

Title: Pre-action Dispute Management Lead department or agency: Ministry of Justice Other departments or agencies:	Impact Assessment (IA)
	IA No: MoJ 068
	Date: 29 March 2011
	Stage: Consultation
	Source of intervention: Domestic
	Type of measure: Primary legislation
Contact for enquiries: Sean Rigney – 0203 334 3187	

Summary: Intervention and Options

What is the problem under consideration? Why is government intervention necessary?

The legal costs involved in making civil claims are often disproportionate compared to the value of the case. In part, costs are driven by the fact that many cases currently settle prior to a court hearing, but by that time have used a significant amount of court resources. It is also considered that for cases that reach court, other forms of dispute resolution may have been more appropriate in terms of the type of service provided, and the cost of that service. Government intervention is necessary as the proposed changes would require legislation.

What are the policy objectives and the intended effects?

To ensure that judicial and court resources can concentrate on resolving disputed cases where a judicial decision is required, rather than the management and processing of cases. Mandatory pre-action directions will encourage and direct early settlement. If a claim does not settle as a result of the pre-action directions, there will no longer be the requirement for allocation questionnaires, pre-trial checklists and case management conferences. Cases will only need to come to court to enforce a debt or for a hearing, when the parties will be better prepared, thus providing potential for reduced waiting times and better utilised judicial time. A fixed or capped legal costs regime will ensure costs are proportionate to the amount in dispute. For debt claims, claimants will be encouraged to use electronic channels wherever these are suitable.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

The following options have been considered:

Option 0: Do nothing (base case)
Option 1: Implement a pre-action dispute management process and fixed costs regime for all money claims up to £100,000

The preferred option is Option 1.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: Autumn 2015
What is the basis for this review? PIR If applicable, set sunset clause date: N/A

Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	Yes
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Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:.....  Date: 22.02.2011

Summary: Analysis and Evidence

Policy Option 1

Description: Implement a pre action dispute management process for all money claims up to £100,000

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

There may be adjustment costs for legal services providers and ATE insurers. There may be cash flow costs for losing claimants and defendants, and costs to all parties from establishing and (in future) revising the fixed cost regime. These costs may be significant. The inflexibility of the fixed cost regime may lead to reduced fairness.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

There may be cash flow gains for some legal services providers, and for winning claimants who would receive earlier compensation payments under the proposal. Reductions in legal costs, court fees and ATE premiums, all relating to improved productive efficiency, would ultimately represent gains to losing claimants and defendants who are liable for these costs.

Key assumptions/sensitivities/risks **Discount rate (%)**

Analysis assumes the current two way cost shifting rules continue to apply for the cases within scope. The fixed cost regime is assumed to identify and implement a more efficient approach to resolving cases, with no change to case outcomes. Risks include that fixed costs are set at the wrong level and lead to worse case outcomes, worse service standards, and to less involvement by legal services providers.

Court cost recovery is assumed to remain the same, and any cost per case changes are assumed to be reflected in changes to court fees and/or to changes in backlogs and waiting times. Legal services providers and ATE insurers are assumed to adjust to the changing pattern of demand associated with the proposal.

It is assumed that the proposal has no significant distributional implications.

The net benefit of the proposal essentially hinges on how the developed fixed costs regime works in practice.

Direct impact on business (Equivalent Annual) (£m):			In scope of OIOO?	Measure qualifies as
Costs:	Benefit:	Net:	Yes	IN

Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?			England and Wales		
From what date will the policy be implemented?			2014		
Which organisation(s) will enforce the policy?			Judiciary / HMCS		
What is the annual change in enforcement cost (£m)?			N/A		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:
Does the proposal have an impact on competition?			Yes		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			Costs:		Benefits:
Annual cost (£m) per organisation (excl. Transition) (Constant Price)	Micro	< 20	Small	Medium	Large
Are any of these organisations exempt?	No	No	No	No	No

Specific Impact Tests: Checklist

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
Statutory equality duties ¹	Yes	13
Economic impacts		
Competition	Yes	13
Small firms	Yes	13
Environmental impacts		
Greenhouse gas assessment	No	13
Wider environmental issues	No	13
Social impacts		
Health and well-being	No	14
Human rights	No	14
Justice system	Yes	14
Rural proofing	No	14
Sustainable development	No	14

¹ Race, disability and gender Impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

Evidence Base (for summary sheets) – Notes

References

No.	Legislation or publication
1	Civil Procedure Rules http://www.justice.gov.uk/civil/procrules_fin/
2	<i>Transforming Civil Justice in England and Wales: A flexible, simple and proportionate approach to dispute resolution in the County Courts</i> http://www.justice.gov.uk/consultations/consultations.htm .
3	Lord Justice Jackson's review of civil litigation costs http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs
4	

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Evidence Base (for summary sheets)

1. Introduction

- 1.1 This Impact Assessment accompanies a Ministry of Justice (MoJ) consultation paper entitled: *Transforming Civil Justice in England and Wales: A flexible, simple and proportionate approach to dispute resolution in the County Courts*². The consultation paper sets out a number of proposals for reforming the way in which the Civil Justice System delivers its services in England and Wales. The reforms are designed to improve the experience of those using the justice system by improving processes and targeting cases towards the most appropriate services for resolution.
- 1.2 The aim of the consultation paper is to seek public views on proposals to provide a more streamlined, responsive and efficient civil justice system that better supports users by preventing the unnecessary escalation of legal problems or disputes where possible. Where judicial intervention is required, the proposals seek to ensure that courts are able to offer a range of quick and efficient services that meet the needs of the court user whilst delivering an effective and proportionate route to justice.
- 1.3 This Impact Assessment examines proposals to introduce a new dispute management process with mandatory pre-action directions for all money claims. Building upon the ideas of the Road Traffic Accident (RTA) Personal Injury (PI) Scheme which was introduced in April 2010, the aim is to put the management of disputes into the hands of those who are involved in the dispute, and clearly signpost options to resolve the issues without the need to come to court.
- 1.4 Information and guidance on alternative dispute resolution options will be provided on web based information sources such as Directgov to enable parties to make informed decisions to resolve disputes. Parties would be encouraged to use alternative dispute procedures such as mediation, conciliation or early neutral evaluation, rather than resorting to court proceedings. The court would be the last resort in the dispute process, allowing the judiciary to focus on legal disputes that cannot be resolved by the parties themselves. We therefore envisage a staged process with fixed costs applying at each stage, with those costs relating to different dispute values and/or different case types.
- 1.5 As the proposal includes the development of a fixed recoverable costs regime, the proposals will need to take into account any future policies resulting from Lord Justice Jackson's review of civil litigation costs³. The consultation will follow the publication of the consultation response on Lord Justice Jackson's proposals.

Background

- 1.6 The current process for civil court claims involves a claim being started in a County Court or online through an electronic channel, i.e. Money Claim Online (MCOL), or the Claim Production Centre (CPC) for bulk issue of straightforward debt claims. When a claim is defended, it is considered by a judge who may allocate the case to one of three court case management tracks, depending on the value of the claim. The court issues case management directions for the parties to follow, which may also involve case management hearings or be on paper only. Depending on the track that the claim has been allocated to, the parties will also be expected to complete a Pre-Trial Checklist (for which a fee is payable) and then request a final hearing once all the directions have been complied with. A further fee is payable at hearing stage.
- 1.7 Pre-action protocols currently exist within the Civil Procedure Rules. The Practice Direction on Pre-Action Conduct was introduced in 2008 and, apart from certain exceptions, it applies to all types of proceedings including those governed by other Pre-Action Protocols. It aims to enable parties to settle the issue between them without the need to start court proceedings. It does this by encouraging the parties to exchange information about the issue and consider using a form of Alternative Dispute Resolution. Pre-Action Protocols that relate to specific case types include Pre-Action Protocol for Personal Injury Claims and Pre-Action Protocol for the Resolution of Clinical Disputes. These are expected to be followed by parties where appropriate. Pre-Action Protocols

² This will be published on 31 March 2011 at <http://www.justice.gov.uk/consultations/consultations.htm>.

³ <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs>

are generally considered to be effective; however, they are reliant on the behaviour of the parties and rarely lead to sanctions by the court if they are not followed.

- 1.8 Legal costs in civil cases are currently negotiated between parties and their legal representatives on a case by case basis. A 'two way cost shifting' regime applies whereby the losing party in a case pays the legal costs of the winning party, plus their own legal costs. Legal representatives are often paid a 'success fee', which is typically an uplift on the base costs incurred in the case. After the event (ATE) insurance is often available to insure against possible legal costs that would arise in the event that a case is lost.
- 1.9 Civil court fees are payable at various stages of a case but a remission scheme is available to those who would have difficulty paying a court fee and meet the appropriate criteria. The fee for issuing a money claim is based on the value of the claim, including interest. Specified money claims can be issued online through Money Claim Online (MCOL) if they meet the appropriate criteria. Various stages in the life of a claim attract a court fee; these include Allocation to Track, Pre-Trial Checklist, Hearing and General Application fees. A Hearing fee (or a percentage of it) can be refunded where the court is notified in writing that the case is settled or discontinued. Where less than 28 days remain before the hearing, only a percentage of the fee can be refunded; however, where less than 7 days remain prior to the hearing, no refund is paid.
- 1.10 A new low value road traffic accident (RTA) personal injury (PI) claims process was introduced within the Civil Procedure Rules on 30 April 2010. It introduced a standard streamlined process intended to avoid duplication of work and deliver compensation to claimants quicker and at a more proportionate legal cost.

Problem under consideration

- 1.11 The costs involved in making civil claims are often disproportionate compared to the value of the claim, and making claims is often time consuming. In 2009, almost 1.5 million money claims were issued but only 22% of these were defended. Nearly half of defended claims settle or are withdrawn before they are allocated to track. Two-thirds of the claims that are allocated to track do not subsequently reach a hearing, as they are often settled or withdrawn before that stage. In part, costs are driven by the fact that currently, many cases settle prior to a court hearing, but by that time have already used significant court resources. In 2009, the average time taken between issue and hearing for a small claim was 31 weeks and 48 weeks for fast and multi track cases.
- 1.12 In addition, it is considered that for cases that reach court, other forms of dispute resolution may have been more appropriate in terms of the type of service provided, and the cost of that service. These proposals divert disputes through a mandatory pre-action process. Coming to court will be seen as a last resort and where parties have participated in the pre-action process they will only approach the court when they are ready for a hearing.
- 1.13 The Practice Direction on Pre-Action Conduct does highlight alternative ways of resolving a dispute that may be considered but adherence to pre-action protocols is reliant on the behaviour of the parties and sanctions are rarely imposed by the court if they are not followed. There is therefore no control over the costs that can be accumulated prior to the claimant notifying the defendant that there is a dispute.
- 1.14 Government intervention is required as the proposed changes would require primary legislation.

Policy objective

- 1.15 The proposals aim to put the management of a dispute into the hands of those who are involved in the dispute. Parties would be encouraged to use alternative dispute procedures such as mediation, conciliation or early neutral evaluation, rather than resorting to court proceedings. The court would be the last resort in the dispute process, allowing the judiciary to focus on legal disputes that cannot be resolved by the parties themselves. This should provide efficiency savings for HMCS.
- 1.16 The stages under the proposals are still under consideration, but could involve the following:

- *Triage*: What are the initial options available? For example, could the dispute be resolved by referral to an Ombudsman, a Regulator, or a trade association scheme? Or, does the matter require legal advice?
- *Evidence Gathering*: If stage 1 has not resolved the dispute, the parties/solicitors would attempt to resolve the matter and to strictly adhere to the timetable and directions set out in the relevant Dispute Management Process.
- *Negotiation/Settlement*: A stocktaking stage, where most of the evidence has been gathered and the parties will be required to try to settle the claim via mediation or another dispute resolution process, which could be conciliation, arbitration or the parties arranging a settlement conference.
- *Trial*: Where the issue could not be resolved at the settlement stage, the parties would produce joint evidence packs (setting out the efforts made to settle the dispute and the evidence they wish the court to consider), and apply to the court for a final hearing.

1.17 Cases will only need to come to court to enforce a debt or for a hearing, when the parties will be better prepared, thus providing potential for reduced waiting times and better utilised judicial time. A fixed or capped legal costs regime will ensure costs are proportionate to the amount in dispute. For debt claims, claimants will be encouraged to use electronic channels wherever these are suitable.

Economic rationale

1.18 The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistribution reasons (e.g. to reallocate goods and services to the more needy groups in society).

Process efficiency

1.19 In principle the proposal would be justified on efficiency grounds if the same outcomes were achieved at a lower overall resource cost. This would be the case if aspects of current processes could be removed altogether, or if processes could be undertaken by other parties at lower overall cost. The proposal seeks to do the latter; some elements of case management would be the responsibility of clients and their solicitors, rather than the courts.

1.20 The proposal may also reduce the court resources required for cases that never ultimately reach court. This would provide further productive efficiency benefits for HMCS.

Coordination efficiencies – fixed costs regime

1.21 Court cases and other disputes involve (at least) two parties. Due to potential coordination failures and other potential game play issues it is possible that the overall costs of resolving the dispute might be lower than would otherwise be so depending upon how all parties approach a case and behave during the case. If an 'efficient equilibrium' approach or model was devised for a particular case then there might be external benefits from applying such an approach to all similar cases. This would be akin to devising a new more efficient production process and then unrolling it more widely. The rationale for having a fixed cost regime essentially relates to this situation.

1.22 The rationale for the government to get involved, rather than leaving this matter entirely to the industry, relates to a number of considerations. First, any industry-negotiated fixed price regime risks being anti-competitive, and acting as a barrier to entry and/or as a means of securing extra margin from consumers or otherwise undermining the consumer safeguards stemming from competition. This may arise especially if an industry-wide agreement is formed using a number of representative bodies rather than all participants (which would not be possible in practice, including

because future possible participants would be difficult to involve). MoJ involvement could help prevent such risks from materialising.

- 1.23 Secondly, government intervention may be needed to help ensure that an agreement is applied uniformly to all participants, and is applied in the most efficient manner. For example an agreement which is optimal for all parties might be undermined by the 'prisoner's dilemma' problem, whereby one party might be better off if they deviated from the agreement but others would be worse off and the aggregate position would also be worse.
- 1.24 Against these justifications would need to be balanced the resource costs of devising, monitoring, enforcing and revising a fixed cost regime, which might be very significant, and the costs and risks of the regime not being suitable for all cases covered by it. These risks of the fixed prices being set at the wrong level, or not adjusting effectively, have applied to many fixed price regimes in the past (e.g. in command economies), and have been associated with significant economic welfare costs and inefficiencies.
- 1.25 In addition fixed cost regimes can promote a number of unintended consequences. Given that a principal-agent relationship exists between the client and their legal adviser, and that information asymmetries also apply, under a fixed cost regime there is a significant risk that client safeguards and service standards might fall. If this had an adverse impact on case outcomes then there might also be costs in terms of reduced equity and fairness.

Distributional, equity and fairness rationale

- 1.26 The proposal may have distributional impacts between claimants, defendants, and their legal representatives, given cases subject to the proposed pre action dispute management process should settle more quickly, and the payment of legal fees and compensation is staggered. The justification for the proposals might be supported if society valued these distributional implications, e.g. quicker payment to claimants.
- 1.27 Unintended changes to any of these factors stemming from the fixed cost regime could create a further set of distributional impacts, and could directly affect the satisfaction of claimants and defendants with the new processes (e.g. if litigants prefer the current process to the proposed process), to fairness (if case outcomes become less fair), or to reduced confidence in the outcomes reached (if outcomes are perceived as less fair).

Conclusion

- 1.28 The overall economic justification for the proposals probably hinges upon how well the fixed cost regime operates in practice. This is likely to overshadow the other aspects of the proposals.

Affected stakeholder groups, organisations and sectors

- 1.29 The following individuals and sectors are likely to be affected by the proposals:
 - *Claimants*: Claimants will be required to comply with the mandatory pre-action directions set out in the dispute management process before embarking on any court action.
 - *Defendants*: Similarly, defendants will be required to proceed under the new process.
 - *Legal profession*: The changes will affect any claimant and defendant solicitors dealing with claims that fall within scope of these proposals.
 - *Her Majesty's Courts Service*: The proposal may result in a reduction in HMCS resources required to deal with cases.
 - *ATE insurers*: the proposal may result in a change in the demand for ATE insurance.

2. Costs and benefits

- 2.1 This Impact Assessment identifies both monetised and non-monetised impacts on individuals, group and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not

traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

Option 0: Base case (do nothing)

Description

- 2.2 Under the “do nothing” base case the current system would remain unchanged. Significant court and judicial resource would continue to be spent on case management processes, and cases would continue to be brought to court when alternative forms of dispute resolution may have been more appropriate. Legal costs would continue to be negotiated on a case by case basis, and overall costs would often reach levels disproportionate to the value of the claim.
- 2.3 The “do nothing” option is compared against itself and therefore its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

Option 1: Implement a pre action dispute management process for all money claims with value up to £100,000

Description

- 2.4 Under this proposal, a new set of pre action dispute resolution processes would apply to all money claims up to £100,000. The new processes would see a formalised pre-action process that would impose strict time limits for communications and key exchange of evidence between parties with a firmer emphasis on alternative resolution methods such as mediation and neutral evaluation of claims. It is estimated that the proposal would affect around 1.4 million money claims.
- 2.5 A fixed costs regime would be established to ensure that costs do not escalate. The current RTA PI scheme has a fixed costs regime which was developed after negotiation by the Civil Justice Council with claimant and defendant representative bodies. The intention would be to undertake a similar exercise for the cases in the scope of this proposal, as necessary.
- 2.6 As outlined above, the costs and benefits of the proposals are strongly influenced by the assumptions made about how the fixed cost regime might work in practice, although feedback from legal practitioners representing both sides of the existing RTA PI process is that they are working well.

Costs

- 2.7 Parties and their solicitors may face one-off costs relating to familiarisation with and awareness of the new protocols and procedures, although these are not expected to be significant.

Providers of legal services

- 2.8 In general, any costs to legal services providers would mirror the gains to claimants and defendants who use, and pay for, these legal services. We assume that if there was a reduction in business in this area then legal services providers would engage in other activity relating to other types of case, or may engage in other types of work, of a broadly equivalent value.
- 2.9 In this instance there may be some costs incurred by legal services providers associated with IT and training to adhere to new pre-action procedures. On an ongoing basis, the proposals will require legal services providers to adhere more strictly to a set of pre-action procedures, which is likely to impose additional costs.
- 2.10 In this instance the reforms may lead to reduced levels of legal services business if the process efficiency reforms result in less overall resource being needed to resolve a case. The same applies to the fixed cost regime, assuming this involves devising and applying the most efficient approach.

The lower costs per case are not expected to increase demand for cases and hence case numbers, as case numbers are assumed not to change.

- 2.13 The fixed costs in the existing RTA scheme were developed through negotiation with relevant representative bodies. Implementing this proposal may also require negotiation with legal services providers. Further ongoing negotiation costs might be incurred as and when the fixed costs regime is amended and updated in future, and other costs to legal services providers might arise as a result of how the fixed cost regime is monitored, applied and enforced

HMCS

- 2.14 The position for HMCS is similar to that for other service providers. HMCS charges fees for the services it provides and HMCS fees are assumed to cover HMCS costs. As such, a measure which affected HMCS costs would have a neutral financial impact on HMCS.
- 2.15 In this instance the number of defended cases is considered to remain the same. However some parts of existing court process would not be applied in future, and fees would not be charged accordingly (e.g. allocation fees and hearing fees). The reduction in fee income is assumed to reflect the reduction in HMCS costs.
- 2.16 This is based on an assumption that applying the pre action dispute management process to cases may result in more cases settling before court involvement is required. This may be a strong assumption.
- 2.17 In addition HMCS may face some minor one-off operational cost increases associated with amending court forms and training material. There may be further costs associated with developing the fixed costs regime through negotiation. It is assumed that these increased HMCS costs would be met by increased HMCS fees per case.
- 2.18 A further feature of the proposal would be that proof of compliance with the dispute management activities would be required by the court in order for proceedings to be issued. The exact nature of the processes involved is yet to be determined, although they are likely to result in some court and possibly judicial resource being required.
- 2.19 It has been assumed that the reforms would not involve HMCS capacity being adjusted (e.g. staff and estate). As such there would be no capacity adjustment costs.

Claimants and defendants

- 2.11 It has also been assumed that the proposals would not affect case outcomes in aggregate. This might be a fairly strong assumption. Also whilst the aggregate position may be the same, this might not be so for each individual case.
- 2.12 Although it has been assumed that the fixed cost regime would involve applying a more efficient approach it is possible that this might be associated with reduced levels of service quality from legal services providers. At one extreme this might have an adverse impact on case outcomes, although this is assumed not to be the case.
- 2.13 Losing parties in cases might also incur cash flow costs. The proposal is designed to increase the speed at which cases are resolved, and hence may require losing parties to pay compensation more quickly. The RTA PI process also requires staggered payment of legal fees as cases proceed through each stage. For the cases affected, if legal fees are currently paid at the end of the case, this will represent a further cost to losing parties given payments will now be made earlier.
- 2.14 Pre-action protocols exist within the Civil Procedure Rules and parties are expected to follow them in appropriate cases. However, the proposal will ensure compliance with the relevant procedures, which may impose costs on claimants and defendants who do not currently adhere to the protocols.
- 2.15 Finally, claimants and defendants (or those acting on their behalf) might directly incur increased operational costs from the way the new process runs. In particular there may be costs in

negotiating the new fixed costs regime and in reviewing and updating it in future. These may be significant.

ATE insurers

- 2.20 This is insurance relating to one party (generally the claimant) being exposed to the other party's (generally the defendant's) costs if the party taking out the insurance loses their case.
- 2.21 ATE insurance should be regarded in the same way as other services. A decrease in business for insurers, e.g. because lower risks are being covered, would equate to a gain to those who pay the insurance premium. In this instance whilst the claimant might take out ATE insurance cover the costs of the premium would be charged to the defendant if the claimant wins the case. In this analysis we assume the claimant wins the case.
- 2.22 Fixed legal costs are designed to create greater certainty. Developing fixed costs may therefore result in reduced ATE insurance premiums, and possibly a reduction in the demand for ATE insurance, which would represent a cost for ATE insurers.
- 2.23 As for legal services providers, it is assumed that insurers would respond to this by entering other fields or other lines of business. As such it is assumed that insurers would not incur any ongoing costs but would incur costs from adjusting to a new pattern of demand.

Equity and fairness

- 2.24 It has been assumed that case outcomes would not be affected in aggregate. However on an individual case basis the fixed cost regime is likely to introduce inflexibilities. This may lead to outcomes being less fair in some cases. It has been assumed that this would apply equally to defendants and claimants.

Distributional costs

- 2.25 As above, it has been assumed that case outcomes would not be affected in aggregate. Overall, winning parties are expected to gain at the expense of losing parties only in relation to the speed of payment.

Wider social and economic costs

- 2.26 Wider social and economic costs are not anticipated given the assumptions adopted, in particular that case outcomes would remain the same, that productive efficiencies would be reaped, and most importantly that the fixed cost regime would be successful. The assumptions section of the Impact Assessment considers this in more detail.

Benefits

Providers of legal services

- 2.27 In general any benefits to legal services providers from increased levels of business would mirror the costs to claimants and defendants who use, and pay for, these legal services. In this instance, however, the reforms should probably lead to reduced levels of legal services business.
- 2.28 As explained in the costs section, the process efficiency reforms should result in less overall resource being needed to resolve a case. The same applies to the fixed cost regime, assuming this involves devising and applying the most efficient approach. The pre action dispute management process should provide a more efficient process through which cases can be handled, which will be applicable to a greater volume of cases.
- 2.29 In addition, the proposal should provide legal services providers with better cash flow through the earlier resolution of cases, and through the system of staged payment of legal costs.
- 2.30 Overall, any reductions in cost for legal services providers will ultimately be passed on to the losing parties in cases, who cover the legal costs in such cases.

HMCS

- 2.31 The position for HMCS is similar to that for other service providers. HMCS charges fees for the services it provides, and HMCS fees are assumed to cover HMCS costs. As such a measure which affected HMCS costs would have a neutral financial impact on HMCS.
- 2.32 In this instance the number of defended cases overall is considered to remain the same but HMCS costs per case should be lower, with associated reductions in HMCS fee income. The proposal should result in a reduction in the HMCS resources required to process claims. Currently, cases may settle before a court hearing but after significant court resources have been used on their case, for example in relation to case issue, allocation, and court listing. By requiring proof of compliance with the dispute management activities in order for proceedings to be issued, the proposal may provide efficiency savings for HMCS if these court processes are no longer required.
- 2.33 Further, cases that do ultimately come to court for a hearing may be better prepared if pre action processes have been complied with. This would provide further efficiency savings from HMCS if this reduced the amount of case management processes required at the court.

Claimants and defendants

- 2.34 Any reduction in legal costs and ATE insurance premiums would benefit claimants and defendants in cases that they lose under the current two way cost shifting rules.
- 2.35 Whilst case outcomes are considered to be the same in aggregate this might not be so in each individual case. In some cases it is possible that the claimants or defendant might be better off than beforehand.
- 2.36 There may also be cash flow benefits for claimants in cases they win due to the earlier receipt of compensation, given cases are expected to settle earlier as a result of the proposal.
- 2.37 When cases do require a court hearing, cases will be better prepared and hence hearing times should be shorter. This may allow County Court waiting times to fall, which would benefit all County Court users.

After The Event (ATE) insurers

- 2.38 No benefits to ATE insurers are anticipated.

Equity and fairness

- 2.39 Quicker payment and quicker case resolution might be associated with increased fairness.

Distributional benefits

- 2.40 As above, it has been assumed that case outcomes would not be affected in aggregate. Overall, winning parties are expected to gain at the expense of losing parties only in relation to the speed of payment. Claimants and defendants may be individuals or businesses.

Wider social and economic benefits

- 2.41 The proposals would be associated with increased resource efficiency, given the assumptions applied.

Risks and assumptions

- 2.42 There is a risk that the impacts outlined above could change if the proposals made by Lord Justice Jackson were implemented.
- 2.43 It is assumed that the fixed costs regime, once developed, will accurately reflect the work required and undertaken by legal services providers on a case by case basis. It is assumed that without the fixed cost regime there would be more variation in the way cases are resolved in terms of the legal costs incurred. In particular it is assumed that in some cases the legal costs would be more

substantial and the cases would take longer to resolve. It is assumed that whilst service standards might change in future under the fixed costs regime, this would not affect case outcomes in terms of agreed liability and damages paid.

- 2.44 It is assumed that the costs of establishing the fixed cost regime and of making future amendments would be proportional. In particular it is assumed that these costs would not act as a barrier to appropriate future adjustments.
- 2.45 If the fixed costs developed do not reflect the work required, or do not adapt effectively to changing circumstances, this could lead to a wide range of unintended impacts. These could include less fair case outcomes in terms of damages awarded and liability agreed, and reduced quality of legal services. In particular an inability to adjust by changing the price may lead to adjustment via service standards, which may affect outcomes. Alternatively legal aid providers may cease to engage in this business area.
- 2.46 There is a further risk that fixed costs may be less applicable for higher value or more complex cases, even if fixed costs were set at the correct level on average. If so, this could also lead to the unintended consequences outlined above. Making the fixed costs regime more flexible would reduce this problem, but would increase adjustment costs for all parties involved (given the fixed fee regime would be more complex).
- 2.47 It is assumed that HMCS capacity would not be adjusted in light of these proposals. It is assumed that HMCS fees would adjust to any change in HMCS costs per case, or that case backlogs and waiting times would adjust, such that HMCS overall cost recovery would remain the same.
- 2.48 It is assumed that the proposal will have no impact on the volume of money claims pursued and defended overall.
- 2.49 It is assumed that parties would fully comply with the new pre-action dispute resolution processes, and impacts have been identified on that basis.

3. Enforcement and Implementation

- 3.1 HMCS and the Judiciary will be responsible for implementing and enforcing these proposals, which would take effect from April 2014.

4. Specific Impact Tests

Equality Impact Assessment

- 4.1 An Equality Impact Assessment Initial Screening has been completed and is attached at Annex 2.

Competition Assessment

- 4.1 The fixed costs regime might act as a barrier to entry by preventing competition based on price. The fixed cost regime negotiations might also not reflect the interests of potential future market entrants.

Small Firms Impact Test

- 4.2 Prior to the implementation of the existing RTA PI process, the MoJ involved the Federation of Small Businesses, the Confederation of British Industry and the Engineering Employers' Federation when exploring the impact on business, including small business. During development of the proposals, key claimant and defendant representative organisations will be engaged in respect of exploring the impact on business, including small businesses. The impact on small businesses will be considered further during the consultation process.

Carbon Assessment and Other Environmental Impacts

- 4.2 No significant impacts are likely to apply to carbon emissions and the environment.

Health Impact Assessment

- 4.3 The proposal is not expected to have a significant impact on health, save that it should reduce legal costs in lower value clinical negligence and employer liability cases. Discussions are ongoing with the Department of Health about how this will be taken forward. There may be positive implications from cases being resolved quicker and payments made sooner.

Human Rights

- 4.3 The proposals are compliant with the Human Rights Act.

Legal Aid and Justice Impact Test

- 4.4 The proposal is not expected to have any significant impact on legal aid. Impacts on HMCS are explained in the main body of the Impact Assessment.

Rural Proofing

- 4.4 The proposals are not expected to have any significant rural impacts.

Sustainable Development

- 4.5 The proposals are consistent with the principles of sustainable development.

Privacy Impact Test (an MoJ Specific Impact test)

- 4.6 The proposals will not have an impact on privacy.

Annex 1: Post Implementation Review (PIR) Plan

Basis of the review:

To check whether the proposals have resulted in the intended consequences of putting personal responsibility for resolving disputes into the hands of parties so that court action becomes a last resort and ensuring that legal costs are not disproportionate in relation to the value of any claim.

Review objective:

The post implementation review will analyse the impact in terms of settlement rates of claims and litigation rates for cases that ultimately come to court for resolution. It will analyse the impact on waiting and hearing times and the impact this has on the way HMCS provides its services. The impact on legal costs will also be considered

Review approach and rationale:

As most of the directions that parties would undertake before starting a court action are done pre-court, much of the data used to evaluate the success of the proposals would be qualitative evidence obtained from stakeholders in addition to any quantitative data from HMCS.

Baseline:

The current position is that a court claim can be started without parties being obliged to first explore other ways of resolving the dispute despite this always being an option. Legal costs build up quickly and often disproportionately to the value of the claim and a large majority of cases settle just before trial stage.

Success criteria:

It is intended that there should be a more collaborative approach to dispute resolution that will allow parties to take personal responsibility for how this is achieved at a more sustainable and proportionate cost.

Monitoring information arrangements:

We would focus on qualitative evidence from stakeholders in addition to anecdotal evidence from the judiciary and quantitative data from HMCS.

Reasons for not planning a PIR:

N/A