



The Law Society

Civil Courts Structure Review
Response to the Interim Report by Lord Justice Briggs
February 2016



Introduction

1 The Law Society ('the Society') is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

2 The Law Society welcomes the opportunity to work with Lord Justice Briggs on the civil courts structure review. We understand the need to manage and mitigate pressures on the court system and on judges themselves in a way that addresses the challenges and opportunities presented by technology; upholds access to justice for all, and delivers value for money.

Summary

3 The Society recommends that the main proposals, such as the Online Court (OC) and Case Officers (COs), are rolled out in a phased manner so that there can be thorough testing and an assessment of their impact on access to justice and on confidence in the justice system. In particular, there should be an evaluation of the success of the OC in meeting its stated aims alongside an evaluation of other similar schemes. As important technical and practical issues will arise during the creation and phased roll-out of the OC, solicitors should be involved in the initial design as well as in the phased roll-out. This will ensure that any concerns and remedies are identified and addressed as early as possible. Phased roll-out will also provide an opportunity to refine the practical experience of the OC and for wider lessons to be learned with a view to streamlining the process for litigants in person and focusing the role that solicitors and others can play in supporting clients who choose to use the OC.

4 The Society therefore supports the principle of an OC for straightforward money disputes, in cases involving an amount under £10,000, subject to phased roll-out and, to inform its development, research into the needs of users and their experience during testing. For people who struggle to access technology, or who are constrained in their ability to do so for technical reasons, there has to be an alternative. The Society therefore recommends that there should be an assessment of the percentage of litigants in person who for one reason or another may be unable to use an OC; this, and an analysis of the reasons, should help to address this issue. Similarly, there should be into research into user attitudes where alternatives to court exist, for example in relation to the submission of small claims which can be dealt with on paper. As these alternatives are not always taken up when they are available, research could be expected to provide some insight on attitudes towards the OC and into how to increase uptake and ensure that the OC does not become itself a deterrent to litigants seeking justice.

5 The Society also recommends that there should be costs recovery for litigation in the OC. This might be an appropriate forum for fixed recoverable costs if they are set at a level to allow access to justice and ensure that claims are economically viable and thus able to be supported by expert solicitors where appropriate.

6 Finally, the Society remains concerned that the OC is being taken forward at a time when there has still not been any evaluation of the significant impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. There should be such an evaluation and its findings should be taken into account of the development of the OC.

The Society's Response

7 Six topics have been identified by Briggs LJ for review:

- The Online Court;

- Case Officers (Delegated Judicial Officers);
- Number of Courts and Deployment of Judges;
- Rights and Routes of Appeal;
- Enforcement of Judgments and Orders; and
- Boundaries.

8 This paper considers each of the six topics in turn.

The Online Court

The Principle of an Online Court

9 The Society supports the principle of an Online Court (OC) for straightforward money disputes in cases involving an amount under £10,000, subject to the successful roll-out in the development and testing phase. Technological advances and the increasing IT literacy of the average court user means that the OC should be a reliable and cost-effective way to settle many money disputes, once it has been properly implemented.

10 The OC is not, however, a panacea. Many cases will be too complex for users to lodge a claim on an OC. Many users will feel uncomfortable using an online platform for substantial claims. There is still a considerable subset of the population that either has no IT access, no IT skills, or neither of those.

11 There are also important concerns regarding the stages of the OC. The mediation stage (stage 2) might not be appropriate in cases where there is an inequality of arms: a litigant in person against a large firm with its own legal department, for example. There are important questions around the fairness of the mediation stage of the OC.

12 While it is possible for an IT system to allow litigants in person to file evidence and submit a simple money claim, many individuals will still need legal advice: for example in pre-proceedings, with regards to the validity of their claim, what evidence they need to prove it, and what the appropriate mechanism is for resolving it; or later down the line, regarding how to respond to a defence, and what a fair settlement should look like.

13 The Society agrees that some litigants in person need a simplified system for small money claims. IT solutions, of which the OC is an integral part, have an important role to play in creating this system. They should not, however, be seen as a cure for the various failings with the civil justice system identified in the Interim Report.

14 Finally, the importance of Viscount Hewart's aphorism that "not only must Justice be done; it must also be seen to be done" remains valid and it will be important that, as an integral part of the roll-out, consideration is given at every stage to the impact on public confidence in the justice system and how this can be maintained, for example through ensuring transparency in decision-making, the visibility of the decision-makers and making engagement with the OC optional.

The role of IT in the justice system

15 The Society has always taken a keen interest in IT issues across both the civil and criminal justice systems. For example, the Society has taken an active role in the development of the industry led claims portal (PortalCo) which provides for the administration of cases for Road Traffic Act, Employer Liability and Public Liability claims up to £25,000, where liability is admitted. With safeguards where necessary to ensure that access to justice is not undermined, the judicial system

in general is likely to be improved by greater integration of IT services. In principle, video links, the filing of digital documents, video conferencing, and a focus on recording and analysing data could all help reduce costs and delays in the courts system.

16 The Society recognises that the online approach could offer efficiency savings for lower value cases, but important issues in design, implementation, and scope need to be addressed before any general implementation. It will also be necessary to assess the evidence base for the proposals once further details are available.

17 For this reason, the Society recommends that any OC should be part of this wider IT integration, rather than a stand alone system, and that its development should take account of lessons and good practice identified within Whitehall and elsewhere from the earlier introduction of IT initiatives and broadly similar online services, including Money Claim Online, (an HMCTS service that allows a claimant to take court action against someone who owes money and won't pay).

18 The Civil Justice Council's '*Online Dispute Resolution*' report is also an important starting point in understanding the issues and structures involved in the creation of an online court.

19 While the Society understands the urgency in identifying efficiency savings, and therefore the imperative leading to the parallel review towards immediate court closures and the OC, the two programmes must be run together to avoid litigants falling through gaps. The Society also believes that these changes should not be rushed because of the potential issues for access to justice that would be caused by implementing a sub-optimal system.

20 It will also be important to examine the practicalities of the system once further details are available. For example, the online filing of evidence could be problematic for litigants in person that might not have the technological capacity or resources to digitally file a large number of documents. An OC could also present challenges in cases where, for example, expert evidence might be required.

21 These recommendations are also aligned with those from the recent JUSTICE Report '*Delivering Justice in an Age of Austerity*', which argues that 'the development of a comprehensive online service will take at least two years from the agreement of funding.'

22 The OC also raises important issues of data security, fraud and protection. Major corporations such as Talk-Talk and Sony have been victims of high profile hacks recently. Such events demonstrate the difficulties in keeping data secure, a matter which will need to be addressed in this context if prospective litigants in person are to have confidence in the system.

23 IT projects often incur unexpected and unforeseeable costs, delays, and technical issues. The OC should therefore be subject to a phased roll-out, within a limited geographical area, to ensure that it is fit for a national roll-out. The example of the Civil Resolution Tribunal in British Columbia, Canada, could be a template to follow.

Access to justice

24 The creation of an OC could improve access for people with mobility problems or who struggle with the costs associated with attending court, particularly where the court is at a distance because of the continuing contraction of the provision of the court and tribunal estate. If the OC met recognised standards of usability, it could be expected to bring about faster decision-making. The introduction of an OC would also reflect the growing prevalence of online solutions and tools in society as a whole. Because of this the Society believes that such a system might have positive benefits for access to justice.

25 However, the introduction of an OC could also lead to inequity, particularly if it restricted access to justice for people who do not have IT facilities, who are not IT literate, who have learning difficulties, or who do not have English as their first language. Similarly, progress on the rollout of fast and superfast broadband indicates that there is some way to go in some areas. In particular, provisions will have to be made to ensure that Wales residents have access to both English and Welsh versions of any online platform. The Welsh language provisions on Gov.uk are not currently adequate, and consideration will have to be given to the Welsh language requirements of courts in Wales, both offline and online. The Society is also mindful of the impact that the further devolution of powers to Wales, and the possibility of a separate jurisdiction, could have on such a system.

26 Court users who do not have English as their first language, or who might not be proficient enough to use an online platform, will also need to be provided with adequate translations, or translation tools, to access the OC.

27 Accessibility, user-friendliness, trust and relative cost are all highly important factors. (The recent announcement by the Prime Minister about the expansion of high-speed broadband and proposing to give such access the legal status of a universal service requirement is though welcome and if delivered would greatly assist in this context). As it stands, the internet is not accessible equally across England and Wales, nor are connection speeds uniformly fast and reliable. It is vital that the OC is equally accessible, regardless of the location from which it is accessed. Similarly, older users who have not grown up with online services and citizens less comfortable with them must not be deterred from or disadvantaged in using the OC for that reason; this can be tested during the phased roll-out but it is suggested there may at the very least be need for a programme of some kind to raise awareness of the OC and address misconceptions about how it works and so on.

28 The Society would however be concerned if the OC were to be the only means of resolving certain cases. Consideration should be given to allowing the option of a 'traditional hearing' for those who would otherwise have difficulties operating such a system (an issue which could be alleviated with robust transitional arrangements).

29 The Society also has concerns that any new OC (and indeed the introduction of Case Officers) might mean the benefits of the current adversarial system are lost. If the proposals (taken together) are intended to increase the inquisitorial dimension at the expense of the adversarial this should be proposed directly so that their impact can be properly evaluated and the implications costed and resourced before the new system is implemented. If such a change were to happen tacitly there would be a danger of losing the benefits of the current adversarial system altogether. For example, in inquisitorial systems much of the investigation is carried out by a judiciary trained to undertake such investigations. The risk here is that the task is given to COs who are not sufficiently trained (and potentially not even lawyers). Moreover, there could be significant cost to the public purse in transferring to judges or case officers functions that are currently carried out by the parties or their lawyers.

30 The perceived benefits of the OC therefore could be undermined, damaging its reputation while undermining justice and public confidence. The Law Society would also welcome the commissioning of research designed to determine the numbers and specific needs of litigants that might struggle to use an online court.

31 On balance, the Society would therefore support the creation of an OC, subject to assessing more substantive details during the phased roll-out to ensure that accessibility and wider issues are identified and addressed, and research into the needs of users and their experience during testing.

Solicitors should be involved from the outset in the design and development of the new system and its phased roll-out.

Purpose of the OC and suitable cases

32 The OC would benefit from an initial triage system (as per the CJC's '*Online Dispute Resolution*' report) to ensure that only suitable cases are accepted. By way of comparison, the Financial Ombudsman Service (FOS) receives around 2.4 million contacts annually, but only a fifth turn into disputes that require the FOS's attention. The Ombudsman's initial advice function is critical in triaging problems: consumers might misunderstand a supplier's terms and conditions, or be unclear about benefit entitlements. The human element of advice cannot easily be replaced, and should be supported and respected within any new OC system. It would also be helpful to determine to what extent (if at all) the OC is intended to replace current methods of delivering justice through tribunals as well as courts.

33 The administrative functions of the OC (Tier 1 in the CJC's '*Online Dispute Resolution*' report), such as triage, ensuring documents have been filed correctly, and that claims have some validity, have obvious merit. Provided that solicitors can be involved in the design and phased roll-out, the movement of key processes online should ensure the system is more effective. Consideration should also be given to building mechanisms into the system and there may also be issues to be addressed around the role of solicitors in providing advice in relation to a proposed online claim, for example, a solicitor might assist a client in the preparatory stages of a claim which is then pursued directly by the client through the online system.

34 This might also engage issues in relation to the more general introduction of 'unbundling' (or limited scope representation) of legal services. If solicitors are advising on only certain aspects of the claims, their liability for any negligence arising from aspects of the case handled by the client in person should be limited accordingly. Otherwise, the solicitor will have to spend time checking all aspects of the case, and the benefits to the client of an unbundled service will be lost. Furthermore, the process of coming on and off the record should be simplified so that it is easier for solicitors to offer assistance and represent parties for limited tasks. The Society would thus recommend legislation designed to enable unbundling without the risks arising from claims of negligence resulting from mistakes made by the client outside the express scope of the retainer and any adverse impact upon professional indemnity insurance.

35 The judicial and quasi-judicial functions of the OC (Tier 2 and 3 in the CJC's '*Online Dispute Resolution*' (ODR) report) raise some more contentious issues, and will only be appropriate for certain kinds of cases and litigants. The Society is sceptical, for example, that Tier 2 (Online Facilitation) would be effective in mediating disputes in all but the most straightforward of cases. Mediation usually requires face-to-face or telephone meetings and negotiations, which could be difficult to conduct fairly entirely online. The Society would also wish to avoid simplistic automated negotiation processes that fail to properly address the issues in the case.

36 The experience of the Money Claim Online portal suggests that the savings that would arise from creation of the OC might only manifest themselves over the longer term and certainly not immediately.

37 It is also worth considering the low take up of the current small claims mediation service. These lessons must be taken into account in any development of an OC. Furthermore, CPR 27.10 already provides for decisions without the attendance of the parties. Yet the uptake of this option is rare. If parties are refusing to take up the current process, this suggests they might not opt for an online version.

38 Similarly, while systems such as eBay's and Nominet work effectively, both are ODR and as such are a form of mediation/compromise not of adjudication / determination, which is quite different. Moreover, In the case of eBay, users already have a profile, and all transactions and messages are already logged, which simplifies the process where a dispute arises; it is, in effect, a 'closed' system where most of the relevant information is already on the system. Nominet, meanwhile, attracts users who are already highly IT literate and generally part of an existing business. Those characteristics would not apply in the case of the OC where many users are likely to use the system only once, and there will be a wide range of types case with a multiplicity of different forms of evidence.

39 The Society believes that, subject to a successful pilot, the OC could be suitable for civil claims under the value of £10,000, where the parties are IT literate, and where there is no apparent imbalance of power, for example because one of the parties is a vulnerable person. Personal Injury and housing cases would not be suitable, primarily because of the need for expert evidence to be procured. There is less need for such cases to be filtered through the OC because such cases are already catered for through the Claims Portal. Furthermore, some cases because of their nature or complexity will not be suitable for such a system. There will also be issues to be addressed about what 'escapes' from the system should exist (for example, if a counter-claim is made). It would thus be useful to understand what is likely to be proposed for the OC given that even money-only claims can involve complex issues.

Role and value of solicitors in supporting the development of the online court

40 If the phased roll-out of the OC goes ahead, the Law Society recommends that practising solicitors should be involved in the design and development of the proposed OC; and in considering how the advent of the OC should be communicated to the public. Solicitors are ideally placed to understand and foresee the kind of issues that could arise from establishing an OC. Similar projects in the Netherland (Rechtwijzer 2.0) and Canada (Civil Resolution Tribunal) have both used lawyers to design and run their online system: The Rechtwijzer, which can be described as a mixture of the OC and its 'Assisted Digital Service', is staffed and run mainly by lawyers. It is not mandatory. It was adopted in stages, following pilots. It had the buy-in of the legal profession, mainly because of these safeguards. The development of the OC should follow a similar pattern.

41 It would still be important and necessary for the clients to know their legal rights and understand the relevance of the burden of proof and rules of evidence before interacting with any OC, so it is vital that they have access to a lawyer to advise them.

42 Solicitors have significant experience of working at an early stage with people considering litigation and are also likely to play a role in supporting clients in navigating the OC once it is established. They can also advise clients when not to pursue cases when their claims are weak, or whether the OC is indeed the right forum for their dispute. They will also assist litigants in complying with procedural requirements, thereby mitigating the risk that the OC gets clogged up with incomplete or inaccurate information, leading to further costs, delays and appeals. They will prevent weaker parties being steamrolled at mediation, thereby ensuring some equality of arms. They advise clients when to settle, and when to appeal. They shorten the hearings through preparation, skeleton arguments, and targeted issues. The role of solicitors as gatekeepers is a crucial one in the running of the civil court system.

43 Whilst the Society understands that one of the aims of an OC would be to enable litigants in person to pursue their small claims without the full-time involvement of a solicitor, targeted legal advice in the form of an unbundled service, for a fixed fee, could greatly speed up the process and reduce costs for all the parties involved.

44 The Society welcomes the fact that, whilst the OC is primarily designed for litigants in person, *'automated processes would have bypasses for litigants choosing to use lawyers, and for bulk issuers with departments of staff trained for the purpose'* (Interim Report, para 6.8).

45 On balance, the Society would therefore support the creation of an OC, subject to assessing more substantive details and phased roll-out to ensure that the accessibility and wider issues are identified and addressed. Solicitors should be involved in the design and development from the outset.

Specific issues identified in the interim report with respect to an OC

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. My provisional view favours the first of those options.

46 Considering that Stage 3 of the OC involves judges passing a legal judgment, albeit using technology, and therefore potentially being appealed, there will need to be mechanism for cases to pass between the OC and a physical court. There will therefore need to be new rules for the OC. The CPR was meant to be a simple replacement of the old rules, but the complexity of the civil court system has made this difficult. Litigants in person will need a simplified, straightforward set of rules that clearly explains how the system works, and what their rights and obligations within it are. The Society would recommend issuing a simple set of rules designed specifically for litigants using the OC.

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.

47 Subject to assessment of fuller details, the Society would provisionally recommend maximum damages of £10,000, during the phased roll-out (but noting personal injury and housing disrepair cases are unlikely to be suitable for the OC, not least because of the differing IT solution (via the Claims Portal) that has recently been established for certain types of lower-value PI claims).

48 The Law Society believes that many cases will simply not be suitable for an OC. For example clinical negligence and housing possession cases; and most family cases (for the latter, there seems little point in replicating the Rechtwijzer system, which is already in development). The separate system for most personal injury cases has already been noted above.

49 However, the value of the claim should not be the only determining factor with regards to the suitability of the case for the OC. The appropriateness of an online system for the parties involved should also be taken into consideration. Once the OC has demonstrated that it is an effective means of dispute resolution, a higher level could be set as an appropriate limit if both parties were highly IT literate had the benefit of legal advice. Conversely, the value of the case would be irrelevant if one of the claimants was not IT literate, or had learning difficulties, or was not proficient in English as a first language and the OC was not sufficiently flexible to allow these factors to be addressed.

50 This is especially problematic in cases of housing disrepair. Solicitors currently perform an important gate-keeping function with such claims. It will difficult for the OC to navigate the stages in housing disrepair cases: notice, causation, liability, and quantum..Expert evidence is often needed, and claimants only have a vague idea of the kind of damages they are entitled to. It will also be difficult to assess whether claimants are vulnerable in any way. This will be a particular issue for claimants that reside in social housing.

51 Furthermore, these claimants will sometimes be locked in an unequal battle, as social landlords often use legal representation. Even if they don't, as repeat users of the system, they will have far greater knowledge of and confidence about using the system, which will inevitably cause inequality of arms. Without solicitors performing a gate-keeping function, social tenants might also lodge frivolous, unmeritorious, or unrealistic claims, which would clog up the system, and increase costs on defendants.

52 The complexity of many cases only appears further down the line. Claimants that do not have pre-instruction legal advice will struggle to understand whether they have a case, and what they are entitled to. They might settle for far less than they are entitled to, or take their case to stage three because of unrealistic expectations. In certain cases, such as condensation, there is often no liability, and even where there is some liability, claimants overestimate the value of their claim. These social housing tenants will be affected disproportionately by the £10,000 limit. Even in damages only case, the judge is often required to conduct a hearing to establish time frames and evidence. Claimants are also unlikely to be able to draw up Orders on their own, a function that a judge will have to fulfil.

53 The OC would also need to be aligned with Money Claim Online and the European Small Claims Procedure

54 Any case where there is a strong imbalance of powers between the parties is also highly unlikely to be suitable for such a procedure. This would apply to cases involving a vulnerable client (for example in cases of evictions), domestic violence cases, discrimination cases, and possibly some employment cases. For that reason the Society also recommends that there should be costs recovery for litigation in the OC .This may be an appropriate forum for fixed recoverable costs provided that they are set at a level to allow access to justice and ensure that claims are economically viable and thus able to be supported by expert solicitors where appropriate as is the case with the European Small Claims procedure.

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.

55 In 2015, 86% of households in Great Britain (22.5 million) had internet access, up from 57% in 2006¹. While this trend is likely to continue to rise, this does leave 14% of households in Britain currently without internet access. Around 6 million individuals in the UK have never been online, a sizeable subset of the general population.

56 Internet access and IT literacy correlates with a variety of factors, such as age and location. Only 45% of individuals aged 65+ use a computer daily, compared to 83% for 35-44 age group. Access to the internet by single adult households varies considerably depending on age. For households with one adult aged 65 or over, only 49% had internet access. In contrast 80% of households with only one adult aged 16 to 64 years, had internet access. However the 65+ group as well as being one of the fastest growing sectors of the population and possibly the sector in greatest need of effective access to dispute resolution facilities is also the group who most quickly become IT challenged in a world dominated by the service needs of highly adaptable youth. An online dispute system must address the lowest common denominators of usage.

57 With regards to those households without internet access, of the 14% of households in Great Britain with no internet access, 31% reported that this was due to a lack of skills. Further

¹ Office of National Statistics 'Internet Access – Households and Individuals 2015'

barriers reported included equipment costs being too high (14%) and access costs being too high (12%), while 53% of households without internet access reported that this was because they didn't need it. Similarly, geography plays an important part: The South East had the highest proportion of recent internet users (90%) and Northern Ireland was the area with the lowest proportion (80%).

58 These figures suggest that the users that will struggle with an OC are those that are on low-income, elderly, live in a sparsely populated or rural area, or a combination of those. This means that the assistance for the use of the OC will have to target users that are, by definition, hard to reach.

59 There is also a distinction to be made between 'internet access', which can mean accessing a news article from a mobile phone, and the skills and equipment required to lodge a claim on an OC: a desktop computer, a scanner, high IT literacy, trust in IT security, a decent knowledge of the law, and a good level of English.

60 Should the OC one day become compulsory, assistance will be needed in terms of providing access to a computer, teaching IT skills, and providing alternative ways to enter claims details onto the system.

61 Evidence also suggests that certain users have important concerns regarding privacy, use of data, and online safety. In 2015, 17% of adults who used the internet in the last 12 months had caught a virus or other infection on their computer (for example, a "worm" or "trojan"), which resulted in a loss of information or time. Their concerns would have to be allayed before they would be willing to use an OC. It is also conceivable that an OC would be more susceptible to fraudulent claims, which can be logged online rapidly, than a physical Court. Concocted claims of this kind could even provide a new route for money laundering.

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.

62 The Society considers that this issue requires very careful consideration. It is important that the OC is not used to justify a further increase in the current small claims limits because of the issues around 'inequality of arms' that may arise as well as the potential deleterious effect on access to justice. Unlike, say, personal injury claims, many money disputes are not David and Goliath disputes like personal injury claims. Were QOCS to be possible, that would increase the prospect of wholly unmeritorious claims.

63 Damages-Based Agreements (DBAs) could form an important tool in helping to fund cases taken through the OC. DBAs are more easily used in a non-cost-shifting environment as issues about the indemnity principle and challenges to lawfulness by paying parties do not routinely arise. It would therefore assist those litigants who will require the assistance of solicitors with their claims if, alongside this development, the Ministry of Justice could adopt changes to the DBA Regulations that would encourage their wider take-up.

64 Before the Event (BTE) insurance arrangements might have been effective with regards to legal representation in line with the Jackson Review's ambitions that "positive efforts should be made to encourage the take up of BTE insurance by SMEs in respect of business disputes and by householders as an add-on to household insurance policies." However an unintended consequence of the Jackson reforms has been a significant reduction in the availability of effective BTE to individuals and SMEs. The danger with abolishing cost shifting (particularly up to £25k) is that it would kill off BTE completely for most disputes.

65 Finally, it is worth considering the resource implications of moving from a situation where the parties incur the costs of an adversarial system, to one where the State picks up the cost of an inquisitorial system. Currently, the parties pick up some of the costs of lawyers themselves, whereas the Court will pick up the cost of the inquisitorial system - it may be more expensive to the taxpayer to exclude lawyers than to keep them in the system. It is possible that Court fees will be set to meet that cost, but if one of the aims of the OC is to reduce the cost to a claimant of litigating (by removing his legal representation), then replacing an optional cost with a higher mandatory one would be a perverse way of meeting the policy objective.

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

66 The appeals system could work along the same lines as an appeal from the small claims court, whereby mistakes in law and serious procedural errors give grounds to appeal, as long as the notice of appeal is given within 21 days from the date of the decision.

Case Officers

67 In the criminal sphere, legal advisers are solicitors, barristers, or chartered legal executives that perform certain quasi-judicial functions. However, the diverse nature of training, qualifications, and experience could create a patchwork of capability which, in some cases, might not be sufficient to ensure the consistent delivery of quasi-judicial functions, so care will need to be taken before any introduction of Case Officers (COs) in the civil context.

68 Moreover, whilst certain tasks - such as a neutral evaluation of applications, applications for time extensions or issues of procedural administration - could potentially be performed by COs without affecting the substantive issues in a case, inconsistency would be likely to increase the risk of appeals and reviews by litigants. Any such reforms should also not remove or limit existing rights of appeal against such decisions. If the role of court officers were to be enhanced in this way so that they could perform procedural functions and contribute to case-management, the Law Society would also recommend action to define a minimum skill set for the role. This would make it easier to determine what additional training and close supervision and management was appropriate for individual court officers in order to perform CO functions, thereby ensuring effective minimum standards and consistency of decisions. Strong performance management would also be important to ensure that quality was maintained and that, where necessary, remedial action could be taken quickly.

69 The introduction of COs is also in line with the recommendations of the JUSTICE Report '*Delivering Justice in and Age of Austerity*', which argues for a 'primary dispute resolution officer' to triage cases. This is relatively new territory, and the Law Society would therefore recommend that the effectiveness of COs, and the attitude of users to the involvement of COs, is tested during the phased roll-out.

70 The Society recommends that the proposed expansion of the role of court officers should also be contingent on the outcome and findings of the County Court Legal Advisers Pilot Scheme started at the County Court Business Centre ('CCBC') and the County Court Money Claims Centre ('CCMCC') for a period of 12 months from 1 October 2015 to 30 September 2016. As with the OC itself, the expansion of court officers' roles should be tested and subject to evaluation.

71 With regards to the OC specifically, court officers could be involved in an early triage system, working with legal advisers, to ascertain whether claims have been filed correctly, and whether they are suitable for resolution through the OC.

72 Claimants wishing to appeal a decision by a CO should be able to lodge their appeal directly with a District Judge or a Deputy District Judge. The Law Society is concerned about the potential imbalance of powers between claimants in any conciliation phase of the OC. In such cases, COs might not be sufficiently qualified, so judicial intervention might be necessary.

73 Considering the quasi-judicial nature of the decisions that COs will take, and the role they will perform, one consideration could be to take on junior judges as COs as part of their career progression. This would constitute part of the training programme for judges, and would ensure that COs are constitutionally independent.

74 Finally, the Society observes that the clear independence of COs is vital. Transparent rules governing their behaviour and the management of potential conflicts of interest, is critical as is confidence that they will operate in a way that is essentially fair and not in any way biased either towards defendants or claimants. Without such safeguards, these proposals could undermine public confidence (and indeed undermine confidence in the OC if such a role is to be played here).

Specific issues identified in the interim report with respect to 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.

75 The Society would favour a simple telephone mediation over an 'Early Neutral Evaluation' (ENE) in stage 2. This is partly because small claim mediation has a decent track record: 70% success rate in empowering the parties to settle, and partly because the qualifications and skills required for a mediation are not as comprehensive as those required for an ENE. Finally, a litigant in person might not differentiate between the ENE of a CO and a binding legal judgment from a judge.

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.

76 The Society recommends that the requirements for COs in terms of qualifications, training, and experience should be that of a three year post-qualification experienced solicitor, barrister or chartered legal executive for all types of function. The template offered in the family and criminal sphere could be a useful starting point in this respect.

77 There should be consistency in the functions that COs fulfil, and therefore in the qualification and training they should possess. The risk of 'mission-creep' can be avoided by clearly delineating what is an administrative or quasi-judicial function, and what should remain the exclusive preserve of the judiciary.

78 In particular, the training for COs should cover the administrative processes and framework supporting the decision-making processes, the background law and civil procedure rules and the specific rules relevant to the powers delegated to them.

79 As highlighted above, if COs are to perform quasi-judicial functions, for example during stage 2, their independence will need to be absolutely safeguarded. Their appointment should also be subject to rigorous procedures to ensure such independence.

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

80 The Law Society would be in favour of a right to appeal a CO's decisions. This should take the form of a right to have a decision in substance taken again by the judges, within a reasonable time limit, and with a small penalty for abuse of this right.

Number of Courts and Deployment of Judges

81 The Law Society agree with the Interim Report proposition that the many issues within the civil justice system need to be addressed before thinking about how or if the unification of the civil courts is desirable. Maybe of the reforms affecting civil justice (Jackson, legal aid cuts, Brooke, etc...) are still bedding down. Attempting to unify the system now would imply internalise these unresolved issues.

Court of Appeal

82 The Law Society is concerned by the evidence that caseloads are continuing to increase at all levels of the justice system. Justice unduly delayed is justice undermined, and it is therefore vital that improvements in the efficiency of one level of the justice system are not made at the cost of efficiency at another level. In 12 years there has been a 67% increase in permission to appeal applications and in the same period only one addition to the number of appeal judges. This therefore appears to be a resourcing issue.

83 Consideration should be given as to whether there should be an extension of the composition of the judiciary to deal with application increases, rather than re-allocating certain cases to other parts of the judiciary. The Law Society also believes on the grounds of both access to justice and the principles of natural justice that any of the envisaged changes should not undermine any existing right of appeal that litigants enjoy.

84 A more robust system of data collection would also help identify some of the issues causing the increase in work coming to the Court of Appeal. As the Jackson Review noted, the current systems in place for data collection as not always as robust or comprehensive as they could be.

85 Research should be conducted into the reasons for this increase. Whether that reason is litigants in person, or a lack of specialism of judges in the lower courts, or some other reason, the answer cannot be to restrict the right of appeal. The Court of Appeal also fulfils an important law-making function, which should be preserved. If rights to Appeal were limited, this could prove problematic in resolving issues such as those that arose in the Mitchell case. This could perhaps be remedied by Court of Appeal Practice Notes, but these could not wholly replace the authoritative CoA judgments.

86 The Law Society recommends that there should be a focus on case management and decision-making in the lower courts, where legal advice from solicitors to both sides can reduce the number of cases that go to appeal. The potential to improve the alignment of IT systems across the civil courts, and effective integration of the OC, would be likely to contribute to a reduction in caseload in the medium term. This should be an aim of the announced programme of fundamental reform of the civil and criminal court systems with technology at the heart of the changes. Finally, while a change in the number of Lord Justices might be unlikely, this possibility should not be discounted altogether.

87 The Law Society is not convinced that methods for reducing waiting times and creating a sustainable work load in the future can be found without the relevant statistical analysis. Furthermore, if it is shown that litigants in person cause these delays, the creation of an Online Court that does not require legal assistance might only worsen the problem.

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.

88 The Society would be concerned by any attempt to limit the right to renewal. If the proposal was simply to limit the format in which that right might be exercised, the Law Society would be less concerned, provided that the limitation was not so severe as to constitute a barrier and prevent or weaken access to justice.

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

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

89 The Society is concerned that this might simply shift the challenge to another level of the courts, and not constitute a sustainable solution.

Enforcement

90 The interim report notes various questions regarding enforcement, and seeks views.

91 At this stage, the Society does not offer any comments other than to suggest that this important and complex issue should be subject to a separate consultation.

Boundaries

92 The Society believes that the arguments for and against the potential integration of the Employment Tribunal and Employment Appeal Tribunal into the structure of the civil courts are finely balanced and that this would benefit from a separate consultation.