Response to Lord Justice Jackson's Review of Civil Costs

The Institute of Legal Executives

The Institute of Legal Executives (ILEX) is the professional and leadership body representing Legal Executive lawyers and has a membership of 24,000 students and practitioners. There are 7,500 fellows who are regulated by the ILEX regulatory arm, ILEX Professional Standards (IPS).

Alongside Barristers and Solicitors, Legal Executive lawyers are recognised under the Legal Services Act 2007 as qualified lawyers. Recent developments also mean that Legal Executive lawyers are eligible for prescribed judicial appointments, including eligibility as first tier judges of tribunals.

Changes in legislation also permit Legal Executive lawyers to become partners and to form partnerships with other lawyers.

In addition, fully qualified and experienced Legal Executives lawyers are able to undertake many of the legal activities that solicitors and barristers do, (subject to advocacy rights). For example, they will have their own client base with full conduct and responsibility of cases.

Legal Executive lawyers must adhere to a code of conduct and, like solicitors, are required to undertake and obtain continuing professional development

points each year and throughout their careers in order to keep themselves abreast of the latest developments in the law.

ILEX provides policy responses to Government consultations in order to represent its members and the public interest.

Consultation Response

This response is submitted by ILEX following consultation with Council Members specialising in personal injuries work and other civil litigation areas.

Introduction:

1. ILEX welcomes the opportunity to respond to the phase 2 period of Lord Justice Jackson's Review (hereinafter the ''Review'') of Civil Litigation Costs, namely the consultation phase. From the outset, Lord Justice Jackson's preliminary report is to be admired for its thoroughness and its clarity of expression. It is to be hoped, contrary to some recent indications in the press, that the proposals for change which emerge from this project will receive the backing they need to become law.

General Observations:

2. ILEX has long been concerned that civil costs are kept both reasonable and proportionate. However, as the Review rightly points out, the issue of costs is one which generates deeply held and fundamentally opposed opinions. In arriving at our conclusions, it is fair to say that there was in truth no single concensus in the ILEX membership and divergent views did emerge during the course of our discussions and deliberations.

3. However, there is no escaping the fact that there appears to be fault on both sides of the fence, in particular in relation to personal injuries (PI) litigation. Some Claimant solicitors will tend to cost build, others not; some Defendant insurers (and claim handlers) will review cases sensibly, making admissions of liability where appropriate within the protocol periods and/or narrowing the issues between the parties and in personal injury cases co-operate with the Claimant's lawyer to ensure that the

Claimant's rehabilitation needs are assessed and met as soon as possible; others simply maintain unreasonable denials of liability, particulary in PI and insurance backed work.

4. All parties in the litigation process, however, need to move away from their respective and or preferred positions regarding case conduct and costs generally and engage in debate on how best to slow down the escalation off costs in all litigation, but particularly that of PI litigation. Otherwise, there is a danger the same arguments will continue to re-surface long after the recommendations have been implemented, albeit perhaps in a different guise.

5. This continuing debate on costs, however, must not detract from one of the primary issues of concern underpinning this current Review: that of access to justice for the ordinary person on the street. ILEX continues to be concerned that the ever-increasing costs burden of civil litigation can result in a denial of access to justice for the many people who cannot afford such levels of costs or be potentially exposed to such high level of costs. Therefore there appears to be a need for a mechanism which makes costs more predictable to the parties prior to the commencement of proceedings and during proceedings. This is clearly in the public interest. Very careful consideration therefore needs to be given to the means whereby meritorious litigants are assured of the access to justice which they deserve bearing in mind that public funding in civil cases is now unavailable in many areas.

6. It is imperative, that our civil law system serves its users as cost-effectively as possible, whilst maintaining the quality of adjudication for which this jurisdiction is rightly famed. To this end, it is essentail that the cost burdon of on-going litigation on a daily basis is fair, proportionate and reasonable to the claim.

7. ILEX looks forward to Lord Justice Jackson's final report that will address all of the fundamental issues sensibly and in the wider public interest,

having regard to the important principle of access to justice and the need for costs to be proportionate, fair and reasonable in all cases.

8. ILEX notes from Annex 2 of the Review, however that various organisations were consulted during the course of Phase 1 of the Review. ILEX is disappointed that as a professional and representative body, with a large proportion of our members practicing in the civil area, it was not consulted during the course of Phase 1 of the Review.

Executive Summary

8. It is essential to recognise that the issue of costs extends beyond personal injuries work. To this end, any proposed principles must apply across the whole arena relating to the civil litigation and not just be PI driven. However, at the same it is an important principle to recognise that other areas like professional negligence do have there own procedures, but the balancing act is to ensure that common underlying principles in respect of costs permeates right through the civil litigation process.

9. The key issues for ILEX are to ensure that costs do not serve to deny access to justice as a result of (i) being too expensive to bring a case; and (ii) from fear of being exposed to excessive costs should the claim fail. ILEX believes that the rules should have the following objectives:
    - Keep costs reasonable, proportionate and fair;
    - Ensure that liability for costs is predictable having regard to the conduct of the parties;
    - Incentivise prompt and reasonable settlement offers; and
    - Penalise unreasonable behaviour – not just by cost sanctions (which can add to costs) but by other procedural means.

Civil Procedure Rules 1998

10. Although a decade on from Lord Wolf's ground breaking Civil Procedure Rules 1998 (the CPR), there is no escaping the harsh reality that civil litigation in this country is more expensive than ever.

11. On balance, however, the CPR has worked well. Notwithstanding this, there is also no escaping from the fact that that different courts, Circuits and judges view and apply the CPR differently. To this end, there must be uniformity of application of the CPR, but at the same time recognising the advantages of the applicability different procedures in the civil litigation process.

Costs-Shifting

12. ILEX is of the view that the 'costs follow the event' rule should be maintained. The rule is consistent with the 'Polluter Pays' principle. It is the view of ILEX that when someone has caused injury and or other wrong (statutory or otherwise) they should meet not only the compensation for the injury or wrong but the full reasonable, necessary and proportionate costs caused by their negligence. Similarly, those successfully defending a claim ought not to be burdened with the expense to which they have been put without just cause.

Success Fees

13. Success Fees are fundamental and should continue to be recoverable without restrictions. There will always be arguments for and against success fees. However, the recoverability of the success fees was in part based on the removal of Legal Aid. Success Fees also compensates lawyers for representing unsuccessful Claimants. In this sense they work on the 'swings and roundabouts' principle. If success fees are deducted from damages then successful Claimants would ultimately be subsiding access to justice and the system failing to provide full compensation and to fully protect rights[1].

After the Event (ATE) Insurance

14. ATE is to protect the Claimant from adverse costs if unsuccessful. ATE also covers Claimants with the cost of disbursements and the Claimant's

[1] The Lord Chancellors Consultation Paper 1998 at paragraph 2.1

own disbursements costs. In Road Traffic Accidents (RTAs), for example, claimed disbursements could include the police accident report, medical and non-medical reports, in addition to searches on the Motor Insurance Database. Without ATE, Claimants might have to take out a loan to cover these costs, which would be an unfair burden on Claimants. This is not only applicable to personal injury claims, but other areas of civil litigation.

15. It is also arguable that ATE acts as a filter for unmeritorious, fraudulent and spurious claims, thus providing a benefit for Defendants.

Before The Event (BTE) Cover

16. ILEX notes Lord Justice Jackson's preliminary views in respect of Before the Event Insurance (BTE) cover, where insurers pay lawyers to act for the insured when a claim arises as having a 'number of benefits and serves the public interest'. ILEX makes the following observations:

- BTE policies may have many exclusion clauses (which has been addressed); and
- Extension of BTE will also undermine freedom of choice (this would not be in interest of consumers)

ILEX is of the view that BTE clients should have freedom of choice of their legal representative both before as well as after proceedings have been issued.

Fixed Costs

17. It is the view of ILEX that fixed costs in Road Traffic Accidents is not working well for the reasons given in paragraphs 36 to 37 of this response.

18. ILEX is also concerned that quality of service provision will reduce with the extension of fixed costs to the fast track. A firm cannot provide a Rolls Royce Service and not be paid for it. This cannot be in the public and consumer interest. ILEX would suggest that more research is required or

pilot studies undertaken before an extension of the fixed fee scheme to fast track cases is considered.

19. To approach a fair and just system, any proposed costs matrix as suggested by the Review would need to account for all of the issues raised in paragraphs 36-37 of this response.

Small Claims Court

20. For the reasons set out in paragraphs 36 to 39 of this response, ILEX does not agree that the upper limit in respect of PI cases (or indeed other cases) in the small claims court should be increased.

Summary assessment of costs

21. The feedback from Legal Executive lawyers is that summary assessment is not a problem.

Detailed Assessment:

22. ILEX is of the view that there is room for reform in the detailed Assessment Procedure. Importantly, however, the court management powers should be more widely utilised. This should be supplemented by increasing the range of penalties currently available.

Cost Shifting:

23. ILEX is firmly of the view that the English rule of ‘’costs follow the event’ must be preserved in the interest of Claimants.

24. It is one of ILEX’s fundamental messages that, in terms of social justice, the Polluter Pays’ principle dictates that it is the person who causes injury (or other actionable wrong) to another through their negligence, for example, that should compensate the victim, and the cost should not fall upon the victim or society in general.

25. It is arguable that civil litigation, in particular personal injury litigation can also been seen to benefit society as a whole because it operates as a

deterrent, upholding standards of health and safety. It also encourages responsibility through the allocation of duty.

26. ILEX's view is that deductions would not be equitable from a Claimant's award, particularly from pain and suffering and past losses in personal injury cases.

27. ILEX is keen to support proposals to the litigation process so as to remove unnecessary costs in the system so as to keep the processing costs proportionate and to a minimum without prejudicing the rights of the Claimant or the dumbing down of the claims process. To this end, the new claims process and the Multi Track Rehabilitation Code needs time to 'bed in''. This initiatives can be supplemented, however, with changes in protocols that enable the following:
    - admission of liability earlier;
    - encouraging Alternative Dispute Resolution (ADR);
    - quicker recoverability of compensation for the Claimant; and
    - fixed Directions and better case management as a whole.

28. All of the above can easily be achieved by following and adhering to the spirit of the Pre-Action Protocols.

Success Fees and Conditional Fee Arrangements

29. There will be always be arguments for and against success fees. However, ILEX is of the view that success fees are fundamental and promote access to justice. As such, the success fee should be recoverable without any restriction.

30. Although it could be argued that ending recoverability of success fees would certainly take much of the heat out of the "Costs Wars", whether the doubling of damages is a price worth paying is another important issue to consider. For example, in terms of personal injury work, it was recently

estimated that damages would have to double at least, given the high level of costs in personal injury (PI) cases as they approach trial[2].

31. The original Conditional Fee Arrangement format (that replaced legal aid) capped the fee at 25% of the damages. This was commonly referred to as ''the claw back''. It is arguable that if such a scheme is resurrected, Claimants may well consider dealing with insurers directly rather than seeking legal advice. This would not be in the interest of consumers. ILEX is of the view that the current Conditional Fee Arrangements have been absorbed into the legal culture and since the retraction of legal for personal injuries, they facilitate an alternative route for many to access justice, which they may not otherwise have. Importantly, this alternative route is not only confined to personal injury litigation, but other areas for example defamation.

32. Moreover, if success fees are deducted from damages then successful Claimants would ultimately be subsiding access to justice and the system failing to provide full compensation and to fully protect rights[3].

After the Event Insurance (ATE)

33. The objective of ATE insurance is to protect the claimant against adverse costs. However, in a Road Traffic Accidents (RTAs), for example, claim disbursements could include the police accident report, medical and non medical reports, in addition to searches on the Motor Insurance Database. Without ATE, Claimants might have to take out a loan to cover these costs, which would be an unfair burden on Claimants.

34. ATE also has the following advantages:

    - If the premium is staged, it increases the pressure on the opponent to settle before the premium increases, thus keeping costs down: and

[2] http://www.lawgazette.co.uk/news/jackson-hints-ending-recoverability-success-fees
[3] The Lord Chancellors Consultation Paper 1998 at paragraph 2.1

- The insured will not be intimidated by the high costs estimates of the opponent because it will be the insurer who pays these in the event of a loss; and
- The opponent will be aware that the merits of the case have been assessed by an independent insurer and the insurer may have concluded that on balance the case has good prospects for success.

Before the Event Insurance

35. ILEX makes the following observations in respect of Before the Event Insurance (BTE)

    - BTE policies may have many exclusion clauses (which has been addressed); and
    - Extension of BTE will also undermine freedom of choice (this would not be in interest of consumers)

36. As regards the latter, ILEX would be concerned that BTE insurers may insist on inappropriate lawyers or non-local lawyers. Freedom of choice must not be undermined as this will impact on access to justice. ILEX is of the view that BTE clients should have freedom of choice of their legal representative both before as well as after proceedings have been issued

Contingency Legal Aid Fund and the Supplemental Legal Aid Scheme

37. Although in principle a good idea, ILEX has concerns as to where the start up funding would emanate from, in addition to long term sustainability issues. As the Review itself recognises the above proposed schemes raise as many problems as they solve. However, the schemes cannot be dismissed out of hand and, dependant on the outcome of the costs Review may warrant very serious consideration especially if success fees and ATE premiums were abolished.

Fixed Costs

38. ILEX is not fully convinced that the Fixed Costs Regime is working well for the following reasons:

- Very few cases follow an A-Z route. It is the minority of cases, mainly passengers with full recovery at 3 months that fit the idea of 'simple claims'. Most cases have additional issues, vehicle related hire, repairs, disputes on vehicle value and/or injury related problems, rehabilitation needs, care needs etc. and contrary to the popular belief of some, injury above £5,000 become more protracted in recovery time, treatment need and can even be permanently debilitating whilst remaining within the £10,000 limit.

- Lawyers are subject to professional obligations. It is not possible to strip from the process the need to carry out certain checks, to properly supervise non qualified staff and to meet Client care needs even if meeting that need does not always progress the case such as advising on lack of progress.

- Issues of rehabilitation, vehicle hire and vehicle repair are issues of meeting a Claimants identified need where that need has not been met elsewhere. Just because an insurer is unable or chooses not to meet the need does not mean it does not exist. It would hardly be putting the claimant at the centre of the process if no provisions in costs were made for Claimants to be properly advised and assisted in getting those needs met.

- There continue to be disputes about medical reports.

- Different firms applying different techniques

- Danger of under-settlement

39. In addition to the above, ILEX is concerned that quality of service provision will reduce. This cannot be in the public and consumer interest. ILEX would suggest that more research is required or pilot studies undertaken before an extension of the fixed fee scheme to fast track cases is considered.

Small Claims Court Personal Injuries Limit

40. Arguments have been advanced both for and against raising the small claims limit. However, this was also the subject of a recent Government consultation. Following representations from relevant stakeholders, including ILEX, the Government concluded that there should be no change to the small claims track limits, including those for personal injury and housing disrepair claims[4].

41. As a matter of completeness, ILEX submitted the following arguments against raising the limit:

- Personal injury claims are complex and often require independent legal guidance and expert evidence, the cost of which would be prohibitive if the limit were raised. The substantive law involved in a personal injury claim can be complicated and a claimant in person may not be aware of regulations or statutory duties that could apply to their claim. In addition issues such as identifying the right defendant and establishing a breach of duty of care can be difficult for an unrepresented claimant to understand. It can also be hard to collate the necessary evidence, medical and otherwise, to prove a claim. Potential Claimants could be put off by the work involved and would not bring a claim;

- In a vast majority of claims the defendants to personal injury claims are insured and the insurance companies can afford to be legally represented or will use expert claims handlers, even in lower value claims. If the limit was raised the claimant would often not be able

[4] http://www.parliament.uk/commons/lib/research/briefings/snha-04141.pdf

to afford legal representation and would have no prior knowledge of establishing a claim. This could lead to inequality of arms;

- There is the added concern that potential Claimants could have strong claims but be unable to afford legal representation or conduct their own claims either because they are poorly educated or because they do not have English as their first language. These people are often the most vulnerable in society. There is a real danger that they will be deprived of access to justice;

- Raising the limit of the small claims track will not in itself solve the issue of disproportionately high costs. It is necessary, alongside examining the track limits, to look at ways of streamlining the process to reduce costs this way;

- In some law firms the majority of the work carried out is personal injury claims with a value of less than £5000. Some firms suggest as much as 90 per cent of their work is on claims with a value of less than £2500. These firms are concerned that if the limit was increased this work would disappear and firms may have to lay off staff, or in the most extreme cases, cease practising. This could have a knock-on effect on firms being unable to practice other areas of law and could lead to difficulties with access to justice.

- Neither the advice sector nor the courts could cope with a substantial increase in Claimants in person in small clams cases; and

- Although there are leaflets available that offer advice on procedural matters, such as what claims can be heard within the small claims track, these do not deal with substantive law. It would be difficult to produce a leaflet that covered every aspect of substantive law that could be relevant to a personal injury claim.

42. Moreover, there are specific concerns relating to industrial diseases such as vibration white finger which are brought on by working conditions. A

claim for personal injury must be brought within three years of the date a person knew, or should have known, that they have a claim. There are fears that defendants will argue that Claimants should have attributed their symptoms to their workplace more than three years before proceedings were commenced. In addition there is the concern that without either medical expertise or specialist-engineering expertise Claimants will be unable to construct a claim. If the limit were raised to £5000 then many claims for industrial diseases would be brought within the ambit of the small claims track.

43. Further reasons against raising the limit in the small claims track are as follows:

- Claimants in person could potentially undervalue their claims and accept an offer of settlement that is too low. There are often significant increases from the first and final offer made by insurance companies, sometimes estimated to be as high as 50 per cent. Claimant solicitors' state that initial offers made by insurers are low for tactical reasons which a claimant in person might not understand. If a Claimant was to accept the first offer from an insurance company they could be considerably under-compensated for their injuries.

- The argument that district judges will safeguard the Claimant's interests by taking an interventionist approach when conducting hearings in an attempt to level the playing field between the parties is somewhat misleading as:

  (I) many claims never get to the hearing stage as the majority of cases are settled out of court;

  (II) Claimants in person will still have to assemble all the relevant evidence to establish their case;

  (III) Claimants in person will still have to deal with the correspondence and tactics of defendants' solicitors;

(IV) research indicates that district judges have greater difficulty hearing cases where one or more party is unrepresented[5].

Summary Assessment

44. ILEX is of the view that the Summary Assessment procedure is not causing significant problems. Indeed, Lord Justice Jackson's Review espouses the benefits of Summary Assessment as including greater speed; cost savings; and discouraging tactical meritless interim applications.

45. Further, due to the difficulties with the detailed assessment process (see below), ILEX sees the benefit in the wider use of summary assessment. One option might be to introduce summary assessment in all cases, with a residual discretion for the judge to order a detailed assessment if there were special circumstances. There may also be merit in the proposal of a provisional assessment which would then become final unless either party applied for detailed assessment. These proposals would mean that, in most cases, the significant (and generally disproportionate) costs of the detailed assessment process can be avoided.

46. ILEX also feels it is also important to bear in mind that a trial judge is generally in the best position to take a view on the staffing of a matter and the time spent on particular tasks. ILEX considers however that the judiciary should receive further training on the assessment of costs. At present, where costs are summarily assessed, this does not always receive the time and attention it deserves. There is a perception that judges are inconsistent in their approach and generally award less than if the matter went to detailed assessment.

Detailed Assessment of Costs

47. ILEX is of the view that there is room for reform in the detailed assessment Procedure.

[5] "Lay and Judicial Perspectives on the expansion of the Small Claims Regime" by John Baldwin, LCD Research Series 8/02 (2002)

48. The Review puts forward various options for reform, which include: introducing a new bill format to present the relevant information more clearly and transparently than the format currently used; a compulsory offer procedure, whereby the paying party would have to make an offer in respect of the costs at the same time as disputing an opponent's costs; and introducing an "intermediate procedure", which takes a more broad-brush approach to assessing costs than the detailed assessment system but which applies more broadly than the current summary assessment procedure.

49. ILEX considers that the current detailed assessment process can generate disproportionate costs. It is not cost effective in most cases to take a matter to detailed assessment. As well as looking at measures to broaden the use of summary assessment, we would also support efforts to streamline the detailed assessment process including developing an improved bill format. Another option may be a provisional paper assessment. This may be an effective and efficient way to proceed.

50. Importantly, however, the court management powers should be more widely utilised. This should be supplemented by increasing the range of penalties currently available and not just cost sanctions, which would add to costs. However, at the same time it is important not to lose sight of the fact that some parties are not backed by insurers; cannot afford lawyers or insurance. Any proposed sanctions must not act so as to deny access to justice.

Case Management

51. Part 36 is widely seen as one of the great successes of the CPR. However, it is not a panacea. ILEX is of the view that the Part 36 procedure needs more teeth to penalise non-acceptance by the Defendant of a Claimant's offer as the present balance is very heavily weighted against Claimants who reject a Defendant's offer.

52. ILEX also considers rule amendments should be made which reverse the decision in *Lamont v Burton* which has served to introduce an inherent and unacceptable uncertainty in the process which is undermining.

53. ILEX is also of the view that a docketing system for civil litigation would assist in promoting a more effective system for case management. This structural change would allow more effective case management as envisaged by the CPR. In particular, Judges should be encouraged to make better use of their powers under CPR 3.1 to defer non-critical or subsidiary issues in favour of those which will more readily lead to a resolution.