Bar Council response to the Civil Courts Structure Review: Interim Report

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to Lord Justice Briggs' report entitled Civil Courts Structure Review: Interim Report (the Interim Report).[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to make further written submissions as part of the Civil Courts Structure Review being undertaken by Lord Justice Briggs. The Bar Council also appreciates the invitation from Lord Justice Briggs to meet with members of the profession to discuss the Interim Report and our further written submissions and would be happy to provide representative practitioners and/or Bar Council policy staff members to attend such meetings.

5. The Interim Report makes clear that the intention is that fundamental changes to the structure and operation of civil courts will be implemented. While we continue to feel unease

[1] Lord Justice Briggs (2015) Civil Courts Structure Review: Interim Report. Available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf

at some of the proposals, as outlined in our initial written submissions in November 2015,[2] our current submissions primarily focus on how possible changes could, or should, operate in response to the specific matters raised in the Interim Report. We do reiterate our concerns, however, where we believe that they have not been dealt with adequately, as well as where we believe inaccurate assumptions are made.

6. In particular, the Bar Council is concerned that the Interim Report does not clearly identify the sources of the civil court system's current problems, namely the causes of the increase in the numbers of litigants in person within the civil court system. In particular, the absence of funding options for many litigants following the cuts to civil legal aid and the introduction of the Jackson costs reforms is directly connected to the increased numbers of litigants in person who are without sufficient legal advice. It is likely that the situation has been made worse by significant increases to court fees. The problems to which these reforms have given rise have been exacerbated by inadequate funding of the court system (rather than inherent problems with its existing structures and personnel).

7. We also remain concerned about the proposals for the Online Court (OC) and the introduction of Case Officers. As currently described, these proposals mark a fundamental departure from our adversarial system of justice and the judicial role with consequent effects on recruitment and training. It is difficult to support such proposals in the absence of argument and evidence that they will in fact improve both access to justice and the administration of justice.

8. There are two primary issues which concern the Bar Council. First, and most importantly, the impact of any changes on access to justice for individuals and other parties seeking to resolve their disputes through the courts. Secondly, the impact any changes will have on the Bar and what this will mean for the efficient delivery of justice and the sustainability and diversity of both the profession and the judiciary.

9. Our submissions are divided into the key topic areas identified by the Interim Report – the OC; Case Officers; the Number of Courts and Deployment of Judges; Rights and Routes of Appeal; Enforcement of Judgments and Orders; and Boundaries. Although our response deals with the issues identified by Lord Justice Briggs where he particularly invites further input we have expressed our views more widely where we believe it is necessary to do so.

[2] The Bar Council's November 2015 cover letter and submission are at Annex 1 and Annex 2 to this response. We have also included the Bar Council's January 2016 response to the Civil Justice Council Property Dispute Working Group's discussion paper at Annex 3.

The Online Court

Overview

10. We remain concerned that the objective of introducing a "lawyerless" court will in practice produce a two-tier justice system. Those who can afford to will still engage lawyers to deal with their litigation whilst the potential lack of any costs recovery or funding for advice or representation will preclude those who are most likely to need legal assistance from obtaining it. This has the potential to damage the standing of the legal system in the eyes of the general public and the reputation of the legal system in this country and beyond.

11. While some may take the view that there is already in effect a two-tier system in place divided between those who can afford lawyers and to issue proceedings and those who cannot, we believe that the OC proposal not only produces a two-tier effect, but actually enshrines a two-tier arrangement by building it into the civil justice system. It is important to understand that outside the OC there will be cost recovery for lawyers and the assumption of legal assistance and representation, there will be determination by judges not Case Officers and the system will be based on our adversarial system, while the OC appears to be premised on, or at least indicates, a distinct movement towards an inquisitorial system, with determination by Case Officers and with a presumption that parties will not have the benefit of legal representation and will be unable to recover any legal costs. These three aspects distinguish the OC from the dispute resolution system which is frequently described as the best in the world. Before deciding that we need something entirely new and distinct we should look to work with the system we already have.

12. At the same time we can foresee that there will be an increase in unregulated, uninsured and often untrained providers of legal "advice" unrestrained by ethical codes of practice. The increase in the activities of paid McKenzie Friends in recent years is a clear indication, in our view, of what is likely to lie ahead (whether or not remuneration is precluded in future or indeed whether it is possible to police the problem where a court operates online). People generally want lawyers and assistance with representation when facing or pursuing legal action; they are facing uncertain outcomes and engaging in unknown and often daunting processes. This desire for support and advice will not change simply because cases will be determined by a new type of court. We doubt that pro bono agencies can realistically plug gaps. In our view there should never be an assumption that voluntary work will make up for failings in the justice system. We remain concerned that for significant numbers and categories of litigant technology will remain a barrier to, rather than enhancement of, access to justice.

13. We are also concerned by the potential for vulnerable litigants to be influenced by other parties, whether family members or others. We note the difficulties with ensuring the identity of a litigant and preventing fraudulent claims from being brought through the OC.

The changes proposed could give rise to an increase in the number of fraudulent road traffic accident claims which the County Court already has to decide. There is also a concern that if there is undue influence on a litigant to bring a claim, and there is no appearance before a judge who can assess this at an early stage, vulnerable litigants will be badly affected by the proposed changes.

14. Further the Interim Report notes[3] that a feature of the OC will be that judges will receive no assistance on the law from the parties. The proposal to introduce Case Officers in the OC with a quasi-judicial role is, in our view, potentially the beginning of a shift to a career judiciary of a very different character to that which presently commands public confidence. The experience of continental Europe makes clear that the move to a career judiciary would have considerable associated costs, having regard to the number of judges required. There is also a reputational risk for the judiciary, and the jurisdiction, flowing from the reduced status and independence of the judiciary. It also raises questions about the nature, breadth and frequency of training that will be required for judges dealing with cases in the OC and, together with other proposals, heralds the introduction of an inquisitorial system in which court officials or expert systems provided by the court will be guiding and advising litigants. The implementation of these proposals would mark a fundamental departure from the way in which access to justice has until now been secured. They are not just organisational reforms. We consider that whatever their final form they should be introduced in a way which involves rigorous testing and evaluation of their impact and before there is any widespread dismantling of the existing court structures. We also suggest that this is more properly a matter for Parliament, given that it goes to the heart of our justice system.

Whether the OC should be a separate court with its own bespoke rules, or a branch of the County Court, governed by the CPR with appropriate amendments.

15. We do not believe that the present system and court structure is failing other than as a result of lack of investment and resources. We agree, wholeheartedly, that the introduction of modern technology into the court system at all levels is both necessary and likely to be beneficial for all users. However, this does not mean that efficiencies and other benefits are only to be found through the creation of an entirely new court. We consider that there is much more that can be done within the current system to make it work well, rather than embarking on a bottom up and wholesale reform. Both logistically and structurally (for example, for appeals), the OC could be incorporated within the existing structure. Indeed it seems somewhat counterintuitive to consider bringing the Employment Tribunal and the Employment Appeals Tribunal within the wider court system whilst leaving the OC as a standalone and separate court.

16. The perceived weakness noted at paragraph 5.23 (that the civil courts simply do not provide reasonable access to justice for any but the most wealthy individuals) does not take

[3] See Interim Report paragraph 6.15

into account the strength and availability of the Small Claims Track (SCT). Indeed it is a criticism which might more forcefully be directed at claims in the High Court which the OC is not intended to address. District Judges already take a proactive approach to cutting solicitors and counsel's fees when summarily assessing costs in the County Court[4] and there is no reason to conclude that costs cannot be contained, particularly if there is a move to more cost-effective procedures underpinned by investment in IT.

17. As noted in the Interim Report at paragraph 2.28, the money claims online ("MCOL") system is already in existence. We would, however, query the effectiveness of this system at the current time given there are difficulties with MCOL, for example litigants not being able easily to commence claims in joint names. A greater use of technology within the courts case records systems and at an administrative level would assist, and already has assisted, the County Court to deal more efficiently with claims. In due course systems for logging filed documents online so that the parties can also view those documents, and methods for the electronic storing and presenting of evidence would be beneficial. However, these changes require time to bed in and for IT issues to be resolved. We would therefore suggest a carefully phased approach to the introduction of any further online systems.

18. The advantage of phasing in such a transition at the same time as retaining the existing systems in tandem, as they are modified by the introduction of IT, would be considerable and would meet many of the concerns we have about access to justice. A limited pilot with specific and mandatory success criteria which were independently determined would, in our view, be necessary measures which would ensure that public confidence in a new system could be maintained.

19. If the OC is implemented as a replacement for entire categories of claims presently brought in the County Court (particularly if it is the only route available), then the Bar Council believes that for entirely pragmatic reasons it would have to be a separate court with its own bespoke rules. If the intention is to ensure that the OC is as user-friendly as possible and that it will be used by individuals and organisations without the assistance of legal representatives, its rules and processes should be simple, written in plain English and not require knowledge of the CPR or how the courts operate more generally. However, experience with the tribunal system and the CPR itself suggests that well-intentioned aims of this sort are difficult to achieve in practice given the complexities of modern legal systems and the substantive law.

[4] The common assumption of lawyers appearing in the County Court is that costs will be reduced to 60-66% of those claimed if assessment is on the standard basis and 75-80% if the costs are assessed on the indemnity basis. Circuit Judges and District Judges do reduce costs below this level if appropriate in the case and following the principle of proportionality in CPR r 44.3.

The types of claim which should be included within, or be excluded from, the OC, assuming that £25,000 is used as the planned steady-state value ceiling.

20. In our view the OC would only be appropriate for money claims; all claims in specialist lists should be excluded. We agree that there would have to be a cap: we have concerns about whether £25,000 is an appropriate level. This is roughly the same as the median annual wage in the UK (much more if one takes into account the impact of taxation). Claims at the top end of the bracket are likely to be extremely significant for individuals and we question whether it is appropriate to deal with such litigation in the same way as much smaller claims or indeed with the objective of limiting or precluding legal advice or representation. The value of a claim is not necessarily determined by its monetary value, but by its complexity and the consequences to the individual.

21. We agree with the Interim Report's view that the OC would be inappropriate for specific types of cases, including those involving injunctions, declarations or possession actions. In relation to possession actions we note the use of the possession claim online system; however, we have reservations in cases where reasonableness and/or Article 8 ECHR grounds are likely to be raised.

22. We also agree that there will need to be provision for cases to be transferred out of the OC where:

- The case is complex
- There are matters of public importance, e.g. human rights issues
- There are contested factual issues
- Cross-examination is necessary, or
- There are applications involving contempt.

23. In our view significant factual disputes cannot properly be dealt with on the papers or via an OC. Judges are only in a position adequately to assess credibility if live evidence is given in person. Equally, public confidence in the judiciary and acceptance of the outcome of litigation is in large measure to the result of personal interaction with the judge and experience, in person, of judicial conduct of hearings, all the more so where litigants are not represented. In addition to the obvious benefits of live witness evidence the advantages obtained from using physical exhibits, models and plans to explain a case clearly (to the benefit of the judge and all parties) would be lost. While we accept that video conferencing might in part solve this problem, we again query whether this is realistically available to the average litigant in person. Video conferencing assumes that a litigant in person has the facilities and can be at home (usually during working hours) and has a landline. We note that

the attempt to carry out cross-examination by video-link in the Trade Marks Registry was not regarded as a success.[5]

24. We agree that personal injury claims with a value above the small claims limit should be excluded from the OC unless both parties agree to the claim being dealt with through the OC.

25. The scope of the OC also raises concerns about its impact on the junior Bar. If all or the majority of cases with a value of £25,000 or less are brought within the remit of the OC this will have a significant impact on the junior Bar. Currently claims with a value of £25,000 or less will most usually be within the SCT or the fast track. These are cases which are usually dealt with by the junior Bar, which can offer cost-efficient advice and representation. These cases also provide an important part of the development of a young advocate's practice, since it is by appearing in these cases that barristers acquire experience and hone their advocacy skills. The change would therefore threaten one of the most-cost effective methods of providing expert advice, analysis and representation in precisely the value of claim at which the OC is aimed.

26. This is also of importance for the wider administration of justice since we believe the removal of work that allows for training and experience will see the departure of talented advocates to other areas of practice or from the Bar altogether. This will in turn have an impact on the pool of advocates available to become leading advocates in 10 or 20 years' time, and decrease the pool of potential candidates for the judiciary. We note the concern expressed in the Interim Report in relation to the low number of civil judges and we see little long-term prospect of that being ameliorated if there is no career path from the Bar. Finally on this point, whilst our system continues to be adversarial the availability of suitably qualified people who can provide high quality advocacy is key to its successful operation.

27. We also query the role of the OC in relation to family proceedings. We assume, given the commentary in relation to the boundaries between the civil and family courts, that the OC is not intended to affect or take any cases that are family cases. However, we are also mindful of the comments made by the President of the Family Division in relation to online proceedings providing a possible future for the family courts. We are concerned by any review of the approach to the operation of the County Courts, or the cases that it most commonly deals with, which does not take this into account. There is a danger of parts of the civil courts developing at different paces to the detriment of the system as a whole.

[5] By way of comparison we note the streamlined approach for small and medium enterprises (SMEs) successfully adopted in the IPEC. The only problem for that Court is that its success has led to significant delays as additional judicial resources have not been deployed.

Assessing the size of the class of court users, actual and potential, who will be challenged in the use of computers, and therefore need assistance, identifying the types of assistance required, and the ways and means of providing it.

28. It is difficult to assess the size of the class of actual and potential court users who will be challenged in the use of computers. The Interim Report notes that it has been suggested that the majority of litigants in person may require assistance in the use of technology to use the OC.[6] This appears to reflect the position indicated by the most recent Office for National Statistics (ONS) reported statistics on internet usage (from 2015). Whilst the statistics do not provide a breakdown of usage across all protected characteristics, they do suggest that individuals in a number of specific age groups and locations would find the use of a wholly internet-based court challenging.

29. Although we agree this is not a reason to avoid digital reforms, the assumption that the majority of litigants in person looking to use an OC will not be capable of interacting with an entirely online platform is likely to be accurate.

30. That is likely to be compounded by the fact that a great deal of the digital interaction currently taking place occurs in the context of transactional activities which are short in nature and have specific outcomes for which the user interface is highly customised. Internet usage is not a guide to whether litigants will be able to use a system which is necessarily much more complex. There are no systems of which we are aware operating within the UK which employ the complex heuristic models which would be required for litigation of any range. The only example we can think of is the NHS 111 service (NHS Direct) which is of course mediated by a trained operator.

31. As the Interim Report recognises, assistance will need to be made available to those unable to use the OC. The form which that assistance takes cannot itself be solely online or digital, although video tutorials, process flowcharts and fact sheets written in plain English will be of assistance to OC users generally.

32. We note that in the "simple" example at paragraph 6.8, there is a requirement that all parties should have personal email addresses, scanners, PCs and fixed landlines. No consideration is given to what the position would be if these facilities are not available, particularly if the OC is mandatory for cases within its competence. There is no other consideration given to how it would work for the anticipated 50% of users who would not have access, and the ability, to use the system. While it may be correct that most individuals have access to the internet nowadays this is usually through handheld devices (mobile phones and tablets) rather than desktops or computer facilities sufficient for dealing with legal documents.

[6] See Interim Report paragraph 6.57.

33. On a practical level, it is difficult to see how a party without ready access to a computer, scanner and landline and the ability to use them would be able to participate in the OC process at all. The problem of requiring users to upload documents presumes access to and a facility with technology which many do not possess. It cannot seriously be suggested that the target population for the OC all possess and are comfortable with the use of scanners and PCs. Assisted Digital will not be able to provide hardware (e.g. scanners or video link equipment) and advice on how to use a litigant's own systems or home visits to assist with these essential features of the proposed OC process.

34. If litigants are unable to use the OC that would plainly raise issues in relation to access to justice. Indeed the inevitable result may be that if it is cheaper and easier to use it would be used by those with legal advisors and IT facilities. We think it is likely, at least in the medium term, that a two track version will be required, which accommodates those without the facilities to participate in the OC (hence our preference for a pilot and the gradual emergence of an online system from the existing court structure).

35. We are also concerned that accessibility has not been addressed. Elderly litigants who have not grown up in a 'digital era' may be less able to use IT systems and engage positively with them. Sight-impaired and hearing-impaired litigants will not have access to documents online or video and telephone conferences, without assistance. Whilst a reference is made to the need for the portal to accommodate Welsh speakers, the diversity of the general population and the number of languages in which local authorities have to provide translations of their advisory publications suggests that the task will be very much greater in scope. For example, according to the 2011 census, in the Borough of Hackney 88 different languages were spoken. According to the census breakdown and with a population of nearly 300,000, this would potentially exclude 24% or over 72,000 Hackney residents from use of the OC unless they were also fluent users of spoken and written English or had access to translation services and assistance in navigating and using the OC. Further, we have concerns for those litigants who are illiterate. We are concerned that individuals simply will not be able to properly access the court system in order to enforce their legal rights, as they should be entitled to do.

36. Litigants in person who are currently using the County Court often find the experience daunting. This extends to concerns when they receive court documents as they are often unclear as to the importance of the variety of documents that are sent (whether they relate to the listing of a hearing, directions, a judgment or warrant for execution). We are concerned that an OC will be a similarly daunting experience for some litigants, who will be in a more vulnerable position in the absence of either legal advice or being able to attend court to speaking to an usher or other member of staff. This could create undetectable access to justice issues.

37. We would also suggest that reduced reliance on paper conflicts with the desire to sell off specialist court buildings. The use of IT for hearings requires infrastructure. Paper and people can be transported to almost any large enough room for temporary hearings, but if the OC or any of the existing courts are to develop using exclusively digital hearings (no paper),[7] these resources would have to be provided. This means that the Temporary Courts proposal[8] would not work with court rooms that are not adapted for the purpose.

38. The move towards paper-free trials is an aim that in our view requires further and better consideration. There are significant risks and pitfalls in trying to make the presentation of all trials paper-free. The effectiveness of considering documents on screen rather than paper is not merely an old-fashioned approach. Research has shown that there is a higher level of comprehension of documents on paper than from screen-based reading.[9]

39. We also have concerns about the continued transparency and public nature of the court system. Will hearings be accessible by the public and if so with what safeguards?

Identifying any items qualifying for limited costs shifting, other than court fees, and whether the generally limited scope for costs shifting should be subject to a conduct exception.

40. A fundamental aim of the OC appears to be that of avoiding the need to engage lawyers. Nevertheless since lawyers can be used if a litigant needs or wants a lawyer we think it inevitable that some parties will have legal representation. It follows that the recovery of costs would either have to be precluded entirely or restricted. We would suggest that there be cost shifting arrangements modelled on the SCT with exceptions for cases where expert evidence is necessary (with Part 35 applying, although perhaps in a modified form). We would however favour compensatory costs for unreasonable behaviour in order to have some conduct sanction available. Again we note the potential attractiveness of the OC as an avenue for fraudulent claims if there are no costs consequences.

Deciding whether any other route of appeal than to a Circuit Judge would be appropriate, and the rules to govern such appeals.

41. Our view is that all appeals should be to a Circuit Judge. No permission should be required. Permission should be required for a second appeal to the Court of Appeal.

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[7] Interim Report paragraph 5.127

[8] Interim Report paragraph 5.129

[9] See, for example: http://www.scientificamerican.com/article/reading-paper-screens/ and http://insights.uksg.org/articles/10.1629/uksg.236/

42. The applicable rules on appeals would need also to be simplified, perhaps with fixed costs for appeals, so that lawyers could be engaged at the appeal stage (at least for a merits review).

43. Subject to resolving the precise ambit of the role played by Case Officers our starting position is that appeals from their decisions should be to the District Judge. No permission should be required.

Case Officers

Whether the conciliation offered by Case Officers in stage 2 of the OC should be based on simple telephone mediation or some form of written early neutral evaluation, or a mixture.

44. Since early neutral evaluation involves a review of the merits of a case we do not think it is an appropriate function for Case Officers to perform. A litigant in person with no access to legal advice will not be in a position to assess the quality or correctness of an evaluation and will be under considerable pressure to regard it as determinative of the likely outcome of a claim. That potential unfairness is compounded by the fact that Case Officers would be dealing with claims which potentially give rise to issues in wide areas of the civil law.

45. Whilst we acknowledge that different considerations apply to mediation it is a central feature of the process that a mediator is neutral, not connected to the parties or their claim and in a position to receive confidential information from a party (not necessarily information relevant to the legal merits of the claim or which is likely to be disclosed at a hearing). We have considerable unease with the concept of an official of the Court with case management and listing responsibility being in a position where, either unconsciously or consciously, they are able to influence the parties in relation to settlement in these circumstances.

46. Mediation services are widely available and we would support a system by which there is a pause in the litigation for the parties to take the opportunity of discussing settlement between themselves or being referred to ADR agencies for that purpose.

How to draw a practicable but flexible line between routine case management, suitable for Case Officers, and the more discretionary type calling for judicial expertise and authority.

47. We do not consider that this is likely to be a matter of simple working practices. It may well lead to intractable problems by seeking to introduce another tier of decision-making into what is primarily a judicial process.

48. Whilst we acknowledge that some decisions may be administrative in nature, in practice it is extremely difficult to characterise case management decisions as "routine". We can see, for example, that a decision as to whether a party had uploaded a fully legible copy

of a document might be regarded as administrative whilst a decision as to whether the document adequately set out or evidenced part of the case, for example whether a written "contract" had been uploaded, would be judicial. However, even in this example the case management decision may in fact turn upon whether the issue in the case is whether there was a contract at all, in which case a partly legible document might well do, or as to its precise terms, in which case it might not.

49. Whilst we would not suggest that it is impossible to produce a system in which judges have a greater degree of administrative support our reservations centre on the inherent proposition that judicial case management is capable of being unbundled neatly into matters which are anodyne and routine and those which have a special "judicial" ingredient. In practice we suspect that the overall aims of the OC are only likely to be achieved if case officers have judicial functions to some degree and that this is the inevitable path upon which we are being encouraged to embark.

50. If there is to be a first rung on the judicial ladder not preceded by years of practice and experience then we are likely to have a very different model of judiciary in the future. We would be concerned if there was a move towards a continental system by stealth since, as the Interim Report acknowledges, the public in this country rightly expect that "civil judges, even the most junior, are experienced in law, in the practicalities of litigation and dispute resolution and in the tough school of life."[10]

Specialisation, qualification, training and experience of Case Officers.

51. We assume that Case Officers are intended as a new resource and are not to be taken exclusively from the existing staff.[11] The role we think assumes some degree of legal training and presumably requires technical training and procedural training in both the new rules and the CPR. We question whether this will actually save money. If the role requires professional qualifications then it seems counter-intuitive for the state to take in-house the considerable cost of employing lawyers to run a "lawyerless" court when the obvious and cheaper alternative is to fund advice and assistance. Another alternative is to improve the training of existing staff and infiltrate Case Officers into case management in the existing structures.

The precise parameters of the right to have a Case Officer's decision reconsidered by a judge.

52. This necessarily depends upon the type of decisions that Case Officers take. We do not support any shade of judicial decision making or discretion being exercised by Case Officers (although as we have commented, we suspect that is intrinsic to what is proposed). Equally we do not see how typical users of the OC are going to be able to understand any subtle rule-

[10] Paragraph 2.17

[11] Interim Report paragraph 5.90

based distinction between decisions of Case Officers that can be reconsidered and those that cannot. Either all decisions have to be capable of being reconsidered, which we suspect is untenable, or the decision itself has to indicate that it is immutable. The inherent difficulty is that the aim of relieving judges of responsibility is only likely to be achieved by a significant downward shift of decision making but to do so in circumstances where those decisions will then be incapable of challenge would not be acceptable. We are concerned that challenges to Case Officer decisions could end up as an area of satellite litigation, in fact increasing cost and time, in much the same way that costs case management has increased the time and costs spent in producing and challenging costs budgets.

Number of Courts and Deployment of Judges

53. In relation to the potential unification of the High Court and County Court we note that the Interim Report broadly accepts the position we advocated in our November 2015 submission, namely that a case has not been made out at present for unification.

Moving the current value limits dividing the County Court from the High Court, so as to direct more of the workload towards the County Court.

54. We agree that this would be a method of directing more work towards the County Court although the retention of a flexible system for transfer between the jurisdictions and for the identification of particular types of case as an exception to value allocation should feature.

55. An increase of the financial level to £500,000 appears to be a logical step change particularly if steps are to be taken to improve the number and quality of civil judges in the County Court. Although we would repeat the comments made above in relation to the value of claims to individuals, noting the comparison between the median annual wage in UK of approximately £25,000 and the proposed financial level of £500,000, and the potential that the justice system may be perceived as being 'two-tier'.

Finding structural means of reinforcing the principle that no case is too big to be resolved in the regions.

56. In what is a relatively small geographical jurisdiction London is often the most accessible and convenient location for cases to be tried, both for the parties and their witnesses. In addition, and despite a thriving regional Bar, there is a concentration of legal expertise in Central London. We do not think these structural features are likely to change significantly in the short term.

57. However, what is also missing in the regions is a cadre of permanent High Court judges able to deal with the largest cases. We consider that a structural change in relation to

judicial deployment in the regions would reinforce the principle that no case is too big to be resolved outside of London.

Doing more to foster the growth of regional centres of civil specialist excellence, so as to avoid the current tendency of regional cases to be issued in, or transferred to, London.

58. We agree that this may require at least some of the regional centres to be made fully competitive with London as a venue for the largest and most complex civil cases. In some major centres equivalent facilities and a great deal of legal expertise already exist (for example, Birmingham and Manchester). The provision of a stable body of High Court judges might well counter any tendency for regional cases to be issued in or transferred to London.

Finding ways of giving effect to the recommendation that there needs to be a greater concentration of civil expertise among the Circuit Judges and District Judges.

59. We do not disagree that there are obvious benefits to be gained from increasing the number of judges whose workload is exclusively civil and increasing the number of civil judges sitting in one place.

60. We think this is evidently a matter of judicial resource and deployment. Court closures will have the effect of concentrating civil justice, and judges, in fewer centres. Consideration might be given to conducting Judicial Appointments Commission (JAC) competitions on the basis that judges are recruited to sit exclusively with a specific civil workload or in a specific jurisdiction.

Improving the current systems for the transfer out of London of cases more appropriately managed and tried in the regions.

61. Apart from establishing clear criteria for cases which would be "more appropriately managed and tried in the regions" we have not identified any significant procedural obstacles to transfer.

Considering whether further to reduce the number of District Registries, or to abandon or replace the concept altogether.

62. Our previous response made the point that a reduction in the number of District Registries should be premised on a significant improvement in IT. Subject to this and whilst we support the continued existence of District Registries in the regions, we agree they could be reduced in number if that would increase efficiency and produce savings which could be utilised elsewhere.

Considering whether the current number and geographical territories of the Designated Civil Judges will best serve the civil court structure as it emerges from the Reform Programme.

63. We consider that it would be premature to make any assessment until the precise ambit and effect of the Reform Programme can be assessed.

Deciding whether and if so how to deal with the divisional fault line within the Rolls Building.

64. The main question identified in the Interim Report appears to be whether the Rolls Building courts should be merged into a single Business and Property Court. We do not take the view that there is any significant evidence that the current arrangement is problematic, apart from the difficulties experienced by lay people in understanding it. Whilst there may be an overlap of some work we do not think that now is the time to undertake a significant merger of jurisdictions against the background of other far-reaching reforms.

65. If the courts could be more efficient if they were merged and if that would produce a cost saving which could be used elsewhere that would be a powerful argument in the present climate of reduced funding. However, for the reasons set out in our November 2015 submission, we continue to take the view that the advantages of the present divisions as identified by Sir Henry Brooke in his report outweigh the gains to be made from organisational reform. We think the better course would be to work consciously towards the melding of jurisdictions where that is possible with a view to reassessing the need for divisions in due course. We note that to some extent that is already underway with the recent establishment of the Financial List and combined pilot trial schemes.

Considering whether any structural changes would increase the capacity of the civil courts to respond more quickly and flexibly to sudden changes in the make-up of the civil workload.

66. Whilst we agree that increasing the ability of the civil courts to respond to change quickly and flexibly is a worthwhile aim in itself, we consider this question is insufficiently precise on which to consult externally. The question of what structural changes might be necessary to achieve this objective depends entirely upon how sudden changes are and what part of the makeup of the civil workload they relate to. We think it is essentially a matter of risk assessment and planning by HMCTS.

Rights and Routes of Appeal

How valuable is the current broad right to the oral renewal of an application for permission to appeal which has failed on the documents?

67. We note that paragraph 9.19 of the Interim Report suggests that the working party considers that reducing the quality or quantity of the service is the lesser of two evils when compared to the status quo.

68. We consider that the realistic options are to:

- Keep the system as it is
- Introduce a greater degree of discretion/lower test than "totally without merit" (in effect allowing the single Lord Justice to be a gate-keeper), or
- Remove the right of oral renewal.

69. As set out in our November 2015 submission, we consider the right to renew an application orally to be an important feature of the appeal system. We do not agree with the suggestion[12] that an application for permission to appeal in front of the judge who tried the case is, in many cases, a proper opportunity. Obtaining permission in those circumstances is, for obvious reasons, very difficult unless there is a clear point of law. Further we are of the view that an opportunity to take time to consider whether to apply for permission is an important safety valve in preventing unmeritorious appeals.

70. Our primary position is therefore that we would not support the abolition of the right and would favour the retention of the existing system. If reform is considered inevitable then a greater restriction on the ability to proceed to an oral hearing is the only measure which we think ought to be considered. That would involve a reformulation of the threshold test applied by the single judge in determining whether an oral hearing ought to be precluded.

71. We note the proposed introduction of a pro bono scheme for representation at Court of Appeal oral hearings by counsel and this may be a natural adjunct. We do not consider that it would be sustainable on a pro bono basis and are extremely wary of any system designed which relies upon voluntary work by the profession. On a separate note, we have also previously made the suggestion that time for oral presentation should be strictly guillotined.

72. We remain of the view that more work is required to identify why the workload of the Court of Appeal has suffered such an alarming increase in order to target measures at the underlying causes. If the increase is as a result in the numbers of litigants in person this should be addressed by proper advice, rather than by restricting rights of appeals and potentially adversely affecting access to justice.

[12] See Interim Report paragraph 9.23.

To what extent if at all would a substantial increase in the use of deputies in the Court of Appeal, or the use of two judge courts, reduce the actual or perceived quality of the decision making?

73. We do not consider that the quality of decision making would suffer in two judge courts if both judges are Court of Appeal judges and would support this proposal in suitable cases. Equally we do not consider that the introduction of a deputy in a three judge court would have any detrimental impact on quality.

Should the thresholds for the obtaining of permission to appeal be raised, and if so by reference to what criteria?

74. We do not regard a change in the threshold to raise the permission hurdle to be justified simply on the grounds of workload and lack of resource. As set out above we consider, in relation to renewed oral applications, that a greater willingness to say that an appeal is totally without merit or a reformulation of this test would be the only acceptable alteration to the present permission thresholds. We are concerned that any change to the threshold might be seen as a restriction on access to justice.

Should the focus of the Court of Appeal be directed mainly to second appeals?

75. We would oppose the development of the Court of Appeal's jurisdiction in this direction for the reasons set out in our earlier response. Maintaining the present level of access to the Court of Appeal is vital for the effective functioning of the entire system, including coherent development of the law.

How should space be made in the workloads of High Court judges if they are to be able (however willing) to provide more assistance to the Court of Appeal, both as deputies and by the giving of more appellate jurisdiction to the High Court?

76. This is a matter of judicial deployment and we have too little information on which to make suggestions. As we understand it the overall problem identified in the Interim Report is of an increasing workload and a static judicial resource. Plainly it is not easy to square this particular circle without more resource being made available. We would not support a solution which attempts to alleviate pressures on the Court of Appeal by reducing the number of High Court judges available to discharge their primary function of hearing cases at first instance in the High Court.

Enforcement of Judgments and Orders

77. We agree that enforcement may be a significant area of weakness in the present system for some litigants and that reform is required. We would suggest that the topic is one which merits a detailed consideration on the basis of research into feasible options for the amalgamation of systems or proposals for the adoption of a single model derived from one of the existing court systems.

78. We agree with the Law Society that this is an area which should be the subject of a separate consultation.

Boundaries

Whether, and if so how, the Employment Tribunal and Employment Appeal Tribunal might be integrated into the structure of the civil courts?

79. Again we consider that this question should be dealt with by way of a separate consultation. We do not see much advantage in bringing these tribunals within the civil court structure if they are to operate in a silo but equally if there is to be judicial integration then we would wish to know precisely what is proposed. We do not understand either tribunal to be subject to the workload pressures that necessitate urgent reform elsewhere.

Bar Council
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