

Response to DCA Consultation on "A Single Civil Court?"

The London Solicitors Litigation Association (LSLA) is over 50 years old and represents the interests of a wide range of litigators in London handling a broad range of civil and commercial litigation. Through its 950 solicitor members and strong links with a wide number of professional bodies, it represents nearly all civil litigation practices in London. The LSLA operates through a Committee of some 15 members which includes members of the Civil Justice Council, Civil Procedure Rules Committee, Law Society Civil Litigation Committee and local Law Societies. The Association has a long track record of responding to consultation papers and has drawn on a wide range of views in responding to the current consultation paper.

INTRODUCTION

The LSLA has found it difficult to respond to this paper as it does not clearly to define the objectives of the proposed reform. The three benefits identified in paragraph 4 are either objectives which we question are necessary or appear to represent ends which could be achieved without necessarily abolishing the two-tier High Court and County Court system. We see more obvious potential benefit in rationalising the Queen's Bench and Chancery Divisions with a single Division with specialist lists.

It is also unclear to us whether the paper is the result of any perceived need on the part of any user group for reform. For example, little is said as to whether the benefit of reform would be to save substantial overheads and other costs and, if so, whether those savings would be used to enhance the resulting single Civil Court system particularly with the much needed investment of IT. If these are intended objectives, in our view they should be clearly identified. Otherwise, apart from the perhaps illusory benefit of a single right of audience in all the Civil Courts, as indicated we question the utility of many of the suggested reforms.

Turning to the specific questions:

Question 1. Do you think there should be a single Family Court, incorporating current FPC business, standing alongside a single Civil Court? Or should reform focus on unifying the High Court and county courts to form a Civil Court while retaining separate FPCs?

Comments: The LSLA does not represent family law practitioners, and therefore we do not comment.

Question 2. Do you agree that any new Civil Court should broadly retain the existing judicial structure? If not, please explain how it should differ and why.

Comments: We suspect that the consultation will be hampered by the lack of clarity of what is meant by "existing judicial structure". We assume here that it refers to the two-tier system in the High Court and County Courts respectively. It is somewhat odd to amalgamate the two Courts, which have at their heart two "tiers" of Judges, and then ensure that the existing tiers are maintained by entrenching in statute the special status of High Court Judges. If, however, there is to be a single Civil Court, then we agree with the approach of entrenching that status. The status obviously has a purpose. We therefore think it sensible that some steps should be taken to ensure that only High Court Judges deal with the more demanding and complex cases in the system. The present reservation of certain powers to the High Court is confusing and could be simplified. Note for example that it presently arises by statute (for example the Human Rights Act), second legislation (for example the High Courts and County Courts Jurisdiction Order 1991) or common law. On the issue of separate Divisions, we see some benefit in moving to having more specialist lists, to improve the dispensation of justice, in which event we see a persuasive argument in favour of abolishing the Queen's Bench and Chancery Divisions.

Question 3. Do you agree that it is better to release appropriate work to suitable Circuit judges and Recorders rather than re-badging them as deputy High Court judges? If not, please explain why.

Comments: This is really a function of the manner in which certain powers will be entrenched as High Court Work. The issue arises because Circuit Court Judges and Recorders have no jurisdiction to undertake High Court work. We suspect that the High Court will need to continue to release less difficult work to Deputies or ensure that expertise not available within High Court Judges can be found with appointing Deputies to deal with a particularly specialist or technical matters. This is really a matter of terminology. The re-badging of Circuit Judges and Recorders is merely a consequence of the rules to which we have referred and not a necessary end in itself.

Question 4. Do you think there is a need for a new category of 'starred' Recorders to whom more complex work could be designated?

Comments: We agree. If a heavy case and/or a case requiring specialism cannot be allocated to an appropriate High Court Judge then in the interests of justice it ought to be allocated to a "starred" Recorder.

Question 5. Do you agree that a judge-led rule making process, in which Ministers have a secondary approval role, is the best way to ensure appropriate and flexible allocation of judicial business? If not, why?

Comments: Again, we suspect that the consultation may be hampered by the lack of clarity as to what is meant by "rule making process". We assume it is a reference to rules about judicial allocation. In that respect, we see no reason to depart from the approach outlined by Lord Woolf in his paper "Constitutional Reform: the Lord Chancellor's judiciary - related functions - proposals" which clearly stated that it was for the judiciary and not the executive to deploy Judges. Given that this has been reflected in clause 3(2)(c) of the Constitutional Reform Bill, which clearly states that deployment and allocation of work is the responsibility of the Lord Chief Justice, we are unclear why this matter is being addressed again by way of consultation. It should not be possible for the executive in any way to influence the dispensation of justice by having any role to play in the allocation of a Judge to a particular case. Nor do we believe there is any basis for considering that Ministers have a contribution to make in this respect.

Question 6. Do you think that creating a Civil Court and by removing most geographical and jurisdictional restrictions on where cases are issued we will increase users' understanding of and access to the system?

Comments: We doubt that such a change will by itself increase understanding and access to civil justice. Claimants can already choose where to commence proceedings and rules exist to enable a defendant or the Court to alter that choice where appropriate. If the reference to "jurisdiction" is intended to allow higher value cases to be commenced in the lower Court, then this would cut across many of the protections envisaged in the consultation paper. We therefore believe that the question, with respect, misses the point.

Question 7. Do you agree that venue for case management and hearing should be determined as part of the subsequent allocation process. Do you foresee any difficulties in operating this model in practice?

Comments: Again, we are unable to see a persuasive basis for changing the existing approach. Case management and venue are already decided as part of the allocation process.

Question 8. Should all lower-tier judges from the current High Court and county court systems be fully aligned? Please give reasons for your answer.

Comments: We tend to think not, for the reason outlined earlier that not all "lower-tier Judges" in the new Civil Court could be treated as having the same expertise to deal with trials and case management in complex or difficult cases. There would continue to be a "starring" system

reflecting, for example, that many High Court Masters would not have the same experience as County Court District Judges in dealing with trials (albeit for a lower value than in the High Court). This reinforces our view that it would be an ill thought out reform that afforded High Court Masters the same wide trial jurisdiction as a County Court Judge, but then sought to distinguish between all such Masters and Judges by identifying their expertise and experience to handle difficult types of trials. This reinforces our concern as to whether any general reform is necessary or appropriate.

Question 9. Do you agree with the above proposals about statutory restrictions on the proposed power to make rules about the allocation of judicial business (paragraphs 39 to 44)? If you disagree with any of them, please explain why. Should there be any other restrictions?

Comments: We agree that the statutory restrictions should be retained. This would ensure that only upper-tier Judges would deal with human rights matters, judicial review and other administrative Court work, wardship and international child abduction cases as well as certain special orders such as injunctions.

Question 10. Do you agree that the creation of specialist courts or lists should be a matter for the proposed allocation rules, and there is generally no need to retain the statutory status of some of them? If not, please explain why. Do you think the Commercial Court should be an exception?

Comments: There is, in our view, a powerful reason for retaining a specialist commercial Court. Having acknowledged that, we think it matters less whether such a specialist Courts or lists are the function of rules or practice directions, or are creatures of statute. That said, if there was any suggestion that a judicial Court of this nature might be overridden by some later administrative rule then we would have no objection to the Court being enshrined in statute. Above all, however, the international prestige and recognition of the Court is a consequence of its Judges and its facilities and not its legal basis.

More generally, and in our view critically, the real issue is ensuring that specialist or complex cases are dealt with by the Judges with most experience and expertise to deal with them. This is nothing more than taking the overriding objective of the CPR and applying it to the structural organisation of the civil justice system. We tend to the view that the modern system probably no longer requires separate Queen's Bench and Chancery Divisions which were established before the Courts began to deal with many different types of specialist action. Instead, we probably ought to be working towards a system of specialists lists by design. This is, for example, what has happened not only with the broader remit of the Commercial Court but, to take another

example, with defamation cases which are handled by a specialist list of only two or three Judges. We believe that identifying the appropriate lists is a more appropriate and relevant objective than amalgamating the High Court and County Court. We recognise that many Judges will be reluctant to feel that they are being "pigeon holed" into specialists lists, but that is partly a function of how specialist the lists are and there should be no impediment on a Judge being allocated to more than one list. If this approach were to be followed it is important that allocation of cases to Judges within lists is not the function of only the senior Judge in that list. Otherwise, there is a danger that a single judicial mind might have too prominent an influence on the development of the law in a particular area, which we would consider to be a bad thing.

Question 11. Which of the options outlined in paragraph 52 do you prefer and why?

Comments: The three options put forward are :

- to abolish the concept of divisions altogether
- to retain the divisions broadly as now with adjustments as necessary and incorporating the various specialist courts and lists
- to retain the concept of divisions only as a grouping of cadres of High Court Judges

We can see an advantage in simplification and codification of the existing system. At present, the system is by no means clear, even to the practitioner. For example, the distinction between the Commercial Court and the Chancery Division is inconsistent and confusing. The Supreme Court Act 1981 provides for business in the High Court to be distributed among the Divisions, namely, Queen's Bench, Chancery and Family. Thereafter, there are specialist courts within the Divisions, such as the Admiralty, Commercial and Administrative Courts within the Queen's Bench Division - some specialist courts being the creature of statute (eg Admiralty and Commercial) and some simply being designated as such by Practice Direction (eg the Administrative Court). Some, but not all business is allocated to particular divisions by Statute (eg Schedule 1 to the Supreme Court Act 1981). There are specialist proceedings designated as such by CPR Part 49 - eg Companies Act proceedings, and then there are specialist proceedings which are designated their own CPR rules such as proceedings in the Technology and Construction Court. Finally, there are specialist lists where cases are allocated to different lists depending on the subject-matter of the case. The lists are used for administrative purposes and may also have their own procedures and judges. So, for example, the Mercantile Court means "a specialist list established either in the Central London County Court and certain designated district registries." In all, it is a confusing picture with the system having developed by way of evolution rather than by design. Codification and simplification would clearly be beneficial although that is not to say that unification of the high court and county court is the only way to achieve this.

It may be that unification is not a necessary pre-requisite to such changes. As we have indicated above, we tend to think that the three options do not address the real issue which is the

desirability of appropriate specialist lists (and retention of a "Commercial Court").

Question 12. If a concept of divisions as judicial cadres is adopted, should this be a matter for statute or solely for the judiciary? If the former, how (if at all) would you wish to change the boundaries compared with the existing divisions?

Comments: We believe that abolishing the existing Divisions and adopting judicial "cadres" may represent a change of little substance unless it were part of a global programme for identifying the appropriate specialist lists of Judges so as to improve the dispensation of justice. That said, it is not clear to us that such adjustments to the allocation of business could only be achieved by abolishing the existing Divisions.

Question 13. Do you agree with the proposals in paragraph 58? If not, please explain what system you would prefer and why.

Comments: We agree that the existing civil appeals structure would appear to require little if any change following unification and the existing Bowman reforms.

Question 14. Do you think that the same principles that govern civil appeal routes should be applied to family appeal routes? In particular, do you think that:

- **final decisions by lay magistrates and all types of district judge should *generally* be appealed to Circuit judges not High Court judges; and**
- **appeals from Circuit judges should *generally* go to High Court judges, not to the Court of Appeal?**

Comments: The LSLA does not represent family law practitioners, and therefore we do not comment.

Question 15. Do you agree that it should be for the appropriate professional bodies (in liaison with other stakeholders including Government) to bring forward proposals for reforming rights of audience before a single Civil Court; but that, as a minimum, the substance of existing rights should be maintained?

Comments: We agree.

Question 16. Do you agree that the above listed 'miscellaneous' issues do not raise significant issues for potential Civil Court reforms? If not, please explain where and how difficulties might arise.

Comments: We broadly agree. Whilst some issues, for example enforcement, Court fees and rules and user committees, would need to be addressed in anticipation of unification, we doubt that any significant issues would arise.

Question 17. Do you think that establishing a Civil Court would, in principle, bring benefits (as described at paragraph 4)?

Comments: We deal separately with the three benefits identified in paragraph 4, taking into account the Partial Regulatory Impact Assessment on each point:

1. Judicial benefits

It is suggested that the complexities of the current system with the geographical, financial and subject specific boundaries unnecessarily complicate the allocation of work to appropriate Judges. We are unsure that the complexities are as significant as suggested. Proceedings can already be issued, in the main, wherever the Claimant chooses, and when the subsequent issue of allocation is addressed the geographical, financial and specialist issues will be relevant. Arguably the Court is in a better position at that stage to address allocation than it would be at the commencement of proceedings. This was a benefit anticipated by the Woolf reforms and in our view further progress in these respects should not be a deciding factor in establishing a single Civil Court. We have some reservations about moving to a not clearly stated system whereby claims could be brought in a single Court, unless it were explicitly stated that the purpose would be to achieve allocation to the appropriate "list" of Judges with relevant experience and expertise in the matters arising in the case.

We particularly note the suggestion in paragraph 11 of the PRIA that unification could lead to a reduction in judicial cost because "more cases would be dealt with by lower tiers of judiciary and perhaps away from London". Put simply on this basis it does not

commend itself to us as an objective justifying reform. Among other matters, no evidence is put forward (or, so far as we are aware, is any in existence) to suggest that cases are currently allocated to inappropriate levels of Judges. Indeed, we would be anxious to see safeguards in place to ensure that there would be no lowering of the level of judicial experience etc here in particular cases.

Nor is any evidence put forward as to why it would be beneficial to parties, or in the interests of justice, for more cases to be heard out of London. It cannot be overlooked that London houses the vast bulk of the commercial Bar and the cost of arranging for such professionals to address cases outside of London must be matched against the probability that other legal costs, eg solicitors costs, would be lower should cases be heard out of London. However, this is another matter which has already taken into consideration and argued at the allocation stage. It is also open to any Defendant to a case commenced in London to argue that it transferred to a District Registry. On such an application the Court can and will take into account questions of costs as well as convenience.

2. **A unified system would be cheaper and easier to administer**

We strongly suspect that this is the principal argument in favour of unification. However, many of the concerns regarding administrative costs would already appear to have been met by the establishment of Her Majesty's Court Service on 1 April 2005. Whilst it remains desirable to make significant savings particularly through the development and implementation of a common IT system, the consultation paper does not make clear why unification is a necessary pre-requisite to that objective. It ought to be possible to achieve it under the umbrella of HMCS and, if this is not the case, reasons should be given.

3. **User benefits**

A unified civil Court might be easier to understand and use but we doubt, following the introduction of the CPR, that practitioners would benefit from any further simplification of what is already a unified procedural code. Also, as stated above, no evidence is put forward to support the contention that users consider the current system to be unduly complex or restrictive. It is already open to prospective Claimants to issue proceedings, with few exceptions, wherever they wish, with any transfer being made later if necessary. At this stage, we therefore believe the issue of user benefits is more apparent than real.

Question 18. Do you see any alternative to the model whereby the county courts are abolished and, in effect, the High Court becomes the Civil Court? If so, what is it?

Comments: The need is to simplify, modernise and streamline existing proceedings. Consideration should be given to whether this can be achieved using existing legislative powers without the necessity for abolition of the county courts. It may be that, on closer examination, unification would be the easiest way of achieving this. There is much to be said for starting from scratch with a new Civil Court. However, the means should follow the end not vice versa. If it is possible to achieve the perceived benefits without unification and using existing legislative powers, then this would seem to be the most sensible option.

Question 19. Do you have any general comments, on either the contents of this paper or the attached Partial Regulatory Impact Assessment, that do not fall within the scope of any of the specific questions posed? If so, please feel free to give them here.

Comments: The critical issue for the future of administration of justice is the chronic shortage of funds for IT development. It is surprising that the issue is not addressed in the consultation paper. If (but only if) unification of the High Court and County Court was the only way to achieve a consistent IT system across the Courts, then this in our view would represent a better reason for unification than many (if not all) of the other suggestions contained in the consultation paper.

FURTHER CONTACT

The LSLA would welcome the opportunity to contribute to any further work in this area. Any queries or comments on this paper should be addressed either to:

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