ACCESS TO JUSTICE

Consultation Paper No 1 issued by the Royal Court Rules Review Group dated

1st October 2014

CONSULTATION PAPER

The Royal Court Rules Review Group ("the Review Group") invites comments on this consultation paper. The purpose of the paper is to explore what changes might be made to the Royal Court Rules 2004 ("the Rules") to improve access to justice and reduce the risks of and costs associated with litigation.

The specific questions the Review Group wish you to respond to are set out in the **Appendix.**

All responses should be sent to:-
Miss R Traisnel, Bailiff Chambers, Royal House, St Helier, JE1 1BA or by email to r.traisnel@gov.je by **30th November 2014**

It is the policy of the Review Group to make the content of all responses available for public inspection unless specifically requested otherwise.

Contents

A. Royal Court Rules Review Group ("The Review Group")

Membership –

The membership of the Royal Court Rules Review Group is as follows:-

1. Mr William Bailhache QC – Deputy Bailiff
2. Mr. Malcolm Ferey – Chief Executive Citizens Advice Bureau
3. Advocate Timothy Hanson/Advocate Jonathan Speck – President of Law Society[i]
4. Advocate Steven Pallot – Law Officer's Department
5. Advocate Anthony Robinson - Partner Bedell Cristin
6. Mr Matthew Thompson – Master of the Royal Court

Remit of the Review Group

1. The remit of the Review Group is to review the Rules to improve access to justice, to reduce the risks of and costs associated with litigation. The focus of the group is on how disputes may be adjudicated in a manner which is both proportionate to what is at stake and is cost effective.

2. The Review Group is particularly concerned to explore issues affecting ordinary individuals who may be deterred from litigation by the Rules in their current form and/or the practices of the Royal Court. The Review Group in its deliberations will consider whether any changes should apply to all potential users of the Royal Court or whether there should be reforms only for certain categories of claim.

3. The Review Group will also co-ordinate with the access to justice review set up by the States of Jersey under the chairmanship of Senator Paul Routier. While the Review Group will consider whether changes can be made to the Rules in relation to what orders the Court may make about one party recovering the costs of litigation from another, issues concerning the scope of legal aid and amounts charged by the legal profession to their own clients involved in disputes generally are matters for Senator Routier's access to justice review.

B. The purpose of this consultation paper

1. The purpose of this paper is to consult on what type of changes should be made in principle to the Royal Court Rules or to Practice Directions in force from time to time. The Review Group seeks feedback on the suggestions set out in this paper to explore how such changes whether individually or collectively might improve the effectiveness of the court process for litigants.

2. The Review Group has already received feedback from individuals in response to its initial invitation seeking comments on which areas or issues for improvements in procedure should be considered by the Review Group.

3. In light of these responses the Review Group wish to make it clear that issues of substantive reform are outside the scope of this review, although the Review Group will pass on any suggestions to the relevant department within the States, the Jersey Law Commission or any other body whom the Review Group considers ought to be aware of a particular issue.

4. The Review Group is also unable to comment on the detail of individual past cases although it will take into account general observations arising from such cases about the process of litigation and litigants' experiences of the process.

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C. The Current Position

1. Rules approved by the Royal Court in relation to the conduct of litigation were first introduced in 1963. The power to do so is found in Article 13(1) Royal Court (Jersey) Law 1948 which provides that rules of court may be made by the Superior Number of the Royal Court to regulate and prescribe the procedure and practice to be followed in the Royal Court. Although Article 13(1) does not set out any principle to define the approach pursuant to which the Royal Court may approve rules, the Royal Court has made such rules from time to time by applying its experience as to how best to deliver justice.

2. Royal Court Rules were reissued in 1968, 1992 and 2004. There is also a regular and ongoing process of amendments. Since initial approval of the Rules in 2004, 17 amendments have been passed. The focus of the Review Group is not intended to alter or restrict ongoing development of the Rules arising from judicial experience, a particular statute or issues arising from individual cases.

3. There are also other procedural rules applicable for certain claims before the Royal Court arising out of particular statutes. The Review Group consider that any changes to such procedural rules will follow on from any modifications to the Rules[ii].

4. While a number of aspects of Jersey law have their origins in customary law, the basis of the Rules arises from rules developed by the High Court of England and Wales. Much of the language of the Rules is either very similar to or identical to language used in the English equivalent until the latter were reformed in 2000. The Jersey Courts and practitioners still refer to the Supreme Court Practice (1999) (locally known as the White Book) as a guide to interpreting the Rules.

5. A more recent influence on the Rules is the enactment of the Human Rights (Jersey) Law 2002, which came into force on 10th December, 2006. The Rules, in particular the right to a fair trial contained in Article 6 of the European Convention of Human Rights, must be read and given effect to in a manner which is compatible with Convention Rights.

6. Jersey Customary Law still has some application to procedural matters such as the Clameur de Haro , an Acte Vicomte Charge D'Ecrire (referred to in Rule 11/1), the division of estates and dower (part 13 of the Rules) and vues (part 14 of the Rules). [iii].

7. How the Rules are to be applied and interpreted has also been developed by judicial decisions of the Royal Court and the Court of Appeal over the years in individual cases. In particular the Royal Court and the Court of Appeal in more recent years have taken note of developing practice in other jurisdictions, especially England and Wales, and have sought to apply the spirit of such reforms, so that cases no longer proceed solely at the convenience of parties or their legal advisers. In Re Esteem Settlement (2000) JLR note 41 the Court of Appeal stated as follows:-

> *"The objective of all involved in civil proceedings is to progress to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within a reasonably short time.*
> *In the 21st century the conduct of advocates playing interlocutory games, passing between the Royal Court and the Court of Appeal several times before pleadings are closed, and perhaps additionally before trial is reached, is unacceptable, because usually only the lawyers benefit. The assumption that a trust fund will necessarily bear the lawyers' costs no longer applies.*
>
> *The correct function of pleadings is to set out the material facts the parties will later rely on to establish their causes of action or defences. Advocates should not try to persuade the Royal Court to strike out the whole or part of a pleading which contains plainly arguable causes of action, or to edit a pleading to make it more or less effective.*
>
> *If there is not a change to new ways of practice consistent with this objective, advocates may be ordered to pay the costs of the opposing party, or be denied the ability to charge their own client for unnecessary additional work."*

8. In Ybanez v BBVA Private Bank (Jersey) Ltd 2007 (JLR note 45) the Royal Court noted that actions should generally be concluded within twelve months. It was also expected that any complex case was to be concluded within 24 months and that only in exceptional cases involving highly complex issues of law and fact or other difficult circumstances would a delay of 36 months not be regarded as inordinate. The Review Group's experience is that cases before the Royal Court do not meet the guidance set out in Ybanez.

9. The Royal Court has also taken a much more robust approach in more recent years to striking out cases which have been allowed to lie dormant.[iv]

10. Despite the more active approach of the Royal Court in recent years, the litigation process in Jersey remains essentially adversarial. It is therefore subject to the same criticism that was levelled at the procedure in England prior to reform of the procedural rules in that jurisdiction. Without entering into a debate about precisely how far such criticisms apply to litigation before the Royal Court, the findings of a report produced by Lord Woolf in evaluating the previous English rules are still relevant to an assessment of the litigation process in Jersey. Lord Woolf found that the English procedure was:
    a. too expensive and costs could frequently exceed the value of a claim.
    b. too slow in bringing a case to conclusion.
    c. too unequal with a lack of equality between the powerful and wealthy litigant and the under-resourced litigant.
    d. too uncertain in terms of forecasting what litigation might cost and how long it would last which induced fear of the unknown.
    e. difficult to follow for many litigants, if not incomprehensible, and
    f. too adversarial as cases were run by the parties rather than the courts with rules of court being ignored by the parties and not enforced by the court.

11. Feedback that the Review Group has already received is that for individual litigants litigation is too expensive. Any case where the amount claimed is between £10,000[v] and £100,000 rapidly becomes uneconomic because costs are either going to exceed or become close to the amount in issue. For some plaintiffs, the risk of an unsuccessful

claim and the consequential costs orders that might follow is also a significant deterrent to pursuing a claim.

12. Feedback was also received in relation to cases concerning road traffic accidents or accidents in the work place. Frequently such proceedings were not issued until three years after the original incident. This is because three years is the time period within which personal injury claims have to be brought unless there is agreement between the parties to extend the time within which such proceedings can be brought. Notwithstanding active encouragement of the Court, a number of such cases are still taking a further two to three years to come to trial. Unless they settle they are not concluded within a year of issue of proceedings despite this being an objective of the Royal Court. Although there may be reasons for some of the delays, the view of the Review Group is that a delay in resolving matters of five to six years after an act of negligence, and in some cases longer, is too long and is unacceptable.

13. Some of these delays are outside the control of the Royal Court; it is a private matter between a potential litigant and their lawyers as to when they wish to issue proceedings. However parties and their advisers, until relatively recently, were amending timetables between themselves, without referring the matter back to the Royal Court. Although this practice has now changed, because the Royal Court has made it clear that such a practice is unacceptable, it has been a factor contributing to the overall time cases take to resolve and usually therefore to the costs incurred by the parties.

14. It is also fair to observe that while the Royal Court makes every effort to hear cases as soon it can, the Royal Court is required to give priority to criminal prosecutions, where the liberty of the subject may be at stake, and to matters relating to the welfare of children. Occasionally, this can delay the hearing of a civil case although the Royal Court makes every effort to maintain dates fixed before it, and adjournments of agreed dates for these reasons are very unusual. The Court diary for 2014 is currently fairly full which suggests that parties may have to wait around five months before they can reserve trial dates for anything longer than a day for civil matters. Dates for longer hearings of more than a week are also frequently fixed well in advance both for administrative convenience in the management of the court diary but also because there is a higher degree of probability that there will be numbers of witnesses and adequate

notice to them has to be given, as well as to any Commissioner and the Jurats who are asked to commit to such trials. We think these time periods bear generally favourable comparison with other jurisdictions, especially the United Kingdom.

15. The constraints on running more than two cases at any given time are the limited number of full time court rooms, and on running more than three cases contemporaneously are the need for Commissioners and Jurats, the requirement for appropriate Judicial Greffe staffing, and the need for court ushers.

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D. Areas for Consultation - The Overall approach

1. As a result of its analysis of the current position, the Review Group has reached the conclusion the Rules need to be reformed. It is hard to disagree with the conclusions of Lord Woolf in 1996 about reforming English procedure that the Royal Court's procedure should:-

    a. Lead to justice in the result that is delivered
    b. be fair in the way it treats litigants
    c. offer appropriate procedures at reasonable cost
    d. deal with cases with reasonable speed
    e. be understandable to those who use it
    f. be responsive to the needs of those who use it
    g. provide as much as certainty in terms of timescale and costs as the nature of a particular case allows.

2. The issue is how these principles should be reflected in Jersey's procedural rules. The Review Group, in looking at reforms that have taken place in England, consider it appropriate to review how far such reforms have been successful. From various commentaries on the changes in England there appears to be more robust case management by English judges. More cases also seem to settle there, either before proceedings are commenced, or relatively early in the litigation process. There is, however, criticism that steps required to be taken prior to the commencement of litigation have led to an undue front loading of costs and are disproportionate. The amount of guidance issued by the High Court in relation to the conduct of litigation is as substantial as it has ever been and costs have not decreased[vi]

3. The Review Group in this consultation paper have identified three headings where it invites responses. Within each heading are more detailed proposals for consideration. The three headings are as follows:-

    a. Procedural Reforms
    b. Costs
    c. Understanding the Rules

4. The Panel therefore invites consultation in respect of these three areas. In consulting on these areas, the Review Group seeks responses to the principle of a particular idea or suggestion. The Review Group is interested in how far those who respond agree or disagree with a particular proposal, whether they have any alternative suggestions and whether what is proposed will improve access to justice.

5. The questions set out in this paper are listed in the **Appendix** for ease of response.

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E. Areas for Consultation – Procedural Reforms

An overriding objective

1. As noted in Part C of this paper, there is no statement of principle defining any approach pursuant to which the Royal Court might approve its own procedural rules. This contrasts with the position in England and Guernsey. The overriding objective of the rules in both those jurisdictions is to enable the Court to deal with cases justly. Dealing with cases justly is defined in both jurisdictions as including so far as it is practicable:-

    a. Ensuring that the parties are on an equal footing;
    b. Saving expense
    c. Dealing with the case in ways which are proportionate.
        i. to the amount of money involved;
        ii. the importance of the case;
        iii. the complexity of the issues;
        iv. the financial position of each party.
    d. Ensuring that the case is dealt with expeditiously and fairly;
    e. Allotting an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
    f. Enforcing compliance with rules, practice directions and orders

2. The overriding objective both underpins the basis upon which rules are formulated and also places an obligation on a court to give effect to the overriding objective when exercising any power given to it by any procedural rules or interpreting any rule. The parties are also required to help the court to further the overriding objective.

3. The overriding objective applied in England and Guernsey is already also applied in Jersey in the Children's Rules 2005, the Matrimonial Causes Rules 2005 and the Civil Partners Causes Rules 2012.

4. The Review Group therefore seeks consultation on whether the procedural rules of the Royal Court should be subject to an overriding objective; if so, should the overriding

objective follow the English and Guernsey definition or should the objective be developed further to address questions of costs with the addition of a further factor as follows:-

> *"keeping the expenses to which the parties are exposed by the litigation to the minimum which is commensurately and proportionately advancing each party's case."*

5. Arguments in favour of an additional obligation are to recognise that the costs of the litigation process in England have not reduced as a result of the Woolf Reforms. It therefore might be said that an additional focus on incurring costs proportionately as part of any overriding objective is now required.

6. The arguments against a different overriding objective are firstly that a different objective might lead to arguments about why Jersey's position was different from England or Guernsey. Secondly, any objective would be inconsistent with the objective contained in the Matrimonial Causes Rules, the Children's Rules and the Civil Partners Causes Rules. The Review Group accept that if a different overriding objective was adopted then existing rules in Jersey which had followed the English and Guernsey definitions might have to be amended. The Royal Court would also not have the benefit of court decisions elsewhere on an identical provision.

Pre-Action Communications

1. In England and Wales, before the commencement of litigation, a party is generally required to write in advance to the person or entity they wish to sue, to set out details of the claim. Anyone receiving such a letter is required to respond. The steps to be taken are quite detailed and have been said to contribute to an unnecessary front loading of costs. Against that the requirements appear to have led to cases being settled at an earlier stage and before proceedings have been issued.

2. In England, if a party does not comply with a pre-action protocol, a case may be stayed. A party may also be punished by not recovering all the costs it would otherwise be

entitled to recover or by the court reducing or disallowing the amount of interest otherwise payable to a party.

3. The Review Group firstly seeks consultation on whether litigants should adhere to some form of requirement to notify a potential defendant with details of its claim and for the defendant to be required to respond before issuing proceedings, and if so, what exceptions might apply to such a general requirement. It would seem, for example, that such a requirement would not apply to certain types of claims such as applications for injunctions and applications for directions by a trustee.

4. Secondly the Review Group seeks views on what sanctions should be imposed on a party who does not adhere to any requirement to set out its claim or answer in advance of proceedings. In particular, should the Royal Court have power to stay proceedings and vary rates of interest in addition to sanctioning a party by making some form of costs order against the defaulting party?

5. Thirdly, the Review Group seeks consultation on how far the Court should prescribe, whether by rule or practice direction, what is expected in terms of a pre-action communications or whether how to meet any requirement should be left to the parties. The Review Group consider, if the latter approach is taken, it is inevitable that ultimately some form of guidance will be given in individual cases before the Royal Court.

Jurisdiction and the Petty Debts Court

1. The current minimum jurisdiction of the Royal Court is £10.000.[vii] Claims below £10,000 are generally heard by the Petty Debts Court.

2. This limit came into force on 1 June 2004. The Review Group seeks consultation on whether this limit should be increased.

3. Secondly, whether or not the jurisdiction of the Petty Debts Court is increased, the Review Group seeks consultation on whether the procedures of the Petty Debts Court should be made simpler. At present the Petty Debts Court Rules 2004 broadly track the

Royal Court Rules although there is discretion to adopt a simpler approach. The Review Group therefore seeks consultation as to whether the Petty Debts Court Rules 2004 should reflect the small claims approach adopted in England since 2000.

Pleadings

1. The Rules currently require each party filing a pleading to set out the material facts relied upon. The Review Group considers it is not always easy to follow what is being claimed by a party or why a claim is being resisted. Plaintiffs do not always set out the amount of their claim. Answers do not always contain an explanation of why a defendant is disputing a claim. These problems occur more frequently with parties who are unrepresented and unfamiliar with court processes.

2. The Review Group therefore seeks consultation on:-

    a) whether in respect of a claim a party should summarise its case including setting out relevant legal principles on which it relies;
    b) whether a plaintiff as far as possible should be required to state the amount of money being claimed;
    c) whether the defendant should be required to set out a concise summary of why it disputes the plaintiff's claim.
    d) whether the Royal Court should have the power to distil a party's pleading so as to identify the essential issues, such that, subject to appeal, the party would be bound by it.

3. The Review Group further seek consultation on whether the current power to require a party to provide further and better particulars of its pleading should be extended to require any party to provide clarification of any matter in dispute in the proceedings or to give additional information in relation to such matter.

4. The Review Group do not envisage such a power dispensing with any evidential rules relating to provision of documents by discovery or exchange of information by way of witness statement. Rather the rationale for any such power would be to require parties

to make their case clear on any particular point in issue between a plaintiff and a defendant with the aim of saving cost.

Summary Judgment

1. The Royal Court Rules currently allow a plaintiff to apply for summary judgment in respect of his claim on the basis there is no defence. A defendant who has made a counterclaim may also apply for summary judgment on the counterclaim.

2. The summary judgment power in England has been extended to allow the Court to give summary judgment against a plaintiff or a defendant on the whole of a claim or on a particular issue if it considers:-
   a. The plaintiff has no real prospects of succeeding on the claim or issue, or
   b. The defendant has no real prospect of successfully defending the claim or issue.

3. The effect of this extended power firstly means that a party against whom an application is brought has to show that he has a case that is better than merely arguable. This is a more difficult hurdle than current test on a summary judgment application which only requires an arguable case.

4. Secondly the extended power allows for defendants to argue that a plaintiff's case has no real prospect of success. At present actions which are weak currently cannot be struck out and have to proceed to trial.

5. The Review Group seeks consultation on whether the current summary judgment power in Jersey should be broadened in line with the changes that have occurred in England.

Directions

1. The current approach of the Rules is for the Royal Court to give directions for a matter to go to trial once the pleadings have closed i.e. the parties have set out the essential facts of their case together with details of what remedies they are seeking. If at the outset a claim is adjourned for a lengthy period or indefinitely when it is first presented, the Court has no role to play in relation to how long the case might remain adjourned.[viii]

2. The fixing of a hearing for directions is also currently left to the parties[ix]

3. There is therefore no general power vested in the Court under the rules requiring the parties to attend before the Court for directions. The Review Group considers that both the power to adjourn indefinitely without any Court involvement and the fact it is only the parties under the rules who can fix a date for directions can contribute significantly to periods of delay.

4. Although the Court can ultimately strike out a claim if a trial has not occurred within three years of directions first been given,[x] the period of delay has to be inordinate, inexcusable and the Court has to be satisfied on the balance of justice that the claim should be struck out.[xi] While the Royal Court has been willing to strike out cases where there have been significant periods of delay, such a power does not mean that cases are conducted within the timeframes contemplated by the Royal Court. Rather the power to strike out cases is a means of ending cases where there has been excessive delay. It is an option of last resort.

5. The Review Group seeks consultation on whether the practice by which parties can adjourn cases indefinitely is one that should continue or whether any adjournment should require approval of the Royal Court following the parties providing information to the Court as to the length of the period of an adjournment required and the reasons why the matter is to be adjourned.

6. Secondly, the Review Group seeks consultation on whether the Court should automatically fix a summons for directions within a defined period of pleadings closing.

7. Thirdly, the Review Group also wishes to ascertain whether the Court through the Master should have power to require parties to attend before the Court for directions at any stage of an action if it considers it appropriate to do so.[xii]

Mediation

1. The Royal Court Rules at Rule 6/28 allow the Royal Court to stay proceedings for alternative dispute resolution. This can either be done on the application of any party or of the Court's own motion.

2. In the Petty Debts Court, the current practice is for all disputed matters to be referred to mediation before any further steps are taken in the proceedings unless there is no point in doing so. The vast majority of cases are referred. The mediation process in the Petty Debts Court has been running for a number of years and has an extremely high rate of success in resolving disputed debts.

3. The Review Group wishes to consult on whether a similar process should be extended to the Royal Court, either by way of alterations to the Rules or a practice direction. The Review Group seeks feedback as to whether any such power should be for certain types of disputes only, such as road traffic accidents or personal injury claims or disputes of under a value the Court may vary from time to time. A figure of £100,000 is suggested for consultation.

4. In consulting on this proposal the Group recognises that there would have to be sufficient mediators to adjudicate upon such disputes.[xiii]

Discovery

1. Discovery i.e. the process by which each party exchanges relevant documents with the other party or parties, has become one of the time consuming and expensive aspects of litigation. The obligations on parties and their advisers to produce all relevant documents are extensive.[xiv]

2. In England the Court has power to limit the obligations of a party to reduce their impact; the scope of any discovery is limited by the application of the overriding objective in particular so that discovery is proportionate.
3. The Review Group therefore seeks consultation on whether the Royal Court should have power to limit discovery and if so on what basis.

Electronic Discovery

1. The Review Group is aware that in recent years, there have been particular difficulties with the extent of the discovery obligation because of the proliferation of communication via electronic means. For parties to produce relevant documentation which includes documentation produced or sent electronically has become an onerous task. The Rules, at present, do not distinguish between documents stored electronically and documents produced manually. The obligation is the same. There are no practice directions dealing with electronic discovery. Rather the matter is left to the parties who have addressed matters having regard to protocols developed in England designed to address the difficulties of electronic discovery.

2. The Review Group invite suggestions on how parties should approach issues of electronic discovery. Should the protocols in England be adopted? The Review Group considers that if there is a power to limit discovery, such a power should extend to electronic discovery.

3. The Review Group also consider that in retaining experts to ensure that all relevant electronic communications have been disclosed in accordance with the obligations on a party, the retention of such experts and the approach they adopt should also be proportionate and in accordance with any overriding objective in place. The Review Group seeks specific comments on issues parties have faced in relation to electronic discovery and suggestions as to how electronic discovery should be tackled.

Expert Evidence

1. At present a party may adduce expert evidence on subjects which are not or not wholly within the knowledge or experience of ordinary persons, as long as such expert evidence is relevant to an issue at stake.[xv] The use of experts is common in personal injury claims, in particular to determine the amount of damages recoverable.

2. In light of the litigation system in Jersey being adversarial, the Court has no power to require one party to accept an expert instructed by the other party or by the Court (see **X Children v Minister Health and Social Services [2012] JRC 068**).

3. The Review Group wishes to consult on whether this rule should be changed. Should the Royal Court have power to limit expert evidence to a single expert?

4. If the Royal Court should have such power, when should the Court exercise a power to require a single expert? Is each party still entitled to retain its own expert on issues at the heart of the litigation? Should there be a monetary limit above which parties should be entitled to retain their own experts? By contrast for issues that are relatively ancillary, should the Court only limit expert evidence to a single expert. As an illustration, in a road traffic case, should orthopaedic evidence be permitted from two experts on the extent of the injuries but the consequential care costs and therapy required might be limited to a single expert.

5. If the Court were to order that there should be only one expert, the Review Group wishes to consult on how the questions to such expert should be put. Should they first be approved by the Court or should the parties be left to formulate the questions on which the expert is to opine?

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F. Areas for Consultation - Costs

The Current Position

1. One of the areas of complaint received by the Review Group is the cost of litigation. These complaints manifested themselves in a number of different ways but can be summarised as follows:-

    a. The hourly charge out rates of lawyers;
    b. The threat of significant adverse costs orders operating as a deterrent.
    c. The lack of appreciation of how much litigation might cost;

2. This part of the consultation will focus on the second and third of these issues in looking at potential changes to the costs regime that operates for litigation before the Royal Court. As noted in Part A of this consultation paper, the issue of amounts charged to litigants by the legal profession is outside the scope of this review and is a matter for the Access to Justice Review established by the States of Jersey and chaired by Senator Routier but the Review Group cannot disregard the first issue entirely because it is essential background for assessing the appropriate procedural changes which will improve access to justice – discovery is a prime example.

3. The current practice in relation to costs is that, in the case of applications made prior to trial; costs are dealt with at the conclusion of the relevant application. In the case of a trial, costs are dealt with after judgment has been given. In deciding what costs orders to make the Court possesses a broad discretion.[xvi]

4. Unless the matter concerns the costs of a trustee on an application for directions, where a different approach is adopted,[xvii] costs are awarded on either the standard or the indemnity basis.[xviii]

5. Unless a summary assessment of costs is carried out by the Court hearing a matter, assessment of costs is carried out by a Greffier Substitute specialising in taxation matters within the Judicial Greffe. A summary assessment of costs is a power that is relatively

rarely used. A party which has been awarded its costs successfully may also seek a payment on account. Fixed costs are only awarded in respect of actions to recover debts unless the Court orders otherwise.

6. The Royal Court does not assess the fees charged by an Advocate to his or her own client absent a claim under Article 30 of the Supply of Goods and Services (Jersey) Law 2009.

7. This part of the consultation seeks feedback as to whether the costs regime applicable in Jersey should be modified to address the concerns expressed to the Review Group. Given that the costs rules applicable in Jersey have been developed from English practice, the Review Group has considered changes that have been made in that jurisdiction and seeks feedback on how far such changes should be applied in Jersey to try to address concerns raised about the costs of litigation.

Fixed Costs

1. The Review Group seeks feedback on whether the rules for recovery of fixed costs should be extended beyond actions to recover money. In England the fixed costs regime operates in respect of claims up to a certain value and of a certain type. The monetary value is £25,000; the type of cases where fixed costs can only be recovered in addition to actions for recovery of money are actions to recover goods, possession of land, road traffic accidents and employment liability cases.

2. The amount of costs recoverable is a combination of a fixed sum and, other than actions for recovery of money or goods, a percentage of damages recovered.

3. The Review Group seeks consultation on the following issues:-

    a. Should there be a fixed cost regime which applies to all claims up to a certain value?
    b. If a fixed cost regime is to apply to all claims, what is the appropriate level for a fixed cost regime?
    c. What type of actions should a fixed cost regime apply to?
    d. Should it be any claim or only a claim falling within a defined category?

e. In addition to the categories of claim in England where costs are fixed, should a fixed cost regime apply to building dispute?

Summary Assessment

1. In relation to the summary assessment of costs, the Court has power to assess costs summarily at the invitation of the parties. There is also a practice direction allowing for summary assessment for all interlocutory applications other than a summons for directions before the Judicial Greffier/Master lasting one day or less.

2. The Review Group seeks feedback whether this power should apply automatically to all interlocutory applications (not including applications by trustees under Article 51 of the Trust(Jersey) Law 1984) lasting one day or less unless the Court orders otherwise). The rationale for considering the proposal is that the risk of a summary assessment of costs against a party may avoid unnecessary applications. Equally the existence of such a practice might promote tactical applications. In practice, all parties would prepare to have a draft bill of costs available at the conclusion of a hearing and be ready to justify it.

The Ability to Recover Costs

1. The Review Group has noted that in England, for certain types of actions, costs can only be recovered up to the amount of any damages awarded absent unreasonable or dishonest behaviour by a litigant. This applies to personal injury claims which would include claims arising out of road traffic accidents, accidents at work and claims for medical negligence. In such cases a potential plaintiff is often facing a defendant's insurance company with significantly more resources.

2. The Review Group wishes to explore whether limiting the ability to enforce costs against a plaintiff in a personal injury matter assists in striking an appropriate balance between the plaintiff and a defendant so that there is more equality of arms. In putting forward this proposal for consideration the Review Group notes that other remedies, in particular a payment into Court or an offer to settle may be made which can still

provide protection to a defendant who faces a plaintiff who advances a spurious claim or who exaggerates his claim significantly.

Offers to Settle

1. The Review Group seeks input on whether the Rules should be amended to give effect to existing practice to contain express provision to permit any party to put forward a proposal to settle a matter which, if not accepted, can be taken into account when the Court deals with the costs of proceedings.

2. The benefit of such an amendment is to firstly allow plaintiffs to make proposals to compromise their claims and secondly, to give effect to the practice of parties putting forward proposals on a *"without prejudice save as to costs basis"* which has been recognised by case law but is not referred to in the rules or any statute.

Litigation Funding

1. The Royal Court has recently recognised that any party may enter into a litigation funding agreement.[xix] At present the Review Group consider that Jersey lawyers may enter into a no win no fee agreement but cannot uplift normal charge out rates if the claim is successful.

2. The Review Group seeks consultation on whether lawyers should be permitted to uplift normal charge out rates if they act on a no win no fee basis or enter into conditional fee agreements and if so on what basis. The concern with such agreements is that they create a conflict between a lawyer's duty to advise his client and the lawyer's commercial interest in claims being prosecuted successfully. The Group notes in particular, if a claim is unsuccessful, that it is the client who bears the costs of the other party. Yet it might be said that such agreements allow more litigants access to the Court for claims which at present they could not afford to pursue due to lack of funding.

3. If no win no fee or conditional fee agreements should be permitted, should any no win no fee or conditional fee agreement be subject to approval of the Royal Court.

4. Part of litigation funding involves insuring against costs should a party be unsuccessful. However the premium paid by a litigant is not recoverable as part of the costs of litigation if that litigant is ultimately successful (See **Riley v Pickersgill & Le Cornu [2002] JLR 196)**. The Review Group seeks feedback on whether such premiums should be recoverable. In England such a premium was recoverable until 2012 when the law was changed by statute.

Cost Budgets

1. At present there is no obligation on any party to indicate to any other party how much its conduct of a case will cost. The only partial exception is where security for costs is sought against a plaintiff. In support of his application a defendant has to set out the amount of security it seeks by reference to the likely expenditure it will incur.

2. One of the significant of areas of complaint the Review Group received was that parties were unaware of what litigation would cost. While part of this is between a litigant and their lawyer and litigants should be provided with estimates for costs,[xx] the Review Group wish to consult on whether the Rules should require parties to provide budgets to each other as to the likely cost of proceedings.

3. The Review Group further wishes to know whether any exchange of budgets should occur in all actions or only certain types of actions, such as personal injury claims, medical injury and employment disputes.

4. The Group further seeks responses as to whether the Court should review such budgets at the time they are exchanged or whether they should only be reviewed in any taxation process. The Group is concerned to control unnecessary costs; against that if the Court is required to review budgets at the time they are exchanged that can itself increase costs. The Group therefore invites comments as to where the balance should be drawn.

Lawyer/client costs

1. The Review Group wishes to consult on whether the Court should have power to determine a bill as between advocate or ecrivain and a client in contentious matters before it.

2. At present, absent a claim in negligence, for breach of duty, under the Supply of Goods and Services (Jersey) law 2009 or a complaint of professional misconduct, the Royal Court has no power to review the fees charged by a Jersey lawyer to a client.

3. Yet in feedback received, both by the Review Group and the access to justice review chaired by Senator Routier, the cost of litigation was a consistent complaint. Given the power of the Royal Court to tax costs between parties, should that power be extended to assess a client's own costs.

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G. Areas for Consultation - Clarity of Language

1. The Review Group recognises that the Rules have developed since they were first introduced in 1963 on an ad hoc basis with modifications added over the years to address particular issues. The Rules are not therefore a composite code. Equally there is nothing inherently defective in the Rules in the way in which they have developed. Any of the areas for consultation set out in this paper could be introduced to the Rules by way of amendment. This would allow changes to be introduced relatively quickly compared to developing new rules from scratch.

2. The Review Group is also conscious that the principles set out in the Rules are supported by an extensive body of case law which has built up since the Superior Number of the Royal Court first approved procedural rules in 1963. The decided cases are of benefit to those familiar with the rules, in particular practitioners in advising their clients.

3. The Review Group recognises however that the Rules are not necessarily easy to follow for those who do not appear before the courts on a regular basis, in particular litigants in person. The Citizens Advice Bureau and the Judicial Greffe already spend significant time in guiding litigants in person on what is required to a take a particular step in a proceeding. If more and more litigants in person are parties to proceedings before the Royal Court, as is the trend in England and Wales, the Review Group recognises that there is force to the view that says that the rules of procedure applicable to the Royal Court should be understandable to those who wish to bring or defend a claim.

4. The Review Group therefore seeks consultation on whether any changes to procedural rules should be by way of amendment to the rules or whether the changes should be as part of creation of new rules.

5. The Review Group also considers there is an alternative, namely to introduce any changes as amendments to the Rules so that any changes can be introduced relatively quickly with a view to producing new rules of procedure which are more accessible

than the Rules in due course. Views are sought as to whether this is an appropriate way to proceed.

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[i] Due to Advocate Hanson's retirement as president

[ii] See for example the Matrimonial Causes Rules 2005, the Children's Rules 2005 and the Bankruptcy (Desastre) Rules 2006)

[iii] The Review Group thanks Advocate Hanson for his researches and for a copy of his article Reforming Jersey's Royal Court Rules :Lessons from the CPR which included an analysis of the history and different sources of the Rules

[iv] See as a recent example Viera v Kordas 2014 JRC 042

[v] The minimal amount that can be claimed before Royal Court

[vi] For a more detailed analysis see Advocate Hanson's article Reforming Jersey Royal Court Rules Lessons from the CPR, the report of Civil Justice Council dated 21st March 2014, More Harm than Good - Professor Michael Zander on ten years of the Woolf reforms New Law Journal article dated 13th March 2009, and Litigation trends – Jackson a year on assessing the costs New Law Journal article dated 31st March 2014.

[vii] See Petty Debts Court (Miscellaneous Provisions (Jersey) Law 2000.

[viii] Under Rule 6/25(1) a case being adjourned indefinitely for 5 years without any steps being taken is automatically struck out

[ix] Although the Court can give directions following an unsuccessful application for summary judgment and unsuccessful strike out application and following third party proceedings.

[x] See Rule 6/25(2) or within 2 months of when an application for directions should have been made (see 6/26(13).

[xi] A recent example is Vieria v Kordas [2014] JRC042.

[xii] At present, if an action is stayed for mediation the Court can require the parties to attend to attempt conclusion of the stay period for further directions to be given.

[xiii] In the Petty Debts Court mediation is carried out by the Master of the Royal Court, who is appointed as a relief magistrate specifically for this purpose.

[xiv] See Victor Hanby Associates Ltd v Oliver [1990] JLR337.

[xv] See Attorney General v Bhojwani [2009] JRC207A.

[xvi] See Civil Proceedings (Jersey) Law 1956 Part 1 and Flynn v Reid [2012][2] JLR226 for the discussion by the Court of Appeal on the approach the Royal Court should adopt in relation to the awarding of costs.

[xvii] See Alhamrani v J P Morgan Trust Co. (Jersey) Ltd [2007] JLR527 and in the matter of J P Morgan 1998 Employee Trust [2013][2] JLR239.

[xviii] See RCR Part 12 and related Practice Directions and RCR 09/01, 02 and 03 and 13/02.

[xix] See Valette Trust =[2012] JLR1 and Barclays Wealth Trustees (Jersey) Ltd v Equity Trust (Jersey) Ltd [2013] JRC094. This allows those funding litigation to share in the damages recovered .

[xx] See Law Society Code of Conduct.

Appendix - Questions for Consultation

An overriding objective

1. Whether the procedural rules of the Royal Court should be subject to an overriding objective?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

2. Should the overriding objective follow the English and Guernsey definition of an overriding objective?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

3. Should the overriding objective be developed further to address question of costs?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Pre- action communications

4. Whether a litigant should adhere to some form of requirement to notify a potential defendant in advance of details of a claim (other than in trust applications and where interim relief is sought)?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

5. Whether a defendant should be required to respond to a potential plaintiff before issuing proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

6. What sanction should be imposed on a party that does not adhere to any pre-action communication, obligation?

7. Should the Royal Court exercise power to stay proceedings or vary rates of interest in addition to sanctioning a party in costs who does not adhere to any pre-action communication obligation?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

8. Should the Royal Court prescribe whether by rule or practice direction what is expected in terms of pre-action communications?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

9. Should how to meet any requirement of a pre-action communication be left to the parties?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Jurisdiction of the Royal Court

10. Should the maximum jurisdiction of the Petty Debts Court of £10,000 be increased?

Yes	NO

11. If the limit should be increased, what should the maximum jurisdiction of the Petty Debts Court:

The Petty Debts Court

12. Should procedure of the Petty Debts Court be made simpler:

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

13. Should the Petty Debts Court Rules 2004 be amended to reflect the small claims approach adopted in England since 2000?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Pleadings

14. In relation to a claim should a party summarise its case including setting out relevant legal grounds upon which it relies as well as setting out all material facts on which it relies

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

15. Should a plaintiff as far as possible be required to state the amount of money being claimed?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

16. Should a defendant be required to set out a summary of why it disputes a plaintiff's claim?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

17. Should the current power to require a party to provide further and better particulars of its pleading be extended to require any party to provide clarification of any matter in dispute, or give additional information in relation to such matter, whether a matter of law or of fact?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

18 Should the Royal Court have power to define the legal and factual issues in dispute between the parties?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Power to adjourn sine die

19. Should the power to adjourn cases indefinitely be one that should continue?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

20. Should any adjournment require approval of the Royal Court following the parties providing information to the court as to the length of the period of an adjournment required and the reasons why the matter is to be adjourned?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Summary Judgment

21. Should the current power to grant summary judgment be extended to:

a. allow applications to be made by a defendant.

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

b. to introduce a real prospect of success test.

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Directions

22. Should the court automatically fix a summons for directions within a defined period of the pleadings closing?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

23. Should the Royal Court Rules make express provision for the Master to have power to require parties to attend before the Master or the Royal Court for directions at any stage of an action, if the Master considers it appropriate to do so?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Mediation

24. Should all disputes commenced before the Royal Court be automatically stayed for mediation before any further steps are taken in the proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

25. Alternatively, should the power to stay be exercised for certain types of disputes only?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

26. If you consider that disputes should only be stayed for certain types of disputes only, please set out what types of disputes a stay should apply to.

27. Alternatively, should claims below a certain value be referred to mediation, unless there is no point in doing so?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

28. If you consider that all claims below a certain value should be referred to mediation, please set out the maximum appropriate figure:

Discovery

29. Should the Royal Court have power to limit discovery?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

30. If you consider the Royal Court should have power to limit discovery, on what basis should such a power be exercised?

31. In relation to electronic disclosure should the protocols in England be adopted?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

32. Please also set out any specific comments you have on issues faced in relation to electronic discovery and all suggestions as to how electronic discovery should be tackled:

Expert evidence

33. Should the Royal Court have power to limit expert evidence to a single party?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

34. Should any power to limit expert evidence to a single party only apply to cases below a certain value?

Yes	No

35. Please state the value of cases below which the Court may limit expert evidence to single experts?

36. Please set out when the court should exercise such a power to require a single expert:

37. Should each party still be entitled to retain their own expert for issues at the heart of the litigation?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

38. For issues that are relatively ancillary should the Royal Court be able to limit expert evidence to a single expert?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Costs

39. Should the rules for recovery of fixed costs be extended beyond actions to recover money?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

40. Should there be fixed costs for all claims up to a certain value?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

41. If a fixed costs regime is to apply to all claims up to a certain value, what is the appropriate level for a fixed cost regime:

42. If you consider that a fixed cost regime should only apply to certain types of actions, please identify what type of actions should a fixed costs regime apply to?

43. Should the power to summarily assess costs apply automatically to all interlocutory applications lasting one day or less?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

44. Should the ability to enforce costs orders against a plaintiff in personal injury matters be limited to the amount of any damages awarded absent unreasonable or dishonest behaviour?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

45. Should any party be allowed to put forward a proposal to settle a matter which, if not accepted, can be taken into account, when the court deals with the costs of proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

46. Should lawyers be permitted to uplift normal charge out rates if they act on a no win no fee basis?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

47. Should any no win no fee or conditional fee agreement be subject to approval of the Royal Court?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

48. Should after the event insurance premiums be recoverable from an unsuccessful party?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Budgets

49. Should parties be obliged to provide budgets be required to each other as to the likely cost of proceedings?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

50. Should any exchange of budgets occur in all actions?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

51. If you consider that an exchange of budget should only occur in certain types of actions, in what type of actions and at what stage should an exchange of budgets occur?

52. Should the Royal Court review such budgets at the time they are exchanged?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

Lawyer/ client costs

53. Should the Royal Court have power to determine a bill of costs between advocate or ecrivain and a client in contentious matters?

Strongly Agree	Agree	Neither Agree/Disagree	Disagree	Strongly Disagree

54. When should the Royal Court be able to exercise such a power?

General

55. Should any changes arising out of this consultation be introduced a) by amendment to the rules, b) by the production of new rules, or c) a combination of both?

56. The Review Group also invites you to set out any comments you may wish to make in relation to what is proposed or any other proposals you may wish the Review Group to consider before it makes its final recommendations: