controversy.

The arguments in favour

The majority of all personal injury claims are worth less than £5k. The costs in lower value claims are often the most disproportionate. The small claims track is considered by some to be a more efficient system and a more appropriate forum to hear lower value personal injury claims. The ABI has informed Lord Justice Jackson that on cases worth between £1k and £5k costs paid are as follows:

Motor related claims	£984m
Employers' liability claims	£171m

Under the small claims regime such costs would not have to be paid and could be passed to claimants by way of damages, or passed to the general public by way of reduced insurance premiums.

Many lower value claims are straightforward. They are relatively simple for claimants to understand. If the assessment of general damages was easier and more predictable then it might be feasible to move cases worth more than £1k to be pursued on the small claims track.

Many claimants have BTE cover as part of other policies. They can offer legal advice or representation for the small claims track.

The arguments against

Personal injury cases can involve complex issues which require legal guidance. By lifting the small claims level to £5k many severe and complex injuries would be brought within that regime. A claimant may not wish to pursue a claim without representation, which he would have to fund himself, creating a significant barrier to justice.

'Deep pocketed' defendants could continue to use lawyers creating inequality of arms.

Claimants cannot value their cases themselves and without lawyers would under-settle their claims.

Determining the correct track for personal injury claims would become much more difficult and allocation hearings would become complex.

Consumers would not enjoy lower insurance premiums. On the contrary, as fast track cases would diminish ATE premiums would rise significantly, restricting access to justice. Furthermore BTE insurers would be required to fund certain claims without being able to recover costs, and accordingly BTE premiums would rise.

APIL's membership survey has suggested that almost 70% of all personal injury work consists of claims for less than £5k general damages. Firms specialising in this work would face a significant loss of business. Such firms would be "decimated". The reduction in the number of pi firms would create access to justice problems.

If the levels were increased claimants would seek help at legal advice centres which would be unable to cope with a substantial increase in the number of unrepresented claimants.

10. In April 2007 the DCA published a consultation paper on track limits. Four possible courses of action were set out for the small claims track: raise the limit to £5k; raise the limit to £2.5k; raise the limit in line with inflation; or preserve the same limit. The conclusion of the post consultation report was that the level should remain at £1k.

An increase in the level would need to be accompanied by some appropriate safeguards for claimants. These could include:

- **Restricting the increase to certain types of claim (e.g. uncontested claims relating to soft tissue injuries)**
- **A revised system of assessing general damages. A software system for assessing low value damages could be devised.**
- **Provision for some kind of legal advice – claimants could recover the costs of a pre-determined amount of legal advice.**

Views are sought on the options and the possible safeguards

Should there be one-way costs shifting for personal injury claims?

The vast majority of personal injury claims are either resolved in favour of the claimant or dropped before issue. It is rare for claims to end in any costs being paid to defendants.

Claimants take out ATE to protect themselves from costs orders and to pay their own disbursements in the event that they are unsuccessful. As the premiums are recoverable defendants pay a high price for the protection they receive in the very few cases which they win. Upon looking at data it appears to Lord Justice Jackson that one-way costs shifting would be cheaper for defendants and reduce the burden on claimants.

The proposal raised for Phase 2 is whether it would be more cost effective to remove the claimant's liability for costs in respect of unsuccessful claims. The proposal for consideration is:

- (i) in cases in which C win, C recovers on the same basis as now
- (ii) in cases which C loses the court makes no order for costs
- (iii) Because C is not as risk of costs he does not need to buy ATE for the other side's costs – that element of the premium is saved.

An analysis has been carried out of data supplied by insurer X (the same insurer mentioned on page 4 under 'How much civil litigation is there'. X has approximately 8% of the insurance market for RTA, EL and PL pi claims. During 2008 22,726 claims were notified to X. The total number of claims on which X paid out was 11,750. Proceedings were served in 1,414 cases (6.22% of the total). 99 proceeded to trial. "One or two" resulted in a costs order in favour of the defendant. Taking into account cases where the claimant failed to beat a Part 36 offer, on the 22,000 or so cases notified, X obtained a costs order in 25 cases (approx 0.1% of the total). On those 22,000 or so cases X paid £2,976,541 in respect of ATE premiums. It is not known what percentage of the ATE premiums covered other side's costs cover but it is a reasonable inference that the savings would far exceed the sums recovered.

Would a one-way costs shifting regime be advantageous?

Claimant perspective: the claimant would no longer be a risk of having to pay the defendant's costs. This would be advantageous although on the other hand some incentives may need to be introduced to discourage frivolous claims and to encourage the acceptance of reasonable offers.

Defendant perspective: it could be said that one-way costs shifting would increase frivolous actions and make claimants more reluctant to accept reasonable offers. FOIL suggested incentives to avoid these dangers (see below). An alternative suggestion would be a power to award costs against the claimant in exceptional circumstances.

The public interest: the personal injury litigation industry is populated by numerous interest groups and middlemen, all of whom have to meet their overheads and make a profit on top. If any layer of activity can be removed from the process (and insurance against adverse costs liability is one layer of activity) it may be thought that this would serve the public interest.

FOIL's suggested incentive scheme:

Damages awarded	Costs consequences
Equal to or greater than claimant's offer	Defendant pays claimant's costs with uplift
More than 10% higher than defendant's offer AND less than claimant's offer	Defendant pays claimant's costs on standard basis
10% higher than defendant's offer	Claimant recovers costs to date of offer

	only
Equal to or lower than defendant's offer	Claimant receives costs up to date of offer and suffers a 10% penalty on damages

Jackson LJ's tentative view is that penalties of the kind suggested by FOIL may not be necessary. CFAs already discourage frivolous claims and the rejection of unreasonable offers. The claimant must also insure his own disbursements. Jackson would question whether the risk of adverse costs operates as a brake upon claimant conduct.

11. (a) views and (b) statistical data relating to the issue of one-way costs-shifting are requested.

Can the transaction costs of personal injuries compensation be reduced?

In this chapter the focus is on 'ordinary' personal injury claims, RTA, EL (including disease) and PL.

Claimants usually win their cases and the litigation is generally straight forward. The great bulk of the work is carried out by specialists. The costs of personal injuries litigation remain high, particularly for lower value claims. The question must be asked as to why such high costs are being incurred, particularly on the claimant side.

The answers given by the claimant side

- Expenses of obtaining work – claimants must get work by marketing or by paying referral fees.
- Time spent with clients – individual claimants need more time and attention than defendant clients.
- Cash flow- claimants are only paid at the end of a case.
- Attitude of defendants – defendants define the issues, they generate unnecessary costs by failing to respond to letters, or failing to provide information etc. They put claimants to proof on issues which should be admitted.
- There are necessary costs on every case
- Assessing general damages is not straight forward and needs research.

The answers given by the defendant side

- There is no proper scrutiny of costs – claimants have no interest in the costs being incurred.
- Excessive hourly rates – claimant hourly rates are substantially higher than defendants' hourly rates and are excessive
- Referral fees
- Exploitation – claimant lawyers exploit the rules and make unnecessary applications
- No competitive tendering
- Excessive legal input – claims could perfectly well be resolved between claimant and insurer without input from lawyers.

One possible view is that there is some force in the points made on both sides and that cumulatively the matters on both sides account for the high cost. Jackson leaves open whether this view is indeed correct.

Referral fees

There seems to be a general view amongst solicitors on both sides of the fence that these are an unwelcome addition to personal injury costs. The majority of solicitors do not accept the 'access to justice' argument.

The new process for personal injury claims (MOJ process reform)

The essential elements of the new process are set out:

- Use of a 'notification form' to notify the defendant of a claim
- Investigation of the claim within a set period
- Response from defendant admitting liability or requesting more time or identifying any area that is problematic. Offers of rehabilitation can be made at this time.
- Admission of liability will be binding. Claimant will then obtain a medical report. Claimant will send it to defendant as part of a settlement pack including claimant's offer to settle. Defendant will then accept offer or make counter-offer.
- Fixed costs including success fee will apply to first stage (leading to denial or admission). No referral fee paid.

Although initially proposed for all personal injury claims up to the value of £25k following consultation the new process will now be limited to RTA cases up to £10k.

Lord Justice Jackson's preliminary view is that a process along the original lines for cases up to £25k "makes eminent good sense". He suggests that any development of that should be dovetailed with the new RTA process to create a single package of reform. The current process reform will need amendment if changes are introduced to raise the small claims limit or make success fees/premiums unrecoverable.

12. Comments are sought on three matters:

- (i) How the proposed new claims process (the MOJ RTA regime) would be affected if any of the reforms in this report were to be adopted**
- (ii) How the new claims process might be built upon, in order to cover all fast track personal injury claims**
- (iii) Any other constructive suggestions for co-operation between claimants and defendants to facilitate the swift and fair resolution of low value personal injury claims where there is no defence on liability and quantifying damages is straightforward.**

Can the Assessment of General Damages for Personal Injuries be made Simpler and More Predictable in Lower Value Cases?

Claimants have both case law and the JSB guidelines to assist them. The use of case law is very time consuming and does not always reflect normal settlement parameters. The JSB guidelines are an imprecise tool.

Many insurers use a software tool, either 'Colossus' or 'Claims Outcome Adviser' (COA). The majority of cases (for some insurers more than 90%) settle within the software recommended figures.

According to claimant representatives judges invariably award more than the software predictions. Worrying stories of under-settlement have been submitted during the review. Jackson LJ has an open mind on the extent of this problem. If it is the case that the present system of evaluating cases is expensive and sometimes results in under-settlement it may be reasonable to look towards radical reform.

Some European countries have adopted a variation of a 'points system' with judicial or legislative approval. JSB guidelines are updated by inflation and to reflect case law although the data from case law has shrunk over recent years as the number of judicial decisions has reduced. They provide a useful starting point for practitioners but have not created a clear, transparent and simple method of calculating general damages.

An analysis of how Colossus works is set out in the report. The two software systems Colossus and COA allow for sophisticated and personalised valuation of an individual's claim. The systems ensure consistency but are they calibrated at 'proper' levels which reflect the damages which judges would award?

Looking at other jurisdictions there are simpler, more consistent and more cost effective ways of calculating general damages. A points system allows for transparency but may be inflexible. One solution would be to use a Colossus type system and adapt it for a wider and more authoritative application, accessible on the internet to all parties in the process. Although current tools may be seen as defendants' systems Colossus is technically open to anyone who buys a licence. ISO, the company that provides COA, has launched a system called PICAS which is available for all stakeholders. The system is already being used and has a number of benefits. The medical data is input directly by the medical expert. The expert must be definite – a prognosis of 12-18 months cannot be recognised, it must be either 12 or 18 or somewhere in between. This does not appear to have caused problems to date.

One drawback is that all current systems have been created without judicial or authoritative input. If this could be achieved it would guard against under-settlement.

In its 1998 report the Law Commission rejected a proposal for increased use of medical scoring. It considered the role of computers but made no recommendations regarding their use. Since then technology has moved on.

13. Comments are invited on three matters:

- (i) whether a judicially approved points-based software system might be developed?**
- (ii) Whether under-settlement is a significant problem and, if so, whether the system might reduce the risk**
- (iii) Whether the use of such a system might reduce the costs of handling lower value personal injury claims.**

At the moment the focus is on personal injury claims up to £25k. However, points based systems are used overseas even for serious pi claims and it might be possible at a later date to develop a system for achieving at least a preliminary valuation in serious cases.

CONTROLLING THE COSTS OF LITIGATION

E-disclosure

A new practice direction and questionnaire will come into effect in October 2009 to augment current rules, particularly to assist in identifying the scope of a 'reasonable search' and to agree the format of disclosure.

14. Views are sought on experiences of e-disclosure, on whether a particular approach has saved costs or caused wastage. Views are sought on the methods set out in the report by which the costs of e-disclosure might be controlled and on any other proposals which would control costs.

Disclosure Generally

Submissions have been received suggesting that radical reform is needed to the disclosure process. Some consider any limitation of disclosure fundamentally wrong but given that limited/no disclosure works in some jurisdictions it must be considered a possibility at this stage.

Reviewing the current system, in litigation which does not involve substantial resources, in the majority of cases it seems to work reasonably well. Concerns have been raised that in personal injury cases pre-action disclosure has become a "cottage industry" in which claimants pursue applications and claim costs for minor protocol breaches. Claimants argue that information and documents are often withheld. Jackson LJ hopes that these issues will be overtaken by the 'new process' outlined above. Once litigation is underway the rules seem to work without problems.

In litigation which involves substantial resources and expense disclosure seems to cause the most problems. There are many difficulties, including the growth of electronic communications, duplicative disclosure, failure to follow agreed procedures and in some cases lack of adequate case management. The approach in other jurisdictions is detailed.

The options for consideration include:

- No change
- Abolish standard disclosure and limit disclosure to documents relied upon, with the ability to seek specific disclosure
- 'Issues based' disclosure akin to that being piloted in the Commercial Court
- Revert to the old 'discovery' test
- No default position – appropriate breadth of disclosure to be set at the CMC
- More rigorous case management
- Use of disclosure assessors
- Restrict the number of specific disclosure applications and/or raise the standard to be met, or reverse the burden of proof.

15. Views are sought on all issues

Witness statements and expert reports

Witness Statements

Written witness statements have achieved their objectives in shorter, less substantial cases. The real problem concerning witness statements arises in larger and more substantial cases and the report focuses on these. Possible actions include:

- Enforce compliance with the Woolf reforms - to achieve concise reports with robust use of sanctions
- Focus evidence more on the issues
- Make witness summaries the norm
- Confine statements to matters that are not within the documents
- Stipulate a maximum length.

Expert evidence

Concerns about the cost of expert evidence arise in cases of all size. The criticisms of the system in the submissions included:

- Failure to identify the right issues
- The perceived difficulty for a judge to rule that a claimant cannot rely upon evidence obtained prior to the first CMC
- An overwhelming failure to impose the use of a single joint expert
- Delay caused by unrealistically short deadlines in the timetable
- An inability to contact the opposing expert
- Prevaricating tactics in relation to the experts' meeting
- The expense of obtaining the attendance of an expert at trial.

Jackson LJ has been told that in personal injury cases pre-action liaison over selection of experts is often not working well. The remedies appear to be two-fold: the courts must investigate non-compliance with para 2.14 of the PAP and impose sanctions for breaches. Secondly, proper liaison over selection of experts must be a key part of the 'new process' which is being developed for personal injury claims.

It has been suggested that obtaining expert evidence should be postponed until after disclosure.

16. Comments are sought on timing of expert evidence

In Jackson's experience expert meetings have proved very effective in narrowing technical and expert issues. He feels that the costs involved are usually worthwhile.

The greatest concerns over expert evidence were raised in relation to straightforward RTA, EI and PL claims, where the cost can be more than the damages. Two proposals have been put forward:

- The use of accredited experts who are known to be impartial, to increase resolution of cases with one expert
- A scheme put forward by a clinical negligence organisation whereby single experts, jointly instructed but paid for by defendants, binding defendants but not claimants might be appropriate for claims identified as lower value by the parties at the outset.

17. Views are sought on both of these proposals

Other cost saving suggestions

- Sequential exchange of expert evidence on liability to be standard. In personal injury/clinical negligence cases the claimant should be obliged to disclose their expert report with service of proceedings.
- Presumption that all quantum experts will be instructed on a 'single joint' basis unless court decides otherwise. Experts must be agreed prior to instruction.
- No costs recovery for reports not relied upon or not covered by permission given for experts to be called.
- Whether a procedure whereby opposing experts give evidence concurrently might be included in the CPR, perhaps subject to a pilot.

18. Views are sought on the various proposals

Case Management

Pre-action protocol

There is general consensus that the early exchange of information is beneficial but concerns are raised that claimants run up substantial costs even before a letter of claim is sent. The issue of protocols generating substantial costs is one of the issues to be focussed upon in Phase 2. To take an "obvious example" the personal injury pre action protocol enables essential information to be exchanged but complexities are growing. Hopefully problems can be solved by the 'new process'. Once the new process has been finalised that will have to run in conjunction with the PAP. These two procedural documents together could run to some length.

19. Could the two procedures (process reform and the personal injury pre-action protocol) somehow be combined together into a reasonably concise, user friendly document?

Allocation and process to trial

In some courts it appears that the listing of interim hearings is problematic, with lengthy delays.

20. More information is sought

Other case management issues

Many court users and practitioners believe that the court system fails to impose strict enough sanctions. Proposals include:

- All deadlines in the CPR to be amended to carry a specified sanction

- When directions refer to “exchange” of documents a party willing to proceed but unwilling to disclose unilaterally should be permitted to file evidence at court. The defaulting part will then need a court order for an extension of time.
- A change in judicial policy to state that after an agreed date non-compliance with deadlines would no longer be tolerated except in exceptional circumstances. There would then be a series of ‘hard cases’ where claims were struck out. Jackson is not advocating this as a remedy but it is one way of dealing with the concerns.

ADR

Lord Justice Jackson’s preliminary view is that away from business litigation parties are less well informed on ADR and there is a need for better information and education.

21. Are the present procedural rules and the present judicial approach to ADR leading to a saving of costs or a wastage of costs? (separate consideration to be given to each category of claim)

Trials

The procedural rules on fast track trials appear to be broadly satisfactory. There are concerns about the cost of multi track trials.

22. Views are sought on possible remedies including controlling the timetable and the evidence; ‘chess clock’ agreements to encourage better discipline; a reduction in the duplication in skeleton arguments and oral advocacy; or a cap on recoverable costs of attendees at trial.

Suggestions are sought on devising rules to encourage the early resolution of cases destined to settle to reduce the number of ‘steps of the court’ settlements.

Costs capping

The pros and cons are set out together with an examination of the practice of DJ Lethem in Tunbridge Wells. The issue is hugely controversial and produces polarised views. One possible analysis is as follows: costs capping cannot be used in isolation to control costs, tempting though this may seem to those who feel costs are too high. It may be used as an adjunct to a wider exercise of costs management in those cases where it is appropriate for the court to undertake costs management. Otherwise, however, capping should be reserved for exceptional circumstances as currently prescribed. It must not be used as a shortcut or treated as a sword to cut through the Gordian knot of civil costs.

23. Further comments are sought

Should the costs shifting rules be modified?

Almost all parties agree that the costs shifting rule must be retained. This must be critically examined, in particular, looking at those jurisdictions which do not have costs shifting: the small claims track, tribunals, the US etc. In examining those jurisdictions the arguments for and against are more finely balanced than the general approval of the parties would suggest.

There may possibly be further specific examples of litigation where the abolition of costs shifting is a serious candidate, for example, in group actions. Subject to defined examples, however, it appears that costs shifting in some form must remain for the generality of litigation.

The working assumption is that costs shifting in favour of claimants should remain. Whether that should extend to success fees/premiums is a more difficult question.

The possibility of introducing one-way costs shifting for personal injury cases is discussed above (page 17).

24. The existing costs shifting regime should not be regarded as a 'sacred cow'. Further views are sought on:

- **Whether there are any further discrete areas of litigation where costs shifting could be effectively abolished?**
- **Whether there is a case for a presumption of one-way costs shifting either in personal injury litigation or across the board, and what issues and options should be considered?**
- **If costs shifting is retained what principles should operate? 'Loser pays' is only one option. Other options could be considered to encourage early resolution including the use of ADR.**
- **In cases where costs orders are made whether the rules should mitigate the full impact of such orders by forms of costs protection either in favour of claimants or in favour of individuals generally.**

The Recoverability of Success Fee and ATE premiums

Leaving aside the statistical question of whether success fees are set at the right level the effect of recoverability transfers all claimant costs to defendants whether they win or lose. If claimants win they recover under the 'loser pays' rule. If they lose they recover their costs through the success fees on other cases. Defendants end up bearing their own costs in all cases, either because they lose or because they pay for the privilege of recovery of their own costs when they win through ATE premiums in many other cases. Recoverable premiums also mean that all

claimant disbursements in all cases are transferred to defendants, either through 'loser pays' or through ATE premiums on other cases.

In addition to the legal costs the administrative costs and profits of insurers are reflected in the premiums charged by ATE providers. Thus even if the system works perfectly defendants in areas of litigation affected are in practice paying out more than the total costs of both sides in all cases. The argument is made that the system is not working perfectly, that success fees and premiums are too high and there is too much 'largesse' in the system including referral fees.

In other jurisdictions which allow conditional or contingent fees the costs of those are not passed on to defendants. If additional liabilities cease to be recoverable here the issue arises of how individual litigants can be protected. In the field of personal injury this might include;

- Introducing one-way costs shifting
- Capping the proportion of damages which the claimant's lawyers can take.
- Providing that damages for future care should be protected
- Raising the level of damages –this might be feasible if some of the huge transaction costs could be reduced.
- Introducing a CLAF or SLAS.

Similar measures may be needed away from personal injury.

25. Further evidence, data and comment is requested upon:

- **The appropriateness of the levels of success fees set in different types of litigation**
- **The appropriateness of ATE premiums in different types of litigation**
- **Whether success fees and premiums should continue to be recoverable**
- **If not, what steps should be taken to provide for the funding of personal injuries litigation; and, what other steps should be taken to preserve access to justice for those currently dependant upon success fees and ATE.**

Costs Management

Costs budgeting (the setting of limits on expenditure in the same way as costs capping) was rejected by Lord Woolf. The suggestion was regarded by the legal profession as unworkable, unfair and likely to be abused. Lord Woolf's response was that costs would be attacked by case management rather than by orders limiting expenditure. Since then there have been many developments in costs capping and predictable costs. With the power to require estimates and powers in exceptional cases to cap costs judges retain a wide armoury to achieve costs management.

It would be possible to extend costs management, making it the norm for the court to cap recoverable costs at each stage. The disadvantage would be that the winner would not recover all of his costs. The principle advantages would be certainty and the provision of an incentive on parties to keep costs down.

Whether this more Draconian form of costs management would be welcomed by court users is not known.

Costs management ought not to involve the sort of expense that practitioners have experienced in costs capping; much of the work should already be done. There are questions over the ability of the judiciary to manage costs but more judges have now been solicitors, and although further training may be needed judges are trusted with many complex issues on which they have no personal experience.

In very large measure judges could achieve costs management under current rules but it would be helpful for the rules to set out what judges are expected to do.

26. Views are sought on the following issues:

- **Should costs management become a feature of or an adjunct to case management?**
- **Should section 6 of the CPD or any equivalent be elevated to a rule?**
- **Should those provisions be strengthened to give the court greater power to manage and control costs?**
- **What further amendments are required to the rules to enable the court to carry out effective costs management?**
- **What improvements, if any, should be made to Form H? In particular, should a detailed breakdown of costs estimate/budget be required?**
- **Should the more Draconian form of costs management canvassed above be introduced for any category of litigation e.g. business disputes?**

THE ASSESSMENT OF COSTS

Summary Assessment

This issue arose with some frequency during the consultation.

Benefits

- Speed and cost – cheaper than detailed assessment and avoids unnecessary delay
- Raising awareness – brings the issue to costs to the fore as costs may be addressed during the proceedings.
- Promotes reasonable behaviour – any applications which are unreasonable or lack merit will attract immediate costs consequences
- The trial judge's knowledge – in a better position than a costs judge looking at costs after the event.

Drawbacks

- Inexperience and a lack of information – the trial judge may lack the necessary expertise and may not have all the information
- Increases costs – the preparation required makes summary assessment less cost effective than is thought.
- Reluctance to criticise counsels' fees on the part of advocates.

Options for Reform

1. Make no change
2. Abolition – instead judges could be encouraged to order the paying party to make an interim payment on account. The outstanding balance would then be agreed or assessed by detailed assessment. Alternatively the judge could make a provisional assessment of, say, 70% or 75% of the costs claimed which would become a final order unless either party required a detailed assessment.
3. Restructure – keep the system but revise the rules governing its use. For example the CPR could encourage judges to only use summary assessment where they have sufficient expertise, they have sufficient time, and all of those involved have the right information and sufficient time to consider it. The statement of costs could be improved and better training provided to judges. If a summary assessment could not be conducted the judge would be encouraged to order a payment on account with the balance to be agreed or subject to detailed assessment.

Option 3 is the preferred route.

27. Views are sought on what information it would be appropriate to include in costs schedules for summary assessment.

Detailed Assessment

Concerns expressed

- The most frequently expressed concern is that the costs of detailed assessment and the court fees charged are often disproportionate to the amounts at stake in the main proceedings.
- The form of the bill (like a Victorian account book) is not appropriate or helpful in the 21st century

- The decision in *General of Berne Insurance v Jardine Reinsurance Management* requiring each section of the bill to meet the indemnity principle has caused a lengthening of bills and encouraged more argument.
- There is a 'points of dispute industry' – points have become unnecessarily prolix
- Preparing a bill is expensive
- There may be delay of several months before a hearing
- The complexity of the rules and the potential for windfalls or unforeseen benefits for both claimants and defendants.
- The lack of proper disclosure, and the lack of documents from the receiving party
- Late offers to settle
- The tendency to use the published guideline rates for summary assessment. There are a number of issues to be resolved with their use. There has been no formal consideration of their suitability for use at detailed assessment.

Options for Reform

- Fast Track On the fast track there will be no need for points of dispute or reply if a matrix or tariff system is in place. It may be possible to do away with detailed assessment for such cases, except, possibly, for exceptional cases.
- Limit points of dispute As an interim measure it has been suggested that the points of dispute should be no more than three pages on the fast track
- Compulsory offer procedure There should be a requirement that the paying party make an offer at the same time as serving points of dispute.
- Part 36 Should apply to detailed assessment in the same way as substantive proceedings
- New bill format There are many possibilities for the future. A sub group is working at the moment on the possible ways in which bills may be dealt with electronically.
- Disclosure Query whether any change is needed
- Time for Appeal The decision in *Kasir v Darlington* causes confusion. It is suggested that time to appeal should run from the conclusion of the final hearing.
- Provisional assessment It may be possible to have a system of provisional assessment for bills of up to say £50k. If either party is unhappy with the provisional assessment the matter can be listed for a hearing. In respect of bills up to £10k it may be possible to deal with them without a hearing.
- Intermediate procedure One approach would be a procedure which fell somewhere between the current system and summary assessment, to provide a more broad brush approach than current detailed assessment.
- Costs of detailed assessment The question arises as to whether the effect of *Crane v Cannons Leisure Centre* should be reversed. Primary legislation would probably be required.
- Hourly Rates One option would be to revert to the pre 1999 approach whereby hourly rates have to be justified by the receiving party by reference to the A and B factors. An alternative would be for the ACCC to set guideline rates for detailed assessment. This would be better than the current situation where guideline rates expressly limited to summary assessment are used for detailed assessment.

28. Views are sought on all issues