



A Note to Accompany the Publication of

***The Third Interim Report: An Analysis of Questionnaire
Feedback from Legal Practitioners***

as part of the Official Monitoring of the Disclosure Pilot in
the Business and Property Courts of England and Wales

17 September 2020

The *Third Interim Report*, dated 25 February 2020, marked an important monitoring milestone in the course of the Disclosure Pilot. In response to a distributed questionnaire, it provided those who are most affected by the Pilot — those are who engaged in litigation in the Business and Property Courts up and down the country — an opportunity to ‘have their voice’, and to convey their views on two aspects of its operation.

First, respondents were able to provide feedback on the ‘micro features’ of the Pilot, and on particular operational, documentary, and drafting aspects of PD 51U which governs the Pilot. *Secondly*, respondents were asked for their views as to the overall effect of the Pilot, and specifically, whether the Pilot was bringing about a culture change in the way in which the disclosure process was being conducted. Responses were forthcoming from 71 individuals or entities. When considered in totality, and when analysed within the pages of the *Third Interim Report* question-by-question, the responses provided a fascinating and important picture of what was felt to be working well, and what was considered to be in need of improvement or finessing.

In addition to the analysis of each question by means of summaries, graphs, and text, the *Report* also seeks to capture the concerns and, in some cases, the frustrations, of respondents, by reproducing *verbatim* key comments in yellow text boxes. It was plain from the responses to the questionnaire that, whilst some aspects of the Pilot (such as the new concept of Initial Disclosure, and an early emphasis about TAR possibilities) were perceived to be helpful, other aspects (such as preservation duties, the Disclosure Review Document, creating lists of issues for disclosure, and over-engineered approaches to model selection) were proving troublesome for many. The *Report* seeks to highlight both the positive and the not-so-positive, as drawn from those questionnaire responses.

Upon receipt of the *Third Interim Report* (and also in light of subsequent feedback from other groups and individuals), the Disclosure Working Group has proposed amendments to several aspects of PD 51U. It is anticipated that these will be considered by the Civil Procedure Rules Committee in October. These types of amendments are indicative of what was always intended, i.e., that the Pilot would be a ‘living Pilot’ that sought to respond to the concerns of those who are intricately involved in its operation.

Whether the Pilot is achieving its stated ambition of ‘operat[ing] along different lines driven by reasonableness and proportionality’ (to quote Sir Geoffrey Vos, Chancellor of the High Court, in *UTB LLC*

v Sheffield United Ltd [2019] EWHC 914 (Ch) [75]) will be the subject of a later questionnaire to the legal marketplace. Respondents will have a further opportunity to provide feedback, on the basis of their more widespread experience, as the Pilot enters into its third year of operation. As part of that feedback, it will be important to ascertain how the overall success of the Pilot can be assessed. Obviously, whether or not the Pilot has saved, or increased, costs — whether in relation to the disclosure process itself, or overall for the litigation concerned — will be a key empirical benchmark that will be sought to be measured.

In the interim, however, the judiciary of the Business and Property Courts of England and Wales will be surveyed, shortly after the commencement of the new judicial term in Autumn 2020, to ascertain their views and experiences ‘at the coalface’ of the Pilot’s operation.

This was always destined to be a broad-ranging and impactful Pilot, as the experiences of respondents who contributed their views and experiences as part of the *Third Interim Report* aptly demonstrate. I wish to thank everyone who gave generously of their time and expertise to complete the questionnaire. Please be assured that there will be further opportunity for detailed feedback as the Pilot continues its operation into 2021.

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