



## **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).<sup>1</sup>
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

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<sup>1</sup> 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,<sup>2</sup> 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.

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<sup>2</sup> 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<sup>3</sup> 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

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<sup>3</sup> 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<sup>4</sup> 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.

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<sup>4</sup> 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.<sup>5</sup>

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.

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<sup>5</sup> 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.<sup>6</sup> 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.

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<sup>6</sup> 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),<sup>7</sup> these resources would have to be provided. This means that the Temporary Courts proposal<sup>8</sup> 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.<sup>9</sup>

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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<sup>7</sup> Interim Report paragraph 5.127

<sup>8</sup> Interim Report paragraph 5.129

<sup>9</sup> 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.”<sup>10</sup>

#### **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.<sup>11</sup> 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-

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<sup>10</sup> Paragraph 2.17

<sup>11</sup> 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<sup>12</sup> 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.

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<sup>12</sup> 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  
March 2016**

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**The Chairman  
Alistair MacDonald QC**

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The Rt Hon Lord Justice Briggs  
Court of Appeal  
Royal Courts of Justice  
Strand  
London  
WC2A 2LL

20 November 2015

Dear Lord Justice,

**Civil Courts Structure Review**

The Bar Council is pleased to be in the position to contribute to the current Civil Courts Structure Review you have been tasked with undertaking.

As you are well aware, there has been limited time to respond and our general view is that the devil is likely to be in the detail, which is of course missing from the outline proposals. We would have liked to have given further thought to some of the topics. It is not clear how the review topics fit together since there is considerable overlap and it is not clear whether there is a proposal for a package of reform or a series of potential stand-alone reforms. In any case, we hope that what we have been able to produce in the time available is of interest and use.

The Achilles' heel of most of what is proposed seems to us to be cost. The Government's record of funding the necessary investment identified in previous reviews (including Woolf, Brooke, and Jackson) is poor. The prospect of obtaining large scale investment now on the basis that a future cost saving can be made seems to us to be remote in the present climate.

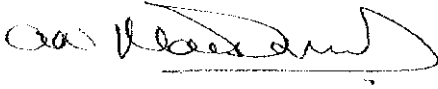
Dismantling large areas of the civil justice system without an impact assessment or a properly funded alternative is not a course that we would support and may have far reaching, if unintended, consequences (the virtual abolition of Legal Aid being the clearest example).

Notwithstanding these reservations we are supportive of modernisation and reform but we think the approach ought to be: start where you are, use what you have, do what you can.

**The Bar Council**  
[www.barcouncil.org.uk](http://www.barcouncil.org.uk)

We understand that you are required to submit an interim report before the end of the year. We are, of course, happy to assist further, whether before or after you complete your interim report.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Alistair MacDonald', with a horizontal line underneath.

**Alistair MacDonald QC**  
**Chairman of the Bar**





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## About the Bar Council

1. This is the submission of the General Council of the Bar of England and Wales (the Bar Council) to the Civil Court Structure Review (the Review).<sup>1</sup>
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 written submissions as part of the Civil Courts Structure Review being undertaken by Lord Justice Briggs. While we understand that the brief timescale of the Review makes it difficult for a wider public consultation to take place, we would encourage any further work on this area to be carried out in a transparent way and ensure that, at the very least, the recommendations of the Review are subject to open consultation before any changes are implemented.
5. We understand that there will be an interim report before the end of 2015. We welcome further engagement on the Review and we are eager to assist however and wherever possible.
6. The Bar Council also feels that it is important to consider the funding that would be required to realise any of the proposals put forward. In the light of the current Government spending review, it is difficult to imagine that there will be sufficient initial and continuing funding made available for wholesale reform of the civil courts.
7. This written submission is divided into the four topic areas, which we understand that the Review will consider, that is to say, the introduction of an On-line Court (OC), the creation of Delegated Judicial Officers, the number of civil courts and the routes of appeal.

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<sup>1</sup> Courts and Tribunals Judiciary (2015), Civil Courts Structure Review. The terms of reference of the Review are available here: <https://www.judiciary.gov.uk/announcements/message-from-the-lord-chief-justice-and-the-master-of-the-rolls-civil-courts-structure-review/>

## Topic 1 – On-line Court

8. While we understand that the Review is considering the creation of an OC it is unclear what the precise proposal is. Until an outline of the proposal for an OC is provided our response can only be in principle.

9. Depending on the precise proposal, an OC might be suitable for the determination of some limited issues. However, we consider that this is subject to funding, infrastructure, access to justice and transparency considerations. Given that we do not think that the OC could deal with the entirety of issues in any area, we question whether it is not better to invest in the existing Court system.

10. We consider that an OC will require significant funding on an initial and continuing basis. No details have been provided about the amount of available funding or any funding commitment. If funding for the Courts is limited it is questionable whether that funding will be sufficient to meet the needs of the required IT infrastructure and personnel costs and the requirements for access to justice. There are existing systems which (at least in part) operate in an online environment but which are inadequate. In addition there are systems, which could use online systems or electronic case management, but do not. In these circumstances, it may be more advantageous to use any available funding to address the limitations with existing systems and to bring them more into the online environment before embarking on the introduction of a wholly new system.

11. We note the examples of “comparators” in the Susskind Report.<sup>2</sup> However, a common feature of these systems is that they are each used in narrowly defined circumstances or specific and limited areas of law or practice. This is not likely to be the case with an OC with no limitations on the areas of law or circumstances which define the ambit of its jurisdiction. Further, the “comparators” used relate to situations where the parties are demonstrably able to deal with issues online.

12. It is fundamental that any proposed system must provide access to justice. Justice is a precious and indispensable asset for any civilised society. Access to justice should therefore be paramount in any consideration of the introduction, structure and appropriateness of an OC. It is also vital that the principle of open justice is not lost. The ability of the public to hear argument and see how decisions are reached is an important element of our civil justice system.

13. The problem that the recent published OC proposals<sup>3</sup> appear to be trying to address is that there are an increased number of litigants in person (LiPs) seeking the Courts’ assistance.

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<sup>2</sup> Online Dispute Resolution Advisory Group of the Civil Justice Council (2015), ‘Online Dispute Resolution – for low value civil claims’ (the Susskind Report). Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>

<sup>3</sup> The Susskind Report. Available at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> See also, JUSTICE (2015), ‘Delivering Justice in an Age of Austerity’ (the JUSTICE Report). Available at:

Many claims brought by LiPs are not clearly set out or are based on a fundamental misunderstanding of the law. These issues could be addressed by appropriate pre-action advice. However, pre-action advice is unavailable primarily as a result of the absence of legal aid. Accordingly, LiPs are increasingly using the Courts and the judges as a resource to achieve resolution. As a result there are two primary considerations to be borne in mind in any new system: (i) access to initial advice and (ii) access to justice.

14. We agree with the view that early advice and active case management can improve the situation for LiPs and other court users, by reducing delays and adjournments before a matter reaches a substantive hearing in front of a judge. However, we do not believe that the current proposals for an OC would necessarily solve this problem. There will still be LiPs who are unable to access an exclusively online system and also those who nevertheless consider that justice requires that they have their 'day in court'. In addition, whilst we agree that the use of more online facilities and a digital case management system should be available throughout the system, in the foreseeable future there will always be a need for a parallel off-line system. Careful thought is also needed to ensure that justice is done openly and that the arguments advanced and the reasoning behind judgment in any case, are available to the public, other judges and the legal profession.

#### **Assumption of internet access**

15. We believe that the assumption that all LiPs would be better able to access an OC than a physical court is flawed. There are three difficulties with the proposal:

- 15.1 The absence of sufficient high-speed broadband coverage for England and Wales is well known. We do not accept that all LiPs necessarily have a sufficiently reliable access to the internet for the purposes of pursuing claims. The practical steps any system would require include: high-speed broadband, a computer with compatible software, a printer and a scanner and a landline connection. The common alternative route to access the internet (other than a computer in the LiP's home) is via a library. However, with library closures such a form of access is becoming less, rather than more, available. Many young people only have access to a mobile phone, as the nature and expense of landlines makes them surplus to everyday requirements.
- 15.2 There is a lack of trust in the security of the internet and a lack of confidence, particularly in older people, in their ability to use it. Even if a LiP is able to use the internet to access the OC it does not follow that they would choose to do so.
- 15.3 Many LiPs wish to appear in front of a judge. This is not just to have their 'day in court' but also because they have a lack of confidence and trust in the other professionals, court staff or individuals that they deal with in the litigation process. It is our view that an OC that does not enable face to face interaction will increase rather than ameliorate this lack of confidence. If the proposal is simply

intended to remove the requirement for court rooms to save money, we do not think that this adequately addresses the desire for a hearing in front of a judge and the potential transfer of costs to litigants.

16. We believe that a mandatory OC would restrict access to justice for individuals, in particular those who are elderly and/or vulnerable and less able to access the internet. We are therefore strongly of the view that it should not be compulsory and that the current judicial system or an off-line version of the OC should be maintained in tandem.

### **Existing systems**

17. Claim forms for some disputes and payment of court fees can be completed online. However, the current online systems are still not appropriate for all users and cannot be used at all for some (for example, if fee remission is being sought, or where there is more than one claimant or more than two defendants).

18. Any OC would require sufficient infrastructure and resources in order to function. The technical requirements will include (at least) appropriate and adaptable technology, data and physical security, identity verification and disaster recovery. The personnel requirements will involve additional training for all court staff and judges, as well as for the court users and pro bono organisations which assist LiPs, including Citizens Advice Bureaux and the Bar Pro Bono Unit. The additional role of a “registrar” is addressed separately. Importantly there would need to be sufficient financial resources in place to set up and maintain the system and the personnel costs. The OC would require a substantial, real and continuing investment in the Court system.

### **Early advice**

19. A frequent problem with LiPs is the failure to have early advice on the merits of their claim. We have great concerns about the Tier One proposal in the Susskind Report.<sup>4</sup> This proposal increases the workload on the Courts substantially. The suggestion seems to be that a new strata of personnel will be employed (increasing cost) or that the existing staff will have to take on an increased workload and additional roles in order to reduce the caseload on Judges (increasing delays). Importantly, this blurs the Courts’ role in deciding disputes with the proposed advisory role. The latter role is one which the Courts have historically avoided for the obvious reasons that it removes the independent status of the Courts, exposes them and their staff to liability and would require (it is assumed) increased judicial oversight and costs, for example, in respect of insurance. It also potentially raises issues of competition with other legal advisory services.

20. There is a possible alternative arising out of the Tier One proposal, other than retaining the status quo, namely the resumption of the provision of legal aid for advice only. This would be state funded and would enable LiPs to have proposed cases assessed and advice provided

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<sup>4</sup> See paragraph 6.2: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>

at an early stage. This would be separate from the Court system and therefore maintain an appropriate separation of powers.

21. We do not believe that lawyers are the problem. The assumption that lawyers cause problems fails to recognise that all lawyers are trained in mediation and negotiation. It assumes, wrongly, that lawyers are not seeking alternative dispute resolution (ADR) for their clients when that would be the best option. There is good evidence to support this proposition. When legal aid was removed from private family cases, references to family mediation dropped by 46%. Lawyers were the source of advice to litigants to resolve their disputes by the use of mediation services. Frequently advice has to be given to clients at an early stage to weigh up the cost benefit of proceeding with a case, especially in light of the recent fee increases in civil claims. Such early advice keeps a large number of cases out of the Courts, reducing costs for litigants and reducing the burden on the Courts, judges and staff.

22. In our view any advisory level service would have to be free at the point of access.

### **Use of ADR**

23. Any ADR requirement cannot be mandatory, but it can and should be encouraged, robustly where necessary. If ADR is mandatory under the OC then there will be Article 6 European Convention on Human Rights (ECHR) issues. In our view, encouragement for ADR could be in the form of a clear statement in the rules that, if parties have not utilised ADR, there will be costs consequences unless satisfactory reasons are given to the Court.

24. Currently, it is unclear how the mediation aspect of the OC would work. In many cases, it can be helpful if the parties are both involved at the same time. We do not see how video-conferencing would be feasible given the technical and cost burden this would place on LiPs. More generally it also gives rise to difficulties where the LiPs do not understand the “without prejudice” rule and seek later to rely on statements made in the mediation.

### **Case management**

25. Active and early case management can greatly assist in the resolution of disputes. Where the pleadings are before a judge they can look at the papers and assess the issues.

26. The Tier Three proposal in the Susskind Report<sup>5</sup> appears to replicate, in part, the current position that operates in most courts within the County Court and in some within the High Court, for example the Intellectual Property and Enterprise Court (IPEC). Early case management (after pleadings) frequently takes place and Judges actively manage the cases before them in order to ensure that appropriate directions are given, issues are narrowed and where possible dealt with at an early stage. In a substantial number of cases, this results in the resolution of the dispute.

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<sup>5</sup> See paragraph 6.4: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>



27. These decisions generally take place at a case management conference (CMC). The option for decisions on the papers already exists and can be employed at the request of the parties. The IPEC provides a clear example of a working system where there are pleadings but evidence is directed on specific issues and there can be a determination on the papers.

28. In our view these two existing examples show that such methods can be, and already are, adopted without the need for an OC.

29. One issue which will cause problems, if not addressed, is the hearing bundle. If a case is to be determined on the papers, the Court needs to dictate the index with standard bundling and common pagination so that the references by the parties in submissions can be understood. Technical limitations of e-systems, such as file size, would also have to be borne in mind. We accept that administrators (as opposed to those taking judicial decisions) would be able to ask for clarification of cases or additional documents and information. However, as discussed below, we do not consider that such administrators should have a judicial function.

30. In our view the use of a Tier Three style level of OC should not be made mandatory. In addition, the parties should always have the option of a final hearing in front of a judge. LiPs will often not trust the opinion or direction of anyone apart from a judge. The judge needs to be seen to be impartial, and we would therefore be against a formal inquisitorial, rather than an adversarial role, being adopted.

31. We support the Court having an online file of the case (as has been done in criminal cases) but there have to be facilities for those who cannot use such a file online, or access such a file, or prefer paper. A LiP should not be required to have online facilities to access their case, this raises practical and Article 6 ECHR issues.

### **Appropriate claims and value**

32. In our view the OC would only be appropriate for money claims and all claims in specialist lists would be excluded. There would have to be a cap: in our view £25,000 is appropriate. Part 8 claims could be included subject to the issues set out below. However, there would have 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, or where there are contested factual issues or where cross-examination is necessary or for applications involving contempt. Factual disputes cannot properly be dealt with on the papers or via an OC. Judges are only in a position to adequately assess credibility if live evidence is given in person. The attempt to carry out cross-examination by video-link in the Trade Marks Registry was a notable failure. 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 LiP. Video conferencing assumes that a LiP has the facilities and can be at home (usually during working hours) and has a landline.

33. 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.

34. We consider that the OC would be inappropriate for cases 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.

### **Costs/Fees**

35. In our view any advisory or Tier One service should be paid for by the state. The service will save money later by helping to avoid cases progressing when they have no merit. We note the position in the costs benefit analysis of the JUSTICE Report that there was an estimated £8.80 saved for every £1 of legal aid expenditure on benefits advice.<sup>6</sup>

36. In relation to the ADR service (or Tier Two<sup>7</sup> comparator) we are of the view that there should be a fee. This fee should not be so high that the service is not used. We also anticipate that any model, if effective, would also be used by solicitors. A lower fee for this service would reflect the fact that it saves costs in the long term, and therefore in our view this service should be supported by government.

37. On the issue of costs shifting between the parties, the small claims track and First Tier Tribunal already operate on the basis that the parties bear their own costs. There is also a discretion for the judge or tribunal to award costs in the event of unreasonable behaviour. We believe these models to be sound for lower value claims. Our view would be that the Tier Three stage should adopt a similar approach to the small claims track and the First Tier Tribunal.

### **Rules**

38. Any rules for the OC would need to be simple, clear and readily comprehensible. There is a concern that an additional set of rules will add to an already complicated system, which might further confuse and cause difficulties for LiPs. Therefore the new rules will need to be integrated with the existing rules, as otherwise the consequences of transfer for cases inappropriately started in the OC will be to cause confusion and waste costs.

### **Transparency**

39. By its very nature an OC would be less transparent. The only way to achieve transparency of any kind would be to have available recordings of every interaction between the parties and the Court which could be made publicly available, subject to the issues addressed in Part 5 of the Civil Procedure Rules (CPR). There would remain an issue of

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<sup>6</sup> See paragraph 1.7: <http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>

<sup>7</sup> See the Susskind Report, paragraph 6.3: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>



whether the Art. 6 ECHR right to a public hearing had been complied with where a hearing was online and therefore not public. All judgments would have to be public – to achieve this a judgments’ portal (or similar) would need to be designed, provided and maintained. Alternatively, funding to BAILII could be provided.

## Appeals

40. There must be an appeal route from the OC. The OC envisaged would appear to operate on the same level and serve the same functions as the existing District Judges. In our view the obvious route of appeal would be to the Circuit Judge, subject to that level of Judge being retained (as to which see Topic 3 below). The issues concerning appeals are addressed in more detail in Topic 4 below. We accept that an appeal could, with the agreement of the parties, be based on submissions without an oral hearing, with the Judge retaining a discretion as to whether he/she was able to determine the appeal on the basis of written submissions or whether there should be an oral hearing.

## Topic 2 – Delegated Judicial Officers

41. We consider that court officers (referred to in the Terms of Reference as ‘Delegated Judicial Officers’ and in the JUSTICE Report on Delivering Justice in an Age of Austerity as ‘registrars’) should be legally qualified, by which we mean authorised to carry on a reserved legal activity under the Legal Services Act 2007, and should have a minimum period of post-qualification experience of five years before taking up such a role. We agree with JUSTICE that this role requires a legal qualification; we disagree that ‘graduates who have passed their professional examinations’ are legally qualified in the relevant sense.<sup>8</sup>

42. As these court officers are not judges, we do not consider that they should be termed ‘Delegated Judicial Officers’. That description is likely to mislead LiPs into believing that they are judicial officers, and therefore judges. We refer to them below as ‘designated court officers’. We do not believe that ‘Registrar’ would be an appropriate title as it is the former title of a District Judge.

43. The Family Court, unlike the civil jurisdiction, has lay judges and a legal adviser (fully legally qualified) advises them on law and procedure, deals with early case management in private law proceedings and with a District Judge gives first directions and carries out a gatekeeping/allocation role in public law proceedings. There is no right of appeal from allocation decisions. The JUSTICE Working Party did not consider family justice,<sup>9</sup> and we consider that the recent changes to the Family Court mean that the system is already efficient and offers good value for money: there is no real scope for the work to be done at a lower level nor, as the Family Court has lay magistrates, is there a need.

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<sup>8</sup> See JUSTICE Report paragraph 2.29: <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>

<sup>9</sup> See JUSTICE Report paragraph 1.4: <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>

44. We consider that designated court officers could perform a useful case management function in giving standard case management directions in straightforward disputes in the civil courts and a gatekeeping/allocation role as already exists in the Family Court. A set of standard directions should be drawn up by a judge for the main types of dispute in each court or division. Designated court officers could then review the statements of case (including any Reply), identify cases in which standard directions are likely to be appropriate, and give suitably adapted directions on paper. There should be a right to make written submissions seeking a review of the directions by a judge, ordinarily on paper. Written submissions should not be sought from the other party if the judge, having considered the submissions, decided that the application for a review should be rejected. There would be no right to an oral hearing, although the judge could grant an oral hearing, if requested. Otherwise, the review application would be decided on paper.

45. We do not consider that designated court officers should have authority to resolve live issues as to substantive rather than merely procedural rights, including striking out cases which appear to them to have no real prospect of success. This is a determination of civil rights and obligations and is and must remain a true judicial function.

46. If the designated court officers are legally qualified as set out above and are carrying out case management and allocation functions, we consider that they should attend the Judicial College civil training course alongside District and Circuit Judges, as already happens with legal advisers who sit with lay magistrates in the Family Court. We consider that there should be periodic reviews of the work of the designated court officers, undertaken by the designated civil judge. A mistake at the case management stage could be costly both to the parties and in terms of court time and periodic review in this way by a judge would ensure that the court officers were giving appropriate and effective directions. The judge would also be able to make changes to the standard directions in the light of experience of their application by the designated court officers.

47. If designated court officers are to act as mediators as recommended by JUSTICE, they would need the same training as other qualified lawyers who conduct mediations, for example that provided by the Centre for Effective Dispute Resolution (CEDR). If a court officer conducts a mediation, they should take no further part in case management. As noted above, we doubt whether mediation by telephone or online as recommended by JUSTICE would be effective in any but the simplest cases.

48. We do not consider that court officers should carry out early neutral evaluation as recommended by JUSTICE: as the purpose of early neutral evaluation is to give the parties an indication of the view which a judge might take at trial, it can only properly be undertaken by a judge.

### **Topic 3 – Number of Civil Courts**

49. We will consider three issues related to the number of civil courts:

- 49.1 Should the current separate identities of the County Court and the High Court be maintained or should their jurisdiction be modified?
- 49.2 Should the current Divisions within the High Court, and the specialist courts, be preserved or modified?
- 49.3 What should be the number and functions of the District Registries?

### **The separate identities of the County Court and High Court**

50. The possible unification of the County Court and High Court was the subject of an extensive review by Sir Henry Brooke in his 2008 report 'Should the Civil Courts be Unified?'<sup>10</sup> Sir Henry concluded that the main driver for unification was the existence of what he described as the "No Man's Land" in which there was concurrent jurisdiction in both Courts. He considered unsustainable the unpredictable and illogical allocation of general common law business between the two Courts, with heavier cases often being dealt with by more junior judges.

51. Sir Henry also criticised the large number, but limited authority of, Designated Civil Judges, the anomalies and difficulties over jurisdiction at different judicial levels and the inadequate arrangements for hearing High Court business outside London.

52. Nevertheless, Sir Henry concluded that these problems could better be solved by reform of the existing system, rather than by introducing a unified civil court. He said that, whilst the ultimate goal (with which we agree) is to ensure that cases come before the judge who is most appropriately qualified to deal with them, it is preferable for difficult and specialist litigation cases to be started in the appropriate court, rather than being 'left to the chance of finding their way upwards within a unified system'.<sup>11</sup> The risk of bad decisions about allocation in a unified court was too great.

53. Sir Henry also considered that introducing a unified court would inevitably involve significant expenditure, which, if it could be funded at all, would better be spent on other areas, such as IT development. In addition, the abolition of the High Court in its present form might damage the status and standing of High Court judges, leading to recruitment problems and a reduction in quality. There was substantial disagreement about whether all judges of a unified court would be High Court judges, or whether some other workable system could be devised.

54. Some of the reforms proposed by Sir Henry to the existing system were implemented, although this took some time. For example, the minimum value below which a claim may not be started in the High Court, where the County Court also has jurisdiction, was increased from £15,000 to £25,000 in 2009, but it took until 2014 to implement a further increase to £100,000. Also in 2014 a single County Court with national jurisdiction was established in place of the local courts and its equity jurisdiction was raised to £350,000. Further detailed

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<sup>10</sup> Available at: <https://www.judiciary.gov.uk/publications/civil-courts-unification/>

<sup>11</sup> See paragraph 616: <https://www.judiciary.gov.uk/publications/civil-courts-unification/>

investigations would be required to determine whether these, and other, changes have reduced the problems which Sir Henry identified, but it seems unlikely that the considerations which persuaded him to reject the idea of a unified court in 2008 have now changed to any significant degree.

55. The factor which, as we understand it, has prompted a further consideration of the unification of the High Court and County Court, is the proposal to introduce a new OC to deal with lower value disputes (as discussed above). The extent to which this will impact on the need to retain a separate County Court depends, to a great extent, on the scope of the proposed OC, which is currently uncertain.

56. If the OC's jurisdiction largely replicates that of the existing County Court, it would be logical to assign any residual County Court business to the High Court. We do not, however, understand the current proposal to be that the Online Court will have a similar width of jurisdiction to the existing County Court and we would be opposed in principle to such a proposal. This would require significant compromises to well-established procedures for ensuring the quality of justice which, even if they could be justified in relatively low value cases in order to save costs, would be unacceptable in, for example, a case involving property worth £350,000 falling within the existing County Court's equity jurisdiction.

57. On the assumption that the jurisdiction of the proposed OC is intended to be considerably narrower than that of the current County Court, however, the factors which persuaded Sir Henry not to recommend a unified civil court seem to us to continue to apply and, indeed, to apply with more force now that the County Court jurisdiction has been increased.

58. There remains a place for a specialist High Court in which weightier and higher value disputes can be commenced without the risk that they will not find their way to the appropriate level of judge in a unified system. This risk will be unaffected by the introduction of a new OC. Moreover, the possibility that allocation of cases to the appropriate level of judiciary might, in future, be carried out by 'Delegated Judicial Officers' or 'designated court officers' or 'Registrars', whose experience might not equip them to make such decisions reliably, potentially increases the risk inherent in a unified system.

59. On the other hand, a quicker and cheaper alternative for more straightforward and/or lower value cases (but which exceed the OC's jurisdiction) remains attractive. The recent decision in 2014 to increase the width of the County Court jurisdiction means that there is now a range of cases which would previously have been commenced in the High Court but which must (or can) now be commenced in the County Court. That was widely perceived to be a desirable policy objective. We are unaware of any rational basis for abandoning that policy by merging the County Court with the High Court, thereby moving that range of cases back into the High Court jurisdiction, from which it has so recently been removed.

60. There is an argument that the County Court limits could be raised even further, but this appears to us undesirable at present. First, the limits have only recently been raised (to levels which received broad support in the responses to the Ministry of Justice's consultation) and there has been insufficient time to assess the impact of those changes. Secondly, the value of

a claim is of limited use in determining its complexity. Where claims are of very low value, an argument can be made for ignoring any complexity in the interests of keeping costs proportionate to the amount in dispute. But claims worth more than £100,000 can involve levels of complexity or specialist expertise which readily justify allocation to the High Court.

61. In addition to these reasons, the other factors identified by Sir Henry, including the cost of unification and the risk of reduction in status of High Court judges, remain persuasive factors against unification.

62. We also note that there is a conflict between a proposal for unification and a proposal to allocate some of the Court of Appeal's work to the High Court. Whilst it is potentially acceptable for an "inferior" court's decision to be reviewed by a "higher" court, even if the latter is not primarily an appellate court, it is impossible to see how a unified court could be involved in appeals of its own decisions, especially if all judges of the unified court are notionally of the same "rank".

### **The Divisions within the High Court and the specialist courts**

63. Sir Henry Brooke considered the future of the Divisions and the specialist courts in his report and concluded that there was no need to make any recommendations about them. He recorded the substantial opposition amongst the judiciary to a system of "ticketing" judges for particular specialisms within a unified court, referring to the advantages of the Divisional structure including that it 'creates an esprit de corps among a cadre of judges who look to their Head of Division for leadership, and ... the assignment of judges to cases is assisted because they are all cross-ticketed to do all the work of their Division...'<sup>12</sup>

64. We agree with these comments. We believe that the current structure works well in practice and that replacement by specialist lists within a unified court is undesirable.

65. There is no reason to think that the current system suffers from any disadvantages, other than a possible confusion amongst lay people as to the function of the Queen's Bench and Chancery Divisions, arising from their historical development and names. Any difficulty arising from this is far outweighed by the risk that a system of ticketing judges for particular types of case might dilute the consistency and quality of decisions. We are not aware of any evidence that the current structure results in inefficiencies or injustice of any kind: on the contrary, it has positive advantages.

66. Practitioners have developed their practices as experts within particular Divisions or specialist courts. The judges in those courts tend to be drawn from those practitioners, with the result that they bring with them a wealth of experience and specialist knowledge which enables consistent and high quality decisions to be reached in all cases within related areas. It is highly undesirable that these benefits should be sacrificed on the altar of simplicity of nomenclature.

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<sup>12</sup> See paragraph 589: <https://www.judiciary.gov.uk/publications/civil-courts-unification/>

## **The District Registries**

67. Sir Henry Brooke recommended a reduction in the number of Queen’s Bench District Registries since the development of technology has meant that the need for a local building at which solicitors can file papers is much reduced. He also identified advantages in bringing a large number of general civil cases together under the case management of fewer Designated Civil Judges.

68. We agree with these comments in relation to the reduction in the overall numbers of District Registries but we note that they were predicated on better technology (in particular telephone and video hearings). Some seven years later the use of IT at District Registry level remains a challenge and most CMCs/CCMCs and many applications are still face to face, even where all or most legal representatives have to travel to attend. Telephone hearings are rarely offered, particularly for CMCs/CCMCs, and routine video conferencing is non-existent. Even if increased funding were to be made available for videoconferencing facilities it would, for the reasons discussed above, be unwise to assume that all unrepresented parties would have the necessary equipment and knowledge to take part in a hearing by video link.

69. We agree that case management by fewer Designated Civil Judges is also likely to be advantageous and to produce more efficient and consistent working practices. We note that the Queen’s Bench Division masters in London conduct a significant amount of work by email, which is less well used in the District Registries. For example, they will frequently vacate a CMC if directions are agreed by consent, filed by email in word format and approved. If agreement is reached close to a hearing date in the District Registries, it will often go ahead, with a considerable waste of costs.

70. There are other inconsistent approaches to case management. For example, the ‘model directions’ published by the clinical negligence masters in London are not always followed in the District Registries, and the approach to costs budgeting also varies from one District Registry to another.

## **Topic 4 – Routes of Appeal**

71. Particularly given that this response is for the purposes of an interim report, there are a number of subjects on which the Bar Council considered that further information would be useful:

71.1 To what extent (and, if so, in what way) is the increase in the incoming workload in the Court of Appeal reflective of an increase in the workload of the courts and tribunals from which appeals lie?

71.2 How do the types of appeal compare with the types five years ago? The Hear-By Dates list contains a number of different types of appeal and the increase in workload may not have been uniform. If that is right then any proposal to reduce the workload or to handle it differently may need to be targeted, and may have to be tailored to specific types of appeal.

- 71.3 Is it presently anticipated that there are any types of appeal which will become less frequent in the future? For example, the introduction in fees to employment tribunals has seen a dramatic decrease in cases being brought at first instance and a decrease in appeals to the Employment Appeal Tribunal. Further, the recent increase in fees in the civil courts may have an impact on the propensity of individuals to commence litigation.
- 71.4 How does the Court of Appeal currently divide its time and how does that compare with five years ago? For example, how much sitting time is actually devoted to hearing oral renewals of applications for permission to appeal? What types of appeal generate renewed oral applications? How many judges sit to hear such applications? What proportion of submissions are time-limited? What percentage of renewed oral applications succeed? In what types of cases? To what extent are such applications conducted by litigants in person? Where litigants appear in person does that take longer and, if so, can it be ascertained how much longer?
- 71.5 To what extent do litigants in person appear at full hearings? Again, does that mean that hearings take longer? Can that extension of time be measured in monetary terms? Is there an economic argument for competent representation at appellate level in that the cost of the judicial time saved may be greater than the cost of providing competent representation?

**Should the right to an oral renewal of an application for permission to appeal be removed or attenuated?**

72. The Bar Council considers that the necessary powers already exist in that the single Lord Justice who considers an application can certify that it is without merit and thus prevent any oral renewal. There is, however, a risk that justice will be denied if, in cases where that cannot be said, there is no right to an oral hearing. Sometimes, especially in long and complicated cases, it is not easy to see without the help of counsel at an oral hearing which if any of the grounds of appeal have a real prospect of success.

73. It is important that the court system remains a fair and comprehensive system for all including those who choose to contract and litigate here. They are an important source of revenue who can go elsewhere. The safeguards in the system should not, for instance, be diluted because of an increase in appeals from litigants in person. That would be unfair to all classes of court user.

74. There are steps which the Bar Council considers merit further consideration:

- 74.1 The rules for the presentation of appeals on paper and orally could be presented in a more user friendly way so that litigants in person have less difficulty understanding them

74.2 The greater accessibility could be accompanied by a greater use of powers to dismiss an appeal for failure to follow the requirements for efficient presentation, and

74.3 The time permitted for submissions at the oral renewal of an application to the Court of Appeal could be rationed further.

**Should the Court of Appeal become a second appeals court, save for appeals from the High Court, with a leap-frog route where issues of general importance are involved**

75. The Bar Council is opposed to this development which would detrimentally affect all users of the courts by limiting their access to the Court of Appeal. The preservation of the existing level of access to a high quality Court of Appeal is important in maintaining the integrity of the system as a whole.

76. The proposal fails to attach sufficient weight to the way in which decisions of the Court of Appeal are used by lawyers on a day-to-day basis. Whilst some points are obviously of general importance, others which come before the court turn out to be important without that being clear at the time.

77. Decisions of the Court of Appeal in matters which were not and would not be recognised as involving issues of general importance guide what lawyers do in individual cases. Sometimes they are directly on point; sometimes the analogy or the indication as to current judicial thinking is persuasive. These authoritative decisions have a strong influence in determining the points which are and are not taken to trial and in determining what concessions, at what level are made (for instance as to contributory negligence or as to individual items in a claim). This part of the function of the Court of Appeal increases the certainty for practitioners and operates to reduce litigation.

78. The quality of decision making would suffer if, instead of final appeals being determined by two or three person constitutions of the Court of Appeal, they were determined by single High Court or County Court judges.

79. It is not clear how the Court of Appeal could be a second appeals court save for appeals from the High Court, if the High Court was part of a unified structure. For the reasons set out in paragraph 59 above, the Bar Council considers that it could not then be a forum for appeals and a route of appeal from the unified court to the Court of Appeal would be required.

80. Finally, with regard to second appeals, there is a risk that rather than saving time and costs more would instead be wasted in arguing first as to what was and was not a suitable case in which to omit the first stage of appeal and second as what cases did and did not merit a second appeal.



**What appeal types could properly be transferred to the High Court, or to High Court Judges? How could space in their workloads be created to enable them to assume an extended appellate burden?**

81. It is difficult to answer these questions without further information such as that to which the Bar Council drew attention at the beginning of this section. Given the pressure on the Court of Appeal, if spare capacity could be created in the High Court it might be better used by temporarily reducing the complement of High Court Judges and increasing the complement in the Court of Appeal. The increase in salary would be relatively modest.

**Bar Council  
November 2015**

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## **Bar Council response to the Civil Justice Council's Property Disputes Working Group discussion paper**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Civil Justice Council's (CJC's) Property Disputes Working Group discussion paper.<sup>1</sup>
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 recognises that the present distribution of jurisdiction between the First-tier Tribunal and the County Court is complicated and gives rise to confusion and frustration on the part of users. The Bar Council welcomes the CJC's initiative to consider ways of rationalising and improving the present positions.
5. The Bar Council considers that proposals for the better use of judicial and administrative resources must be assessed against the following four overriding principles:
  - a. The proposals should not have any adverse effect on access to justice
  - b. There must be clarity for litigants as to how the proposals will affect their case
  - c. The proposals, including those for any pilot scheme, must be procedurally robust, and

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<sup>1</sup> Civil Justice Council (2015) Property Disputes Working Group discussion paper. Received by email 22 December 2015.

- d. The proposals must be capable of being applied efficiently throughout England and Wales (to the extent that they are intended to ultimately apply to all geographic areas).

### **Access to Justice**

6. The Bar Council considers it fundamental that any proposed changes should not affect litigants' access to justice. Access to justice can be affected as a matter of a quantifiable restriction of the litigant's access to the court or tribunal, for example through fees considerations or geography, or as a matter of apparent restriction on access to justice, through access being made more difficult for litigants as a result of complex or confusing procedure.

7. Many of the jurisdictional areas the Working Group has considered in its Discussion Paper (for example those concerning leasehold disputes and mobile homes) often involve litigants of modest and/or limited means.

8. As the Discussion Paper recognises the fees and costs regime of the First-tier tribunal and the County Court are very different. Fees in the First-tier Tribunal are significantly lower than in the County Court. In the First-tier Tribunal a party that has not conducted the litigation unreasonably will ordinarily have no liability for another side's costs. In the County Court the losing party is expected to pay both sides costs.

9. The lower fee regime and narrower costs jurisdiction in the First-tier Tribunal are important for ensuring that those wishing to seek the First-tier Tribunal's determination of a dispute are not put off by the money they must find to start proceedings or the risk of adverse cost orders.

10. The Bar Council considers that the existing statutory powers to transfer claims from the County Court to the First-tier Tribunal (under section 176A Commonhold and Leasehold Reform Act 2002 and section 231B Housing Act 2004) but not vice versa promotes access to justice.

11. The Bar Council considers it vital that any proposals for reform preserve the present financial arrangements for litigants bringing claims in the First-tier Tribunal.

### **Clarity for Litigants**

12. It is the Bar Council's view that it is of paramount important that the CJC have in mind the position of litigants in person within the jurisdictions of the County Court and the First-tier Tribunal when developing any new approach. Many of the parties appearing before the First-tier Tribunal are unrepresented either through choice or because they cannot afford representation. Often non-lawyer representatives appear in the First-tier Tribunal. It is important that the proposals do not give rise to uncertainty or confusion, especially to unrepresented parties.

13. The proposals in the Discussion Paper risk causing uncertainty or confusion for users at two levels.

14. Firstly, the Civil Procedure Rules (CPR), and the body of case law interpreting and explaining them, are more complicated than the First-tier Tribunal (Property Chamber) Rules 2013. This may itself have an adverse impact on access to justice.

15. Secondly, any assimilation of the two tribunals' jurisdictions will give rise to uncertainty as to when and how new case management powers will be exercised.

16. The problems of uncertainty will not only face those without representation. Where a case is being conducted by a non-legal expert (for example a valuer or surveyor) it is not likely that they will have the necessary familiarity with the CPR to be able to assist their clients to the same extent as they can under the First-tier Tribunal procedural rules.

17. Further, represented parties expecting to conduct proceedings under the County Court's costs regime may have a sense of grievance if their proceedings become subject to the more relaxed regime of the First-tier Tribunal.

18. Although these problems can be mitigated by rules and guidance, the challenge of producing rules that are clear and achieve fairness and certainty in these already overly technical areas is clear. The challenge will also have to meet the fact that litigants in person require clearer and less 'legalistic' guidance. It is the Bar Council's view that while this hurdle is not insurmountable, it is significant.

### **Procedural Robustness**

19. Both the First-tier Tribunal and the County Court are creations of statute. It is obviously essential that proposals for rationalisation fall within the powers and jurisdictions conferred by Parliament.

20. The Bar Council doubts that the equivalence of First-tier Tribunal Judges and County Court judges described in paragraph 20 of the Discussion Paper is sufficient to confer the procedural powers proposed in paragraph 22 of the Discussion Paper. Parliament has legislated in this area (see paragraph 9 above) and the powers conferred do not appear to be wide enough to confer the case management powers proposed.

21. The Discussion Paper does not explain how the pilot exercise will be conducted. Unless the exercise is to rely on the consent of the parties, thought must be given to the extent to which amended legislation is needed.

22. Other procedural issues that must be clarified are the need to ensure that both tribunals are seized of the dispute (a point recognised in paragraph 23(d) of the Discussion Paper) and the differing routes of appeal between the First-tier Tribunal and the County Court (a point identified in paragraph 6 of the Discussion Paper).

## **Nationwide applicability**

23. There is a concern that the proposal put forward, while workable in London or Cambridge, may not be readily transferrable to the remainder of the country. There are currently 173 County Court hearing centres in England and Wales. This can be contrasted to the five First-tier Tribunal (Property Chamber) regional offices. These geographic concerns are on two bases: (i) expertise of the court or tribunal and (ii) enforceability of decisions.

24. The advantage of the First-tier Tribunal (as identified in paragraph 5 of the Discussion Paper) is that there are expert panel members who can deal with questions of valuation, housing conditions and disrepair, agricultural issues and environmental health. A County Court judge cannot readily deal with these questions and issues within the same expertise and skill. If the intention of the proposal is that County Court judges would be able to reconstitute themselves as a tribunal in an appropriate case (as suggested in paragraph 21 of the Discussion Paper) then there will need to be adequate provision for the expert wing members necessary to attend at the relevant County Court centre. The current proposal does not account for or consider the practical and logistical issues involved in terms of listing and travel to ensure that litigants have their cases heard by the correct tribunal.

25. The second issue in relation to the applicability of the decisions throughout England (and Wales) relates to the availability of all remedies in both jurisdictions (as anticipated in paragraphs 7 and 21 of the Discussion Paper). The issue of remedies is discussed in more detail below. In order to enforce any decision bailiffs and other Court officers are usually required in addition to the order of the Court. If First-tier Tribunal judges are to be able to grant remedies beyond determinations or declarations, then there should also be the appropriate resources to enforce those remedies. As a matter of pure practicality the physical transfer of papers and orders from one office to another may slow down and complicate enforcement. It is hoped that the pilot scheme would flag any such challenge. However, the Working Group is asked to note that as the Eastern regional office is in the same building as the Cambridge County Court, it may not offer a useful pilot in relation to this particular issue.

## **Discussion paper questions**

**Question 1 – At paragraph 15 of the discussion paper, three broad options are given. These are:**

- a) to do nothing, and continue with the existing system**
- b) by using flexible judicial deployment, to modify and extend the powers of the judges of the tribunal and the county court to move between those roles when hearing such cases.**
- c) to establish a new housing court or tribunal to deal with all matters concerning housing and property.**

**Which of these options would you favour and, briefly, why?**

26. The Bar Council is broadly supportive of option (b), but this is subject to the overriding principals set out above.

**Question 2 – Are there jurisdictional areas not identified in the paper where flexible deployment might be used?**

27. The Bar Council is aware that the Chancery Bar Association and Property Bar Association have both been consulted in relation to the proposal put forward. We therefore do not consider it necessary to answer this question, which relates primarily to matters of substantive law, but hope to assist the Working Group by focusing on ‘higher level’ issues that affect all litigants.

**Question 3 – During the course of its discussions, the group considered that the following areas of dispute should remain within the jurisdiction of the county court. Do you agree with that assessment, and if not, why not?**

- a) Claims for possession in relation to both mortgages and tenancy agreements
- b) Unlawful eviction
- c) Business Tenancy renewals under Landlord and Tenant Act 1954

**Are there other areas that you believe should remain the sole preserve of the County Court? Please give reasons.**

28. It is agreed that matters relating to possession should remain within the sole preserve of the County Court. Where there are fundamental questions of a person’s right to their home or business this should, in our view, be determined by the Court. There are also questions of enforcement which mean that the County Court is best placed to deal with these issues. It is further agreed that unlawful evictions should remain the sole preserve of the County Court on the same basis.

29. In relation to business tenancy renewals, it is noted that different considerations would apply to opposed hearings, where the same possession issues noted above arise, and unopposed tenancy renewals, which settle in the vast majority of cases. In terms of the later, the status quo is obviously that the directions of the court act as a backdrop to negotiations and are often used to keep those negotiations on track and moving forwards. It is the Bar Council’s view that the current status quo works, and also that it would be inappropriate to transfer such cases to the First-tier Tribunal (Property Chamber) which deals with residential and agricultural cases.

**Question 4 – A number of practical issues are identified in the paper which will need resolution. These include:**

- (a) Costs shifting – this is an area where the powers of the court and some parts of the Property Chamber differ How large a hurdle is this likely to be, in your view, in the flexible deployment of a judge between the two jurisdictions when hearing an individual case? Might it prove a barrier – perceived or otherwise - to accessible justice for litigants in mixed cases? Are there possible solutions to that?

**(b) Procedural Rules: the county court and the tribunal operate under two distinct sets of rules of procedure. Again, how large a hurdle is this likely to be, in your view, in the flexible deployment of a judge between the two jurisdictions when hearing a case? And how might that hurdle be overcome?**

**(c) Remedies: the remedies available to the county court and the tribunal differ, for example in the power of the court to award damages and to make orders for specific performance. Again, might the mixture of such powers be a benefit – or instead prove a barrier – perceived or otherwise - to accessible justice for litigants in cases of this kind? And are there solutions to that?**

30. In relation to costs shifting there is clearly a difficulty that will arise where a case commences in the County Court and then moves to the First-tier Tribunal. Any prior costs orders in the County Court should follow the CPR; however, it will be unclear whether those costs can still be recovered in the First-tier Tribunal, and if so on what basis.

31. The current statutory framework ensures that there will only ever be a 'shift downwards' in terms of costs; i.e. that a party's potential liability will decrease when a case is transferred to the First-tier Tribunal. We query what would happen if a case was transferred or re-transferred to the County Court. Would costs be dealt with for each part of the case on the basis of the particular jurisdiction? How would such costs be divided up? At what stage would costs determinations need to be made? How could earlier costs be determined (on a costs shifting basis) without taking note of the final determination of the case?

32. There is a concern that issues in relation to costs will give rise to access to justice issues, as noted above. The expectation of a litigating party that they will recover their costs, or alternatively that the parties will bear their own costs, will have a serious and at times determining influence on whether a party decides to bring a claim. We are concerned that if the costs issues are not adequately addressed there would be a reduction in the number of meritorious claims brought and determined. We do not consider that a reduction in the number of claims for a reduction's sake is an adequate approach to justice. Parties must feel that they can access a Judge or Tribunal to determine their case if such a determination has become necessary (through ADR not working or because a determination is needed to pursue a remedy such as forfeiture). Costs should not have a freezing effect on necessary litigation.

33. There will also need to be a consideration for how contractual provisions will be given effect. Almost all long residential leases contain provision for the recovery of costs (albeit that the precise wording of those provisions may vary). It would be wrong for the Courts to retroactively affect the operation of such provisions; however, it is also noted that there are current limits of the recovery of such costs under section 20C of the Landlord and Tenant Act 1985.

34. Given the above considerations, it is our view that the costs issues noted will constitute a barrier to the accessibility of justice for litigants.

35. We further note (as set out above) that when considering costs the Working Group should also bear in mind the fees of the County Court and First-tier Tribunal (for issue and hearings). These fees are currently higher in the County Court (ranging between £35 to £10,000 for issue and £25 to £1,090 for a hearing) than in the First-tier Tribunal (ranging between £0 to £440 for issue and £0 to £194 for a hearing). The different level of fees will also be a consideration that litigants will bear in mind when issuing a claim; the discrepancy in relation to hearing fees in particular may cause a litigant to feel that their expectations have not been met for example if the case is transferred to the County Court from the First-tier Tribunal. This potential uncertainty in relation to later costs may present a barrier to the perceived accessibility of justice.

36. In relation to procedural rules, this is likely to be a perceived hurdle rather than an actual hurdle. This is a hurdle that could be overcome with clear rules and guidance. The difficulty would be the sheer numbers of litigants in the Court and Tribunal who are not represented. The current procedural rules, in particular the CPR, can already confuse litigants in person. This can lead to delays in cases either while judges have to explain the rules, or alternatively by litigants not complying with directions through misunderstanding rather than intentional intransigence. For the flexible deployment of the judiciary to operate in the way intended by the proposal there would have to be incredibly active and on-going case management throughout a case. While such case management is to be encouraged, it would, of necessity, take up court, judicial, management and administrative time.

37. There is also a concern that while a trained legal professional may be able to understand a judge or tribunal judge 'changing hats' during a case, this procedural difference may be less easy to understand for those who are not familiar with legal process. It should be borne in mind that the majority of litigants will only find themselves in Court or at the Tribunal on a single occasion in their lives. They will not be familiar with the court or tribunal or how they operate. Justice should not only be done but should be seen to be done. A confusing and overly legalistic approach may impeded a litigant's ability to engage with the legal process in a meaningful way.

38. In relation to remedies, the availability of a mixture of remedies to both the County Court and First-tier Tribunal (Property Chamber) would clearly be beneficial. This alone would reduce the multiplicity of applications and actions that currently have to be made by litigants to deal with all issues arising in their cases.

39. There is a concern, however, in relation to the practicalities of enforcement. A remedy is only a true remedy for a successful litigant if it is capable of enforcement. As noted above, not all of the First-tier Tribunal regional offices are located in the same building as County Courts with enforcement officers. A clear and practicable solution needs to be arrived at for ensuring that cases can be easily transferred to the relevant enforcement officers as necessary.

40. There is also a reservation in relation to injunctions. We do not consider it appropriate for Tribunal judges to be considering matters of contempt or committal proceedings for the enforcement of injunctions. We would encourage the Working Group to give special consideration to this issue. One of the key weaknesses of the range of remedies currently



available in the First-tier Tribunal is that the Tribunal judge cannot order a party (either landlord or tenant) to comply with the provisions in the lease. While we would therefore welcome the addition of specific enforcement and injunctions to the Tribunal's range of remedies as a matter of practicality, we are concerned as to the further implications and how those shall be dealt with. The Working Group is also asked to bear in mind that, as far as we are aware, the training currently given to County Court judges and to First-tier Tribunal members is not the same and would have to be altered so that all judges were able to deal with the different remedies available.

41. A further concern in relation to the remedies available is the effect that these will have on the losing party, or the party who is found to be in debt. By way of example, at the current time a tenant can apply to the First-tier Tribunal for a determination as to the reasonableness of their service charges. The sensible approach by any landlord in response to such an application (were the Tribunal to have the same powers as the County Court) would be to seek an order that those service charges were payable. This would then result in a County Court Judgment (or similar) against the tenant. At the current time a tenant can make an application simply for a determination without putting themselves at risk of a CCJ and the credit rating implications that this brings. If a tenant thought there was a risk that a money judgment might be made against them this would have a real bearing on their decision as to whether to challenge those service charges or not. This could cause a significant hurdle to tenants seeking service charge determinations.

**Question 5 – Are there any other issues raised by the discussion paper to which you wish to respond? In particular:**

**(a) Are there any other benefits in making changes in the way landlord and tenant, property and housing disputes are resolved in the court and the tribunal that you wish to note?**

**(b) Are there further impacts of any of the suggested options that you wish to highlight?**

**(c) Are there other practical steps that you would wish to see in streamlining the procedure by which such cases are heard?**

42. A clear benefit of making changes in the way landlord and tenant, property and housing disputes are determined is that it will reduce and avoid repeat applications, which consequently may be seen as a waste of time for litigants. That said, all County Court hearing centres and Tribunals would have to adopt a clear and consistent approach towards transfer for the proposal to be workable.

43. A further impact to note is the effect on listing. At the current time cases are listed in both the County Court and the First-tier Tribunal (Property Chamber) in the knowledge that some of those cases listed may not go ahead as the case may settle. Given the geographical points noted above (at paragraph 23), if a case 'became' a tribunal case but was sitting in the County Court then one would assume any expert panel members (valuers, assessors,

surveyors) would need to travel to the County Court for the case to be heard. If that case then settled there would not necessarily be a similar case at that hearing centre to justify or require the attendance of the expert panel members. We would therefore query the benefit of such cases not being dealt with at the Tribunal, and therefore whether there would be any benefit to the County Court being able to retain discretion in such cases.

44. There is also a concern as to the expertise of the County Court judges. The Central London County Court is, as far as we are aware, the only county court hearing centre to have a specialist Chancery List. Most County Court judges have to deal with a multiplicity of claims; including family cases, personal injury disputes, contractual claims, and real property and landlord and tenant disputes. Those County Court judges will not necessarily have the expertise to deal with those matters which are usually referred to the First-tier Tribunal, and anecdotally County Court judges are enthusiastic to transfer such cases for this very reason. Even when cases are retained by the County Court, this will often be on the basis that counsel can assist in explaining the relevant law and technical aspects as necessary. There is a danger that inexperienced judges retaining cases and unrepresented litigants in person appearing on their own account will result in cases not being determined on an appropriate legal basis; this would seriously undermine the standing of the justice system in these cases. The benefit of the First-tier Tribunal (Property Chamber) retaining its position as a specialist tribunal is that it encourages judges to refer cases to it, rather than seeking to retain cases.

45. The final impact that we note is the effect on appeals. There is no proposal to alter the jurisdiction of the Upper Tribunal or the High Court. There could therefore be cases where an appeal arises but the jurisdiction of the case for the purposes of appeal has to be split. This would be an unsatisfactory situation for any party and would lead to increased costs and uncertainty. The Bar Council would encourage the Working Group to develop a clearer view as to how appeals would be dealt with.

46. Other than those indicated above, there are no other practical steps that the Bar Council can identify on the basis of the current proposal. We would be happy to comment further once the issues in relation to costs, procedure, remedies, listing and appeals have been more fully formed.

#### **Question 6 – Would you be available to attend a workshop on Friday, 5 February 2016?**

47. If it would be useful, a barrister and a member of the Bar Council's policy team would be able to attend a workshop on Friday 5 February 2016.

**Bar Council**  
**January 2016**

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