ChBA response to informal consultation of the Disclosure Working Group

Previous ChBA feedback

1. Through the ChBA's involvement with the Chancery Court Users Committee the ChBA became aware in 2017 of the work of the Disclosure Working Group ("DWG") on a proposed replacement of Part 31 and the associated Practice Directions with a reordered and rewritten single body of rules. What is intended is a radical overhaul to change behavior and culture and reduce the burden of disclosure. The new regime is to be piloted in the Business and Property Courts.

2. The ChBA expressed its views on the draft proposals to the DWG in a paper dated 25 July 2017. Please click here to read. It expressed the ChBA's concerns at the watering down of the fundamental obligation of a litigating party to disclose adverse documents, at the lack of a holistic approach to a review of case management procedure, at the front loading of costs, the lack of consultation and the overlarge scale of the proposed pilot.

3. The ChBA was invited to consider informally revised draft proposals to which it responded by letter from Amanda Tipples QC to Mr. Edward Crosse of the DWG dated 18 October 2017. Please click here to read. The ChBA acknowledged that some but not all of its concerns as to the watering down of the obligation to disclose adverse documents had been addressed. The others had not.

4. One of the points made in the ChBA paper was that wider consultation amongst other SBAs and other stakeholders using the Business and Property Courts would be advantageous. Since then the DWG has launched this informal consultation and this response is in relation to that wider consultation.

5. The ChBA's working party had the opportunity to meet and discuss its concerns with Chief Master Marsh on 22 January. The views expressed in this paper reflect the views expressed in that meeting.

CHBA views

6. Save to the extent addressed as set out above, the ChBA concerns, as set out in its paper and its letter remain. The DWG is referred to those documents.

7. In addition the ChBA makes the following further observations.

8. A change to the rules, particularly a radical change to the rules, comes at a significant price in the form of time for practitioners and judges to become familiar with the new rules, increased cost to clients as a consequence, and disruption to all court users as a new system is established, bedded in and problems ironed out. There ought, therefore, to be a clear advantage to be gained by such a change.

9. The ostensible advantage here is a reduction in the costs of litigation. This was identified by GC100 as a problem, they identified the costs of disclosure in particular, and this was the catalyst for the formation of the DWG. No evidence or study as such has identified the costs of disclosure as a particular reason for the high costs of litigation (over and above high hourly rates, increased costs of complying with pre-action protocols, and new measures such as costs budgeting etc which increase the number of effective case management hearings), nor what aspect of disclosure was responsible. Anecdotal evidence is that the costs of disclosure has increased because the volume of electronic data which has to be reviewed has grown exponentially over recent years. The ChBA is concerned that the proposed changes to the disclosure rules do not tackle in any meaningful way the real problem – namely, the vast amount of electronic data litigants now possess. Accordingly we are concerned that whatever tangential benefits a change to the rules may achieve, they do not achieve a clear advantage over the existing rules, particularly when there is nothing proposed by the new rules which cannot be achieved under the existing rules.

10. These changes will increase the front loading of costs in litigation which obstructs access to justice and is a disincentive to settlement. There is anecdotal evidence that the piecemeal

measures introduced over recent years have increased the front loading of costs. The complexity of the new disclosure requirements will only increase that trend.

11. We suggest that what is required is a holistic review of pre-action and early post action procedure so that any changes which are made are focused properly on the real problems and fit together as a cohesive procedural regime. Piecemeal reform of this kind increases the risk of fragmenting a cohesive civil procedure regime. For example, the point has already been made by the ChBA in the past that the absence of a duty to disclose adverse documents when making Basic Disclosure does not sit with the "cards on the table approach" of the CPR and the pre-action protocols. Why would a party now disclose adverse documents at the earliest stage if the rules do not require him to do so even when he serves his claim?

12. If the pilot is to proceed, we remain of the view that it should be smaller, or that there should be a staged roll out. There would be less risk, or more contained risk, of the sort of disruption which occurred when costs budgeting was introduced and lists became jammed. There should be a formal and effective process for feedback and monitoring of success or failure backed by statistics collected both within and outside the pilot scheme. Plainly judges and Masters should be trained in the new regime.

The Chancery Bar Association
26th February 2018