A response by the Institute of Legal Executives

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

30 June 2011

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

The Institute of Legal Executives

The Institute of Legal Executives (ILEX) is the professional body representing Legal Executive lawyers and has membership of around 22,000 practitioners and students. ILEX is also an awarding organisation regulated by the Office of Qualifications and Examinations Regulation offering learners the opportunity of completing legal qualification at Level 3 and Level 6 on the Qualifications and Credit Framework (QCF).

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 Deputy District Judges and first tier judges of tribunals, with the first Legal Executive Judge being appointed in August 2010.

Moreover, Government legislation has recognised the significance of Legal Executive lawyers within the legal system, and has given them the right to run

their own business in partnership with other lawyers and in the future with other commercial legal services providers.

Legal Executive lawyers are able to undertake many of the legal activities that solicitors do. They will have their own caseload and can represent clients in court where necessary.

Legal Executive Lawyers must adhere to a code of conduct and, like solicitors, are required to complete Continuing Professional Development annually in order to keep themselves abreast of the latest developments in the law.

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

ILEX's response has been formulated following consideration of the consultation paper by various Council members who practice in various areas of civil litigation.

Our response deals with the principles and matters in the order in which they are raised in the consultation document, so far as ILEX wishes to offer a view. Having said which, we appreciate that a number of areas overlap so cannot always be considered in isolation.

1. ILEX believes that access to an effective civil justice system is a fundamental right which benefits society as a whole, and agrees with the government statement that the UK's system of civil justice is a cornerstone of a civilised society.

2. ILEX also makes the point that throughout the consultation, reference is made to the Woolf reforms, and how these have not been as successful as the government would have hoped in their implementation. Lord Woolf, when making his recommendations

assumed there would be technical developments introduced in order to compliment the reforms he had suggested. Such technical reforms have not happened, and if they had been introduced hitherto, then perhaps the civil justice system would not be in the position in which it finds itself today.

3. The court system is, as the government has recognised, largely paid for by court fees, and so is currently not costing the government money, per se. It is the fundamental right of members of society to use the court system should it be appropriate, and this is not something that should be taken away.

2. Preventing cost escalation

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

4. ILEX does not believe that the current RTA PI Scheme's financial limit should be extended at present.

5. Whilst the government acknowledges the current scheme is working, and states this is supported by claimant and defendant groups alike, it has also recognised that although many of such groups have indicated their support for the scheme, they have also warned that the scheme is still in its early stages, and needs to mature further before success can be measured.

6. ILEX believes that the fact that the scheme has only been in place for just over one year, means that it is too early to yet extend it.

7. ILEX considers it would be difficult for cases over £10,000 to be included in the portal at present, and that there may be problems with

the insurers dealing with cases which are inherently likely to be more complicated than those which are currently dealt with under the portal.

8. Further difficulties may be encountered with those claims which are worth more than £10,000. For example, at present, in the portal only two reports are available, that of a GP and a consultant orthopaedic surgeon, if appropriate. Therefore, reports of other disciplines (such as other expert witness reports) would not be covered, for a case which is likely to require them.

9. ILEX believes that it would be more appropriate to wait for a period of time, so that the scheme is more mature, and more cases have reached stage 3, which the government has acknowledged in the paper has not happened yet.

10. ILEX believes that a much more meaningful evaluation can be carried out once the scheme is more established, and if the results of such an evaluation show at that stage than an increase is appropriate, then changes to the scheme can be considered at that time.

11. To ILEX this seems like a much more cost effective way to approach the issue of increasing the financial limit of the current scheme. It would not be appropriate to make the changes at an early stage, and incurring further, unnecessary costs in attempting to rectify changes made prematurely, and before meaningful evaluation, when this is a situation which could easily be avoided by allowing the scheme to mature.

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

12. For the reasons stated in answer to Q1, ILEX does not consider it appropriate at this stage to extend the limit of the scheme.

Q3. Do you consider that the fixed costs regime under the current RTA PI Scheme should remain the same if the limit was raised to £25,000, £50,000 or some other figure?

13. No. If the financial limit of the RTA PI Scheme is raised, ILEX strongly believes that the fixed costs cannot remain the same.

14. ILEX believes that it will follow in the majority of cases, if not all, that personal injury matters worth in excess of £10,000 will involve a more serious injury, and will potentially raise more complicated matters. It is also likely that further work will be involved and the lawyer should be able to charge for this additional work.

15. ILEX would be concerned that, for example, insurance companies would deal with matters worth in excess of, say, £50,000 as they currently deal with those matters worth £10,000 and under, and for example, junior members of staff may be used to deal with matters beyond their expertise, resulting in them dealing with a case of higher value in the same way as that of a lower value, when the issues are much more complex.

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

16. ILEX believes that there should not be a tariff of costs dependent on the value of a claim. ILEX believes that assessed costs would be most appropriate for claims worth in excess of £10,000.

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

17. ILEX does not believe (see our answer to Q1) that the Scheme should be extended at this present time.

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

18. ILEX does not believe that the scheme should be extended to include employers' and/or public liability personal injury claims.

19. Liability can often be a difficult issue in cases such as these. There needs to be consideration given to the fact that medical records and, for example, health and safety records, occupational health records and personnel records, which can sometimes be voluminous, will need to be obtained and considered. There are also disclosure issues which could arise in cases such as these and other issues, such as contributory negligence, causation etc.

20. Employers' liability cases and public liability cases are inherently different to RTA cases. ILEX believes that a fixed costs regime would not sufficiently cover the type of work needed for investigations in such

claims. ILEX would be concerned that some such cases would be 'dumbed down' and due to fee earning pressure, some investigations may not be carried out sufficiently. It is entirely possible that professional negligence claims against law firms will increase as a result of some initial investigative work not be carried out properly.

21. ILEX is concerned that one potential problem if these types of claims are to be included is that the level of the work will increase, but the level of fee earner conducting the work will go down. This again, has potential to result in the investigative work at the outset of an EL/PL claim, which is currently quite considerable, not being sufficient or effective.

Q7. If your answer to Q6 is yes, should the limit for that scheme be set at (i) £10,000, (ii) £25,000, (iii) £50,000 or (iv) some other figure (please state with reasons)?

22. ILEX does not believe there should be a variation of the RTA PI Scheme introduced for EL/PL claims.

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

23. Due to ILEX's response to Q6 we do not consider it appropriate to make any modifications, as we do not believe there should be a variation of the Scheme introduced for EL/PL claims.

Q9. Do you agree that a variation of the RTA PI Scheme should be introduced for lower value clinical negligence claims? If not, please explain why.

24. ILEX notes the pilot scheme which is being set up by the National Health Service Litigation Authority (NHSLA) for low value NHSLA

clinical negligence claims, we also note that this is in consultation with clinical negligence stakeholders across England and Wales.

25. ILEX believes that the pilot scheme must be running for a sufficient period of time before the government can assume that it works sufficiently well to cover claims of 'low value' clinical negligence. Again, it is not something which should be rushed; if it is, it is likely to be more costly to rectify.

26. Clinical negligence claims are also inherently different to many RTA claims. It is necessary for much investigative work to be carried out at an early stage, to establish whether the Claimant has a legitimate claim.

27. The work initially to be carried out, is document heavy and labour intensive, if it is rushed (due to monetary constraints and pressure arising from this) something vital may be missed, which could potentially have a significant impact on, for example, a catastrophically injured claimant.

28. ILEX questions whether it would be appropriate to consider a 'no fault' scheme on claims under, for example £10,000. This would then negate the need for the labour intensive research which currently needs to be carried out. ILEX also believes that this should be considered in conjunction with the current 'speedy resolution' scheme, which is a scheme currently running in Wales[1].

[1] http://www.wales.nhs.uk/sites3/home.cfm?orgid=255

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

29. For the reasons given above, ILEX does not believe that it is appropriate at this time for a variation on the RTA PI Scheme to be introduced for clinical negligence claims, regardless of level.

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

30. For the reasons given above, ILEX does not believe such a scheme should be introduced at present, and therefore has no comments regarding modifications.

Q12. Do you agree that a system of fixed recoverable costs should be implemented, similar to that proposed by Lord Justice Jackson in his *Review of Civil Litigation Costs: Final Report* for all fast track personal injury claims that are not covered by any extension of the RTA PI process? If not, please explain why.

31. ILEX reiterates that it does not agree that a system of fixed recoverable costs should be implemented for all fast track personal injury claims that are not covered by the RTA PI claim, or any extension of it.

32. EL/PL claims and clinical negligence claims are intrinsically different from many RTA claims, as are other claims which fall into the fast track and not covered by any such process. They all require much more investigative work than a standard RTA. ILEX believes it is extremely important, to the client, to the public and in the interests of justice, to ensure that a lawyer deals with a case properly. ILEX is concerned that the more a process is 'dumbed down' the less opportunity there will be for real access to justice by the public. ILEX is also concerned

with the potential increase in professional negligence claims against firms.

33. ILEX is also concerned that if such a system is implemented, it could ultimately lead to more applications to allocate to the multi-track. In EL/PL claims, it is likely that more experts will be required, than in a standard RTA case. Therefore, a case will not be disposed of in less than one day, and therefore not technically suitable for the fast track. ILEX is concerned that this will ultimately increase costs.

34. Having said which, ILEX is pleased to note that the government has recognised that if such a scheme were to be developed, it would require further work regarding the figures. ILEX suggests discussions should be held, that they should be detailed, and should be entered into with stakeholders who should be representative of both claimant and defendant bodies alike.

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

35. No. for the reasons given above, ILEX does not believe it is appropriate to introduce fixed recoverable costs to other fast track claims.

36. ILEX would be concerned that simply introducing a fixed costs scheme would mean that firms may not be able to offer such services, and would ultimately impact upon access to justice.

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

37. Not applicable.

Q15. Do you agree that for all other fast track claims there should be a limit to the pre-trial costs that may be recovered. Please give reasons.

38. ILEX does not believe that a system should be introduced which would limit the pre-trial costs recoverable.

39. The work which will need to be carried out in a case is unique to that case. Lawyers want to ensure that they carry out a proper job, and do any investigations that are necessary to represent their client.

40. Practitioner input questioned whether this would be possible to achieve in any event, as there may be a situation where, for example, a defendant takes little or no action to progress a claim, which results in more work than usually necessary, being carried out. Generally in such circumstances a claimant will do all of the work, and prepare for trial etc in any event.

41. However, ILEX can see that the question of proportionality may be raised, but would suggest that rather than introducing a scheme to limit the costs awarded in a 'one size fits all' approach, that it is ultimately a decision for the costs judge. If all parties conducted themselves well, and did the work that was required, the costs would not be so high. It would be wrong to put an artificial limit on the costs that can be recovered, but costs judges should be astute and aware, and take into account each case on its own merits.

42. Having said the above, if such a scheme were introduced, then ILEX strongly believes that it must be in line with the various pre-action protocols, and must have sufficient 'teeth' to sanction those parties who do not comply with directions. Combined with this, Judges will need to use the case management powers that are already available to them more effectively.

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

43. Practitioner input around this matter was that it cannot be harmful for mandatory pre-action directions. However, it was also acknowledged that whilst many practitioners are unable to work from a single protocol, they do attempt to adapt various protocols and/or act within the spirit of such protocols. It is recognised that this is adequate when both parties are doing so. Protocols work when they are adhered to, but if not, problems will arise.

44. ILEX is not convinced the proposals are in the correct format, and consider that further practitioner or stakeholder input should be sought before introducing any protocols.

Q17. If your answer to Q16 is yes, should mandatory pre-action directions apply to all claims with a value of up to (i) £100,000 or (ii) some other figure (please state with reasons)?

45. ILEX has reservations concerning setting a financial limit. A high value case is not always equivalent to a case of high complexity. Whilst this will quite often be the case it does not always follow. For example, a case could be worth in excess of £100,000 and be relatively straight forward and, conversely, a case could be worth £10,000 which involves a number of complex issues.

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

46. ILEX strongly believes each case should be considered on its own merits. The monetary value and complexity of the case needs to be considered, together with the issue of conduct of parties. ILEX does not

believe there should be a compulsory stage. Many parties who reach the position where they need to issue court proceedings, do so because negotiations with the other party have not been successful, which may include failure to deal with any issues. The party seeking to recover should not have to wait to resolve the issue.

47. There may also be a circumstance where the matter will only be determined (for example for insurance purposes) if there is a court hearing. In that instance, it should be possible, for example, for both parties to sign a certificate or the like, exempting them from being bound by the protocol and having to wait for the completion of the compulsory settlement stage.

48. ILEX questions what would happen in a situation where one party did not engage at all with the other, leaving one party to complete all the work. There must be adequate sanctions to prevent the party seeking to recover, from being penalised in this situation. This goes back to the issue raised under Q16; there must be sufficient ‘teeth’ to any protocol to ensure compliance where necessary.

49. Again, ILEX believes that using protocols such as these is only really effective when both parties are in dialogue, and practitioner input indicates that with some parties, it is only when proceedings are issued, that their mind becomes focussed on the matter in hand.

50. ILEX is concerned that introducing such a settlement stage will lead to costly satellite litigation, regarding whether parties have or have not complied with pre-action obligations. This will result in further delay, confusion and legal disagreements about matters other than the issue itself, and ultimately in increased costs.

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

51. Not applicable

Q20. Do you consider that there should be a system of fixed recoverable costs for different stages of the dispute resolution regime? If not, please explain why.

52. Again ILEX believes that because each case will be different, including the level of engagement between the parties, it will be extremely difficult to introduce a system of fixed recoverable costs for a dispute resolution regime.

Q21. Do you consider that fixed recoverable costs should be (i) for different types of dispute or (ii) based on the monetary value of the claims? If not, how should this operate?

53. Notwithstanding our comments above, if fixed recoverable costs were to be issued, whilst practitioner input can only initially see it working if it is calculated on monetary value, it is recognised that it is extremely difficult, and almost arbitrary to produce a figure. It is questioned as to how this would be quantified. ILEX reiterates that complexity issues need to be considered, which will vary from case to case, no matter what the type of dispute.

Q22. Do you agree that the behaviours detailed in the Pre-Action protocol for Rent Arrears, and the Mortgage Pre-Action Protocol, could be made mandatory? If not, please explain why.

54. ILEX questions the practical purpose in doing so. The protocols are already in place, but again, the usefulness of such protocols ultimately relies upon the level of engagement between the parties.

55. If it was made compulsory for, say, a defendant to comply with the protocol, ILEX asks what sanctions would be applied if they do not comply? We question the suitability and appropriateness of costs sanctions. ILEX further questions the usefulness of making the protocol mandatory when there can be a situation where a defendant has no intention at all of engaging with the claimant, who ultimately is undertaking all of the work, and being kept out of the property. This could ultimately lead to an unnecessary burden upon the Claimant, to which there is no suitable outcome.

Q23. If your answer to Q22 is yes, should there be different procedures depending on the type of case? Please explain how this should operate.

56. Not applicable.

Q24. What do you consider should be done to encourage more businesses, the legal profession and other organisations in particular to increase their use of electronic channels to issue claims?

57. ILEX believes that in order to encourage more businesses, the legal profession and other organisations to increase their use of electronic channels to issue claims, the system in place needs to be a good system and one which runs smoothly. Currently, the electronic systems are not adequate when a matter is a more complex and, for example, more characters are required than currently available.

58. The only ways in which electronic channels will be made more attractive is if efficiency is increased and the costs are reduced.

59. For example, if you issue proceedings using the electronic channel, you then have serve all documents separately, which from a practitioners point of view is not efficient.

60. ILEX believes any electronic way of dealing with claims should be fully compatible with the CPR.

61. Practitioner input suggests that the electronic systems do tend to work well in relation to small and simple debts, however with anything more complex, difficulties arise.

62. Practitioner input also suggested that dealings with some local county courts are not always good, and that if they, as practitioners, could be assured that the electronic system would work efficiently for all matters, they would be minded to use such a system.

63. ILEX believes the problem is that hitherto the courts have been significantly underfunded in terms of technology, and until that matter is fundamentally addressed, we are doubtful that much will change in that regard.

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

64. ILEX believes that the small claims financial threshold of £5,000 should be not be increased, and that any such increase would act only to reduce and/or deny access to justice.

65. It is noted that the small claims track is less formal, with the intention being to allow people to resolve the disputes themselves without professional legal representation, and with little or no recoverable costs, but ILEX does not see how it follows that "…More consumers and small businesses would therefore benefit from the small claims procedure if the financial limit was increased." [2] Where there are genuine disputes, it does not follow that people should not be able to

[2] Consultation document "Solving disputes in the county courts: creating a simpler, quicker and more proportionate system" Page 35, paragraph 112.

recover costs that they have incurred because of legal advice, for example, that they have sought.

66. Otherwise, we will reach a point where legitimate claims cannot be pursued because of the fear of costs involved. £5,000 is a substantial amount of money for some individuals and/or small businesses, and the work involved in attempting to recover that may be too high for them to consider, let alone if it was set at a higher rate.

67. ILEX has concern that the government intends inform the public about the way to deal with court procedures etc solely by the internet. Whilst ILEX appreciates the authenticity of www.direct.gov, such services would need to be widely advertised, and consideration needs to be given to the fact that there are also a number of less authoritative and genuine websites to which the public will also have access to. Furthermore, consideration must be given to those sections of society who either may not have access to the internet, or for whom use of the internet causes difficulty.

68. ILEX sees no justification for raising the small claims financial threshold.

69. ILEX also considers there may be implications on the court system if such an increase were to be introduced. It may cause problems for those individuals or small businesses who cannot afford to pursue or defend a claim due to the costs involved, and it may also prevent, say, bulk issuers from issuing, as they may take the view that they will not do so as they cannot recover costs. The use of the system will ultimately decline to such a level where a large income stream to the courts and tribunal service will be lost, which will have further implications in terms of court closures and matters being dealt with inefficiently.

Q26. If your answer to Q25 is yes, do you agree that the threshold should be increased to £15,000 or (ii) some other figure (please state with reasons)?

70. Whilst ILEX has stated in response to Q25 that we do not believe the small claims threshold should be raised, as we believe there is no justification, and that if it is raised, access to justice will either be severely restricted or denied altogether for some, if the government is intent on raising the limit, ILEX believes it would be more appropriate to raise it in line with inflation, given that the limit has not been raised since 1999.

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

71. Yes.

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

72. Not applicable.

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

73. ILEX does not believe that the fast track financial threshold should be automatically increased. The monetary value of a claim is only one aspect which should be considered when considering whether a claim is appropriate for the fast track.

74. ILEX strongly believes that it must always be within the power of the court to decide, no matter what the value of the claim, that a matter can

be held in the multi-track (for example, if a case is going to take in excess of one day).

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

75. Not applicable.

3. Alternative Dispute Resolution

76. As a general comment regarding Alternative Dispute Resolution (ADR), it is clear the government have recognised that the Woolf reforms provided a greater push towards the use of ADR, together with the introduction of judicial case management enshrined formally into the court process once the Civil Justice reforms were introduced.

77. By virtue of the fact that a key part of the overriding objective of the CPR requires the courts to actively manage cases and to encourage "…the parties to use an alternative dispute resolution procedure if the court considers that appropriate…" ILEX believes that the powers are already available to the courts to ask the parties to consider whether ADR is appropriate to them, and for sanctions to be imparted if they do not when it was not reasonable for them, having regard to the outcome of the case, to refuse to do so. Given that such powers are already enshrined in civil justice system, and available, it is clear that they are underutilised, and ILEX would suggest that this is due to the issue of training The Judges must use the powers that are already available to them more efficiently.

78. Furthermore, there are references to ADR throughout the pre-action protocols. ADR, or lack thereof, can be considered when determining costs, which would seem to ILEX to be a fairer way of dealing with the matter.

79. ILEX strongly believes that ADR is a useful adjunct to litigation and in suitable claims can be an appropriate tool for resolution.

80. ILEX stresses that mediation is not a panacea, it must be remembered throughout that mediation will cost the parties involved, and these will be costs which will not be recoverable. This may not be acceptable, or in deed possible, for both parties.

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

81. ILEX considers the CMC accreditation scheme for mediation providers to be sufficient. All providers and/or mediators should be sufficiently regulated.

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

82. Not applicable.

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

83. ILEX does not agree that a referral should be compulsory. Parties should be advised fully of all options, and consider whether it is appropriate for their individual case. It must be remembered that mediation will still require work to be carried out, and can be costly in a procedure which is complex. It may be seen as another level to attempt to progress through.

84. Practitioner input from those who had used the small claims telephone mediation service, was that it did prove useful. However, practitioner

input also concluded that it should not be compulsory. It is clear that willingness to engage is essential for mediation to be successful.

85. With vast differences in the way cases are run and how different courts handle matters, and the parties involved, no two cases will be the same, therefore a 'one size fits all' approach is not appropriate.

86. However, should mediation be refused in a matter, and it is decided that there was no reasonable or valid reason for such a refusal, it should be possible for costs sanctions to be awarded against the refusing party.

87. Furthermore, there are going to be a number of cases where mediation is not suitable, and so not required. For example, a case such as a straightforward debt recovery, ILEX questions the need for mediation. The debt is owed and the claimant wishes to, and has a right to, be paid for the goods or services provided.

Q34. If the small claims financial threshold is raised (see Q25), do you consider that automatic referral to mediation should apply to all cases up to (i) £15,000, (ii) the old threshold of £5,000 or (iii) some other figure? Please give reasons.

88. ILEX repeats its view that the small claims financial threshold should not be raised.

89. However, rather than having an automatic referral at a stage, perhaps it would be more appropriate once the parties have issued proceedings, to allow them a stay for ADR to be considered if it has not been attempted pre-issue.

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

90. The most appropriate way would be for it to remain as a telephone service as it currently is. It is relatively simple and inexpensive, and practitioner input suggests that it has been found useful in the instances it has been utilised.

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

91. Whilst ILEX believes that referral for mediation should not be compulsory, we would expect that simple debt cases would be exempt from any referrals, together with house repossession cases, where there is a protocol which should have already been complied with.

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

92. See above.

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

93. Practitioner input on this matter was mixed, but it was agreed that there should be an element of choice for parties to agree that small claims hearing could be conducted by telephone or determined on paper.

94. However, there must be an element of judicial discretion as to whether it is appropriate to the case in question. It must be considered by the

Judge whether they need to see the witnesses, in order to ask them questions to make his/her assessment.

95. In terms of telephone hearings, it must be considered that such hearings are likely to be more difficult to manage with one or more litigants in person, than if one or both parties are legally represented. So it will again depend upon the merits of each case alone.

96. ILEX questions why the government to not consider mediation is appropriate for disputes between the government and tax payers over tax liabilities or debt.

Q39. Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

97. Again, ILEX does not believe that such mediation should be compulsory. ILEX further believes that if compulsory mediation is introduced in such cases it will simply increase costs.

98. Lawyers are already under a duty to provide their client with information and advice regarding the mediation process, under their various codes of conduct, and also throughout the claim, for example, see 'Part A – Settlement' on the Allocation Questionnaire.

99. It may be useful for a leaflet provided by the court which the lawyers must pass to their client when explaining the mediation process, but it must cover mediation as a whole, including the advantages and disadvantages.

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

100. ILEX reiterates that mediation should not be compulsory, but in relation to the last point made in answer to Q39 this could be produced as a leaflet, and the details of particular web page provided.

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

101. It is possible that more sophisticated litigants in person, such as some businesses and insurers (in subrogated claims), will be aware of the advantages and disadvantages of mediation, and some may have previous experience. Some larger businesses may have already considered or attempted mediation prior to litigation.

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

102. See above.

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

103. ILEX believes this to be a relatively sensible suggestion.

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

104. Particularly the provisions regarding that the content of written settlements negotiated at mediation can be made enforceable, and the provision ensuring that no party is statute barred from initiating proceedings due to a limitation period expiring whilst they are involved in the mediation process. No party should be penalised for using mediation if it is suitable to a claim and all parties agree to do so.

4. Debt recovery and enforcement.

Q45. Do you agree that the provision in the TCE Act to allow creditors to apply for charging orders routinely, even where debtors are paying by instalments and are up to date with them, should be implemented? If not, please explain why.

105. Practitioner input on this matter was mixed. Whilst it was agreed that there should be some form of protection, it must depend upon the circumstances. ILEX questions whether it is correct for a debtor who is paying by agreed instalments, which are up to date to have a charging order applied for? The circumstances are different when a debtor has agreed to pay by instalments but has defaulted.

Q46. Do you agree that there should be a threshold below which a creditor could not enforce a charging order through an order for sale for debts that originally arose under a regulated Consumer Credit Act 1974 agreement? If not, please explain why.

106. Practitioner input suggests the belief that most people would apply an element of common sense prior to making an order, in terms of undertaking an assessment of what they are likely to achieve.

107. Again, ILEX believes here that judicial discretion is extremely important, and should be utilised. Any orders obtained should be proportionate, and considered in relation to the particular case before the Court.

108. After much debate, ILEX considers it appropriate to leave the situation as it is (without a threshold), and the courts should take its responsibility seriously and use its discretion at all times to consider if it is appropriate.

Q47. If your answer to Q46 is yes, should the threshold be (i) £1,000, (ii) £5,000, (iii) £10,000, (iv) £15,000, (v) £25,000 or (vi) some other figure (please state with reasons)?

109. For the above reasons, ILEX believes it will cause difficulty to decide on a figure. Common sense and Judicial discretion should prevail. The courts already have discretion if, say, children are involved. It would be more appropriate not to have a monetary threshold. This situation would leave the applicant with the decision of whether to apply, and leave the court to determine, given all the circumstances of that individual case, whether it is appropriate for a possession order to be made.

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

110. Practitioner input here was also mixed, and therefore ILEX does not offer a view on this at this stage.

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

111. In relation to Attachment or Earnings Orders, practitioner response agreed that it is currently an unreliable system. As a result it is one which is often avoided in practice.

112. In relation to the fixed table, the practitioners were unsure as to whether these would work in practice, and whether they will offer assistance, or whether they will simply be too rigid and unable to make reasonable calculations taking into account the disposable income that the debtor actually has available.

Q50. Do you agree that there should be a formal mechanism to enable the court to discover a debtor's current employer without having to rely on information furnished by the debtor? If not, please explain why.

113. ILEX is not convinced that a formal mechanism to enable the court to discover a debtor's current employer without relying on the debtor would work in reality for the reasons below.

114. Firstly, there are Human Rights and Data Protection issues to consider.

115. Those issues aside, whilst it would be a useful tool in terms of not having to rely on the debtors themselves to provide the details, it assumes that the court has adequate resources to undertake this additional and investigative work. We also question the resources available in other government departments and whether they would realistically be in a position to provide such information.

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

116. Practitioner input was unanimous that something needs to be done to improve the current TPDO procedure, but ILEX questions whether there are sufficient resources available within the courts to do so.

117. ILEX is also concerned that if such changes were implemented that it would fall foul of the Data Protection Act, and that Human Rights issues would be raised by debtors. This may lead to costly satellite litigation, and subsequently further strain on the court system.

Q52. Do you agree that TPDOs should be applicable to a wider range of bank accounts, including joint and deposit accounts? If not, please explain why.

118. Whilst this would assist the procedure there are data protection and human rights issues which need to be fully considered prior to any implementation, and therefore we question the effectiveness of the powers in any event.

119. Furthermore, ILEX has reservations regarding the capacity of the courts to undertake this type of work, and whether the banks would oblige.

Q53. Do you agree with the introduction of period lump sum deductions for those debtors who have regular amounts paid into their accounts? If not, please explain why.

120. See our answer to Q52.

Q54. Do you agree that the court should be able to obtain information about the debtor that creditors may not otherwise be able to access? If not, please explain why

121. Throughout all of the orders that the government are proposing, ILEX is seriously concerned that the courts will not have the appropriate resources to carry out the work. It also seems that the government is essentially suggesting that the courts give legal advice as to the 'most appropriate' course of action. This causes concern and has always been something the courts have previously not wished to do in the past. It may also leave an applicant in an inappropriate situation, and without recourse, should the advice provided be incorrect.

Q55. Do you agree that government departments should be able to share information to assist the recovery of unpaid civil debts? If not, please explain why.

122. Again, ILEX raises concern that such a proposal would fall foul of data protection laws, and would essentially be ineffective. Furthermore, the resources within the government departments needs to be considered, and ILEX is mindful that government departments have historically not always effectively shared information with other departments.

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

123. See our above reservations regarding data protection, human rights issues, and the issue of resources within the courts and government departments.

124. ILEX would also be concerned regarding the sanctions, if any, which are to be applied to those parties who do not comply with the orders.

125. ILEX also questions what would happen if a claimant relied upon the advice given by the court as to the best way to achieve judgment, and the route chosen, upon advice, did not work.

Q57. Do you consider that the authority of the court judgment order should be extended to enable creditors to apply directly to a third party enforcement provider without further need to apply back to the court for enforcement processes once in possession of a judgment order? If not, please explain why.

ILEX agrees that the authority of the court order judgment order could be extended to enable creditors to apply to third party enforcement providers directly; however, this would be subject to such providers being suitably regulated.

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

ILEX assumes that such issues and processes would be considered and advanced by the regulatory body.

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

ILEX agrees that all Part 4 enforcement should be administered through the county court, with the caveat that it is ensured that proper resources are allocated to it.

5. Structural reforms

Q60. Do you agree that the current financial limit of £30,000 for county court equity jurisdiction is too low? If not, please explain why.

126. ILEX agrees that the current financial limit of £30,000 for county court equity jurisdiction is too low.

Q61. If your answer to Q60 is yes, do you consider that the financial limit should be increased to (i) £350,000 or (ii) some other figure (please state with reasons)?

127. ILEX believes that the jump from £30,000 to £350,000 is far too high, and that to work out the increase using the average house prices in London is misguided.

128. However, if house prices are to be used as guidance, then ILEX believes that consideration of the national average (rather than the London average) would be more appropriate. Therefore, ILEX would suggest a financial limit of £200,000 would be more appropriate.

Q62. Do you agree that the financial limit of £25,000 below which cases cannot be started in the High Court is too low? If not, please explain why.

129. ILEX agrees that the financial limit of £25,000 below which cases cannot be started in the High Court is too low.

130. However, using the example provided in the consultation document of raising it to £100,000, which would result in an extra 500 cases being dealt with in the county courts, our concern with raising the limit is the resources available within the county courts.

131. ILEX believes that the county courts currently struggle with workload, and with the impending closure of many courts, and the limited resources available, we question whether county courts would easily be able to absorb the extra matters.

132. Furthermore, in relation to resources, if the High Court is dealing with fewer matters as a result of any increase to the financial limit, then any resources freed up should be utilised by the county courts to assist in dealing with the additional work.

133. ILEX adds a caveat to any increase, whereby any matter issued in the county court, which became clear that it was more appropriate for it to be heard in the High Court, Judicial discretion should be exercised, and the matter transferred.

Q63. If your answer to Q62 is yes, do you consider that the financial (other than personal injury claims) should be increased to (i) £100,000 or (ii) some other figure (please state with reasons)?

134. ILEX considers £100,000 to be an appropriate figure, subject to the caveat in answer to Q62.

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

135. Whilst ILEX agrees in principle that this should be the case, it means that the courts will need to ensure that there is a suitably qualified Circuit Judge available at a county court. ILEX adds the condition that, if a suitably qualified Circuit Judge was not available, then a party should be able to go to the High Court in order to seek a freezing order.

136. ILEX advances again however, its concern regarding resources in the county courts already being stretched.

Q65. Do you agree that claims for variation of trusts and certain claims under the Companies Act and other specialist legislation, such as schemes of arrangement, reductions of capital, insurance transfer schemes and cross-border mergers, should come under the exclusive jurisdiction of the High Court? If not, please explain why.

137. Yes.

Q66. If your answer to Q65 is yes, please provide examples of other claims under the Companies Act that you consider should fall within the exclusive jurisdiction of the High Court.

138. No comment.

Q67. Do you agree that where a High Court Judge has jurisdiction to sit as a Judge of the county court, the need for the specific request of the Lord Chief Justice, after consulting the Lord Chancellor, should be removed? If not, please explain why.

139. ILEX agrees with this proposal, believing that it will provide greater flexibility and efficiency.

Q68. Do you agree that a general provision enabling a High Court Judge to sit as a Judge of the county court as the requirement of business demands, should be introduced? If not, please explain why.

140. Given the comments above regarding the resources at the county courts, ILEX believes this to be a sensible suggestion.

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

141. ILEX agrees a single county court should be established, thereby taking away geographical boundaries. However, it must be that the individual courts all talk to each other and have open and transparent lines of communication.

142. ILEX again would raise its concern regarding the issue of resources, and if it becomes clear that it is resulting in excess additional work for some courts, then they must be allocated additional resources in order to cope with the workload.

143. If there is to be one county court, there will need to be more telephone lines, and more contact by e-mails in order for matters to run more smoothly.

144. Practitioner input suggested it would be useful to have some form of tracking system, where practitioners could contact the courts and know what is happening with the claim they are dealing with.