Nuffield Foundation

Improving civil justice reform

An analysis of major reviews in England and Wales

Policy brief

Dr John Sorabji

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Executive summary

This policy brief sets out the findings of **Improving civil justice reform – an analysis of major reviews in England and Wales** (the *Improving civil justice reform* report), which reviewed the most recent four major, official, civil justice reviews carried out in England and Wales: the Civil Justice Review 1988; The Woolf Review; the Jackson Costs Review; and the Briggs Review (the four Reviews). The report was commissioned by the Nuffield Foundation as part of its *Public right to justice* programme.

The report identified the four Reviews' objectives, approaches to the reform process and recommendations, and the manner in which those recommendations were implemented. It concluded that despite each of the four Reviews intending to reduce procedural, temporal and financial barriers to access to justice, they cannot be seen to have done so. It identified four key weaknesses in the civil justice reform process exemplified by the four Reviews. The weaknesses are: definitional; constitutional; institutional; and empirical.

To overcome the four weaknesses, the report and this policy brief advocate the adoption of eight recommendations for improving the civil justice reform process, and through that access to justice, in England and Wales. **The key recommendations at a glance are:**

- Adopt a broad, tripartite definition of access to justice, which encompasses preventative, consensual and adjudicative justice.
- Reaffirm the constitutional importance of the civil justice system, and that it delivers a public good and is not simply a part of the service sector.
- Establish a permanent Civil Justice Reform Institute to oversee, devise and co-ordinate effective long-term civil justice reform.
- Establish, ideally within the Civil Justice Reform Institute, a single, accountable body responsible for implementing reform.
- Establish an Access to Justice Institute to provide the evidence-base for reform, including the economic case for specific reforms.
- Engage more fully in comparative study of civil justice systems from across the world to inform future reform.
- Require piloting and testing of reform.
- Introduce a statutory duty on Government to provide sustainable, long-term funding for reform.

The core practical proposal is that effective reform requires new, permanent institutional capacity operating within a framework that understands access to justice to mean more than effective access to the civil courts. Specifically, effective reform requires the creation and long-term funding of a permanent Civil Justice Reform Institute and an independent Access to Justice Institute.

Together, these new Institutes would provide continuity, expertise and a stakeholder-focus for civil justice reform. They would facilitate the delivery of reform that is evidence-based, tested, and delivered as part of an overarching and coherent strategy for improving access to justice, which should be understood in a broad sense to include:

- **Access to preventative justice**, i.e., access to advice and information that helps individuals and businesses order their affairs according to the law and in ways that minimise the potential for legal disputes to arise.
- **Access to consensual justice**, i.e., access to consensual resolution of legal disputes, and thereafter access to those processes.
- **Access to adjudicative justice** before the civil courts (i.e., access to legal advice, representation, the civil courts, judgments and enforcement), which not only resolves disputes definitively but also is the means through which the state is held to account and the framework within which individuals and businesses order their affairs lawfully and preventative and consensual justice operate.

The policy problem

Civil justice is in crisis. That it is has been recognised since the 1990s. It remains so despite the four Reviews and multiple discrete reviews and reforms aimed at increasing access to the civil justice system. In many ways it is a worse crisis today than it was previously: problems of complexity, cost and delay – which have been and remain endemic – are now exacerbated through stark and long-term reductions in funding for the civil justice system.

The crisis continues because civil justice reform in England and Wales has been characterised by periodic initiatives rather than sustained reform programmes. Despite repeated diagnoses identifying cost, delay, complexity and uneven access to justice, reform efforts have often been fragmented and reactive. The *Improving civil justice reform* report identifies four key deficits where effective reform is concerned: England and Wales lacks enduring structures that are capable of devising a coherent, co-ordinated reform strategy and which are able to evaluate, implement and thereafter maintain effective evidence-based long-term reform. These institutional and empirical deficits are compounded by definitional and constitutional ones. The definitional deficit arises because England and Wales adopts too narrow and legalistic an approach to 'access to justice', which equates it with access to the court. This deficit frames and limits reform efforts so that they are court-centric and thus fail to fully engage with the causes of unmet legal need. The constitutional deficit arises because of a failure by Government to place sufficient weight on the constitutional importance of the civil justice system, falsely perceiving it to be no more than a dispute resolution service rather than the means through which the judicial power of the state is exercised to secure preventative, consensual and adjudicative justice. Only if the full, constitutional importance of the civil justice system is appreciated will the other deficits be overcome.

The upshot of this crisis is patent. The World Justice Project's Rule of Law Index 2023 makes clear that international comparators demonstrate that access to affordable civil justice is more difficult to achieve in England and Wales than in comparable countries across the world. National studies show that unmet legal need is significant: the Justice Select Committee and the Legal Services Consumer Panel reporting that two-thirds of the population of England and Wales do not, for instance, know

how to secure legal advice, while 3.6 million are reported as having unmet legal need concerning legal disputes each year. Forty years of reform have not left England and Wales with genuine, practical access to justice for all. The crisis continues despite political, judicial and legal professional will and support for improvements to be made, as evidenced by the four Reviews. This is shameful. With the acknowledged failure of the HMCTS Reform programme to yield improvements in access to justice, reform to our reform processes is now of critical importance if steps are to be taken to improve access to justice so that it is genuinely and practicably available to all.

Improving civil justice reform's contribution

The *Improving civil justice reform* report is the first systematic analysis of the four Reviews. It identifies commonalities across the four Reviews and highlights their ad hoc, reactive nature. It notes their court-centric focus, meaning that they looked at how to improve access to the civil courts by reducing complexity in the civil courts' practices, procedures and structures, and by reducing litigation cost and delay. They thus failed to consider how to tackle, for instance, unmet legal need and how it undermines effective access to justice. It also highlights how the Reviews were predominately carried out by small working parties led predominately by senior members of the judiciary who were supported by small, ad hoc secretariats and working parties whose membership was predominately drawn from legal profession. The four Reviews demonstrated a marked absence of input from non-professional court users, i.e., lay court users, as well as of the public in general, i.e., those who evidence unmet legal need. That even remained the case for the Briggs Review, which identified the need for user-centred reform. The report also emphasises how each of the Reviews was commissioned in the absence of an overarching-long-term reform strategy and with a problematic approach to evidence.

The report draws attention to the partial approach the four Reviews took to the evidence-base for reform in two ways. First, none of the Reviews was based on robust qualitative or quantitative evidence. Genn's complaint in, for instance, *Judging Civil Justice (2009)*, that civil justice reviews were generally based more on anecdote than evidence, and hence there could be no proper basis for identifying the causes of the access to justice deficit in England and Wales or thereafter devising cures for those causes, was not unique to that review. It is generally applicable. Secondly, while each of the four Reviews, to differing degrees sought evidence to support its work, none can properly be said to have secured as full a set of qualitative or quantitative evidence as serious reform requires. Without a proper evidence-base, the identification of where the causes of access to justice problems cannot be reliably identified and hence, there is no proper basis to conclude that reform recommendations actually engage with and provide a means to cure those problems. Moreover, absent an effective evidence-base to test implementation, it cannot be seen whether and to what extent reforms are making effective improvements to access to justice nor whether they themselves are exacerbated existing problems or creating new ones.

Commonalities concerning the approach taken to the Reviews' reform recommendations are also identified. Apart from the Briggs Review, which saw most of its recommendations go unimplemented, the Review's saw either almost complete or substantial implementation of their recommendations, which given the continuing access to justice gap strongly points to their inability to achieve their objectives of improving access to justice. Where one Review's recommendations were not implemented, they would commonly be recommended again by a subsequent Review. Where some recommendations were concerned – such as those calling for improved and increased provision

of information technology for the civil courts as well as those that focused on the need to improve civil enforcement processes – they would be repeated consistently across all Reviews, indicating a significant failure to tackle an endemic weakness in the civil justice system: that weakness remains today. By bringing into focus the fact that the vast majority of the recommendations of the first three of the four Reviews were implemented, the overall failure of effective lasting reform is emphasised.

Finally, the report identifies how implementation, and thus the efficacy of the Reviews, has been undermined by the introduction of separate reforms at the same time as the Reviews' recommendations were implemented. For instance, in the absence of a coherent, overarching civil justice strategy, reforms to conditional fee agreements in 1999 and reductions in civil legal aid from 2012 undermined the Woolf and Jackson Costs Reviews' ability to increase access to justice.

From recommendations to implementation

The *Improving civil justice reform* report makes eight recommendations aimed at improving the civil justice review process. They are intended to replace the current ad hoc, evidence-light and short-term approach to reform with one that is considered, evidence-based and capable of securing long-term improvements to access to justice. The recommendations are interlocking and intended to be implemented as a coherent whole. An attempt to implement individual recommendations in isolation or partial implementation simply risks maintaining the problems that have undermined both the efficacy of past reform and, particularly, the four Reviews' attempts to improve access to justice.

Implementation of the recommendations will provide the necessary definitional, constitutional, institutional and evidential framework for effective and holistic reform to and improvement of access to civil justice. Their implementation would provide a stable institutional framework to proactively, rather than reactively, identify where reform was needed; target reform recommendations on those properly identified problem areas; and promote coherent implementation and ongoing monitoring. It would provide, for the first time, a basis for effective, holistic, evidence-based and continuous improvements to be made to access to civil justice.

Creating institutional capacity for successful long-term reform

The central, practical, policy recommendation is that permanent, sustainably-funded, institutional mechanisms are created to deliver evidence-led civil justice reform. These institutions – the Civil Justice Reform Committee and the Access to Civil Justice Institute – would complement existing (primarily court-focused) structures: the Ministry of Justice; His Majesty's Courts and Tribunals Service (HMCTS); the Civil Procedure and Online Procedure Rule Committees; and the Civil Justice Council. They would not supplant them, although whether those bodies could be rationalised is a separate and further issue that could properly be considered.

The new institutional mechanisms would fill a significant and longstanding gap in England and Wales' civil justice system: one that is centred on the ability to provide a long-term, coherent, holistic and evidence-led strategy for improving access to civil justice, reducing unmet legal need and overseeing reform's effective implementation. The new institutions would fill this gap by providing continuity, systemic co-ordination, and the ability to gather and test evidence as well as to formulate and secure the implementation of continuous improvement to the civil justice system and access to it.

This new institutional capacity should be understood as a necessary, facilitative condition for future, substantive civil justice reform.

A Civil Justice Reform Institute

The Civil Justice Reform Institute would place the improvement of access to civil justice on a permanent footing. It would replace the current ad hoc, reactive and episodic approach to reform carried out by small, primarily judge-led reform teams with a cross-institutional body able to bring together stakeholders from across the civil justice system. It would, particularly, be better able to secure the promotion of user-centric reform than past reform efforts have been able to do. As a permanent body, the Institute would also be able to build long-term institutional knowledge and expertise in the field of access to civil justice and the effective reform of the civil justice system.

As a permanent body, the Institute's functions would be wider in scope, focus and role than any existing civil justice reform body. They would include overseeing the development and sequencing of user-focused, evidence-led reform, and advising on how to reduce unmet legal need and thus access to preventative, consensual and adjudicative justice. It would, through working with the Access to Justice Institute, enable proactive reform to be engaged in and assess reform implementation, not least through the continuous monitoring of access to civil justice and the operation of the civil justice system.

Access to Civil Justice Institute

An Access to Civil Justice Institute would ensure England and Wales is able to engage in fully evidence-led civil justice reform for the first time in its history. The Institute would provide independent research and evaluation capacity. It would provide a centre of excellence for data gathering, the empirical evaluation of reform recommendations, their testing and implementation. It would help ensure that evidence is able to inform user-centric design, not least through gathering and analysing evidence of user experience of access to civil justice, including access to the civil courts.

The absence of and need for such an Institute has been recognised since, at least, the 1990s, when the need for an evidence-led approach to reform was commented on critically where the Woolf Review was concerned. With the establishment of, for instance, the Nuffield Family Justice Observatory, the continued absence of such an Institute where civil justice is concerned is all the starker. The creation of such an Institute would meet those concerns, solving the evidence-gap where reform is concerned. It would provide the Civil Justice Reform Institute, Government, judiciary, HMCTS and other relevant civil justice bodies – such as the Civil Procedure Rule Committee, Online Procedure Rule Committee and Civil Justice Council – with a reliable, robust body of evidence and analysis to support their work. Its creation would thus improve policy-making and increase the accountability of reform outcomes.

Delivering reform: implementation, costs and governance

Implementation of the eight reform recommendations will require, as recommendation eight makes clear, sufficient and sustainable funding. It will, in particular, require initial investment to establish the Civil Justice Reform Institute and the Access to Civil Justice Institute. Ongoing funding will thereafter be required to enable them to carry out their responsibilities effectively and, not least where the latter

Institute is concerned, obtain and carry out the analysis of both qualitative and quantitative evidence drawn from across the whole of the civil justice system.

These costs should properly be understood as an investment in reform capacity and in the effective promotion of preventative, consensual and adjudicative justice. Such investment – through helping individuals and businesses to order their affairs within the law, helping them to minimise the prospect of legal disputes arising or escalating, helping them to avoid expensive time-consuming litigation where possible, and achieving a court judgment in good time and at proportionate expense where that is necessary – will promote a variety of social goods, such as economic growth, reduced inequality and better health outcomes, not least by avoiding or reducing the impacts that legal disputes and particularly unresolved ones produce. It is thus an investment in a more just, healthy and prosperous society. It is an investment that, if made, will be of general benefit to society as a whole.

Implementation also calls for the creation of clear governance structures and reporting requirements. The Civil Justice Reform Institute cannot, given the importance of its role, be anything but accountable to the Government and judiciary and, through them, ultimately to Parliament to maintain overall democratic accountability. Effective democratic governance and public confidence in the recommended institutional reforms is also to be achieved through public reporting requirements and through ensuring that appointments to the Institute are carried out through open, transparent and public appointment processes.

Conclusion

The *Improving civil justice reform* report highlights the limitations of past civil justice reviews. It is deeply problematic for any democratic country committed to the rule of law, not least one that prides itself on its deep-seated and longstanding constitutional tradition, that access to civil courts remains seriously out of reach for many, while wider questions of unmet legal need remain endemic. By implementing the Review's recommendations – particularly the proper expansion of how reform processes understand access to justice and the creation of both a Civil Justice Reform Institute and an Access to Civil Justice Institute – England and Wales could transform court-centric, episodic reform into a long-term and sustained programme of reform, that is evidence-led, user-centric, coherent, system-wide and constitutionally sound.

The recommendations in full

Recommendation one – a broad definition of civil justice and access to it

- Future reviews and reforms of the civil justice system should be predicated on an understanding that access to justice does not solely mean access to adjudicative justice, i.e., effective access to the civil courts, judgments and, where necessary, enforcement. They should therefore not be court-centric.

- Access to justice should in future be understood by reform to have a broader meaning, which includes but is not limited to adjudicative justice. A broader understanding of access to justice should include consideration of how to tackle unmet legal need caused by, for instance: poverty; social isolation, alienation or marginalisation; medical, including mental health, issues;

neuro-divergence; vulnerability; low levels of literacy; education; geography; digital poverty; and absence of trust in the civil justice system. It should include access to measures that help individuals and businesses order their affairs within the law, minimise the prospect that disputes may arise (preventative justice) and promote early, consensual resolution where disputes do arise (consensual justice).

Recommendation two – explicitly recommit to the idea that the civil justice system is a public good

- Society and particularly Government should explicitly reject the idea that the civil justice system (the means through which access to justice is delivered), and access to it, forms part of the service sector of the economy.

- If future reform is to be carried out effectively, there needs to be a recommitment by Government, set out in and supported by statute, that there is a public right of access to justice and that this is secured through the civil justice system. This should entail an express commitment to the idea that the civil justice system forms part of the state, which is itself a public good that promotes the rule of law by: enabling individuals and businesses to order their affairs within the law; helping them to prevent legal disputes arising; helping them settle disputes consensually; and, where necessary enabling them to have their legal rights vindicated by a court judgment and enforced.

- This recommendation thus requires the recommitment to the idea that there is a public right of access to justice, which is a right to live under the protection of the rule of law and the social, political and economic framework that it provides.

Recommendation three – create a Civil Justice Reform Institute

- A permanent non-judicial reform body (a Civil Justice Reform Institute) should be established by statute, the remit of which should be oversight of the civil justice system as a whole. It should specifically be responsible for promoting and developing future reform aimed at securing access to justice understood in the broad sense set out in recommendation one. It should promote reform consistently with an overarching, coherent and holistic strategy for the reform of the civil justice system as a whole, which it should develop. It should be accountable to the Government and the judiciary.

- The Civil Justice Reform Institute should have an independent chair. Its membership should be diverse and drawn widely from all stakeholders in the civil justice system. Appointment should be on merit, based on expertise, and effected through the public appointments process.

Recommendation four – introduce accountable implementation

- Implementation of future reform should be the responsibility of a single, identifiable body, which, if it is to work most effectively, should be a standing sub-committee of the Civil Justice Reform Institute and accountable to it and, through it, to Government. It should be required to provide them with regular reports on the progress of reform and should make such reports

public to further public scrutiny and accountability. It should be constituted by stakeholders from across the civil justice system.

Recommendation five – secure a sound evidence-base – an Access to Civil Justice Institute

- All future reform should be evidence-based. Evidence should be relied on by the Civil Justice Reform Institute to determine whether and where reform is necessary and the causes of problems that stand in need of reform. It should be relied on in the development of reform recommendations, used to test reform proposals and used to monitor their implementation.

- To facilitate the move to properly evidence-based reform, a permanent research institute – an Access to Civil Justice Institute – should be established. It should have the means to obtain and analyse data and other evidence from across the whole of the civil justice system.

Recommendation six – engage more fully with comparative approaches

- There should be an increased focus on comparative study of civil justice systems from across the world, and particularly their approaches to reform. Future reform reviews should take particular care to learn from both successful and failed reform in other jurisdictions to help maximise the prospect that domestic reforms will succeed.

Recommendation seven – successful reform requires piloting and testing

- All future reform should be subject, where necessary, to mandatory piloting and testing to determine the extent to which it is likely to achieve its objectives and whether, and if so how, it may have unforeseen adverse consequences.

Recommendation eight – successful reform requires sustainable funding

- To facilitate effective future reform – and the institutional capacity that underpins it and its implementation – there should be a statutory duty on Government to provide the reform process, including the Civil Justice Reform Institute and Access to Civil Justice institute, with sustainable funding. It is not acceptable to expect reform committees or reviews to operate on the basis of small, temporary secretariats with the pro bono support of private enterprise or charities.

Key references and further reading

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About the author

John Sorabji is an Associate Professor of Law at University College London, co-founder and co-director of UCL Laws' Centre for Dispute Resolution, and a member of the Civil Justice Council of England and Wales. His expertise is in civil procedural law and alternative dispute resolution. He is particularly interested in access to and the delivery of effective civil justice. Outside academia he is a barrister and was previously the Deputy Private Secretary to HM King Charles III and before that the Principal Legal Adviser to the Lord Chief Justice of England and Wales and the Master of the Rolls. He has written widely on civil justice reform. He is the author of *English Civil Justice after Woolf and Jackson* (CUP, 2014), and *A Model Code of Civil Procedure for England and Wales* (OUP, 2024), and is General Editor of *Civil Procedure (The White Book)* (Sweet & Maxwell, published annually), which is the leading commentary on the Civil Procedure Rules. He was also a major contributor to the *ELI-UNIDROIT Model European Rules of Civil Procedure* (CUP, 2021).

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