



JUDICIARY OF
ENGLAND AND WALES

Civil Courts Structure Review: Interim Report

by Lord Justice Briggs

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1. Introduction

- 1.1. The Civil Courts Structure Review was commissioned by the Lord Chief Justice and the Master of the Rolls in July 2015. Its Terms of Reference are as follows:
- To carry out a review of the structure by which the Civil Courts (namely the County Court, the High Court and the Court of Appeal) provide the State's service for the resolution of civil disputes in England and Wales.
 - To review the boundaries between the Civil Courts and (i) the Family Court (ii) the Tribunals Service and (iii) other private providers of civil dispute resolution services, but not the internal structures of those other entities.
 - To make recommendations for structural change including, in particular, the structures by which the fruits of the Reform Programme may best be integrated into the present structure of the Civil Courts.
 - To make recommendations for the deployment of judges and delegated judicial officers to particular classes of case.
 - To carry out such informal consultation with judges, the professions and stakeholders as the timeframe permits.
 - To make a written interim report to the Lord Chief Justice and to the Master of the Rolls (as Head of Civil Justice) by the end of 2015.

The Review Team

- 1.2. I am the judge in charge of the Review and this is my Interim Report. When asked to undertake it, I had been a Judge of the Civil Division of the Court of Appeal for just over two years, a High Court Judge (assigned to the Chancery Division) for six years before that, and a fee paid s.9 deputy High Court Judge since 2000. I was the chancery supervising judge for the Northern and North Eastern Circuits as Vice Chancellor of the County Palatine of Lancaster from October 2011 until April 2013, responsible for supervision of the chancery work of the High Court (but not the County Court) in Manchester, Leeds, Liverpool and Newcastle. During 2013 I undertook a review of the practice and procedure of the Chancery Division of the High Court known as the Chancery Modernisation Review, publishing my Final Report in December 2013. From 2013 until now I have been national liaison judge for the Personal Support Unit. From 1979 to 2006 I practised as a barrister from chambers in London, doing chancery and commercial litigation. I will succeed Lord Justice Stephen Richards as Deputy Head of Civil Justice in January 2016.
- 1.3. I have from the outset of this review been greatly assisted by the work and wisdom of a small Hard Working Group, chosen both to enable me to fill the large gaps in my own knowledge and experience of the relevant subject matter, and to provide close liaison with the HMCTS Reform Programme, with which this review is very closely connected, as described below. Its

members are:

- 1.3.1. Mr Justice Stephen Stewart. Stephen was called in 1975, was the Designated Civil Judge (“DCJ”) for Merseyside from 2003 to 2011 and for Greater Manchester from 2011 to 2013; He was appointed a High Court Judge (QB) in 2013 and the Administrative Court Liaison Judge for the North & North Eastern Circuits in 2014. He was a Member of Civil Procedure Rules Committee (“CPRC”) from 2008 to 2013.
- 1.3.2. HH Judge Nigel Bird. Nigel was called in 1991, became a Circuit Judge in 2011, and is currently one of the two Senior Circuit Judges of the Mercantile Court in Manchester. He is a member of the Insolvency Rules Committee and the Civil Judicial Engagement Group. Nigel has valuable current experience of specialist civil business and a recent practice in insolvency work, also outside London.
- 1.3.3. District Judge Christopher Lethem. Chris was a member of the Hickinbottom Working Group and has been at the forefront of implementation of the Hickinbottom Report on Judicial Responses to Litigants in Person. He is a former course director at the Judicial College responsible for the delivery of training in Civil Law and also the Jackson Reforms. Chris has the particular qualification of being a District Judge, dealing with that part of civil litigation which lies at the heart both of this review and the Reform Programme, as well as being a serving member of the CPRC.
- 1.3.4. Richard Goodman. Richard supports a range of Reform work in HMCTS, having joined the agency after two years as Director of Policy at the Financial Ombudsman Service. He was previously Director of International Operations at the UK Border Agency. Richard has been the invaluable link between this review and the Reform Programme.
- 1.4. I cannot speak too highly of the contribution made by this Hard Working Group, who have fully deserved their title. They have made both collective and individual contributions to the necessary research, to the appraisal of the strengths and weaknesses of the current structure, and above all to the formulation of options for structural change, and the pros and cons of each.
- 1.5. Nonetheless I take full responsibility for the contents of this Interim Report, and in particular for what consultation and further work will show to be its shortcomings. I have not considered myself bound by the opinions of a majority (or even unanimity) within the HWG, but I have derived a great deal of what follows from their experienced and wise advice.
- 1.6. I have also worked with, and been considerably assisted by the contribution made by, the members of the Judicial Engagement Group (Civil) in their response to the presentation to them of aspects of the design of the Reform Programme as it has emerged from HMCTS. Its members have been deliberately drawn from the whole of England and Wales, from rural as well as urban areas. My aim has been to reflect that same national balance in my work and my consultation.

The HMCTS Reform Programme

- 1.7. The genesis of this review lies in the fact that in March 2015 HMCTS embarked upon the consideration of a plan to carry out fundamental reform of the administration of justice generally in England and Wales (not just civil justice) with a particular focus upon three matters:
 - 1.7.1. The opportunity to use digital tools and modern IT to improve the issue, handling, management and resolution of cases of all kinds;
 - 1.7.2. Reducing the reliance on buildings, and rationalising the court estate; and
 - 1.7.3. The allocation of aspects of the work currently done by judges to court officials under judicial supervision, originally called Designated Judicial Officers (“DJOs”). This description is in the course of being changed to Case Officers, and I will use that description of them as a convenient label in this report.
- 1.8. Besides the inevitable need to focus on efficiency and economy in a time of austerity (since the Ministry of Justice is not a protected department of State) the Reform Programme has been undertaken by reference to the following guiding principles (“the Reform Principles”):
 - A model built around the needs of those who use it (citizens, business users, visitors and overseas users, victims, witnesses and state users).
 - A system which is accessible – easy to use, digital by design and default and well supported for non-digital users.
 - A system which is proportionate and segmented – with the ‘majesty of the court’ when needed and lower cost, lower burden (mostly digital) channels where not.
 - A structure built on the strong, independent and trusted justice brand – but with different channels/experiences for different cases – all consistent with this brand.
 - A system which is transparent and accountable –in approach and use of digital transparency.
 - A model which is financially viable – operating at low cost for much of the system, and securely funded.
 - A model which is future proofed, designed for 2050 not 2015 – with a flexible infrastructure to keep it relevant.
 - A people strategy which will support our business strategy – so we will need a higher skilled but smaller workforce.
- 1.9. I have endeavoured to apply the same principles to this review, both to optimise my instruction to integrate the Reform Programme into the civil court structure and because I consider that they (and in particular the first and fourth) are excellent guiding principles for my purposes.

- 1.10. The Reform Programme is both wider and in different respects narrower in scope than this review. It is wider because it encompasses all types of justice service: criminal, civil, family and tribunals (the latter three being worked upon together under the label CFT). My terms of reference are limited to a review of Civil, and only to the boundaries between Civil and Family and between Civil and Tribunals. The Reform Programme looks at detailed IT plans, costings, savings and the detail of working practices, whereas this review is mainly about structure. The Reform Programme is closely concerned with the court estate, i.e. bricks and mortar, which is not directly part of this review of organisational rather than physical structures.
- 1.11. The Reform Programme is narrower than this review because its implications for the civil courts' structure impact much more directly upon the simpler and lower value parts of the workload than, for example, upon the complex work of the specialist courts in the Rolls Building, or that of the Court of Appeal. By 'lower value' I mean lower in monetary amount, rather than in value or importance to the parties. Nor is the Reform Programme specifically about court structures. Rather, it makes no assumptions whether the essential structure of the civil courts will stay the same, or be radically re-designed.

Urgency – the Limited Scope of this Interim Report

- 1.12. The Reform Programme has until now been conducted at a speed of advance largely dictated by the perceived need to develop a business case in time for the Government's 2015 spending review. Since the Reform Programme and this review are inter-active, in the sense that each contributes to, and learns from, the other, it was recognised at an early stage that it would be necessary to make progress towards an interim report rather faster than the size of the subject and the practicalities of carrying out research and consultation would ordinarily dictate, in particular because of the intervening holiday months of August and September. This urgency has affected the review process in three particular ways:
 - 1.12.1. It has necessarily curtailed both the extent and depth of consultation, as is reflected in my terms of reference. I have in practice been limited to an initial round of informal and 'first stage' consultation among a more limited number of consultees that I would have preferred, necessarily seeking initial reactions rather than considered responses, bearing in mind in particular the time-constraints facing organisations and associations which need to consult internally before providing responses on behalf of their members. To ease the constraints on consultees caused by this shortage of time I have thus far consulted only informally and on a Chatham House basis.
 - 1.12.2. It has also curtailed the extent to which I have been able to commission any statistical research, such that the research which has been undertaken had not started to bear fruit by the time when I needed to write this Interim Report.
 - 1.12.3. It has had a major effect upon the content of this report. Readers will find that it is limited to a description of the present structure, an analysis of its strengths and weaknesses, the setting out of options for structural change, with an initial list of the pros

and cons of each but, for the most part, with only the provisional expression of tentative conclusions in the areas where I have found it appropriate to do so. It may fairly be said that this report is intended to start rather than to conclude a debate, about important matters which have in the past been a fertile ground for controversy.

- 1.13. Urgency apart, the wide-ranging and in many respects ground-breaking nature of the Reform Programme, and the uncertainty until very recently about the extent to which it would receive Government funding, has itself been a cause of real uncertainty about the subject matter of the review. Even though funding is now resolved there is little about the Reform Programme that has yet reached the level of detail, at least in relation to the civil courts, necessary to be able to do much more than speculate about its effects upon the structural issues, nor is any part of it yet set in stone. Much of it depends critically upon assumptions about what software can be designed to run a digitised court, and about the quality of the end-product, with very little to study by way of reliable precedent, here or abroad.

Paper

- 1.14. The central assumption (about which I will have much to say in due course) which underlies both the Reform Programme and this review is that it is now technically possible to free the courts from the constraints of storing, transmitting and communicating information on paper. The 'digital by design and default' element in the Reform Principles embodies a commitment to bring that revolution to pass, and the principled requirement to design for the future rather than simply for the present requires me to approach this review as a challenge to make recommendations for a digital (i.e. as far as possible paperless) court structure, while recognising that there will have to be a substantial, difficult and probably painful transitional period before that revolutionary change is fully achieved. A core element in the business case for the Reform Programme is that the funding necessary to bring that revolution about will produce net savings in the long run and that, without that investment up front, the imposition of substantial further savings on the courts would just have led to a long, not very slow, decline.
- 1.15. An inevitable consequence of this aspect of the Reform Programme is that my progress towards identifying the best options for change (including no change) in the structure of the civil courts is aimed and directed at a future period when the stranglehold of paper has been broken. This is most unlikely to be complete earlier than four years hence, even if the funding proves sufficient and the formidable challenges of technical design and implementation can be successfully overcome. Nor will it happen all at once. This requires both a willing suspension of disbelief (at which many of my consultees have balked) and the exercise of an informed imagination about the contours of a brave new paperless world for which there are few if any precedents which can be visited or studied. As a small stepping stone towards that end, I have disciplined myself to conduct the whole of this review online, in the sense that I have neither received nor generated a single piece of paper from start to finish, save only to make paper copies of electronic documents available to those consultees attending meetings

without lap-top computers. The undertaking of this daunting discipline (to a two finger typist) has been made possible only by the timely arrival on my own lap-top of a trial version of e-Judiciary, the new cloud-based judicial platform and electronic communications system, to the far-sighted designers of which I express my sincerest gratitude. To those consultees who have had to type, scan and email what they would rather have written and posted I can only apologise, but I am entirely unrepentant. Conducting this review in a paper-less environment has been both an education, and a liberation, in itself.

Why Review Now? An Overview

- 1.16. Ten years ago, there was initiated a project, approved by the Judicial Executive Board (“JEB”), to re-structure the civil courts of England and Wales into a single Unified Civil Court (“UCC”). The project ran into heavy opposition, in particular from the senior judiciary. The project was suspended while Sir Henry Brooke was invited to report on the desirability of a UCC, and to make recommendations. He concluded in August 2008 that the UCC project should be abandoned, but he made a series of recommendations designed to address some of the shortcomings in the then structure of the civil courts. He envisaged that a further general review of that structure might be needed in ten years time.
- 1.17. The Brooke recommendations were then considered by a working party led by Lord Justice Moore-Bick, the then Deputy Head of Civil Justice. Its report in April 2009, as adopted by JEB, accepted many of Sir Henry’s recommendations, rejected others, and concluded that no alteration to the then structure of the civil courts was necessary or justified.
- 1.18. So why is it that, only six years later, a further top to bottom review of the structure of the civil courts has been deemed necessary? I would highlight the following matters:
 - 1.18.1. Other courts and tribunals have re-structured and/or modernised themselves, with conspicuous success. Examples are the Family Courts, the Tribunals Structure and the Chancery Division.
 - 1.18.2. A major impediment to re-structuring and modernisation, namely the limited, antiquated and inefficient IT systems currently in use is now on the point of radical improvement, funded by large scale Government investment, even in a time of austerity. This funding is conditioned upon a radical re-structuring of the services being provided by all the courts, including criminal, family and tribunals, by way of the Reform Programme. I am advised that the criminal courts are already further advanced in the introduction of modernised IT than the civil or family courts, or the Tribunals Structure. The civil courts can be no exception.
 - 1.18.3. The foreign competition for international litigation which faces the Rolls Building courts means that they cannot be left out of a structural review, if there is anything by way of structural change which might serve to protect and enhance their currently pre-eminent international status.

- 1.18.4. At the same time, advances in the sophistication of online services and the large increase in the proportion of court users for whom online communication is both easy and normal make an Online Court designed for litigants in person a practicable proposition for the first time, at least for some types of cases. In this respect the civil courts of this country already lag behind the court services offered by some of our neighbours, and well behind available private dispute resolution alternatives, both here and abroad.
- 1.18.5. The very large scale withdrawal of Legal Aid funding of civil litigation, coupled with the ever-increasing complexity both of law and of civil procedure, has meant that a growing proportion of civil court users are now, as litigants in person, gravely hampered in making effective use of the courts as traditionally structured for the vindication of their rights. For as long as the procedure of the civil courts is purely adversarial, and governed by a complicated code intelligible only to lawyers, the valiant efforts of judges, voluntary agencies and pro bono lawyers will only be, at best, a palliative.
- 1.18.6. The ever increasing burden on the civil division of the Court of Appeal (up by over 54% in six years) without any increase in the number of Lords Justices (and a reduction in its staff) means that a way has to be found of re-distributing part of its workload, if delays in the hearing of appeals are not to continue at the current wholly unacceptable levels. Significant downward movement of appellate work has implications for the whole of the underlying structure, if space is to be made for such work within the timetables of the already hard-pressed High Court Judges.
- 1.19. It is with these considerations primarily in mind that I have been asked to address again the question, answered in the negative only six years ago, whether it is now time for structural change. But there remain powerful factors militating against wholesale replacement of the current structure, some of which have become even more compelling during that same period. In particular, the perceived quality of justice available in our civil courts for those who can afford it has never been higher. The specialist courts in London (Commercial, Chancery and TCC) continue to be the forum of choice for international litigants with no other connection with this jurisdiction, for the resolution of business disputes arising for example in relation to international trade and intellectual property. Their standing and cohesion has been significantly enhanced by their move to the Rolls Building, the world's largest court complex for business and property disputes. It is well recognised that UK plc is supported to a large but unmeasurable degree by the quality of the rule of law which supports business here, quite apart from the very large invisible earnings derived from international litigation.
- 1.20. Furthermore the flexibility with which the civil workload is currently shared between courts and judges is a contributor to efficiency, and it must depend to a large degree on the familiarity of court staff and of court users with the current structures, much of which might be put at risk by wholesale change. The very fact that the Reform Programme will itself introduce widespread (non-structural) change may be a reason for avoiding the dislocation which simultaneous major structural change might bring about.
- 1.21. But against that must be balanced what I would call the new wine into old bottles effect. If

the civil courts are to be liberated from a dependence on paper by IT and other processes calling for intricate design, testing and deployment, it makes little sense to introduce them into a structure which is remedially unsuitable, or which does not enable those expensive innovations to be used to best effect. Most of the structure by which civil justice is currently delivered is very old indeed, and is heavily influenced by the constraints which the still almost universal reliance upon paper files make inevitable.

Glossary

- 1.22. This is in many respects a complicated and technical subject, and this report is addressed both to those legal professionals who know it, and to the wider public who may find much of it difficult to understand without a fuller explanation of technical terms than can easily be fitted into the text.
- 1.23. I have therefore arranged for a glossary of the main technical terms to be included at the end of this report. I am indebted to Andrew Caton (Private Secretary to the Deputy Head of Civil Justice) for its preparation. Where necessary it deliberately sacrifices precise accuracy to concise intelligibility for the uninitiated. It is also fitted with electronic links for those who wish to research the contents more fully.

2. The Current Structure

Introduction

- 2.1. The structure of the civil courts is dominated by two horizontal lines, one between the High Court and the County Court and the other between both those courts and the Court of Appeal (civil division). The High Court is a single court, based in London, but with numerous District Registries around the country for the issue and, in a few of them, management and trial of proceedings. There used to be about 170 county courts around the country (including Greater and Central London), each a separate court of record with its own geographical boundaries, buildings and staff. In 2014 those county courts were merged into a single entity, so that there is now a single High Court and a single County Court. An on-going court closure programme means that the number of separate locations (or hearing centres) where cases in the County Court are determined is likely to reduce very substantially.
- 2.2. Although both courts have some areas of exclusive jurisdiction, and particular areas of specialist practice, for the most part they handle civil cases of similar broad types, with the County Court having some largely theoretical financial upper limits to its original jurisdiction, whereas there are no upper limits on the jurisdiction of the High Court, but rather value thresholds below which cases cannot be brought there. In practice the County Court handles the less complex, medium and lower value cases, and the High Court the more complex and higher value cases. Allocation of work between them is achieved largely by court-user choice, moderated by the exercise of gatekeeping powers in each court, to transfer appropriate cases to the other, and to geographical locations best suited to the parties' needs.
- 2.3. Appeals from both courts lie to the Court of Appeal but, from the County Court, only against final orders in specialist and multi-track cases. Interim orders and fast track final orders are appealed to the High Court. In addition the Court of Appeal hears appeals from the Family Court and from tribunals, both those within the main Tribunals Structure and those which, like the Employment Appeal Tribunal ("EAT") and the Competition Appeal Tribunal ("CAT"), are independent of it.
- 2.4. I have briefly mentioned the geographical distribution of both the County Court and the High Court, and will have much more to say about it in due course. But I must introduce the important vertical lines, mainly in the High Court, which separate the different types of more or less specialist cases which make up its workload. These lines manifest themselves as separating divisions, courts and lists. Leaving aside the Family Division, the High Court is divided into two Divisions, Chancery and Queen's Bench, which continue to reflect lines originally drawn within the new single High Court when it was formed from the merger of the former courts of common law and equity in the 19th century. Those two Divisions still have High Court Judges, Masters and Registrars allocated exclusively and almost always permanently to each, as well as their own separate judicial leadership, esprit de corps and traditions, but they do not now (if they ever did) encompass a wholly distinct, exclusive or even recognisable single category of workload. The most that can be said, and even this is a

serious over-simplification, is that the Chancery Division is focussed mainly upon cases about business and property whereas the Queen's Bench Division deals with everything else.

- 2.5. Of much greater relevance, in terms of accommodating particular streams of specialist work, are the growing number of separate courts within each Division. For the purposes of this introduction I will just list them. Within the Chancery Division there are the Patent Court, the Intellectual Property Enterprise Court ("IPEC", formerly the Patent County Court) the Companies Court and the Bankruptcy Court. The Chancery Division used to share with the Family Division responsibility for the Court of Protection, but has now almost completed the process of ceding its share to the judicial leadership of the Family Court. It therefore falls outside the scope of this review.
- 2.6. For its part the Queen's Bench Division accommodates the Administrative Court, its new-born daughter the Planning Court, the Admiralty and Commercial Court, together with a number of geographically distinct Mercantile Courts, and the Technology and Construction Court ("TCC").
- 2.7. Both the Chancery and Queen's Bench Divisions provide an exclusive home for a number of distinct specialist or semi-specialist work streams without enclosing them within specialist courts or lists. Thus the Queen's Bench Division accommodates defamation and clinical negligence work, and some other specialist personal injury claims such as mesothelioma cases, while the Chancery Division deals with a range of business and property specialisations, such as partnership, competition, contentious probate, trusts, and pensions.
- 2.8. A number of substantial work streams are in effect shared between divisions and courts, with the distribution between them governed mainly by party (usually claimant) choice, subject to judicial powers to transfer. These include professional negligence and general contractual disputes, landlord and tenant disputes and a whole range of business disputes which are shared in London between the Chancery Division and the Commercial and Mercantile Courts and, in the regional High Court trial centres, between the Chancery Division and the Mercantile Courts. There is also an element of sharing between those courts and the TCC, both in and out of London.
- 2.9. The co-habitation (since late 2011) of the Chancery Division, the Commercial Court and the TCC in the Rolls Building has created a business and property court centre which is not only the largest of its kind in the world, but also a powerful magnet for international civil litigation and a powerful contributor to the high status of the UK as an attractive place in which both to do business and to invest. Its coherence as a business and property court centre easily transcends the structural, organisational and other divisions within it. This has recently been manifested, to public acclaim, by the creation of a Financial List for very high value cases requiring international financial market expertise which is the equally shared creation and responsibility of the Chancery Division and the Commercial Court.
- 2.10. No similar specialist courts or lists form part of the structure of the County Court. This is no doubt because each County Court used to be primarily a local court for a defined

geographical area, too small to admit any significant specialisation within it, and because the typical case load still is usually (though not invariably) less complex in nature. There were, and remain, some variations of specialist jurisdictional limits as between County Courts (now between hearing centres within the unified County Court). For example some have bankruptcy and insolvency jurisdiction whereas others do not. More significantly, some hearing centres of the County Court are large enough to admit internal divisions of work streams, for example as between chancery and general civil cases, in the main regional trial centres where there is also a Chancery District Registry which manages and tries cases, and in the Central London County Court. Nearby smaller hearing centres of the County Court send chancery and other specialist work to those larger centres. Some County Court hearing centres have developed particular specialisations for which they are resorted to from across England and Wales, such as the hearing centre at Birkenhead, which specialises in Part 8 road traffic accident Portal disposals, where liability is not in issue.

- 2.11. Of more general significance to the division of work in the County Court is the division of the Part 7 workload into the three tracks: small claims track (“SCT”), fast track (“FT”) and multi-track (“MT”), together with other distinct work streams such as possession cases and Part 8 cases. Broadly speaking, the SCT now handles claims up to £10,000, but with a limit of £1,000 for personal injury claims and claims against landlords for disrepair. This lower limit may be about to rise to £5,000, at least for personal injuries. The FT handles the band between the SCT claim limit and £25,000, provided that the trial can be accommodated within one day and does not require multiple experts, while the MT handles the rest. This allocation of claims into tracks was a core feature of the Woolf reforms, but the financial limits have since been revised upwards.
- 2.12. The boundary between the High Court and the County Court, in relation to the claims which could be brought and determined in each, used to be regulated by financial limits to the jurisdiction of the County Court, capable of being overridden by party agreement, or by transfer to it of cases from the High Court. The County Court’s equity and probate jurisdiction still is so limited, and the current limit in relation to the value of trusts and estates was recently raised to £350,000. The limit of the probate jurisdiction is still only £30,000. But otherwise there are generally no such limits. Rather, there are lower limits to the amount which may be claimed in the High Court, currently £100,000 generally, and £50,000 for personal injuries.
- 2.13. Of much greater relevance in practice are the rules and guidelines by which the High Court Masters (and TCC Judges) transfer cases from the High Court to the County Court. This discretion is exercised by reference to a set of common guidelines relating to the value, complexity and public importance of the case, and availability of suitably specialist judges and the location and facilities of the destination court: see CPR Pt 30.3(2). But there are in practice important value distinctions as between the Queens Bench and Chancery Divisions. Generally the Queens Bench Masters and TCC judges consider for transfer claims up to £250,000, whereas the Chancery Masters use £500,000 as the relevant threshold. Although those financial limits are not published, the understanding of these practices among the professions helps parties to choose or, where necessary, to agree upon the appropriate level

of court from the outset. They therefore play a central role in the allocation of business between the High Court and the County Court.

- 2.14. Since 1999 the whole of the civil court structure has, in theory at least, been bound together by the same set of procedure rules, the Civil Procedure Rules (“CPR”). Before that date the County Court had its own bespoke rules, slightly simpler than the Rules of the Supreme Court, as befitted the lower complexity and lack of specialisation of its work-load. The unification of the procedure rules was a major achievement of the Woolf reforms, although there are large areas of differences in detail between the rules and practices applied in different courts, and for particular types of work. The result is that, although originally designed to bring about an overall simplification, the current Rules, Practice Directions, Guides and other procedural materials are now collected in a White Book of just under 7,000 pages, very much larger than that which encased the last version of the old Rules of the Supreme Court, and longer than the King James Bible.
- 2.15. There was a time, again at least in theory, when the High Court was staffed by High Court Judges (“HCJs”), the County Court by County Court Judges now called Circuit Judges (“CJs”) and the court of Appeal by Lords Justices of Appeal (“LJs”). But the picture is now very much more complicated. The Court (of Appeal) now receives assistance from HCJ deputies from all three High Court Divisions, and from retired LJs. The High Court is served by a large number of deputies, (“S.9s”) drawn both from the CJs and from senior practitioners as part-time fee-paid judges, together with retired HCJs. Both the QBD and the Ch D has teams of specialist Masters and part-time deputies, and the Ch D also has its specialist Bankruptcy Registrars and their part-time deputies. The work of the CJs in the County Court is augmented by practitioners sitting as fee paid Recorders. Over 85% of the work of the County Court is now done by District Judges (DJs) and their part-time Deputies (“DDJs”).
- 2.16. Only a small minority of the judges who undertake civil work do it full time, even if they are full time judges. Most divide their time between civil and family and/or crime, and some do tribunal cases. The only significant classes of full time civil judges are the 18 Chancery High Court Judges, the 19 specialist Senior Circuit Judges, the 5 Bankruptcy Registrars, the 6 Chancery and 9 QB Masters, most, but not all, of the 22 Designated Civil Judges (“DCJs”) and the 14 CJs and 10 DJs of the Central London County Court. There are few other civil-only judges in the County Court. The only LJs who do not do criminal appeals are those who did not do so in the Chancery Division and Family Division when HCJs. This is not because full time civil or family only specialisation is seen as desirable but because they (or most of them) are not regarded as qualified to preside in the Court of Appeal Criminal Division (“CACD”). But even they all do their share of other appeals. None of the Presiding Judges are civil only, nor are any of the most senior leadership judges except the Master of the Rolls (who is Head of Civil Justice) and the Chancellor.
- 2.17. It is a fundamental unifying feature of all judges in England and Wales that they are drawn from the ranks of already experienced professionals, as barristers, solicitors, legal executives and occasionally (but much less than elsewhere in Europe) academics. We do not have, like many European neighbours, a career judiciary. The public therefore expect, rightly, that all

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. That is, in this jurisdiction, an important part of what the word 'judge' means.

- 2.18. Another fundamental feature of the current structure is the result of the fact that the almost universal medium for the creation, communication, storage and transport of the information upon which it depends (apart from oral submissions) is paper. The result is that the essential concept of a 'court' is mainly delimited by the constraints arising from the need to store, review and move paper files. Generally speaking, this means that the processes for case handling, case management, interim hearings and trials all have to take place within single or adjacent physical buildings, capable of housing hearing rooms, judges, administrative staff, back offices and file storage. A graphic illustration of the adverse consequences of ignoring that constraint is provided by the administrative inefficiency which formerly afflicted the Central London County Court, when its back offices and hearing rooms were housed on opposite sides of Park Crescent.
- 2.19. But this constraint is about to be removed, on the assumption (which underlies this review) that the move to a paperless court is both technically possible, and that the necessary funding is to be made available to achieve it. The process of liberation from the constraint of paper has even started, as I shall shortly describe, but it has yet to have a large effect.
- 2.20. It is difficult to exaggerate the potential structural consequences of liberation from the constraint of paper-based communication. It means for example that case issue, handling, management, conciliation and parts of enforcement can all take place in business centres, or even a single national centre, far removed from the places where face to face hearings are to be held. It means that judicial case preparation and judgment writing can take place remotely from hearing centres or file storage centres, even (like part of the preparation of this report) on the move, on trains, at sea, abroad or at home. Even hearings, by telephone or video, may be conducted remotely from hearing centres or business centres. In short, digitisation potentially loosens the geographical bonds that have hitherto dictated the physical structure of the civil courts.
- 2.21. I will be exploring these possibilities in due course. At present I am concerned only to note how much of the court structure which we take for granted is and has always been constrained by a feature, paper, which really is soon to disappear. But the rate at which paper may be heading towards the exit will itself constrain the rate at which, and the routes by which, far-reaching reforms may be achievable.
- 2.22. Before looking in more detail at particular parts of the structure, it is worth dwelling briefly on the part played by the civil courts in the wider structure by which the rule of law is sustained. The rapid growth of Alternative Dispute Resolution ("ADR") during the last 30 years leaves the civil courts as very much the last resort for the resolution of civil disputes. Negotiation, arbitration, mediation, early neutral evaluation and adjudication by ombudsman services and others together resolve far more disputes than the civil courts.

- 2.23. But the availability of an affordable recourse to an expert, experienced and impartial court for the obtaining of a just and enforceable remedy in reasonable time remains an essential guarantor of the rule of law, for at least six main reasons. First, the very existence of access to civil justice forms an essential constitutional foundation for respect for civil rights, and the performance of civil duties, in a law-abiding national culture. It is in short the guarantor of the rule of law in the civil context. Secondly, the higher civil courts continue to develop and declare the law, against an increasingly complex background of domestic and European legislation. Thirdly, the court strictly upholds and applies the law, whereas other ADR systems frequently use different criteria, such as the fair and reasonable test applied by the Financial Ombudsman Service. Fourthly, the court underpins most forms of voluntary ADR. Mediation would potentially yield justice to the richer, more powerful or risk-tolerant litigant if the weaker party could not refuse an unjust offer by saying: “see you in court”. Early neutral evaluation would be meaningless unless it was a reliable prediction of the just outcome in court. Fifthly, there are gaps in the effectiveness of ADR and regulation which can only be filled by a court, as a last resort. Finally the court is the place for enforcement of agreements to settle disputes made during ADR.
- 2.24. It is therefore nothing to the point that, for example, the automated dispute resolution service offered by ebay deals with more disputes than the whole of the civil courts, or that about 90% of civil cases settle before trial, and most civil disputes even before issue of proceedings. Leaving aside clarification of the law, the ultimate success of the civil courts would be fully achieved if, like the nuclear deterrent, they never had to be used at all. But that is no reason for allowing them to decay or become obsolete.

The County Court

- 2.25. In physical terms the newly unified County Court consists, at this moment, of two business centres, one call centre and 145 hearing centres or courthouses all round England and Wales. The hearing centres are almost all long-established, but the business and call centres are new. It is convenient to describe them first.

The Northampton Bulk Centre

- 2.26. The Northampton County Court Business Centre or “Bulk Centre” for short, is a judge-free office block, entirely separate from the Northampton County Court, which handles all the incoming bulk electronic issue of money claims, and also all incoming Money Claims On Line (“MCOL”) from issue to Directions Questionnaires (“DQs”), or to default judgment if undefended. That service is provided nationally, i.e. for the whole of England and Wales. Apart from Possession Claims OnLine it is the only fully digitised part of the civil justice system accessible to litigants, so it is worth describing in some detail. The Bulk Centre also performs the administration of the Small Claims Mediation Service, part of the attachment of earnings mode of enforcement, and various other services not relevant to this review. It was established in 1992 and now has a staff of about 200.
- 2.27. Bulk claims consist of generally simple and low value money claims by large entities such as

utilities, each of which now registers with the Bulk Centre's new online system called Secure Data Transfer ("SDT"). The significant software investment required to be made by bulk claimants in order to use SDT limits its use to large entities. The current annual workload is about 750,000 claims, and rising. 95% of claims are undefended, and lead to automated default judgment within the Bulk Centre, with no case-by-case judicial involvement at all.

- 2.28. MCOL is a service for the issue online of individual money claims. In sharp contrast with SDT, it requires nothing more than an internet connected computer to access, and 80% of its claimant users are LIPs. It is relatively crude in its software, containing no built-in rules or online triage or help apart from a pdf guide, although the Bulk Centre runs a telephone and email help service for MCOL users, both claimants and defendants. Since its launch in 2001 it has reached a steady state of about 180,000 claims annually. Where the claim is unopposed the claimant may request both judgment and (if unsatisfied) a warrant of control online. Other forms of enforcement have to be applied for by post. In order to encourage litigants to use MCOL, a reduced fee is charged, compared with issue by paper.
- 2.29. Both the bulk service by SDT and MCOL are limited to liquidated (i.e. debt rather than damages) claims. In CPR parlance these are called specified money claims. The theoretical limit for both is £1 short of £1 million, but in practice the typical value of the claim is modest. The current (2015) average is £1665 and the median is £644. They both handle incoming claims in broadly the same way. In summary, after automatic processing of the fee and logging the claim onto Caseman (the County Court computerised database), the claim is sent automatically to a single printing contractor which prints the claim onto paper, prepares a defence pack and posts it to the defendant. Save that the defendant to a MCOL claim may respond online (other than by an admission), the processing of defended claims then becomes entirely paper-based. The parties submit DQs, with a sanction of strike out or default judgment if the claimant or defendant fails to do so. If both do, then unless the parties elect to use the Small Claims Mediation Service the paper claim file is sent to the appropriate local hearing centre, (either the centre selected by the claimant or the centre nearest the defendant's location) where it is matched with the Caseman details and processed in the time honoured way, until final disposal.

Small Claims Mediation

- 2.30. If the claim is a small claim (under £10,000) and both parties so request by ticking boxes on the DQ the case is remitted to the free Small Claims Mediation Service at the Bulk Centre. The small staff team try to book the case for a one hour telephone mediation by an HMCTS employee (usually working by telephone from home). All that the mediator has are the names and telephone details of the parties, and the essential details of the claim recorded on Caseman. Nonetheless the small national team of only 14 mediators (former court back office managers) achieve a remarkable current success rate in settling 70% of the cases referred to them. Unfortunately, despite conducting up to five of these simple mediations a day, there are only enough mediators to service about 35 to 40% of the national demand. If the case has not been settled within 28 days of referral it is sent as a defended case to the local hearing centre in the usual way.

Judicial participation

- 2.31. I described the Bulk Centre as judge free, and so it is. But there is a relatively small stream of judicial work required to be done on files located there. These are currently sent out in batches to remotely located DJs as box work. No hearings of any kind take place at the Bulk Centre. It is planned to send this judicial work stream, again in paper batches, by DX to the DJ and Legal Adviser team at Salford: (see below).

The County Court Money Claims Centre at Salford

- 2.32. The Salford Centre was set up in 2012, and seeks to achieve on paper the same efficiency and economies of scale that the Northampton Bulk Centre achieves with claims issued electronically. It is confined to money claims. It also houses the newly launched Legal Adviser pilot. Its current staff is about 220, and it has a judicial team of DDJs working a 2 or 3 judge stream on a rota basis, doing judgments and other judicial determinations purely by way of box work. As at the Bulk Centre, there are no hearings of any kind.
- 2.33. Apart from its total reliance on paper, the processes at Salford largely mirror those at Northampton. Money claims are issued and served by post (save where the claimant wishes to effect service). If undefended or admitted they proceed to judgment at Salford, and it provides a warrant of control service, although these generally have to be transmitted (by Caseman) to the debtor's local hearing centre for bailiff service. If the case is defended then, after submission of DQs, it is sent as a paper file to the appropriate local hearing centre for case management and trial, just as from Northampton.
- 2.34. There are well-advanced plans to centralise enforcement by Attachment of Earnings and Charging Orders at Salford, to which I shall return in Chapter 3.
- 2.35. The Salford Centre currently achieves a turn-round time of 5 working days for over 90% of its incoming work, replacing the wide regional variations within its specific workload previously achieved in regional county courts (now County Court hearing centres). It claims to have achieved savings in the region of £3m a year from the centralisation of its work.

The Loughborough Contact Centre

- 2.36. Incoming telephone calls to the Salford Centre are now routed to the call centre at Loughborough. Receptionists there have access to Caseman and are able to deal with about 90% of incoming enquiries without having to pass them (usually by email) to Salford, or to a local hearing centre.

The County Court Hearing Centres

- 2.37. These hearing centres are the successors, in the new unified County Court, of the old separate local county courts, offering local civil justice in cities and towns all over England and Wales and providing the forum for the determination of a range of simpler and lower value civil disputes, traditionally within modest jurisdictional value limits, from most of which

they have now been freed. There are, at the moment of publication of this Interim Report, 145 of them, but it is almost certain that there will be many less when a final report is published, due to the current closure programme, which is subject at the moment to review of consultation responses. It is very unlikely that the current round of proposed closures will be the last.

- 2.38. Practitioners of my generation may look back (fondly or otherwise) to a time when the local county court was a distinct and separate physical entity, under a single roof, with its own hearing room or rooms, staff, judge or judges and back office facilities. There are still some County Court hearing centres like that, but the current pattern is much more varied. Typically the current County Court hearing centre will be part of a combined court centre, including Magistrates and/or Crown Courts, the Family Court and sometimes one or more tribunals, as well as a High Court District Registry. It will often be difficult to find within the relevant building any space (whether hearing room or even back office desk) given over exclusively to County Court work. One occasionally finds a building described on the outside wall as a specific county court, only to discover on entry that the building is in fact a court centre in which the county court shares the facilities with one or more of those other civil, family or criminal courts or tribunals. The Central London County Court used to be a large and conspicuous exception, but even it has now been absorbed into the large mainly civil and family justice centre at the Royal Courts of Justice (“RCJ”).
- 2.39. Just as the County Court usually now shares physical space with other courts and tribunals, so it also shares judicial and other staff. It is unusual (outside the Central London County Court) now to find DJs with a purely civil (as opposed to mixed civil and family) workload. It is a little less uncommon among the CJs, and still common among the small number of DCJs, but all of them are also S. 9 judges, who therefore mix County Court and High Court work in varying proportions. Furthermore, outside London, DJs typically perform the role of High Court Masters and Registrars in the case management and increasingly trial of High Court cases within their District Registry.
- 2.40. Judicial leadership in the County Court is mainly provided by the 22 DCJs, each with responsibility for supervising the civil work of the County Court within a territory usually defined by one or more counties. Each DCJ will therefore have leadership responsibility for one or (almost always) more County Court hearing centres of varying size and busyness within his or her territory. The DCJ may be the only full-time civil CJ trying cases within that territory, but is almost always assisted by ‘civil hours’ worked by CJ colleagues and Recorders, and occasionally even by the visiting HCJ on circuit whose High Court or Crown Court list has collapsed. The DCJ will be assisted by a substantial team of DJs, spread in ones, twos or occasionally larger numbers around the hearing centres in the DCJ’s territory.
- 2.41. Hearing centres continue to be dominated as to their internal structure by the still almost universal use of paper as the means of communication and storage of information. In short, the paper file continues to reign supreme. Save for those cases issued at the business centres, all other County Court cases have to be issued at the appropriate hearing centre and dealt with as paper files from the outset. Even the cases issued at a business centre, once disputed,

arrive as paper files at the chosen hearing centre for case management and trial after the receipt of completed DQs from the parties. In such cases, all that the business centre has done, on receipt of the DQs, is to decide upon the hearing centre to which the case, and therefore the file, should be sent. Thus the potential for efficiency in storage, transmission and accessibility of case information which is issued and stored electronically at the business centres has largely been lost by the time that the defended cases (admittedly a very small proportion of those issued) reach the appropriate hearing centre. All that remains in electronic form is the very small amount of information about each case stored on Caseman.

- 2.42. The consequence of this continued dominance of paper is that each hearing centre, despite the generic name, remains in substance a traditional court, with its own back office staff for case handling and file storage, usually its own listing function and its own facilities for enforcement of judgments, although the latter is about to change in some respects.
- 2.43. Hearing centres vary widely in their size, judicial teams, back office staff and in the range of work which they handle. The largest, such as Central London, Birmingham, Leeds and Manchester, have substantial teams of CJs and DJs, sufficient to allow specialisation in chancery and insolvency, even in the absence of a High Court District Registry on site, as at Central London. The smallest centres hardly ever see a CJ, and their workload is much more limited. In some areas, such as Greater London and Manchester, there are 'hub' centres to which specialist work and multi-track cases are transferred for trial from smaller outlying hearing centres. Some centres develop a substantial specialist practice for no logical reason, such as the Pt8 determination of quantum in low-value RTA cases at Birkenhead.
- 2.44. The capacity of a particular hearing centre to handle incoming civil cases within reasonable time limits is governed in part by the size of its judicial team but, since most are centres for civil and family work and most judges do both (or civil and crime), civil capacity is regulated annually by the allocation from on high, at national, circuit and then local level of civil hours (as opposed to family hours) and by budgets regulating the use of fee-paid judges (Recorders and DDJs). Performance against time limits is monitored regularly from the data stored on Caseman by a statistical team based in Warrington, and reviewed quarterly by the Civil Business Authority, a committee of HMCTS and judicial members, based in London.

E-working: electronic diaries and documents

- 2.45. Electronic diaries have been in use in at least the larger hearing centers for some years. Some electronic storage of court files has just started in some hearing centres, using a combined diary and e-filing system called F diary.

Enforcement in the County Court

- 2.46. There is a tendency among litigators, including judges, to regard the obtaining of final judgment in a case as the end of the process, subject to appeal, and to treat enforcement as a poor relation. The main methods of individual enforcement of County Court judgments are Warrants of Possession (of land) and of Control (possession of goods), Charging Orders, Attachment of Earnings and Third Party Debt Orders. Methods of collective enforcement are

mainly by Bankruptcy and Winding-up petitions, which give rise to separate proceedings of their own. There is also procedure for the obtaining of information from debtors about their assets, as a precursor to enforcement, by examination before a court officer. Default by judgment debtors in complying with the court's orders to attend or to provide relevant information in connection with enforcement is, in the last resort, punishable by committal to prison.

- 2.47. I shall not describe these procedures in detail at this stage. A sufficient description will emerge when I describe (in Chapter 5) their perceived weaknesses and the opportunities for fundamental improvement presented by digitisation. I will also describe (in Chapter 3) the steps currently being taken to improve some of them by centralisation of the relevant processes. It is sufficient for me to say, as part of my description of the current structure, that County Court enforcement is at present heavily localised, paper based, prone to error in form filling, and widely perceived to be slow, ineffective and expensive.

The High Court

- 2.48. The civil workload of the High Court is both headquartered and mainly carried out in London. All the High Court Judges are based there. As already described, many of them, and all the Masters and Registrars, work there full-time. The QB Judges all spend at least half their time in London. Only two Chancery Judges sit regularly outside London as supervising judges (for half their time). Even the Senior CJs who undertake most of the specialist High Court work outside London as s.9 Deputies spend significant time sitting in London. The result is that the centre of gravity of the High Court is firmly rooted in London, in the RCJ and (for business and property cases) in the Rolls Building. London is the location of the Queens Bench and Chancery Principal Registries.
- 2.49. It is nonetheless possible for claims to be issued in the High Court in a large number of District Registries around the country and handled, case managed and tried in a much smaller number of them. The prevalence of postal issue (and the developing facility for issue by email) makes the large number of issue-only District Registries something of an anachronism, but the facility for regional handling, management and trial is nothing of the kind. A large number of High Court cases are managed and tried in regional centres, several of which assert and seek to abide by the principle that no case is too big to be tried there. Nonetheless the very largest cases tend, with a few exceptions, to be managed and tried in London, mainly because that is where the largest firms of litigation solicitors and most prestigious barristers' chambers are located. This is in marked contrast with the distribution of large-scale criminal work, more evenly around the country. London (and the Rolls Building in particular) is also overwhelmingly the centre of the international civil work of the High Court, no doubt because of its pre-eminence as an international financial centre and its good international travel links.
- 2.50. I have already noted that the civil work of the High Court in London is much more divided (vertically as it were) into specialist streams than in the County Court, both by a proliferation

of named specialist courts and divisions, and by the de facto existence of specialist work streams within both the Chancery and Queen's Bench Divisions. Nonetheless a simpler version of that stratification into specialist units is replicated in the main regional trial centres at Cardiff, Bristol, Birmingham, Manchester and Leeds, and to a lesser extent at Liverpool and Newcastle. Leaving aside the last two (in which Chancery is the only significant specialism) the remainder all undertake Administrative, Planning, Chancery, Mercantile and TCC specialisms, as well as the de facto specialist clinical negligence cases. More general High Court QB work (in particular personal injuries) is also managed and tried there, and at further regional centres, including Sheffield and Nottingham.

- 2.51. A remarkably large amount of High Court work is tried by judges other than High Court judges. First, there is a large scale use of s.9 Deputies (retired HCJs, salaried CJs and fee paid senior practitioners). This extended to over 30% of all trials in London in the last measured year, and over 90% of High Court trials outside London. Secondly, a very large proportion of company and insolvency cases are tried in London by the Registrars. Thirdly, an increasing number of cases are tried by Masters, although the burdens of costs management and other work have limited the growth of this otherwise welcome development.
- 2.52. In return (as it were) HCJs undertake an increasing amount of civil tribunal work, in the Upper Tribunal doing Immigration, Asylum, Tax and Chancery cases, in the Employment Appeal Tribunal ("EAT") the Competition Appeal Tribunal ("CAT") and elsewhere. QB HCJs spend a large part of their time in the Crown Court, the Divisional Court and in the Court of Appeal (Criminal Division). HCJs also undertake a much more restricted role as deputies in the Court of Appeal (civil division).
- 2.53. Most HCJs also undertake a variety of leadership roles. Up to 14 QB HCJs perform an important pastoral and operational leadership role as Presiding Judges, two in each circuit (but four in the South East), under the overall supervision of the Senior Presiding Judge (with, now, a deputy), but this role covers criminal work as well as civil. Between them the pairs of Presiders provide continuous cover in each circuit. Two Chancery HCJs perform the role of Chancery Supervising Judges, one for the North and North East, and one for the Midlands and West. This covers only half the term time in each of those two very large territories. The Chancellor performs the same role for the South East (including London). The Judge in Charge of the Commercial Court is also in charge of the Mercantile Courts, in London and regionally. There are also two Administrative Court Liaison Judges. The list of other leadership roles is almost endless, including membership of committees (e.g. the various rules committees), councils (e.g. the Civil Justice Council) and as Presidents of Chambers in the Tribunal Service. Their status and reputation makes them attractive targets for chairing all kinds of public enquiries, and they are at present being considered for a major new role in the supervision of the surveillance work of the security services.
- 2.54. I think it unnecessary to provide a detailed description of each of the specialist courts, lists and work streams within the High Court, at least in relation to the work carried on in London. This is because (as will appear from Chapter 5) informal consultation suggests that there is a high degree of satisfaction with both the quality of the specialist work, and with

the current structure by which it is divided up. I must however describe two areas where, nonetheless, structural change is at least worth considering. The first is in the Rolls Building.

- 2.55. Viewed from the outside, the Rolls Building has during its short existence already established for itself the highly regarded status as the world's largest business and property court centre, handling almost the whole spectrum of (mainly) complex and high value litigation within that broad class, both for English litigants and a large proportion of litigants from abroad. In sharp contrast with all regional centres, and now even the RCJ, it is a purely High Court operation.
- 2.56. Viewed from the inside, the Rolls Building structure appears to continue to consist of a miscellaneous collection of different courts, grouped under two separately led and administered Divisions. It is not a court structure which anyone would deliberately have designed, being rooted (and some would say steeped) in its historical origins. Thus the whole of the Chancery Division is now housed there. It includes the Companies Court, the Bankruptcy Court, the Patent Court and the IPEC, but they only undertake particular parts of the chancery workload, amounting in aggregate to much less than half. The rest of the chancery workload is in part general business and property work, and in part specialist streams of work (such as competition, probate, partnership, pensions and trusts), handled by all the Chancery Judges on a non-ticketed basis. Only part of the QB Division is based there, but it consists of the entirety of three specialist courts, namely the Admiralty and Commercial Court, the TCC and the London Mercantile Court. No general QB business is located there.
- 2.57. There are large differences in the practices of the two divisional structures within the Rolls Building, and in the practices of the individual courts. Whereas the use of Masters as a junior section of High Court judiciary (historically for case management rather than trial) is a common feature of the two civil Divisions viewed as a whole, it is the most obvious dividing feature of the practice of the two Divisions within the Rolls Building. The Chancery Division still uses Masters, and Registrars within the Companies and Bankruptcy Courts, now for both case management and trial, whereas the QB Rolls Building courts do not use them at all, case management being done entirely by their High Court and s.9 judges. The exception is the single Admiralty Registrar, left behind in the RCJ (because he doubles as a QB Master).
- 2.58. There are similar differences in judicial leadership. Each of the three QB Rolls Building courts has a Judge in Charge (although the Mercantile Court is, in effect, a single judge court), but no judge in overall charge below the President of the QBD (based in the RCJ, with other wide ranging responsibilities, primarily crime). By contrast the whole of the Chancery operation is led by the Chancellor as Head of Division from chambers in the Rolls Building, although the Patent Court has its judge in charge, derived probably from a time when it was in effect a single judge court, although it no longer is. Each of the teams of six Chancery Masters and five Registrars have a Chief (i.e. judge in charge), reporting to the Chancellor. The overall result is that there is no single judicial operational leader of the Rolls Building below the Lord Chief Justice. Since its workload is entirely civil, it might be thought that the leadership lay with the Master of the Rolls as Head of Civil Justice, but his leadership function lies more in policy than in operations, and he is also Head of Division for the Court of Appeal (civil).

- 2.59. The civil structure in the RCJ is, by contrast, much simpler. It houses the remainder of the QB Division operation, including the Administrative and Planning Courts, together with the rest of the QB workload, although as in Chancery there are specialist streams, such as defamation and clinical negligence. It uses a team of 9 Masters (again with its own Chief). It is headed, on site, by the PQBD, and each of the Administrative and Planning Courts have their own Judge in Charge, as does the defamation list and the general list (still known by the outdated distinction as jury and non-jury lists). The only slight departures from that uniform structure are that in the new Planning Court all case management is done by Judges rather than Masters, and the Administrative Court has its own specialist Master. I have already mentioned the Admiralty Master.
- 2.60. The aspect of this structure which might be worthy of consideration for structural change is whether there are further specialist work streams which might be considered suitable for recognition by setting up specialist courts, as was recently done in relation to planning. The two prime candidates may be clinical negligence and, more generally, personal injuries. For the purpose of general description, all that I need say at this stage is that these work streams currently form an important part of the general business of the QB Division.
- 2.61. I have hinted when describing the Rolls Building as the only purely High Court operation that this is no longer the case in the RCJ. This is because the Central London County Court ("CLCC") is now housed there. This is however only a case of living side by side, rather than cohabitation, because the CLCC is housed in a separate building (the Thomas More Building, former home of most of the Chancery Division) has a wholly separate back office, separate judges and staff. The RCJ of course also houses almost all of the Court of Appeal.

The High Court in the Regions

- 2.62. The biggest single feature which distinguishes the structure of the regional High Court from its London counterpart is its almost complete assimilation, wherever it operates actively, with the County Court hearing centres in the same cities. They use the same buildings, the same court rooms and back offices, much the same judges and the same staff. The other main distinguishing feature is that the overwhelming bulk of the regional High Court trial work is conducted by CJs sitting as S.9 deputies, rather than HCJs. The same CJs can, but by no means always do, perform the same trial function in the County Court. Similarly, the High Court case management, trial and other work carried out in London by Masters and Registrars is carried out in the regions by DJs, who perform the same functions in relation to the County Court work.
- 2.63. The result of this assimilation is that, internally, few people within those regional centres think in terms of the two courts as separate entities and, as will appear, most of them would favour their merger into a unified civil court. Viewed from outside however, the picture is by no means so clear. There is a real sense among the professions and businesses which use those centres for their civil litigation that, having an active branch of the High Court in their city, applying the principle that 'no case is too big to be tried here' is an important part of the underpinning of the rule of law there, and of the ability of those cities to compete on level terms with London.

- 2.64. I have already described specialisation as the characteristic which most clearly distinguishes the High Court from the County Court. This characteristic is most clearly displayed in those regional High Court centres which maintain, at CJ and DJ level, one or more of the specialist work streams which broadly replicate those undertaken in the Rolls Building in London, namely Chancery, Mercantile and TCC. Cardiff, Bristol, Birmingham, Manchester and Leeds conduct all three. Liverpool and Newcastle provide a Chancery service and a limited Mercantile and TCC operation. Neither of them have permanently resident Specialist CJs, but rely upon specialist CJ cover from Manchester and Leeds respectively. They do both have small teams of resident DJs with a chancery specialisation, but none of the DJs do chancery work for more than a maximum of about 40% of their time. Preston is also an active Chancery District Registry. The oversight of the Chancery work in all eight cities is assisted by annual visits by the Chancellor and (other than at Preston) by regular sitting periods, for one or two weeks each term, by the relevant Chancery Supervising Judge, who also provides leadership and liaison with London. Where required, heavy chancery trials are assigned to a visiting HCJ or retired HCJ from London. There is no similar pattern of assistance by HCJs for Mercantile or TCC work.
- 2.65. The core of this specialist service is therefore the resident specialist CJs, most of whom are Senior CJs. In none of those centres are there more than three CJs in a particular specialisation. Typically there is only one or two. Nonetheless the aggregate of the specialist civil CJs in each of Birmingham, Manchester and Leeds amounts to a combined team of between 4 and 6, and work-sharing arrangements between them of differing levels of formality mean that a viable nucleus of specialist judges is maintained at a level which provides continuous cover for urgent and interim applications, and avoids the excessive listing delays and inefficiencies which would inevitably attend a single judge court.
- 2.66. In the recent past the capacity for specialist work of the regional High Court centres at Birmingham, Cardiff, Leeds and Manchester has been significantly strengthened by judicial and back office resources for the handling, management and hearing of Administrative and Planning cases. The judicial firepower has been provided by ticketing already resident CJs and allotting relevant cases to HCJs visiting on circuit. Neither specialisation makes significant demands on the resident DJs, any more than it does on the QB Masters (other than the single Administrative Court Master) in London. This development has been widely welcomed, in particular where the underlying issue (such as a large planning appeal) is of particular interest to the local community.

The Court of Appeal

- 2.67. The Court of Appeal (civil division) is almost entirely London-based. A single constitution of three LJs occasionally sits for short periods in Cardiff but the court has no permanent presence or staff there. It used to sit occasionally in other regional centres, but this was stopped on grounds of expense. That decision is under review. In London it is entirely located in the RCJ, save that when the Chancellor (who is a full member of the Court like the

other Heads of Division) presides at the hearing of an appeal it takes place, like all his other hearings, in the Rolls Building.

- 2.68. The Court of Appeal takes incoming appellate work from all parts of the High Court, (both civil and family), from final orders in the County Court, from the Family Court and from tribunals, both within and separate from the unified Tribunals Structure.
- 2.69. It will be immediately apparent that although the Court of Appeal (civil division) is wholly within the remit of this review, only part of its workload comes from the civil courts (treating family and tribunal business as outside my remit). Furthermore the typical workload of each LJ will consist of an even smaller proportion of civil case-work. That is because first, many LJs spend a substantial part of their time sitting (usually presiding) in the CACD. Secondly, seven members of the court have pre-eminent leadership roles which substantially detract from the time which they can devote to cases in the Court of Appeal, both in terms of hearings and box work. They are the LCJ, the MR, the three Heads of Division, the Senior President of Tribunals and the Senior Presiding Judge. Several of them have LJs as deputies with similar but less serious constraints. There are from time to time one or more LJs fully engaged on important public enquiries or inquests. Thirdly all LJs carry out leadership or management roles of varying degrees of weight, some of which are international in nature, involving significant travel overseas.
- 2.70. A recent time and motion study carried out in the Court of Appeal suggests (although the figures are still being collated and audited) that, averaged out over the whole court, each LJ spends over 12 hours on leadership duties each week. If the six top leadership judges (for whom there are statistics) are removed from the analysis, the figure is still over 9 hours per week. The burden of this leadership work (in terms of time at least) has significantly increased over the last 15 years. It is of real importance and benefit to the justice system as a whole, but its adverse effect upon the capacity of the Court of Appeal to perform its primary task needs to be recognised.
- 2.71. While the capacity for case work of the LJs has thus been decreasing (both individually and as a group) the incoming workload has been increasing dramatically, by over 54% in the last 6 years. By 'incoming' I mean applications for permission to appeal, rather than full appeals, although some incoming appeals have already received permission from the lower court. Full appeals have risen slightly overall, with annual variations. Whereas the Court of Appeal has some limited control of the amount of full appeals (by giving or refusing permission), it has no control at all of the amount of incoming work.
- 2.72. There has in the meantime been no increase in the number of LJs, and a small decrease in the overall number of the court's staff. It is therefore not surprising that waiting times for all stages of appeals have greatly increased, and are likely to increase further for as long as the incoming work continues to outstrip the combined capacity of the LJs and deputies to deal with it. The current waiting times for non-expedited full appeals are between 11 and 19 months, depending on the stage at which permission is granted.

- 2.73. With a few exceptions, such as committal, appeals to the Court of Appeal require permission. There are three main stages. First, permission for a first appeal may be given by the judge who made the order in the court appealed from, but this is relatively unusual. Secondly, permission is sought from the Court of Appeal on paper (with one exceptional class). Thirdly there is a right to renew the permission application orally, usually, but not by right, to a different LJ. About 70% of those refused permission on paper seek an oral renewal. The exceptional class is permission applications in family cases by LIPs, which currently go straight to an oral hearing. There is an emerging fourth stage, increasingly resorted to by LIPs, which is to seek to re-open an oral refusal by an exceptional procedure known (after the case in which it was recognised) as a *Taylor v Lawrence* application: see now CPR 52.17.
- 2.74. In deciding whether to grant permission to appeal, three main filters are applied. The standard test is that the appellant must demonstrate a real prospect of success, or some other compelling reason for an appeal. Where permission is sought for a second appeal, the appellant must show, in addition to a real prospect of success, that the appeal raises an important point of principle or practice, but the 'compelling reason' alternative remains. The third filter is labelled "TWM" meaning Totally Without Merit. Where an appeal is so labelled (usually on the paper application) it may not be orally renewed.
- 2.75. The second appeals test is an effective way of reducing the pressure of full appeals in relation to the work streams to which it applies, mainly appeals from the Upper Tribunal and some from both the High Court and the County Court where the first appeal lies from a Master or District Judge to a CJ or HCJ, usually in relation to interim orders, including case management. But it is wholly ineffective in reducing the pressure of applications for permission to appeal, both on paper and by oral renewal. This is why the main impact of the increase of appellate work arriving at the Court of Appeal manifests itself at the permission to appeal stage.
- 2.76. The TWM filter ought to be an effective way of reducing the number of hopeless appeals which reach the more labour-intensive stage of oral renewal, but it is generally perceived to be under-used. Its language is felt to constitute a discourteous rebuke, understandable in its originally designed role of triggering a Civil Restraint Order, but unsuitable in the permission to appeal context. The result is that many truly hopeless appeals make it to the oral renewal stage.
- 2.77. The TWM appellation also itself generates a right to appeal to the Court of Appeal, when used to characterise a hopeless application in the High Court for Judicial Review, or a hopeless application for permission to appeal to the High Court or the Employment Appeal Tribunal ("EAT"). Thus a device designed to protect the Administrative Court, the High Court and the EAT from the burden of hearing hopeless applications in full actually generates more work for the Court of Appeal.
- 2.78. The Court of Appeal judiciary are not, outwardly at least, divided into specialist groups like the High Court judiciary. The Court of Appeal does not even replicate the High Court divisional structure, although all the LJs are at present selected from among the HCJs, and

chosen partly for their specialist expertise so as to maintain a very rough approximation in specialist experience to the incoming specialist work streams. A sufficient expertise in the subject matter of appeals from tribunals is maintained by reason of the fact that HCJs frequently sit in the appeal level of the tribunal system, both the Upper Tribunal as well as other separate appellate tribunals such as the Employment Appeal Tribunal (“EAT”) and the Competition Appeal Tribunal (“CAT”).

- 2.79. Internally the incoming work is divided into specialist streams for case handling by the court’s lawyers and for case management by supervising LJs with case management responsibility for each stream. This ensures that specialist appeals are heard by panels which (depending upon the complexity and importance of the case) include one or more LJs with the requisite expertise. The Court maintains a list, regularly updated, recording the expertise levels of each LJ in each work stream, graded for work of different levels, such as paper PTAs, oral renewals, giving lead judgments and being the only expert in that work stream in a panel. LJs are expected both to widen and deepen their range of specialist expertise while serving in the Court, and the capacity to do so is one of the competencies by reference to which they are selected by the Judicial Appointments Commission.

Boundaries

Civil/Family

- 2.80. Although of quite recent origin, the boundary between the civil courts and the family courts (including both the Family Court and the Family Division of the High Court) is well defined both in terms of the work undertaken and the court structure. Very little work straddles the boundary, in the sense that it can be litigated in both civil and family courts. The only significant types are claims under the Inheritance (Provision for Family and Dependents) Act 1975 and disputes about the beneficial ownership of co-owned homes under the Trusts of Land and Appointment of Trustees Act 2008. They may both be brought in the Chancery and Family Divisions of the High Court, and the County Court but not, by a legislative oversight, in the new Family Court.
- 2.81. A much more serious boundary issue between the civil and the family courts (below High Court level) is the competition between the two for the allocation of judicial time and court space. I shall have more to say about this in Chapter 5. It is sufficient to say that an annual allocation is currently made on a national, then circuit, then local level, but that recurrent emergencies in dealing with urgent family cases usually mean that the original civil allocation for a particular year is never fulfilled in practice, and not recouped thereafter.

Civil/Tribunals

- 2.82. There are two areas of inconveniently shared jurisdiction between the civil courts and the tribunals which call for attention. The first relates to the County Court and the First-tier Tribunal Property Chamber in relation to landlord and tenant disputes about forfeiture, service charges, leasehold enfranchisement and the right to buy. I mention these in more

detail in Chapter 3, as work in progress, because they are in the process of being addressed. They are an unusual example of claims entirely between private parties in (or partly in) the Tribunal Structure. The typical characteristic of a claim within the jurisdiction of the Tribunal Structure is that one party is an organ of government.

- 2.83. The second is the uncomfortable split of jurisdiction between the civil courts (mainly the County Court) and the Employment Tribunal (“ET”), in relation to common law and statutory claims by employees. The common law jurisdiction of the ET is capped at £25,000 (a limit set as long ago as 1994), whereas the County Court has no statutory jurisdiction to compensate for unfair dismissal, although an unlimited common law jurisdiction. Anecdotal evidence suggests that the recent court fee rises in the ET (well above the relevant rate in the County Court) have driven employees into pursuing common law claims, such as termination and holiday pay, in the County Court, even when well below the capped limit.
- 2.84. The ET and EAT are not themselves part of the main Tribunal Structure, and are sponsored by the Department for Business, Innovation and Skills (“BIS”). Nor are they part of the civil court structure. There are a number of competing proposals about the future of these tribunals which I will describe in Chapter 3. One of them, which falls within my terms of reference, is to align the ET and the EAT more closely with the civil courts.
- 2.85. Unexpected transfers of work between tribunals and civil courts give rise to the need to be able also to transfer judges as well, both to avoid under-use of one group, from whose jurisdiction the work has fled, and excess pressure on the resources of the other. Former difficulties in this respect have been largely alleviated by the Crime and Courts Act 2013. Consideration is being given to further steps in this regard, but they are on the fringe of my terms of reference.

Civil/ADR

- 2.86. The relationship between the civil courts and the providers of ADR has undergone fundamental development during the last thirty years but, save in certain respects (described below), it has now reached a relatively steady state. I would describe it as “semi-detached”. The civil courts do a reasonable amount to encourage parties to settle their disputes by an appropriate form of ADR, but do not as yet act as primary providers of it, save in certain modest respects. Thus most judges will, at the case management stage, provide a short stay of proceedings to give the parties space to engage in ADR. The courts penalise with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years, to make any form of ADR compulsory.
- 2.87. This is, in many ways, both understandable and as it should be. First, the civil courts exist primarily, and fundamentally, to provide a justice service rather than merely a dispute resolution service. As I have said, the fact that the civil courts will provide and enforce a just outcome to civil disputes within a reasonable time is a fundamental foundation for the effectiveness and approximation to justice of the dispute resolution services available from

ADR providers, for the reasons given earlier in this chapter.

- 2.88. Secondly, the courts are seized of a dispute only when proceedings are issued. By contrast, the modern emphasis is upon pre-issue ADR. Nonetheless the courts have done what they can to assist by the vigorous promotion of pre-action protocols, the main purpose of which is to encourage the parties to exchange information without which, in practice, pre-issue ADR usually stands a much-reduced prospect of success. Recent court fee increases may in some areas be having the same effect, but the evidence is not yet clear.
- 2.89. From time to time the court service has endeavoured to provide some facilitation of ADR but, as yet, without lasting success. There was a time when some County Courts offered free space after court hours for short mediations. Later, some government funding was made available to assist in the administration of a mediation service called the National Mediation Helpline, but both the administration itself and all the mediators were private entities.
- 2.90. The Small Claims Mediation Service was launched, originally as a pilot scheme, and fully established in 2014. It is managed from the Bulk Centre in Northampton, as described above. This is at present the only mediation offering routinely provided by the civil courts. It is yet to become fully effective since it has insufficient mediators to meet even half of the relevant demand, and I am advised that there is no budgeted resource to expand it.
- 2.91. ADR in the form of judicial early neutral evaluation is offered on an infrequent ad hoc basis by various courts, including the TCC and the Chancery Division. Further, the District Judges who undertake both Family and Chancery case management outside London have successfully introduced a measure of early neutral evaluation into Chancery litigation about family property (such as TOLATA and Inheritance Act claims) by cross-application of their experience in conducting financial dispute resolution hearings in family cases. It is worth noting that all these examples of early neutral evaluation are undertaken by judges of the same or similar seniority to those who would try the relevant cases if not settled earlier.
- 2.92. A very large number of disputes about civil rights are resolved by a range of ombudsman services. The Financial Ombudsman Service alone resolved some 310,000 complaints last year relating to the insurance, banking and investment industries, and describes itself as the world's largest ADR provider, with a staff of 4,000, including 300 ombudsmen and 2,000 adjudicators.
- 2.93. Save when occasionally ruling upon the legality of the processes of various ombudsmen, by way of judicial review, the civil courts have no formal link with ombudsmen services. But they remain, for the reasons already given, a vital last resort and upholder of the rule of law, without which those services would be deprived of at least part of their effectiveness.

3. Work in Progress

3.1. I have in Chapter 2 sought to set out a snapshot, as it were, of the structure of the civil courts as at the end of 2015. But a snapshot will inevitably present a misleading picture of settled immobility if it does not include a description of the large miscellany of existing projects designed to change the current structure. Some of them have been approved, enacted and implemented, but their effects have yet to be fully established. At the other end of the range lie proposals, official and unofficial, which have yet to be considered by any persons or organisations with power to direct change, but they come from sources which deserve attention. I will fail to refer to all of them, partly because my work to date has failed to bring them all to my attention and partly because they do not all impinge to a significant extent upon the structural issues which are the subject matter of this review. The largest and most important of them is the HMCTS Reform Programme, but this deserves a later chapter of its own.

Costs

- 3.2. The magisterial final report by Jackson LJ into civil litigation costs was delivered in December 2009. It sought to put right the major problem that “in some areas of civil litigation costs are disproportionate and impede access to justice”. Jackson LJ proposed what he described as a “coherent package of interlocking reforms”, most but not all of which have since been implemented. The central proposals (which were implemented) included the almost complete removal of ATE premiums and success fees as elements of costs recoverable from an unsuccessful defendant, the banning of referral fees, and success fees in excess of 25% of general damages, together with qualified one-way costs shifting (“QOCS”) in personal injuries litigation and a 10% uplift in damages to assist in funding claimants’ costs. He also recommended a fixed costs regime in the fast track, with a view to it being extended to parts of the multi-track. He also made far-reaching proposals for costs budgeting and discretionary costs management, applicable across the whole range of civil litigation.
- 3.3. It is no criticism of what are generally called the Jackson Reforms that they were, and their implementation has been, primarily directed to curing very serious abuses and disproportionality in the cost of conducting personal injuries litigation.
- 3.4. Certain recommendations made by Jackson LJ have not been implemented. In particular, fixed costs have yet to be applied to parts of the fast track or considered for application above the fast track, although there is now a proposal from the Department of Health that a fixed costs regime should be implemented for all clinical negligence cases where the claim does not exceed £250,000. There is growing pressure for an upwards extension of a fixed costs regime across the whole of civil litigation. It is important to my analysis because, although costs reforms are not part of my terms of reference, their availability as an adjunct or an alternative to structural change is material when considering how to address the formidable barriers to access to civil justice still represented by the costs likely to be both incurred and risked by the average litigant.

- 3.5. The Jackson Reforms are properly to be regarded as still containing an element of work in progress for another important reason. The introduction of mandatory costs management, to be conducted side-by-side with case management, has given rise to a substantial increase in the workload of case management judges which, because of the relative novelty of this process to both judges and practitioners, may fairly be regarded as having yet to settle down. The effect on workload is not the subject of detailed or reliable statistical evidence, but anecdotal evidence suggests that, although not uniform, the increase in workload attributable to costs management is causing a significant extension of waiting times for CCMCs (Costs and Case Management Conferences), to such an extent that, in the Queen's Bench Division, the Masters have had to declare a temporary moratorium on costs management of clinical negligence cases to allow their lists to recover. Elsewhere, increased waiting times have produced the unfortunate result that, by the time a costs budget comes to be adjudicated upon at a CCMC, it may already be out of date because of the cost of legal time expended on the case during the waiting period.
- 3.6. Costs management remains under continuing review by the CPRC. Changes recently approved include making costs management discretionary (rather than mandatory) in cases about an urgent health issue such as mesothelioma and cases involving children, a simplified procedure for claims under £50,000 and guidelines encouraging the parties and judges to take a broader brush view than hitherto when agreeing or fixing budgets.
- 3.7. Costs management continues to operate as a mainly mandatory regime between a floor of £25,000 and a ceiling of £10 million. Otherwise it lies in the discretion of the case management judge. It has also been made discretionary in the new Rolls Building faster and flexible trial pilots, even for cases within the otherwise mandatory bracket.
- 3.8. It is worth bearing in mind that Jackson LJ recommended that all costs management should be discretionary. The decision to make it compulsory within the wide bracket identified above represented a significant departure from his preferred scheme. The controversy generated by that departure has not entirely died down.
- 3.9. It was hoped that a major benefit of up-front mandatory costs management was that it would greatly reduce the need for detailed assessment of costs after the event. This is necessarily still work in progress because the inevitable delay between the CCMC and the detailed assessment of trial costs means that the anticipated benefits have yet to work their way through the pipeline. Even when they do, anecdotal evidence suggests that a decrease in the burden of detailed assessment may be attenuated to some extent by a new satellite form of litigation, namely seeking additional costs beyond budget.

Court Fees

- 3.10. Save for the cost of paying its judges, the running costs of the civil courts have been, broadly, met by court fees, if measured over a period of years. Traditionally, the policy underlying the quantification of fees was that the fee should be broadly commensurate with the cost to the State of providing the relevant service for which the fee was payable.

- 3.11. From April 2014 very substantial fee increases leviable at most stages in civil litigation were implemented, both in the civil courts generally and in the Employment Tribunal (“ET”) in particular, where issue was previously free of charge. This led to a 75% fall in the workload of the ET. A challenge to the lawfulness of the increases in the ET failed because the claimant trade union had not demonstrated that would-be claimants were unable rather than unwilling to pay the fees, but the causative link between the increases and the sharp reduction in claims was acknowledged.
- 3.12. The effect of the fee increases upon the workload of the civil courts is much less clear. There was, as anticipated, a spike in cases issued before April 2014, and a fall thereafter. The extent to which the issue rate has since recovered differs over the range of different work types and courts. It needs further analysis.
- 3.13. A further substantial round of court fee increases has just been decided upon, after consultation. The combined effect of the existing fee increases and those about to be implemented is regarded by many consultees as capable of discouraging access to civil justice. It is even seen by some consultees as placing the Commercial Court at a competitive disadvantage with similar courts abroad, including New York in particular, where court fees which were once broadly comparable are now very much lower than in London. The recent decision not for the moment to raise the cap on issue fees charged as a percentage of the amount claimed (currently set at £10,000) ought to have given some comfort in that regard.
- 3.14. The underlying policy behind the recent and proposed fee increases appears to include first, the subsidisation of the later and more expensive stages of civil litigation by increases in issue fees. Since only a small proportion of claims issued reach those later stages, this operates in practice as a subsidy for the few by the many.
- 3.15. Secondly, the policy includes an element of cross-subsidy of other aspects of litigation (family and crime in particular) by civil court fees, whereby civil litigants are subsidising the cost of the provision by the State of a service to an altogether different class of court users.
- 3.16. Differential court fees are also used as a means of encouraging particular procedural conduct by court users. Thus for example, the fee levels for the making of money claims online are lower than for making them in the traditional paper format.
- 3.17. The levels of court fees are not part of my terms of reference, but securing access to justice certainly is. The fact that civil court fees have recently risen substantially and will soon do so again is therefore an important part of the background to the options for structural change with which this report is concerned.
- 3.18. The burden of court fees for the least well-off is alleviated to some extent by what used to be called fee remission, although its extent was reduced in 2013. The paper form by which this is claimed has been very recently thoroughly re-drafted, with a view to reducing the large number of fee remission forms which had to be returned, having been incorrectly filled in. HMCTS had the good sense to engage the voluntary assistance of the Personal Support Unit

in carrying out that re-draft, the result of which was to produce a wholly new and more user-friendly form, now called "Help with Fees". It has only been in place for about two months, and the extent of its contribution to improved efficiency has yet to be statistically measured. Subject to that, it stands as a shining example of a new approach to drafting procedural material in a language really (rather than theoretically) capable of being understood by court users without the assistance of lawyers, to which I will return frequently in this report.

Re-Distribution of Workload

- 3.19. There are a number of new and pending initiatives designed to redistribute or reallocate parts of the civil workload so as to improve the service offered to court users and relieve pressure points. I have already mentioned the recently formed Planning Court. To that may be added three developments in the Rolls Building.
- 3.20. The first is the Financial List. This is a joint venture formed out of the cohabitation of the Chancery Division and the Commercial Court in the Rolls Building, designed as a specialist list for which a small team of Chancery and Commercial HCJs are ticketed, and designed to facilitate the efficient and expeditious hearing of very high value and complex cases about financial markets, structures, transactions and instruments. The ticketed judges are chosen for their experience in these fields, and offered focussed training. Cases are to be transferred to the Financial List from the Chancery Division and Commercial Court, case-managed and tried by the same (ticketed) judges (i.e. docketed) and the List is to accommodate a "Financial Markets Test Case Scheme" to facilitate the resolution of market issues governed by English law without the necessity of a specific prior dispute. The Financial List commenced operation in October 2015.
- 3.21. At the same time, all the Rolls Building courts (except IPEC, which already enjoys the relevant characteristics) announced the setting up of a Shorter Trials Scheme, designed to secure the expeditious docketed management and trial of cases estimated to last no more than four days (including pre-reading), with limited pleadings, disclosure and cross-examination, and trial within eight months of the CMC.
- 3.22. A parallel scheme, called the Flexible Trials Scheme, launched at the same time, enables the parties by agreement to adapt trial procedures to suit their particular case, but provides a default format which also limits disclosure, cross-examination, oral submissions and expert evidence. Both schemes are being piloted for two years from October 2015: see generally CPR PD 51N.
- 3.23. There is another fast track scheme being considered, for trials of bankruptcy and insolvency matters before the Registrars. This reflects the fact that, consistent with a trend recognised and encouraged in the Chancery Modernisation Review, the Registrars are conducting an increasing proportion of the trial work of the Bankruptcy and Companies Courts, with three out of five of the Registrars hearing trials in most weeks. This is taking place alongside a complete re-writing of the Insolvency Rules, which govern bankruptcy and insolvency proceedings, largely (but not entirely) in substitution for the CPR. These rules contain what

to the untrained eye appears to be a curious mixture of substantive law and procedure, ranging from the substantive law as to insolvency set-off at one end to the detailed procedures for proof of debts and approval of expenses at the other.

- 3.24. Within the County Court there are regional initiatives being put in place to try and improve the capacity for civil work notwithstanding the constant pressure of family cases upon judicial time and court space. For example, a group of North London County Court hearing centres have sought to separate out between them civil and family work so that two of them concentrate on civil, and the other on family. In the South East, there is a listing practice which may loosely be headed “civil fortnights” whereby a multiple civil list is arranged for a particular location every six months, for which a small group of CJs are rostered for hearing, thereby creating a sufficient concentration of judges to handle a list efficiently and take advantages of the inevitable court door settlements by double or even treble listing. In that way a tranche of multi-track cases can be disposed of during those fortnights much more efficiently than if listed before single CJs in separate courts throughout the year. A similar scheme to concentrate DJs in a single court for the hearing of a large list of fast track cases is in operation in Sussex.
- 3.25. On the boundary between the County Court and the High Court, some work is taking place with a view to facilitating the transfer down of High Court work in London to the CLCC. This includes both Chancery and Queen’s Bench work, and one purpose of the study is to identify means of freeing up High Court Judges to undertake some of the burden of the Court of Appeal. The study is concerned both with creating sufficient capacity within the CLCC at Circuit Judge level to take that work, and identifying procedural impediments to its being transferred down.
- 3.26. Earlier this year the Master of the Rolls instituted a judicial consultation upon financial thresholds separating the High Court from the County Court, specifically the lower threshold for claims in the High Court, the financial threshold for probate claims in the County Court and the financial limit upon the County Court’s equity jurisdiction. Following significant judicial opposition to the raising of those thresholds, the question whether to do so has been incorporated within my terms of reference. I shall refer to it again in Chapter 8.
- 3.27. Finally under this heading, a long-prepared pilot scheme for allocating routine work currently undertaken by DJs to Legal Advisers commenced operation in the Salford Business Centre in October 2015. The purpose of the pilot was to ascertain whether suitably-trained and supervised Case Officers could undertake (at much lower cost) certain routine parts of the current workload of DJs, thereby achieving both significant cost savings and an improvement in the quality of the DJs’ workload by the removal of some routine box work.
- 3.28. The pilot was long in preparation because of an extended disagreement between MoJ policy officials and the Civil Procedure Rules Committee (“CPRC”) about the identity of the types of work currently being done by judges which could properly be assigned to Case Officers. In the event, the list of items permitted by the CPRC was substantially narrower than originally sought by MoJ with the result that the pilot has proved to be a rather smaller scale project than originally envisaged.

3.29. Nonetheless, once approved, the scheme was implemented by training a small group of former Magistrates' Court Legal Advisers, with no prior experience of civil (as opposed to family or criminal) work, for deployment on a rota basis at the Salford Centre in the same office space as is used by the small team of DDJs who currently undertake the judicial workload flowing from the undefended claims issued at that centre. It is planned that, shortly, this workload will be augmented by judicial work flowing from the Northampton Bulk Centre. The limited types of work to which it is applied are set out in the Schedule to CPR PD 51K. Early indications (including my own observation during a visit to the Salford Centre on 6 November 2015), suggest that the model whereby suitably qualified Case Officers carry out tasks under close judicial supervision works well.

Routes of Appeal

- 3.30. I must mention three proposed changes to current routes of appeal. The first two would both, if implemented, help relieve the current pressure upon the workload of the Court of Appeal, although only one of them was designed with that objective in mind. That is a proposal that appeals from decisions by CJs about private law matters in the Family Court should in future lie to the HCJs of the Family Division. Early indications from the Court of Appeal's time and motion study suggest that these might amount to about 6% of the overall workload of the Court of Appeal, including a slightly higher percentage of the workload represented by oral applications for permission to appeal. By "private law" I mean cases about children and property arising in the context of divorce.
- 3.31. The second proposal is that appeals against all orders of the County Court should henceforth lie to a single HCJ. This proposal was not designed to relieve pressure on the Court of Appeal. Rather, it was designed to resolve an occasionally impenetrable uncertainty as to whether a County Court order was interim or final. If interim the route of appeal already lay to the High Court. If final, it lay to the Court of Appeal.
- 3.32. Nonetheless, the proposal, if implemented, would in theory relieve the Court of Appeal from an estimated 9% of its current workload. But the proposal contemplates a form of leapfrog from the County Court direct to the Court of Appeal where a case involves a point of general importance, and there would be a similar second appeal route from the High Court to the Court of Appeal. Both of those routes would tend to reduce the percentage saving of the Court of Appeal's workload to which I have referred.
- 3.33. These two proposals are likely to be implemented by the necessary rule changes during 2016, subject to the release of sufficient High Court Judge time by transfer to other judges of a sufficient proportion of their current workload. Once implemented they should reduce the final appeal workload of the Court of Appeal by confining it to second appeals in relation to those two types of case, with a consequentially higher threshold for the obtaining of permission. But this will not be likely significantly to reduce the work needed for permission applications, because these are almost as burdensome for second appeals as they are for first appeals. Many of the appellants in relation to private law family matters are now LIPs,

who will be unlikely to be deterred from seeking permission for second appeals after losing an appeal in the High Court by the receipt of realistic advice about the merits, in particular when (as in most cases) the appeal is about their children.

- 3.34. More generally, there is already in progress an internal review of the Court of Appeal's procedures, due to be considered by the whole court in March 2016, designed to address the delays caused by the increasing pressure of its workload. I describe this in more detail in Chapter 9.
- 3.35. The third proposed change to the current routes of appeal concerns appeals in bankruptcy and insolvency matters from DJs sitting in the County Court. Currently, such appeals go from the DJs to the High Court Judge. The proposal is that such appeals in London should in future go to the Registrars, because of their specialist expertise in such matters, and because it would reduce pressure on the HCJs and enable them to relieve the burden on the Court of Appeal by taking more appellate work. In the regions the appeals would go to the nearest specialist Chancery SCJ. This sensible proposal has yet to be approved as a matter of policy. It faces the theoretical difficulty that, at present, the Registrars have the same pay-grade and (arguably) status as a DJ so that, notwithstanding their undoubted specialist expertise, they lack that level of seniority which normally separates a judge from whom, and to whom, an appeal is directed by current routes of appeal. They do however sit in the High Court, rather than the County Court from which the appeals would come, and well deserve their growing collective reputation as a national centre of excellence in company, insolvency and bankruptcy work.

The Court Estate

- 3.36. I have already referred to the programme of court closures currently subject to consultation. The underlying policy, so far as it affects the civil courts, is to concentrate the County Court hearing centres in a smaller number of larger centres, thereby taking advantage of perceived economies of scale. Contrary to what some commentators have suggested, it was not originally conceived as a plan to sell courts to raise money to buy computers, although disposals of closed courts will both raise money and reduce running costs. The implications for the court estate of the wholesale digitisation of court processes contemplated in the Reform Programme lie in the future.
- 3.37. At the same time, some attempt is being made to analyse and, if possible, improve the level of utilisation of the courtrooms in the larger centres and in the Civil Justice Centre at Manchester in particular. There is a perception, currently being tested, that substantially more intensive use of those centres could be made, as one means of absorbing incoming work from smaller courts nearby which are proposed to be closed.

Litigants in Person

- 3.38. A series of recent reports have focussed upon the need to make better provision for the

assistance of litigants in person in both the civil and other courts, in view of the substantial increase in their numbers attributable mainly to the large-scale withdrawal of Legal Aid from both civil and family court users. Those reports include the November 2011 Report of the Civil Justice Council “Access to Justice for Litigants in Person”, the report of the Judicial Working Group on Litigants in Person led by Hickinbottom J, published in mid-2013, Chapter 9 of my final report for the Chancery Modernisation Review, published in December 2013, and the report by JUSTICE on “Delivering Justice in an Age of Austerity”, published in 2015. I shall have much more to say about the issues raised by these reports in due course. For present purposes I shall merely summarise the steps currently being taken to assist litigants in person in the civil courts, partly in response to them.

- 3.39. First, there is an ever-increasing number of publications, mainly of them online, prepared by LIP-facing advice agencies, giving intelligible advice and practical guidance to individuals bringing or defending court proceedings without the assistance of lawyers. Some attempt to coordinate this valuable work, and thereby to avoid unnecessary and expensive duplication, is made by the holding of an annual National Forum organised by the Civil Justice Council (“CJC”), the fourth of which has just taken place. These events bring together the advice agencies, judiciary, HMCTS, MoJ and even Ministers.
- 3.40. Secondly, the Litigant in Person Support Strategy (LIPSS) is led by Law for Life, LawWorks, the Personal Support Unit (PSU) and RCJ Advice (with support from the Bar Pro Bono Unit and the Access to Justice Foundation). It involves the pro bono advice sector more widely, as well as others including HMCTS and the judiciary. The Support Strategy’s objective is: (i) to create arrangements across England and Wales to enable LIPs to know what support is available to them; (ii) to enable LIPs to get practical support and information; and (iii) to provide them with a route to some free or affordable legal advice.
- 3.41. The four leading organisations have been funded by the MoJ to develop specific services to deliver the three part objective above. For example, in relation to enabling LIPs to know what support is available to them, a central website has been created for LIPs (www.advicenow.org.uk/going-to-court) and a campaign raising awareness of help available for LIPs is shortly to be launched. So far as enabling LIPs to get practical support and information is concerned, there are amongst other things e-learning modules, new PSU centres providing emotional support for LIPs in courts and online support with court forms. In providing LIPs with a route to some free or affordable legal advice, there are, for example, new LawWorks Clinics providing free legal advice, the establishment of duty schemes and the encouragement of ‘unbundled’ legal services where the LIP can afford some legal help (e.g. some advice, or some representation at a key hearing) but not a traditional full legal service.
- 3.42. Thirdly, there is a continuing and in certain areas rapid expansion of pro-bono advocacy for LIPs. Of particular note among recent developments are the pro-bono advocacy schemes established in the Chancery applications court (“CLIPS”) and its Queen Bench equivalent, and in some County Court hearing centres for defendants to residential possession claims. Steps are now being taken to see whether these schemes can be replicated in the Court of Appeal.

- 3.43. Fourthly, the MR has appointed Asplin J to supervise improved co-ordination at judicial level of efforts to assist litigants in person, and she has established LIP liaison judges in a large number of civil and family court centres around England and Wales. She is also working with the Judicial College and with the CJC to provide further LIP training for judges.
- 3.44. Fifthly, a start has been made in using the advice and assistance of LIP support agencies in the drafting of forms and court guides for LIPs. I have already referred to the new 'Help with Fees' form. Another example is the Litigants in Person Guide to the Chancery Applications Court, which received invaluable drafting assistance from Law for Life.
- 3.45. Finally, the CPRC has introduced, at Part 3.1A, a new rule laying down general case management principles applicable where at least one party to proceedings is unrepresented. That new rule reinforces the pre-existing assumption that LIPs are as much subject to the CPR as any other litigant, but encourages both the parties and the court to adapt standard case management directions as appropriate to the circumstances of unrepresented parties. There is also further work being done by the CPRC to review standard form directions templates to make them more intelligible by LIPs.

IT

- 3.46. The radical digitisation of the processes of the civil courts are of course a central theme in this review. If implemented successfully, they will completely transform the courts' working practices, and open up possibilities for modernisation, efficiency and improved service beyond anything currently available or possible.
- 3.47. Both Lord Woolf and Jackson LJ (with my full agreement in the Chancery Modernisation Review) have emphasised that full and effective modernisation and reform of practice and procedure is simply unachievable without the design, provision, installation and satisfactory proving of up to date and efficient IT. In paragraph 1.62 of CMR final report, I lamented that, four years after the publication of Jackson LJ's final report, there had still been no significant progress with IT, at least in the Chancery Division.
- 3.48. Some progress is, at last, now being made, even in advance of the planning, implementation and funding of the HMCTS Reform Programme. Since it will all have been thoroughly overtaken by the digitisation which is currently being planned, I need describe the progress to date only in outline.
- 3.49. First, all the Rolls Building courts now have access to an electronic filing and diary system called CE files, to which limited public access is also being provided in booths in the reception area of the Rolls Building itself. As an adjunct to that, there is now in place a pilot scheme for the issue of proceedings by email for the Rolls Building courts.
- 3.50. Secondly, some regional civil hearing centres have now instituted a similar electronic diary and filing system called F Diary. There is however no public access to the court files on this system.

- 3.51. Thirdly, a new cloud-based system for document storage and management, email and online working has been designed for the judiciary, and is in the process of being rolled out: (“e-Judiciary”). This greatly improves the ability of judges to work and communicate away from their offices and base courts. Teething problems in enabling the migration of material from the DOM1 system previously used by judges and planned to be in continued use by court staff have arisen, and are being addressed.
- 3.52. None of these new systems, even once fully tested, proved and in operation will of themselves enable paperless trials to take place, although they should be of considerable assistance to judges conducting case management by reference to the relevant (but limited) court file. There are software systems now available for paperless trials, which are from time to time used in the Rolls Building by litigants with the resources to afford and deploy them. The Crown Court is well ahead of the civil courts in this respect. All that needs to be said for present purposes is that, subject to provision of the requisite training, and overcoming long-standing preferences for paper, there is no technical reason why civil trials cannot be conducted on a paperless basis, once the funding and IT infrastructure is made available for that purpose during the implementation of the Reform Programme.

Enforcement of Judgments and Orders

- 3.53. Enforcement is currently carried out on a very de-centralised basis. That is, each County Court hearing centre has its own judges, staff and bailiff service dealing with enforcement of judgments. There are now approved projects for centralising the processes for the obtaining of charging orders and attachment of earnings orders which will come into force in April 2016, based at the Salford Business Centre, before this review is concluded.
- 3.54. This will build on the efficiencies already achieved in the Northampton and Salford Business Centres, where some (but not these) forms of enforcement can already be applied for where a claim leads to judgment there, without the case having to be sent to a local hearing centre.
- 3.55. As will appear from Chapter 10, I hope that this early measure of centralisation, even though still paper based, will pave the way for a much more thoroughgoing unification of enforcement processes, once the efficiencies from digitisation and automation during the Reform Programme become available.
- 3.56. There is also an ongoing HMCTS review of the County Court Bailiff service, of the details of which I have yet to become fully appraised.

Boundaries

- 3.57. I mentioned in Chapter 2 that there were proposals on foot which might affect the boundary between tribunals and the civil courts. The first concerns the residential property work shared by the Property Chamber of the First tier Tribunal and the County Court. The workload of the Property Chamber is not limited to this work. It includes Land Registry adjudication and

agricultural work as well, but the residential property work generates the largest number of its cases.

- 3.58. There are at present areas of shared jurisdiction, but also areas of exclusive jurisdiction where different aspects of the same dispute have to be litigated in the Property Tribunal and the County Court. The areas of exclusive jurisdiction cause the main practical problems. For example, a single dispute about a long leasehold relationship may commonly involve service charges and ground rent. The Property Chamber has exclusive jurisdiction about service charges, but no jurisdiction about ground rents. A forfeiture claim may raise issues about breach, on which the Property Chamber can adjudicate, and waiver, upon which the County Court has exclusive jurisdiction. I need not provide a complete list.
- 3.59. The Civil Justice Council set up a working party to consider these difficulties and related property dispute matters in May 2015, to report in April 2016. Its brief includes the question whether certain disputes about disrepair might best be resolved in an expert tribunal as well.
- 3.60. More recently the President of the Property Chamber has proposed a package of solutions, including the ability for some Property Tribunal judges to sit at the same time as County Court judges, and vice versa, and permitting suitable cases to be transferred between County Court and Property Tribunal (each way) so that cases can be fully determined in the forum best suited to the centre of gravity of the dispute. This package is being piloted at present.
- 3.61. The other boundary area lies between the civil courts, the Employment Tribunal (“ET”) and the Employment Appeal Tribunal (“EAT”). There are again, within the employment and discrimination fields of work, awkward areas of shared and exclusive jurisdiction, about which I will have more to say in Chapter 11. At present there are three sets of remedial proposals.
- 3.62. The earliest in time, from the President of the EAT in March 2014, suggests that the EAT be given an original (i.e. first instance) jurisdiction to hear the heavier cases for which the ET currently has the only first instance jurisdiction. The second, from the President of the ET in May 2015 (and supported by the President of the EAT), is for the creation as a civil court of a new “Employment and Equalities Court” with a broad non-exclusive but uncapped jurisdiction over employment and discrimination cases (to include discrimination in goods and services), as a specialist court capable of taking cases currently undertaken by the County Court and the ET. The third, from the Law Society in September 2015, entitled “Making Employment Tribunals Work for All”, proposes a radically restructured ET, with four internal elements suited to different types of case, ranging from paper determination, investigative adjudication, ADR and traditional adversarial litigation, all with a single point of entry with gatekeeping to one of the four elements.
- 3.63. I do not need to consider these proposals in detail. The ET and the EAT are not, currently constituted as tribunals, within my terms of reference. But I do address, in Chapter 11, the underlying issue whether the future of these tribunals lies in converging with the civil courts or becoming part of the main tribunal structure, if they are not to continue their rather lonely existence in between.

4. The HMCTS Reform Programme

Introduction

- 4.1. I have provided a brief overview of the Reform Programme, and set out the principles by reference to which it is being conducted, in Chapter 1. It is necessary now to say a little more about the process by which it is being carried out, and to describe some of the themes which are emerging under each of its three main headings: IT, Court Estate and Case Officers.

Process

- 4.2. A singular feature of the Reform Programme is that it is being conducted by HMCTS and not by the Ministry of Justice. It is a programme in which the Lord Chancellor and the Lord Chief Justice are acting jointly and share ultimate control over HMCTS.
- 4.3. In order to supplement the role of the Senior Presiding Judge and his Deputy in the day-to-day development of the Reform Programme, judicial involvement or “engagement” with the process has been facilitated by the setting up of a Judicial Steering Group, and by separate Judicial Engagement Groups (“JEGs”) for each of Civil, Family and Tribunals. I have already described the valuable assistance provided to this review by the members of the Civil JEG.
- 4.4. Thus far, the design work within the Reform Programme has been carried out in two stages, called Sprint 1 and Sprint 2. Sprint 1 ran from March until the end of July 2015. Sprint 2 is ongoing at the time of writing this report, and expected to complete by the end of 2015. Sprint 1 was necessarily conducted at a very high (almost blue sky) level of generality. There is however emerging from Sprint 2 much more detail about each element of the Programme. Both stages have been conducted with a view to enabling and validating a business case for the Reform Programme as a whole, within an overall five-year time-frame from commencement in March 2015 until the achievement of a steady state within a reformed court structure.
- 4.5. The HMCTS design team consulted with the Civil JEG twice during Sprint 1 and will have consulted three more times by the end of Sprint 2. In addition, small groups (usually consisting of one member of the design team and one judge) have worked together on specific items, producing papers for the next meeting of the Civil JEG. Court visits by the members of the design team are also planned so as to give them further first-hand understanding of relevant aspects of the workings of the civil courts.
- 4.6. It is anticipated that, during the first half of 2016, an outline design emerging from Sprint 2 will be worked up so as to identify the aspects requiring primary legislation, to a level of detail sufficient to enable that legislation to be drafted, and necessary consultation upon it to take place.

- 4.7. The Chancellor's Spending review, presented to Parliament on 25 November 2015 announced over £700m of funding for the reform of the courts. This responded fully to the HMCTS business case for the Reform Programme, and provides at least an initial level of confidence that the Reform Programme will be fully funded, notwithstanding continuing constraints on public spending.
- 4.8. There is not yet a detailed plan as to the dates upon which, or even the order in which, different parts of the Programme are to be rolled out. Nonetheless it is reasonably well-settled that there will not be a single implementation date, but rather the roll-out of separate elements of the Programme by a process which will include testing and trialling before full implementation.
- 4.9. It is also well-settled that, in relation to the civil courts, the Programme will not include a radical replacement of the CPR across the board, to co-incide with the introduction of paperless working, because that is regarded as too difficult and time-consuming as an element within the Programme. Nonetheless, there is a readiness to contemplate separate procedure rules for the Online Court, as I shall later describe in detail.

IT

- 4.10. As is reflected in the second of the Reform principles (see paragraph 1.8) the ambition of HMCTS is to digitise the whole of the processes of the courts, including the civil courts, within four years from now, subject to funding and technical constraints. That can be (and is intended to be) achieved in two broad ways. The first, less ambitious, way is simply to replicate in digital form the current processes of the courts, so that the digital process is as near an approximation to the current paper or other physical process as can be achieved, thereby minimising changes in practice and procedure, including procedure rules. Thus for example, where an order of the court currently exists primarily in a physical form, as an original and one or more sealed paper copies, it will in future exist primarily as an electronic document, but be capable of being copied onto paper where necessary, for example where it has to be served on a person without facilities for receiving electronic documents.
- 4.11. The second, more ambitious, method is to make use of IT for new or different processes and procedures which are not capable of being carried out on paper. Thus for example, modern IT would enable court users to issue a claim without the assistance of lawyers by accessing online software, pre-designed to elicit the relevant information, evidence and documents necessary to enable the court to determine the claim, by an interactive process of question and answer, where each new question or set of questions is responsive to answers input by the user. This is the sort of IT contemplated for use in Tier One of the HM Online Court ("HMOC") model described in the report to the Civil Justice Council and to the Master of the Rolls entitled "Online Dispute Resolution for Low Value Civil Claims" by the Online Dispute Resolution Advisory Group in February 2015. I will refer to it as "the ODR Report". The same tiered structure was also adopted in the report by JUSTICE later in 2015 entitled "Delivering Justice in an Age of Austerity ("the Justice Report"). Both reports noted the precedents set

for an online court or tribunal of broadly this kind already in use for family and consumer disputes in the Netherlands, and about to be deployed for small claims in British Columbia.

- 4.12. Digital innovation of this second kind would enable the creation of wholly new processes for the resolution of civil disputes. The current thinking of the HMCTS design team is that a new type of civil court (currently labelled the Online Court, or “OC”) could be created for the resolution of relatively straightforward debt and damages claims up to a provisionally chosen value at risk of £25,000. As will appear, the OC would achieve its purposes as far as possible by automated software, both for initial triage and basic conciliation, but disputes not thereby resolved would receive human attention both from Case Officers (previously labelled DJOs) and, for final determination, from judges.
- 4.13. This wholly new concept of an Online Court takes its lead from the ODR Report and from the Justice Report, but it is significantly different from both. I shall have a great deal more to say about it in due course but, for present purposes, it is sufficient to say that it is a concept which is wholly dependent on the introduction and imaginative use of IT, as well as upon behavioural and cultural change, both of which are principal aims of the Reform Programme, and would be impossible without them.
- 4.14. Running in parallel with these two different modes of digitisation is the development of “Assisted Digital” provision. Recognising that there is a substantial section of civil court users who would find it difficult or even impossible to conduct civil litigation through computers, it is being designed to ensure that they thereby suffer no impairment in their access to justice by the proposed digitisation of courts, by providing them with the requisite assistance. Forms of assistance currently being considered include online help, telephone help-lines and face to face human help.

The Court Estate

- 4.15. Digitisation of court processes, and the consequential emancipation from the tyranny of the paper file, both encourages and compels a wholly new look at the court estate which, in its present form, is an inheritance from a period when there was no alternative but to locate facilities for issue, case handling and management, file storage and judges, as well as hearing rooms, in the same or closely adjacent physical buildings.
- 4.16. The current thinking of the HMCTS design team, in relation to the court estate, has the following main themes. First, the ability to locate case issue, handling, management and some conciliation remotely from judges and hearing rooms means that, for the future, estate planning will draw a distinction between business centres (including for that purpose call centres) and hearing centres, in a more thoroughgoing way than has thus far emerged from the commencement of that process within the County Court, in the way described in Chapter 2. At present, cases are transferred in the form of physical files from business centres to hearing centres for all requisite processes following the receipt of Directions Questionnaires, including most case handling, management, listing and trial. In the future, hearing centres are likely to be designed and provided mainly as pure hearing centres, and

then only for those cases which require a face to face physical trial or other hearing rather than, for example, determination on the documents, by telephone or by video conference.

- 4.17. The second main current theme consists of the identification of three tiers of Prime, Enhanced and Standard courts, the Prime courts being mainly reserved for criminal trials by jury, and civil cases being directed to the Enhanced and Standard courts, depending upon the requirements for particular types of case.
- 4.18. As I have explained in Chapter 3, the current round of proposed court closures is a prelude to, rather than consequence of, these aspects of the Reform Programme, but the underlying policy objective of refocusing the court estate upon a smaller number of larger hearing centres is likely to remain a driver behind the further rationalisation of the estate which is planned to follow on from thoroughgoing digitisation.

Case Officers (DJOs)

- 4.19. This strand of the Reform Programme derives from a perception that a great deal of judicial time (and in particular the time of DJs) is being deployed upon routine processes, mainly in the form of box work, which could more economically be done by much lower paid civil servants employed as Case Officers (a name which it is now agreed replaces the original acronym DJO, or Delegated Judicial Officer).
- 4.20. In its early Sprint 1 stage, the blue sky thinking of the Reform Programme left it to be decided in the future whether these Case Officers should become, in effect, a new junior class of judge, and whether they should be given the power, subject to review or appeal, to decide disputed questions of substantive rights.
- 4.21. The ambitions of the Reform Programme in this respect have however become much more focussed during the course of Sprint 2, in the following ways. First, it is clearly not now (if it ever was) the ambition of the Reform Programme that any new class of Case Officers should be, even in substance, let alone in form, a new class of junior judge. Rather, there would continue to be clear blue water between the District Judges, and these Case Officers, who would remain civil servants employed and largely managed by HMCTS, but working under judicial supervision.
- 4.22. Secondly, although the ambition remains that these Case Officers should be vested with a substantially broader range of functions than those conferred upon the Legal Advisers in the current Salford Pilot (described in Chapter 3), it is now broadly common ground between the designers and the members of the Civil JEG that their functions should not include the final determination of substantive rights (however small the value at risk) or the approval of the settlement of civil claims on behalf of children and other protected parties. These functions, it is accepted, are inalienable judicial functions, only to be performed by judges. It is also broadly recognised that, the higher the value at risk, complexity or importance of a case, the more that good case management is likely to be a judicial art, dependent for its quality upon substantial judicial training and experience, and therefore unsuitable as a

function for Case Officers. The dividing line between case management of that type, and the more routine giving of standard form case management directions in smaller and less complex cases remains a matter for careful debate and analysis.

- 4.23. Finally, it is also now recognised that there are a significant number of useful models for this type of function already being undertaken by Case Officers rather than judges throughout the current structure of the civil courts, which are likely to serve as prototypes in the further development of this strand of the Reform Programme.

Transparency and Open Justice

- 4.24. The need to ensure that the transparency with which the civil courts currently achieve their objective of open justice is not compromised by any strand of the Reform Programme, and by digitisation in particular, has been a common concern of the design team and the Civil JEG from the outset of the Programme. The requisite standards were set out in an early JEG paper, and the design team has responded with a steadily deepening analysis. The need for open justice has not, from the outset, been regarded as an insuperable obstacle to the planned reforms. On the contrary, the imaginative use of IT is regarded as a means whereby transparency may be improved rather than merely preserved, albeit by methods which may differ significantly from those currently employed.
- 4.25. The current planning is focussed around the following main headings:
- (a) Publication: this refers to the putting into the public domain of information about pending cases and hearing dates;
 - (b) Search: this comprises facilities to enable the public, the press and interested parties to apply to obtain certain details about particular cases of interest online, and to register for the provision of further information as a case proceeds;
 - (c) Documentation: this heading contemplates replicating in digital form or improving upon the facilities currently available for the press and public to inspect the publicly available parts of court files;
 - (d) Observation: this stage contemplates the making available of facilities for the public to observe hearings (whether by telephone, video, or face to face) at least as freely as is currently possible, albeit by different methods, including online video display in court buildings, but not so that they can be photographed, recorded or disseminated by the observer;
 - (e) Record: this heading encompasses publicly available information about court orders, judgments and generally the outcome of civil proceedings.
- 4.26. The most challenging of these headings is observation, in the context of a planned move away from a default assumption that every case which is not settled must be determined by a traditional trial or face to face hearing in a courtroom. Observation (or listening in) to video or telephone hearings is by no means straightforward, but is currently regarded as a technical challenge rather than an insuperable obstacle.

- 4.27. It is recognised that the current means protecting matters properly deserving confidentiality in court proceedings will have to be replicated in a digitised environment. Again there appears to be no technical reason why this should not be achievable.

5. Strengths, Weaknesses, Opportunities and Threats

Introduction

- 5.1. This SWOT analysis addresses the civil courts as they are now, assumes that the work in progress described in Chapter 3 will broadly be completed, and treats the contents of the Reform Programme as relevant mainly to opportunities and threats. It is by no means confined to an analysis of structure. Rather, it is intended to serve as the basis upon which decisions about options for structural change (including no change) might best be made.
- 5.2. The detailed analysis which follows needs to be read and understood as a whole. It will no doubt be tempting for critics of the current civil court structure to treat parts of what follows, taken on their own and out of context, as confirmation from within that the civil courts are unfit for purpose. This would be both wholly wrong and irresponsible. Viewed as a whole the civil courts continue to justify their reputation as among the very best in the world. Viewed separately from the other courts, they cost the taxpayer nothing. Although in my view insufficiently well regarded, they continue to be a major and vital contributor to a law-abiding, fair and just society.
- 5.3. A review of this kind would be pointless if it did not seek out and describe perceived weaknesses in the current civil court system, and the threats or risks to its continuing success in a time of radical proposed change. Inevitably it is the weaknesses and the risks which call for detailed analysis, rather than the strengths, because it is the weaknesses which may be remediable by structural change. The reason for identifying strengths is not to clothe the participants in the delivery of civil justice with a comforting sense of a job well done. The reason is, in a time of radical impending change, to focus on aspects of that which we should cherish, so that they, and the underlying causes of them, are not put at risk in the revolution upon which we are about to embark.

Strengths

- 5.4. The civil courts of England and Wales are among the most highly-regarded in the world. The integrity and incorruptibility of the judges is beyond question. Being chosen from among mainly seasoned practitioners, their experience and expertise leaves little to be desired. As a further contrast, judges invariably write (or speak) their own judgments rather than leave their drafting to assistants or *referendaires*. Furthermore, the capacity of the judges to deliver extempore judgments means that, to a much greater extent than in most of Europe, court users generally receive their decisions quickly, once a hearing in court has taken place.
- 5.5. There is also a reasonably satisfactory level of practical collegiality among the civil judiciary. Collegiality among the civil judges is harder to maintain in the smaller regional hearing centres than in London and the main regional cities. Collegiality is promoted by a variety of methods, including the Judicial College itself, annual and regional conferences, judges'

associations, the Inns of Court and judicial dining rooms in major court buildings.

- 5.6. The Judicial College continues to be a vital source of judicial training and professional development, albeit not as well funded as many would desire.
- 5.7. The judiciary and court users both benefit very substantially from the integrity and commitment to justice (as a pre-eminent duty) of civil advocates, both barristers and solicitors. This is of particular value to LIPs, although understandably not always appreciated by them, at least in advance.
- 5.8. A generally satisfactory level of communication between the judiciary, HMCTS, the professions, other stakeholders and court users is maintained by a network of geographical and specialist court user committees. There are also a range of other outreach activities, such as student marshalling programmes, other contacts with universities, and court-based public legal education events. The after-hours conference programme (based upon a Californian precedent) currently being offered at the Bristol Civil and Family Justice Centre is a shining example.
- 5.9. The system of precedent continues, notwithstanding the ever-increasing volume of English and European legislation, to be a powerful source of legal certainty. Nonetheless, in the view of many, far too many decisions now reach the law reports so that, despite practice directions to the contrary, the court is all too often flooded with an unnecessary number of cited and copied authorities.
- 5.10. Although the contribution of the qualities of the civil courts to the maintenance of the rule of law is something which is, in general, difficult to pin down statistically, there can be little doubt that the very high standing of the law, as a fundamental pillar of civilised society in this country, is one to which the civil courts continue to make a major contribution, both in every-day practice and by underpinning a law-abiding culture.
- 5.11. Moreover, subject to certain glaring exceptions, the speed with which the civil courts progress cases from commencement to final determination is, in particular by comparison with some neighbouring jurisdictions, reasonably satisfactory. That is not to say that the targets currently laid down by HMCTS are invariably or habitually met, or that what is described as the fast track is truly 'fast'. The current targets in the County Court are 30 weeks for the small claims track, 50 weeks for the fast track and 80 weeks for the multi-track. Only a percentage of each type of case is expected to fall within the target, and time taken after trial for the preparation of reserved judgments (usually only in the multi-track) is not included. Nonetheless, the time taken for a case to progress from commencement by issue of proceedings until trial (in the small minority of cases which do not settle) is not so much longer than the time taken by the parties in preparation for trial that the civil justice system can fairly be described as seriously overloaded as a whole. Many of the cases which take longer than the targeted time do so because of delays by the parties (including restricted availability of expert witnesses) rather than by the courts. As will appear, the relatively satisfactory position is entirely otherwise on appeal, at least to the Court of Appeal.

- 5.12. Although the structure of the civil courts is complicated, and rooted to a large extent in its historical origins, it manifests a remarkable level of flexibility, particularly in terms of workload allocation and judicial deployment, both in avoiding seriously excessive waiting times and in the allocation of suitably senior and specialist judges to manage, hear and determine those cases which, by reason of their importance to the parties and to society, and their complexity, deserve to receive it.
- 5.13. This flexibility manifests itself in a variety of ways. Foremost among them are: (i) the capacity for each level of court to have recourse to suitably qualified and experienced deputies, both salaried and fee-paid; and (ii) the power of case management judges in the High Court and the County Court to transfer down, and up, and to different hearing centres around the country, cases which may be more suitably managed and tried elsewhere than in the court or hearing centre where they were commenced. The current structure achieves an extraordinary balance between party choice and judicial direction in relation to the identification of a suitable court. Although not without its critics, it is a system which commands broad respect among court users.
- 5.14. It would however be wrong to describe these qualities as evenly spread across the whole of the civil court structure, still less as equally available to all actual or potential court users with civil disputes needing resolution. In general, these strengths and advantages are there to be enjoyed primarily by those sufficiently wealthy to be able to pay for the professional costs of legal representation, coupled with rapidly rising court fees, and with the financial and emotional resources to endure the large risks of liability for opponents' costs, should they lose, in most areas of civil litigation.
- 5.15. Thus, the courts with the highest international reputation are those situated in the Rolls Building. They attract the voluntary submission to their jurisdiction by numerous international parties, both by their original choice of law and jurisdiction in their contractual dealings, and by their recourse to the long-arm jurisdiction of the English courts where permitted by their rules of private international law. I have already noted that the exceptional quality of those courts contributes in no small measure to the attractiveness of this country as a place in which to own property and carry on business because of their underpinning of the rule of law. The legal services contribution in terms of invisible foreign earnings is anecdotally estimated at more than £3 billion per annum, with consequential benefits in terms of tax revenue and expenditure on supporting services. This is powerfully underpinned by the leading role played by the Rolls Building courts.
- 5.16. More generally, the whole of the High Court retains a brand name and reputation for excellence which attracts civil litigants. This is illustrated (albeit anecdotally) by the fact that a fully functioning High Court presence sufficient to accommodate trials of the largest local cases is widely regarded as an important part of the underpinning of cities such as Cardiff, Bristol, Birmingham, Manchester, Leeds, Liverpool and Newcastle, both because it encourages legal and accountancy services to locate there and because it supports those cities as good places in which to establish and do business. It is also illustrated (statistically) by the fact that there is a significant flow of cases transferred from the High Court to the

County Court by case management judges, implying that litigants choose to issue more cases in the High Court than is strictly appropriate.

- 5.17. It is impossible to be precise about the reasons for this. There is undoubtedly a perception that the High Court provides better case management and more thorough and reliable trial by more senior judges, with greater specialist expertise. There is a suspicion that some solicitors' firms seek to secure better charging rates by issuing proceedings in London, even if much of the work is done by their regional offices, but changes in the principles for determining charging rates in the detailed assessment of costs are supposed to have stamped that out. There is also a long-standing perception among London litigating solicitors that the Central London County Court is a place to be avoided, because of a historic disfunctionality in its back office processes. I have received conflicting messages during informal consultation as to whether the move of the CLCC to the RCJ has brought about a complete change for the better in those processes, but it must be acknowledged that the CLCC remains, even after its recent move, dogged by that poor administrative reputation, whether fairly or not.
- 5.18. Thirdly, the High Court undoubtedly benefits from its vertical stratification into specialist courts and lists, and from its ability to devise and implement new courts and lists (such as the Planning Court and the Financial List) as and when circumstances so require.
- 5.19. Finally, there is an undoubtedly beneficial relationship in the public mind between the High Court and the High Court Judge. They both gain added strength to their reputation for excellence by their association with each other.
- 5.20. Although currently afflicted by serious overload and therefore delay, the Court of Appeal otherwise commands high public respect for the balance currently struck between written presentation and oral submissions and for the quality of its judgments over the very wide range of different and often complex cases with which it deals. Its written and oral procedures for the obtaining of permission to appeal virtually guarantee that no appeal with significant merit or importance goes without a full hearing. There is a broad view that the current number of LJs strikes an appropriate balance between the need for specialists of every kind and the high quality of judicial skill needed for discharging the work of the court overall. Although not divided into specialist sub-courts or lists, the court's listing and case management processes usually bring to bear a sufficient level of expertise and experience to specialist cases of all types.
- 5.21. Most civil litigation in England and Wales is carried on in the County Courts. Its salaried and part-time judges deal with a wide variety of cases which impact hugely on the every-day lives of its users and which, to those users, are of the very highest importance. Mortgage and rent possession actions fall within the exclusive jurisdiction of the County Court. The ability of the County Court to take on an increasing workload that is both challenging and important is vital to the structure of the civil courts as a whole. Three examples of such work are (a) homelessness appeals which are closely related to Judicial Review claims (b) "gang injunctions" and "anti-social behaviour injunctions" and (c) the recent addition of the power

of certain CJs to grant pre-judgment Freezing Orders. The work of the District Judge and the Deputy District Judge in the County Court is some of the most varied faced by any judge.

- 5.22. Notwithstanding current closure proposals, and even if they were all implemented, the County Court still provides accessible civil justice in numerous convenient locations all round England and Wales. At the same time it has also made significant initial strides in the centralisation of bulk and online handling of cases in their early stages, without sacrificing a local presence for those which are defended, and which need face to face hearings.

Weaknesses

- 5.23. The single, most pervasive and intractable weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals, for that tiny minority still in receipt of Legal Aid, for those (mainly with personal injury claims) able to obtain no win no fee agreements with their lawyers (“CFAs”), for the few who obtain free advice and representation, and for substantial business entities. In short, most ordinary people and small businesses struggle to benefit from the strengths of our civil justice system described in the previous section of this chapter.
- 5.24. There are a number of interlocking reasons for this. In outline, they may be summarised in this way. The civil courts are, by their procedure, their culture and the complexity of the law which they administer, places designed by lawyers for use by lawyers. Despite all the efforts made over the last fifteen years, the cost of legal representation in the civil courts, coupled with the risk of liability for a successful opponent’s costs, still make the conduct through professional representation of small and medium-sized civil cases, other than for personal injuries on CFAs, disproportionately expensive and therefore unaffordable, measured against value at risk. Those who choose, or are forced, to litigate in person suffer crippling disadvantages by comparison with represented opponents which none of the present efforts to alleviate do more in reality than palliate. Many others simply choose not to litigate at all for the vindication of their civil rights.
- 5.25. To any rational observer who values access to civil justice, this is a truly shocking state of affairs. There is nothing new about its fundamentals, although an accurate perception of its seriousness may have been dulled, both in the public and the professional mind, by the more generous provision of Legal Aid in the past (now almost completely withdrawn), by the availability of CFAs for personal injury claims, by efforts to make civil procedure simpler, more intelligible and proportionate, and by the laudable efforts of the pro bono agencies to assist some of the victims of this state of affairs by the provision of free advice, free representation and free moral and practical support.
- 5.26. There are some, such as the authors of the Justice Report, and many of those engaged in the provision of pro bono advice and representation, who need no persuading that this shocking proposition is true. But there are many who, I suspect, are either unaware of it, or who would even dispute it. To them I address the analysis which follows. It forms a central theme in this report, and underlies the main option for structural change contained in it.

Courts Designed by Lawyers for Lawyers

- 5.27. There are two main contributors to the truth of the proposition in the above heading. The first is that English civil law (by comparison with criminal or even family law) has become so complicated that much of it is either unintelligible or inaccessible (or both) to the ordinary citizen or small business, without the assistance of lawyers. While this may be the inevitable consequence of an increasingly complex society, it is accentuated by the fact that, whereas historically law was created by Parliament and judges, it is now created in addition by the EU legislature and by the ever-expanding jurisprudence emanating mainly from Strasbourg about human rights.
- 5.28. The second contributor is civil procedure. By that I mean both procedural rules and court culture. It is convenient to take culture first, since it is much older and more deeply embedded than the current version of the rules.
- 5.29. The cultural norm that our civil courts are places for lawyers manifests itself in countless ways. For example, outside the small claims track, judges are not generally expected to do their own legal research but rather to confine themselves to adjudicating between rival legal submissions presented by the parties' lawyers, and supported by citation of authority which it is the lawyers' right and duty to deploy.
- 5.30. Notwithstanding the largely successful attempt to abolish Latin, the language typically used in court remains full of legal jargon. Even the phrase 'litigant in person' is a lawyer's phrase, redolent of outdated thinking that such persons were typically those who, with a choice to be legally represented, nonetheless wished to represent themselves, and thought of as an inhibition to the smooth running of the court's business between legally qualified judges and representatives. Attempts were made about three years ago to find some less lawyerish phrase to describe them, but they failed, and the alternatives were eventually outlawed by an informal practice direction from the Master of the Rolls.
- 5.31. I do not suggest that lawyers use legal jargon as the result of some affectation, still less a means of monopolising the process of the courts. Time-honoured legal words and phrases encapsulate a volume of learning understood by those actively present in court, and their use saves considerable time. But the fact remains that much of the oral exchange between those participants, and much of the documentary exchange as well, is couched in legal language which leaves non-lawyers, both parties and public onlookers, far behind.
- 5.32. Turning to the rules, I acknowledge that it was a founding principle of the reform that produced the CPR that they should be couched in plain English: see section 1(3)(b) of the Civil Procedure Act 1997 which requires that the power to make Civil Procedure Rules is to be exercised with a view to securing that: "the rules are both simple and simply expressed". Section 1(3)(a) imposes the additional purpose that: "the system of civil justice is accessible, fair and efficient".
- 5.33. I do not intend (a few days before becoming the Vice-Chairman of the Civil Procedure Rules

Committee) to enter publicly into the debate about whether those objectives have been achieved by the CPR. Since rules and their amendments are made by Statutory Instrument, they have to comply with the principles applicable to statutory drafting. There is no doubt that the combined work of the CPRC and the skilled drafting team which serves it has produced a body of rules and practice directions which demonstrates excellent consistency in the use of language and a generally very satisfactory avoidance of ambiguity. They have also tried to avoid the use of legal jargon, but in many cases have simply substituted new jargon for old, partly in the text of the rules and practice directions, but more often in common lawyerly usage. Thus for example, where a particular form of settlement offer used to be named after the reported case in which it was first approved, namely as a *Calderbank* letter, its successor is now generally called (no more intelligibly to an LIP unfamiliar with the CPR) a “Part 36 offer”.

5.34. But regardless whether the objectives of simplicity and clarity have been fully realised, no-one with whom I have spoken about this question regards the CPR as realistically intelligible to the average LIP. Take the procedure for the small claims track as an example. It is a track which is expected to be used predominantly by LIPs, so that it might have been thought that a simple set of small claims track rules might be available for their use. There is in fact no such simple set of rules. A diligent LIP searching the White Book will alight (at page 881) upon Part 27, headed “the Small Claims Track” in which Rule 27.1 will tell him to what types of claim the track applies. Rule 27.2 then lists in sub-paragraph (1) eight other parts of the CPR which do not apply and then, at sub-paragraph (2), provides that: “the other Parts of these Rules apply to small claims except to the extent that a Rule limits such applications”. There then follow, in Part 27 and its attached Practice Direction, a miscellany of particular provisions about the procedure to be followed in the small claims track, but they must be read in the light of the whole of the rest of the CPR, save for those eight dis-applied Parts. Thus the diligent LIP must first identify and understand those parts which are dis-applied and then seek to gain an understanding of the rest of the CPR, which does apply. While this may achieve perfect clarity to judges and lawyers, it is difficult to imagine a method of drafting calculated to be more opaque to the typical LIP users of that track.

5.35. Further, the diligent LIP will fail to gain a working understanding of the procedure of the civil courts merely by studying the Rules. They have, both originally and increasingly during the life of the CPR, become supplemented by a growing number of Practice Directions, and by Practice Guides for different courts. The Guides alone occupy almost all of the first 700 pages of Volume 2 of the White Book. None of them set out to assist LIPs, as distinct from lawyers. For example, paragraph 1.5 of the current Chancery Guide provides that:

“The aim of this Guide is to provide additional practical information not already contained in the CPR or the PDs supplementing them. Litigants and their advisers are expected to be familiar with the CPR and the PDs. This Guide should be used in conjunction with them. It is not the function of this Guide to summarise the CPR or the PDs, nor should it be regarded as a substitute for them.”

5.36. The new LIP rule (CPR 3.1A) is not even addressed to litigants in person. Rather it provides a small number of points of guidance to judges and legally represented parties as to

procedural steps which they may or must take to alleviate the predicament of unrepresented parties. It is, like the whole of the rest of the CPR, drafted by lawyers for lawyers (including judges).

Disproportionate Expense and Risk attributable to Legal Representation

- 5.37. There will always be some small claims for which the use of professional representation and advice will inevitably be disproportionate to the value at risk. This is the thinking behind the small claims track, even though it does not offer a complete or satisfactory solution. There are however deep-rooted reasons why that disproportionality between legal cost and value at risk extends much higher than the current small claims track limits, namely £1,000 for personal injuries and housing disrepair and £10,000 for other claims. There is a notional line (I will call it “the Line”) below which the aggregate costs of the parties’ legal representation will usually be disproportionate to the value at risk, and it was common ground among all those whom I have informally consulted that this Line lies a long way above the current small claims track limits. Value at Risk (“VaR”) is a concept which embraces not only the amount of a simple claim, but the net amount where there is an admitted cross-claim, or the amount of damage to a business which might be caused by the grant or withholding of an injunction to restrain the use of intellectual property. It is the value, expressed in monetary terms, which is really at issue between the parties, and may emerge with clarity only after close of pleadings, or after the issues have been narrowed by a partially successful mediation, or after the striking-out of parts of a claim, or cross-claim, by means of robust case management.
- 5.38. Views differ as to the relationship between the aggregate costs and the VaR which ought to be regarded as disproportionate. Nonetheless, taking 100% as the starting point, almost all consultees recognised that it would be an unusual civil claim in which, assuming that it went all the way to trial, costs would be proportionate if the VaR was below £25,000. Most consultees would put the Line much higher, for example between £50,000 and £100,000, and some would put it higher still.
- 5.39. For the participant in litigation of a type to which qualified one-way costs shifting (“QOCS”) does not apply, there exists, in addition to the necessary outlay on a litigant’s own lawyers, with the prospect of only a partial recovery if successful, a risk of an equivalent proportionate liability for the opponent’s legal costs. Thus the disproportionality inherent in the combined expenditure of costs equivalent to or greater than the VaR affects the parties not merely jointly, but severally. In terms of risk, they each bear the whole of that disproportionality.
- 5.40. The likelihood, or risk, of incurring costs liabilities which are disproportionate to the VaR is not merely a barrier to access to justice for those who simply cannot afford to pay or risk the amounts at stake. It is also a barrier for potential litigants generally, since the outlay and risk of disproportionate sums for the purpose of recovering or preserving money or value in civil litigation is just not sensible or rational conduct. Thus the barrier to justice constituted by this weakness affects not only those who, being unable to afford legal representation, are nonetheless forced to litigate in person at grave disadvantage. It affects that large, silent class of persons with civil rights or disputes that deserve the attention of the courts who, even if

they can afford to do so, rationally choose not to deplete or risk their resources in litigating at disproportionate cost and risk with an uncertain outcome. This leads both to civil rights not being vindicated by potential claimants, and to those with a good defence to a claim submitting to it rather than risk the disproportionate costs of contesting it. A recent survey by Citizens Advice suggests (subject to final checking) that 71% of its clients would think twice before even contemplating litigation, and that only 14% would feel confident enough to represent themselves.

- 5.41. Some of the reasons for the disproportionately high cost of legal representation and advice may reasonably be attributed to the current structure and procedure of the civil courts. They include the relatively generous provisions for costs shifting in cases above the fast track, as explained in the Jackson Report, and as might be remedied in part by an upwards extension of a fixed recoverable costs regime. Other reasons for over-lawyering may include the English system of precedent, which requires much greater reference to and citation of authorities than in most continental systems. Even procedure rules are liable to become encrusted with authority, as the litigation culminating in the *Mitchell* and *Denton* cases demonstrate. The efforts of the CPRC to provide Rules and Practice Directions covering every conceivable eventuality in unambiguous terms has not prevented them becoming overlaid with precedent.
- 5.42. It may be that the relatively small scale of built-in conciliation procedures, as opposed to external forms of private ADR, is another cause. The still predominant inclination of some case management judges to case-manage single-mindedly for trial, rather than for resolution by other means, may be another.
- 5.43. Other reasons for the extent of this disproportionality may more fairly be laid at the doors of the legal professions. First, the dominant model for the provision of legal advice and representation by solicitors is that of the traditional retainer to provide all relevant services from start to finish including, where appropriate, representation and advice from barristers. I am told that solicitors are mindful of the desirability of “unbundling” their services so as to provide more limited or focussed specific services within the context of a dispute otherwise conducted by the client as an LIP. Steps are being taken to explore ways of unbundling which will not expose law firms to unacceptable risk of negligence liability. But there are some who fear that there would be such difficulties, in particular with their insurers, in avoiding negligence liability for failing to provide a full service, that such unbundling may prove to be impossible without the protection of primary legislation.
- 5.44. For its part, the Bar has for a long time professed a desire to provide direct access services, such as advocacy at trials or particular hearings, while leaving litigants to manage the rest of their cases on their own. The provision of limited direct access services by the Bar has undoubtedly increased, and on occasion offers a more affordable and therefore proportionate form of legal assistance in cases of small or moderate VaR. The Bar now runs a Direct Access website for the purpose of bringing it to public attention. But this service is still very much the exception rather than the rule. It is likely to remain so for as long as culture and procedure makes the day to day management of civil litigation a task primarily for lawyers.

- 5.45. There are of course significant areas where the cost of legal representation does not lead to the result that individuals are forced either to litigate in person or to forgo access to justice. The obvious example is personal injury litigation. This large class of civil work lay at the heart of the Jackson Reforms, the outcome of which was that individuals wishing to obtain compensation for a personal injury can obtain professional advice and representation at negligible cost and risk to themselves, provided that the perceived merits of their claim are sufficient to persuade a solicitor's firm to offer them a no-win, no-fee service. This protects them from the disproportionate cost of paying for their own professional representation, while QOCS insulates them from the risk of their opponent's costs, if unsuccessful.
- 5.46. Nonetheless, this beneficial outcome of the Jackson Reforms, even when supported by costs budgeting and costs management, has not produced the result that the legal costs incurred in small and moderate value personal injury litigation (including clinical negligence) are now proportionate, particularly in the small minority of claims that go all the way to trial. On the contrary, wildly disproportionate expenditure still occurs, albeit not at the claimant's risk. In those cases, the adverse consequences of that disproportionality lie not in impeding access to justice, but rather in increasing motor and employers' liability insurance premiums, and in an increased litigation burden on the National Health Service in most clinical negligence cases. Thus the disproportionality remains a weakness of the civil justice system, but of a different kind.

LIPs at Grave Disadvantage in the Civil Courts

- 5.47. It may be that many readers would regard this third proposition as flowing inevitably from the first. In my Chancery Modernisation Review Final Report I referred to the historically entrenched attitude that litigants in person are a problem to be managed away, rather than a group of court users with as much as right to an intelligible and useable process as the majority who are professionally represented. I continued:

"In that respect, I consider that three common misconceptions need to be put to one side at the outset. The first is that a shared concern about the unfairness of current practice and procedure vis a vis litigants in person can be properly addressed merely by taking steps on the periphery to ameliorate them. Access to justice is not provided by making practice and procedure only moderately unfair to litigants in person, rather than (as at present) seriously unfair to them.

The second misconception is to think that the unfairness to litigants in person inherent in practice and in procedure can be satisfactorily addressed at trial (or at some significant interim hearing) simply by the patience, courtesy and investigative court-craft of the experienced judge. In many cases, if not the vast majority, it will by then be too late, because the cumulative hurdles which litigants in person will by then have failed satisfactorily to overcome will have left them with insuperable disadvantages by the time they get to trial or to a hearing. Furthermore, the judge will be constrained when seeking to redress those disadvantages at a hearing by the need to give fair treatment also to the represented party and to ensure that the expensive professional assistance in which that party has invested is put to economic good use, rather than wasted.

The third is that written descriptions of practice and procedure truly intelligible to the average litigant in person can be satisfactorily formulated by lawyers. This was, with the

benefit of hindsight, perhaps a misconception which undermined the CPR. Complex practice and procedure is not made intelligible to the average lay person merely by the removal of Latin and legal jargon and the use of short sentences. The text needs to be written, or at least closely reviewed, by those with a day to day experience and understanding of the way in which litigants in person approach the courts. There are agencies which, subject to real resource constraints, can now offer that assistance. I consider it unfortunate that there has been no such experienced resource available to the Civil Procedure Rules Committee, even though it has lay representation. The result is that, despite the exceptional skills of the drafting service provided to that committee, its product has been, and continues to be, a body of rules prepared by professionals and intelligible only to professionals. I say this as a past member of the CPRC, and fully accept my share of responsibility for that outcome."

- 5.48. I made those observations in relation to the Chancery Division of the High Court, but they were endorsed in 2015 by the authors of the Justice Report, as applicable to the civil courts generally. Having reconsidered them in the context of this review, and with the benefit of close involvement in LIP-facing work arising from having been the judicial liaison representative for the Personal Support Unit during the intervening period, I regard those observations as still being fully applicable to the whole of the civil courts.
- 5.49. I acknowledge at once that the District Judges and Deputy District Judges who daily conduct trials in the small claims track in the County Court and the Registrars in the Bankruptcy Court do their level best to alleviate the disadvantages experienced by litigants in person, by a combination of courtesy, clarity of language and an element of investigatory process, frequently (and commendably in my view) putting on one side the procedural rules which regulate the management and trial of such claims. But even in the small claims track there are no procedures which in reality ensure that, well in advance of a trial or face to face hearing, LIPs are encouraged to formulate their grievances in an intelligible manner, to produce relevant documents and other evidence to prove their claims, or even to provide a sufficient explanation of their claims to enable opposing parties (also frequently without the benefit of legal representation) to know what is the case against them, and prepare to meet it at trial. All too frequently, the unrepresented litigants arrive at court with ill-assorted documents (and without copies) so that the judge is left trying to sort out the consequential mess in such a way as to produce a short but fair trial without further adjournments. Sometimes even small claims give rise to serious legal complexity, such as claims about consumer credit, and it is frequently pure happenstance whether LIPs have brought with them the documents of central relevance to their claim.
- 5.50. The disadvantages of this kind affect LIPs whether or not their opponents are legally represented. But if they are, (which is the norm outside the small claims track) then of course those disadvantages multiply. In such cases, they are frequently aggravated by a perception, derived from the lawyerly culture which I have described, that everyone in the courtroom is against them, even the judge, because all of them are lawyers, and usually speak in legal jargon. This is a perception frequently expressed by LIP clients to Personal Support Unit volunteers, and is one reason why the mere presence of such a volunteer in court alongside an LIP is widely regarded as a valuable counter to that perception, even if still at best a only palliative rather than a cure for it.

- 5.51. I also gratefully acknowledge the increasing level of legal assistance provided by all advice agencies and volunteers acting pro bono. They are also in the forefront of providing online advice about law and court procedure in language intelligible to LIPs, and are starting to play a growing part in assisting in the drafting of legal forms commonly used by LIPs, such as the new 'Help with Fees' form.
- 5.52. My attendance at the 4th Fourth National Forum on Access to Justice for Litigants in Person on 4 December 2015 has impressed on me the depth and breadth of individual projects directed to addressing and supporting the increased number of LIPs appearing before the courts. Space prevents me from individually recognising the sterling work being carried out by organisations and individuals dedicated to ameliorating the lot of the LIP seeking to operate in a traditional court environment. The conclusions I have taken from the meeting are that: (i) there is a universal recognition that there is still much to be done to begin to render the present system intelligible to the LIP: we are, in the words of the Civil Justice Council report from which the annual conferences evolved, still making the best of a bad job; (ii) provision is patchy and can lead to a post code lottery for the LIP; (iii) there is still not a coherent nationwide strategy for the provision of the necessary assistance, and (iv) the very existence of the conference and the groups involved in it is the most eloquent testament to the need to create a system that is accessible to the citizen without the lawyer.

Work Overload and Delay – Problem Areas

- 5.53. I have described the general performance of the civil courts in terms of timeliness as one of its relative strengths, subject to exceptions. I must now deal with some of those exceptions, and attempt to explain their causes.
- 5.54. Much the worst exception is the overload currently affecting the Court of Appeal. It has been the principal matter of complaint about the civil courts in the informal consultation which I have carried out to date. In 2001 the Court of Appeal published projected waiting times for non-expedited appeals of not more than 10 months. These waiting times remained as published targets until revised in July 2015 to a maximum of 19 months. In fact the achieved waiting times began seriously and continuously to exceed the 2001 published guidelines by September 2014. In the absence of significant structural change, there is every reason to suppose that the waiting times will continue to deteriorate beyond those published in July.
- 5.55. This weakness lies not merely in increased waiting times. There was also a regrettable increase in the number of listed appeals which, after waiting for a considerable time, then got removed from the list at a late stage, often (but not always) because some other appeal has been certified fit for expedition, for which space in the list could only be made by removing an existing case. Plainly, the extension of hear-by dates for full appeals inevitably increases the number of pending appeals for which expedition requests are made and, where necessary, granted. Nonetheless steps are now taken to keep space in the list for urgent appeals, so as to avoid broken fixtures as far as possible.
- 5.56. This is a lamentable state of affairs, the effect of which is largely to undermine the strenuous

efforts being made in the first instance courts to achieve satisfactory waiting times for the determination of civil claims. It is likely to cause particular pain to users of the Financial List, the Patent Court, the IPEC and the new Faster Trials Pilots in the Rolls Building, unless their appeals are treated as routinely fit for expedition, but that would only increase yet further the waiting times for the main body of pending appeals. Appeals about children and planning largely escape these delays, because they are routinely expedited.

- 5.57. The simple reason for this large increase in waiting times is that the incoming work of the Court of Appeal has increased by over 54% during the last six years, and the latest statistics do not suggest any alteration in that upward trend. During the same period there has been no increase in the number of LJs, and no significant increase in the use of HCJs as deputies. There has been a small decrease in back office staff. Also during the same period, as already explained in Chapter 2, the theoretical capacity for case-related work of individual LJs has reduced, due to the ever-increasing demands on them for leadership and administrative activities. In practice, this has been partly offset by LJs working substantially longer hours, but in 2014 the level of incoming work passed the saturation point, and the rate of deterioration in waiting times thereafter has been alarmingly steep.
- 5.58. There has been no similar or consistent increase in the number of full appeals requiring to be undertaken by the Court of Appeal. There have been significant variations year by year, but the overall pattern is only very slightly upward. Statistics based on numbers of appeals are not a reliable guide to the underlying increase in the workload. Although it is possible to identify which of the nine workstreams separately recorded have contributed most to the increase, the average amount of work per typical appeal in each of those streams has not previously been statistically recorded or calculated. Much more reliable workload statistics will shortly be available as the result of a time and motion study conducted within the Court of Appeal in relation to paper disposals and hearings carried out from May to July 2015, when final returns from reserved judgments and orders are complete, and the computer database audited. These will be available in time for the final stage of this review.
- 5.59. The disparity between the increase in incoming work (consisting mainly of applications for permission to appeal) and full appeals has two main possible causes. The first is that there has been a disproportionate increase in unmeritorious appeals which fail to survive the permission stage. The second is that the judges are (possibly unconsciously) applying a higher hurdle in practice in determining whether to give or refuse permission, even though the formal tests set out in the Rules have not significantly changed. The fact that a substantial proportion of the increased incoming workload consists of applications for permission to appeal by LIPs would tend to support the first of those reasons, since they have only their sense of injustice, rather than legal advice about the merits, to guide them whether or not to seek permission to appeal.
- 5.60. The second serious area of extended waiting times relates to Costs and Case Management Conferences (“CCMCs”). The availability of an early Case Management Conference (“CMC”) in cases in the multi-track, both in the County Court and the High Court, is an important factor in the timely and efficient management of civil litigation. It is at the CMC that a

trial date or window, and (now) a trial duration is ordinarily set, by reference to which all subsequent case preparation then takes place.

- 5.61. A major reform implemented as a result of the Jackson Report is judicial management in advance of the amount and proportionality of legal costs recoverable by costs shifting at the end of civil proceedings. Like the CMC, Costs Management has to be conducted as early as possible during the proceedings, lest the bulk of costs have already been incurred. For obvious reasons, case and costs management are best conducted side-by-side. It was the hope of those behind this reform that, in due course, the parties would become sufficiently acclimatised to the costs management principles being applied by the courts that they would be able to agree costs budgets in the overwhelming majority of cases so as to avoid the devotion of substantial time and resources by the court to proactive costs management. It remains to be seen whether this hope will be fulfilled. In the meantime, the requirement to conduct costs management alongside case management has greatly increased the time typically taken (and therefore having to be pre-allocated) for CCMCs, as opposed to CMCs, with consequential increases in the workload of the case management judges, and in the waiting times for CCMCs.
- 5.62. This phenomenon does not appear to have been evenly distributed across the whole range of civil litigation. It has caused well-publicised difficulty for the QB Masters, who have temporarily suspended costs management of clinical negligence cases until January 2016, to enable their CMC waiting times to reduce to sensible proportions. Cost management has become a fertile source of satellite litigation in clinical negligence cases, where it appears that defendants' lawyers are being instructed to contest claimants' costs budgets almost line-by-line, as a matter of routine.
- 5.63. I can well recall when receiving my training in costs management (coincidentally from District Judge Lethem, now on my Hard Working Group) how widespread was the concern that the then increase in judicial time needed for costs management had not been budgeted for by the provision of any additional allocation of civil hours, or case management judges. The view then taken by those in charge was that costs management might well cause a temporary increase in the workload, but that it would soon settle down as litigation lawyers became familiar with the new culture of court-enforced proportionality. It is not yet clear whether this prediction will prove to be correct.
- 5.64. The third problem area relates to waiting times for trials in the Patent Court. That court is in ever-increasing competition with the intellectual property courts of Germany and the Netherlands for European patent business, and this competition is not expected to be put to an end when the Unified Patents Court comes into operation across Europe in 2017, because each member state's national system of patent courts will continue to operate in parallel with it.
- 5.65. The essentially wasting nature of intellectual property rights means that, in disputes about them, time is always of the essence. In practice, for the English Patent Court to compete with its main European rivals, it is necessary for it to be able substantially to guarantee a

trial within one year of issue of proceedings. This is a target which the Patent Court meets only intermittently. Currently, the waiting time for trials in that court is rising towards the 18 month mark.

- 5.66. Attempts to alleviate this difficulty have been met by the selection of a patent specialist for appointment to the last vacancy among the Chancery Judges, but it remains to be seen whether this welcome addition will fully resolve the problem. It should go without saying that intellectual property litigation represents an important part of the offering which the Rolls Building courts make to the UK business community, both as a forum for the resolution of cross-border disputes, and as a foundation for the establishment of businesses which rely heavily on intellectual property for their success.
- 5.67. The delays which I have described constitute one large and two smaller examples of a more general difficulty facing the civil courts. However flexible the procedures for transfer of cases and for allocation of cases to appropriate judges, between London and regional courts, divisions and lists, changes in particular parts of the workload frequently occur at a rate faster than is in practice addressed by the allocation of focused judicial resources. In an ideal world such resources should be pre-allocated, rather than allocated only after waiting times have started to extend because of the arrival of new types of business, or an intensification of particular existing types. Taking the current overload of the Court of Appeal as a prime example, the problem now to be faced is not merely how to find the resources with which to deal in reasonable time with new appellate work coming in, but how to tackle the backlog, built up over the last year, which lies at the root of the currently wholly unacceptable waiting times.
- 5.68. Just as it would be wrong to describe the particular delays currently affecting some civil work streams as demonstrating a general weakness, so it would also be wrong to describe the capacity of the civil courts to react to changes in workload as generally so slow as to amount to a major weakness, in particular by comparison with other civil court systems. Judicial resources have indeed been pre-allocated on particular occasions in the past to meet anticipated increases in workload. The increase in the number of judges (and High Court Judges in particular) within the TCC to meet the workload which was anticipated to be likely to arise from the construction work planned for the London Olympics is a case in point. Ironically, the perfectly reasonable predictions as to increased workload did not entirely materialise in the event.

Operational Management and Judicial Training

- 5.69. The commitment of Government to revolutionise the court system by digitisation within four years, and to derive substantial operational savings by erecting a new structure on the basis of it, presents challenges which few if any of those currently responsible for the management of the court system will ever have experienced, and for which the judicial leadership team which plays an equal role with the MoJ in discharging that responsibility have not been specifically trained. Few judges remain long enough in any particular leadership or management role either to learn it thoroughly, or to leave an indelible mark

upon it. Unusually for such a large and complex structure, there is not a comprehensive system of succession planning, although there is for the Presiders and now for the office of Senior Presiding Judge, supported by a Deputy and intended successor. Very occasionally, senior judges turn out to be born managers. A few more achieve excellent management skills during years of judicial leadership. The majority (including me) have management thrust upon them.

- 5.70. I have described the current work of the Judicial College as a strength of the current structure, subject to concern about its level of funding. There is now a judicial leadership course offered by the Judicial College, but it provides 3 discontinuous days of standard training for all leadership judges, rather than anything yet specifically geared for the challenge which lies ahead. The coming IT revolution will need to be supported by a substantial increase in the resources of the Judicial College, both in terms of money and tutors skilled in the new IT systems being introduced. I do not think that it is realistic to expect all of the judges who have spent a lifetime working and wrestling with ever larger and more numerous paper files just to take to an online, on-screen paperless environment like ducks to water. A useful litmus test will be to see how well and quickly the judges learn to use the new e-Judiciary system now being rolled out, for which there are no available training resources of any significance. The hope is that they will, but e-Judiciary is, within the geography of a fully digitised civil court system, only a little foothill.
- 5.71. Furthermore, the coming revolution is about much more than just IT. The end of the age when the court structure is dominated by paper is likely to bring about changes in working practices and in the location of work, both for judges and staff, for which four years is a challenging timetable. It will probably have to be accompanied by a large element of culture change which will require the most sensitive leadership, management, training and support.
- 5.72. There is also a legitimate concern about whether, apart from some of the most senior judiciary in London, there is sufficient staff support for leadership judges, to enable them to meet the large challenges which lie ahead. There are about to be put in place Local Leadership Groups to assist with the deployment and management of the planned reforms, and to help nurture the change in culture among judiciary and HMCTS office staff which will be needed. But although Presiders and DCJs, upon whom the main judicial leadership burden will fall regionally, currently have regional judicial secretariats to assist them with their leadership activities, those may need to be augmented to provide the requisite support for the task of supervising the implementation of the Reform Programme among the civil judiciary. Presiders and DCJs have full hearing lists as well, so that their own leadership time may be relatively thinly spread.

Managing the Civil Workload and Raising the Status of Civil Justice

- 5.73. The judicial part in the operational management of the workload of the civil courts is, at best, patchy. There is something of a civil-only management gap between the Designated Civil Judges on the one hand and the Head and Deputy Head of Civil Justice on the other. Lord Woolf recommended as follows:

“There will be a senior judge with overall responsibility for civil justice to be known as the Head of Civil Justice. His appointment will raise the status of civil justice and ensure the effective use of resources within the entire administration of civil justice. In order to achieve this he will co ordinate the practices and the deployment of the judiciary in the Queen’s Bench and Chancery Divisions and between the High Court and county courts in London and on the Circuits.”

- 5.74. For most of the time since then the Master of the Rolls has been the Head of Civil Justice, with an LJ as his Deputy. I am due to take up that deputy role in January 2016. The DCJs are operational managers par excellence, but the Head and Deputy Head are not, or at least are not perceived to be. Rather, they work upon policy, procedure and strategy. Furthermore, all the DCJs and the Head and his Deputy undertake full case-specific judicial workloads, and have to fit their operational management activities around the edge of their main judicial tasks.
- 5.75. The Deputy Head of Civil Justice gains some input into, and information about, the civil judicial workload by ex officio membership of the HMCTS Civil Business Authority, which meets quarterly, and by taking a leading role in the running of annual conferences for the DCJs. But the main current role of the Deputy is the vice chairmanship, and de facto leadership under the direction of the MR, of the Civil Procedure Rules Committee. The current functions of the Deputy are not at present an adequate substitute for the vital coordinating role of the regional Family and Chancery Liaison or Supervising Judges, as described below.
- 5.76. The established system of judicial line-management requires the DCJs to report up to the Presiders in relation to civil matters. The Presiders have a pastoral role which includes looking after the welfare of the whole of the circuit judiciary, and a particular operational role in relation to the criminal and general civil workload. On a national basis the same goes for the Senior Presiding Judge, his office and staff, to whom the Presiders report. They do not report to the MR or to his Deputy. By contrast the operational chain of command for family work goes from the Designated Family Judge (“DFJ”), via the Family Liaison Judge at circuit level, to the President of the Family Division. There is thus a direct and continuous chain of operational family-only management from the DFJs to the top of the family tree. As will appear there is a similarly direct operational chain of command for the chancery workload, at least in the High Court. But the other civil specialist courts do not have a reporting line either to the MR or to a civil-only head of division.
- 5.77. There is nothing inherently logical about this structure. It is probably an inheritance from a divisional structure within which Chancery and Family Judges were mainly specialists in their particular disciplines, whereas QB Judges all mixed civil with crime. It only partly reflects the reality that the vast majority of judges who contribute to the discharge of the civil workload mix that work with either or both of family and criminal work. In theory there ought therefore either to be an operational workload management system which accommodates criminal, family and civil work together, or one in which each have a direct managerial chain, from bottom to top.

- 5.78. The reason why this gap in the judicial operational management structure of the civil courts gives rise to a weakness is because, in the competition for resources, particularly outside London, civil tends to come third in the queue after crime and family. It is something of a Cinderella, even though it produces court fee surplus revenue which it is the developing policy of the MoJ to apply as a resource across the whole of the court system. Mixing metaphors, civil is the Cinderella that lays the golden eggs. Lord Woolf's expectation of a rise in the status of civil justice is yet to be fully achieved.
- 5.79. I do not mean that the Cinderella-like status of civil work has been caused by the operational management gap. It is mainly the understandable result of the fact that both crime and family command a more prominent place than civil in public and political priorities. My concern is that civil therefore needs the protection and enhancement which a more active and direct linkage between the Head of Civil Justice and the DCJs would achieve, just as it has been achieved in relation to family work.
- 5.80. This weakness manifests itself in a number of ways. First, I have already referred to the current inability of the system for the allocation of civil hours outside London to resist the frequent inroads of urgent family business, caused either by urgent hearings about interim care, or the need to resolve cases about children within the statutory 26 weeks timeline. No similar statutory timeline applies to any civil work. The inevitable losses of civil judicial time and court space incurred as a result of the understandable need to meet these emergencies do not, so I am reliably informed, get made good in subsequent years. The previous year's allocation is just repeated and then invaded again by urgent family attrition as previously.
- 5.81. Secondly, apart from the DCJs, who are either entirely or predominantly focused on civil work, too much of the County Court civil work warranting a more senior judge than a DJ is undertaken by multi-ticketed CJs whose percentage of civil work is frequently too low to make it easy for them to apply the requisite skills and experience. They are rostered to 'help out' with the civil workload, but it is not the, or even a, central part of their judicial practice. This may well be because the large recent increases in the financial limits of the County Court's jurisdiction have yet to be reflected in a more generous allocation of Circuit Judges with a substantial civil practice.
- 5.82. Thirdly, there is a wide perception that the same lack of civil focus adversely affects the civil expertise of many DJs. I have described how, save in the Central London County Court, DJs are almost invariably engaged in a mix of civil and family work, such that it is difficult to develop specialist civil teams outside London, let alone the esprit de corps as a civil judicial force which is a powerful contributor to the quality of the civil work carried out both in the RCJ (including the CLCC) and in the Rolls Building.
- 5.83. The DCJs have neither the formal power nor the practical 'clout' to make any significant inroad upon these difficulties, and no-one senior to them in the judicial operational management chain treats it, for understandable reasons, as a main priority. There are indeed powerful reasons why mixed judicial practices make a vital contribution to the flexibility of the court structures as a whole. The difficulty is that specialisation is a much more important

requirement within civil work than it is in family or criminal work, because of the much more diversified and legally complex work streams of which it is made up. That requirement for civil-only teams within which appropriate specialisation can be developed is well recognised in London, but insufficiently applied, if indeed recognised, by those with the requisite operational powers in the regions.

- 5.84. An example of a practical disadvantage flowing from this lack of focus upon civil work as special is the substantial stream of cases transferred in from case management DJs outside London to the QB and Chancery Masters in the High Court. It is equivalent in volume to the cases transferred out by the Chancery Masters, and much larger in volume than the cases transferred out by the QB Masters. In 2014 the QB numbers were 454 out and 723 in. During the first ten months of this year the numbers are 236 out and 557 in, a disparity of more than double. Some of the cases coming in are properly transferred to the High Court because of specialist complexity, but most are not. The Masters would happily transfer them out again, were it not for an understandable concern that this would suggest to court users that the left hand of the civil court system did not know what the right hand was doing. It would also cause unacceptable delay in the progression of the cases concerned.
- 5.85. A tendency in the regions (outside the seven main regional civil trial centres) to transfer too many cases to London has a knock-on effect upon the availability of suitably qualified solicitors and counsel in the regions. Legal litigation practices tend to concentrate and flourish where the work is. Any practice which adversely affects the nurturing of viable civil legal practices in towns and cities outside London risks undermining both regional local economies and regional access to civil justice.
- 5.86. To this perhaps down-beat picture the regional operational management of Chancery business is an undoubted exception. The operational management structure between the regional chancery specialist DJs and Senior CJs, via the regional Chancery Supervising Judges to the Chancellor as a civil-only head of division, appears to work well, and chancery esprit de corps is supported both by the requirement that the specialist Senior CJs all spend significant time doing s.9 work in the Rolls Building, and by the holding of one day annual conferences attended by the whole of the chancery judicial community, including specialist DJs. Unlike the structure for the Family Court, this Chancery structure is at least in theory confined to the High Court. But in practice this makes little difference in the regions, where the High Court / County Court distinction is of little operational importance. In London there is a close working relationship between the Chancellor and the chancery specialist CJs and DJs in the Central London County Court, supported by a Chancery Liaison Committee which he chairs.
- 5.87. For its part, the regional Administrative Court is much smaller, and of more recent origin, but is well supported by its own supervising judges. My experience and consultation to date suggests that the operational management support for the regional TCC, Mercantile and general Queen's Bench regional judicial teams is less well established. None of those specialist courts have operational reporting lines to the MR, as Head of Civil Justice.

District Judges' Box Work

- 5.88. I am advised that there are four main problems affecting the throughput and quality of the DJs' box work. The first is that in most hearing centres they do not have protected time set aside for box work, but have to fit it in around their hearing lists, out of court sitting hours and when cases settle. The result is that their output of completed box work tends to be very uneven, which places peaks and troughs in the way of the back office staff who deal with it.
- 5.89. Secondly, there is simply too much routine box work currently dealt with by DJs, which could properly be given to Case Officers. This is a weakness which it is a main objective of the Reform Programme to correct.
- 5.90. The third is that cuts in the back office resources within regional hearing centres has led to a perceived 'de-skilling' of parts of the court staff to the extent that more box work is now referred to DJs, of a type which historically the court staff used to be able to do. Again, this is a weakness which the recruitment and training of Case Officers pursuant to the Reform Programme ought to correct.
- 5.91. Finally, the rise in the LIP element among the users of the civil courts inevitably makes box work for DJs harder and (anecdotally) more time-consuming, because of the understandable difficulties faced by LIPs in preparing and submitting appropriate forms, statements of case and bundles. Again, the putting right of this difficulty is a primary objective of the Online Court element of the Reform Programme.

Statistics

- 5.92. Most of the civil court structure is reasonably well served by data capture and analysis to the extent that it provides reliable statistical information about the number of cases handled and the performance against targets in relation to waiting times. This has been an area of real progress in recent years, and performance against targets is now monitored quarterly by the Civil Business Authority, against those very detailed statistics.
- 5.93. But it is a uniform feature of current data capture that it does little or nothing to measure workload in terms of time taken by judges, either upon case-related matters or otherwise. By contrast, proper time recording of work in professional firms and barristers' chambers has been revolutionised during the last 30 years.
- 5.94. This is in part the result of the use within the civil courts of old-fashioned IT with, by modern standards, limited if any facilities for time recording. It is probably a matter of relief among most judges that they do not, other than when participating in time and motion studies of limited duration, have to fill in time keeping forms like solicitors and other professionals.
- 5.95. Nonetheless, this deficiency in data capture about time spent is a significant weakness in the management of the civil courts, because mere numbers of cases are a poor guide as to real workload. The absence of time-related data adversely affects the ability of courts to identify appropriate specialities when judicial vacancies arise, and to react to peaks and troughs in

particular parts of the workload by the prompt application to them of the requisite resources.

- 5.96. Occasional time and motion studies, such as that conducted in 2011 during the Chancery Modernisation Review, that conducted in the Court of Appeal in mid 2015 and that currently being undertaken in sample regional court centres for the purposes of this review help to fill that gap from time to time. They are not intended to be a 'spy in the cab', but rather to record judicial time on an anonymised basis, in order to ascertain the real burden of particular types of work. They are not a complete or satisfactory substitute for a system of data capture which records workload continuously. Again, this is a weakness almost certainly capable of remedy during the process of digitisation of the civil courts intended to be achieved by the Reform Programme.

Enforcement of Judgments and Orders

- 5.97. If the civil court structure is the Cinderella of the court system, then enforcement is certainly the Cinderella, some would say the Achilles heel, of the civil courts, or at least of the County Court. I have earlier described it in summary as heavily localised, paper based, prone to error in form filling, and perceived to be slow, ineffective and expensive.
- 5.98. Some of these deficiencies are already being addressed by the currently planned centralisation of the systems for dealing with charging orders and attachment of earnings. Plainly the move to a digitally based system creates at least the opportunity for dealing with others, such as problems with form filling and some aspects of delay. An online digital form can be programmed with built-in rules to reject an attempt to submit it until it has been completed correctly, thereby streamlining the current processes under which forms are passed to and fro between applicant and court until completed correctly, causing delays in post and while sitting in piles awaiting attention. These delays commonly take months, sometimes up to six months or more.
- 5.99. Again, the current processes require unnecessary stages of routine judicial scrutiny, in particular for the purpose of checking whether forms have been filled in correctly, but these are well capable of being addressed by that part of the Reform Programme relating to Case Officers, and by automation.
- 5.100. The more intractable weaknesses lie mainly in the current system for the enforcement of warrants of possession of land and of goods by the County Court bailiff service. Consultees have compared it in scathing terms with its High Court equivalent, an essentially privatised but regulated operation whose members are now called High Court Enforcement Officers. The County Court bailiffs are all employed by HMCTS, and a principal suggested reason for the perceived shortcomings in their performance is that, unlike their High Court equivalents, they are not incentivised by performance-related remuneration.
- 5.101. Whatever the reasons, the County Court bailiff service is criticised for being slow, with long waiting times for appointments, over-burdened with other tasks such as service of process, and inefficient. The result is that County Court judgment creditors commonly prefer to seek enforcement in the High Court. Judgments for over a mere £600 can be enforced by High

Court warrants, and charging orders obtained in the High Court for judgments over a mere £5,000. I have already noted that too much of the processing of enforcement is carried out by judges rather than Case Officers.

5.102. Even if the excess is in future transferred to Case Officers, there will still be a need for judicial involvement in enforcement processes, for example to deal with disputes about service, interpleader, suspension of warrants and with disputes over the ownership and sale of charged property. For as long as the weaknesses in County Court enforcement processes continue to drive judgment creditors to the High Court, the workload of the Masters will continue to be cluttered with enforcement-related business which ought to be dealt with elsewhere.

5.103. A particular complaint of consultees who (or which) have to use the County Court's enforcement processes is that the recent large rises in fees for enforcement processes have been unaccompanied by any improvement in the quality of the service received.

Conclusion on Weaknesses

5.104. It should not be thought, by reason of the fact that this section on weaknesses is so much longer than the preceding section on the strengths of the civil court structure, that my overall conclusion is that the civil courts are failing or dysfunctional. Taken as a whole, the strengths greatly outweigh the weaknesses, save only for the lack of access to justice provided to ordinary individuals and small businesses due to the disproportionality between the cost of legal representation and the value at risk in their disputes, and the grave disadvantages which they do or would encounter if pursuing their claims as litigants in person.

Opportunities

5.105. It will be obvious by now that I regard the Reform Programme as providing an unprecedented opportunity to address most of the weaknesses which I have thus far identified. If digitisation can be successfully achieved, it offers a new-found freedom from the tyranny of paper, which I have described as the dominating influence upon the current structure of our courts and systems. If properly designed, it offers the prospect of providing greater and better access to justice, and a better quality of justice service, but at less cost.

5.106. Specifically, the biggest single opportunity which I would identify is that digitisation using modern software provides an opportunity for the first time to design from scratch and build from its foundations a wholly new court for the specific purpose of enabling individuals and small businesses to vindicate their civil rights in a range of small and moderate cases where, at present, access to justice is denied by the combination of disproportionate legal cost and grave disadvantages from litigating in person. In short, it makes it possible for the first time to provide a court for the resolution of appropriate civil disputes without recourse to lawyers, or with such minimal recourse that their services can sensibly be afforded. This would be the Online Court as I have outlined it in Chapter 4, and which is the subject matter of the whole

of the next chapter. I need say no more about it at present.

- 5.107. I do not by this mean that such a court will resolve at a single stroke all the disadvantages currently facing LIPs. They will still be regular users of the other courts, for example as defendants to residential possession cases and as participants in proceedings which are not about money. The current efforts of the advice and pro bono agencies will therefore continue to be an essential part of the civil justice system. Nor for the reasons already given will such a court deal with all aspects of disproportionate cost. The current efforts to improve costs management, to extend fixed costs, to unbundle legal services and to provide direct access to the Bar will all need to continue, as will the search to provide further methods to fund civil proceedings, whether by a Contingency Legal Aid Fund, or otherwise.
- 5.108. Next, freedom from the tyranny of paper gives rise to a wholly new range of choices about the geographical location of all aspects of the civil justice system. There will be no need for hearing centres to be in the same buildings as the back offices which issue, handle and manage cases. The efficiency savings thus far achieved by the County Court business centres at Northampton and Salford are likely after full digitisation to look, with the benefit of hindsight, like the tip of an iceberg.
- 5.109. New choices about geographical location will also enable fresh consideration to be given to the concentration of specialist judicial recourses, both by the assembly of judicial teams of sufficient size to permit civil specialisation, and by the ability to move electronic case files without geographical constraint, and to conduct telephone and video hearings remotely from the geographical location of the litigants. They will also provide a fresh opportunity to review the adequacy of the distribution of civil justice services throughout England and Wales.
- 5.110. Similarly, the opportunity to de-couple aspects of the provision of a civil court service currently concentrated under a single roof creates choices which should enable the court's service to litigants to be provided at much greater convenience to them. They will be able to view court files about their cases online, and to be automatically prompted on their smart-phones about hearing dates and time limits for compliance with directions. There need no longer be a default assumption that every interaction between the litigant and the judge need take place in a physical court room.
- 5.111. Finally, the liberation of DJs from a large proportion of box work which could satisfactorily be carried out by Case Officers could unlock a log-jam which currently inhibits the passing of work downwards for the purpose of freeing up senior judicial capacity to assist in alleviating the excessive burdens on the Court of Appeal.

Threats

- 5.112. Every process of radical change brings with it threats or rather risks, both general and specific. My reason for setting out the following list is not because, either singly or in the aggregate, I regard them as constituting good reasons for avoiding, or even minimising,

change. They are simply matters which need to be borne constantly in mind during the process of design and implementation of new structures and systems. I will start with general risks, and then move to the particular.

- 5.113. The first general risk is that, by trying to change too much at one time, or too quickly, irreparable damage is done to a civil court service which, viewed overall, is currently functioning well, at least for those who can afford it.
- 5.114. The following factors make this a real concern. First, most of the digital structure which it is sought to create is, at present, still to be designed, tried, tested and proved, and some parts of it have no direct operating precedent from which success in the design of something similar may confidently be assumed.
- 5.115. Secondly, the proposed reforms involve fundamental cultural change, operational change, geographical change and legal procedural change. Even if it were possible in theory merely to replicate all those features of the current system after digitisation, that is not what is intended, nor would it be a sensible use of the large investment now approved.
- 5.116. Thirdly, in the context of proposed reforms to the civil structures throughout the country, there are likely to be regional complications, differences in attitudes and receptivity to change and differences in the rate at which changes are likely to be successfully implemented. These will be a major challenge for the Local Leadership Groups which are being set up to tackle them.
- 5.117. The second main area of risk may be headed 'throwing out the baby with the bath-water'. It is almost impossible when reviewing a complex system, built up over many years, to identify the component parts of it which underpin its quality, whether as contributors or prerequisites. Some may be almost invisible to the naked eye, so much so that the part played by them in the success of the structure as a whole only becomes apparent when they are removed, and the structure then under-performs.
- 5.118. It is not difficult to think of aspects of the present structure about which that concern might be true. Although it is easy to describe the dominance of paper as an inhibition to the unbundling (from under a single roof) of the various elements of a civil court, that close-knit relationship between those elements has its own advantages which may too easily be taken for granted. For example, difficulties experienced in the progression of a particular complex case from issue, through handling, management, listing and to trial may be ironed out by a face-to-face meeting in the back office of the court concerned between the relevant staff and the judge, and back office teamwork may more generally be encouraged and improved by on-site judicial support and encouragement. Separating the judges in hearing centres from case handling, management and listing in business centres plainly risks disrupting that level of human co-operation, teamwork and common purpose, with consequences which cannot easily be measured in advance. I am not the first to express these concerns. They have been debated on previous occasions when the consequences of digitisation have been examined by HMCTS and by the judiciary.

- 5.119. I consider that listing of cases should be a matter meriting particular attention. It is recognised (e.g. in the Framework Document) that listing is ultimately a judicial responsibility, although usually carried out by court officers on behalf of the judges. If separating judges from back offices causes listing to become divorced from judicial supervision and control it may become hard for that responsibility to be exercised adequately.
- 5.120. More generally, substantial change to a system in which face to face personal communication between litigant, witness and judge is both central and highly valued by processes which make greatly increased use of remote means of communication, risks undermining an aspect of English civil justice which sets it apart and, for many, above the civil systems of many of our neighbours. The constant task which lies ahead is to focus upon and preserve those parts of our much loved oral system which really matter, not only in the sense that they make a major contribution to the achieving of a just outcome, but also because they play a vital role in the perception, in the minds of the unsuccessful litigants, that they have been listened to, and have had a fair day in court.
- 5.121. All that can usefully be pointed out at this stage is the advantage of ensuring that the designers of the new digital systems are given maximum exposure (by court visits and meetings with judges) to first-hand experience of the ways in which the current structure works successfully, so that they have them well in mind when considering whether, and if so how far, to depart from them. That is one of the reasons for the programme of court visits currently being put together as part of the process of judicial engagement with the HMCTS design team. Final decisions on design will in any case be a matter for determination by the Lord Chancellor and the Lord Chief Justice, under the partnership between them by which HMCTS is governed.
- 5.122. The third main area of threat, or risk, may be headed funding. Although there is now a commitment by government to fund the Reform Programme at the level requested by HMCTS, the commitment is not open-ended. The capacity for novel and complex IT programmes to overrun their budgets is so well known as to amount almost to a fact of life. Under-funding is not merely a risk which threatens design and construction. It will need to be kept in mind as potentially affecting the Assisted Digital Service, without the full provision of which access to an Online Court would be denied to those who are challenged in the ownership or use of computers. Similarly, once established, a new digital system and, even more so, an Online Court will require maintenance and constant updating no less than a court building. The Online Court is likely to have digital systems for commoditised guidance, case-specific triage and embedded rules which will need constant monitoring and updating, in particular during the early years while a new system settles down. The current process whereby every rule change has to be made by statutory instrument is likely to be much too slow and unwieldy.
- 5.123. All this is likely to take place during a period of continual retrenchment in public expenditure upon the courts. That might be thought not to be a particular problem for civil justice, since it has historically been more or less self-financing, and since the proposed changes ought to

make it financially more efficient, while providing at least as good a quality of service. But there are two caveats to be borne in mind. The first is that if the introduction of the Online Court provides access to justice for the first time for a substantial class of potential litigants who are currently deterred from going to court at all, then the design of the civil courts' structure going forward needs to accommodate the real prospect that its business will increase substantially.

- 5.124. The second caveat is that the natural assumption that the extra resources needed to handle increased business would themselves be self-funding needs to be tested against the policy to use part of the fee income from the civil courts to subsidise the cost of the family and criminal courts. Whether it is right that this income should be used in that way is a political matter upon which I refrain from commenting. It is sufficient merely to point out that the existence of such a policy means that it cannot simply be taken for granted that a civil justice system with the potential to be self-funding will be fully funded in practice.
- 5.125. Finally, the risk that substantial court fee increases will reduce rather than promote access to civil justice is too obvious to need more than a mention, save to note that fee increases for the use of courts (such as those in the Rolls Building) which significantly impact upon their competitiveness as against courts overseas may more easily lead to a permanent loss of litigation business, and therefore UK revenue, than fee increases for litigants who have no practicable alternative but to use the English courts.
- 5.126. The final general threat may be described as transition pain. The wholesale move from a paper-based to computer-based means of storing, transmitting and communicating information is bound to be a painful process, and an unwelcome one to the many judges and court users who, by long habit or instinctive preference, will simply be reluctant to make the transfer from the one to the other. Court users are not the only class of persons engaged with the civil justice system which includes members who find the use of computers difficult, uncongenial or sometimes even impossible. Some judges do as well. There are many who regard on-screen documents as inherently less easy to work with during a trial or other hearing than paper documents in bundles. They are perceived to be less easily marked, annotated and compared with each other. Several judges whom I have consulted have expressed the hope that, even in an essentially paper-free environment, they will still be afforded paper core bundles containing all the key documents. Some judges with access to the current e-filing systems already available prefer to have court staff copy the court e-file onto paper in advance of preparation for a hearing, rather than to access and sometimes compare them on a single screen.
- 5.127. These are not insuperable difficulties. There are document management systems which facilitate marking and annotation, although they are currently expensive. The use of twin screens, after appropriate installation, training and practice, readily enables documents to be compared, electronically, side by side.
- 5.128. More generally, transition pain for judges and staff is bound to arise from the combined effects of changes in the court estate, in the structures for the handling, communication and

storage of case related files, in back office management, and in the whole culture of the civil courts, as the Reform Programme proceeds. It is difficult to over-emphasise the challenge which this presents to those who will have the task of implementing the Reform Programme in the day to day running of the civil courts, and the importance of sufficiently funded and pre-planned training and support, by the Judicial College and by leadership judges all over the country.

Specific Threats

- 5.129. Informal consultation has impressed upon me widespread concern about the following specific aspects of the Reform Programme. The first is that the current court closure programme, coupled with closures that are likely to follow from, or at least be enabled by, digitisation, will withdraw from large parts of England and Wales a local court for the hearing of civil claims. In short, it is said that the original reason for the creation of the County Court will be fatally undermined. This is regarded as of particular concern for litigants with scarce financial resources. For example, the defendant to a claim for possession of a dwelling house by reason of rental or mortgage arrears may be faced with a choice between using scarce resources to reduce the indebtedness, or paying substantial fares for travel to a distant court, which may not be connected with their place of residence by any form of public transport. Since there is a broad (but not unanimous) consensus that possession cases of that kind will usually call for a face to face meeting between judge and defendant, if only to hammer out a practical programme of arrears repayments, this is not a difficulty which can simply be cured by the use of video conferencing. It may be that the temporary use as a court of space in another public building ("Temporary Courts") will solve the problem, but that concept is still new and untried, and its logistics and economics have yet to be tested in practice.
- 5.130. I have already mentioned the almost universal expression of concern that a mandatory Online Court for certain types of dispute would deny access to justice to those challenged by the use or ownership of computers. This is the concern which underlies the development of the Assisted Digital Service but, again, those processes whereby the requisite help is provided to those in need of it have still to be fully designed, let alone trialled or proved.
- 5.131. There is I think at least a risk that the implementation of the Reform Programme, together with one or more of the options for change considered in this report could be progressed in such a way as to attract root and branch opposition by groups who are either convinced that it will detract from access to, and the quality of, justice or who resist for reasons of sectional interest. I do not suggest that this is a current threat by anyone. If that threat exists, I am at present unaware of it. Nonetheless it seems to me to be basic prudence and good sense to debate and progress the changes in a way which maximises the prospect of their being made in an atmosphere of consent and co-operation, rather than having to be fought through. I see that as a major objective of this review.
- 5.132. It would be wrong not to report and reflect upon a persistent theme in the informal consultation which I have conducted thus far, to the effect that there is widespread scepticism about the ability of any government organisation to conduct large scale IT

procurement exercises costing hundreds of millions of pounds with a real prospect of ultimate success. I would offer two comments from my own experience. First, some large scale government online projects have been a conspicuous success. Those used by the DVLA for driving licences and vehicle road tax, and now by HMRC for personal tax returns are examples acknowledged by many. The new online system used by the Traffic Penalty Tribunal may be a more relevant example. Secondly, my own experience of the newly developed judicial IT platform, e-Judiciary, upon which I have conducted the whole of this review to date without any recourse to paper, gives me solid reason to do much more than just hope that the IT revolution about to be introduced in the courts will succeed.

5.133. Finally, no summary of the threats or risks which face the maintenance or improvement of the quality and accessibility of civil justice would be complete without at least a mention of judicial morale and recruitment. It used to be axiomatic that the pinnacle of any successful barrister's career was appointment to the bench, and to the High Court bench in particular, almost regardless of the sacrifice in income which that would involve for most appointees and their families. It is of course a political question how much the nation should be prepared to pay its judges, and it is a welcome development that recruitment to the bench, including the High Court bench, is now actively pursued among a much wider class than successful barristers, and that the hard work of the Judicial Appointments Commission is at last making real strides in the practical achievement of judicial diversity. Nonetheless there are worrying signs (even if anecdotal) that recruitment to the bench may now be seriously at risk. For a civil justice system that depends so heavily upon the quality of its judges, this is a risk which cannot safely be ignored.

6. The Online Court

- 6.1. The development of the Online Court (“OC”) is the single most radical and important structural change with which this report is concerned. It provides the opportunity to use modern IT to create for the first time a court which will enable civil disputes of modest value and complexity to be justly resolved without the incurring of the disproportionate cost of legal representation. In my view it offers the best available prospect of providing access to justice for people and small businesses of ordinary financial resources. It will therefore go a long way towards providing a remedy for what I have described in Chapter 5 as the most serious and long-standing weakness of the civil courts.
- 6.2. The concept of an online court has existed in the public domain within England and Wales only for less than a year, although it has been in development in a number of other countries. It first emerged in the report “Online Dispute Resolution for Low Value Civil Claims” (“the ODR Report”), submitted to the Civil Justice Council and to the Master of the Rolls by the ODR Advisory Group chaired by Professor Richard Susskind, in February 2015. The concept was endorsed and developed in certain respects in the Justice Report, published in April 2015. It is now being actively developed by the HMCTS design team, in consultation with the Civil Judicial Engagement Group (“Civil JEG”), as part of the digitisation element in the Reform Programme. Funding is now in place for its design, testing and implementation.
- 6.3. The phrase ‘online court’ usefully identifies the underlying concept as a derivative of those proposed by the ODR and Justice Reports. But it does not define that concept. The ambition of the Reform Programme is that the whole of the civil courts should be digitised. Literally speaking, the civil courts of England and Wales will consist of one or more online courts, probably accessed through a common online portal. But the Online Court described in this chapter is no mere digitisation of an existing court. It is something entirely new.
- 6.4. Nor is the phrase ‘online court’, and the acronym ODR, meant to suggest that the whole of the procedure for the resolution of disputes submitted to that court will inevitably take place online, rather than, for example, on the telephone, by video conference, or in a traditional face-to-face encounter with a judge in a hearing room. That may have been a reasonable impression to be derived from the ODR Report, but the Justice Report contemplated that determination by a judge online would only be one of a range of options, the others including at least telephone and face-to-face hearings.
- 6.5. In fact the true distinguishing feature of the OC is that it would be the first court ever to be designed in this country, from start to finish, for use by litigants without lawyers. By ‘court’ I mean an entity forming part of the mainstream civil justice system, rather than a tribunal or a structure for arbitration or ADR. It is unique among attempts to assist litigants without lawyers because it seeks for the first time in this country to take advantage of the facilities offered by modern IT at all stages in its process. It would be tempting to capture this essential distinguishing feature by calling it a people’s court, were it not for the unfortunate historical connotations which would inevitably attach to that phrase. It is therefore a radical concept in urgent need of a distinguishing name, for which I invite contributions (but no

prizes) during the next stage of this review.

- 6.6. Although there is much about this concept which remains undefined, the following features may be regarded as relatively settled. First, the OC is intended to be used for the resolution of relatively simple and modest value disputes. Simplicity is a requirement both because it is unlikely that first generation software will prove to be up to the task of accommodating complex issues and secondly because the traditional adversarial system is pre-eminently well-suited to the resolution of complex issues of fact and law. It is designed to accommodate disputes of modest value precisely because it is those disputes which continue to attract disproportionate cost, if litigated with the assistance of lawyers. Furthermore, it is probable that, at least in its early stages, the OC will be confined to the resolution of money claims, for reasons discussed later in this chapter.
- 6.7. Secondly, the OC is likely to adopt a variant of the three stage or 'tier' structure originally proposed in the ODR Report and adopted in the Justice Report. I shall have more to say about each of them in due course but, by way of summary, stage 1 will consist of a mainly automated process by which litigants are assisted in identifying their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court, and required to upload (i.e. place online) the documents and other evidence which the court will need for the purpose of resolution. Stage 2 will involve a mix of conciliation and case management, mainly by a Case Officer, conducted partly online, partly by telephone, but probably not face-to-face. Stage 3 will consist of determination by judges, in practice DJs or DDJs, either on the documents, on the telephone, by video or at face-to-face hearings, but with no default assumption that there must be a traditional trial. I would add that these three stages omit a vital fourth stage, namely enforcement, but I will defer my analysis of that stage until Chapter 10.
- 6.8. I think that the key to understanding why the OC concept may harness modern IT so as to provide a civil court structure uniquely suitable for litigating without lawyers lies in stage 1, which I will label triage. In most current civil litigation, stage 1 consists of the litigant turning a blank sheet of paper into particulars of claim, an adversarial process which LIPs tend not to perform with distinction. By contrast, online stage 1 triage software for use in the OC would guide the litigant through an analysis of his or her grievance in such a way as to produce a document capable of being understood both by opponents and by the court. It is easiest to illustrate this by a simple example. Suppose that A has a dispute with her builder B relating to works carried out at her house. After entering the common Court Service Portal and selecting the OC as the appropriate court (if necessary with online guidance), and after providing her name and contact details, A would be asked to identify the object of her grievance by reference to a series of tick boxes which might include her bank, her holiday company, her next door neighbour and her builder. Having ticked 'Builder' the software would present new questions designed to elicit the essential nature of the dispute, for example whether it was about the quality of the work, the amount charged or delays in completion. Ticking (or clicking) the appropriate box would reveal further successive pages, including a page requiring A to identify B and provide his (or if a company, its) contact details, to state whether the building works were covered by an agreement and, if in writing,

requiring A to attach any electronic copy, or scan or photograph with her smart phone any paper copy, so that the central document required by the court for determination of the dispute would be lodged electronically from the outset. Further automated pages would question A as to the details of the dispute, in much the same way as a high street solicitor might do when taking instructions after A sought his assistance. The result of this process would be for the system to generate a document on screen broadly approximating to particulars of claim, which A would be invited to approve or amend, and certify as true. The system would then deliver that document and any accompanying evidence electronically to B (if an e-mail address had been provided by A), or request B to go online by sending B a letter or a text to his mobile phone. The software would then automatically take B through an investigatory process (if also a litigant in person) in broadly the same way, so as to generate the electronic approximation to a defence. These automated investigatory processes would have bypasses for litigants choosing to use lawyers, and for bulk issuers with departments of staff trained for the purpose.

- 6.9. An important part of the concept behind stage 1 would be to provide online help at every stage in the process of completing the requisite online documents, as well as to provide simple commoditised online advice as to the bare essentials of the relevant law. By 'commoditised' I mean a description of the basic legal principles applicable to the litigant's dispute, rather than advice tailored to her particular facts.
- 6.10. The genius of this innovative approach is that (if it can be made to work) it is designed to place upon an electronic file, available both to the parties and to the court, the essential details of, and evidence about, a litigant's case at the outset. By contrast the common experience of DJs hearing small claims track cases at present is that the key facts and evidence remain buried in the minds of the litigants and in their ill-assorted bundles of documents even when they arrive at court for a trial.
- 6.11. This is intended to generate three substantial advantages over the current small claims process. First it enables the parties to communicate to each other the relevant details of and evidence about their case at the earliest possible stage, thereby providing a substitute for the pre-action protocols process used by solicitors in the conduct of most civil litigation. Secondly, it opens up opportunities for conciliation of their claims, whether as the simple result of the exchange of the stage 1 materials, or by mediation or early neutral evaluation, again well in advance of trial. In this context, it was a striking feature of the removal of Legal Aid from private law family proceedings, and the consequential dramatic increase in the proportion of litigants in person, that mediation rates fell sharply rather than (as had been hoped) rose, because litigants in person are less (if at all) aware of the advantages of ADR than lawyers. The introduction of the Mediation Information and Advice Meeting ("MIAM") in this type of litigation is intended to fill that gap, as a compulsory first educative step.
- 6.12. Thirdly, this stage 1 triage process enables the case, if not resolved by conciliation, to be managed and made ready for trial with all the requisite information available on an electronic file, thereby making more efficient the processes of judicial preparation and determination of those cases which cannot be settled earlier.

- 6.13. Stage 2 of the OC process is mainly directed to making conciliation a culturally normal part of the civil court process rather than, as it is at present, a purely optional and extraneous process, encapsulated in the 'alternative' part of the acronym ADR. By that I do not mean that it should be made compulsory. Rather it would build upon the current Small Claims Mediation Service by inviting the parties to engage in an appropriate form of conciliation, albeit respecting the refusal of one or more of them to do so.
- 6.14. A radical departure which stage 3 would make from current practice and procedure is that there would be no default assumption that a live claim would have to be settled at a traditional face to face trial. Rather, the traditional trial would be regarded as the last resort, if the alternatives of resolution on the documents, by telephone or by video conference were deemed to be unsuitable. A face to face hearing could also be confined to the determination of particular issues, where for example live evidence and cross examination was required.
- 6.15. Finally, the OC will mark a radical departure from the traditional courts (outside the small claims track) by being less adversarial, more investigative, and by making the judge his or her own lawyer. By that I mean that judges will receive no assistance in the law from the parties, and may well need more training, more frequently, in the law relevant to the caseload of the OC that they receive at present. I acknowledge that, even now, the DJs who decide cases on the small claims track already have to be their own lawyers, but the ambition of the OC will extend to a substantially wider caseload.
- 6.16. Outside those aspects of the OC concept which might be described as its kernel, there is a range of sub-options, all with their own pros and cons. I would summarise them as follows:
- (a) Whether the OC should be a separate court, with separate rules, or a part of the County Court, regulated by amendment to the CPR;
 - (b) What values and types of claim should fall within, or be excluded from, the OC;
 - (c) Whether the OC should be compulsory, in relation to the types of claim within its jurisdiction and, in any event, how to assist those who are challenged in the use of computers;
 - (d) Whether there should be any, and if so what, provisions for costs shifting;
 - (e) What provision should there be for appeals;
 - (f) How should open justice be guaranteed in an online environment.

Separate Court with Separate Rules or part of the County Court regulated by the CPR

- 6.17. For most purposes these two questions, separate court and separate rules, go hand in hand. It is possible but counter-intuitive to conceive either of the OC as part of the County Court but with separate rules, or of the OC as a separate court, but subject to the CPR.

- 6.18. I would summarise the advantages of the OC as a separate court with separate rules as follows. First, this would best achieve the fundamental objective behind the design of the OC, namely to create a court for litigants without lawyers, because it would insulate the OC from all the lawyerish and purely adversarial aspects of the culture of the civil courts generally, including the County Court. The OC is intended from the outset to be a less adversarial environment, in which investigation by the court will form an important and distinctive part.
- 6.19. Secondly, the OC will in any event need software and structures for the provision of help to those challenged with computers, and that software will need maintenance teams, both technical and procedural. In its early years in particular, it is likely that the electronic structure will need intense maintenance, development and care while it beds down and becomes established. It is vital that there is suitable dedicated resource focussed on the particular services of the OC and the needs of its users, mixing digital expertise with experience of resolving disputes. If it is treated as simply a “bolt-on” to IT maintenance of the civil courts generally, it is likely to be inadequately focused and may be inadequately resourced.
- 6.20. Thirdly, the OC is likely to need special Case Officers, trained in the processes of investigation and conciliation which will be unique to that court. If those special functions are discharged on a part-time basis by County Court Case Officers, it is likely that they will again be less well focused and may be underfunded.
- 6.21. The rules for the OC will need to be constructed from scratch, as a self-standing set of rules designed from the outset to be understood by litigants without lawyers. Large parts of them will need to be embedded in the triage software so that, for example, online claim forms cannot be issued until the essential information has been provided by the litigant. These rules would be best drafted by a very differently constituted committee and drafting team than the CPRC. Current experience (for example with the new Help with Fees form and the LIPs’ guide to the Chancery Applications Court) suggest that those best qualified to draft rules for litigants without lawyers are to be found among the employed and voluntary members of LIP-facing advice and assistance agencies. There will, in practice, need to be close co-operation between lawyers, software experts and drafters of that kind, supervised by a committee with a predominantly lay membership. There will also be much which can be learned from the progress recently made by the main Tribunal Structure, the Employment Tribunal and by the Family Court in devising simpler rules than the CPR.
- 6.22. Fourthly, a separate court with its own rules would be better insulated from the encrustation by authority which has tended to render the CPR ever more complicated and difficult to comprehend.
- 6.23. The advantages of making the OC a part of the County Court, regulated by amendment to the CPR, may be summarised as follows. First, the creation of a third separate court in the civil structure would add to its complexity. This is an issue to which I will return in some length in Chapter 8 below.

- 6.24. Secondly, final determination of cases in the OC will in any event have to be carried out by the same DJs as sit in the County Court. Splitting their activities between two separate courts may detract from efficiency and flexibility of judicial deployment, and there may even be an issue whether the current terms and conditions under which those judges serve will accommodate service in a new court.
- 6.25. Thirdly, the creation of a separate court, with rules formulated by a separate committee, will require primary legislation and might deprive the new court of the established wisdom of the CPRC and its drafting team. It would also fracture the uniformity of rules within the civil courts established as a result of the Woolf reforms.
- 6.26. Fourthly, the creation of a separate court with its own staff might lead to loss of economy of scale.
- 6.27. Fifthly, the creation of a separate court for the lowest value and simplest claims might be perceived as an inferior offering, and risk losing the brand name which the County Court still enjoys.
- 6.28. Sixthly, since an appellate structure would itself be regulated by the CPR, confusion would be caused if the OC had its own separate rules.
- 6.29. These pros and cons have been keenly debated, both in consultation and within my Hard Working Group. My own strong provisional view is that the advantages of creating the OC as a separate court, with dedicated software, staff, rules and rule-making body clearly outweigh the arguments favouring creating it as a branch of the County Court, subject to the CPR. The argument which I have found most persuasive is that only by making the OC a separate court with its separate rules will the objective of creating a court truly designed for litigants without lawyers be achieved. In my view the lawyerish culture of the existing courts and of the CPR is so deeply embedded that nothing short of a clean break in the design and operation of the OC will provide the necessary new start, and the requisite insulation from the old culture.
- 6.30. I recognise the force of the arguments about judicial deployment and economies of scale. I consider that the real difficulties which underlie them will be hurdles which need to be surmounted rather than insuperable obstacles to the creation of a wholly separate court.
- 6.31. I do not regard the arguments about having to use the CPR on appeals, or about a perception of the creation of an inferior court, as being persuasive. The users of numerous courts and tribunals have to cope with a change from their rules to the CPR on appeal. If necessary the court hearing appeals from the OC could itself adopt an appeal section of the OC rules when hearing those appeals, as High Court Judges do without undue difficulty when sitting in the Upper Tribunal to hear tax and other appeals.
- 6.32. Nonetheless this is an important and fundamental issue upon which I would welcome views during the further consultation that will follow the publication of this interim report.

The Confines of the OC – Opt-ins or Opt-outs

- 6.33. I have consulted as intensively as my limited time has permitted on this issue. Views as to the subject-matter boundaries for the OC have ranged widely. Although many have regarded some kind of monetary ceiling as an inevitable starting point, several have emphasised that value is no reliable determinant of the appropriate allocation of cases to courts or judges, and emphasised complexity and the public importance of issues raised as being of equal if not greater importance. Among those who have been prepared to contemplate a value limit, opinions have ranged widely, between £2000 at the bottom and over £100,000 at the top.
- 6.34. There has been a similarly wide-ranging debate about whether the jurisdictional competence of the OC should be defined by reference to types of cases (opt-ins) or by types of cases ruled out (opt-outs). It is firmly agreed in principle that, however the boundaries are drawn, there will have to be, in effect, a permeable membrane along them, through which appropriate individual cases may be passed both out of, and into, the OC. Thus what may appear at first sight to be a simple case may turn out to involve complexity of law or disputed fact that makes it better managed and resolved in a traditional court than in the OC. Once that complexity was appreciated, the case should be able to be transferred to another more appropriate court.

Value Limits

- 6.35. Taking value limits first, the division of a civil litigation workload among courts or into tracks has historically used value limits as a starting point, and they have worked well provided that they are not too mechanistically applied. Thus for example, the current equity limit of the County Court of £350,000 can be overridden where an equity case of higher value but modest complexity is sent to the County Court by a Chancery Master. Equally, equity cases substantially below that value may be sent by a County Court District Judge to the Chancery Division (in London or elsewhere) when it is perceived that the case raises matters of specialist complexity best dealt with by an expert Master or Chancery specialist Judge.
- 6.36. Provided that the same flexibility for moving cases out of or even into the OC is maintained so that cases below the relevant value limit can be moved from the OC to the traditional adversarial environment where appropriate, it seems to me inevitable that some sort of value limit has to be used as a starting point, within cases of types which are not inherently unsuitable for the OC.
- 6.37. I have in Chapter 5 mentioned the concept of a line (“the Line”) below which, by reference to value at risk (“VaR”), it is usually disproportionate to litigate a dispute with full legal representation on both sides. The search for a value limit for claims in the OC by reference to the concepts of the Line and VaR would lead to the identification of a value well above £25,000, and probably above £50,000. It can certainly be said with almost complete confidence that fully represented litigation of a claim where the VaR is no more than £25,000 will almost always be disproportionately expensive in terms of legal costs.

- 6.38. Other consultees have pointed to the current small claims limit as a suitable value ceiling for the OC, both because it would transfer a recognisable block of existing civil cases, leave the fast track and multi-track untouched, and correspond with an existing line below which civil litigation is commonly conducted without legal assistance. The current small claims track limit is £10,000 generally, but a mere £1,000 for personal injuries litigation and housing disrepair, although this limit is likely soon be raised to £5,000 for personal injuries at least.
- 6.39. It may well be that the small claims track limit would be a prudent starting point for the OC, as a stepping stone on the way to a much larger jurisdictional competence. But it would in my view fail altogether to address that large potential class of civil litigants with claims in excess of that amount who are currently deterred from litigating at all by the combined effects of disproportionate legal costs and the grave disadvantages of litigating in the existing courts without lawyers. My view is that a value limit of £25,000 would be a better steady-state objective than £10,000, even if one to be approached in two stages, by using £10,000 as a temporary initial limit. I would retain the ambition that the competence of the OC could in due course be increased beyond £25,000, but be content to let the new court prove itself first. Subject of course to opt-outs, setting the limit at £25,000 will already capture a very substantial part of the business of the County Court, in terms of number of cases, because of the broad pyramidal nature of its workload expressed in terms of value.

Opt-outs or Opt-ins

- 6.40. Whatever ceiling is chosen by reference to value, there has been considerable debate about whether eligibility for the OC should be defined in an inclusive basis, with certain classes of work specifically excluded (opt-outs) or whether, at least in its early stages, the OC should be confined to specific classes of cases only (opt-ins). There has also been debate about the suitability for inclusion, or exclusion, of particular types of work.
- 6.41. Proponents of the opt-out approach emphasise first that, if the rationale for the OC is that civil litigation with lawyers below the Line is disproportionately expensive, this applies across the board, rather than only to specific classes of case. It should be for the advocates for the exclusion of any specific class of case to demonstrate that this disproportionality either does not apply to that class, or that it does not lead to an inhibition upon access to justice.
- 6.42. Those who favour the opt-in approach point to the fact that the OC is a new and untried concept, so that it should be introduced cautiously, class by class, starting with those that can be shown to be the most appropriate. They would start only with liquidated (i.e. specified) money claims between two parties, leaving everything else in the traditional courts until the OC either has or has not proved itself and settled down on its most favourable battlefield.
- 6.43. This principled disagreement may be more theoretical than real, because there is a wide measure of provisional agreement about classes of case which should, at least initially, be kept out of the OC. They include the following:

- (a) Claims for possession of dwelling houses, save perhaps for 'no fault' claims under s.21 of the Housing Act 1988 and claims where there is a mandatory ground for possession and no dispute that it applies.
 - (b) Claims for injunctions or other non-monetary relief requiring the close attention of the court (such as specific performance or declarations).
 - (c) Class claims (including bankruptcy or winding up).
 - (d) Claims by or against minor children or other protected parties.
- 6.44. Much more contentious is the question whether personal injury claims and claims about housing disrepair should be excluded, either in part or lock, stock and barrel. Taking personal injury claims first, I have already explained in Chapter 5 why, in my view, these claims are as capable as any of producing disproportionate legal cost, but not so as to impede access to justice for those with a sufficient prospect of success on the merits to obtain a CFA. The combination of CFAs (i.e. no win no fee agreements) coupled with QOCS enables those with personal injuries to obtain legal representation without unacceptable financial risk.
- 6.45. Proponents of the exclusion of personal injury claims from the OC make the powerful argument that, since it is an almost invariable feature of such cases that an injured private individual is ranged against a large insurance company, nothing short of legal representation for the claimant will ensure that the playing field is not so steeply slanted as to prejudice a fair and just outcome. They also point out that the new PI Portal already offers an online entry for these cases, with its own built-in capacity for negotiation pre-issue and an enviable settlement rate, so that the OC is just an unnecessary and duplicative addition to an already efficient, streamlined and effective process.
- 6.46. To this the advocates for inclusion reply that none of those processes, nor anything else in the Jackson reforms, have yet prevented the expenditure of wildly disproportionate costs on PI (including clinical negligence) cases that go to trial, and that nothing short of the further radical reform contemplated by the introduction of the OC will provide an effective solution. In answer the exclusionists say that most PI cases already settle before significant cost is incurred, and that those which fight, and clinical negligence cases in particular, commonly involve the deployment and testing of expert evidence for which the established adversarial practices and procedures of the traditional civil courts are the best for trial.
- 6.47. While this issue deserves further thought, consultation and debate during the next stage of this review, my provisional view is that, subject to two aspects, the exclusionists currently have the stronger case. The need for injured claimants to have lawyers to level the playing field, coupled with the existence of an established online Portal route towards the court which produces a high level of settlements, with a simple Part 8 process for deciding issues of quantum where liability is admitted, strike me as a very persuasive combination.
- 6.48. My two reservations are these. First, I see no reason why PI cases below the small claims track limit should not be included within the OC. If that limit is raised to £5,000, the OC should accommodate claims below it. That will capture some of the small claims on which the costs

are the most disproportionate, all the more so if claims where, regardless of the face value of the claim, the VaR (i.e. amount really in dispute) is £5,000 or less are either included or sent to the OC once that becomes apparent. A very large number of whiplash and industrial deafness cases fall within that bracket, if liability is admitted. Secondly, I would allow claimants to use the OC for PI claims up to the general OC limit if they wish to do so.

6.49. I have been less easily persuaded thus far by the case that housing disrepair claims by tenants should be excluded from the OC as a class. The case made is that these claims are likely to be fact-intensive and dependent upon effective cross-examination, and that there already exists a developed CFA market which enables tenants of sub-standard dwellings to pursue their claims with legal representation. I would welcome statistical evidence of the availability of risk-free legal representation, and an explanation of how the risk of liability for defendant landlords' costs is, or might be, managed. It may be that, if this evidence is forthcoming, a persuasive case could be made that this class should be given voluntary but not compulsory admittance to the OC.

Should the OC be Compulsory? How to provide the Assisted Digital Service

6.50. Again, these two questions run naturally together, in the sense that it would be entirely unsatisfactory, and possibly unlawful, to make recourse to the OC compulsory until a proven structure of assistance for those who need it was designed, tested and put into full operation.

6.51. Subject to that, and while I recognise that there are arguments to the contrary, it seems to me inevitable that the long term objective of creating a court suitable for litigation without lawyers will only be achieved if the OC is made compulsory for cases within its competence, subject to a broad discretionary case management power to move appropriate cases out of it. The simple reason for this is that it is not only potential claimants that are deterred from litigating without lawyers, but defendants as well. Many of the low or medium value claims currently brought in the County Court are issued by large institutions such as utilities. They would have no particular incentive to avail themselves of the triage services in stage 1 of the OC, and perhaps not even the conciliation services in stage 2. Further, litigants with the resources to use lawyers (whether in-house or independently) may deliberately seek a perceived procedural advantage in litigating against persons unlikely to afford lawyers, and therefore choose to use the County Court rather than the OC.

6.52. Making the OC compulsory for cases within its competence would not of course prohibit parties from using lawyers, although, as will appear, it is likely that the OC would have a costs regime that does not ordinarily accommodate legal costs shifting beyond the repayment of court fees and limited disbursements in a regime similar to that laid down for the small claims track by CPR 27.14. But the use of lawyers by one party in the OC would not place opposing parties at the level of severe disadvantage which currently faces

them in the County Court, (other than perhaps in the small claims track), because of the investigatory and other assistance provided to LIPs by its culture, procedure and dedicated IT.

- 6.53. Leaving aside the need for Assisted Digital, an additional reason for not making the OC compulsory at the outset might be to allow it to prove itself as an attractive forum for litigants without lawyers before making it mandatory for that purpose. It may well be that a proving period for that purpose would run hand in hand with the necessary proving period required to validate the Assisted Digital Service.

Assisted Digital Service

- 6.54. There is a lively continuing debate about what the Assisted Digital Service should include. No one doubts the need for substantial assistance online, in the form of digital help, for the purpose of completing online forms. But that form of assistance, however necessary, will not of itself do much for those who cannot access it.
- 6.55. It is equally common ground that some form of telephone helpline will be necessary, and sufficiently well staffed to ensure that waiting times on the phone do not make the completion of online forms practically impossible.
- 6.56. The more serious debate under this heading, in the consultation which I have conducted thus far, begins with achieving a reliable pre-assessment of the size of the class of users of the OC who are likely to find using computers difficult or impossible. In the context of a digitisation of the whole of the court service, that class will by no means be limited to actual or potential users of the Online Court. Nonetheless, OC users will need particular help appropriate to the way that court works which will differ from the help required by those who, without lawyers, will need to continue to use the existing courts.
- 6.57. Consultation with pro bono advice agencies, and visits to PSU teams in a number of regional courts, have easily persuaded me that the proportion of potential OC users likely to find the use or even ownership of computers challenging is likely to be considerably higher than the same general proportion of the citizens of England and Wales. The discussion of this question at the December 2015 LIP Forum suggests that the figure among current LIP court users may be well over 50%. It may be that if there is added to the potential class of users of the OC that group who, for reasons already discussed, avoid the civil courts altogether at present, then the percentage may fall. But that can be little better at present than speculation.
- 6.58. Concerns about the adequacy and long-term funding of the Assisted Digital Service have been at the forefront of consultation responses to the proposed introduction of the OC, and there is a recognition on the part of HMCTS that they need to be both satisfactorily addressed and tested before there could be any question of making the OC compulsory. At this stage, all I need to add is that although the pro bono agencies have staff and volunteers who are both well qualified and habituated to providing practical assistance of

that kind to court users without lawyers, and would be ideal teachers of persons providing face to face help to those challenged by the use of computers, this is not something which can simply be left to the pro bono agencies. There is a significant class of civil court users who are as challenged by the use of speech or paper as they would be by the use of computers, including the many who do not speak English as their first language, for whom the pro bono agencies are likely to continue to be fully stretched in providing vital assistance. That is not to say that Assisted Digital cannot appropriately be contracted out to private agencies. But it does mean (and HMCTS accepts) that it will have to be paid for as part of the necessary cost of introducing a structure which, if in use across the court system, is likely to provide scope for very substantial savings indeed.

- 6.59. There will also be a significant class for whom the fact that English is not their first language will be a major component in the difficulties which they face in accessing the OC, although not necessarily greater than face them in the existing courts. Modern IT may well make the provision of solutions to this problem easier online than it is face to face. Consideration will also need to be given to the question how to integrate the Welsh language into digitised systems, both in the OC and elsewhere.

Costs Shifting

- 6.60. There has been little discussion thus far about an appropriate costs regime for the Online Court. Consistent with its objective of facilitating litigation without lawyers, it appears to me to be inevitable that costs shifting will not extend (save perhaps in cases of misconduct) to recovery of legal costs, but be limited to court fees and some other expenses. Whether it should include recovery as an expense of the costs occurred in obtaining private assistance with the use of computers has yet to be considered.
- 6.61. In this respect the OC would follow well established precedents, for example in the Employment Tribunal and the small claims track of the County Court.

Appeals

- 6.62. There would plainly need to be an appeals route out of the OC. Again, this has been given little consideration to date. Since judicial determination of cases would be by District Judges, the possible routes of appeal would be to the Circuit Judge in the County Court, to the High Court or, since they would be final decisions, to the Court of Appeal.
- 6.63. The current route of appeal from the small claims track of the County Court lies from the District Judge to the Circuit Judge. Even though the OC is likely to come to accommodate a higher value of case than the small claims track, it seems to me that this route should be the preferred candidate among routes of appeal, subject to consultation responses during the next stage of this review.

Open Justice

- 6.64. I have dealt generally with this issue, as one which arises from the process of digitisation, in Chapter 4. My conclusion is that the requirement for open justice presents a technical challenge, but not an obstacle, to digitisation.
- 6.65. It may be that the very different procedures of the OC, compared with a digitised County Court or High Court, may make some of those technical challenges more difficult, in particular in relation to the element of conciliation proposed to be offered at stage 2. The operation of the Small Claims Mediation Service is, as far as I am aware, not open to public inspection or view of any kind, and mediation is of itself dependent for its success upon confidentiality. It may be that if the conciliation offered at stage 2 of the OC process is to include some form of early neutral evaluation, an issue which I address in the next chapter, then some element of transparency vis-à-vis the public will need to be considered.
- 6.66. Apart from that, I do not consider that the setting up of the OC raises open justice issues to any significantly different or greater extent than digitisation generally. Plainly the introduction of such a new concept of court, backed by new IT systems, will require a programme of extensive testing, both for its technical functionality, its user-friendliness and its effect when operated by sample court users. It may well be prudent to introduce it for specific classes of work, or with a reduced value ceiling, until it has been fully proved and shown to be effective in practice in providing a forum useable without lawyers.

7. Case Officers (DJOs)

- 7.1. This third main limb of the Reform Programme raises issues which are by no means confined to the OC. There is scope for an increased role for Case Officers at all levels within the civil courts, even in the Court of Appeal. They are already in extensive use in most parts of the civil court structure, performing mainly routine functions which might equally be performed by judges, under varying degrees of judicial supervision and control.
- 7.2. I have provided an outline in Chapter 4 of the plans for Case Officers currently being developed by HMCTS. It is now common ground that the phrase used thus far to describe them, namely Delegated Judicial Officer (“DJO”) is best replaced by Case Officer. The person in question is not in any sense a judge. I have explained in Chapter 4 that this is not at all what is intended. There is to be clear blue water between the judges and this important class of civil servants.
- 7.3. Nor will Case Officers be doing judicial tasks which have been delegated to them by judges. These officers will be performing functions assigned to them, not functions assigned to judges and delegated to them. The fact that a particular function is currently carried out by a judge does not make it for ever an inherently judicial function. Determining disputes about substantive rights and duties, and approving settlements on behalf of children and other protected parties are in my view inherently judicial functions, and these should continue to be performed only by judges.
- 7.4. Calling them Case Officers will, I hope, encompass the concepts that: (a) they are not judges, but civil servants employed to carry out responsible tasks within the civil justice system, hence ‘Officers’ rather than workers or judges, and (b) they may be distinguished from others working for HMCTS in court buildings because they will be responsible for some aspect of the handling, management, conciliation and conclusion of specific cases. There are many employees of HMCTS already performing those functions under various different names. The Case Officer will by no means be an entirely new class.
- 7.5. I have from an early stage in this review been consulting about the following issues about Case Officers loosely grouped under these headings:
 - (a) Whether Case Officers should have authority to resolve live issues as to substantive rather than merely procedural rights.
 - (b) The extent to which (both in the OC and the existing courts) Case Officers should have case management authority.
 - (c) The requirements for legal qualifications, experience and training of Case Officers for different types of function.
 - (d) The nature and extent of rights of review by a judge.
 - (e) Whether there are ‘no go zones’ where the involvement of Case Officers would be inappropriate, regardless of value or importance of the issues.

- (f) How and by whom should Case Officers be supervised and managed.
- 7.6. During consultation, and the process of judicial engagement with the HMCTS design team, the following additional issue has arisen:
- (g) What should be the typical role of the Case Officer in the stage 2 conciliation process of the OC.
- 7.7. It is not part of this review of structure to micro-manage the precise delimitation of the authority and functions of Case Officers in the different parts of the civil court system. That is mainly a matter for HMCTS in consultation with the Civil JEG, and ultimately for the CPRC or other relevant rule committee. But the broad principles may properly be regarded as structural, even if the fine tuning is not. In fact there has already emerged broad agreement between HMCTS and the Civil JEG as to the principles which will serve to answer the questions set out in paragraph 7.5(a), (e), and (f) above, and no real issue of principle rather than fine tuning about (b). Questions (c) and (d) have yet to be addressed in any detail. There is an ongoing debate about question (g). In the analysis which follows I will describe the areas of broad agreement first, then (g), and lastly those which have yet to be addressed.

Resolution of Substantive Rights

- 7.8. It is now broadly common ground that the final determination of litigants' substantive rights in civil proceedings is a matter for judges, not Case Officers. But the parameters of this common ground need to be explained. First, by 'substantive rights' are meant those rights (and duties) which the litigants have come to court to have vindicated, defended, clarified, enforced or determined. Some might describe a right to recovery of costs at the conclusion of a trial or interim hearing as substantive, but it is a right which arises as a result of the application of procedural rules of the court, even if its value by the end of a case may be much larger than the amount originally in dispute.
- 7.9. In fact Case Officers already play a large part in the detailed assessment of costs ordered to be paid (or payable pursuant to the CPR, e.g. under Part 36). In the London Costs Office there are more Case Officers doing assessments than Costs Judges, and the most senior of them occasionally hear oral adversarial argument, although most of it is done on documents. The practice is for Case Officers to do assessments up to £50,000 in value.
- 7.10. Nor does the undoubted fact that a procedural decision may effectively determine substantive rights, in the sense that this may be the ultimate consequence of a default judgment, or of a case management decision which makes success impossible in practice, mean that these decisions may not in any circumstances be made by a Case Officer. What is broadly agreed to be excluded is the final determination of contests as to substantive rights and duties. Thus consent orders may generally be made by Case Officers, (subject to an important exception below) and default judgments are regularly made by Case Officers now, and have been for many years.

7.11. This broad agreement accords with the views of the overwhelming majority of those with whom I have consulted thus far. Litigants come to court to have their civil rights and duties finally determined by a judge, applying the law, if the relevant dispute cannot be settled by any other means. To have them determined by anyone else, even subject to appeal, is not what the civil courts are for.

No Go Zones

7.12. Apart from substantive rights, it is now common ground, between HMCTS, the Civil JEG and every consultee with whom I have raised the question, that the approval of settlements of civil claims on behalf of minor children and other protected parties is equally a matter for judges and for no-one else. The reasons are obvious, and admit no other conclusion.

7.13. No other no go zones have yet to appear. Some may yet prove to be so obvious as to call for no discussion, because they have sub-consciously been taken for granted. None are currently the matter of active debate, as far as I am aware.

Supervision and Management

7.14. Leaving aside recruitment, selection and training, the proper supervision and management of Case Officers will lie at the heart of the successful expansion of their role, in relation to matters currently undertaken by judges. The original question was (for a short time) whether Case Officers should be managed by judges alone or by HMCTS alone. The answer which quickly emerged was by neither, acting alone.

7.15. Case Officers will be civil servants, employed by HMCTS, which will have to be responsible for their terms, conditions and pay, for their deployment, career development, health and safety at work, and generally for all those aspects of their management which may be labelled HR. By contrast their operational activity in relation to particular cases will be supervised by judges (inevitably mainly DJs, or Masters or Registrars in the higher courts), to whom the Case Officers will be able to have recourse for advice and guidance, and to whom they will be able to transfer any case-work which (if necessary after discussion) is perceived to be genuinely judicial work.

7.16. There are many courts where that co-management is already well established. For example the Court of Appeal is heavily reliant upon a team of nine lawyers, each of whom handle separate streams of the incoming case-load, under the supervision of the two Masters, with the occasional assistance of an LJ, when requested, to give directions about case progression and management. Similar relationships exist to my knowledge in the Chancery Division in the Rolls Building, and no doubt elsewhere. There is nothing fundamentally different about the familiar co-management of judges' clerks.

7.17. The current Salford Legal Advisers' Pilot is being conducted upon exactly that basis, where supervision is carried out by rostered DDJs sitting in the same room as the Case Officer

lawyers, with a DJ in overall charge of the Pilot, including the necessary training. I witnessed it during November, and it appears to work very well.

Conciliation by Case Officers in the Online Court

- 7.18. The question here is whether the conciliatory role of the Case Officer in stage 2 of the OC process should be primarily that of mediator or evaluator. The question needs some introduction. There are two main models which may be said to have inspired the ambition to provide a culturally normal (but not compulsory) conciliation stage in the process of the Online Court. The first is the success of adjudicators in the Financial Ombudsman Service (“FOS”) in resolving over 80% of incoming complaints without the need for them to be escalated to an ombudsman. The second is the considerable success of small claims mediators in the County Court, who currently manage to empower the parties to resolve about 70% of the cases referred to them from the Northampton Bulk Centre.
- 7.19. It is not absolutely necessary to resolve, in advance of testing, the question which of these models should be preferred. But they are likely to require very different qualifications, training and skills. The time taken and cost incurred in each process may be different. The court context may contain a pointer to the method most likely to succeed.
- 7.20. FOS adjudication is, upon examination and despite its label, better described as a form of early neutral evaluation (“ENE”). The complainant is offered a reasoned written opinion (called a “provisional assessment”) as to the fair and reasonable outcome by the adjudicator. If accepted by the claimant and the respondent, it becomes a decision of FOS binding on the respondent. Either may escalate the matter to an ombudsman, and the complainant may at any stage decide to pursue the complaint in court.
- 7.21. FOS adjudicators, although frequently not legally qualified, are all given considerable training and a general understanding of the relevant law. Both up-front and during their careers, they are trained in the office view as to the application of its governing ‘fair and reasonable’ principle to particular types of case. Their adjudicatory thought-process was described to me during my visit as asking themselves “what would an ombudsman do?” in relation to the complaint before them. Adjudicators deal with complaints at the rate of about 3 or 4 per week, and a provisional assessment typically takes about 2 to 3 hours to write. Dealing with the complaint typically includes listening to, and sometimes counselling, the complainant during a series of telephone calls, and this is regarded as a key to its success. Working as an adjudicator is an established career path to becoming an ombudsman.
- 7.22. Adjudication, or ENE, of this kind is not entirely unknown in the civil courts. The Bulk Centre offers an adjudication service for the purpose of resolving the rate at which an admitted debt should be paid by instalments. A court officer proposes a rate derived from an examination of the debtor’s resources on an Excel spreadsheet. If accepted, that resolves the matter. If either party objects, the issue is sent to a hearing centre for determination by a judge in the usual way. About 90% of these adjudications are accepted without objection.

- 7.23. More generally ENE has had some success when offered by the civil and family courts. Probably the best known example is Financial Dispute Resolution in divorce proceedings. DJs with that skill have successfully transferred it to chancery proceedings about Inheritance Act and similar claims. ENE has occasionally been offered by CJs and HCJs as an adjunct to case management of substantial claims in the Chancery Division, in the TCC and in the Mercantile Courts: see CPR 3.1(2)(m). A common feature of this type of ENE is that it is conducted by someone who may loosely be described as 'on the same level' as the judge who would ultimately decide the case if it did not settle.
- 7.24. Small claims mediation is a much more rough and ready process. The mediator is armed only with the parties' telephone numbers (together with the bare description of the case on Caseman), and applies experienced common sense rather than legal skill during the course of a series of two-way telephone calls during a single hour. If the parties settle, then the mediator prepares a simple standard form of agreement for them to sign, during a further half hour. Small claims mediators are booked to do 4 or 5 of these brief encounters per working day, usually from home. None of the current team have any legal qualifications. They are all former back office court staff with many years of practical experience. They achieve a highly commendable 70% success rate in empowering the parties to settle the cases referred to them.
- 7.25. The general experience in civil litigation over the last 25 years is that mediation has been the dominant method of ADR, far outstripping ENE in terms of the number of cases undertaken and settled. There is a hybrid of the two, called Med-Arb, where the conciliator moves from mediation to a form of binding adjudication if mediation does not empower the parties to settle, but this is again a very small part of the ADR scene thus far.
- 7.26. My provisional view is that the simple telephone mediation model is likely to be a better starting point than ENE for Case Officers to conduct during stage 2 of the OC process. In this respect I acknowledge that the Justice Report inclined to the opposite view, and that there is every reason to give the question further thought during the development of the Reform Programme, and the next stage of this review.
- 7.27. My reasons are first that, in the court context, mediation has much the better track record over many years; secondly that a development of the small claims model, fortified with the Online Court file about the case, is likely to be quicker, cheaper and to make less demands on the Case Officer by way of legal qualifications and experience. Thirdly, I would not expect the court user to think that the Case Officer's opinion of the merits of the case carried the weight of someone on the same level as the judge who would otherwise decide it. While there may be an 'office view' about the fair and reasonable answer to various types of case in the FOS, there is no similar office view about the application of the letter of the law to the wide variety of cases in the civil courts.

Case Management

- 7.28. There is an obvious spectrum within the general concept of case management between,

at one end, sending standard directions to the parties in straightforward cases and, at the other, taking active and robust bespoke control of large complex cases in such a way as to bring them to a timely and just conclusion, by conciliation or trial, without disproportionate cost. The former is an essentially routine process of box work. The latter is an art, acquired by long experience of litigation, and calling for the exercise of real judgment and authority.

- 7.29. That much is common ground, and it follows that the routine end of the case management spectrum is suitable for Case Officers, whereas the artistic end must be done either by judges who are case management experts, such as Masters, or sometimes by no-one other than the trial judge. The devil is in the detail, namely finding a reliable way of distinguishing between the two.
- 7.30. The best current approximation for a dividing line may lie at the boundary in the County Court between the fast track and the multi-track. The multi-track is in part defined by reference to the length and complexity of trial needed for a particular case. If that is right, then the following tentative conclusions might flow. First, all or at least most case management within the OC would best be done by Case Officers, mainly pursuant to internal protocols but with such occasional reference to their supervising DJs as they needed. Secondly, most multi-track cases in the County Court and above would still need to be case managed by judges. Thirdly, most Part 8 cases may, because of their lack of uniformity, probably need to be managed by judges. Finally, there may be little scope for case management by Case Officers in the High Court.
- 7.31. But these are preliminary thoughts about a large topic, which calls for much more analysis in the next stage of this review, and during the development stages of the Reform Programme.

Training, Qualifications and Experience

- 7.32. The foregoing discussion of conciliation models demonstrates how dependent this next question is upon precise identification of the tasks which a Case Officer may be called upon to perform. Many consultees have suggested that a minimum professional qualification of solicitor or barrister with a minimum period of practice of the law should be an invariable rule. While I acknowledge that it might be desirable for many of their proposed tasks, I am not persuaded at this stage that it should always be treated as essential. There are some very routine tasks for which it might be difficult to recruit legally qualified applicants.
- 7.33. A variety of services of the type for which Case Officers may be suitable are currently performed within the civil courts by court officers without any legal qualifications, although the typical substitute is long service and experience in a court back office. They include small claims mediation, debt payment adjudication, detailed costs assessment, approval of consent orders (other than on behalf of children and protected parties) and some enforcement work.
- 7.34. It is likely that the development of this strand of the Reform Programme, within and without the OC, will call for the recruitment of Case Officers for a wide range of purposes. If the business centres in which they are to work handle sufficiently large and varied workloads,

then it may be possible to train teams of differently qualified and experienced Case Officers for different parts of the work.

Reconsideration of Case Officers' Decisions by a Judge

- 7.35. The creation of an extensive right to have the decisions of Case Officers reconsidered by a judge has from the outset been regarded as the natural safety valve for concerns about what was originally (and I think inaccurately) described as the delegation of judicial functions to persons who are not judges. But little thought has yet been given to the precise nature of that right.
- 7.36. It appears to be common ground that this right should not be subjected to a requirement to obtain permission. The nature of the right has variously been described as a right of review, a right of appeal or a right to a full reconsideration *de novo* (i.e. from scratch).
- 7.37. My provisional view is that a right of review is too limited and that a right of appeal would be inappropriate. A review would be too limited because it might be taken to mean that the Case Officer was exercising some quasi judicial discretion, with which the court should only interfere if clearly wrong. A right of appeal would be likely to lead to a requirement that the Case Officer give detailed reasons for every decision, large or small, which would tend to add delay and expense to the Case Officer's mainly routine and administrative functions.
- 7.38. By contrast a right to have the decision in substance taken again by the judge would suffer from neither of those disadvantages. Nonetheless if it could be exercised entirely without consequences for the applicant there is the obvious risk that it might come to be a routine form of abuse, or convenient means for a reluctant litigant to obtain a delay. There may therefore need to be an appropriately tight time limit, and a modest sanction for abuse, such as the loss of a fee or deposit, inflicted not simply because of a mere lack of success, but for misuse of the right.

8. Number of Courts and Deployment of Judges

- 8.1. The prospect that the new Online Court will absorb a substantial part of the existing workload of the County Court has reopened a previously hard-fought but settled debate about the biggest structural issue which has concerned the civil courts since the 19th century, namely whether to replace the High Court and the County Court with a Unified Civil Court ("UCC"). I have noted in Chapter 1 how this ambitious project was embarked upon in 2006 but eventually abandoned, in 2008, after Sir Henry Brooke (a recently retired LJ) had advised firmly against it in his report "Should the Civil Courts be Unified?" ("the Brooke Report").
- 8.2. Sir Henry's advice responded to much more detailed terms of reference than mine, so that a concise explanation of the reasons why he recommended against the creation of a UCC has to be teased out of his very detailed answers to a large number of questions about the then structure of the civil courts. The following summary will be sufficient. First, he acknowledged that there was a large number of organisational problems affecting the civil courts, not the least of which was the then completely fragmented nature of the numerous county courts, and the tendency for the High Court to become clogged with cases of modest value or complexity, due to the unrealistically low financial and other limits upon the county courts' jurisdiction. Secondly, he considered that all those difficulties could be addressed by reforms which did not require the creation of a UCC, such reforms including the unification only of the county courts themselves. Thirdly, he concluded that the creation of a UCC might run the risk of merely internalising the divisions and difficulties for which he proposed specific solutions, rather than resolving them. Fourthly, he concluded that the risks associated with the creation of a UCC, in particular the potentially adverse consequences for the status of the High Court Judge, coupled with the reasoned opposition of the majority of the High Court judiciary, made the embarkation upon an expensive process without a real promise of significant benefit inadvisable.
- 8.3. Sir Henry proposed a large number of specific reforms as a preferred alternative to the creation of a UCC which were then considered by a working party chaired by the then Deputy Head of Civil Justice. The majority of them were approved, and have for the most part since been implemented. In particular, the county courts have now been unified into a single County Court and its jurisdiction substantially increased and clarified. While a comparison between his report and Chapter 5 of this interim report will demonstrate that by no means all the weaknesses which he had identified have been entirely cured, the large strides towards their rectification that have since been made seem to me to have demonstrated the validity of Sir Henry's fundamental analysis.
- 8.4. But the goalposts are undoubtedly about to move, in two main respects. The first is that the creation of the OC and its endowment with a substantial part of the current workload of the County Court will both create a third horizontally divided layer in the structure of the civil courts and, at least in theory, significantly reduce the size of the County Court. The extent of that reduction will of course depend upon the amount of civil business which is transferred to the OC. But if the OC is formed as part of the County Court, rather than as a separate

entity, then at least in theory no such attenuation of the work of the County Court will occur.

- 8.5. The second factor arises directly from the replacement of paper with IT. This is in practice likely to be accompanied by a transformation from the current model of separate physical courts, each with their own facilities for issue, handling, management and trial of cases, to one in which everything except hearings may be concentrated in a small number of business centres, leaving localised courts as essentially pure hearing centres, whether in traditional court buildings or in Temporary Courts where the retention of a traditional court building is either uneconomic or unnecessary, or both. In short, the very concept of a court will become, much more than it is now, a virtual rather than physical or geographical concept, in which different aspects of its functions may be carried out in different places, connected together, and with court users, by modern IT.
- 8.6. Although there may be some who would welcome the reopening of the debate about unification of the civil courts along the battle lines which preceded the Brooke Report, and who regard the outcome in 2008 as having been wrong, even on its merits at the time, I have in consulting concentrated on those new developments which put this old question into a new light, accepting that it needs to be revisited, but starting from a perception that unification was rejected eight years ago for reasons which were good at the time.
- 8.7. I have been surprised at the extent of support for unification, particularly among judicial consultees outside London, where that support has amounted to a clear majority of those consulted. The proportions are the other way around among stakeholder consultees both inside and outside London, and among judicial consultees within London.
- 8.8. The main arguments in favour of unification have been as follows. First, it is said (and I have already acknowledged, in Chapter 2) that there is in practice little focus, in the main hearing centres outside London, upon whether a particular case is in the County Court or in the High Court. In cities where there is a substantial stream of both types of work, it is usually undertaken by the same judges, the same back office staff, and in the same buildings. In short, the distinction has become a virtual irrelevance. The former limits on the jurisdiction of the County Court have now been so reduced that it seldom matters, from the perspective of jurisdiction, in which court the case is issued. It is said that the only reason why the position is still so very different in the Central London County Court is that it, uniquely among the large trial centres which include County Court work, is not also a District Registry.
- 8.9. Thirdly, reliance is placed upon the success of the new Family Court, the product of a substantial (but not quite complete) unification of the family work of the Family Division of the High Court, the County Court and the Magistrates' Court. Those judges with mixed family and civil practices (mainly outside London) may claim to be well qualified to make that comparison.
- 8.10. Fourthly, it is said that unification would enable all civil cases (other than those in the OC) to be admitted through a single portal, gate-kept or triaged from the outset to judges of the appropriate seniority, experience and specialist skill, so as therefore to avoid the current system of transfers between courts.

- 8.11. Consistent with those elements of the case in favour of unification, the general thrust of the recommendations of those in favour has been for a Unified Civil Court (above the OC) with gate-keeping and triage as described, with judges identified in three tiers of seniority, namely High Court Judge, Circuit Judge and District Judge, with the specialist courts and lists currently found within the existing High Court all preserved in London and, if appropriate, enhanced regionally. This would achieve by administrative means rather than court user choice the best matching of cases to judges, and the maximum flexibility to enable the civil courts to cope with unexpected peaks and troughs in particular parts of the civil workload.
- 8.12. It may fairly be said, although this has not been emphasised in consultation, that this model would finesse any difficulties caused to the viability of a continuing County Court by the transfer of a substantial part of its business to the OC, and create the most flexible structural environment within which the impending radical reforms to IT and the court estate may best be carried through.
- 8.13. The arguments of those consultees who favour the maintenance of the division between the High Court and the County Court, notwithstanding the creation of the OC, may be summarised in this way. First, the central reasoning identified as compelling in the Brooke Report is said still to hold good, namely that the preservation of a High Court mainly constituted by High Court Judges serves to preserve and enhance the reputation of both, which would be put at risk by unification. As I have noted in Chapter 2, this is perceived to be a specific advantage of the preservation of a visibly active High Court in the main regional cities, because it reinforces the contribution made by the civil courts to the rule of law and to regional business and professional development by the specific contribution of the highly respected brand name of the High Court.
- 8.14. Secondly it is said that, notwithstanding the establishment of the OC, there will remain large swathes of County Court business which will still be genuinely local in nature, in particular housing cases, and that it will remain a real advantage to preserve an essentially generalist civil judiciary within the County Court brand to administer civil justice locally, even if increasingly from Temporary Courts rather than small courthouses along traditional lines.
- 8.15. Thirdly, it is said (and this objection comes mainly from London) that unification would put at risk the international reputation of the Rolls Building courts as part of a recognisable High Court, which is such a strong foundation for this country as a place in which to own property and establish business, and a magnet world wide for the resolution of international business disputes. In particular, any requirement that litigants submit all cases through a common portal, to gate-keeping by a relatively junior judge or even Case Officer, rather than preserve the litigant's current right to choose a Rolls Building court for commercial and property dispute resolution would gravely undermine the international attractiveness of the Rolls Building courts as currently constituted.
- 8.16. Finally, it is said that to accompany the IT revolution currently planned with a simultaneous move to unification without any assurance that the risks identified in the Brooke Report can now be safely accommodated would simply be a bridge too far.

Analysis

- 8.17. Rather than say so repeatedly, I make it clear at this stage that everything which follows in this chapter by way of analysis is strictly provisional, save for the conclusion that there should not be a rush to unification as a prelude to the further advance of the Reform Programme. While it might in theory be preferable to start with a clearly defined structure, and then build the IT, staffing and judicial arrangements and physical court buildings within it, there simply is not time to undertake unification as a first step, and too many aspects of the civil part of the Reform Programme are yet to be worked out in any detail to enable it to be known in advance how a unified structure might best be framed.
- 8.18. There might be little alternative to unification, or the merger of the residue of the County Court into the High Court (which is in substance a particular route to the same end) if it could clearly be seen now that the County Court, shorn of the business to be transferred to the OC, would no longer be a viable entity on its own. But in my view that is neither an inevitable nor even a likely conclusion, once the uncertainty as to the nature and workload of the OC has been sorted out.
- 8.19. There are a number of reasons for this. First, the County Court will almost inevitably retain substantial swathes of essentially local business, such as residential possession cases, ASBIs and local neighbourhood disputes which will remain quintessentially County Court rather than High Court work. Secondly, it is on balance likely, and at least very possible, that the County Court will retain most personal injuries work, above an increased small claims limit (below which they would be within the OC). This is a very large part of the current business of the Fast Track.
- 8.20. Thirdly, it is possible that the County Court will in future have a much closer relationship with the Employment Tribunal, if the present unsatisfactory isolation of that tribunal is resolved in favour of its becoming integrated within the civil courts, rather than within the Tribunal Service: see Chapter 11 below.
- 8.21. Fourthly, there is scope for a more rigorous transfer to, or confinement within, the County Court of civil cases which are not so complex, specialist or of high value as to make it appropriate for them to be dealt with in the High Court. I return to this later in this chapter.
- 8.22. Finally, it is not even now a prerequisite of a viable court, and certainly will not be in the future, that it has any particular size or level of workload. Both the two most recently formed courts, namely the Planning Court and the Intellectual Property Enterprise Court ('IPEC') are, by comparison with the residue of the County Court following the most optimistic creation of the OC, very much smaller in workload and judicial complement, and yet nonetheless rightly regarded as highly successful. Thus the implementation of the OC part of the Reform Programme and even of a large scale rationalisation of the court estate, should not be regarded as compelling unification, but only as an opportunity for it, if otherwise desirable on its merits.

- 8.23. I consider that a further important factor is that the implementation of the Reform Programme will inevitably remove large parts of the current structural fabric of the civil courts, so that the simultaneous removal of the main horizontal division within their structure may leave the resulting mass so unstructured as to become unmanageable. It is obvious how the proposed rationalisation of the court estate may contribute to bringing this about. I have already explained how, in my view, the substitution of electronic communication and storage of information for the current domination of paper will itself undermine the current concept of a court as a place in which cases are issued, handled, managed, conciliated and tried. In short, if the notion of a court is to become an increasingly virtual rather than physical concept, then the preservation or, if necessary, creation of clear structures within it is likely to be essential to its proper functioning. On the face of it, unification would appear to be a major step in the opposite direction.
- 8.24. It must however be acknowledged that the implementation during the last eight years of most of the reforms proposed in the Brooke Report, as an alternative to unification, have not dealt entirely successfully with some of the weaknesses for which unification was then proposed as a remedy. In particular, the current balance between party choice and judicial power to transfer cases between courts, and between London and the regions, continues to give rise to difficulties, the end result of which is still to leave too many relatively simple, non-specialist and moderate to low value claims within the High Court rather than the County Court and in London rather than in an appropriate regional centre, where they ought properly to be, for the greater convenience of the parties. The knock-on consequence, namely that High Court judges remain too heavily burdened at present to be able to provide the requisite support to the over-burdened Court of Appeal, continues to be an intractable difficulty which might, at least in theory, be more easily sorted out within a unified court.
- 8.25. The move from paper to electronic forms of information storage and communication ought in principle to offer better scope for the easy and swift transfer of appropriate cases between courts than is currently available. The much greater concentration of case issue, handling and management within a small number of business centres ought to serve the same end. It is remarkable, to a London based judge, how easily cases are transferred within a large regional civil justice centre between the High Court and the County Court, and how little delay or disruption this causes.
- 8.26. The successful partial unification of the courts administering family justice certainly constitutes a model worthy of closer study as a possible prototype for unification of the civil courts than has been possible during the rather hurried first stage of this review. But so does a much closer analysis of the reasons for the current weaknesses, within the civil structure, which stand in the way of the perfect allocation of cases to the right level of court within that structure. I shall have more to say about deployment of civil judges later in this chapter. It is sufficient to say at this stage that improvements in that regard may pave the way for a better allocation of work between the High Court and the County Court than is currently achieved, so that unification, with all its attendant risks and uncertainties, may not be the only, or even the best, solution for those difficulties. As Sir Henry Brooke pointed out, unification may do no more than internalise those difficulties within a single structure.

- 8.27. It may well be that such steps both should and will lead to an outcome in which all non-complex, non-specialist cases, regardless of value, are removed from the High Court, leaving it as an aggregation of specialist courts or lists, tailored to the determination of complex and specialist cases only. Much of the opposition to further rises in County Court jurisdiction limits in the responses to the consultation undertaken by the Master of the Rolls in 2015 was based upon a perception that complexity, specialist nature and public importance were better criteria for distribution of cases between the High Court and the County Court than mere value. Nonetheless it seems to me that value will always remain a relevant criterion, in the sense that the very highest value cases may properly require the attention of the most senior and experienced judges, if only because of the propensity of the parties and their lawyers to leave no stone unturned in their endeavours to achieve success, and the need in consequence for the exercise of the most experienced and robust case and trial management. Furthermore, some broad guidelines which make reference to value at risk seem to me inevitable if a balance between party choice and judicial control is to continue to operate in an intelligible manner.
- 8.28. My provisional conclusion on this question at this first stage is therefore that a case has not been made out for unification, and that much further and detailed study needs to be undertaken by way of seeking avenues for the improvement of the current allocation of the workload between the existing courts, before it would be worth taking those risks of unification identified in the Brooke Report, none of which seem to me to have gone away, or become of reduced significance.
- 8.29. I wish therefore to explore specific options for moving the current boundaries between the High Court and County Court, with a view to increasing the County Court's share of the overall civil workload, and the share of it dealt with in the main regional cities rather than in London. These options may include raising substantially both the current limits on the equity and probate jurisdiction of the County Court, together with the lower limits for the issue of claims in the High Court. They are likely to include (i) steps to reinforce the principle that no case is too big to be resolved in the regions, (ii) deploying increased resources to some of the main regional trial centres so as to make them true competitors with London for the management and trial of large and complex civil cases, (iii) doing more to ensure that cases considered too complex for generalist regional hearing centres or non-specialist judges are transferred to regional centres which have those resources, rather than to London, and (iv) doing more to encourage the transfer out of London of cases more appropriately managed and tried in regional hearing centres. I would also expect that steps to increase the concentration of judges who do mainly or solely civil work in hearing centres large enough to admit more specialisation will be a major contributor to the achievement of those goals.

The Future of the Divisions

- 8.30. I have already described in Chapter 2 the divisional structure of the High Court and the historical, although perhaps illogical, separation of judicial teams and back-office staff which it causes, particularly in the Rolls Building.

- 8.31. A perception that this divisional structure, separating in particular the Chancery, Commercial, Mercantile and TCC courts despite their sharing a substantial range of common business and property work which could be dealt with in any of them, may be sub-optimal and due for radical reform has been a topic for serious thought and debate for over 20 years.
- 8.32. It was analysed in the Bar/Law Society report on Civil Justice in 1993 in which the courts sub-committee (of which I was a member) proposed a merged Civil Division, handling all kinds of business and property disputes with specialist ticketed lists around it like satellites. This proposal was later reviewed in the Woolf Report. While it received favourable comment, Lord Woolf did not go so far as positively to propose its implementation. Thereafter a proposal for a new business and property division, labelled “the X Division” (in default of agreement upon any specific name), was formulated, debated and revised intermittently throughout the following 10 years, but never adopted. It was mentioned without adverse criticism in the Brooke Report but, again, Sir Henry did not see fit to make a specific recommendation that it be adopted.
- 8.33. Prior to 2011, the Chancery Division, with its specialist courts, was located relatively compactly in the Thomas Moore Building and adjacent parts of the RCJ, while the Commercial Court and TCC became, over the years, concentrated within the cramped confines of St Dunstan’s House (now demolished). Thus the case for merger was throughout that period undermined by the fact that the three courts had no geographic or physical relationship with each other as neighbours. Nor did the impending move to the Rolls Building in and before 2011 generate sufficient momentum for a marriage, in advance, of those separate courts under their two separate Divisions, in advance of impending co-habitation. Plans for an X Division reached the stage of a proposal which had been broadly hammered out and agreed by a committee chaired by Sir Andrew Morritt, the then Chancellor, on which the Chancery Division, the Commercial Court and the TCC were all represented by serving judges. I was one of the chancery members of that committee. Nonetheless it failed to proceed to approval at the level of the Judicial Executive Board.
- 8.34. From 2011, the judges and back-offices of all three courts (mis-describing the Chancery Division for convenience as a court) have cohabited and indeed cooperated well together in the Rolls Building. The judges and clerks are all intermingled on one and a half upper floors within the building, although the Chancery Masters and Registrars remain accommodated separately. The back offices were originally separate, but within sight and practical communication of each other. They are now becoming increasingly integrated.
- 8.35. An enduring strength of the divisional structure (including for that purpose the Family Division) was that it encouraged among the High Court judiciary (including Masters and Registrars) a collegiate esprit de corps within groups dealing with related workloads, which included the sharing of experience, shared learning and mutual encouragement. Since 2011, that collegiality has become increasingly shared among all the judges based in the Rolls Building, although it has by no means entirely replaced the former sense of divisional identity. High Court judges are still thought of as Chancery judges or QB judges, even in the Rolls Building.

- 8.36. But the fundamental obstacles to any divisional merger of the Rolls Building courts have always lain elsewhere. Much the most serious obstacle has been the perception that the commitment to criminal work characteristic of all judges of the Queen's Bench Division might be watered down, and their availability for serious criminal cases reduced, if they were to be merged with the Chancery Division judges, none (or almost none) of whom undertake criminal work, even though an increasing minority come to the Chancery High Court bench with some experience of it as Recorders. A second obstacle has probably been a persistent belief that such a merger might water down the distinctive brand and international reputation of the Commercial Court, even though there has never been a suggestion that, upon such a divisional merger, the Commercial Court would lose its identity.
- 8.37. The recent establishment of the Financial List, and the emergence of new Fast and Flexible Trial pilot schemes in which all the Rolls Building's courts participate has demonstrated that cohabitation while separated by divisional boundaries can produce healthy offspring, even in the absence of a divisional marriage or merger. But the question nonetheless remains whether, for example, the operational management of the Financial List really is best achieved by parallel working arrangements between the Chancellor and Judge in Charge of the Commercial Court, rather than by a unified judicial management structure within the Rolls Building, and whether such a structure might generate greater back-office and other efficiencies in the use of the building and its facilities than is currently achieved.
- 8.38. As Sir Henry Brooke noted in 2008, such a merger would give rise to the need to consider how the Chancery Judges might, if willing, make a real contribution to the criminal workload of the High Court judiciary. But the Chancery Judges are at present fully stretched in undertaking the workload of the Chancery Division, upon the basis that they make no contribution to the criminal workload at all.
- 8.39. I acknowledge that this is a sensitive subject, which has on occasion in the past generated more heat than light. It is also undoubtedly true that the Rolls Building courts have achieved a collective international pre-eminence as a business and property litigation centre notwithstanding the continued presence of the divisional fault-line running between them. Nonetheless at a time when the structure of the whole of the civil courts is being reviewed in connection with a revolutionary change in IT, designed to affect the Rolls Building as much as anywhere else, it seems to me no less than prudent to revisit this oft-debated question during the next stage of my review, on the basis that if it is not grappled with now, it probably never will be.

Number of District Registries

- 8.40. The Brooke Report recommended a reduction in the number of District Registries, and indeed the number has been reduced from about 100 to 43. There is good reason in my view to reduce the number still further. It is questionable whether the District Registry as a place where High Court proceedings can be issued will survive full digitisation. It is much more likely that the High Court will follow the County Court and limit the place or places of

issue to one or more large business centres. Indeed the very concept of proceedings being issued in a place will be unlikely to survive a fully digitised regime under which all civil claims will be issued online, through a Portal, which will give access to a number of virtual rather than physical courts.

- 8.41. Much more important to the important public perception of the places where the High Court may be found will be the civil justice centres where a significant number of High Court cases will be heard, at trial and (but less than at present) for the purposes of case management and interim relief. As already happens in the County Court, and in the High Court outside London, case management will increasingly be by telephone or video conference. Continuity may sensibly be maintained in the short term by continuing to call the High Court hearing centres District Registries, but the name will eventually belie the reality.
- 8.42. I can see no reason to delay the process of reducing the number of District Registries to those places where High Court cases are managed and regularly tried. There is of course no reason why a High Court trial should not occasionally be held in any hearing centre with the requisite facilities, when this would best suit the parties, their legal teams and their witnesses. Once paper no longer requires the case to be handled and managed where it is to be tried, there will be no need to restrict hearings to District Registries, but effective listing and deployment of judges will be best served by arranging for most of them to be tried in recognised High Court hearing centres.
- 8.43. There is a more focussed question whether the Central London County Court should for the first time be given a non-issuing District Registry status. It is currently a civil-only (i.e. non family) County Court hearing centre, handling its own geographical territory and handling multi-track County Court cases sent in from smaller hearing centres around London, as well as cases issued in the High Court in London which are transferred to the County Court by the Masters. It also has a bankruptcy jurisdiction. The arguments for and against District Registry status are quite technical. At this interim stage I need not describe them in detail. The outcome will turn on whether by gaining District Registry status the CLCC will be assisted in undertaking more of the caseload currently issued in the High Court in London than it does at present. Anything which contributes to that outcome is to be welcomed.

Deployment of Judges

- 8.44. I have already noted that, apart from the identified problem areas, civil cases are for the most part dealt with in a reasonable time from commencement, even though HMCTS hear-by targets are not routinely met in all regions. The more serious problem affecting the civil courts relates to the lack of enough civil-only judges, or judges for whom civil work represents a major part of their practice. I have suggested in earlier chapters that this is the result of the Cinderella status of civil work outside London and the main civil justice centres, an operational workload management gap between the DCJs and the MR and his

deputy, and the need in many of the smallest hearing centres for the inevitably very small judicial teams to be, in effect, jacks of all trades.

- 8.45. One perhaps beneficial effect of a concentration of court resources in fewer, larger centres, a major objective of the Reform Programme, should be that it will prove possible to re-arrange the judiciary into larger teams which permit greater specialisation. By that I mean both more judges who do civil as their only or main workload, and judges who develop real specialisation in work streams within civil.
- 8.46. It should also be possible to use such concentrations of civil judges to achieve a better level of efficiency in the discharge of civil business. I have noted how large improvements in listing are achievable when there are more than one or two judges sitting to do civil work in the same hearing centre, and how this has in practice been achieved by combining the judicial resources of a group of County Court hearing centres, either by concentrating civil work in one of them, as in North London, or by holding civil fortnights twice a year, as in the South East. The same thinking underlies the concentration of a large team of civil-only CJs and DJs in the Central London County Court.
- 8.47. But large hearing centres are not a guarantee of civil specialisation, as is apparent for example at Birmingham. This is one of the largest civil justice centres outside London, but its 17 DJs regard being multi-ticketed across civil and family disciplines as an advantage. That said, they do take advantage of their numbers to develop individual specialisations within those two main categories, and listing of cases before them is built around that structure. I have already mentioned that regional centres of specialisation should justify an increase in jurisdiction and a better spread of civil business across the country as a whole.
- 8.48. Nor in my view should the achievement of better concentrations of civil judges simply be left until the likely changes in the court estate delivers fewer, larger hearing centres. There is no reason why it should not start now. This is not a plea simply for more judges, but rather for those judges who do civil, each spending a much higher proportion of their time on civil work. This should lead to a strengthening of the civil judiciary in the middle sized to larger hearing centres, and to a diversion of a larger volume of the cases, currently being transferred to London, to those centres, avoiding the High Court in London being burdened by cases which would more appropriately be dealt with regionally.
- 8.49. A powerful argument can also be made for applying civil judicial resources to the strengthening of at least some of the main regional trial centres to the point that makes them truly competitive with London for managing and trying the very largest and most complex cases. The principle that no case is too big to be tried in the regions will not be fully achieved until that is done.
- 8.50. Changes of this kind are not achieved overnight. An increased emphasis on civil at the judicial recruitment stage will only bring in results slowly. Judges build up their practices over years, and may be reluctant to make rapid changes in the current balance of their workload. The achievement of this change does not lie entirely within the power of the civil leadership judges,

and will require patient and detailed negotiation with colleagues in family, crime and even tribunals. It will take a determination at the highest judicial level to ensure that this result is achieved.

- 8.51. I have no firm view as to the remedy for the operational workload management gap to which I have referred above, and in Chapter 5. I acknowledge that pastoral management is best provided in the regions by the Presiders, because the overwhelming majority of the judges who do the civil work also do family or criminal work, or both. Pastoral leadership and care cannot be split up like the workload. It may be that the gap could be filled by a more active workload management role for the Deputy Head of Civil Justice.

Number and Geographical Distribution of Designated Civil Judges (“DCJs”)

- 8.52. Sir Henry Brooke recommended that the then number of DCJs be reduced, and this has been done. More generally the rationalisation of the court estate and the revolution in the means of communication between courts and between judges contemplated by the Reform Programme makes it inevitable that this question will need further consideration as the geographical redistribution of the civil courts becomes more clear in due course.
- 8.53. It is in my view unrealistic at this early stage to do more than to put this topic on the agenda for consideration during the next stage of this review. Even then it may be too soon to make any firm proposals.

9. Rights and Routes of Appeal

- 9.1. The analysis within this chapter starts and finishes with the pressing need to find a better than merely hand to mouth solution to the excessive workload which has recently undermined the ability of the Court of Appeal to deal with its non-urgent cases within a reasonable time. I have described the problem, and the reasons for it, in Chapters 2, 3 and 5. In short, the incoming work of the Court of Appeal has increased by over 54% in the last six years. For the first four years, the courts' judges and staff managed to absorb most of the increase by working harder and longer. But in mid 2014 the percentage of appeals missing their hear-by targets began a sustained and ever-increasingly steep rise, from which the court shows no current sign of recovering. There is every reason to suppose that, without urgent and radical reform, the recently much extended hear-by targets will not be adhered to either. Furthermore, the most important time for the parties ends only when the judgment is handed down and the order made.
- 9.2. These delays do not merely affect the hearing of full appeals. The waiting times for the determination on paper, and at oral renewal, of applications for permission to appeal are also substantially longer than previously. This is not merely an irritation within the context of an over-long progression to a full appeal. Many attempted appeals end with a final refusal of permission (usually at the oral rather than the written stage) and that brings to an end a period of sometimes crippling uncertainty for the parties, while the question whether the first instance judgment has finally disposed of their dispute remains uncertain. Thus the prompt determination of applications for permission to appeal is an end in itself.
- 9.3. The doubling of expected waiting times for full appeals is not, as has already been explained, the consequence of any large increase in the number of full appeals, which have only risen by about 5%, and unevenly, over the six year measured period. Rather, the increasing waiting times for full appeals have been brought about by the ever-increasing need to redeploy LJ's away from full appeals, toward the determination of applications for permission.
- 9.4. Statistical work carried out both last year and this year suggests that the average time taken by a typical LJ upon a written application for permission is only about one third of the time taken upon an oral renewal. It will be immediately apparent that, case for case, oral renewals take up a much larger proportion of judicial time than paper applications, despite the fact that most judgments on oral renewal are given ex-tempore, rather than in writing.
- 9.5. The judges of the Court of Appeal have not stood idly by and merely observed these unfortunate developments with indifference. In mid 2014 work was started on the preparation of a business case for the recruitment of more lawyers, or alternatively Judicial Assistants (JAs), to assist with the preparation of Bench Memoranda (for full appeals) and a new more focused type of Case Summary for use during the permission stage. Obtaining increased resources during a time of austerity does not happen quickly, and the increase in the team of JAs obtained took effect only in October 2015.

- 9.6. At the end of 2014 a Hard Working Group of three LJs and one of the court's Masters was established under my chairmanship, for the purpose of carrying out a full internal review of the court's procedures for dealing with applications for permission to appeal. The time and motion study of cases heard or determined on paper during May to July 2015 was an integral part of that exercise. Comprehensive proposals for reform are being prepared, informed by the workload database created by that exercise, and are to be presented to the full court in early March 2016. Although final decisions on most of the proposals have yet to be made, options include the greater use of two judge courts, increased deployment of deputies, transfer of classes of appeal to the High Court, raising the thresholds for the obtaining of permission to appeal and reducing or removing the right of oral renewal of a permission application, after refusal on the documents. Some of them, such as the use of more two judge courts, are already being used pending decisions about a full package.
- 9.7. It was however apparent by the time of the setting up of this court structure review that potential solutions to the Court of Appeal's difficulties ought not to be regarded as lying entirely within that court's own powers of self-management. Possible solutions include the substantially greater use of High Court Judges in connection with what is currently the Court of Appeal's workload, and the reduction or abrogation of the mainly unrestricted right of an unsuccessful applicant for permission to appeal on paper to make a renewed application orally. It is indeed fair to say that virtually all of the range of possible solutions to the overload of the Court of Appeal raise issues which either affect the structure of all the civil courts, or which raise real issues as to the extent of appellate rights and the quality of appellate justice, which deserve consultation and analysis in this review. This is so, even though the urgency of the problem is likely to lead to decisions in principle having to be taken earlier than the publication of any final report on this review. But that is no reason why this interim report, and consultation both preceding and following it, should not be of real assistance.
- 9.8. Viewed at the highest level of generality, there are only four ways in which the overload of a civil court can be addressed, if an ever-increasing lengthening of its waiting times is to be avoided. They may be summarised as:
- (1) increasing the court's resources;
 - (2) reducing the court's workload;
 - (3) improving the court's efficiency; and
 - (4) deliberately reducing the quantity or quality of the service.

I will briefly address each of those in turn.

Increasing resources

- 9.9. I have already described how a modest increase in the number of the court's Judicial Assistants has been obtained. It is possible that a further increase may be authorised. Similarly, the office has obtained one more lawyer to deal with the increasing caseload.

- 9.10. The real issue under this heading is however judicial resources. The ordinary complement of the court of appeal is 38 LJ's, plus the five heads of division (LCJ, MR, Chancellor, PQBD, PFD.). It has temporarily been raised by one to enable one LJ to conduct a full-time public enquiry but, since he will retire at the end of the enquiry and the complement will then be reduced to its standard level, this has led to no real increase in judicial resources.
- 9.11. I have consulted thus far on the working assumption that an increase in the number of LJ's is most unlikely. It is probably also undesirable, since the current complement of 38 plus 5 is about as large a number as is likely to be able to function well as a collegiate body, and a further significant increase in its numbers might be perceived as (and indeed be) the cause of a potential reduction in its overall quality. Meanwhile, such increases in the non-judicial strength of the Court of Appeal as may be obtainable during a continued period of austerity are unlikely to do more than address the outer fringes of the current overload.
- 9.12. There is a much more realistic prospect of increasing the judicial complement of the Court of Appeal by a substantially greater use of deputies, that is High Court Judges sitting part-time in the Court of Appeal, than at present. The court is already very much indebted to its retired members for their work as deputies, but it is inevitable that their assistance rises and falls unpredictably over time, and cannot be managed. The Court of Appeal uses a substantially lower proportion of deputies from the High Court for its work than does either the High Court or the County Court. The current proportion of HCJs used in the Court of Appeal is under 10%, whereas the use of S.9 deputies is over 30% in the High Court in London, (and over 90% outside), and the use of Recorders and Deputy DJs is roughly 30 % in the County Court.
- 9.13. There is no reason to suppose that there would be any shortage of HCJ volunteers for this work provided that their contribution was reasonably divided between box work and hearings, and between permission to appeal work and full appeals. The problem, of course, is that the High Court judiciary are already fully engaged with their own work, so that space would have to be found by sending part of their workload elsewhere, to free them up to make an increased contribution as Court of Appeal deputies. I have already described in Chapter 3 how, in anticipation of the coming into force of a new appeal to the High Court routed from final orders in the County Court and from orders of the Family Court in private-law family proceedings, steps are already being taken to explore ways of making more High Court judge time available. But these changes will not on their own relieve the Court of Appeal of a sufficient part of its workload, not least because the creation of an intermediate appeal stage at High Court level will not of itself prevent unsuccessful appellants from pursuing applications for permission to make a second appeal to the Court of Appeal: see again Chapter 3 above. No steps have yet been taken to identify ways of freeing up High Court Judges from their existing workloads, so as to enable them to spend more time in the Court of Appeal itself as deputies, rather than more time discharging an increased High Court appellate workload.

Reducing the workload

- 9.14. Requiring appeals from the County Court and the Family Court (in private law matters) to be made first to the High Court is of course a way of reducing at least the first appeal workload of the Court of Appeal. It may be that there are a number of further steps that should be taken towards the general objective of making the Court of Appeal a second appeals only court, save of course for appeals from first instance decisions of the High Court itself. Most appeals from the Upper Tribunal are already subject to the second appeals filter, because the main function of that tribunal is itself appellate. But this is not true of appeals from the Employment Appeal Tribunal, from the Competition Appeal Tribunal, from the County Court's appellate jurisdiction in homelessness cases, or in relation to the large workload constituted by public law appeals from the Family Court, in relation to the care and adoption of children. Even though they may (apart from the last-mentioned) fairly be described as second appeals, the second appeal test does not apply to them.
- 9.15. It is in that context neither fair, or obviously sensible, that the whole burden of reducing the workload of the Court of Appeal should fall on the other civil courts, merely because they, like the Court of Appeal, are within my terms of reference, whereas the other courts are not. I do not of course suggest that this is what is currently happening. On the contrary, the currently planned route for private law family appeals will be implemented, if it can be, so as to place the consequential burden on the judges of the Family Division, rather than upon the rest of the High Court judiciary, with knock-on consequences for the Family Court (if the family HCJ contribution to that court has to be reduced) rather than for the High Court or the County Court. Nonetheless the asymmetry in my terms of reference needs to be borne in mind as a reason why my analysis of remedies for the Court of Appeal's overload may appear at first sight less than evenhanded.
- 9.16. It has been suggested in consultation that the Civil Division might consider re-forming itself into something which more closely resembles the Criminal Division, in which the ordinary contribution from the LJ's to a three judge court is usually (all though not invariably) one rather than three, and where the balance is made up not only by HCJ's but also by CJ's.
- 9.17. If the root of the problem in the Court of Appeal lay in an excessive burden of full appeals, that might be an attractive solution. But if, as the statistics may show, the problem lies really in the burden constituted by the permission to appeal workload, this solution loses much of its force. This is because the determination of an application for permission would generally need to be made by a judge of clearly greater seniority than the judge whose order is being appealed. Thus, permission to appeal from the County Court or Family Court, or from the Upper Tribunal, could not appropriately be assigned to a CJ, and permission to appeal from the High Court would still have to be assigned to an LJ. Thus if the only real change in the allocation of the burden of permission to appeal work was from LJ's to HCJ's, then this could just as easily be achieved by a greater use of HCJ's as deputies in the Civil Division, as currently constituted.

Improving efficiency

9.18. I have already described how the more focused use of JAs together with an increase in their complement has produced some increase in efficiency. A substantial further improvement could be derived (at relatively low cost) from increasing the complement of JAs so that, as in many comparable jurisdictions, each LJ has a JA to assist, both in preparation as at present, and in research for judgment writing. Other changes have also assisted, such as the encouragement (by a change in the CPR) to respondents to lodge short written submissions in opposition to the grant of permission to appeal, thereby occasionally revealing short but conclusive objections to the grant of permission otherwise obscured by the essentially one-sided process for the obtaining of permission. Other improvements in efficiency, and in the reliability of the paper process, are being actively investigated and pursued, but none of them, even taken in the aggregate, are likely to make more than modest contributions to removing the delays caused by the current overload.

Reducing the Quality or Quantity of the Service

9.19. Reductions in the quantity or quality of a service as the result of overload frequently occur despite the best endeavours of all concerned to avoid them. The current delays and increasing levels of broken fixtures for full appeals are an example in point. But sometimes such reductions have to be caused deliberately, as the lesser of two evils, where there is no other solution to the problem. In the present context, some may say that the substitution of the High Court for the Court of Appeal as the court to which first appeals should be made from the County Court and, in part, from the Family Court are examples of a deliberate reduction in quantity, viewing the Court of Appeal on its own as the current provider of the service. Others may say that the substantially increased use of High Court Judges as deputies may have a similar effect upon quality, although difficult to define or quantify. A deliberate increase in the number of final appeals heard by a two judge rather than three judge court may be described as containing elements of both.

9.20. The complexity of finding ways to free up some resources among High Court Judges for the assistance of the Court of Appeal may fairly be described as resembling either musical chairs or a very long tunnel. Doing so efficiently, and at sufficient speed, calls for flexibility, clear lines of operational workload management and across-the-board teamwork, the present strengths and weaknesses of which I have addressed elsewhere in this report. It is however some consolation that, at the end of the tunnel, the planned relief of District Judges from a substantial part of their current routine box work may offer some element of additional resource as the ultimate recipient for different types of work being passed from judicial chair to chair. But that assumes that the savings which may be anticipated from having that box work undertaken by Case Officers paid very much less than District Judges will leave space for the District bench to provide at least some assistance (and it may not need to be that much) in making this sideways transfer of work practicable.

9.21. Some consultees have suggested that a reduction in quality might be occasioned if the right

to oral renewal was either removed, or substantially reduced, or if some significantly higher threshold for permission was devised, or greatly increased use made of the 'Totally Without Merit' ("TWM") filter. Any of these steps would certainly tend to reduce the pressures on the court which lead to all parties to appeals suffering the disadvantages occasioned by the current delays. Consultees have taken widely different views about whether steps designed to reduce or eliminate oral renewals should be taken. I will begin with some of the arguments in favour.

- 9.22. First, oral renewals take up judicial time at roughly three times the rate of paper applications for permission. Even though there are of course fewer oral renewals than paper applications, about 70% of applications on paper which are refused are followed by an oral renewal. Thus the saving of time occasioned by steps to eliminate them or reduce their number would make a major contribution towards reducing the overload of the court.
- 9.23. Secondly, a would-be appellant on a first appeal will already have had two opportunities to persuade a judge that their appeal has some merit before reaching the stage of oral renewal, namely an application (usually orally) to the first instance judge and then an application on paper to the single LJ. On a second appeal the merits of the case will already have been considered on an earlier full appeal. Reasonable appellate justice does not require appellants to be given three chances to obtain permission, or even two chances on a second appeal.
- 9.24. Thirdly, the normal threshold for the grant of permission, at both earlier stages, is a relatively generous one, on a first appeal. There need only be a real (i.e. more than fanciful) prospect of success.
- 9.25. Fourthly, a relatively summary process for the obtaining of permission may be regarded as a reasonable quid pro quo for the fact that the Court of Appeal does not impose truncated argument at the hearing of full appeals along the lines, for example, of the Court of Justice of the European Union or of the US Supreme Court. The opportunity for full oral argument is highly valued, and hardly anyone has suggested that it should be cut down in that way. But it comes at a high price in terms of the expenditure of judicial time, especially using a three judge court.
- 9.26. Fifthly, it is not a sensible use of the time of the court's judges to become bogged down in a sifting process if, as at present, it detracts from the time spent on their primary task of determining full appeals.
- 9.27. The arguments against removing or abrogating the right of oral renewal may be summarised as follows. The first is that it offers a means either of correcting 'mistakes' made at the paper stage, or of obtaining a second opinion from a different LJ, in the context of a court in which, typically, full appeals are dealt with by three LJs rather than one.
- 9.28. Secondly, there are occasions when a refusal on the papers is followed not only by the grant of permission on the oral application but a successful full appeal. It is suggested that the removal or abrogation of the right of oral renewal therefore causes injustice to some appellants.

- 9.29. Thirdly it is said that the right of oral renewal is valued by many civil and other litigants. That is the inevitable conclusion from the stark fact that some 70% of would-be appellants to the Court of Appeal renew their applications orally, if unsuccessful on paper. It may be that the right is valued as an intrinsic part of an essentially oral process of justice in this country. Litigants may value a last 'day in court' before their claim ultimately fails. But some litigants may make cynical use of the right of renewal as a tactical means of buying further time, and many LIPs may simply renew orally as a matter of course, having no advice on the merits with which to temper their own understandable sense of disappointment or injustice.
- 9.30. Balancing these arguments raises a more general question of principle which needs to be addressed. Of course, every system of justice, including civil justice, aspires to deliver perfect justice. But financial and other constraints upon resources, coupled with the inherent fallibility of human beings, even if they are senior judges, means that perfection can never be more than an aspiration. Rights of appeal are not necessarily to be equated with a right of a litigant to some theoretically correct outcome to their dispute. A full appeal may still produce a 'wrong' outcome, where it is later reversed by the Supreme Court or, worse still, overruled in a later but different case, with no remedy given to the unsuccessful appellant in the earlier case. Further, there comes a point where the route towards supposed perfection becomes so demanding of resources that a line has to be drawn. The perfect can be the enemy of the good, and theoretically perfect but very slow justice can be worse than timely, but slightly rough, justice for everyone.
- 9.31. In the present context, if the process of analysis of ways in which to address the current and increasing workload of the Court of Appeal leads to the conclusion that nothing short of an element of abrogation of the right to oral renewal will bring waiting times back to an acceptable level, then there may have to be a straight trade-off between delay and a narrowing or abrogation of that right, which simply cannot be avoided.
- 9.32. Nor need the oral renewal issue be addressed as a black and white question of straight abrogation. It may be that the current right of oral renewal should be replaced by a broad discretion in the judge dealing with the paper application to direct that it should be adjourned into court (preferably quickly and before that same judge) in cases where the judge perceives that there is some uncertainty as to whether permission should be granted, which might better be resolved by hearing oral submissions, than purely on the documents. Furthermore, the right need not necessarily be simply abrogated or substituted across the board. There may be types of appellate work where, for example because it is a second appeal, a removal or substitution of that right could be more appropriately implemented than elsewhere. Furthermore, it could, like the suspension of costs management in clinical negligence cases by the Queen's Bench Masters, be abrogated or substituted on a temporary basis, so as to bring waiting times back to within reasonable bounds, before being reinstated as part of a steady-state procedural structure.

Consequences at High Court and County Court level

- 9.33. It will have become apparent that the solutions to the problems created by the overload in the Court of Appeal do not lie wholly within the gift, or the power, of that court on its own. The process of making working time available to the most obvious candidates as deputies, namely the High Court Judges, itself involves detailed analysis of the allocation of work within the High Court, the transfer of work from the High Court to the County Court (and vice versa), and the allocation of any increased flow of work coming down to, or staying within, the County Court, whereas it is presently High Court work.
- 9.34. Thus, the obvious recipient of work unloaded from the shoulders of a High Court Judge is not the County Court judiciary. Rather it is likely to be the Section 9 High Court judiciary, or Masters and Registrars. Since they in turn are fully engaged with their current workload, measures for the greater and more efficient transfer of work from their shoulders to the County Court then have to be addressed.
- 9.35. Once the County Court is reached, there is at present simply no untapped resource of civil Circuit Judge time currently available to take an increased flow of that work, or to deal with work which is retained, rather than transferred up to the High Court as it is at present. On the contrary, for reasons explained in earlier chapters, the availability of suitably experienced Circuit Judges with a more than very limited civil practice is one of the most under-resourced parts of the civil court structure, taken as a whole. This has over the last two decades mainly been addressed by allocating ever more weighty cases to District Judges. They are by now far the greatest civil judicial resource within the County Court as a whole, not merely for case management, but for trial and other forms of final determination. District Judges now undertake over 85% of the total County Court hearings.

Conclusion

- 9.36. I offer no firm solutions or recommendations to this intractable problem. It is under active and anxious present consideration by others than just me, and the statistical basis for identifying which changes might, in the aggregate, be sufficient both to reduce the current waiting times and create a steady state going forward is not (quite) yet available, although it very soon will be. Nonetheless the choice between these perhaps unpalatable alternatives is not merely a matter of statistics. It raises questions of public importance which deserve further and urgent consultation during the early part of the next stage of this review.

10. Enforcement of Judgments and Orders

- 10.1. I have already described in outline the current structure for enforcement of civil judgments in Chapter 2, work in progress to centralise parts of it in Chapter 3 and its continuing weaknesses in Chapter 5. I turn now to the question how it might be improved for the future, bearing in mind that no amount of reform of the civil courts' structure and processes from issue of proceedings until judgment will make them fully effective if weaknesses of enforcement remain an Achilles' heel, as many think that they are, in the County Court in particular.
- 10.2. The opportunities created by wholesale digitisation, a radical rethinking of the court estate, and the reallocation of routine matters to Case Officers probably provides a never-to-be-repeated opportunity for a fundamental review of the structure for effective enforcement. So many of its processes consist of the routine completion and checking of forms, rather than the making of judicial decisions involving legal principle or discretion, that there is much that ought to be able to be done to streamline them.
- 10.3. The starting point seems to me to be to appreciate the gulf that lies between the features, complexity and difficulty of a case between issue and judgment on the one hand, and the issues which may arise on enforcement of the judgment on the other. Regardless whether the original claim was for a liquidated sum or for unliquidated damages, or the proportion (or disproportion) between the sum recoverable as such and the amount payable by way of assessed recoverable costs, the only real difference between one judgment for the payment of a sum of money and another (leaving aside questions of instalments) is one of amount.
- 10.4. The issues which then arise when the judgment comes to be enforced (if indeed it needs to be) will usually have nothing at all to do with the issues which arose in the proceedings and were determined by the judgment. They will concern the amount, nature and whereabouts of the judgment debtor's assets and, in relation to payment by instalments, their resources. Issues may arise as to ownership of those assets, as where a charging order is sought in relation to a co-owned house, or bank account. Some of these, in particular where the interests of third parties are concerned, may well require judicial determination, and will sometimes raise issues of real complexity, but they will be entirely divorced from the issues in the original proceedings, and there is no reason why there should be any similarity in terms of complexity or difficulty between the two.
- 10.5. It seems to me to follow, although I have yet to consult at all on this question, that there is no particular reason why a High Court judgment should be enforced in the High Court, or a County Court judgment in the County Court, still less a judgment of the Online Court, in the OC. There may be good reasons why particular kinds of enforcement in relation to property or goods may best be administered from the court nearest to the place where those assets are situated. But even then, if the communication of relevant information for the purposes of enforcement is to become as fully digitised as the similar processes prior to judgment, there is no reason in principle why the activities of a bailiff need to be enforced from the nearest available County Court hearing centre. Any necessary warrant can be emailed, and there is

no technical reason why it cannot be presented to the judgment debtor, or person in control of the relevant property, in electronic form, using simplified forms of computer similar to those currently used by those who visit property to record information on electricity or gas meters, or who seek a signature for the recorded delivery of post. If a paper version is needed for service, it would be cheaper for bailiffs to have printers than for them to have to travel to hearing centres to pick them up.

- 10.6. Although, therefore, I remain as yet unpersuaded by the arguments for the general unification of the civil courts, there does seem to me to be a real case for unification of the processes of enforcement, sufficient to accommodate judgments emanating from all three levels, High Court, County Court and Online Court.
- 10.7. That would not mean simply adopting, lock, stock and barrel, the current enforcement processes of one court or the other. There are, as I have described, perceived to be large differences in the efficiency of execution of warrants in relation to property and goods, as between the County Court and the High Court, which might point strongly in favour of adopting the High Court's processes in that respect. Nonetheless, by the time that this review is concluded, the proposed centralisation of the County Court processes for the obtaining of charging orders and attachment of earnings orders will probably have run their course, giving the County Court a distinct edge over the High Court in that respect.
- 10.8. The best course, it seems to me at least in principle, is to identify the strengths of each of the current courts' processes, and construct a unified enforcement structure which marries up the best with the best, and discards the worst.
- 10.9. I am impressed that steps are already being taken to centralise enforcement of charging orders and attachment of earnings. Digitisation offers distinct opportunities to build on these initiatives. These may be summarised as follows:
 - (a) I am advised that many litigants experience problems in completing the forms that underpin modes of enforcement. Inter-active online forms can assist the parties through preventing errors in its completion. Work has already been undertaken in this respect in the field of Accelerated Possession and has proved successful.
 - (b) Significant judicial time is spent on checking these forms and granting interim orders. The pilots for charging orders and attachment of earnings, envisage such work devolving to Case Officers. Digitisation renders this work more administrative and may be best suited for Case Officers, freeing up judicial time. It may even prove suitable for a measure of automation, where routine checking is done by computer.
 - (c) The present pilots envisage that there will only be hearings where there is a genuine contest as to the grant of a charging order or attachment of earnings order. This will release significant judicial time presently deployed on short hearings that clog District Judges' and Masters' lists.
 - (d) Automation of the grant of interim orders will significantly improve the waiting times for the grant of remedies for enforcement, reducing processes that can take weeks or

even months to a matter of hours.

10.10. Provisionally, I can see real advantages in creating an enforcement platform for the enforcement of all civil judgments.

10.11. I recognise that there will need to be consideration of the status of High Court Enforcement Officers and County Court bailiffs, and a recognition that the present work of the County Court bailiff encompasses steps which extend beyond pure enforcement such as the service of process for litigants in person.

10.12. I stress that these considerations have not been widely consulted upon beyond my Hard Working Group. Neither they nor I have been able to identify any insuperable objection to unification of enforcement. I therefore commend it as a subject for much more focused and informed discussion and consultation during the next stage of this review.

11. Boundaries

Introduction

11.1. This short chapter addresses options for structural change affecting the boundaries between the civil courts, the family courts, the tribunals and other providers of ADR services. It goes without saying that they will require discussion with those responsible for the structure of those courts, tribunals and other entities. They also lie at the edge of my review, and have received less attention thus far than matters lying wholly within the arena of the civil courts.

Civil and Family

- 11.2. There are as I said in Chapter 2 very few boundary issues between the civil and the family courts. There is a small overlap of jurisdiction in relation to Inheritance Act and TOLATA claims, and the curious omission, when creating the Family Court, to give it jurisdiction in relation to either.
- 11.3. Although it is not strictly a matter for me at all, I can see no reason why jurisdiction over those claims should not be extended to the Family Court. But I must not thereby taken as suggesting that the family courts (i.e. Family Court and Family Division of the High Court) should have exclusive jurisdiction over either of them, to the exclusion of the civil courts.
- 11.4. Both types of claim include examples where the overlap between the principles applicable to property adjustment on divorce is strong, and other examples where it is almost non-existent. An Inheritance Act claim brought by a widow or widower requires the court to consider the order which the court might have made if the deceased and the claimant had been parted by divorce rather than death. Such claims are almost bound to be best decided in the family courts. Others may not affect spouses at all, and are quintessentially chancery cases. Furthermore Inheritance Act claims, and TOLATA claims, are often accompanied by a claim to construe, rectify or set aside a will.
- 11.5. Both the family and civil (usually chancery) courts are regularly used for these claims, and I am not aware of any general view that this opportunity to choose the appropriate court, coupled with judicial power to transfer where the choice is wrongly made, is unsatisfactory.
- 11.6. The more serious boundary issue between civil and family arises, as explained in Chapters 2 and 5, from the still unsatisfactory competition between the two for judicial hours. But there is no simple structural fix for the continuing tendency for civil hours to be lost to the dictates of urgent family business. One solution suggested to me might be for civil cases also to be given statutory hear-by periods as well, but I doubt whether that would command or really deserve the necessary political support.
- 11.7. A simpler solution might be for there to be added each year to the civil hours allotted to each region a prudential margin, based upon previous experience in that region, of hours

sufficient to accommodate the anticipated family emergency inroads in the next year. Any unused excess could be handed back in a subsequent year. The detail of this solution is hardly structural, although the consequences of the present allocation problem are.

Civil and Tribunals

- 11.8. The two current issues under this heading are (i) the sorting out of the jurisdictional anomalies between the County Court and the Property Chamber of the FtT in relation to residential property matters, and (ii) the desirability of finding the right home for the Employment Tribunal (“ET”) and the Employment Appeal Tribunal (“EAT”).
- 11.9. In my view the current proposals for the resolution of the first issue (referred to in Chapter 3) appear to be a sensible and pragmatic solution. As with the Inheritance and TOLATA claims, I can see no merit in trying to cram all the relevant business into either the County Court or the Property Chamber. It is sufficient to ensure, as far as possible, that the same dispute between the same parties does not have to be split up artificially and litigated in both, as currently happens at the moment. I look forward to reading the forthcoming CJC working group report on property disputes, which I understand will address this among other issues.
- 11.10. The second issue is much more difficult. I have already provided a bare outline of the current proposals in Chapter 3. As I said there, my concern is not with their detail, but with the underlying question about the right home for the ET and the EAT. The options appear to be three:
- (a) To leave the ET (and the EAT) where they are, uncomfortably stranded between the civil courts and the main Tribunal Structure.
 - (b) To bring both tribunals broadly under the wing of the structure of the civil courts.
 - (c) To make both tribunals part of the Tribunal Structure, as First Tier and Upper Tribunals respectively.
- 11.11. There is an emerging consensus, with which I agree, that option (a) is the least satisfactory. It leaves both tribunals unsupported by the management structure and resources of either the civil courts or the Tribunal Structure. Although that is also the status of the Competition Appeal Tribunal, that position of isolation works well for the latter, not least because it is a UK rather than English body (for which there is not at present a proposal for devolution), and deals with a relatively small amount of very complex and often very high value business, for the resolution of which its economist members play a vital part. For whatever reason, the CAT works well on its own, is not seeking more support than it already gets from the Chancery (and Scottish) judges, and needs no re-structuring at present.
- 11.12. Option (b) may look slightly counter-intuitive at first sight, but has a number of factors in its favour. The first is that the ET and the EAT both deal with disputes between private parties, rather than (like most of the Tribunal Structure) with issues between private parties and government.

- 11.13. The second is that there is a very large overlap between the rights and issues litigated in the ET (and the EAT) and the civil courts, and unsatisfactory jurisdictional limits which sometimes mean that the whole of a particular single dispute between the same parties cannot be litigated in either. Both have jurisdiction over common law contractual claims, but the ET is limited to an old cap of £25,000. Yet the ET has exclusive jurisdiction over statutory claims for unfair dismissal and discrimination at work, the former capped but the latter not. Sorting out these infelicities would be easier if the ET was within the civil courts structure.
- 11.14. Thirdly, although at its inception there was good reason for a new statutory jurisdiction to be adjudicated upon by a tribunal with a majority of lay members, the strength of that reason has diminished with the growth of detailed jurisprudence, to the point where both the ET and the EAT are predominantly judge-led. Moving the two tribunals within the civil courts structure would not deprive them of the continuing benefit of lay contributors, where appropriate. They could well fit the role of assessors.
- 11.15. Fourthly, moving both tribunals within the civil courts structure would provide added flexibility for the allocation of the occasional very large cases to judges with the requisite experience and authority, whereas the EAT has at present no original (i.e. first instance) jurisdiction of its own.
- 11.16. Fifthly, a move under the wing of the civil courts is the current preference of the Presidents of both Tribunals and, so I am told, of most of their judicial colleagues.
- 11.17. Against those advantages, there are three reasons why a move of the ET and the EAT within the Tribunal Structure might be preferable. The first is that it is likely that the Scottish part of the current UK Employment Tribunal structure will be both devolved and then made part of the Scottish tribunal structure. But if the Scottish element is devolved, then there is no overriding reason why the English and Welsh part should follow the same route. The Northern Ireland employment courts have always been part of its civil courts structure.
- 11.18. Secondly, the ET has its own procedure rules, which are regarded as being both simpler and more suited to the work of the Tribunal and to its typical users. But there is no reason why bringing the ET and the EAT within the civil courts structure should mean that the CPR would have to be applied to them. I have already explained why I consider it strongly arguable that the new OC should have its own bespoke rules, and the ET's procedure rules may be a useful source of assistance in their formation.
- 11.19. Thirdly, a move of the ET and the EAT within the civil courts structure might make it more difficult for BIS to continue to be their departmental sponsor. This may be a partly political question, so I will say no more about it than that, if the other factors point towards option (b), it would be a pity if this difficulty could not be overcome.

Civil and ADR

- 11.20. The emergence of pre-issue Portals, and the generally high level of recourse to private sources of ADR before the issue of proceedings where the parties have access to affordable legal advice, does not seem to me to disclose a need for significant structural change. Nor does the 2013 ADR Directive, which requires member states to ensure that businesses provide consumers with information about ADR for the resolution of contractual disputes. If there is an area of concern that ADR is not attempted enough before issue of proceedings, it arises in relation mainly to claims of the value and type which I would favour placing within the jurisdiction of the OC. This is planned to have its own stage of culturally normal, but not compulsory, conciliation built into it.
- 11.21. It has been suggested that some adaptation of the MIAM should be added to civil procedure for the benefit of LIPs, based on the Family Court model. There is a similar requirement to approach ACAS for advice about conciliation, in the procedure of the ET. I agree that these are worth considering further.

12. Next Steps

Introduction

12.1. The earnest student of this interim report thus far will have found what I fear may look like a rather disorderly mixture of facts, analysis, criticism, hope and expectation. The purpose of this final chapter is to draw some of the threads together, and to provide a springboard into the next stage of this review, for all those minded to participate in it, as consultees or otherwise.

Timetable

12.2. I stated in Chapter 1 that my main focus, consistent with my terms of reference, was to look forward to a time several years hence when the revolutionary change from paper to digital really had occurred, rather than to consider structural changes to a court system likely otherwise to continue as it is now. But that forward-looking viewpoint does not carry with it the luxury that the remainder of this review process can be conducted over a four or five year timeline. Now that funding has been committed, the Reform Programme is going to gather pace rapidly. Aspects of the re-design of the civil courts are going to be moved out of the blue sky onto detailed virtual drawing boards at an ever-increasing pace, starting right now.

12.3. It has therefore been provisionally decided that I should complete this review by the end of July 2016, dearly though I would have wished for longer. This seven month period will need to accommodate a large, more transparent and formal process of consultation, a thorough audit of the facts and figures upon which my analysis is based, and the assimilation, audit and deployment of the statistical sampling which I set in motion in September 2015, but which has yet to bear fruit.

12.4. I plan therefore to resume consultation immediately, and to complete it by the end of May 2016. In order to maximise the effectiveness of that process, I invite written responses to this interim report by not later than the end of February 2016, so that I can conduct a programme of face to face, video and telephone meetings thereafter, leaving space to think and write in June and July.

Firm Views

12.5. The large majority of the views expressed in this interim report are strictly and necessarily provisional, due to the compressed timescale, the limited consultation and the previously high level of generality of the planning of the Reform Programme. But I have reached firm views about some matters, and summarise them in bare outline below. The relevant detail will be found in earlier chapters.

The Online Court

- 12.6. I consider that there is a clear and pressing need to use the opportunity presented by the digitising of the civil courts to create for the first time a court (the OC) for litigants to be enabled to have effective access to justice without lawyers. I regard a general value ceiling of £25,000 as a sensible first steady-state ambition for the OC, even if it is necessary to build up to it in stages, and by no means ruling out the possibility of increased jurisdiction if the concept proves to be a success. That value ceiling will need to have the built-in flexibility to move cases from it into a more traditional court where complexity or other relevant considerations make that appropriate on a case by case basis.
- 12.7. The OC should have the three stage structure outlined in Chapter 6, providing for largely automated, inter-active online triage at stage 1, conciliation and management at stage 2, and resolution by judges at stage 3, by whichever of documentary, telephone, video or face to face process is best suited to each case. There should be very little scope for costs shifting, to include court fees and some disbursements but not legal costs.
- 12.8. The steady-state ambition should be to make the OC compulsory for cases within its competence, but only when processes for providing the requisite support to those challenged by the use of computers and online services have been designed, tested and proved to work.

Case Officers and Automation

- 12.9. There clearly is scope for transferring some functions currently undertaken by judges at the more routine end of their spectrum of work, from judges to Case Officers and for the automation of some of those functions. These functions are likely to include matters which are not actively disputed, and some routine case management of less complex cases, including management of all cases in the OC.
- 12.10. The making of decisions resolving parties' substantive (rather than procedural) rights and duties will not be suitable for transfer to Case Officers, nor will be the approval of settlements on behalf of children and other protected parties.
- 12.11. An important part of the role of Case Officers should be the provision of conciliation services in the OC.
- 12.12. Case Officers will need training and experience appropriate to their particular functions, and active judicial supervision of their discharge of all functions currently carried out by judges.
- 12.13. Parties aggrieved by the decision of a Case Officer should be entitled to have the decision re-considered by a judge.

Number of Courts

- 12.14. There should not be an immediate move to the creation of a unified civil court, ahead of the

implementation of the Reform Programme. The creation of the OC should not lead to the simultaneous replacement of the County Court, even if the OC is established as a separate court.

12.15. But this view does not stand in the way of the unification of processes for Enforcement, if on further consideration that finds favour.

Allocation of Judges to Civil Work

12.16. There should be a stronger concentration of civil expertise among the Circuit Judges and District Judges.

12.17. All civil work with a regional connection should be judicially case managed and tried in the regions, regardless of value, with very limited specialist exceptions, such as Patents.

12.18. A way must be found to prevent the permanent loss of civil hours to meet the needs of urgent family cases.

Now or Never

12.19. The accelerating timetable of the Reform Programme means that some items ought to be addressed more urgently than a seven month timetable going forward would permit. Without knowing yet what that timetable is, the list which follows can only be regarded as provisional, and liable to grow.

12.20. The first is the burden on the Court of Appeal, and options for alleviating it. I have explained in Chapter 9 how urgent this is, and that some decisions on a package of measures are likely to be made, at least in principle, in early March 2016. Written feedback on this issue by the end of February would therefore be most welcome.

12.21. The second consists of another package, namely taking the steps necessary to prepare the civil judiciary in advance to play their part in the management of the revolutionary changes that are about to occur as the Reform Programme begins to be rolled out, from April 2016. These include improvements to the structure for the operational management of the civil workload, funding and preparation for the Judicial College to be able to provide the leadership and operational training to the judiciary, and the provision of staff support to the leadership judiciary.

12.22. The third, which I can only describe in the most general terms at the moment, is progressing nearer to conclusions about structural options closely connected with those parts of the Reform Programme for which the design will need to be undertaken before August 2016. The best indication of the part most likely to have been embarked upon by then is the detailed design of the software needed for the Online Court. This is likely to be an important critical path item, for reasons which will be apparent from Chapters 4 and 6.

Focus of the Next Stage

12.23. In identifying options for structural change I have tried to identify the front runners in a wider field, so that all those participating in the next stage of this review can focus their thinking and contributions upon a narrower range of choices than has faced me and my Hard Working Group since last July. I set out below some guidelines which I commend to all participants as a way of producing a debate along more focussed and therefore, in the relevant areas, more detailed lines.

12.24. By this I do not mean that there need be no sense of urgency about these matters. On the contrary, the next stage of this review is likely to become more of an interactive exchange between this review and the Reform Programme, than a conventional review where recommendations are made in a final report, deliberated over time thereafter and only then implemented, to the extent finally approved.

The Online Court: see Chapter 6.

12.25. Under this heading, the key issues going forward are I think as follows:

12.25.1. 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.

12.25.2. 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.

12.25.3. 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.

12.25.4. 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.

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

Case Officers: see Chapter 7

12.26. As explained in Chapter 7, there has been a large measure of provisional agreement between HMCTS, the Civil JEG and with consultees during the first stage of this review about what appeared to be major issues about the role of Case Officers. Those which survive, and need further and closer analysis, are the following:

12.26.1. 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.

12.26.2. 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. This arises mainly in the County Court, not the OC. It may be as much a matter of sensible working practices as hard lines and rules.

12.26.3. Specialisation, qualification, training and experience of Case Officers.

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

Number of Courts and Deployment of Judges: see Chapter 8

12.27. I have left for further consideration the question whether a sufficient case can be made for eventual unification of the civil courts to make it worth taking the serious risks arising from doing so, as set out in the Brooke Report. My provisional view is that such a case has not yet been made out, and that detailed consideration of other means of remedying current weaknesses needs to be carried out. Within and additional to that general topic lie the following:

12.27.1. 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.

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

12.27.3. 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. 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.

12.27.4. 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.

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

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

12.27.7. 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.

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

12.27.9. 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.

Rights and routes of appeal: see Chapter 9

12.28. I have explained how urgent it is for the excessive burden on the Court of Appeal to be alleviated, and that decisions in principle are likely to overtake the preparation of a final report within this review. Nonetheless urgent written feedback on the key questions of public importance outlined in Chapter 9 would greatly assist in informing that decision making, and in shortening the routes to implementation thereafter. I would identify the key issues to be as follows:

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

12.28.2. 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.

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

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

12.28.5. 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.

Enforcement: see Chapter 10

12.29. This is a potentially very important subject which has yet to receive sufficient attention or consultation in this review. I would therefore welcome as much feedback as possible in relation to it.

12.30. The key question is whether enforcement of judgments should become a unified service, even if the civil courts which deliver those judgments are not themselves unified. But there will be many potential questions of a more detailed kind, such as:

12.30.1. Which features of the current County Court and High Court enforcement procedures would best be replicated or developed in a unified service.

12.30.2. Are there possible new methods of enforcement, or new procedures within the currently recognised avenues, which would be made possible or better by the processes of digitisation and automation.

12.30.3. Should all methods of enforcement be centralised as far as possible, along the lines now being planned for charging orders and attachment of earnings orders.

12.30.4. Should there be a default assumption that judgments for payment of money should

themselves require a judgment debtor who fails or is unable to pay the debt within the stated time to take initial steps to facilitate enforcement, such as disclosure of assets and income resources, rather than leave the judgment creditor to have to take the initiative, as at present.

Boundaries: see Chapter 11

12.31. The only item under this heading upon which significant further work and consultation will be needed as part of this review is the question whether, and if so how, the Employment Tribunal and Employment Appeal Tribunal might be integrated into the structure of the civil courts. Even then it is a large question lying only at the borders of my terms of reference, upon which others than me are likely to have a more important, and decisive, influence.

Generally

12.32. I remain acutely conscious that, notwithstanding all the assistance which I have received, I may well have entirely omitted relevant issues and choices, and that readers of this report may think that my focus thus far has under-rated some, over-emphasised others, or has just been plain wrong. If so, please let me know as soon as possible.

12.33. I do not wish to limit in any way those who may wish to respond. There are many individuals and even substantial stakeholder groups whom I have not yet consulted at all, due either to my lack of knowledge about them about them or to sheer pressure of time. Some of those whom I have consulted, or who have volunteered responses (for all of which I am very grateful) may feel that I have thus far been insufficiently responsive to, or accepting of, their informal views. If so, please let me know.

Comments on this report may be sent to: ccsr@ejudiciary.net

Glossary

ACAS

The Advisory, Conciliation and Arbitration Service – An organisation that provides free and impartial information and advice to employers and employees on all aspects of workplace relations and employment law. It is widely known for its provision of conciliation to resolve workplace problems.

ADR

Alternative Dispute Resolution – ways of attempting to resolve disputes so as to avoid litigation. Mediation is the primary form of ADR.

After the Event Insurance (ATE)

After the Event Insurance – Insurance by one party against the risk of it having to pay its opponent's legal costs, where the insurance policy is taken out after the event giving rise to court proceedings (e.g. an accident involving personal injury).

ASBI

Anti-social Behaviour Injunction – an injunction that prohibits the person in respect of whom it is granted from engaging in housing-related anti-social conduct of a kind specified in the injunction.

Assisted Digital Support

Assisted digital support is for people who can't use online government services on their own. The support can be someone guiding a user through the digital service or entering a user's information into the digital service on their behalf. It can be provided by the private, voluntary or public sectors.

ATE Premium

A sum of money paid or payable for insurance against the risk of incurring a costs liability in proceedings.

Attachment of Earnings

A Court Order that can be applied for by a creditor that if successful allows for deductions to be made from a debtor's wages and paid directly to the creditor.

BIS

The Department for Business Innovation and Skills.

Further information on its role can be found here: <https://www.gov.uk/government/organisations/department-for-business-innovation-skills>

Brooke Report

In January 2008 the Judicial Executive Board, comprising the senior judges in England and Wales, invited Sir Henry Brooke, a retired Appeal Court judge, to conduct an inquiry into the question of civil court unification.

The full report can be found at: <https://www.judiciary.gov.uk/publications/civil-courts-unification/>

CACD

Court of Appeal (Criminal Division) – The Court that hears appeals from the Crown Court.

Case Officers

Civil servants authorised to exercise a limited number and category of case specific functions. Also see Delegated Judicial Officer (DJO).

CaseMan

The computerised case management system for County Court and District Registry cases.

CCBC

County Courts Business Centre, or Bulk Centre – This is a facility located in Northampton which was set up by HMCTS to deal with straightforward debt claims issued electronically, by Secure Data Transfer.

Further information can be found here: <https://www.justice.gov.uk/courts/northampton-business-centre/ccbc>

CCMC

County Court Money Claims Centre is part of the CCBC and is an online service that allows county court claims to be issued for fixed sums by individuals and organisations over the internet.

Further information can be found here: <https://www.justice.gov.uk/courts/northampton-business-centre/money-claim-online>

CFA

Conditional Fee Agreement – An agreement under which a lawyer agrees only to be paid by their client in the event that the client's claim succeeds – a 'no win – no fee agreement.' Where the client's claim does succeed, the lawyer is paid their normal fee and an additional amount, known as a success fee. The success fee is not calculated as a proportion of the amount recovered by the client.

CFT

Civil Family and Tribunals, part of the HMCTS Reform Programme. See [paragraph 1.10 of the review](#).

Chancery Applications Court

Deals with interim applications in the Chancery Division, it sits daily in Court 10 in the Rolls building.

A guide to its work can be found here: <https://www.judiciary.gov.uk/publications/guide-litigants-person-chancery>

Chancery Division

The Chancery Division is a part of the High Court of Justice (the other divisions being the Queens Bench Division and Family Division).

Further information on the work it undertakes can be found here: <https://www.justice.gov.uk/courts/rcj-rolls-building/chancery-division>

Chancery Modernisation Review

The Chancery Modernisation Review was conducted by Lord Justice Briggs and was commissioned by the Chancellor of the High Court in January 2013.

The report and background can be found here: <https://www.judiciary.gov.uk/publications/chancery-modernisation-review-final-report/>

Charging Orders

A charging order is an order obtained from a court by a judgment creditor, by which the property of the judgment debtor in any stocks or funds or land stands charged with the payment of the

amount for which judgment shall have been recovered, with interest and costs.

Chatham House basis

A principle according to which information disclosed during a meeting may be reported by those present, but the source of that information may not be explicitly or implicitly identified.

Circuit Judges (CJs)

Circuit judges are judges in England and Wales who, primarily, sit in the County Court, Crown Court and Family Court.

Further information on their role can be found here: <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/circuit-judge/>

Citizens Advice (formerly Citizens Advice Bureau) (CAB)

A charitable organisation which has offices throughout the country at which the public can receive free advice and information on civil legal, and other, matters.

Civil Judicial Engagement Group (Civil JEG)

A group of judges representing all levels of the judiciary and every part of the country who work with the HMCTS officials on the civil part of the Reform Programme.

Civil Justice Council (CJC)

The CJC is an advisory public body established under the Civil Procedure Act 1997. It is responsible for overseeing and co-ordinating the modernisation of the civil justice system.

Further information on their role can be found here: <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/>

Civil Procedure Rule Committee (CPRC)

The Civil Procedure Rule Committee was set up under the Civil Procedure Act 1997 to make rules of court for the Civil Division of the Court of Appeal, the High Court and the County Court.

Further information can be found here: <https://www.gov.uk/government/organisations/civil-procedure-rules-committee>

Civil Procedure Rules (CPR)

The Civil Procedure Rules – The primary rules of court for civil litigation in England and Wales.

The rules can be found at: <http://www.justice.gov.uk/courts/procedure-rules/civil>

CLCC

The Central London County Court.

Competition Appeal Tribunal (CAT)

The Competition Appeal Tribunal is a specialist tribunal, further information on its work can be found here: <http://www.catribunal.org.uk>

Conciliation

An umbrella expression used in the report to include all types of ADR and also conciliation services provided (or to be provided) by the court service.

Costs Budgeting and Costs Budget

Costs budgeting is the management of costs throughout the litigation process. The Civil Procedure

Rules require parties to prepare a costs budget detailing their likely costs based on considering the issues in the case, the procedural stages and the amount of time each stage of the litigation is likely to take. The court then approves or amends those budgets at Costs and Case Management Conferences (“CCMCs”).

County Court

The County Court deals with civil (non-criminal and non-family) matters.

Types of civil case dealt with in the County Court include:

individuals and businesses trying to recover money they are owed;

individuals seeking compensation for injuries, or damages for breach of contract or other wrongs;

landowners seeking orders that will prevent trespass, or for possession at the end of a tenancy.

Further information on the County Court and the work it does can be found here: <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/county-court/>

County Court Bailiff

County Court bailiffs are employees of HMCTS and are responsible for enforcing orders of county court by recovering money owed under county court judgments. They can seize and sell goods to recover the amount of the debt. They can also serve court documents and effect and supervise the possession of property and the return of goods under hire purchase agreements.

Delegated Judicial Officers

Term used in the early stage of the HMCTS Reform Programme to refer to civil servants authorised to exercise a limited number and category of functions on a case specific basis. Called Case Officers in this report.

Deputy District Judge (DDJ)

Deputy District Judges are part time fee paid judges who carry out the same function as District Judges.

Deputy High Court judges (S.9 Judge)

An existing judicial officer holder or suitably qualified senior lawyer appointed by the Lord Chief Justice to sit part time as a deputy judge of the High Court.

Designated Civil Judge (DCJ)

Designated Civil Judges are Circuit Judges or Senior Circuit Judges who have general oversight of, and responsibility for, the conduct of non-family civil business at the courts within a specified area, usually one or more counties. They have leadership responsibility for all judges (other than High Court Judges) doing civil work within their specified area.

Designated Family Judges (DFJ)

Every care centre has a DFJ who is responsible for it and for other Family Courts in the area which have been designated as hearing family work. DFJs are Circuit Judges, or in some cases Senior Circuit Judges. They are responsible for leading all levels of the family judiciary other than High Court Judges at the courts for which they have responsibility, and for ensuring the efficiency and effectiveness of the discharge of judicial family business at those courts.

Direct Access

A scheme whereby members of the public may now go directly to a participating barrister without

having to involve an instructing solicitor or other intermediary. In the past it was necessary for clients to use a solicitor or other recognised third party through whom the barrister would be instructed.

Directions Questionnaires (DQs)

The directions questionnaire is a form that has to be filed with the Court giving the court certain information about the claim including the approximate sum in dispute; which witnesses of fact are likely to be called; whether expert evidence is necessary; how disclosure of electronic documents will be dealt with; how long the parties think the trial is likely to last and an estimate of costs.

The Form (N181) can be found here: <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/n181-eng.pdf>

If the claim is allocated to the small claims track the form N180 is used: <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/n180-eng.pdf>

District Judges (DJs)

District judges are full-time judges who deal mainly with the majority of cases in the County Court. They are assigned on appointment to a particular circuit and may sit at any of the County Court hearing centres or District Registries of the High Court on that circuit.

Further information on their role can be found here: <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/district-judge-role>

Divisional Court

A divisional court, in relation to the High Court of Justice of England and Wales, means a court sitting with at least two judges. Matters heard by a divisional court include some criminal cases in the High Court (including appeals from Magistrates' courts and in extradition proceedings) as well as certain judicial review cases.

The usual constitution of a divisional court is one Lord or Lady Justice of Appeal and one High Court Judge.

DOM1

The Computer network used by the Ministry of Justice and HMCTS

Early Neutral Evaluation (ENE)

Early neutral evaluation is a process, provided both privately and on occasion by the court, in which an early indication is given of what the outcome might be if the matter were to be finally adjudicated in court.

Employment Appeal Tribunal

The Employment Appeal Tribunal is a specialist tribunal and its primary role is to hear appeals from Employment Tribunals in England and Wales, and Scotland.

Further information can be found here: <https://www.gov.uk/courts-tribunals/employment-appeal-tribunal>

Employment Tribunal (ET)

The Employment Tribunals is a specialist tribunal established to resolve disputes between employers and employees over employment rights. The tribunal will hear claims about employment matters such as unfair dismissal, discrimination, wages and redundancy payments.

Further information on the work of the ET can be found here: <https://www.gov.uk/courts-tribunals/employment-tribunal>

Ex Officio Member

An ex officio member is a member of a body (a board, committee, council, etc.) who is part of it by virtue of holding another office.

Family Division

The Family Division is part of the High Court of Justice along with the Queen's Bench Division and the Chancery Division.

Further information can be found at: <https://www.gov.uk/courts-tribunals/family-division-of-the-high-court>

Fast Track

One of the tracks that a case can be allocated to by the Court when lodged (the others being the Small Claims Track and Multi-Track). Tracks were introduced by the Woolf Reforms and were intended to assist in making sure that all cases were dealt with proportionately and in accordance with the overriding objective.

If a claim has a financial value of between £10,000 and £25,000, and likely to take no more than a day to try, then it is likely to be allocated to the Fast Track. The rules and practice direction relating to the Fast Track can be found here: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part28>

Financial Ombudsman Service

The Financial Ombudsman Service is a free service for consumers that tries to help settle disputes between them and UK-based businesses providing financial services, such as banks, building societies, insurance companies, investment firms, financial advisers and finance companies.

Further information can be found here: <http://www.financial-ombudsman.org.uk/about>

First-tier Tribunal Property Chamber

The First-tier Tribunal Property Chamber is one of seven chambers of the First-tier Tribunal which settle legal disputes and are structured around particular areas of law. The First-tier Tribunal Property Chamber handles applications, appeals and references relating to disputes over property and land.

Further information on the Tribunal and areas of work it covers can be found at: <https://www.gov.uk/courts-tribunals/first-tier-tribunal-property-chamber>

Fixed Recoverable Costs

Costs which are fixed in amount by rules of court, rather than be case specific assessment or costs management.

Framework Document

The Framework Document sets out a partnership agreement reached by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals in relation to the effective governance, financing and operation of HMCTS.

The Framework document can be found here: <https://www.gov.uk/government/publications/hm-courts-and-tribunals-service-framework-document>

Hard Working Group (HWG)

This is the small group who have helped with this report. Please see paragraphs 1.3 to 1.4. for their details.

High Court Enforcement Officers (HCEO)

A High Court Enforcement Officer (HCEO) is an officer of the High Court of England and Wales responsible for enforcing judgements of the High Court, often by seizing goods or repossessing property.

High Court Judges (HCJ)

High Court Judges are Judges that are assigned to one of the three divisions of the High Court – the Queen’s Bench Division the Family Division and the Chancery Division.

High Court judges usually sit in London, but they also travel to major court centres around the country. They hear serious criminal cases, important civil cases and appeals in the High Court and assist the Lord Justices to hear appeals in the Court of Appeal.

HMCTS

HMCTS is an executive agency of the Ministry of Justice, operated under a partnership between the Lord Chancellor and Lord Chief Justice, and is responsible for the administration of the criminal, civil and family courts and tribunals in England and Wales and non-devolved tribunals in Scotland and Northern Ireland.

IPEC – Intellectual Property Enterprise Court

The Intellectual Property Enterprise Court was previously known as the Patents County Court, but it is now part of the High Court. It is a court for bringing relatively simple and moderate value proceedings involving intellectual property matters such as patents, registered designs, trade marks, unregistered design rights and copyright.

Further information on the Court can be found at: <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/the-chancery-division/courts-of-the-chancery-division/intellectual-property-enterprise-court>

Jackson Report/Reforms

In November 2008 the Master of the Rolls appointed Lord Justice Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.

Lord Justice Jackson published a preliminary report in May 2009 and a final report in December 2009.

The Jackson Reforms refer to the changes made following the publication of his report, largely pursuant to his recommendations.

The final report can be found here: <https://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs-final-report>

Judicial Assistants (JAs)

Judicial Assistants are qualified lawyers who assist the Judges of the Court of Appeal and the Justices of the Supreme Court by carrying out research in connection with appeals and summarising applications for permission to appeal.

More information on their role can be found here: <https://www.justice.gov.uk/courts/rcj-rolls->

[building/court-of-appeal/civil-division/judicial-assistants](#)

Judicial College

The Judicial College is the organisation responsible for training judges in the courts of England and Wales and tribunals judges in England & Wales, Scotland and Northern Ireland.

Further information on the role of the College can be found here: <https://www.judiciary.gov.uk/about-the-judiciary/training-support/judicial-college>

Judicial Executive Board (JEB)

As part of the changes to the judiciary introduced by the Constitutional Reform Act 2005, a Judicial Executive Board was created, comprising senior members of the judiciary. Its purpose is to assist the Lord Chief Justice with his executive and leadership responsibilities.

More information can be found here: <https://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/how-the-judiciary-is-governed/judicial-executive-board>

Law Society

The Law Society is the professional association that represents and governs the solicitors' profession for the jurisdiction of England and Wales.

Litigants in Person (LiPs)

A litigant in person is an individual, company or organisation that is a party to legal proceedings but not represented by lawyers.

Lord Chief Justice

Lord Chief Justice is the judge who is the Head of the Judiciary of England and Wales, a role previously performed by the Lord Chancellor.

The Lord Chief Justice is also the President of the Courts of England and Wales and responsible for representing the views of the judiciary to Parliament and the Government.

Lord/Lady Justice (LJ)

A Judge of the Court of Appeal.

Master of the Rolls

The Master of the Rolls is the Head of Civil Justice, and the second most senior judicial position in England and Wales, after the Lord Chief Justice.

Masters

A Master is a judicial officer of the Queen's Bench Division or Chancery Division whose role is concerned primarily with procedural matters such as applications and case management. They also try an increasing number of cases, where a High Court Judge is not required.

MCOL

Money Claims Online – An electronic system which allows litigants to issue simple, straightforward claims for money online. Administered at the Northampton Bulk Centre.

Mercantile Court

The Mercantile Courts are regional courts of the Queen's Bench Division of the High Court with specialist Circuit Judges, dealing with commercial or business disputes, in London and the main regional cities.

Further information on the Mercantile Courts can be found at: <https://www.justice.gov.uk/downloads/courts/mercantile-court/mercantile-court-guide.pdf>

MIAM

Mediation, Information and Advice Meeting – an early stage in private law family proceedings designed to inform parties about the availability of ADR.

Mitchell and Denton Cases

These were two cases in which the Court of Appeal (first in Mitchell and clarified in Denton) set out the approach to be taken by Courts when dealing with applications for relief from sanctions under CPR 3.9 after the rule had been amended following the Jackson reforms.

Mitchell can be found here: <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1537.html>

Denton can be found here: <http://www.judiciary.gov.uk/?p=51071>

Multi-Track

One of the three tracks to which a civil case can be allocated after it has been issued.

Northampton Bulk Centre

See CCBC.

OC – Online Court

See Chapter 6 of this review for further details in relation to the proposed OC for England and Wales.

ODR

Online Dispute Resolution -Dispute resolution which uses technology to assist the resolution of disputes between parties.

The CJC report on ODR which is mentioned in Chapter 6 of this review can be found here: <https://www.judiciary.gov.uk/reviews/online-dispute-resolution>

Part 7 Cases (Pt 7 cases)

Part 7 refers to Part 7 of the Civil Procedure Rules and the issue of a Part 7 claim form is the usual method of bringing a civil claim.

Part 8 Cases (Pt 8 cases)

Part 8 refers to Part 8 of the Civil Procedure Rules and it is an alternative procedure to the usual method of bringing a civil claim (Part 7) It is mainly aimed at resolving disputes where a claimant is seeking the court's decision on a question which is unlikely to involve a substantial dispute of fact.

PCOL

Possession Claims Online. An electronic system which allows litigants to issue simple, straightforward claims for possession claims online.

Personal Injury (PI)

Personal Injury is a term used to describe any type of physical or mental injury which has been caused to an individual.

Personal Support Unit (PSU)

The Personal Support Unit is an independent charity that supports people going through the court process without legal representation, by providing practical and emotional support, but not

advocacy or legal advice. They have thirteen offices in eleven Courts in England and Wales.

Further information on them can be found at: <https://www.thepsu.org>

Planning Court

The Planning Court forms part of the Administrative Court and deals with all judicial reviews and statutory challenges involving planning matters.

Further information can be found here: <https://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/the-planning-court>

Practice Direction (PD)

Practice Directions accompany and amplify the Civil Procedure Rules and give practical advice on how to apply and act in accordance with the rules themselves.

The Rules and Practice Directions can be found here: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules>

Pre-Action Protocols (PAP)

These set out how the courts expect parties to behave prior to commencement of any claim. They are primarily designed to assist the parties to resolve disputes without recourse to starting proceedings in court.

A list of the PAPs can be found here: <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol>

President of the Family Division (PFD)

The President of the Family Division is the head of the Family Division of the High Court of Justice in England and Wales and Head of Family Justice.

President of the Queens Bench Division (PQBD)

The President of the Queen's Bench Division is the head of the Queen's Bench Division.

Further information on the role can be found here: <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/profile-pqbd>

Pro Bono work

Advice given or professional work undertaken voluntarily and without payment as a public service.

QB Judges

Judges of the Queen's Bench Division.

Qualified One Way Costs Shifting (QOCS)

The ordinary rule in litigation is that the losing party pays the winning party's legal costs. This is known as costs shifting. One way costs shifting is where the ordinary rule is changed so that when the winning party is a claimant the defendant pays the claimant's litigation costs. Should however the defendant win, the claimant does not have to pay the defendant's litigation costs.

Queen's Bench Division (QBD)

The Queen's Bench Division is one of the three divisions of the High Court together with the Chancery Division and Family Division.

Further information can be found here: <https://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench>

Reform Programme

The HMCTS Reform Programme – see Chapter 4 of this review for full details.

Registrar

Registrars in Bankruptcy are judges who sit in the Chancery Division of the High Court, both in the Bankruptcy Court and in the Companies Court. The jurisdiction involves hearing and determining a wide variety of personal and company insolvency cases, as well as matters involving specialised aspects of company law not related to insolvency.

There is also Admiralty Registrar (who is also a Queens Bench Master).

Further information can be found here: <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/high-ct-masters-registrars>

Rolls Building Courts

The Rolls Building is a court complex in London that houses the Chancery Division as well as the Admiralty and Commercial Court, and the Technology and Construction Court.

Royal Courts of Justice (RCJ)

The Royal Courts of Justice, commonly called the Law Courts, is a court building in London which houses the Court of Appeal, part of High Court and the Central London County Court.

Rules

See Civil Procedure Rules (CPR).

Salford Business Centre

The building in which the County Court Money Claim Service for the whole of England & Wales is based. This handles the early stages of money claims issued on paper, rather than electronically.

Salford Legal Advisers Pilot

This is a pilot scheme running from 1 October 2015 to 30 September 2016 and covers claims issued at Northampton Bulk Centre, Money Claims Online and the County Court Money Claims Centre in Salford. The pilot scheme (see Practice Direction 51K) allows Legal Advisers to carry out some routine and basic procedural applications, under judicial supervision.

Further information can be found here: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51k-the-county-court-legal-advisers-pilot-scheme>

Second Appeal

A second appeal is an appeal to a higher court from a decision of a lower court which was itself made on appeal.

Section 9 Judge

See deputy High Court judges.

Senior Circuit Judge (SCJ)

Senior Circuit Judges carry out the full duties of a Circuit Judge and, in addition, hear particularly demanding or specialist cases.

Senior President of Tribunals

The Senior President of Tribunals is the independent and statutory leader of the tribunal judiciary. The office of the Senior President of Tribunals is independent of both the Executive and the Chief Justice, and was established under the Tribunals Courts and Enforcement Act 2007.

Further information on the role can be found here: <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/senior-president-tribunals>

Senior Presiding Judge (SPJ)

The Senior Presiding Judge for England and Wales is a member of the Court of Appeal appointed by the Lord Chief Justice to supervise the Presiding Judges for the various judicial circuits of England and Wales. The Senior Presiding Judge is responsible for deployment and personnel issues for all circuits and acts as a “general point of liaison” for the courts, judiciary and Government.

Small Claims Track

One of the three tracks that a civil case can be allocated to by the Court when lodged. A case will normally be allocated to the small claims track if the value is under £10,000, or a lower amount if the claim is for personal injuries or housing disrepair.

SWOT analysis

A structured planning method used to evaluate the strengths, weaknesses, opportunities and threats involved in a project or in a business venture.

TCC

The Technology and Construction Court.

Temporary Court

A large room or suite of rooms in a public or other building such as a town hall or community centre, used on an occasional basis for the conduct of court hearings. Sometimes called a ‘pop up court’.

Third Party Debt Orders

A means of enforcement of a court judgment whereby a judgment creditor can recover monies owed by a judgment debtor) from a third party who is either holding money for the judgment debtor (usually a bank or building society) or who owes the judgment debtor an amount of money for whatever reason.

TOLATA Claim

A Claim under The Trusts of Land and Appointment of Trustees Act 1996, usually about the beneficial ownership of land.

Totally without Merit (TWM)

If a case is certified as being totally without merit by a Judge at the paper consideration of a permission to appeal application or an application for then there is no right to request that the decision be reconsidered at an oral hearing.

Unified Civil Court (UCC)

A proposed unification of the High Court and County Court that was last considered by the Brooke Report in 2008.

Value at Risk (VaR)

The value, expressed in monetary terms, of that which is really in dispute between the parties to a civil case.

White Book

A book that sets out the rules of practice and procedure in the Civil Courts, including the Civil Procedure Rules, Practice Directions and Court Guides.

Woolf reforms

Reforms introduced following the publication in July 1996 of a review of the civil justice system by the then Master of the Rolls, Lord Woolf which resulted in the introduction of the Civil Procedure Rules.

The final report can be viewed here: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/contents.htm>