RECOMMENDATIONS

Unless otherwise stated, all abbreviations and defined terms used in these recommendations are included in the glossary.

CHAPTER 3. PROPORTIONATE COSTS.

1 "Proportionate costs" should be defined in the CPR by reference to sums in issue, value of non-monetary relief, complexity of litigation, conduct and any wider factors, such as reputation or public importance; and the test of proportionality should be applied on a global basis.

CHAPTER 4. THE CAUSES OF DISPROPORTIONATE COSTS AND HOW THEY SHOULD BE TACKLED WHILST PROMOTING ACCESS TO JUSTICE

2 When striking the balance between the need for predictability and the need for simplicity, the Rule Committee, the MoJ drafting team and the authors of practice directions, protocols and court guides should accord higher priority in future to the goal of simplicity.

3 There should be no further increases in civil court fees, save for increases which are in line with the Retail Price Index rate of inflation. All receipts from civil court fees should be ploughed back into the civil justice system.

CHAPTER 5. INDEMNITY PRINCIPLE

4 The common law indemnity principle should be abrogated.

CHAPTER 6. COSTS COUNCIL

5 The ACCC should be disbanded and a Costs Council should be established.

CHAPTER 8. BEFORE-THE-EVENT INSURANCE

6 Positive efforts should be made to encourage the take up of BTE insurance by SMEs in respect of business disputes and by householders as an add-on to household insurance policies.

CHAPTER 9. AFTER-THE-EVENT INSURANCE

7 Section 29 of the Access to Justice Act 1999 and all rules made pursuant to that provision should be repealed.

8 Those categories of litigants who merit protection against adverse costs liability on policy grounds should be given the benefit of qualified one way costs shifting.

CHAPTER 10. CONDITIONAL FEE AGREEMENTS

9 Section 58A(6) of the Courts and Legal Services Act 1990 and all rules made pursuant to that provision should be repealed.

10 The level of general damages for personal injuries, nuisance and all other civil wrongs to individuals should be increased by 10%.

CHAPTER 11. THIRD PARTY FUNDING

11 A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.

12 The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited if and when the third party funding market expands.

13 Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.

CHAPTER 12. CONTINGENCY FEES

14 Both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients. However, costs should be recoverable against opposing parties on the conventional basis and not by reference to the contingency fee.

15 Contingency fee agreements should be properly regulated and they should not be valid unless the client has received independent advice.

CHAPTER 13. CLAF OR SLAS

16 Financial modelling should be undertaken to ascertain the viability of one or more CLAFs or a SLAS, after and subject to, any decisions announced by Government in respect of the other recommendations of this report.

CHAPTER 14. LITIGANTS IN PERSON

17 The prescribed rate of £9.25 per hour recoverable by litigants in person should be increased to £20 per hour. The prescribed rate should be subject to periodic review.

CHAPTER 15. FIXED COSTS IN THE FAST TRACK

18 The recoverable costs of cases in the fast track should be fixed, as detailed in chapter 15.

CHAPTER 19. ONE WAY COSTS SHIFTING

19 A regime of qualified one way costs shifting, as detailed in chapter 19, should be introduced for personal injury cases.

CHAPTER 20. REFERRAL FEES

20 The payment of referral fees for personal injury claims should be banned.

CHAPTER 21. ASSESSMENT OF GENERAL DAMAGES FOR PAIN, SUFFERING AND LOSS OF AMENITY

21 A working group should be set up to establish a uniform calibration for all software systems used in assessment of damages for pain, suffering and loss of amenity, consequential upon personal injury, up to £10,000. That

calibration should accord as nearly as possible with the awards of general damages that would be made by the courts.

CHAPTER 22. PERSONAL INJURIES LITIGATION: PROCESS AND PROCEDURE

22 The new process being developed by the MoJ for low value RTA claims should be monitored to ensure that the costs savings achieved are not negated by satellite litigation and avoidance behaviour.

23 There should be discussions between claimant and defendant representatives, under the aegis of the CJC, in order to develop a streamlined process for all fast track personal injury cases which fall outside the MoJ's new process.

24 The effect of MROs upon the costs of personal injuries litigation should be kept under close scrutiny.

25 Direct communication should always be permitted between a solicitor and any medical expert whom an MRO instructs on behalf of that solicitor.

CHAPTER 23. CLINICAL NEGLIGENCE

26 There should be financial penalties for any health authority which, without good reason, fails to provide copies of medical records requested in accordance with the Pre-Action Protocol for the Resolution of Clinical Disputes.

27 The time for the defendant to respond to a letter of claim should be increased from three months to four months. Any letter of claim sent to an NHS Trust or ISTC should be copied to the NHSLA.

28 In respect of any claim (other than a frivolous claim) where the NHSLA is proposing to deny liability, the NHSLA should obtain independent expert evidence on liability and causation during the four month period allowed for the response letter.

29 The NHSLA, the MDU, the MPS and similar bodies should each nominate an experienced and senior officer to whom claimant solicitors should, after the event, report egregious cases of defendant lawyers failing to address the issues.

30 The protocol should provide a limited period for settlement negotiations where the defendant offers to settle without formal admission of liability.

31 Case management directions for clinical negligence cases should be harmonised across England and Wales.

32 Costs management for clinical negligence cases should be piloted.

33 Regulations should be drawn up in order to implement the NHS Redress Act 2006.

CHAPTER 24. IP LITIGATION

34 Consideration should be given by the Patents Court judges and the IPCUC to the question whether the Patents Court and Patents County Court Guide should be amended to include any of the proposals set out in paragraph 2.5 of chapter 24.

35 The proposals in the IPCUC Working Group's final report for reforming the PCC should be implemented.

36 After reformation of the PCC, the Guide should be amended to give clear guidance on the requirements for statements of case, illustrated by model pleadings annexed to the Guide.

37 There should be a small claims track in the PCC for IP claims with a monetary value of less than £5,000 and a fast track for IP claims with a monetary value of between £5,000 and £25,000.

38 One or more district judges, deputy district judges or recorders with specialist patent experience should be available to sit in the PCC, in order to deal with small claims and fast track cases.

39 There should be consultation with court users, practitioners and judges, in order to ascertain whether there is support either for (a) an IP pre-action protocol or (b) the Guide to give guidance regarding pre-action conduct.

CHAPTER 25. SMALL BUSINESS DISPUTES

40 A High Court judge should be appointed as judge in charge of the Mercantile Courts.

41 A single court guide should be drawn up for all Mercantile Courts.

42 Consideration should be given to devising a special streamlined procedure for business disputes of lower value.

43 HMCS should prepare a guide in respect of "small business disputes" for the assistance of business people who wish to deal with such disputes themselves without the assistance of lawyers, either by mediation or on the small claims track.

CHAPTER 26. HOUSING

44 The Government should reconsider undertaking a simplification of substantive housing law, as proposed by the Law Commission in 2003, 2006 and 2008.

45 Where a landlord could use PCOL to issue possession proceedings but chooses to issue manually, he should only be able to recover an amount equal to the PCOL issue fee.

46 The Pre-Action Protocol for Possession Claims based on Rent Arrears should be amended in order to set out what steps should be taken by landlords, so as to comply with their obligations under ECHR article 8.

47 Paragraph 24.2 of the Part 52 practice direction should be amended in order to set out what categories of documents should be lodged by the respondent in homelessness appeals and when these should be lodged.

48 Consultation should be carried out on the proposal that where a housing claim is settled in favour of a legally aided party, that party should have the right to ask the court to determine which party should pay the costs of the proceedings.

CHAPTER 27. LARGE COMMERCIAL CLAIMS

49 After 18 months, the question whether section D6 of the Admiralty & Commercial Courts Guide ought to be repealed or amended should be reconsidered in the light of experience.

50 Sections D4 and D8 of the Admiralty & Commercial Courts Guide should be amended to permit more frequent allocation of appropriate cases to designated judges.

CHAPTER 28. CHANCERY LITIGATION

51 CPR Part 8 should be amended to enable the court to assign a case to the fast track at any time.

52 The amount of costs deductible from a trust fund or estate should be set at a proportionate level at an early stage of litigation. Whether the balance of costs should be paid by the party who incurred them or by some other party should be determined by the judge.

53 Practice Direction B supplementing CPR Part 64 should be amended to provide that, save in exceptional cases, all *Beddoe* applications will be dealt with on paper.

54 A suitable body of tax experts should become an "approved regulator" within section 20 of the Legal Services Act 2007.

55 Part 6 of the Costs Practice Direction should be amended to require parties in Part 8 proceedings to lodge costs estimates 14 days after the acknowledgment of service (if any) has been filed.

56 A scheme of benchmark costs should be implemented for bankruptcy petitions and winding up petitions.

57 Costs management procedures should be developed in order to control the costs of more complex insolvency proceedings.

58 The Law Society and the ChBA should set up a working group in order to consider the remaining chancery issues raised by the Preliminary Report.

CHAPTER 29. TECHNOLOGY AND CONSTRUCTION COURT LITIGATION

59 Section 5 of the TCC Guide should be amended to draw attention to the power of the court to disallow costs in respect of pleadings or witness statements which contain extensive irrelevant or peripheral material.

60 Paragraphs 14.4.1 and 14.4.2 of the TCC Guide should be amended, so that they are focused upon key issues rather than all issues in the case.

61 The CPR should be amended so that appropriate TCC cases can be allocated to the fast track. Section 68(1)(a) of the Senior Courts Act 1981 should be amended, so that district judges of appropriate experience may be authorised to manage and try fast track TCC cases.

62 Mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful.

CHAPTER 30. JUDICIAL REVIEW

63 Qualified one way costs shifting should be introduced for judicial review claims.

64 If the defendant settles a judicial review claim after issue and the claimant has complied with the protocol, the normal order should be that the defendant do pay the claimant's costs.

CHAPTER 32. DEFAMATION AND RELATED PROCEEDINGS

65 If recoverability of success fees and ATE insurance premiums is abolished:

(i) The general level of damages for defamation and breach of privacy claims should be increased by 10%.

(ii) A regime of qualified one way costs shifting should be introduced.

66 Paragraph 3.3 of the Pre-Action Protocol for Defamation should be amended to read as follows:

"The Claimant should identify in the Letter of Claim the meaning(s) he/she attributes to the words complained of."

67 The question whether to retain trial by jury in defamation cases should be reconsidered.

CHAPTER 33. COLLECTIVE ACTIONS

68 The starting point or default position in collective actions should be (a) in personal injury actions, qualified one way costs shifting and (b) in all other actions, two way costs shifting. At the certification stage, the judge may direct that a different costs regime shall operate.

69 Rule 9.01(4) of the Solicitors' Code of Conduct 2007 should be amended, so as to permit the third party funding of collective personal injury claims.

CHAPTER 34. APPEALS

70 There should be a separate review of the procedures and costs rules for appeals, after decisions have been reached in relation to the recommendations in this report concerning first instance litigation.

71 Pending that review, appellate courts should have a discretionary power, upon granting permission to appeal or receiving an appeal from a no-costs jurisdiction, to order (a) that each side should bear its own costs of the appeal or (b) that the recoverable costs should be capped at a specified sum.

CHAPTER 35. PRE-ACTION PROTOCOLS

72 The Pre-Action Protocol for Construction and Engineering Disputes should be amended, so that (a) it is less prescriptive and (b) the costs (or at least the recoverable costs) of complying with that protocol are reduced. The need for that protocol should be reviewed by TCC judges, practitioners and court users after 2011.

73 The general protocol, contained in Sections III and IV of the Practice Direction – Pre-Action Conduct, should be repealed.

74 Annex B to the Practice Direction – Pre-Action Conduct should be incorporated into a new specific protocol for debt claims.

CHAPTER 36. ALTERNATIVE DISPUTE RESOLUTION

75 There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

76 An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.

CHAPTER 37. DISCLOSURE

77 E-disclosure as a topic should form a substantial part of (a) CPD for solicitors and barristers who will have to deal with e-disclosure in practice and (b) the training of judges who will have to deal with e-disclosure on the bench.

78 A new CPR rule 31.5A should be drafted to adopt the menu option in relation to (a) large commercial and similar claims and (b) any case where the costs of standard disclosure are likely to be disproportionate. Personal injury claims and clinical negligence claims should be excluded from the provisions of rule 31.5A.

CHAPTER 38. WITNESS STATEMENTS AND EXPERTS

79 CPR Part 35 or its accompanying practice direction should be amended in order to require that a party seeking permission to adduce expert evidence do furnish an estimate of the costs of that evidence to the court.

80 The procedure developed in Australia, known as "concurrent evidence" should be piloted in cases where all parties consent. If the results of the pilot are positive, consideration should be given to amending CPR Part 35 to provide for use of that procedure in appropriate cases.

CHAPTER 39. CASE MANAGEMENT

81 Measures should be taken to promote the assignment of cases to designated judges with relevant expertise.

82 A menu of standard paragraphs for case management directions for each type of case of common occurrence should be prepared and made available to all district judges both in hard copy and online in amendable form.

83 CMCs and PTRs should either (a) be used as occasions for effective case management or (b) be dispensed with and replaced by directions on paper. Where such interim hearings are held, the judge should have proper time for pre-reading.

84 In multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early a stage as is practicable.

85 Pre-action applications should be permitted in respect of breaches of pre-action protocols.

86 The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions.

87 The Master of the Rolls should designate two lords justices, at least one of whom will so far as possible be a member of any constitution of the civil division of the Court of Appeal, which is called upon to consider issues concerning the interpretation or application of the CPR.

88 Consideration should be given to the possibility of the Court of Appeal sitting with an experienced district judge as assessor when case management issues arise.

CHAPTER 40. COSTS MANAGEMENT

89 The linked disciplines of costs budgeting and costs management should be included in CPD training for those solicitors and barristers who undertake civil litigation.

90 Costs budgeting and costs management should be included in the training offered by the JSB to judges who sit in the civil courts.

91 Rules should set out a standard costs management procedure, which judges would have a discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties.

92 Primary legislation should enable the Civil Procedure Rule Committee to make rules for pre-issue costs management.

CHAPTER 41. PART 36 OFFERS

93 The effect of *Carver v BAA plc* [2008] EWCA Civ 412; [2009] 1 WLR 113 should be reversed.

94 Where a defendant rejects a claimant's offer, but fails to do better at trial, the claimant's recovery should be enhanced by 10%.

CHAPTER 42. COURTS ADMINISTRATION

95 Most county court cases should be issued at regional centres, where the staff will be skilled in processing routine proceedings. However, a facility to issue proceedings at all county courts must be retained.

96 Only if cases are defended, should they be transferred to, or retained in, county courts, where the staff should be specifically trained for, and focused upon, the administration of contested cases.

97 The Association of District Judges and HMCS should together draw up a scheme for the increased delegation of routine box work from district judges to proper officers within the court service.

CHAPTER 43. INFORMATION TECHNOLOGY

98 A suitable body should be appointed to exercise strategic oversight over all IT systems which are installed in the civil courts.

99 Judges and practitioners should be included in future development teams for individual court IT projects.

100 E-working should be extended to the rest of the High Court in London, in particular the Queen's Bench Division and also to the SCCO.

101 Once e-working has been introduced across the High Court in London, it should be rolled out (suitably adapted) across all county courts and district registries in England and Wales.

102 Consideration should be given to establishing an IT network for the courts which is separate from, and therefore not constrained by the security

requirements of, the gsi system. This network should have its own appropriate level of security.

103 Judges and court staff should receive proper training in relation to court IT systems. Likewise legal practitioners and their staff should be properly trained in relation to court IT systems and should be willing to adapt their procedures.

CHAPTER 44. SUMMARY ASSESSMENT

104 If any judge at the end of a hearing within Costs PD paragraph 13.2 considers that he or she lacks the time or the expertise to assess costs summarily (either at that hearing or on paper afterwards), then the judge should order a substantial payment on account of costs and direct detailed assessment.

105 A revised and more informative version of Form N260 should be prepared for use in connection with summary assessments at the end of trials or appeals.

CHAPTER 45. DETAILED ASSESSMENT

106 A new format of bills of costs should be devised, which will be more informative and capable of yielding information at different levels of generality.

107 Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.

108 A package of measures to improve detailed assessment proceedings should be adopted, as set out in section 5 of chapter 45.

109 The proposals for provisional assessment should be piloted for one year at a civil justice centre outside London in respect of bills up to £25,000.