Nuffield Foundation

Improving civil justice reform

An analysis of major reviews in England and Wales

Full report

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About this report

The civil justice system in England and Wales has been subject to an almost continuous cycle of reform since the 1980s. This report considers the reviews that gave rise to them. It is divided into five parts. **Part one** provides background and context. **Part two** sets out an overview of the four most significant civil justice reviews carried out since the 1980s and their principal recommendations. **Part three** considers implementation of the Reviews' recommendations, concluding that they failed to significantly and lastingly improve access to justice. **Part four** identifies the principal deficit where effective civil justice reform is concerned: England and Wales' lack of enduring structures capable of effecting successful long-term reform. This deficit arises for four reasons: definitional; constitutional; institutional; and empirical. It then goes on to make eight recommendations, which if implemented would improve the conduct of future reviews and reform programmes and their ability to improve access to justice. Finally, **part five** summarises the report's conclusions.

I thank the anonymous reviewer whose comments helpfully improved this report.

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Executive summary

Introduction

This report examines four decades of major civil justice reform efforts in England and Wales. It does so because, despite those efforts, there remains a very significant access to justice deficit. England and Wales remains, as the World Justice Project identified in 2023, behind comparable countries where its ability to deliver access to justice is concerned. Our civil justice system remains overly complex; many litigants must litigate, when they do so, without legal advice or representation; litigation cost remains high; and delay remains present as, for instance, data published by the Law Society and His Majesty's Courts and Tribunals Service illustrate and the Justice Select Committee has recently concluded (see 3.3 and 4.1, below).

The report's specific focus is four official, i.e., Government- or Judicial-commissioned, reviews of the civil justice system (the four Reviews):

- the **Civil Justice Review 1988**, the aim of which was to reduce litigation time and cost through recommending improvements to civil court structure, practice and procedure;
- the **Woolf Review (1994–1996)**, the aim of which was to fundamentally reshape the approach to civil litigation to increase 'access to justice for all' by reframing civil court practices and procedures to promote early settlement and manage disputes consistently with the aim that they were resolved via judgment reached at proportionate cost;
- the **Jackson Costs Review (2009)**, the primary focus of which was to conduct a fundamental review of the costs of civil litigation and make reform recommendations to reduce such costs and thereby increase access to justice; and,
- the **Briggs Review (2015)**, the primary aim of which was make recommendations that would influence the Reform programme that Her Majesty's Courts and Tribunals Service had embarked upon to digitalise the civil courts. It, particularly, was to consider how to create a digitalised court that would be genuinely accessible to individuals who litigated without legal assistance.

The report, which is based on a critical assessment of the Reviews and relevant literature relating to them, identifies the four Reviews' specific objectives and approaches to the reform process. It discusses their recommendations and the manner and extent to which they were implemented. It concludes that – notwithstanding the very significant commitment from the judiciary, legal profession, and successive Governments and Parliaments to reform, not least by those who carried out and informed the Reviews and devised their recommendations – while they did introduce some improvements to access to justice, the Reviews did not effect lasting improvement. Unmet legal need remains acute.

The report examines these Reviews for a specific reason: if we are to improve our ability to devise, carry out and implement transformative and enduring reform that improves access to justice, and thus reduces significantly unmet legal need in England and Wales, we need to understand how previous reforms were carried out and what structural and other factors hampered their ability to turn their recommendations into long-lasting improvement. This report carries out that study.

Common themes

In examining the four Reviews, the report identifies several common themes across the four Reviews, which lie behind the fact that they have not produced lasting improvements in access to justice. These include that:

- they were framed as court-centric reviews and therefore 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 were predominately judge-led, with the support provided by a small advisory group drawn from additional judges, members of the legal profession and other professional court users;
- there was a general absence of involvement of lay court users;
- they were commissioned on the basis of anecdotal evidence while not being informed by an overarching, long-term strategy; and
- they are increasingly concluded in short time periods.

Implementation

The report also identifies problems with implementation as lying behind the fact that they have not produced enduring improvements in access to justice. Acceptance of the four Reviews' recommendations varied. In some cases, their recommendations were adopted almost in the entirety. This was the case for the Woolf and Jackson Costs Reviews. For the Civil Justice Review 1988, there was substantial implementation, whereas very few of the Briggs Review's recommendations were implemented. In many cases, recommendations made by one Review would not be implemented and would then be adopted, again, as recommendations by subsequent Reviews. Where recommendations, for instance, concerning the need for increased and improved provision of information technology (IT) were concerned, they were repeated by all Reviews as they were either not implemented, not implemented in full or implementation was less than effective. Equally, where recommendations concerned specific reforms to civil court practice and procedure – e.g., the creation of a single procedural code for the civil courts or the introduction of active case management – they would either be viewed as, for instance, premature or unnecessary when first made, with their utility only becoming fully appreciated by the second time they were recommended. Additionally, some reform recommendations, such as those concerning improvements to the civil enforcement process, particularly those made by the Briggs Review, were viewed by Government as tending to be too difficult to implement and thus went, and continue to go, unimplemented.

Implementation was also, in many cases, adversely effected through separate reforms that were independent of a Review and its recommendations. The most obvious example of this was the creation of significant litigation over litigation funding that scarred the first decade of the Woolf Review's recommendations' implementation, which arose from reforms to legal aid and conditional fee agreements in 1999. Similar problems arose in the effective implementation of the Jackson Costs Review's reforms, which was hampered by a reduction in access to justice caused by the significant reduction in legal aid availability after 2012 that was carried out independently of that Review and contrary to the assumptions on which its recommendations were made. Further problems also arise through failure on the part of, for instance, Government to properly implement recommendations made by the Reviews.

Four key deficits

The report, finally, identifies key reasons that undermined the ability of the four Reviews to effect lasting and significant reform. Those deficits do not relate to implementation of the Reviews' recommendations, albeit where the Briggs Review is concerned very few of its recommendations were implemented. Their failure to improve access to justice stems from four deficits, which shaped the manner in which the Reviews were commissioned and carried out. Those deficits are:

- **definitional** – civil justice reform is informed by too narrow an understanding of 'access to justice', one that is court-centric and hence fails to address or engage with the truly significant access to justice deficit that is centred on unmet legal need that results a majority of individuals not even reaching the point where they can seek legal advice and assistance;
- **constitutional** – civil justice reform operates against a background understanding that misrepresents the civil justice system, and hence access to justice, as a consumer service rather than part of the constitutional fabric of society;
- **institutional** – reform is carried out on a piecemeal basis by task-and-finish reviews rather than by a single, permanent institution that is responsible for developing a long-term, coherent access to civil justice strategy and overseeing its implementation; and
- **empirical** – civil justice reform is not informed by a robust evidence-base, nor is implementation and continuing revision and improvement informed by such evidence.

These deficits meant that from their inception the four Reviews could not be in a proper position to effect lasting reform.

Overcoming the deficits

To overcome the four deficits and provide a sound basis for successful, transformative, future reform, eight recommendations are made. The essence of those recommendations is that effective civil justice reform requires new, permanent and sustainably funded institutional capacity operating within a constitutional framework that understands access to justice to as a public good and means more than effective access to the civil courts as providers of consumer services.

Specifically, the recommendations focus on effective reform requiring the creation and long-term funding of a permanent Civil Justice Reform Institute. This should be responsible for both developing

reform recommendations and implementation. It should be supported by an independent Access to Justice Institute. Together, they would provide continuity, expertise and a stakeholder, i.e., user-focus for civil justice reform. Together they would also facilitate the development and delivery of reform, including the economic case for it, that is evidence-based, tested, and delivered as part of an overarching and coherent strategy for improving access to justice, which, it is recommended, 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; and access to adjudicative justice before the civil courts, i.e., access to legal advice, representation, the civil courts, judgments and enforcement.

If the eight recommendations were to be implemented, the commitment to reform and to improve access to civil justice evidenced by the four Reviews, those who commissioned them, carried them out and, to varying extents, implemented them, can be channelled to greater benefit to the public than has been the case over the last forty years.

Summary of recommendations

The following specific recommendations are made in **part four** of the report.

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 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.

Contents

1 Civil justice reviews – Background and context

The civil justice system in England and Wales is routinely subject to review and reform.[1] Between 1851 and 1988, there were fifty-eight such reviews.[2] Historically, the most significant type of approach to such reviews was through the establishment of a Royal Commission. The restructuring of the civil courts and legal profession in the 1870s was, for instance, a consequence of the work and reports of the Judicature Commission.[3] Additionally, both wide-ranging reviews – such as that of the Rules of the Supreme Court and the civil courts' operation conducted by the Evershed Committee[4] – as well as more focused ones – such as that carried out by the Rushcliffe Committee, which resulted in the establishment of public legal aid,[5] or that carried out by Cantley Committee, which focused on the reform of personal injury litigation[6] – were established by the Lord Chancellor.

The approach taken since the 1980s has differed. Since then there have been no Royal Commissions established to examine and propose reforms of the civil justice system. From 1988, there have, however, been nine major reviews commissioned by either the Government or the judiciary.[7] There have also been government-led reviews, such as those that have recently considered legal aid provision.[8] There have been three significant independent reviews,[9] as well as a large number of reviews and reports carried out by the Civil Justice Council.[10] There has also been detailed scrutiny by the House of Commons' Justice Select Committee.[11] There has, it could be said, been an excess of reviews.

Improving access to justice has been the general focus, in various ways, of each of these reviews and reports. They have sought to do so through examining the civil justice system as a whole or through examining a discrete aspect of it. Generally, the official reviews commissioned by Government or the judiciary have taken a system-wide focus rather than, like the Cantley Committee, a single-issue focus. The Reviews, which are examined in this report, particularly focus on two things: that access to justice means access to a civil court, judgment and, where necessary, enforcement; and, consequently, that they and their recommendations focus on the nature and structure of the civil courts and their practices and procedures. This type of approach was typified by the Woolf Access to Justice Review of the mid-1990s. It identified the problem of access to justice as follows:

> *'Throughout the common law world there is acute concern over the many problems which exist in the resolution of disputes by the civil courts. The problems are basically the same. They concern the processes leading to the decisions made by the courts, rather than the decisions themselves. The process is too expensive, too slow, and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system."*[12]

In other words, the reviews have had a court-centric approach. Having identified, or assumed, that the civil courts and their processes are the source of the problem concerning access to justice, the various reviews have then proposed numerous structural and procedural reforms. Reform has consequently been concerned with streamlining the civil courts, making the processes less complex, less time-consuming and less costly. This is not to say that some reviews have not also looked at ways in which access to justice could not be enhanced through reforms beyond court-centred reform, e.g., by reforming the funding of civil litigation. Nor is it to say that reviews have not, to some degree, also looked at the promotion of non-court-based consensual (or alternative) dispute resolution as a wider means to secure access to justice.[13] They have. However, those issues have generally not been the focus of official reviews commissioned by either the Government or the judiciary.

Notwithstanding these very many reviews and their reform recommendations, it remains the case that access to justice – whether conceived in the narrow sense of access to a court and judgment or a broader sense that encompasses, for instance, access to an effective dispute resolution process whether that be achieved through access to a court and judgment or to a non-court-based (or alternative) dispute resolution process – continues to be problematic. It remains an ideal rather than a practical reality for very many citizens and businesses within England and Wales, as cogently illustrated by Byrom in 2024.[14] The aim of this report is to consider the approach taken by the most significant, official, civil justice reform reviews carried out since the 1980s. It specifically but not exclusively examines: the Civil Justice Review 1988; the Woolf Review; the Jackson Costs Review; and the Briggs Civil Court Structure Review. Each of these Reviews was commissioned by the state: the former two by the Government; the latter, two by the judiciary (with Government support), which following the Constitutional Reform Act 2005 has a greater role in setting the direction for reform and development of the civil justice system. Each Review focused on reforming the civil justice system, in the sense of the civil courts, as a whole. In looking at them the report specifically considers each of the Reviews' background, purpose, approach, methods and principal recommendations. It also refers to other relevant, non-official, reviews, as well as those that looked at specific aspects of the civil justice system. It does so by examining the Reviews themselves, academic analysis and literature concerning their implementation, as well as relevant Government, parliamentary and National Audit Office materials. This will be done in **part two** of this report. Having looked at these issues, **part three** identifies the extent to which the Reviews' recommendations were implemented, including their effectiveness in terms of improving access to justice. In **part four**, recommendations are set out concerning how our approach to civil justice reform. Proposals are made concerning how future reviews should be carried out so that they might be better able to improve access to justice. Finally, **part five** summarises the conclusions drawn.

2 The reviews

2.1 Overview

The four main, official Reviews of the civil justice system commissioned since the 1980s are examined here. While the specific background to each of the Reviews examined here differs, there is one common theme: a general acceptance by those who commissioned them that the civil justice system, by which was meant the civil courts, was failing to secure effective access to justice.

Each of the four Reviews, in their different ways, pursued a common purpose: to reduce economic and procedural barriers to access to justice. In this they were entirely consistent with historic approaches in England and Wales as well as those in other jurisdictions.[15] Their purpose, generally speaking, was to reduce systemic complexity in the civil justice system (the civil courts and their practices and procedures), reduce litigation delay and cost, and – in one case – improve access to litigation funding as a concomitant of cost reduction. Two different approaches to these issues can be seen in the four Reviews. The first taken is to place responsibility for the Review in the hands of individuals from outside the civil justice system. The other sees responsibility placed in the hands of the senior judiciary. Irrespective of these two overarching approaches, the manner in which each of the Reviews was carried out was broadly similar. For instance, each sought to adduce evidence; each consulted, albeit those consultations did not engage non-professional court users or the public generally to any great degree; and each sought to draw, in varying degrees, on academic evidence and evidence concerning the operation of civil justice systems in other countries.

In the light of these approaches, each Review made a series of detailed reform recommendations, which it concluded would best achieve its overall objective of enabling the civil justice system to better deliver justice and access to it. One and only one Review sought to provide a sense of the cost that would be incurred if its recommendations were implemented. And one Review took place against the backdrop of the implementation of pre-existing reforms. Its recommendations if implemented were, unlike the others, predicated on the success of separate reforms.

Of the four Reviews, two were commissioned by the Government, i.e., the Lord Chancellor. They were the Civil Justice Review 1988 and the Woolf Access to Justice Review of 1994–1996. The two more recent official Reviews were commissioned by the judiciary of England and Wales. The first was the Jackson Costs Review of 2009, which was commissioned by Sir Anthony Clarke MR (with the support of the Government). The second, and most recent, the Briggs Civil Court Structure Review, was commissioned by Lord Thomas CJ and Sir Terence Etherton MR in 2015. The difference in approach to commissioning the reports stems from reforms to the role of Lord Chancellor carried into effect by the Constitutional Reform Act 2005. That Act resulted in the senior judiciary, and particularly the Lord Chief Justice, taking on a greater leadership role concerning the courts and judiciary than had previously been the case.[16] That did not, and does not mean, that future official reviews cannot or will not be commissioned by the Lord Chancellor (or the Ministry of Justice).[17] It

does, however, mean that the likelihood is that they are more likely to be commissioned by the senior judiciary, following consultation with and the support of the Lord Chancellor, than was historically the case.

This change in approach as to whom commissions official reviews may have a future impact on how they are funded, and the personnel who carry them out. It need not, however. It may, also, have an impact on the likelihood that reform recommendations are implemented. Care will therefore need to be taken when future reviews are commissioned that there is sufficient funding and appointment of personnel to support those commissioned to carry out the review, and that there is sufficient political and judicial will to implement such reform recommendations as are accepted by whomsoever it was that commissioned the review. It is, however, likely – whether future official reviews are commissioned by the Government or the judiciary – that consistent with principles set out in the *Concordat*[18] there will have been prior consultation between the two and agreement as to the nature of the review and its scope.

2.2 – The Civil Justice Review 1988

2.2.1 – Background

The Civil Justice Review was established in February 1985 by Lord Hailsham LC. The immediate background to the Review was twofold.

First, questions had been raised about the viability of maintaining separate County and High Courts by the Beeching Commission in 1969, which proposed reforms to the Assize and Quarter Sessions.[19] While it concluded it was not in a position to consider merger of the County Courts into the High Court (as had originally been proposed in 1872[20]), it opened up the question whether merger should take place along with procedural reforms that would simplify access to the civil courts, e.g., through requiring all civil claims to commence in a new single civil court. It also considered how best to improve civil court efficiency through structural simplification of the courts and an approach to judicial deployment that would enable judges to be deployed more flexibly. These latter points, as noted in the Civil Justice Review 1988, influenced discrete reforms to procedure and practice in the High Court's Chancery Division, albeit as a consequence of a further, discrete, review: the Oliver Review.[21] Both of these reviews and their recommendations demonstrated that through the application of specific reforms to court administration, procedural delay could be reduced. Efficiency could, then it was thought, help promote access to justice. The question from both reviews was thus patent: could specific reforms be translated into more general ones, which could have a broader positive impact on the courts' ability to secure access to justice in good time and at lower cost.

The second key part of the background to the 1988 Review was the Benson Commission's report, which was published in 1979.[22] While its focus was the legal profession, the provision of legal aid and advice, and legal education, it also commented on several matters that were outside its terms of reference. In particular, it noted that there ought to be a wholescale review of civil litigation. As it concluded, '*the time [had] come for a full appraisal of procedure and of the operation in practice of our system of justice, in particular in all civil courts*'.[23] That review (a court-focused one), it concluded, ought to be comprehensive and not conducted by the bodies responsible for devising and promulgated the rules of court. It further noted that such a review would inevitably be costly. Such expense would, however, be more than offset by the benefits to be achieved by reducing

the cost and delays that – it had become apparent to the Commission – continued to affect the administration of justice. Consequent to the Benson Commission reporting, the Law Commission also noted in its annual reports from 1981 to 1985 that there was a need to reform the civil courts and their procedure.[24] Investment in reform repays dividends.

In the light of this background, the Lord Chancellor in 1983 announced the creation of what would become the Civil Justice Review 1988. Initially, however, work was to commence on producing a detailed empirical study of how litigation was administered and managed in the civil courts.[25] Subsequent to that being done, the Law Commission convened a seminar in 1984, which helped to both identify the issues that would fall under the Civil Justice Review's terms of reference and how it was to conduct its work. In the latter respect, it resulted in the establishment of the Review's Advisory Committee.[26]

2.2.2 – Purpose

The Civil Justice Review's main purpose was first identified by the Lord Chancellor in the Government's response to the Benson Commission, when that eventually was published in 1983 (some four years after the Commission reported). It was to make reform recommendations that would '*achieve the most expeditious, economical and convenient disposal of business*' in the civil courts.[27] This was carried through into the Review's terms of reference. They specified that the Review was to make recommendations

> *'To improve the machinery of civil justice in England and Wales by means of reforms in jurisdiction, procedure and court administration and in particular to reduce delay, cost and complexity.'*[28]

In doing so the Review was to focus its work on personal injury claims, small claims, debt, housing and commercial claims. Public and administrative law claims and appeals to the Court of Appeals (Civil Division) were out of scope. It did, however, cover both the County Courts and the High Court. It was also to consider reform to the civil court structure, how civil disputes were distributed between them, and the nature and utility of the rules of the court (the County Court Rules and the Rules of the Supreme Court), including whether the courts should engage in the active management of civil proceedings as a means to reduce procedural delay. It was thus to consider and make recommendations concerning the structure and operation of the civil courts.[29]

2.2.3 – Approach

The Civil Justice Review was, formally, carried out by the Lord Chancellor. However, he was advised by both an expert Advisory Committee and civil servants from both the Lord Chancellor's Department and the Department of the Environment;[30] the latter's civil servants advised on matters concerning housing disputes. The Review's Report was produced by the Committee and the team of civil servants.[31]

The Advisory Committee had ten members. It was chaired by Sir Maurice Hodgson, the former chairman of Imperial Chemical Industries (ICI) and British Home Stores. The other members were: Sir Kenneth Bond, vice-chairman of The General Electric Company; Gillian Borrie, who had been chair of the Legal Services Group, as well as of the National Association of Citizens Advice Bureaux; Lord Griffith, Law Lord and the only judicial member of the Committee; Peter Jacques, of the Social

Insurance and Industrial Welfare Department of the TUC; Robert Kerr, assistant general manager of Guardian Royal Exchange, an insurance company; Rodger Pannone, a solicitor; Mark Potter QC, a barrister; Professor Ian Scott, an academic expert on civil procedure and court administration; and, Richard Thomas, Director of Consumer Affairs for the Office of Fair Trading and previously Legal Officer for the National Consumer Council.[32]

The Advisory Committee was thus narrowly defined in terms of its membership and numbers, although it possessed expertise in court administration, procedure and practice, as well as that of significant interested parties regarding accessibility to and the operation of the civil courts (insurers, businesses, consumers, employers, and those who sought and obtained pro bono advice and assistance). The Committee was noted to have convened forty-one times throughout its tenure.[33] It took a two-stage approach to its work:[34]

First, it considered empirical evidence concerning the operation of the civil courts through examining what records were available concerning the handling of individual cases by the courts. In this way it sought to gain an insight into the views and experiences of litigants, lawyers and the court. Major areas of civil court work were not, however, examined, e.g., Chancery work was not considered. This was said to be due to such work having already been examined by other reform reports, e.g., the Oliver Review.

Secondly, and in the light of the work carried out in stage one, the Review commissioned a range of factual studies of significant areas of civil court business. These areas were identified through the application of broad criteria applied to the empirical data available. The criteria included: the volume of cases of the specific type; the volume and types of court hearings; the social and economic importance of the subject matter; and the need to take account of a major specialist field. This approach resulted in factual studies being commissioned by the Advisory Committee from several management consultancies in respect of: personal injury work; small claims; debt enforcement; and the commercial court. It also led, where housing work was concerned, to the commissioning of a factual study from Bristol University's School of Advanced Urban Studies.

The use of management consultants, under the direction of the Lord Chancellor's Department, to conduct such work was not uncontroversial. Their use was vehemently opposed by the attendees of the Law Commission seminar (which formed part of the Review's genesis) when it was first proposed. Notwithstanding such opposition, they were appointed on the basis, as it was put by the Lord Chancellor, of ensuring that the Review would have a '*totally new look at the old character of civil procedure*' – a point also underscored by the fact that the chair and vice-chair of the Advisory Committee were drawn from industry and not the legal profession or judiciary.[35] The importance and necessity of appointing external consultants to carry out this work was noted by Plotnikoff in 1988. As she explained it, it was necessary due to the absence of established research centres, the focus of which was the administration of civil justice in England and Wales, not aided by the fact that the judiciary at the time had taken an approach that precluded academic research into the operation of the civil courts. As she put it,

> *'The choice of consultants for judicial research was unprecedented. England has no equivalents to the Institute for Court Management, the National Center for State Courts, or the Federal Judicial Center, to conduct judicial administration research or contribute to the development of a cadre of trained court administrators. Judicial administration is a subject ignored by English legal commentators, and social scientists and academic researchers have*

been treated with distrust by the judiciary. In 1984, a university project on judges' sentencing practices was halted by the Lord Chief Justice after the pilot stage and resulted, until recently, in a blanket ban on academic research based on judge interviews."[36]

Judicial and Government attitudes to research are now more welcoming; however, it remains the case that there is no permanently established equivalent to the research institutes that necessitated the appointment of management consultants in 1988.

The factual studies drew, to a large extent, on data drawn from individual civil claims. It was, however, noted that the need for the Advisory Committee to conclude its work speedily meant that sufficient primary source information was not always obtainable.[37] While it was noted that greater time to conduct the Review could have yielded more primary evidence, the Committee concluded that this did not hamper its work or call into question its conclusions. It did so because the factual studies were used as the basis for the preparation of consultation documents by the Review. The consultation documents summarised the key factual findings drawn from each of the factual studies and set out a range of reform options. A further general consultation document was later published. It raised general issues concerning the civil justice system as a whole.[38] In addition to the factual studies and consultation documents and their responses, the Committee also considered approaches and developments in other countries.[39]

There were 760 written responses to the consultation documents. Additionally, the Advisory Committee obtained oral evidence concerning the consultation documents from a wide-range of individuals. This included evidence from the senior judiciary, judicial associations, the Bar Council, the Law Society, the Guild of British Newspaper Editors, the Lord Chancellor's Department, the Money Advice Association, the Law Centres Federation and the Housing Aid Centre.[40] The responses to those consultations were said to have not called into question any of the factual findings in the studies, although they were noted to have raised questions about some of the inferences that had been drawn from them. It should be noted, however, that there is a difference between consultation responses not calling into question factual findings and the ability of consultation responses – that are not themselves capable of providing primary empirical evidence – to bring to light evidence and factual findings absent from the initial factual studies. It may well have been the case that greater time and better evidence-gathering might have yielded not just more but better evidence, which could have added to the factual findings as well as, perhaps, calling some of the findings made in the factual studies into question.

In approaching the evidence and other information it obtained, the Advisory Committee adopted two working assumptions. First, that it was important to gain the perspective of litigants concerning the civil courts' operation and accessibility to them: a user-centred focus, in this respect. The Review was thus to be as informed by court users as it was by the perspective of the judiciary, legal professionals and other organisations.[41] Secondly, and where reform proposals were concerned, that approaches and reforms that had worked in one area could provide useful guidance to what would work in another. Thus, reforms to the provision of witness statements in proceedings before the Official Referees' Courts (now the Technology and Construction Court) and the Commercial Court having been seen to have worked would work similarly when applied generally.[42] The expectation was that having worked well in those two jurisdictions, the reforms would be equally applicable in other civil proceedings.

2.2.4 – Principal recommendations

The Civil Justice Review 1988 made a total of ninety-one recommendations. It supported them with an indicative assessment of where its recommendations, if implemented, could have significant cost implications, both in terms of additional expenditure and savings.[43] Its recommendations were grouped under nine headings: the Civil Justice System; Procedure; Judicial Administration; Access to Justice; Personal Injury; Small Claims; Debt Enforcement; Housing Cases; and the Commercial Court. The principal recommendations under each heading were as follows:

The Civil Justice System: the primary recommendation made was that the County and High Courts should remain separate with the former's jurisdiction no longer having an upper financial limit. The positive centrepiece of the reforms was, however, to revise the jurisdiction of the courts, so as to ensure that access to the High Court was broadly confined to public law disputes and complex and higher value private law disputes, i.e., the County Courts were to take on a significantly greater share of civil disputes.

These reforms were to be complemented with simpler, improved ways to transfer cases between the two courts. A single point of entry to the County Courts, which at that time remained separate local courts, was to be established as a means to promote greater efficiency and reduce delay within the County Court system. Reforms were to be made to increase the number of County Court trial centres, including enabling County Court trials to be listed in the Royal Courts of Justice.[44]

A series of reforms to judicial offices were also recommended, including: opening up appointment to the office of County Court Registrar, which was to be redesignated as a judicial office, to both barristers and solicitors; increasing the number of temporary and additional judges who could sit in the County Courts; and senior Circuit Judges to be designated to conduct more complex work in the County Courts.[45]

Procedure: a significant number of recommendations for procedural reform were made. These included: the introduction of a single means to commence claims;[46] the creation of a common set of core procedural rules and costs provisions for the County and High Courts; the introduction of active court case management,[47] including pre-trial reviews and automatic case directions; provision for the exchange of witness statements; a reduction in the amount of documents provided in cases, with the use of cost sanctions to discourage abuse of the new limitation; and new targets for both the County and High Courts concerning the length of time that claims took to proceed to trial.

Recommendations also proposed separate consideration of the utility of introducing class actions and reform to civil evidence, including the continued utility of rules concerning hearsay.[48]

Judicial Administration: recommendations focused on securing effective training for court officials, for the introduction of service-level standards (objectives) for court officials when dealing with court users, and for securing continuity of employment of court officials in key areas, i.e., court listing offices. This was to be complemented by increased judicial training and the provision to judges of guides to civil adjudication by the Judicial Studies Board. Standard working hours for judges were to become the norm, with courts to sit five days a week.

It was also recommended that the High Court's long vacation in the summer be limited to August each year. Improved provision of information technology (IT), especially in the County Courts, was highlighted as a key area of necessary improvement (a point that would be reiterated in 2025 by the Justice Select Committee, (see below at 3.2.4.1). Linked to this, more effective court management information was to be made available to both the judiciary and the Lord Chancellor's Department. More effective judicial leadership structures in individual County Courts and groups of courts were also recommended. The introduction of means for lawyers to provide effective feedback on the implementation of reform recommendations was also recommended.[49]

Access to Justice: recommendations focused on improving access to the courts through: integrating the work of court officials, registrars (now district judges) and legal advice agencies to facilitate the provision of better advice to litigants on court procedure. Integration was to be achieved, among other things, by advice agencies having permanent bases in court buildings where that was feasible. Access to justice for litigants-in-person was to be increased through judges taking a more interventionist approach to managing proceedings, with such litigants in small claims, housing claims and debt claims having a statutory right to assistance from a lay representative. Court officials were also to be given specific training to enable them to provide more effective help and assistance to litigants. Access was further to be facilitated through the production of standardised, plain language court forms. More broadly, the prohibition on contingency fee funding, while not abolished, should be subject to review as should the ability to adjudicate claims on their merits without a hearing (on the papers) in small claims (an issue that would still be subject to consideration and implementation in 2026). To further access, the introduction of early evening hearings was also recommended, albeit this was limited to facilitating small claim arbitration hearings. Greater early access to civil legal aid and greater transparency in lawyers' fees was also recommended.[50]

Personal Injury: the key recommendation was for the Lord Chancellor to consider, with the insurance industry, the introduction of a privately financed no-fault insurance scheme for less serious road-traffic-accident-based personal injury claims. Additional recommendations included those focused on the reduction of delay, e.g., for speedier access to medical records from hospitals and to police car accident reports.[51]

Small Claims: reform recommendations focused on increased publicity for small claims, including reference to there being a 'small claims court', improved listing practices that would separate out small claims from other cases to decrease delay in dealing with them, and for small claims to be fully resolved at a single hearing on the merits of the claim. Further reforms recommended an increase to the financial limit, thus increasing the number of claims that would fall within the ambit of the small claims process, which was to have a self-contained set of procedural rules. Those rules should dispense with the formal rules of evidence. They should also make provision for judges to be able on their own initiative to rescind an order referring a small claim to arbitration.[52] Finally, it was recommended that judges dealing with small claims adopt an interventionist approach to trials, which would include judges questioning the parties and witnesses. It was also recommended, as a departure from the principle of open justice, that small claims hearings be heard in private.[53]

Debt Enforcement: reform to the division of responsibility for debt enforcement between the County and High Courts was to be maintained, with the automatic transfer to the High Court of

judgment debts of £5,000 and over. County Court bailiffs were to be fully integrated into the court service, with their duties redefined and made public. High Court execution and administration orders were to be reformed. Consistency regarding exceptions to the seizure of goods that apply in bankruptcy law and in debt enforcement was to be implemented. Outdating terminology, i.e., Latin, was to be replaced with plain language terminology for enforcement processes. In this way it could become more understandable and accessible.[54]

Housing Cases: the creation of a separate housing court was rejected in favour of encouraging effective, systematic handling of housing claims within the ambit of existing housing lists – with possession claims, if supported by a further study, to be dealt with exclusively in the County Courts. The introduction of new housing and rent claims and procedures was recommended, with more evidence to be provided to the court concerning the defendant's circumstances in possession claims. These new measures were to be publicised to parties likely to be significant users of them, e.g., local authorities, building societies, housing associations. The judiciary were to be given specific and systematic training in housing claims by the Judicial Studies Board. A degree of consolidation was to be implemented with Rent Assessment Panels to be integrated into the courts and tribunals.[55]

The Commercial Court: no recommendations were made to reduce the cost of commercial litigation. The recommendations focused on reducing delay, by specifying that trails had to take place within three months of the trial date being set; providing two additional commercial court judges; and maintaining the previous approach to case management, including in respect of interim applications, by the court while providing a means to identify complex commercial cases that would then be allocated to a specified judge or judges who would have sole responsibility for managing the case to trial.[56] To help achieve the three month trial date objective, it was further recommended that lower value cases be excluded from the court, with that lower limit raised if necessary to help meet the objective of reducing delay, i.e., delay was to be reduced by moving cases to other parts of the system. Again, paper-only decision-making on formal or uncontested applications was promoted as a means to reduce delay. It further recommended that court fees be increased to reflect the cost of dealing with claims in the Commercial Court.[57]

Finally, the Review concluded that if its recommendations achieved their objective and reduced delays and complexity in the civil justice system, this was likely to result in an increase in claims pursued before the courts.[58] Success, greater accessibility, would thus lead to a need for additional costs to the civil courts, e.g., court staff costs in the main, to be recovered from litigants through an increase in court fees. It also concluded that care would need to be taken to implement ongoing monitoring of the justice system to try to ensure that any additional demands made to the civil legal aid fund and any need to appoint additional judges to deal with the increased demand should be kept to a minimum. In other words, its ultimate conclusion, implicitly put, was that successful reform would result in extra demands on the civil justice system, which would in all likelihood lead to a need to consider how to deal with extra staffing and funding needs. While the Review stressed the need to keep any such additional costs to a minimum, it implicitly suggested the need for sustainable, adequate funding for the reformed civil justice system.

2.3 – The Woolf Review

2.3.1 – Background

Lord Woolf was appointed by the Lord Chancellor in March 1994 to conduct a detailed review of the practice and procedure of the civil courts.[59] This was only three years after recommendations made by the Civil Justice Review 1988 were implemented. It might thus fairly be said to have been commissioned at too early a stage for a proper assessment to have been made whether and to what extent its predecessor's reforms had had a positive impact on achieving their aims, i.e., on reducing procedural delay, reducing the cost of litigation and, more generally, increasing access to justice.

Whatever the merits of the view that its appointment was made at too early a stage – and it should be noted that Lord Woolf asserted that the implementation of the Civil Justice Review had left serious flaws in the civil justice system[60] – it was apparent that a general view was firmly established in the early 1990s that radical reform was needed to bring to an end what was understood to be, in the words of Glasser, a crisis in civil justice.[61] That crisis was no more than the one that had given rise to the 1988 Review and the many previous reviews that it noted had taken place since the 19th century: it was the crisis of excess procedural complexity, cost and delay hindering effective access to justice. The one difference was that the crisis was said to have continued to grow ever more acute during the 1990s, while the reform process that followed the 1988 Review was said to have '*stalled*'.[62]

The general understanding that the crisis in civil justice was not just endemic but was increasingly serious was particularly apparent as the General Council of the Bar and the Law Society commissioned a significant, independent review of the civil justice in 1992 (the Heilbron-Hodge Review[63]) – the year after the Civil Justice Review's 1998 recommendations were implemented. It was established on the basis that there remained an '*urgent need of further fundamental reform*' that would genuinely increase access to justice.[64] As will become apparent, much that it recommended influenced the nature of the reforms the Woolf Review would itself go on to recommend.

2.3.2 – Purpose

The Woolf Review had three specific aims, each of which would have been familiar to anyone cognisant of the Civil Justice Review's terms of reference. They were as Lord Woolf put it, *'to review the current rules and procedures of the civil courts in England and Wales'*.[65] He was to do so

> *'to improve access to justice and reduce the cost of litigation;*
> *to reduce the complexity of the rules and modernise technology;*
> *to remove unnecessary distinctions of practice and procedure.'*[66]

It was again to be a court-focused approach. While not formally part of the Review's terms of reference, Lord Woolf also stressed, echoing the approach and conclusions of the Heilbron-Hodge Report, that reform needed to give effect to a '*new approach to civil litigation*'.[67] He was not the first to endorse the need for such an approach: a call for a *'new approach'* had first been made by the Evershed Committee when it set out its proposals for the reform of the civil justice system in 1953.[68] The Woolf Review's individual, explicit aims were thus intended to be consistent with and to give effect to another attempt at radical reform, which would change the approach all those who called on the civil courts to resolve their disputes would need to embrace.

Lord Woolf further identified three themes that would underpin the approach taken in his Review. Those three themes, which were consistent with the approach taken by the Heilbron-Hodge Review, were to influence the development of the Review's analysis and recommendations. They were that:

> *'(a) the philosophy of litigation should be primarily to encourage early settlement of disputes;*
>
> *(b) litigants and their lawyers need to have imposed on them an obligation to prosecute and defend their proceedings with efficiency and despatch; and*
>
> *(c) procedures should be simple and easily comprehensible to the layman and lawyer alike.'*[69]

Access to civil justice was thus to be promoted by adopting an approach that litigation should be conducted to produce consensual settlement of disputes. It was also to be carried out according to a new managerial approach, one that required judges to ensure that litigant and lawyer access to the civil courts was managed efficiently and speedily. In both points there was a turn away from unfettered or uncontrolled access to judgment, as the civil justice system's aim. In respect of the latter point, this was to be achieved through the creation of a new, single set of procedure rules for the County and High Courts. That this was part of the Review's terms of reference was made particularly apparent in its Interim Report.[70] Rather than set out that it, like the Civil Justice Review 1988, would consider the creation of a unified common civil procedural code, it – as did the Lord Chancellor – took as its starting point the 1988 Review's[71] (and the Heilbron-Hodge Review's[72]) conclusion that there should be such a new code. The Woolf Review thus started then from several predetermined points of departure, when it might have benefited from considering the utility of these approaches to a greater extent.

2.3.3 – Approach

The approach taken by the Woolf Review both differed from and was similar to that taken by the Civil Justice and Heilbron-Hodge Reviews. The most obvious difference was that it was a judge-led review. Rather than the Review team being a small working party supported by civil servants, as was the case with the Civil Justice Review, or a larger working party made up of lawyers, as was the case with the Heilbron-Hodge Review, Lord Woolf, who led the Review, was supported by an Inquiry Team of civil servants,[73] and drew on the specialist assistance of five 'assessors', i.e., what was in essence an advisory committee: two judges who were experts in the practice and procedure of the High Court and County Courts (Senior Master Turner, DJ Greenslade); and three lawyers (Rupert Jackson QC (who had also taken part in the Heilbron-Hodge Review), John Bolton, Philip Sycamore). He was also supported by an academic expert in the practice of the civil courts, Professor Ross Cranston, and an expert in IT, Richard Susskind.[74]

The Review adopted a similar two stage approach to that taken by the Civil Justice Review. The first stage considered general options for reform, with the second considering specific, specialist areas and problems. Both were informed by evidence-gathering, albeit not – as with the Civil Justice Review – through the publication of consultation papers informed by work carried out by management consultants. The second stage of the Review did, however, see the publication of several issues papers, which provided a focus for discussion and feedback on their reform proposals. These focused on six specific areas: the nature of a proposed new fast track procedure; housing claims; multi-party actions; medical negligence claims; expert evidence; and litigation cost.[75]

The Review's general approach to evidence-gathering and to testing reform proposals focused on meetings with individuals and specialist groups, and discussions carried out at five public seminars held outside London and two held in London.[76] Those seminars canvassed views on specific reform issues, e.g., court control of litigation, small claims, alternative dispute resolution.[77] They also involved dedicated workshops, chaired by an assessor, on specific reform proposals. The seminars' aim was thus to obtain feedback on problems with the civil justice system from a wide range of interested parties (lawyers, judiciary, advice sector works, litigants), and to test reform proposals. The Review also tested reform proposals through extensive consultation with the judiciary, members of the legal profession and a wide range of court users (primarily professional ones), as well as through attendance at many additional conferences that focused on specific aspects of the civil litigation process, e.g., personal injury litigation, medical negligence claims, housing claims, multi-party claims.[78] Consultation included the provision to the Review of written submissions on specific issues and surveys; the latter being commissioned by several of the City law firms (Herbert Smith on the views of UK corporations on reform; Allen & Overy, on the discovery process; the Association of Personal Injury Lawyers on small claims costs).[79] The voice of non-professional court users, i.e., litigants themselves, was not particularly well heard in this process.

Comparative study, as with the Civil Justice Review, also informed the Review. In this case though it took the form of specialist research reports provided to the Review on, for instance, multi-party litigation and class actions (particularly the US approach to these issues), access to justice, court resourcing, court control of litigation, small claims and alternative dispute resolution, which were prepared by Professor Cranston,[80] and on the German approach to litigation cost, which was carried out by Adrian Zuckerman.[81] Unlike the previous two Reviews, further comparative study was also carried out through Lord Woolf's attendance at a range of conferences and events held in other countries, particularly the United States, Australia, Canada and India.[82] Overseas visits would become a feature of later reform reviews.[83]

The Review also sought to draw on empirical evidence, particularly concerning the cost of litigation. Given the paucity of available data – there still being no permanent research body capable of gathering and analysing such data, as had been noted critically by Plotnikoff at the time the Civil Justice Review was conducted[84] – the Review commissioned research from the Senior Courts Costs Office. That research provides details concerning the costs of litigation from approximately 2,000 cases over the period of 1990–1995.[85] This work was then analysed initially by the Costs Office and then by Professor Hazel Genn. The aim of this analysis was to identify costs trends across different types of litigation, and particularly to help identify aspects of civil litigation that produced high levels of costs. This, for instance, helped identify the discovery (disclosure) process and expert evidence as issues that tended to generate excessive costs.[86] The obvious limitation of this data was, however, that it was drawn from the Senior Courts Costs Office. As such it did not cover County Court costs, nor did it provide data concerning the cost of litigation that did not result in parties' costs bills being submitted for taxation (costs assessment) by the court at the conclusion of proceedings. It was thus, at best, a partial view of the cost of litigation.

The second stage of the Review was also characterised by a feature that mirrored the approach taken by the Heilbron-Hodge Review:[87] the establishment of a small number of expert working groups, whose role was to provide Lord Woolf with advice on their areas of expertise. These working groups examined specialist areas of litigation: admiralty; chancery work; the commercial court; public law (the Crown Office); housing claims; medical negligence; intellectual property work; and Official

Referee's work. They also examined specific areas where significant reforms were proposed, i.e., multi-party litigation and the creation of Pre-Action Protocols. As was generally the case with the expertise drawn on by the Review, each working party was constituted of specialist judges, lawyers, and representatives of interested parties, such as local councils, housing associations, Government departments and law centres. Non-professional or lay litigants were (again) notable by their general absence.

Three final points are notable concerning the approach the Woolf Review took. First, unlike any of the other reviews, whether official or otherwise, it published a set of draft rules of court.[88] They would form the basis for the Civil Procedure Rules (CPR) when they were introduced in April 1999 to replace the County Court Rules and Rules of the Supreme Court.[89] Consideration of these new rules was provided by an additional specialist working party.

Secondly, it did not cover all aspects of the civil justice system. Specifically, while it made recommendations to reform the approach to appeals, its consideration was limited by the fact that just two months before the Review's Final Report was published, the Lord Chancellor commissioned a separate official review into the Court of Appeal (The Bowman Review).[90] The Woolf Review was thus constrained in what it could and did recommend in that area, and it concluded by recommending that further consideration should be given to rationalising the procedure concerning appeals: the Bowman Review (of which Lord Woolf was a member), considered the Woolf Review's recommendations for appeals, the organisation and administration of the Court of Appeal's Civil Division, and made the case for that rationalisation. Its recommendations would be enacted via the Access to Justice Act 1999 and what was to be the new CPR Pt 52, the latter of which was introduced in 2000.[91]

Finally, Lord Woolf took steps to ensure that, as far as possible, he liaised with and was kept abreast of separate developments that the Lord Chancellor's Department was considering where civil legal aid was concerned. While legal aid was outside its scope, the importance of trying to ensure that any changes to it – and reforms to the civil courts and their procedure – were consistent with each other was stressed by Woolf. The Review may not have been able to co-ordinate reforms that were intended to increase access to justice through reducing costs and delays in civil litigation and those separate reforms to state funding of civil litigation, but it did note the manifest importance of the relationship between the two. As Woolf put it,

> *'If my proposals can be co-ordinated with the changes to the provision of legal aid this will offer the maximum prospect of my proposals achieving [the] aims [set by the Review's terms of reference].'*[92]

The better approach may well have been to commission a single review that would have looked at both litigation cost and funding, i.e., one that could take a holistic approach to both issues. It might then have been able to propose consistent, co-ordinated reform proposals that could have more effectively secured practical access to justice for all members of society.

2.3.4 – Principal recommendations

The Woolf Review set out a total of 303 reform recommendations.[93] They covered much of the same ground as the Civil Justice Review 1988 and the Heilbron-Hodge Review. They equally covered ground that would be revisited by several other reviews, including the latter two official Reviews

considered here. The recommendations, for instance, looked once more to the creation of a single civil procedural code and active court case management, which had been a focus for the Review's two predecessors. They also covered recommendations to introduce a fixed recoverable regime, which would be revisited twice by the Jackson Costs Review, and detailed recommendations on IT, which both echoed recommendations made by its predecessors and would underpin the aims of the Briggs Review.[94]

The Review's recommendations were grouped under twenty-one main subject headings.[95] They can, however, be broadly grouped into five main categories: Structure and Court Administration; Information Technology; Practice and Procedure; Litigants-in-Person; and Settlement and Alternative Dispute Resolution. The most significant recommendations were as follows:

Structure and Court Administration: both reforms and the maintenance of the status quo formed part of the recommendations concerning structure and court administration. The two key recommendations that focused on maintaining the status quo were that there should be no merger of the Chancery and Queen's Bench Divisions of the High Court, contrary to recommendations made previously,[96] and that the County and High Courts should remain separate,[97] albeit their jurisdictions should generally be the same with cases being dealt with at the lowest judicial level within the two courts as appropriate (see the later recommendations on procedural case tracks, below).

The major reforms recommended were: the creation of a new rule committee, which was to be responsible for the new rules of court that were to apply to both the County and High Courts (its membership was to be drawn from a wide range of interest groups, including those who could provide a consumer, advisory and lay perspective: rule-drafting was thus not to be the sole province of the judiciary and legal profession);[98] the creation of the Civil Justice Council, which was to be a permanent public body responsible for promoting future civil justice reform; the establishment of a Head of Civil Justice, who was to be a senior judge with overall responsibility for the civil justice system. This appointment was to be supported across the country with the establishment of a judicial management structure responsible for overseeing the judicial administration of civil justice at a regional and local level. This superstructure was to be mirrored by reforms to the court service, through: the appointment of court officials who were to work in partnership with the judiciary; the management of claims that would be allocated to the new multi-track (see below) being managed by teams of judges; court staff being encouraged to increase their legal knowledge by qualifying as legal executives; and judicial specialisation being promoted and supported by training. Further recommendations here included that: training should also be given to all judges in how to conduct case management (see below); and greater administrative assistance should be given to judges who are responsible for procedural litigation, i.e., pre-trial litigation, with High Court and Court of Appeal judges being provided with law clerks. Finally, the creation of a civil magistracy, drawn from retired legal professionals, was also recommended.[99]

Information Technology: in respect of which two types of recommendation were made. First, increased availability and use of IT, including video and telephone conferencing as part of case management and court administration (listing, resource allocation, judicial workload management[100]), by the judiciary and the legal profession was recommended. It was also suggested that the public availability of legislation and other primary legal materials (i.e., judgments) should be clarified. Furthermore, as a means to promote legal literacy and to assist the public in securing

access to justice, further consideration of public provision of IT to assist the public in advice centres as well as public spaces was recommended. These recommendations, albeit more detailed, echoed previous ones made by the Civil Justice Review 1988 and the Heilbron-Hodge Reviews, both in terms of IT provision and general assistance to the public to help them gain more effective access to the courts.

Secondly, greater co-ordination of IT provision across the civil justice system as a whole was recommended. How this was to be achieved was to be considered further by the new Civil Justice Council and the Information Technology Advisory Committee (ITAC).[101] Overall IT strategy for the civil justice system – which was to cover medium- and long-term IT strategy, monitoring of the means by which modernisation of the courts was to be funded, and co-ordination with the family and criminal justice systems – was to become the responsibility of a new, independent IT strategy body. It was further recommended that this new body should, in time, become a standing committee of the Civil Justice Council.[102]

Practice and Procedure: the recommendations concerning practice and procedure constituted the majority of the Review's recommendations. They were wide-ranging and radical. The principal recommendation was not, however, contained within its recommendations: the creation of new, simplified, single-set of plain language rules of court for both the County and High Courts. Equally, that the new rules were to be applied and interpreted consistently with a new, and radical, purposive principle – which was committed to the introduction of procedural proportionality[103] – was also not set out in the Review's recommendations, albeit it was set out in the main body of the Review's Final Report.[104] The existence of new rules was, however, referred to repeatedly within its individual recommendations on principle and practice, e.g., that the new rules should eschew Latin terminology. It was also apparent from the body of the Review's Final Report and the fact that draft rules of court were published with that report. The new rules were also said to be supplemented by Practice Directions. To ensure that they would not proliferate and thus reintroduce complexity or differential local practices across the country into practice and procedure, in future these were only to be issued by the Head of Civil Justice and Lord Chancellor.

The specific recommendations on practice and procedure included the following:

- repetition of the Civil Justice Review 1998's recommendation that the court should become responsible for actively managing civil litigation, i.e., parties should no longer be responsible for managing the progress of proceedings to trial. Case management was to be carried out consistently with the rules' new purposive principle;

- the introduction of two mechanisms to promote consensual settlement of disputes: first, through new Pre-Action Protocols, that were aimed at promoting settlement before litigation began; and, secondly, the expansion of provision within rules of court for parties to make offers to settle proceedings;

- the introduction of three separate procedural management tracks for claims (small claims, fast and multi-track), the aim of which was to match the available procedure to the nature and value of claims. In this way, combined with case management, litigation cost and delay were intended to be reduced;

- the introduction of a fixed recoverable costs regime for claims allocated to the new fast track. Responsibility for reviewing that regime on a three-yearly basis and for increasing the recoverability levels was to be given to the Civil Justice Council;
- a range of specific reforms to several areas of practice – e.g., witness statements, the discovery process and expert evidence – aimed at reducing the cost of litigation;
- the introduction of a new, two-part multi-party action. The first part was to promote access to justice for low value mass claims, whereas the second part was intended to promote access to justice for higher value mass claims. Included in this was a recommendation to consider the viability of a contingency legal aid fund for such proceedings;
- a range of specific reforms to practice relating to discrete types of litigation, e.g., housing, personal injury, clinical negligence; public law (including the promotion of alternative dispute resolution for judicial review proceedings); and Official Referee's work and chancery proceedings;
- the development of official Practice Guidance documents to explain how the new procedures, particularly case management, were intended to operate for medical negligence claims;
- subject to the Bowman Review, appellate procedure was to be rationalised, with a single set of appeal rules for all types of appeals;
- increased training for judges, expert witnesses and others engaged in civil litigation.[105]

Litigants-in-Person: the recommendations concerning litigants-in-person included ones that concerned litigants in general as well as lawyers. They centred on the provision of greater access to information, such as via increased access to court libraries and the provision of permanent legal advice centres in court buildings. Where justified by the level of cases brought in specific courts, the provision of specialist debt and housing advice in those courts via Citizens Advice was also recommended. An express recommendation that the Civil Justice Review 1988's recommendations concerning the provision of information and advice to litigants should be fully implemented was also included: thus, acknowledging a failure of implementation where that Review was concerned.

Several recommendations that focused on improving access more broadly were also made. These included recommendations that, in rural areas, consideration should be given to providing 'mobile courts'; that, generally, IT 'kiosks' should be provided in courts on a trial basis; that assistance should be provided in courts to help litigants complete court forms; and that research should be conducted to determine how best information on court processes could be provided to litigants. As the Civil Justice Review 1998 had also recommended, the development of clear signs throughout court buildings was recommended, as was the provision of such information in languages other than English. Also echoing the previous Review, the development of a more interventionist approach by judges, backed by suitable training, in cases where a party was a litigant-in-person was also recommended.[106] Finally, to increase access for litigants, one recommendation called for further work on the question whether courts should sit in the evenings or at weekends.[107]

Settlement and Alternative Dispute Resolution (ADR): four main types of recommendation were made to encourage and promote the use of alternative dispute resolution (ADR), i.e., consensual settlement. First, further research into approaches to such mechanisms in other countries was to be carried out. Secondly, the courts were to trial the use of some forms of ADR process, particularly mini-trials (a form of evaluative ADR). They were also to encourage but not mandate the use of ADR in suitable cases. Thirdly, the private sector was to be encouraged to develop Ombudsman schemes. Those and other such schemes should be integrated with the civil courts, such that Ombudsman (both public sector and private sector) could refer matters to the court to resolve. The private sector was also to be encouraged to develop and promote guidance on the use of ADR. Fourthly, the civil legal aid review should consider how to promote the use of mediation. Further to this, it was also recommended that both the Government and the court service should also take steps to make the public aware of the benefits of ADR.[108]

2.4 – The Jackson Costs Review

2.4.1 – Background

Ten years after the Woolf Review's recommendations were implemented, Sir Rupert Jackson was appointed in January 2009 to conduct a fundamental review of civil litigation costs.[109] He was not the first judge to be appointed to carry out a review of civil litigation since its predecessor's recommendations were implemented. This Review was in fact the third one carried out within a period of two years.

The first of the three prior reviews commenced in January 2007 when Sir Richard Aikens was appointed to chair a working party set up by the Commercial Court Users' Group to consider what, if any reforms, there needed to be to enable the Commercial Court to manage complex litigation more effectively and efficiently. It made various recommendations that were intended to better implement and give effect to the requirements of the CPR, i.e., to the reformed post-Woolf approach to litigation. It also made specific recommendations for the reform of some aspects of the CPR as they applied to the Commercial Court, not least in respect of disclosure – an area that was perennially identified as a cause of excess litigation cost and delay.[110] It further made what was a plea for increased use of and availability of effective IT in the court – a plea that had previously been made in the Civil Justice and Woolf Reviews, would be repeated in the Jackson Costs Review, and would then form the essence of the Briggs Review.[111]

The second review that would pre-date the Jackson Costs Review was one carried out at the request of the Lord Chief Justice by Sir Henry Brooke, a retired Court of Appeal judge. It was focused on one specific issue: to consider whether the County and High Courts should be merged into a single unified civil court – an issue, as noted above, first raised in 1873[112] and considered by both the Civil Justice Review 1988 and the Woolf Review (both of which recommended that there be no such merger).[113] It arose again in 2005, when a decision was taken by the senior judiciary to unify the two civil courts. That decision was not, however, generally well-received by the judiciary. The answer to that opposition was to commission a review, the Brooke Review, to consider the merits of such a reform.[114] It commenced in January 2008. It was completed within six months. It too rejected the idea of merging the two courts and went on to make a series of recommendations that covered very similar ground to that dealt with in recommendations made by the Civil Justice Review 1988. It, particularly, made recommendations to revise the jurisdictional boundaries between the County and

High Courts and to enable senior Circuit Judges, among other judges, to carry out the most complex work in the County Courts, as the Civil Justice Review 1988 had also recommended (see further **part three**, below). It also raised for further consideration unification of the County Courts into a single, unified, national County Court.[115]

In their different and specifically focused ways, both reviews demonstrated an ongoing concern by the judiciary regarding the administration of justice. The Aikens Review highlighted ongoing concerns with the ability of the Commercial Court to delivery timely justice at a proportionate cost for commercial claims. The Brooke Review highlighted ongoing concerns with structural elements of the civil courts that meant that the two courts were unable to function as efficiently and effectively as they could or should – with inefficiency leading to delay and attendant cost across the civil justice system. In both cases, both directly and indirectly, concerns about access to justice remained post-Woolf.

The Jackson Costs Review not only had these two specific Reviews, and the problems they sought to resolve, as its antecedents. There was a more general problem that lay behind its establishment. That was, put simply, over the ten years since the Woolf Review's recommendations had been introduced there had been no significant reduction in the cost of litigation: the economic barrier to access to justice had not been cured. On the contrary, the impetus for the new review was that the opposite had occurred: litigation cost had increased and problems of access, accordingly, become more acute. As Jackson put it,

> *'Despite the general success of the Woolf reforms, the costs of civil litigation continued to rise.'*[116]

Peysner put the same point more bluntly:

> *'It is very unusual in matters of social policy that almost all commentators make the same diagnosis and the same prescription. In the current discussion on litigation costs virtually all commentators agree that Lord Woolf's vision of the new litigation landscape has been implemented largely successfully except in relation to costs where it has comprehensively failed.'*[117]

The Woolf Review's recommendations had not only failed to cure the problem of litigation cost, in some cases they had created new costs. Case management may, for instance, have been a success in controlling the pace of litigation, but it introduced a new form of costs. The use of interim costs orders and the use of costs as a form of sanction for non-compliance with court orders and directions had also created a growth in costs. Steps to promote early settlement of disputes had also led to frontloading of costs.[118]

The problem of increased cost was not, however, entirely a product of the Woolf Review's failure to effect a satisfactory cure. It was also the product of a policy shift concerning litigation funding that was introduced via legislative reform enacted at the same time as the Woolf Review's recommendations were implemented. As a consequence of reforms to conditional fee agreements (CFAs) in 1999, as part of an increased move towards the privatisation of litigation funding as a means to offset reductions in civil legal aid, there had been both a marked increase in litigation cost for two reasons. First, the post-1999 CFAs had themselves caused costs to increase due to the way in which they provided for claimants who had succeeded in their claims to recover success fees and the after-

the-event insurance premiums from the losing party. Secondly, there had been, as a consequence of the first point, a vast increase in litigation about litigation costs, known colloquially at the time as 'the cost wars'. The problem was succinctly described by Jackson:

> *'Over the last decade there have been mounting concerns about the costs of civil justice. Liability insurers have maintained that the costs payable to claimant lawyers are becoming ever more disproportionate to the damages paid to claimants. The media have forcefully expressed their anxiety about the escalating costs of defamation and related litigation. Claimant lawyers have protested about massive costs being run up as a result of procrastination by liability insurers. There has been an explosion of litigation about costs issues, which has added a further layer to the costs of litigation (sometimes referred to as "costs of costs").'*[119]

It was that continuing failure to cure litigation cost taken together with new and increasing costs arising from the CFA regime that formed the fundamental background to, and basis of, the Jackson Costs Review and its establishment. As Sir Anthony Clarke MR explained it,

> 'Cost is without doubt the Woolf reform's central failing. Litigation cost are still disproportionate. They are still excessive in a significant number of cases. While the Woolf Reforms (at any rate in my opinion) have succeeded in other areas, they have not grappled effectively with the problems of litigation costs. To that end it seemed to me earlier this year that the time is ripe to grasp the nettle. To that end . . . I announced a fundamental and independent review of the costs of civil litigation . . .'[120]

2.4.2 – Purpose

The Jackson Costs Review had, on the surface, a more tightly focused purpose than its predecessors. Its express aim, as noted above, was to conduct a fundamental review of the costs of civil litigation. To do so, however, as previous reviews had done, it had to explore the practice and procedure of the civil courts. It thus examined the operation, and consequences, of the Woolf Review's reforms. It also had to consider the effect of reforms to litigation funding, introduced at broadly the same time they were implemented, on litigation cost. Again then, it was a court-focused Review.

The Review's terms of reference, set by Sir Anthony Clarke MR with the Ministry of Justice's support, specifically required Sir Rupert Jackson to *'to conduct a wide-ranging review into civil costs'*. Its objective was stated to be

> *'To carry out an independent 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.'*

To achieve that objective, Sir Rupert was required to:

- *'Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers.*
- *Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.*

- *Have regard to previous and current research into costs and funding issues; for example, any further Government research into Conditional Fee Agreements – "No win, No fee", following the scoping study.*
- *Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars.*
- *Compare the costs regime for England and Wales with those operating in other jurisdictions.*
- *Prepare a report setting out recommendations with supporting evidence by 31 December 2009.*[121]

As the Master of Rolls' announcement made clear the Review, and its terms of reference, was intended to be a *'fundamental and independent review of the whole system'*,[122] i.e., the whole system of civil litigation. Only in that way would it be able to make effective recommendations that could, in principle at least, reduce litigation cost and promote effective access to justice. He would expand on the wide-ranging nature of the Review and its terms of reference during 2009. In doing so he stressed how it was to be a review that would *'leave no stone unturned'*, and that it would examine issues that had previously not been examined, such as the status of the indemnity rule (the rule that requires the losing party to pay the successful party's costs). As far reaching as it was, its approach was subject to one caveat: its recommendations would need to be consistent with one fundamental aspect of the Woolf Review reforms – its commitment to procedural proportionality as contained in the CPR's overriding objective.[123]

2.4.3 – Approach

The Jackson Costs Review owed a debt to its predecessors in so far as its approach was concerned.

As with the Woolf Review, it was led by a single Court of Appeal judge, who was supported by a small number of expert assessors (Peter Hurst, the senior costs judge; Andrew Parker and Michael Napier, both of whom were solicitors; Ross Cranston, a High Court judge and previously the academic adviser to the Woolf Review; Jeremy Morgan QC, an expert costs barrister; Colin Stutt, head of funding at the Legal Services Commission; and, Professor Paul Fenn, an expert economist who had been the adviser to the Civil Justice Council on civil costs from 2003 to 2009).[124] It also drew on a wide range of legal professional and academic expertise, both in terms of discussing issues and preparing drafts for the Review's reports. Comparative approaches were also considered, again as in the Woolf Review, as a result of visits by Sir Rupert to other jurisdictions[125] and discussions with academics and judges from those countries.[126] The Review was also supported by several judicial assistants, who were loaned to it from City law firms and an accountancy firm. They conducted legal research, drafting and provided forensic accounting expertise.

The Review adopted a staged approach, as had both the Civil Justice Review 1988 and the Woolf Review. Unlike both of those Reviews, and more akin to the Heilbron-Hodge Review, those stages and publication of its Final Report and recommendations were required to be, and were, completed in a twelve-month period. The Review commenced on 1 January 2009 and was completed in December 2009.

The first, substantive, stage of the Review consisted of evidence-gathering and the preparation of the Review's Preliminary Report. That report set out the nature of the preliminary factual findings, presented options for reform, and summarised, among other things, approaches taken in other jurisdictions.[127] It particularly considered detailed written submissions, which were generally provided by the legal profession, insurers and businesses, trade unions, and interest groups.[128] Written materials considered also included detailed surveys conducted of Circuit Judges, District Judges and Costs Judges, as well as detailed schedules of relevant cases from a range of specific types of litigation and material submitted by insurers concerning litigation cost.[129] The Review also engaged in consultation via attendance at conferences and seminars organised by similar groups.[130] As with previous Reviews, engagement with lay litigants was minimal. This, first, stage of the Review culminated in the publication of its two volume Preliminary Report in June 2009.

The second, substantive stage, again, echoed the approach taken in the two previous official Reviews. With the publication of the Preliminary Report, this stage focused on consultation. The Woolf Review approach of holding 'roadshows' was adopted. Four formal seminars or roadshows, each of which focused on different, specific issues, were held in Cardiff, Birmingham, Manchester and London. These were complemented by further informal seminars, again on specific issues, e.g., different funding methods, proposals for the reform of case management and the introduction of a new costs management regime.[131] Additionally, this stage also saw the use, once more, of dedicated working groups, of judges and lawyers, who examined specific reform areas in depth. Those areas included: costs management generally; costs management and fixed costs in insolvency proceedings; defamation costs; disclosure costs; and the calibration of personal injury damages.[132]

One novel aspect of stage two was the establishment of two pilot schemes to test the viability of proposed reforms. These were a pilot scheme, which tested the, then, novel process of costs management. The pilot was carried out in Birmingham and was centred on the Technology and Construction Court and Mercantile Court. One obvious disadvantage of this approach was the limited nature of the jurisdictions chosen to test what was intended to be a generally applicable new set of procedures for the management of costs. The second pilot, again focused on costs management. This operated in Manchester and London and was limited to defamation proceedings. Again, it was a limited scope pilot.[133]

The second stage of the Review was completed by the end of August 2009. The third and final stage took place during the last three months of the year. No further written submissions were accepted during this stage, although Sir Rupert did engage in clarificatory discussions on issues with lawyers. Additionally, he gained further insight into a range of issues, such as how solicitors' firms carried out their costs budgeting process, and attended further seminars and conferences.[134] In that latter respect, he attended the Civil Court Users Conference: its membership being drawn widely from professional court users – e.g., law firms, small- and medium-sized businesses, and enforcement agents, but not generally lay litigants.[135] During this period, the only substantial engagement with the Citizens Advice Bureaux also took place. The bulk of this stage was, however, taken up with drafting and finalising the Review's Final Report and recommendations.

2.4.4 – Principal recommendations

The fact that the Jackson Costs Review had a more limited ambit than its predecessors meant that its recommendations also had a narrower focus. They focused on reforms to litigation funding

arrangements, the means by which citizens can overcome economic barriers to access to justice, and to specific aspects of the practice and procedure of the civil courts. Those latter reforms were aimed at reducing procedural, economic and temporal barriers to access to justice.

One key difference between the approach the Jackson Costs Review took to its predecessors was, however, to stress the importance of ensuring that all its recommendations were implemented. The Review was said to have produced a series of interconnected recommendations that were intended to be implemented as an holistic package.[136] Their implementation was also said to be subject to a specific caveat: that there would be no further reductions made by the Government to the provision of civil legal aid.[137] The Review's reforms, intended to promote access to justice by making litigation cost proportionate, were thus subject to two conditions precedent, which could properly also be characterised as de facto recommendations.

The Review's recommendations were grouped under thirty-six headings.[138] As with the Woolf Review, they can be further grouped under six broad headings: Court Administration and Advisory Councils; Information Technology; Litigation Funding; Practice and Procedure; Litigants-in-Person; and Alternative Dispute Resolution. The principal recommendations under each were as follows:

Court Administration and Advisory Councils: a limited number of recommendations were made concerning court administration. They focused on the need to rationalise the process for issuing County Court claims, so that it was carried out in regional centres. The rationale for this was to ensure that claim-issuing was handled by staff experienced in such matters, which would then increase administrative efficiency and reduce the cost to the court service of issuing proceedings. A reduction in the number of defended claims transferred between courts was also recommended. A significant recommendation was also made concerning how procedural applications should be dealt with. This was that further work needed to be carried out to develop a scheme to 'delegate'[139] routine procedural applications from District Judges to court staff.[140]

There was one additional recommendation, which touched on one made by the Woolf Review. That earlier Review had proposed the introduction of a Costs Council, initially separate from the Civil Justice Council but later to become a part of it. That recommendation had not been implemented, although an Advisory Committee on Civil Costs (ACCC) had been established by the Government.[141] Its role was to provide the Master of the Rolls with advice on the Guideline Hourly Rates for the Summary Assessment of Costs. It had not been entirely effective. The Jackson Costs Review recommended that it be replaced with a new Costs Council, which could either be a standalone, independent body – like the Civil Procedure Rule Committee – or a permanent standing committee of the Civil Justice Council. The latter echoed the Woolf Review's original intention.

Additionally, the Review recommended that a new Costs Council should be responsible not just for future Guideline Hourly Rates but that it should also be responsible for keeping fast track costs, as well as other costs, such as those relating to medical expert reports and counsels' fees, under review. In other words, it was to be a permanent mechanism to ensure that litigation cost, the primary economic barrier to access to justice, should be kept under continuing scrutiny and review. If implemented it could, therefore, have formed a basis for moving away from regular Civil Justice Reviews, the aim of which was to reduce litigation cost.[142]

Information Technology: the primary recommendation concerning IT repeated one made by the Woolf Review – that there should be a single body with strategic oversight of IT used by the civil courts. This was supplemented by a further recommendation that judges and court staff should be given appropriate training in the use of IT, and that judges and lawyers should be involved in the teams responsible for future IT developments.[143] Further recommendations also focused on the introduction of e-working in the High Court, and thereafter in other civil courts across England and Wales, and on separating the courts' IT system from that used by the Government to ensure that different security controls were able to be used by the courts.[144]

Litigation Funding: the Review was the first to make a series of substantial recommendations concerning litigation funding. It recommended significant reform to conditional fee agreements (CFAs) to remove what had been identified as major sources of increased litigation cost, i.e., success fee uplift recoverability and after-the-event insurance, with the further introduction of a scheme of one-way qualified costs-shifting. This was supplemented by a recommendation that the level of general damages available for personal injury claims should be increased. This was intended to offset, to a limited degree, the increased burden of paying any success fee that a claimant party would have if the success fee uplift was no longer recoverable from the losing party in litigation. Also linked to this was a recommendation to abrogate the indemnity rule,[145] which had been identified as no longer serving a positive benefit but, rather, formed the basis on which costly and time-consuming satellite litigation was based.

Other recommendations included ones that, if implemented, would have: permitted regulated contingency fee agreements; promoted the use of third-party litigation funding; and resulted in further studies of the viability of contingency legal aid and supplementary legal aid schemes.[146] Still others focused on banning referral fees in personal injury litigation.

Practice and Procedure: the major recommendations in the Review focused on court practice and procedure. They included recommendations for reforms to a range of specialist forms of litigation – housing, intellectual property, large commercial claims, personal injury, clinical negligence, housing, chancery litigation, judicial review and collective actions (albeit there was and remains no general collective action regime in the civil courts). Specific reform recommendations were:[147]

- that there needed to be a greater focus on and understanding of what litigating at proportionate cost meant;
- that the Civil Procedure Rule Committee and others should be more careful in striking a balance between simplicity and predictability in drafting rules of court, practice directions and court guides;
- that the civil courts should be given power to deal with pre-action applications concerning breaches of obligations that arose under Pre-Action Protocols. Furthermore, that reforms be made to the Pre-Action Protocols;
- that a new streamlined processes for personal injury claims be introduced;
- the introduction of fixed recoverable costs on the fast track (as previously recommended by the Woolf Review);
- that a new regime of prospective costs management be introduced;

- various reforms to case management, including the introduction of docketing or judicial continuity (as had previously been recommended by the Civil Justice Review in respect of commercial cases), a stricter approach to non-compliance with case management obligations, and the designation of two Court of Appeal judges to sit on any appeals that arose concerning the interpretation and application of the CPR. The latter two were intended to increase predictability in litigation and reduce non-compliance with case management obligations, so as to reduce unnecessary litigation cost and delay;
- reforms to the process for making offers to settle, to make them more effective and thus promote early settlement;
- that disclosure be reformed to introduce a more nuanced 'menu'-based approach that would reduce the cost and time relating to it. This recommendation drew on reforms in New Zealand and proposals previously made by the Aikens Review.[148]

Litigants-in-Person: the sole recommendation concerning litigants-in-person was that the fixed fee recoverable by them from the losing party in litigation, if they succeeded in their claims, should be increased.[149]

Alternative Dispute Resolution (ADR): no substantive recommendations were made concerning alternative dispute resolution. The two recommendations that were made focused on increasing awareness by judges and lawyers of the utility and availability generally of ADR and, more specifically, through the creation of a standard ADR handbook.[150]

2.5 – The Briggs Review

2.5.1 – Background

In 2015, three years after the Jackson Costs Review's recommendations were implemented, Sir Michael Briggs was appointed to conduct a review of the civil courts' structure. This Review differed substantially from its predecessors in several aspects due to the very different background to its commissioning. That difference did not stem from the fact that, as Briggs acknowledged,[151] it was commissioned to look at questions that had been the subject of the Brooke Review, a mere six years after its recommendations that no significant structural change to the civil courts were accepted. As is evident from the four official Reviews and the ones carried out by Aikens and Brooke, there is nothing unusual with the same reform questions being asked and examined by several reviews within a short period of time. Nor was it unusual that such a review would be commissioned so soon after Briggs himself had conducted a targeted review of the High Court's Chancery Division to ascertain what structural and other reforms might be needed to modernise its practices and procedures.[152] The Civil Justice Review 1988 had, for instance, followed on shortly after the more narrowly focused Oliver Review.

The factor that differentiated the Briggs Review from all of its predecessors was that it was commissioned while the civil courts were already undergoing the most significant reform programme that they had undergone since arguably the 1870s: the Her Majesty's Courts and Tribunals Service (HMCTS) Reform programme. That programme was a product of the agreement reached between the judiciary and the Ministry of Justice that the civil courts, and other courts and tribunals, would be subject to a programme of digitalisation, reductions in the courts and tribunal's physical estate

and court and tribunal administration, and the increasing allocation of work previously done by the judiciary to trained and authorised members of court staff. This programme was a direct result of the imposition of a £750 million reduction in justice system funding as a result of the Government's austerity programme.[153] It was, however, to be funded by a one-off financial investment by the Government of what was said to be £1.3 billion over the course of the programme, with some £750 million to be spent on the civil and family courts and tribunals.[154] The funding was to be used to digitalise the courts and tribunals. It was predicated on the assumption that once digitalised the courts and tribunals would realise costs savings where the operation of the justice system was concerned of approximately £100 million a year.[155] It should be noted that the actual sum committed to the HMCTS Reform programme has been subject to some doubt.[156]

Rather than a Review whose aim was to look at the civil justice system as it was and recommend reforms, the Briggs Review was one that was to consider the reform of a moving target – a system being reformed. It was also a Review that was to consider what recommendations it could properly make on the assumption that the HMCTS Reform programme had succeeded in its aims.[157] Additionally, it was one that would seek to shape that ongoing Reform programme while it was in the course of being iteratively developed and implemented.[158] It might be said that given this background the Briggs Review was one that had substantial barriers in the way of success from the outset. The Review was also placed at a further significant disadvantage when compared to the Civil Justice, Woolf and Jackson Costs Reviews: as it had to be carried out at speed, it did not have the opportunity to engage in the levels of research, empirical data or consultation that had been available to its predecessors.

The Review also took place against an additional factor: the growth of litigants-in-person. Notwithstanding the fact that of the Jackson Costs Review's plea that civil legal should not be reduced, it was subject to swingeing cuts through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). As the Government itself put it, the reduction in legal aid provision would deny access to legal aid to two thirds of those who would previously have been eligible – a truly stark reduction in access to justice.[159] Consequent to that reform being introduced, there was – entirely predictably – a sharp increase in individuals seeking to pursue civil claims without legal advice or assistance. This produced, as Zuckerman rightly put it, both a 'justice deficit' – individuals were not able to secure effective access to justice – and an 'efficiency deficit' – that where they did pursue claims they did so without legal advice or assistance, which meant that the civil courts were required to spend more time and financial resources, including judicial time and resources, administering and managing their claims.[160] It was a reform that thus increased the economic barrier to access to justice, and increased procedural barriers through creating a less efficient court process.

One result of the reduction in civil legal aid and its consequences was a discrete review, the Hickinbottom Review, commissioned by Lord Dyson MR in December 2012. It focused on the effect that the increase in litigants-in-person had on the civil courts and considered what reforms might be necessary to ameliorate, in so far as they could, problems that arose from that increase. While that review made various recommendations for reform – including amendments (which were implemented) to the CPR to promote greater assistance for litigants-in-person – how to improve access to justice for individuals who did not have access to lawyers formed not just part of the essential background to the Briggs Review, but would be the focus of its most significant reform recommendations: those that proposed the creation of an Online Court accessible for all court

users and particularly litigants-in-person.[161] The new court would, as Briggs put it, secure access to justice for the first time for that 'silent class of persons' who would not traditionally consider seek access to the courts to resolve their disputes.[162] It assumed this increase in access would follow straightforwardly from the provision of an online court with an easily understandable web-based process to issue and pursue claims. As with the Review's other recommendations, the viability of this recommendation and its ability to promote access to justice depended on the success of the other aspect of the Review's background: effective completion of the HMCTS Reform programme. As will become apparent in **part three**, that programme was anything but successful.

2.5.2 – Purpose

The Briggs Review moved away from a focus on the practice and procedure of the courts, which had consumed the majority of the efforts of the Woolf and Jackson Costs Reviews, and much of that of the Civil Justice Review 1988. Its specific focus was, however, once more on the structure of the civil courts: it was, again, in reality a court-focused review. Its exact Terms of Reference were 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 Briggs Review thus returned to those aspects of the Civil Justice Review and the Brooke Review that focused on the organisation and internal structure of the civil courts. It did, however, also focus to a significant extent on a recurring theme from all of its predecessor reviews: the use of IT. While not immediately evident from its Terms of Reference, that the Briggs Review was required to focus on how best to integrate the benefits of the HMCTS Reform programme was an explicit reference to the need to take account of and make recommendations concerning the ways in which the digitalisation of the civil justice system, i.e., the use of IT, could alter the civil courts, their structure, and – given the need to also consider *'the boundaries between the civil courts . . . and other providers of dispute resolution'* – the practice and procedure of those courts.

The Briggs Review was thus the first Review that had at its heart the use of IT and the potential it held to improve access to justice, a point that it would stress in two ways. First, by accepting that it would be carried out consistently with the principles that underpinned the HMCTS Reform programme, e.g., that it should secure the development of a digitalised system that was easily accessible for both digital users and non-digital users, proportionate and low cost, and capable of meeting the needs of its various users.[163] Secondly, by acknowledging that the Government's acceptance of its proposals concerning the use of IT to create a new, digital, civil court would 'proceed in a way which maximises its prospects of increasing access to justice for litigants without lawyers'.[164]

2.5.3 – Approach

The Briggs Review was commissioned in July 2015. It was to produce an Interim Report by the end of December 2015. A Final Report was to be submitted by July 2016. It too therefore, like the Jackson Costs Review, was to be completed within the short timeframe of twelve months. In this regard, it too can be seen to mark a shift away from the longer term, multi-year approaches taken by the Civil Justice and Woolf Reviews to the approach that was evident in the other judicially commissioned reviews carried out by Aikens and Brooke. Its timeframe was, however and unlike its predecessors, dictated by the need to develop its recommendations prior to the Government's 2015 Spending Review.[165]

As had been the case since the Civil Justice Review 1988, the Briggs Review was led by a single judge of the Court of Appeal: Sir Michael Briggs. Again, as with Sir Rupert Jackson, he had previously formed part of the team that carried out the Heilbron-Hodge Review.[166] He was supported by a small working party, which was constituted of three judges and a senior official, who was involved in the HMCTS Reform programme, from HMCTS They were: Sir Stephen Stewart, a judge of the High Court and a former member of the Civil Procedure Rule Committee; Nigel Bird, a senior circuit judge based in Manchester and a member of the Insolvency Rules Committee; Christopher Lethem, a district judge who had been involved in the implementation of the Jackson Costs Review's recommendations as well as the implementation of the Hickinbottom Report's recommendations. He was also a member of the Civil Procedure Rule Committee. The final member of the working group was Richard Goodman, from HMCTS.[167] He would be replaced during the course of the Review by Clare Galloway, also a senior member of HMCTS involved in the Reform programme.[168] Their role was *'to enable me [i.e., Briggs] 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'*.[169] Briggs also worked with and considered work done by the Judicial Engagement Group (Civil), that is the working group of members of the judiciary who worked with the Reform programme by providing judicial views on its design.[170] That group had a broad membership of judicial members drawn from across England and Wales.[171]

One consequence of the limited timeframe within which the Review had to be conducted was that it could not carry out detailed consultation and evidence-gathering, as its predecessors had attempted to do. Limited statistical evidence was commissioned and what was produced informed the Review process after the drafting of its Interim Report had already commenced.[172] Its consultation process was generally informal. It drew on the views of a limited number of consultees. Much of the consultation was carried out orally under the Chatham House rule, given its informal and time-constrained nature.[173] It is fair to say that the process was less than ideal, not made easier by the fact – acknowledged by the Review – that it was being conducted against a moving target in that it

was reviewing the structure of the civil courts while they were in the process of being reformed and restructured by the Reform programme.

Notwithstanding the truncated timeframe, the Review adopted a staged approach as was typical of its predecessors. Its Interim Report, published in December 2015, was intended to provide an outline of potential reform proposals. It formed the basis on which the Review received a tranche of written consultation submissions.[174] As with its predecessors, the vast majority of responses were submitted by members of the judiciary, the legal profession, legal advice organisations and legal representative bodies. There was little to no engagement with non-professional court users by way of consultation responses.[175]

The written consultation stage was followed by a third consultation stage. Again, as with its predecessors, this consisted of a series of meetings with judges, stakeholder groups and the public across the country. This also included fact-finding meetings in other countries (Canada, the Netherlands;[176] discussions, but no visit, were also held with the New Zealand Ministry of Justice[177]) to ascertain how they had reformed their civil courts through the use of IT.[178] The research visits to Canada and the Netherlands only occurred after it was stressed that without examining how they had adopted reform approaches comparable to those the Review was recommending, its recommendations would be unlikely to carry weight.[179] Given the fact the Review also focused on the potential integration of the civil courts with other dispute resolution providers, it also explored the use of several public and private sector digital dispute resolution systems, e.g., the online Traffic Penalty Tribunal, Cybersettle (a private dispute resolution system that had been utilised by civil courts in New York), and new e-filing systems that were to be introduced in selected civil courts and the Crown Court.[180]

Finally, again during the third consultation stage of the Review, Briggs engaged in further oral consultation with a range of individuals. These included members of the judiciary, the legal profession, other professional bodies and organisations that supported litigants-in-person.[181]

2.5.4 – Principal recommendations

The Briggs Review made a total of sixty-two recommendations across thirteen headings, many of which echoed previous reforms. They too were intended – as the Review's Interim Report noted in respect of what would become the centrepiece of its recommendations, the Online Court – to increase access to justice *'for people and small businesses of ordinary financial resources'*.[182] Its various, principal, recommendations can be grouped under five broad headings: Court Administration and Structure; Information Technology – General; Information Technology – The Online Court; Alternative Dispute Resolution; and Enforcement. The principal recommendations for each heading were as follows:

> **Court Administration and Structure:** the Review made a series of recommendations concerning civil court administration and its structure, many of which revisited issues that formed the basis of recommendations in previous Reviews.[183] It recommended:
>
> - that training be provided to judges and court staff as required as a consequence of the Reform programme;

- the unification of the County and High Courts be once more considered. Echoing the Civil Justice Review 1998, the Woolf Review and the Brooke Review, it was the fourth civil justice review to recommend that the two courts remain separate. It went on to recommend that further work be done to consider future reform of the High Court's Divisions – a recommendation that has previously been considered, with reform rejected, by the Heilbron-Hodge and Woolf Reviews;

- the eventual abolition of High Court District Registries, as a consequence of creating a new single digital portal for issuing all civil claims;

- that arrangements be made for more regional resolution of complex and specialist disputes. This was to be complemented by additional training for court officers and greater collaboration by judges in regional court centres across different areas of civil work;

- that more effective arrangements were to be put in place to enable the Head and Deputy Head of Civil Justice to carry out effective operational management, with the Designated Civil Judges across the country, of the civil courts. Thus, it recommended that practical administrative improvements be made to the system of leadership of the civil justice system, which was recommended by the Woolf Review;

- further reforms to the functional distinction between the County and High Courts. Echoing past recommendations, but going beyond them, it recommended that the financial limit placed on the County Court's jurisdiction be abolished. This was to be complemented by an increase in the financial threshold for issuing claims in the High Court. Taken together these recommendations would divert more civil proceedings from the High Court to the County Court;

- that triage systems be put in place in the High Court to ensure that more disputes were transferred, as appropriate, to the County Court at the earliest stage possible;

- that a further review of appeal arrangements in the County and High Courts be carried out;

- that steps be taken to rationalise the overlapping jurisdiction that the civil courts had with the Family Court and the First-tier Tribunal, particularly in the latter case where property disputes were concerned. It also noted, albeit it was outside the Review's scope, that there was an argument for increasing convergence between the civil courts and the Employment and Employment Appeal Tribunals;

- that court officials be trained to carry out routine procedural work that was ordinarily carried out by District Judges in the County Court. This effectively reiterated a recommendation made by the Jackson Costs Review, noted above;

- the development, as was already to be done, of IT provision for the Online Court to be provided in a way that it would be accessible to litigants-in-person.[184]

Information Technology – General: the sole general recommendation concerning IT echoed the one made by the Civil Justice Review 1988, which called for steps to be taken to implement

a means to conduct ongoing monitoring of the civil justice system. It did so by recommending that new IT systems for the civil courts should be designed to enable effective anonymised management information about the amount of time judges spent on different type of work in the civil courts.

Information Technology – The Online Court: the most important and innovative aspect of the Review's recommendations was its recommendation that a new 'Online Court' be introduced by primary legislation, with new rules of court applicable to it. This new court was intended to be separate from the County Court, but was to have jurisdiction over litigation that would otherwise be dealt with in that court. Detailed recommendations were also made concerning the exact nature of its subject-matter jurisdiction.[185]

This recommendation also marked a significant departure from previous civil justice reform recommendations for another reason. It did so because it recommended that the new Online Court should have a three-tiered process:[186] the first stage should help parties, before proceedings commence, to ascertain if there is a genuine dispute (the online evaluation tier) – it was also intended to help parties identify sources of free advice, including legal advice, and alternative means (alternative to the court) to resolve their dispute; the second stage should see court officers (to be known as case officers), which the Review recommended be legally trained, manage the parties' dispute and, specifically, help them to resolve it through facilitating negotiation and mediation (the online resolution tier); the third, and final, stage should see disputes resolved by court judgment (the online adjudication tier). The new process was thus intended to fully integrate a range of means by which disputes could be resolved without resort to a judge and judgment into the civil justice system.

Alternative Dispute Resolution (ADR): the sole recommendation called for the provision of out-of-hours mediation provision in the County Court to be reinstated. Small claims telephone mediation and the greater use of online dispute resolution was also recommended.

Enforcement: the reform of enforcement had not been considered by an official Review since the Civil Justice Review 1988, although some reforms had been effected through the Tribunals, Courts and Enforcement Act 2007. Rejecting the established approach, the primary recommendation concerning enforcement was that there should no longer be split responsibility for it across the County and High Courts. It recommended that the County Court should be the sole court with responsibility for enforcement, albeit the possibility should be retained for it to transfer enforcement proceedings to the High Court were that justified because, for instance, enforcement concerned cross-border disputes or arbitration. In the event that that recommendation was not adopted, the Review recommended that enforcement processes should be rationalised and digitalised as part of the Reform programme, with Online Court judgments being deemed to be County Court judgments and subject to the reformed enforcement process. There was further consideration of reform to use of separate High Court enforcement officers, agents and County Court bailiffs, with a call for urgent investment in the latter to improve the delivery of enforcement services.[187]

2.6 – The reviews – common themes

This overview of the four official Reviews highlights several common themes across them, both in terms of their structure and the purpose. They are that:

- the Reviews are primarily judge-led: three of the four official Reviews were judge-led. This approach conforms to the historic approach to civil justice reviews from the 1820s onwards;
- the Reviews are supported by a small Advisory Committee or Working Group. Each of the Reviews included the assistance of a small team of experts. They were, predominately, drawn from the judiciary, the legal profession and various professional court users. Non-professional court users – lay litigants – play, at best, a minor role;
- the Reviews draw on, to the extent available – which is less than ideal – empirical evidence. They also draw upon comparative academic scholarship and seek to obtain evidence from civil justice systems in other countries;
- the Reviews' timeframe for completion has decreased over the last forty years. The first two official Reviews took place over several years. The recent trend is for reviews to take no more than a year to complete;
- reviews are now more likely to be commissioned by the judiciary than by the Government;
- the Reviews all have the same aim: to increase access to justice through reducing the complexity of the civil justice system, reducing delays within it and reducing the cost of litigation: they are court-centric;
- the Reviews have, with one exception, focused on the structure, practices and procedures of the civil courts. The one exception, the Jackson Costs Review, also considered litigation funding. They have all considered the need for improvements to the provision of IT for the courts. All have, to increasing degrees over time, considered the need to develop and promote alternative forms of dispute resolution; and
- the Reviews evidence a short-termist approach, and one that lacks an overarching strategy – a point made clear by the sheer number of reviews that have taken place since the Civil Justice Review, including the four official Reviews and the numerous other smaller reviews.

That each Review seeks to achieve the same aim indicates that either the problems they seek to cure are endemic, a point underscored by the past two centuries of civil justice reforms each also focusing on the same problems;[188] the reforms recommended were inadequate to achieve their objectives; the reviews fail to adequately identify the causes of the problems that create barriers to access to justice and thus their proposed reforms do not connect with or act on the actual problems that create or contribute to those problems; or, again, a combination of all three. It is, however, to implementation that this report now turns.

3 Implementation

3.1 – Overview

Implementation of civil justice reform recommendations is not straightforward. They may be rejected, wholly or partially, or modified by the commissioning body (the Government, the judiciary) due to, for instance, responses received to consultation exercises carried out concerning the recommendations or due to the cost of implementation and the absence of available funding. To the extent that they are excepted, their effective implementation may depend upon the agreement or co-operation of other bodies, e.g., HMCTS. The Briggs Review's recommendations, for instance, depended upon their being accepted by the judiciary and the Government. Their implementation then needed to be effected by the Ministry of Justice, Parliament, the judiciary, and HMCTS. The same was broadly true of the other three official Reviews.

Where reform recommendations are implemented, implementation may then not achieve its objectives. This may be because, as noted above, the recommendations were inadequate to meet the reform need, or they failed to adequately identify the causes of the problem to be cured and, thus, their solutions miss the real target. Cures for symptoms leave the cause intact. Equally, implementation may achieve the reform's objective, but in doing so it may create new and unforeseen problems, and those may then not be fully appreciated as there may be no ongoing monitoring of implementation. As Resnik put it pithily in this respect, civil justice reforms too often focus on curing the problems caused by the previous set of reforms.[189] Furthermore, implementation may succeed and then the problems solved may reassert themselves due to other, unconnected other changes. Where reform is court-centric, it is possible that on its own terms such reform may succeed, but its benefits may be overtaken by problems caused by factors that sit outside the courts. Examples of these various issues are apparent through the four official Reviews and the implementation of their reform recommendations.

3.2 – Review implementation

3.2.1 – The Civil Justice Review 1988

The Civil Justice Review's recommendations were implemented through and under the Courts and Legal Services Act 1990 and amendments to the rules of court. At the time, they were hailed by some as the most significant set of reforms since the creation of the High Court and Court of Appeal in the 1870s. As Sir Jack Jacob described them, the reforms introduced by the Act were *'more profound and extensive than any made since the Judicature Acts of 1873 and 1875'.*[190] He went on to suggest that the 1990 Act would be seen to be *'a great leap forward, designed to improve the administration of civil justice which in turn improves access to justice for those that need it'* and that it amounted *'to a landmark in the on-going history of English civil procedure'*.[191] Others were more circumspect.

Ian Scott, one of the Review's Advisory Committee, concluded in more measured language that the Review and its implementation had had a *'significant effect on the High Court and county courts'*. That effect was primarily structural. Rather than amounting to a revolutionary change, as Jacob suggested, this structural reform taken together with other reforms to the legal profession effected at the same time through the 1990 Act were, in Scott's view, simply the possible *'start of a long, slow, revolution in the administration of justice'*.[192]

3.2.1.1 – Implementing civil justice reform

The major intention underpinning the 1990 Act was to give effect to the structural reform recommendations made by the Civil Justice Review 1988. As Lord Mackay LC explained when describing the then Courts and Legal Services Bill to Parliament, it would

> *'establish a framework for a new system of case allocation and transfer between the High Court and the county courts, so that the High Court can concentrate upon judicial review and other specialist cases, along with other civil cases of unusual substance, importance or complexity, while the more straightforward cases, particularly in the personal injuries area, are heard in the county courts, which are in general quicker, cheaper, and more accessible to ordinary people.'*[193]

This was effected through sections 1 to 3 of the 1990 Act and the secondary legislation made under it, i.e., the High Court and County Courts Jurisdiction Order 1991 (SI 1991/7240) and County Courts Remedies Regulations 1991 (SI 1991/1222). Significant changes effected through these provisions were that: the County Courts' financial limits concerning contractual and tortious claims were set aside and they were to have jurisdiction no matter the amount in dispute between the parties; and, in those other matters where the High and County Courts had concurrent jurisdiction, disputes could be commenced and tried in either court, subject to specified financial limits. To promote greater access to legal representation in the County Courts, provision was made by section 11 of the 1990 Act to enable the Lord Chancellor to make orders removing limitations on who could provide advocacy services in the County Courts.

Other structural reforms that were implemented included the creation of the office of presiding judges for the circuits and a senior presiding judge for England and Wales via section 72 of the 1990 Act; a measure to help improve judicial administration through the creation of judicial leadership structures. This was complemented by implementation of the recommendation to restructure the offices of County Court Registrar into the judicial office of District Judge through section 74 of the 1990 Act.

Where the practice and procedure of the courts was concerned, various of its recommendations were implemented. Amendments to RSC Ord. 6. r.8, among others, effected reforms to service of claims to reduce the length of time that a plaintiff had to carry out service of an initiating process from the point in time when it was issued by the court.[194] Exchange of witness statements was provided for through section 5 of the 1990 Act and the amendment of RSC Ord.38, r.2A in 1988.[195] Provision for split trials on the court's own initiative was provided by amendments to RSC Ord. 25 and Ord. 33, r.4.[196] The prohibition on contingency fees was relaxed through section 58 of the 1990 Act. Relaxation of rules of evidence in small claims was provided for through section 6 of the 1990 Act and of the hearsay rule by section 1 of the Civil Evidence Act 1995. Access to medical reports was facilitated via the Access to Medical Records Act 1988 (albeit that followed on from an attempt

to improve access to such records through the Access to Personal Files Bill 1987, which pre-dated the Civil Justice Review 1988's recommendations) and amendments to RSC Ord. 18.[197] Greater use of cost sanctions was also provided for through section 4 of the 1990 Act, which made provision for powers to make 'wasted costs' awards and to provide for the High Court's costs to extend to the County Courts. Other reforms to the RSC – e.g., to Ord. 27 and Ord. 62. r.7 – made further provision for the use of costs as sanctions.[198]

3.2.1.2 – Major civil justice review recommendations not implemented

Not all of the Review's recommendations were implemented.[199] In so far as its recommendations relating to court administration, improvements to court staff retention etc. are concerned it is difficult to ascertain what changes were implemented. To the extent that they were implemented, their effectiveness was so evidently lacking that by 2001 there were very serious problems in court administration and staff retention.[200]

Where non-implementation was concerned, most significantly, the proposal to introduce a set of common procedural rules was not taken forward. Nor was the recommendation to introduce active case management. Improvements to court information technology (IT) was patchy, at best.[201] No further consideration, as had been recommended, was made of the introduction of class actions, albeit the subject would be revisited in the Woolf Review – as would both the approach to a common set of rules and case management. Early evening hearings were not introduced, nor was the High Court's long vacation limited to August each year. It continues to run from the end of July to the start of October. Mechanisms to monitor implementation were not implemented. As a reform recommendation this would, effectively, be revisited by the Woolf Review and its recommendation to create the Civil Justice Council.

No steps were taken to improve debt enforcement or to remove Latin terminology from the process.[202] No steps were taken to introduce no-fault insurance for road traffic personal injury claims. The recommendation to 'create' a small claims court and a dedicated procedure for it would await the Woolf Review to be reconsidered, recommended and then introduced via the Civil Procedure Rules (CPR). No housing court would be created. It would remain a subject for recommendations and their rejection into the 2020s.[203]

Finally, its implicit suggestion that sustainable funding was needed to ensure the reformed civil justice system would operate effectively was not as well appreciated as it might have been. While the Review was particularly concerned that implementation of its recommendations, and particularly those that would see significant work pushed down to the County Courts, would place extra demands on the system, the Government envisaged the reforms would only engender an additional £5.1 million in costs to the system,[204] of which £2.1 million related to reforms enacted by the 1990 Act that concerned the legal profession and which implemented recommendations made by the Benson Commission.

In essence, the Review's most significant implemented reform was that to the relationship between the High and County Courts. The remainder of its implemented reforms would be overtaken by the Woolf Review, which also adopted and endorsed many of the former's unimplemented recommendations.

3.2.2 – The Woolf Review

The Woolf Review's recommendations were implemented in 1999, three years after it reported. Before it was implemented, two further, more targeted, official reviews were commissioned: the Middleton Review (1997);[205] and the Bowman Review (1997).[206] Both were commissioned by the Lord Chancellor. The Bowman Review, as noted above, considered the Woolf Review's recommendations concerning appeals. Its recommendations, which were consistent with the approach taken by that Review, were implemented.[207]

3.2.2.1 – The Middleton Review's consideration of Woolf

The Middleton Review was more wide-ranging than the Bowman Review. It was commissioned, following the 1997 General Election, by the new Lord Chancellor to reconsider the Woolf Review's recommendations. They had earlier been accepted by the previous Government, which had intended to secure their implementation by October 1998.[208]

Sir Peter Middleton, a former banker rather than a judge, was appointed to not only consider if the target date for implementation was feasible, but more broadly to reconsider the Woolf Review recommendations and, additionally, consider separate proposed reforms to legal aid.[209] Its primary conclusion was that the implementation date was unachievable: effective implementation required more time to be taken as: effective IT systems needed to be introduced; the new court rules were not yet complete; research on fixed recoverable costs was incomplete; judicial and court staff training was not in place; and – importantly – mechanisms to monitor and evaluate the reforms and to conduct research to inform that work were not in place.[210] The importance of the latter was underscored as the Middleton Review noted the importance of evidence-based evaluation of the introduction of active case management in the USA carried out by the Rand Institute and the fact that no comparable organisation or evidence-base for evaluation existed in England and Wales.[211] Given the nature of the outstanding matters to be done prior to implementation, it recommended that the implementation date be reviewed by the Government.[212] It was. Implementation of the Woolf Review's recommendations was put off until 26 April 1999, when the CPR was introduced as a new procedural code to replace the Rules of the Supreme Court and the County Court Rules.[213] It is fair to say that the introduction of this new code of civil procedure would be the most significant reform of court processes since the 1870s.

The Middleton Review ultimately concluded the Woolf Review's 'proposals [were] the basis for a coherent programme of change that can improve the efficiency and flexibility of the top end of civil justice'.[214] Hence they would, as the Woolf Review intended, improve access to justice – albeit to a discrete aspect of the civil justice system, albeit a fundamentally important one: the courts. Middleton thus recognised both the importance and the court-centricity of the recommendations, and Review that gave rise to them. In doing so, the Middleton Review accepted the approach taken by Woolf that 'justice' before the civil courts was a multi-dimensional idea: that it meant achieving a substantively correct judgment in reasonable time and at reasonable expense.[215] Access to the courts would thus in future be mediated by the need to ensure that all three of these objectives were properly given effect. It thus gave increased weight to the need to ensure that the civil courts operated efficiently and cost-effectively.

In reaching its overall conclusion, the Middleton Review did, however, recommend several significant qualifications to the Woolf Review recommendations. Those were that:

- when introduced the procedural case tracks' financial limits should be subject to regular review. Both the small claims and fast track limits should, particularly, be increased once the new system had bedded-in;

- the judiciary should ensure that they take a consistent approach to the application of sanctions for non-compliance with procedural obligations arising under the new system. This was essential if a new culture of litigation was to develop that would produce the necessary reduction in litigation cost and delay, and given effect to the new multi-dimensional approach to justice. It was also essential as the demand for access to the civil justice system was likely to outstrip supply;[216]

- fixed recoverable costs should, over time, be extended to cover all civil litigation. Their level should also, again over time, shift from being set by the state to being determined by the market. An alternative approach to determining the level at which fixed recoverable costs should be set, based on the market, was also set out;[217]

- the court should have the power to appoint a single expert, i.e., a court-appointed expert, and consideration should be given to such experts being remunerated by the legal aid fund;

- more effective management of court buildings should be introduced to enable greater court utilisation and more effective judicial deployment to better enable claims to be heard in a timely manner.[218]

The Review went further than this. It also made several recommendations that looked at wider issues that could improve access to justice. These were that: no-fault insurance schemes with strict liability should be investigated, particularly for medical negligence; there should be a review of the 'loser pays' principle and of how costs awards are determined and, conversely, of whether a loser pays rule should be introduced into tribunal proceedings along with tribunal fees as part of a wider review of tribunal procedure; and there should be a review of restrictions on legal expenses insurance.[219] Consideration of the loser pays rule and legal expenses insurance would not be taken forward but would form an aspect of the Jackson Costs Review. The question of reforms to the tribunals was, however, considered by the Leggatt Review in 2001.[220] No consideration of no-fault insurance schemes has taken place, although it did form the basis of detailed consideration by Atiyah in 1997.[221]

Additionally, the Middleton Review should be noted for two further significant points. It was the first review to explicitly identify a reason why reform had been so difficult to introduce effectively. It concluded that past failures to effect reform successfully stemmed from the civil justice system's complexity and the failure to ensure there was an appropriate means to implement and assess whether and the extent to which reform recommendations had achieved their aim.[222] To remedy that, it recommended the introduction of more effective management and governance structures to oversee reform implementation. It also recommended that the Civil Justice Council, which the Woolf Review had recommended be created, be given a wider role than that Review envisaged. It recommended that the Council be given responsibility for assessing the effectiveness of the Woolf Review's reforms once implemented.[223]

The second issue is more troubling. At the outset of its report, the Middleton Review articulated a deeply problematic understanding of the purpose and function of the civil justice system. It rightly acknowledged that the system aims to resolve civil disputes between parties and, additionally, has

a wider role through providing the framework though which law and order is maintained and the framework within which social and economic activity takes place.[224] Having done so, it then mis-characterises the civil justice system as forming part of the service sector of the economy and not an aspect of Government.[225] This can, as Genn has cogently argued, lead to a reduction in the state's commitment to the civil courts, their funding and access to them, i.e., to access to the civil courts.[226] As such it is a perspective that could undermine access to justice through justifying a reduction in state expenditure on the civil justice system. This could arise either, as Middleton suggested, individuals being charged more for its service as the economy prospered or through treating the civil courts as no more the state's responsibility than other, private-sector, dispute resolution services. By mis-characterising the civil court's role and status, it provides a framework for the state to shrug off its responsibilities where the provision of access to civil justice is concerned. It thus points to the need for there to be a clear understanding and acceptance not only of the civil justice system's constitutional role, but of the exact nature of that role in society. Such an understanding should underpin future reform, setting its terms and parameters. This issue is considered further in **part four**.

3.2.2.2 – Woolf implementation

Following the Middleton Review's positive appraisal of them, the vast majority of the Woolf reform's recommendations were introduced in April 1999 through the introduction of the CPR. This saw, finally, the implementation of the three-times recommended creation of a single procedural code for all the civil courts. This then entailed both implementation of the Review's structural and procedural reform recommendations.

First, and where structural reform was concerned, the CPR's introduction was complemented through the creation, as recommended, of a new rule committee to replace the existing ones: the Civil Procedure Rule Committee (CPRC). This was to be under a statutory duty to ensure the *'civil justice system [was] accessible, fair and efficient'* and that the rules themselves are '*simple and simply expressed*'.[227] That latter objective, while it did see the recommendation to eliminate Latin expressions in the rules of court implemented, has not been realised as the CPRC's ongoing attempts to simplify the CPR exemplify.[228] The CPRC, again as recommended, moved away from the constitution of its predecessors and included a wide variety of interest groups among its membership. In this way it might have been expected that the structural basis for ensuring that the rules of court properly facilitated access to justice both for those parties to disputes who were represented and for those who acted as litigants-in-person. It might also have been expected that procedural simplicity would reduce litigation cost and delay.

The other main structural reforms implemented were: the creation of the judicial offices of Head and Deputy Head of Civil Justice to provide overall leadership for the civil courts, the former of which was initially taken by the de facto head of the High Court's Chancery Division (the Vice-Chancellor) and then by the Master of the Rolls; and the creation of the Civil Justice Council. The former, as recommended, was given responsibility for issuing Practice Directions for the High Court and Court of Appeal, with the Deputy Head of Civil Justice being given responsibility for issuing them for the County Court.[229] The latter, while it took a role in ongoing scrutiny of the civil justice system did not have as expansive a role as that envisioned by the Woolf or Middleton Review. That remains the case today, although it has been – over the last ten years, and remains so today – far more active in its approach to scrutinising the civil justice system.

It was then through the CPR's introduction that the bulk of the Woolf Review's other recommendations were implemented. It particularly gave effect to the introduction of court-based, active case management; again, finally realising a reform recommended twice before the Woolf Review. Pre-Action Protocols were developed and introduced to promote pre-litigation consensual settlement. Consensual settlement was also promoted through the development of Ombudsman schemes, both public and private sector, although they were not integrated into the civil courts and their development cannot necessarily be tied to the Woolf Review's recommendations. Steps were also taken by the Government to promote the use of ADR through the Lord Chancellor's, later the Government's, ADR pledge,[230] and the courts promoted ADR through the duty placed on them to do so as part of active case management.[231] This promotion did not, however, go as far as the courts trialling specific forms of ADR, as had been recommended.

Through the CPR, a commitment to procedural proportionality (multi-dimensional justice) was also introduced both structurally via the procedural case management tracks and active court case management, as well as through the introduction of the CPR's overriding objective, which required the court to deal with cases justly. It was also through the CPR that the various recommendations concerning specific procedural changes were introduced, e.g., to witness statements, disclosure, expert evidence, and measures to promote settlement through formalising the process to make offers to settle etc. Reforms to appellate procedure foreshadowed by the Woolf Review were also implemented in the light of the Bowman Review's recommendations in 2000.[232]

3.2.2.3 – Woolf – what was left unimplemented?

While the vast majority of the Review's reform recommendations were implemented, more so than for the Civil Justice Review, several significant recommendations went unimplemented.

Judges were not provided with increased numbers of legal support, for instance. Court staff were not provided with training to enable them to qualify as legal executives. While the Court of Appeal and, much later, a limited number of High Court judges were provided with judicial assistants,[233] the routine provision of such support for the judiciary was not provided. A civil magistracy was not created. IT provision in public places to better promote access to justice was not implemented and while there was some improvement in court IT, this was to much less of an extent than the Review intended.[234] This was due to several factors, as noted by Sir Henry Brooke: the court rules changed too often to facilitate effective development of IT systems (an issue that remains the case today with multiple rule changes enacted each year); a lack of technical knowledge in systems design; a lack of faith from the judiciary that the system designers would design a system that would be adequate to the needs of the courts; and that the new IT structure would be built on, rather than replace existing, out-dated systems and, implicit to this point, that there was a lack of sufficient funding necessary to fully implement an adequate IT system.[235]

Significantly, no overarching strategy body to monitor and co-ordinate provision of IT for all the courts was created to replace existing bodies, nor therefore was it created as a standing body of the Civil Justice Council. In this respect the recommendations in terms of overall strategic oversight and management of the civil justice system, which would necessarily include IT provision, made by both the Woolf Review and the Middleton Review (the latter in terms of its desire to see improvements to the strategic oversight and governance of reform and its implementation) were achieved.

Where court procedure was concerned, while reforms were introduced to create a form of mass litigation scheme via Group Litigation Orders, steps were not taken to introduce an effective form of collective or class action within the CPR, which the Woolf Review anticipated could result in effective access to justice for claimants with low value claims in specific situations.[236] More significantly, fixed recoverable costs would not be introduced into the CPR in the form the Review recommended nor via the variant proposed by the Middleton Review.[237] As that latter Review had anticipated, setting the level for such costs proved to be difficult and resulted in the issue being set to one side. As a necessary consequence of this, the Civil Justice Council did not take on the role of reviewing recoverability levels.

Most significantly, though, given its centrality to effecting a reduction in litigation time and cost, case management and particularly the necessary cultural change among the legal profession and judiciary to ensure such case management was fully effective as a means to achieve that end was not fully realised. That would remain the case in 2009 when the Jackson Costs Review commenced. The effective and consistent use of sanctions to help promote a new procedural culture was not readily effected.[238] The Jackson Costs Review's warning about the need for there to be a more robust use of sanctions for procedural non-compliance consistent with the CPR's overriding objective, as a means to promote effective access to justice, would be noted as a signal failure of post-Woolf implementation.[239]

Finally, where litigants-in-person were concerned not only was the CPR, as noted above, not drafted in ways that it was readily comprehensible or accessible, but specialist debt and housing advice centres were not established in civil court buildings – neither were permanent legal advice centres nor court information kiosks. Mobile courts were not introduced and evening or weekend sittings were not introduced.

3.2.3 – The Jackson Costs Review

The Jackson Costs Review was broadly implemented following the Judicial Executive Board (JEB)[240] and Government's general acceptance of its recommendations in 2010. Government action on implementation was slowed due to the General Election held in May that year, which resulted in a change of Government. The new Government consulted on the recommendations in November 2010.[241] Acceptance of the principal recommendations was then announced in March 2011.[242] As the Government put it,

> *'In implementing the primary recommendations of Sir Rupert's report set out in the consultation paper, the Government agrees that these proposals should be taken forward as a package, and that the connected constituent parts should be implemented together.'*[243]

This is not to say that the report and its recommendations were not the subject of significant criticism.[244] That criticism focused, on one hand, on the claim that the recommendations were inadequate to reduce litigation cost and, on the other hand, on the claim that the recommendations were inimical to furthering access to justice and that they would, rather, harm fair and effective access. Notwithstanding such criticisms, implementation went ahead and significant reform was made to both the CPR and litigation funding.

3.2.3.1 – Jackson implementation

The vast majority of the recommendations, and all the principal recommendations, were implemented either via primary legislation, amendments to the CPR or judicial decision.[245] Recommendations not implemented were, for instance, that the indemnity principle be abolished, as had also been intended following the introduction of the Woolf Review's implementation,[246] and that the use of legal expenses insurance be promoted as a form of litigation financing.[247] With a small few exceptions, where further work needed to be done to give effect to them or judicial decision was required to do so, it was agreed that implementation should take place on a single date: the complete package of reform would, as they did, all come into effect on 1 April 2013.

The most significant reform recommendations were implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). These focused on the causes of disproportionate litigation cost that had acted as the spur for the Review: excess cost generated by the conditional fee agreement (CFA) funding regime introduced in 1999 separately yet at the same time as the Woolf recommendations were implemented. Part 2 of LASPO transformed that funding regime by, among other things, the abolition of CFA success fee and the recoverability of after-the-event (ATE) legal expenses insurance, subject to some limited exceptions. Post-Jackson CFAs were generally to operate as they had prior to 1999, subject to some differences concerning cost-shifting. The Act also authorised the use of damages-based agreements (DBA) via regulation. What it did not do, however, was make provision for the 10% uplift in general damages, which the Review recommended should accompany the removal of CFA success fee recoverability. It did not do so as the Review took the view that setting the level of damages was properly a matter for the courts, as they were responsible (at common law) for doing so.[248] The merits of that argument were dubious given that the recommendation was a necessary complement to one to be enacted via legislation and, more generally, the fact that the common law had developed an area of law does not and cannot preclude parliamentary action to legislate. Whatever the merits of those points, the Court of Appeal in Simmons v Castle (2012) concluded that it had the jurisdiction to increase damages as from 1 April 2023, as had been recommended.[249]

The vast bulk of the other reform recommendations required changes to be effected to the CPR. It thus had to be carried into effect by the CPRC. These reforms included, for instance, the introduction of costs budgeting and management, which were intended to control litigation cost more effectively. They also included reforms to further promote early settlement through amendments to CPR Pt 36 (offers to settle), to the Pre-Action Protocols, and to the disclosure process.[250] A small number of reforms to the CPR were subject to small scale pilot schemes, the aim of which was to identify practical implementation problems and enable them to be refined before full implementation. Examples of this included the pilot scheme that considered the introduction of concurrent expert evidence, as a means to both reduce the cost and time of expert evidence and improve its ability to assist the court in reaching accurate decisions concerning such evidence, and the pilot scheme concerning the assignment of cases to specific judges (docketing or judicial continuity).[251] An equally small number of discrete recommendations were also taken forward by specific working groups. For instance, as Clark & Jackson note, the recommendation that ADR should be promoted through the production of an ADR Handbook was taken forward by a working group chaired by HHJ Simon Grenfell. It would ultimately be published as the Jackson ADR Handbook.[252] Equally, work to take forward recommendations to promote self-regulation of litigation funding were developed by a Civil Justice Council Working Party.[253]

Given the number of reform recommendations, a decision was made the judiciary to take two steps to secure effective implementation. The first mechanism was, echoing the Middleton Review's call for oversight, the creation by the JEB of a Judicial Steering Group, chaired by Lord Neuberger MR. Other members were Sir Maurice Kay (Vice-President of the Court of Appeal's Civil Division), Sir Martin Moore-Bick (the Deputy Head of Civil Justice), and Sir Rupert Jackson. It met fortnightly.[254] This was the first time that such a steering group had been established to oversee implementation.

The Steering Group was complemented by another innovation, albeit one that had an implicit precedent: it was the establishment of the *'Jackson Five'*.[255] This refers to the Review's recommendation, which was implemented, that five Court of Appeal judges (Lord Dyson MR, Sir Stephen Richards (by then Deputy Head of Civil Justice), Sir Rupert Jackson,[256] Sir Nigel Davis and Sir Kim Lewison) should have responsibility for hearing appeals that arose concerning the reform recommendations as implemented. It was thus to try to ensure a consistent approach was taken to appellate interpretation of the legislative and procedural reforms introduced from 1 April 2013. This innovation can be seen as having an unconscious foreshadowing in the 1870s when, following reforms then, a small number of judges (inevitably due to the smaller number of judges then in the Court of Appeal) dealt with appeals that arose concerning the reformed landscape.[257] It had also, more recently, been foreshadowed following the implementation of the Woolf Review's recommendations, when as noted above, a small number of judges were assigned appeals on procedural issues.

The final aspect of implementation was explanatory in nature. For the first time, there was an explicit commitment to explain the nature of the reforms, seek to persuade critics of the utility of the reforms, and to highlight where implementation was not yet complete while making further suggestions how that could be achieved.[258] This was, primarily, carried out by the eighteen Implementation Lectures given by Sir Rupert Jackson, Lord Neuberger MR, Lord Dyson MR, Sir Vivian Ramsey and Sir Richard Arnold.[259] Examples of explanatory lectures include the 10th Implementation Lecture,[260] which explained the rationale behind the 10% increase in general damages that would be implemented by Simmons v Castle (2012) and the 18th Implementation Lecture,[261] in which Lord Dyson MR explained the rationale behind changes to the CPR's approach to providing relief from the adverse consequences of procedural non-compliance. The latter would ultimately go on to form the basis of the Court of Appeal's twin decisions on the issue, which reset the approach taken by the courts to this issue, in Mitchell v News Group Newspapers Ltd (2013) and Denton v TH White Ltd (2014).[262]

3.2.3.2 – Fixed recoverable costs – The supplemental Jackson Costs Review

One specific recommendation that was not, initially, implemented concerned the expansion of the fixed recoverable costs regime. This had been first recommended by the Woolf Review, but not implemented.[263] The Jackson Costs Review revisited that recommendation and repeated it. Again, post-Jackson it was not implemented. In November 2016,[264] however, Sir Rupert Jackson was commissioned by the Lord Chief Justice and Master of the Rolls to look at the question of fixed recoverable costs again in what became a Supplementary Report to the Jackson Costs Review.[265] The Terms of Reference of this, addendum to the third official Review, were:

> *'(i) To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.*

(ii) To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.

(iii) To report to the Lord Chief Justice and the Master of the Rolls by the 31st July 2017.'[266]

This Review was further required to approach the issue of fixed recoverable costs without any pre-conceived ideas.[267] It would thus, although it did not explicitly say so, look at the issue that had been subject to positive recommendations twice before from first principles. Whatever recommendations it was to reach were also expressly stated to be subject to further, formal, consultation by the Ministry of Justice.[268]

As with the Jackson Costs Review itself, the Jackson Fixed Costs Review, was carried out with the assistance of a range of assessors, one of whom had been an assessor on the original Review itself. Again, it also utilised working parties, which would look in detail at specific issues.[269] And, again it was carried out within a short timeframe: this time eight months. Furthermore, as the Briggs Review (which pre-dated it) had done, albeit to a lesser extent, it took into account the wider policy and reform background. It thus took into account a review of legal aid reforms introduced by LASPO, the then ongoing HMCTS Reform programme, and the Briggs Review itself. Most pertinently, it noted an ongoing and separate review of the case for fixed recoverable costs in clinical negligence claims that was being conducted by the Department of Health.[270]

The Jackson Fixed Costs Review, for the third time, recommended the introduction of an expansive fixed recoverable cost regime. It did so because it drew the conclusion that, *'the only effective way to control the costs of civil litigation is to do so in advance'*. It was thus the only effective way to secure effective access to the court by making litigation cost predictable (and lower than it would be absent fixed recoverability) from the outset of litigation. In doing so, it noted that the failure to implement fixed recoverable costs was the one major piece of unfinished business from the Jackson Costs Review. It also noted: *'At the same time [i.e., as implementing fixed recoverable costs], work must be done to streamline the litigation process and to control the amount of work which litigants and their lawyers are required to do.'*[271] In other words, notwithstanding the vast bulk of the Jackson Costs Review's recommendations having been implemented, the problem that they and previous reforms had sought to cure remained: the civil court's practices and procedures remained too complex and disproportionate to enable litigation to be conducted in reasonable time and at proportionate cost.

Notwithstanding the call for more reform, the Review's recommendations concerning fixed recoverability would go on, for the first time, to provide detailed and specified levels at which recoverability should be set. It thus avoided one of the problems that arose when the Woolf Review recommended the introduction of such a costs regime: arguments over the level at which recoverability should be set. To further facilitate effective introduction of such a costs regime, the Review also recommended that a new procedural case management track for civil claims be introduced – the intermediate track, which was to apply to financial claims of modest complexity with a value above £25,000 and up to £100,000. It also, as another innovation, set out explicitly how its recommendations should be integrated with the other, extant, reform and review processes.[272]

Finally, and specifically, it also made recommendations concerning fixed recoverable costs in clinical negligence claims. In that respect, it pre-empted the conclusion of the Department of Health's own consultation on the subject, which would not conclude until January 2018 with the publication of the responses to its own consultation. It recommended that the Civil Justice Council establish,

jointly with the Department of Health, a working party to develop a bespoke fixed recoverable costs regime for clinical negligence cases.[273] That working party was subsequently established and reported in 2019. It was unable to secure agreement on the level of recoverability, concluding that the Government's consultation arising from the Jackson Fixed Costs Review might deal with the issue.[274] Further Government consultation did not, however, take place in 2022, with the Department of Health issuing its conclusions the following year.[275] While it was understood at one time that such a scheme would be introduced in autumn 2024, no scheme has as yet been introduced. It remains an unintroduced aspect of fixed recoverable costs reform.[276]

It was not until March 2019, eighteen months after the Fixed Recoverable Costs Review was completed, that the Ministry of Justice consulted on its recommendations.[277] That consultation concluded with the Government's response to it in September 2021;[278] four years after the Jackson Fixed Costs Review was published. Following a further, targeted Government consultation carried out in 2023,[279] which came after publication of the draft fixed recoverable costs regime,[280] amendments to the CPR to introduce both a new intermediate procedural case track and extended fixed recoverable costs took effect in October 2023, i.e., twenty-seven years after the Woolf Review first recommended their introduction and fourteen years after the Jackson Costs Review recommended their introduction.[281]

3.2.4 – The Briggs Review

The Briggs Review's recommendations were accepted by the judiciary in January 2017, five months after its Final Report was issued.[282] The Government's response was more nuanced, as it differed depending on the recommendation made. Broadly, however, it too responded favourably following an initial consultation on how best to integrate the recommendations into the ongoing HMCTS Reform programme.[283]

3.2.4.1 – The Online Solutions Court

The centrepiece of the Briggs Review's recommendations was the creation of a new, standalone online court for money claims: the Online Solutions Court, as Briggs called it. As Briggs would describe it, it was intended to *'be a new court, not an organic development or revitalization of the County Court, which currently has jurisdiction in relation to the relevant classes of claim'.*[284] Twenty-one of the Review's sixty-two recommendations were focused on it.

From the outset, the Government rejected this, the primary, recommendation of the Review. There was to be no new, standalone, online civil court. The approach taken was both less ambitious and more ambitious. Less ambitious because rather than creating such a court, the Government with the judiciary had determined to digitalise the civil and family courts and tribunals. They thus decided to adopt the approach rejected by the Briggs Review. More ambitious, at least technically, because rather than adopting the Review's idea of a staged approach to implementation, through which the new Online Court would have a limited jurisdiction that would then expand over time, digitalisation would encompass the two courts and the tribunals by creating a uniform digital process for them all, and do so all at once. As Rozenberg noted,

> *'Sir Oliver Heald, the then justice minister, told me in March 2017 that – rather than confine the new jurisdiction to money claims as Lord Justice Briggs had recommended – ministers*

thought it desirable to have online procedures that were flexible enough to cover family proceedings and tribunal work as well.'[285]

This would be an approach described by the Lord Chief Justice, Lord Thomas, as having been verified by a *'leading firm of consultants'*, which had independently reviewed the HMCTS Reform programme of which it was one of the three main elements, as having *'a breadth of ambition . . . unmatched anywhere in the world'*.[286]

Perhaps most significantly, the rejection of the Review's primary recommendation appeared to have been taken before the Review concluded. This is apparent as the Review's Final Report acknowledged that HMCTS had already taken its own view and concluded that it would create its own Online Court and procedure. As the Review put it,

'I am informed that the MoJ has now reached its own policy view in favour of separate rules and procedure for the Online Court, governed by a new, separate, rules committee, and is preparing primary legislation to that end. Their main driver for this decision is the view, which I continue to share, that nothing less will bring about the change from an excessively lawyerish culture necessary to enable those without lawyers on a full retainer to navigate the court's processes. But the MoJ has yet to decide whether the Online Court should be part of, or separate from, the County Court.'[287]

That the Ministry of Justice had reached this, its own, conclusion as part of the HMCTS Reform programme can be seen as one, important, consequence of the Briggs Review being conducted against the backdrop of a moving target: reform decisions were being taken notwithstanding the fact that a review looking at such issues had not been completed. Reviews against the backdrop of such a target are, perhaps, not the best approach to conducting effective policy development or reform.

The legislation to give effect to the Government's conclusion on the Online Court was the Prison and Courts Bill 2017, published in April that year, i.e., nine months after the Review's Final Report was published. It made provision for the creation of the new, tri-jurisdictional, online procedure. This was to be done through the creation of an Online Procedure Rule Committee, which would have the power to create it.[288] In other words, it marked the public, implicit, rejection of the creation of a new standalone online civil court: the legislation made no provision for the creation of any such new court. It solely made provision for the creation of online rules for the existing civil and family courts and tribunals. That Bill was not, however, enacted due to the 2017 General Election. A second attempt to create this new Rule Committee and hence the power to create a tri-jurisdictional online procedure was attempted via the Courts and Tribunals (Online Procedure) Bill 2019.[289] It too was not enacted. A third, and final, attempt succeeded via the Judicial Review and Courts Act 2022.[290] It thus took five years to give effect to the legislative underpinning for this reform.

In tandem with the Government's attempt from 2017 to 2022 to create the jurisdictional basis for the creation of common, digitalised processes for the civil and family courts and tribunals, further developments took place within the civil courts that were based on the idea that the existing civil courts' processes would be digitalised. One key focus of this concerned the Briggs Review's recommendations concerning the nature of the digitalised procedure. Its recommendations in this regard sought to completely reorient the nature of the civil court process. The historic approach taken by the civil courts is that their role is to resolve disputes through deciding proceedings before them by court judgment. To varying degrees their processes also promote consensual settlement,

i.e., through providing for early disclosure of evidence to enable parties to assess the strengths and weaknesses of their respective claims and defences and hence promote negotiation and settlement. And, since the introduction of the Woolf Review's reforms via the CPR and the Pre-Action Protocols, the civil court process both before and after proceedings have commenced has actively promoted early consensual settlement.

The Briggs Review took the promotion of consensual settlement a significant step further. In doing so it adopted a three-tiered approach to dispute resolution, outlined above. This had first been pioneered by Ury, Brett and Goldberg in the United States in the early 1990s[291] and had been incorporated into the Dutch Rechtwijzer and the Canadian Civil Resolution Tribunal, both of which the Review examined.[292] It had, as the Briggs Review noted, also been advocated in differing ways by the Civil Justice Council and JUSTICE.[293] The specific recommendations made were that the proposed new Online Court should have the three-tier approach, noted above.[294] Given the nature of the three tiers, it was specifically recommended that the planning and design of Tier One commence as soon as possible if it was to be operational by 2020, when the HMCTS Reform programme was intended to conclude. This was said to be a matter of priority. As the Review put it,

> *'the Online Court is only worth proceeding with if it offers a real prospect of greatly improved access to justice to those individuals and small businesses who (or which) cannot afford, or cannot sensibly put at risk, the disproportionate cost of legal representation on a full retainer. Stage 1 is the essential part of the Online Court for achieving that objective. It is, furthermore, the hardest and most time-consuming part of the process to design and test. If it is not embarked upon now, most commentators agree that it is unlikely to be ready for public use when the Reform Programme closes.'*[295]

Tiers Two and Three were to be developed and tested during, or rather as part of, the HMCTS Reform programme. In the event, Tier One was never developed. It was finally, and unofficially, confirmed that its development had been abandoned in early 2023,[296] although it was apparent from speeches given by the senior judiciary prior to that date that it was no longer considered to be a part of the HMCTS Reform programme or the future development of what is now referred to as the digital justice system.[297] It would be replaced by a new approach that is intended to see many existing advice and dispute resolution providers, i.e., private sector and public sector providers, conform to standards set by the Online Procedure Rule Committee, albeit they sit outside the civil courts.[298] On one view, it could be said that this approach maintains the spirit of the Briggs Review's recommendation concerning Tier One, but rests on its implementation through the co-ordination and integration of existing and new means that exist outside the civil courts while marking a rejection of the actual recommendation. It ought also to be noted that its rejection occurred eight years after the recommendation was made and three years after it was anticipated that it would be brought into effect at the, expected, conclusion of the HMCTS Reform programme. In that latter regard, it should also be noted that that Reform programme was itself formally wound up in spring 2023, three years after its initially scheduled end-point. At its conclusion, the initial ambition of the Reform programme had barely been realised.[299] HMCTS explained in this regard that its implementation had *'proved challenging to deliver . . . It [was] also clear that the original scope was too ambitious . . . [and] has faced delays and reductions in scope'*.[300] As Lord Thomas CJ had noted in 2016, it was – as the judiciary had been told – the most ambitious programme in the world.[301] That ought to have served as more of a warning than perhaps it did. It should serve as a warning to future reform.

Where the Reform programme had reached by its conclusion is thus telling. The pilot scheme that introduced online procedures for money claims, i.e., which would give effect to the Briggs Review's aim of creating a digital process for dealing with monetary claims albeit within the County Court rather than within a new Online Court remained that: a pilot scheme. It had commenced in August 2017 and was and is still not near completion.[302] Within that pilot scheme, a further pilot was commenced in 2024 to promote mandatory referrals to mediation for claims within the scheme. This was the closest that the Reform programme had reached by that date to give effect to Tier Two of the Briggs Review's model for its Online Court. More disappointingly, overall, the Reform programme only resulted in 23% of County Court claims coming within the digitalised process.[303] As the Briggs Review noted, the viability of its recommendations were predicated on the successful implementation of that programme. Even if implemented then, it is unlikely that they would have achieved any real success given the extent to which the HMCTS Reform programme had failed to achieve its objectives.[304]

Given this, it is reasonable to conclude that both in terms of its recommendation to create a standalone Online Court and its recommendations as to how a digitalised procedure within that court should operate, the Briggs Review failed to secure its aims in any real sense. Its recommendations had either been rejected or their implementation was not achieved to any substantial degree. That remained the case by December 2025, nine years after the Briggs Review's Final Report was issued. A more effective approach, a more modest one, might then have been one that sought to create a standalone Online Court of the manner the Briggs Review recommended and which had already been created in Canada in 2015,[305] where it has been operative since that time. The sad fact is that England and Wales failed to create in ten years something that had elsewhere been developed and had been running and expanding in terms of its jurisdiction for that entire period.

3.2.4.2 – The other recommendations

The Briggs Review's other recommendations did not fare well either where implementation was concerned.

Its promotion of the greater use of online dispute resolution remains unimplemented. Provision of out-of-hours mediation in the County Court was not reinstated, although the recommendation to increase small claims telephone mediation was given effect through the expansion of small claims mediation in 2024. That expansion, however, arose from a 2022 Government consultation focused on the introduction of mandatory ADR, which in turn built on two reports by the Civil Justice Council that recommended the introduction of mandatory mediation.[306] Those recommendations are now given effect by the pilot mandatory mediation scheme that is itself a part of the Online Civil Money Claims pilot scheme, noted above. At best, the Briggs Review and its recommendations on ADR could therefore have been said to have influenced this development indirectly, as the Civil Justice Council in its reports considered them in formulating its approach to ADR.[307]

The Review's recommendations concerning court administration and structure show some implementation. Its recommendation that judges be provided with training regarding the Reform programme is in place.[308] Triage systems are in place, although some have been in place since 2015, i.e., they pre-date the Review.[309] The County and High Courts remain separate, although the High Court District Registries also remain in existence as no new single digital portal for issuing civil claims has been created nor appears likely to be created in the near future. The County Court's financial limit has not, as recommended, been abolished,[310] nor has there been an increase in the threshold for issuing claims in the High Court. Concrete steps were, however, taken to ensure that increasing numbers of complex and specialist disputes are resolved outside London. This has been particularly promoted

through the development of the Circuit Commercial Court, the successor to the Mercantile Court, as part of the Business and Property Courts. Significant steps have also been taken to increase the authorisation of trained court officials, i.e., those who are barristers, solicitors or chartered legal executives, to carry out judicial work within the County Court through the HMCTS Reform programme and the Online Civil Money Claims pilot scheme.[311]

In respect of the wider recommendations, no further review of the appeal process has taken place, nor, subject to one exception, have steps been taken to rationale the overlapping jurisdiction of the civil and family courts and First-tier Tribunal or between the civil courts and Employment Tribunals, although it is likely that that may now happen as a consequence of the development of common online procedures by the Online Procedure Rule Committee. The one exception was a pilot scheme run unofficially by the Civil Justice Council that considered how property disputes with overlapping County Court and First-tier Tribunal jurisdiction could be managed more effectively. That pilot did not, however, result in any permanent reform, as that would require primary legislation.[312] It is also unclear as to the extent to which its recommendations concerning operational management and administrative arrangements for the Head and Deputy Head of Civil Justice have been put in place.

The most significant single recommendation, outside those relating to the Online Court, concerned enforcement. Its primary recommendation, to abolish the split responsibility for enforcement between the County and High Courts and replace that with a digitalised process as part of the HMCTS Reform programme has not been implemented. On the contrary, the need to urgently move away from the status quo has recently been echoed by the Civil Justice Council in its 2025 report on enforcement reform. It echoed the Briggs Review and concluded that the current dual court approach did not work and should be replaced by a 'single unified digital court for enforcement'.[313] The question of reform to High Court enforcement officers, agents and County Court bailiffs remains open and has also been subject to recent further consideration and recommendations by the Civil Justice Council.[314] And, in so far as the Briggs Review's recommendation that urgent investment be provided to improve the delivery of enforcement services , as the Civil Justice Council concluded in 2025, 'Nothing appears to have been done to improve the bailiff service in the years subsequent to that [the Briggs Review's] report.'[315] As with its main recommendations concerning the Online Court, the Briggs Review was generally more of a lost opportunity than it was anything else.

3.3 – Implementing reform – conclusions

The four Reviews were subject to different levels of implementation. This ranged from the near complete implementation for the Woolf and Jackson Costs Reviews, partial implementation for the Civil Justice Review 1988, to near complete non-implementation for the Briggs Review. Where the first three Reviews are concerned it is beyond doubt that they effected significant change to the civil courts and their practices and procedures. It unfortunately cannot properly be said, however, that they increased access to justice. England and Wales fares badly on global access to justice indicators, where it measures lower levels of access than many comparable countries. Cost and delay within the civil justice system are no better now than previously, with the Law Society reporting in 2023 that the latest round of reform, i.e., the HMCTS Reform programme, had seen delays increase by 64% and costs increased by 34% where online civil justice portals were used.[316] Moreover, as HMCTS's own civil justice quarterly statistics show, the numbers of litigants-in-person continues to grow. In 2020, 64% of civil claims saw both claimants and defendants have legal representation. This had declined to 47% in 2023 and 41% in 2025.[317] This decline long post-dates the implementation of LASPO and its reduction in civil legal aid; as such it is – at the least – strongly suggestive that litigation

cost is continuing to have, and increasingly having, an adverse effect on individuals' ability to secure legal representation, which as Zuckerman has it, leaves them suffering both an efficiency and a justice deficit where access to justice is concerned, noted above.[318]

Where the 1988 Review is concerned, arguably its major achievement was to effect the restructuring of the relationship between the County and High Courts and to place the introduction of active court-based case management on the reform agenda – even if it did not achieve its implementation. The former reform not only remains in place, it has been built upon through subsequent reforms that have further shifted the jurisdictional boundaries between the two courts, seen the creation of the single County Court and the creation of the Business & Property Courts, all of which have been intended to further promote the more efficient and hence cost-effective management of civil litigation. Where the latter is concerned, that would ultimately be implemented following the Woolf Review and now underpins the civil courts' primary means to control the cost and pace of litigation. That there is an absence of evidence to demonstrate how and to what extent it produces positive benefits does, however, qualify any claims to its success in achieving more efficient, cost-effective litigation.

Notwithstanding implementation of a significant proportion of its recommendations, the 1988 Review cannot fairly be viewed as having had a significant impact on improving access to justice. First, as Ramsey concluded, it was 'a failure if judged by the standards of rational policy analysis'.[319] This conclusion was based, among other things, on the Review's failure to have clear policy objectives, that it did not draw upon serious data but rather relied on factual studies that had no proper evidence-base, and that it failed to properly consider alternatives to its proposed solutions which, in turn, where not based on a sound evidence-base. It was also based on his assessment that the Review placed too great a focus on protecting the High Court, and particularly the Commercial Court, to the detriment of individuals whose disputes were not of the nature to fall within the jurisdiction of those courts; in other words, it was focused on promoting the interests of some litigants over the interests of others. Secondly, there is no empirical evidence to demonstrate what positive effect its reforms had. Thirdly, and importantly in the absence of evidence to support a positive case that it promoted access to justice, the fact that its reform agenda, almost immediately its recommendations were implemented, was overtaken by a further Review, the Woolf Review, is strongly suggestive, at the very least, of its inadequacies as a vehicle for improving access to justice – a point underscored by the fact that between the Civil Justice Review 1988 and Woolf Review, the independent Heilbron-Hodge Report made detailed recommendations that went far beyond the 1988 Review in the pursuit of reforms to increase access to justice.

Where the Woolf Review is concerned it is apparent that it had much greater impact than the 1998 Review. Almost all of its recommendations were implemented. It completely reshaped the operation of the civil courts through its introduction of the CPR as a single civil procedural code that was to be subject to a novel purposive overriding objective and which incorporated active case management by the civil courts. Along with its other procedural innovations, such as the introduction of procedural case tracks, and reforms to the approach to evidence-gathering through a more proportionate approach to disclosure and expert evidence, over the last twenty-five years it has fundamentally reshaped the operation of the civil courts. As with the 1998 Review, however, it cannot properly be said that the Woolf Review achieved its objective of improving access to justice. While early, limited, empirical studies conducted by the Government did suggest that its recommendations resulted in a reduction in procedural complexity, cost and delay, and led to a reduction in claims being commenced due to an increase in early, pre-action settlement as well as an increase in settlement after proceedings had been issued, those results were not maintained.[320] By 2009, when the Jackson

Costs Review was initiated, it was clear that the Woolf Review had, in many respects, failed to achieve its objectives. This is evident, notwithstanding the general absence of qualitative or quantitative data, in three key ways:

First, procedural complexity had reasserted itself due to multiple amendments to the CPR being made regularly each year after it was introduced.[321] This was accompanied by a stark growth in judicial interpretation and clarification of individual procedural rules. As a consequence, as Sime put it in 2020, the CPR is now a collection of some simple rules, simply expressed (as the Woolf Review intended) and some highly technical rules, some of which are difficult to understand and apply (as Sime put it diplomatically, such rules are 'not always a success'). That the CPR is now also supplemented by a wealth of Practice Directions, Court Guide, and individual Practice Guides, Practice Statements and Practice Notes only goes to emphasise the growth in its technicality and complexity. Taken together these developments not only speak to the Woolf Review's failure to overcome the procedural barrier to access that stems from procedural complexity, but also the continuing failure to overcome it.[322] It ought therefore to be unsurprising that the Civil Procedure Rule Committee has a standing committee, the focus of which is to simplify the CPR, albeit it is unable to stem the tide of ever-increasing rule amendments, guidance etc.

Secondly, specific reforms intended to tackle significantly problematic areas did not achieve their objective. For, instance, the Woolf Review's recommendations to improve the disclosure process to make it more proportionate and thus reduce the cost and time spent on it by parties failed to do so. Consequently, the disclosure process has, since the CPR's introduction, been subject to three further sets of reform, each of which have also tried to achieve that aim.[323] As disclosure was identified – as it had been since the 1880s[324] – as a major and continuing source of disproportionate litigation cost, the failure of the Woolf Review to achieve improvement in this area is as telling, where any assessment of its overall success is considered, as it ought to be unsurprising. More broadly, as Zander highlighted in 2009, such evidential studies as were carried out demonstrated that rather than there being a reduction in claimant costs since the CPR was introduced, there has been a 15–20% increase. That figure factored out additional increases caused by the changes introduced to CFAs in 1999,[325] which had separately created a new cost burden. As he put it, rather than reduce litigation cost (and hence promote access to justice through ameliorating the financial barrier to access) the Woolf recommendations had in fact had a 'strong . . . effect towards increasing costs'.[326] Costs, particularly claimant costs, remain then a powerful financial barrier to access.[327]

Thirdly, it is also doubtful, at best, that the Woolf recommendations helped reduce litigation delay. Few empirical studies were carried out to consider the question of their effect on delay. Such studies that were done showed that the reforms either had had no effect on delay or had, at best, had a 'weak effect'.[328] Where it had had a weak effect, that was focused on claims that were issued. It was, however, also seen to increase delay in those cases that settled before issue.

As with the 1998 Review, the strongest evidence, in the absence of detailed qualitative and quantitative empirical data, that the Woolf Review failed to achieve its objectives was the establishment of the Jackson Costs Review in 2009, ten years after the Woolf Review's recommendations were implemented.[329] Unfortunately, except in one respect, the Jackson Costs Review also cannot be seen to have improved matters. The one exception is its reforms to CFAs, and particularly its recommendation, as implemented, to abolish recovery of CFA uplifts and insurance premiums from defendants where funded claims succeeded. This achieved its objective. It was not, however, a costs-related problem that arose from either the 1998 or Woolf Review. It was a cure to a problem that arose from

the separate policy development promoted by the, then, Government in 1999 to reduce and replace legal aid with a form of private litigation funding. That the Jackson Costs Review had to tackle this issue points to a lack of joined-up, coherent policy-making where litigation cost is concerned.

Where the Jackson Costs Review's attempts to reduce litigation cost generally are concerned, it is also unfortunately evident that they were not as successful as it was hoped they would be.[330] That it failed to address the question of costs effectively was noted by the Briggs Review in 2015. As it put it, costs continued to be disproportionate and, as such, continued to act as an effective financial barrier to access to justice.[331] Cost disproportionality also lay behind the calls for and introduction of a specialised disclosure regime for business and property cases. It did so because the reforms to disclosure following the Jackson Costs Review, as had previous attempts, failed to reduce costs sufficiently in this area.[332] Overall, it too cannot be seen as resulting in increased access to justice. The success of its later promotion of fixed recoverable costs remains an open question.[333]

Finally and more shortly, the Briggs Review cannot be seen as having had any chance of reducing litigation complexity, cost or delay as so few of its recommendations were implemented. It will remain an open question then whether it too would have followed its predecessors in failing to improve matters or whether, if it had guided the HMCTS Reform programme as it intended, it would have had a positive effect. There is, however, an argument that it has had an enduring indirect effect. Its promotion of the integration of mediation into the practice and procedure of the civil courts[334] and the promotion of digital pre-action advice and settlement processes continues to influence civil justice reform. It does so by underpinning, as noted above, the promotion of a public–private partnership between the civil courts and private sector as part of Sir Geoffrey Vos MR's digital justice system.[335] The ultimate effect of these developments is yet to be seen, but they hold the sole hope that the Briggs Review will ultimately have, to some degree, spurred the introduction of positive reform.

In **part four**, the question of how to engage in more effective reform in the light of this experience is considered.

4 Reforming civil justice

4.1 – Overview

Parts One to Three outlined the nature, purpose, structure and approaches of the four major civil justice reform Reviews that have been carried out over the past forty years. Taken together those Reviews show that England and Wales has over that period made repeated, almost continuous and multiple attempts to improve access to justice. They show that there are no enduring structures that are capable of co-ordinating, evaluating, implementing and maintaining effective long-term reform. They show that this deficit arises for definitional, constitutional, institutional and empirical reasons. That they do so is apparent from the approach taken by the four Reviews to reform:

- First, while the four Reviews sought to improve access to justice, it is clear that they understood that idea in a narrow, legalistic and court-centric sense. Access to justice for the Reviews meant access to the civil courts, judgment and enforcement. There was thus no focus on other, broader aspects of access to justice, such as ones relating to unmet legal need, which is considered further below. This is a definitional deficit.

- Secondly, as the Middleton Review's consideration of the Woolf recommendations illustrated, a pernicious misconception that the civil justice system, and hence the civil courts, form part of the service sector of the economy and that they exist simply to secure private benefits through dispute resolution to individual litigants has developed since the 1990s. This misconception of the nature, role and value of the civil justice system in society is a constitutional deficit.

- Thirdly, reform, as exemplified by the four Reviews and the plethora of smaller reviews that have taken place over the past forty years, has been characterised by reactive, ad hoc, periodic initiatives carried out predominately by members of the judiciary and the legal profession, which examine and re-examine the same issues, including those concerning recommendations – like the need for updated information technology (IT) provision or enforcement reform – that were made previously but not acted upon. There has been no sustained, long-term and proactive programme of reform. Nor has there been one carried out consistently with an overarching strategy. England and Wales equally lacks enduring structures that are capable of co-ordinating, evaluating, implementing and maintaining effective evidence-based, long-term reform. This is an institutional deficit.

- Fourthly, reform has not been based on robust qualitative and quantitative evidence to identify the need for reform, the causes of access to justice problems, or to test and evaluate the efficacy of reform recommendations. None of the four Reviews were based on such evidence. Rather they were based on perception and anecdotal evidence. While there were attempts to subject their reform proposals to evidential testing, such evidence

as was gathered was not the product of independent scrutiny or analysis, except in limited circumstances. None of their recommendations when implemented were subject to long-term data-based monitoring. This is an evidential deficit.

Taken together these four deficits underpin England and Wales' lack of institutional capacity:

- to oversee the development and implementation of a coherent, co-ordinated reform strategy; and
- to ensure that reform, from development to implementation to ongoing monitoring and continuous improvement is evidence-based.

The existence of these deficits, which are further elaborated in this Part, and the general failure of reform is not to say that the Reviews were unnecessary or that they failed to introduce some positive and beneficial changes. They did. Structural simplification where the County and High Courts was concerned was a necessary step in the direction of procedural simplification. The aim of tailoring procedure to the nature, value and complexity of proceedings as a means to promote greater procedural proportionality was a step towards the better marshalling of the courts' and parties' resources in the pursuit of dispute resolution. The promotion of ADR as a complement to the litigation process to assist parties to resolve their disputes consensually and at lower cost and more speedily than through litigation was another such positive development. Perhaps the most significant principled benefit was the Woolf Review's introduction of an explicit commitment, through the Civil Procedure Rules' (CPR) overriding objective, to what Zuckerman has described as an understanding that the civil courts as a public service need to be managed fairly for the benefit of all their users.[336]

Even accepting these positives, put bluntly, the very fact that each of the Reviews was commissioned to tackle the same problem as its predecessor speaks plainly to one fact: none can properly be said to have had a notable positive impact on improving access to the civil courts through the reduction of litigation complexity, cost or delay. On the contrary, in some cases, they had a negative adverse effect.[337] Ultimately, their failure to bring about lasting improvements is most apparent, as Byrom recently pointed out when she noted how the World Justice Project's recent Rule of Law study made clear that 'Global indicators suggest that people find it harder in the UK than in other comparable countries to access and afford civil justice'.[338] It is difficult to conceive how that could be the case if any of the four Reviews had secured any of their objectives to any lasting degree.

Perhaps most telling are the Justice Select Committee's recent conclusions on the state of civil justice in the County Court, that is to say the court where approximately 95% of civil claims are pursued.[339] It concluded that notwithstanding the HMCTS Reform programme the evidence shows that England and Wales has undergone a decade of increasing endemic delay in the court and the failure of the civil court digitalisation programme;[340] a point underscored by the Law Society's evidence on increasing delay and expense in the digitalised civil justice system and HMCTS's own civil justice quarterly statistics, both noted earlier.[341] Equally, as the Select Committee noted, the County Court's processes remained as complex as they were in the 1980s, notwithstanding the four Reviews, each of which aimed to simplify them.[342] Unsurprisingly, the Select Committee has called for, another, urgent and fundamental review.[343]

In the light of this, it is difficult to conclude that the past approach to civil justice reform, focused primarily on reducing barriers to the civil courts, has contributed to any real degree to improving access to justice. If any such urgent review as that called for by the Select Committee is appointed and it

follows the pattern of any of the four Reviews examined here, the significant concern must be that it too will fail to improve access to justice. It will simply form part of an ever-repeating cycle of failed reform. In this Part, eight interlinking and mutually supportive recommendations are made that are intended to break this cycle, improve the reform process and through that improve access to justice. Those recommendations, if implemented, would overcome the four deficits that currently undermine the achievement of effective civil justice reform and access to justice in England and Wales. They are based on lessons that can be drawn from the four Reviews. The recommendations can be summarised as follows:

- the current definition of access to justice should be replaced with a broader, more inclusive one to refocus reform away from its past court-centric understanding of the civil justice system;

- future reform should be underpinned by an explicit recommitment to the idea that the civil justice system is a public good. As a necessary corollary, the misconception that it forms part of the service sector of the economy and simply enables individuals and businesses to secure private benefits for themselves should be rejected. This will ensure future reform is carried out on a sound constitutional understanding of the civil justice system and access to it;

- a permanent Civil Justice Reform Institute should be established by statute. It should have oversight and responsibility for the development and implementation of a long-term coherent strategy for improving access to civil justice;

- all future civil justice reform should be evidence-based, including the economic case for reform. This should be facilitated through the establishment of a permanent Access to Civil Justice Institute, which should be responsible for evidence-gathering, assessment and analysis at all stages of the reform process;

- future reform should be informed by rigorous comparative study of other jurisdictions' approaches to access to civil justice and its reform. This will facilitate English and Welsh reform learning from successful and unsuccessful reforms in those jurisdictions. Lessons could, for instance, be properly drawn from the successful approach to civil court digitalisation in New Zealand;

- a single body should be responsible for implementing reform. Ideally, this body should be a sub-committee of the Civil Justice Reform Institute;

- all future reform should, where necessary, be piloted and tested before full implementation. This will enable effective evidential testing of its efficacy, revision where necessary and the identification of unintended consequences prior to full implementation; and,

- reform and the institutional capacity to implement it effectively should be underpinned by long-term, sustainable Government funding.

The specific recommendations are set out in detail in the remainder of this part.

4.2 – Overcoming the definitional and constitutional deficits

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

Each of the four Reviews was, as is evident from Parts One to Three, focused predominantly if not exclusively on the civil courts and their practices and procedures. In the context of the Reviews, access to justice meant access to those courts, civil judgments and, where necessary, enforcement of those judgments. Access to justice in this sense is what has been called access to legal or adjudicative justice.[344] There is nothing new in this. It has underpinned each of the civil justice reviews carried out in England and Wales since the 1820s, when the Chancery Commission considered what, if any, reforms needed to be effected to the Court of Chancery to reduce the cost and delay in litigation before it.[345] This is the definitional deficit underpinning and undermining current approaches to reform: it is one that gives reform too narrow a focus. This, the first recommendation, seeks to overcome this deficit.

Effective access to adjudicative justice certainly requires cost-effective and timely access to civil courts, judgment and enforcement that is easy and practical because civil procedure is as simple as possible. It also requires that process to be as inexpensive as possible. It also must be timely, so that judgment and enforcement comes within a reasonable time. To focus on complexity, cost and delay within the civil courts, their structures, and their procedures, as the four Reviews did, is however to take a partial approach both to access to adjudicative justice and, more importantly and problematically, to access to justice in its broader sense.[346]

First, access to adjudicative justice goes beyond civil courts and their procedures, which produce judgments and enforcement (access to resolution of legal disputes by the courts). As Creutzfeldt et al have rightly noted, access to adjudicative justice also requires 'access to legal advice', i.e., access to lawyers as the means to secure effective legal advice and representation.[347] A full consideration of access to adjudicative justice is something that the four Reviews cannot properly be said to have achieved as:

- The Civil Justice Review 1988 did not focus on access to advice and assistance as it was intended to complement the Benson Commission's focus on the legal profession, access to legal aid and legal education. It thus took a partial approach to adjudicative justice because it was the second part of a wider review process.[348] As such, it could not have taken a rounded, holistic view of the effects its proposed reforms may have on access to advice and assistance. Its recommendations were weakened as a consequence.

- The Woolf Review also did not consider access to legal advice and assistance. It did not look at funding issues or the legal profession. Given that the Woolf Review made recommendations that included the introduction of new pre-action procedures and a new small claims and fast track procedure, consideration could have been given to questions of how legal advice and representation could be funded for those, lower cost, processes. Equally, as it recommended the introduction of Civil Magistrates, consideration could have been given to the need to train and provide legal advisers for them, which might have required some reconsideration of changes to legal education to, perhaps, enable legal executives to provide that role. Consideration could and should thus properly have been given to the structure of the legal profession. Again, it could be said the Woolf Review had no basis to look at issues concerning costs and the legal profession given the recent reforms in these areas by the Courts and Legal

Services Act 1990. That response makes the same error as that noted above for the Civil Justice Review.

- The Jackson Costs Review did, of course, focus on litigation funding, specifically reform of conditional fee agreements (CFAs). It also made other proposals for funding reforms, such as the introduction of damages-based agreements and the promotion of legal expenses insurance. It did not consider legal aid, although its recommendations were predicated on their being no change to civil legal aid provision.[349]

- The Briggs Review also did not consider the legal profession or funding issues. It did, however, have as a focus the provision of legal advice to individuals who did not have access to lawyers through the digitalisation of the civil courts.

Looked at in this way only the Jackson Costs Review could be said to have had as its focus both access to legal advice and representation, and access to resolution of legal disputes by the civil courts. Although, it was limited in this as it could only focus on private forms of litigation funding and it did not consider what, if any, reforms might be needed to the legal profession to properly effect its recommendations. Given that its proposals concerning fixed recoverable fees originated in the Woolf Review's adoption of that type of reform, and its origins in the approach taken to costs and funding in Germany, the question of the potential restructuring of lawyers' business models to accommodate that reform might have been thought to have been a pressing issue to consider given the differences between the English and Welsh and German legal professions and court processes.

The first conclusion to draw then is that when a future Review considers reforms aimed at promoting adjudicative justice, it needs to consider matters wider than access to the civil courts and their practices and procedures. Such a Review should, for instance, take account of wider issues concerning access. It could, for example, look at the type of issues that were looked at by the independent Low and Bach Commissions.[350] Consideration needs to be given to those aspects of the civil justice system that make access to the court real and practical and how any reforms affect them, and how, in turn, they affect access to the civil courts. A more rounded approach to adjudicative justice reform is thus needed in future, one that takes proper account of issues such as litigation funding, the nature and structure of the legal profession, and the availability and means of delivery of legal advice and assistance. It needs to do so if it is to formulate reforms that have taken into account the complexity and inter-relatedness of those different aspects of the civil justice system that make access to adjudicative justice properly effective.

Secondly, and more importantly, access to justice has a broader meaning than simply access to adjudicative justice. This broader meaning understands access to justice to encompass the 'ability of people to resolve and prevent their justice problems, and to use justice as a platform to participate in their economies and societies'.[351] It thus encompasses access to preventative justice and access to consensual justice.[352] The former encompasses access to public legal education so that citizens understand their rights and obligations and are thus in a position to properly order their affairs within the framework provided by the law. It also includes access to information and the means through which citizens can order their affairs to prevent or minimise the prospect that legal disputes can arise. The latter (as does access to adjudicative justice) encompasses access to information about how to recognise when rights have been infringed. It then includes access to information about how to seek redress informally and formally without resort to litigation and the ability to utilise those forms of redress effectively whether they are complaints systems, Ombudsman schemes or ADR process-

es that promote consensual resolution (the last including access to consensual resolution processes promoted or provided by the civil courts).

Access to justice in this broad, tripartite, sense (preventative, consensual and adjudicative) requires society to put in place measures that:

- ensure all of its citizens' legal needs are met. This is particularly acute where access to preventative and consensual justice is concerned;
- ensure that citizens do not perceive themselves to be excluded from accessing justice in any of its three senses, and through that perception become, in fact, excluded from it;[353] and,
- ensure that they can be positively enabled to secure such access.[354]

As evidence shows, England and Wales has significant unmet legal need.[355] It has, for instance, a population of which two-thirds do not know how to secure legal advice[356] – a problem that the evidence from recent studies in comparable jurisdictions shows is likely to under-represent the problem, as unmet legal need also needs to take into account the proportion of the population who do not know they have a legal need in the first instance.[357] A population that is unable to secure effective legal advice is one that is unable to properly secure access to preventative, consensual or adjudicative justice.

The broader definition of access to justice thus raises issues that go beyond effective access to the civil courts. Equally, those issues are inherently linked with it. An individual, for instance, who is unable to access information concerning their rights is less likely to perceive they have undergone a legal harm, i.e., one where their rights have arguably been infringed. They are less likely therefore to seek legal advice and, consequently, are unlikely to seek access to a court. Such individuals are also less likely to take steps to minimise the prospect that they could end up in a legal dispute. For instance, they may not take steps to order their affairs consistently with their legal obligations or they may not take steps to resolve a potential dispute at an early stage. Unaddressed legal issues inevitably create wider loses to individuals and society as a whole: the former through, for instance, adverse effects on individuals' health and well-being and increased financial problems caused by whatever it was that gave rise to an unavoidable legal issue or one that is not resolved at an early stage, and which then escalates causing further adverse impacts;[358] the latter through, for instance, increased pressure on welfare funding, the NHS and other public services, and the civil courts, arising from those adverse effects on individuals caused by the former.[359]

Given their focus on adjudicative justice, centred around the civil courts, the four Reviews did not consider access to justice in broader sense.[360] Each took as its starting point the idea that, as Dingwall and Cloatre put it in respect of the Woolf Review, 'the court is at the center [sic] of the civil justice system, [despite the fact] most law and society scholars would place it towards the margin'.[361] By focusing on financial, temporal and procedural barriers to access to adjudicative justice, the Reviews – and more importantly those who commissioned them – failed to engage with issues that contribute to unmet legal need, e.g.: 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 – matters that a broader access-to-justice-based reform focus would have addressed.[362] By doing so, they could not but fail to consider matters that need to be overcome if access to preventative, consensual and adjudicative justice is to become a practical reality across the whole of society. Where reviews focus on the civil courts and their procedures, they may recommend reforms that improve those institutions and thereby increase

access to adjudicative justice for those already able, in principle at least, to access the system. They may also increase access for those for whom access was previously constrained by the civil courts and their procedure's complexity, cost and delay. They are, however, not going to improve increase access to justice for those whose access is constrained by difficulties that lie in their lack of awareness of their rights, absence of knowledge of how to obtain advice, or who lack the confidence or capacity to pursue resolution of their rights. Consequently, court-centric reforms are likely to benefit only a small proportion of those who suffer an access to justice deficit.

This problem is reflected in the classic depiction of dispute resolution as a pyramid.[363] Court judgments form the tip of the pyramid, which ought to be unsurprising given the tiny proportion of issued civil claims that result in a judgment.[364] Negotiated resolution sits at the broad base of the pyramid. Those who are unaware of potential disputes or who, for whatever reason, do not take steps to seek any form of resolution are typically excluded from the pyramid. In reality they form the broadest base. Reform when focused on access to adjudicative justice ignores the broad base and under-emphasises all aspects of the pyramid other than its very tip. As Zander critically put it when considering the impact of the Woolf Review,

> *'whilst tinkering with the system we should bear in mind that we are operating at the very top of the pyramid and that the overwhelming majority of disputes will always be dealt with and resolved [or not resolved] without recourse to any form of dispute resolution system be in mainstream courts or some form of ADR.'*[365] (Words in brackets in the original.)

Reform cannot continue to do what Zander critically highlighted. Given this, the first recommendation for improving how civil justice reviews are carried out in future is to remove their court-centric focus. **Future reviews should take as their starting point the aim of increasing access to justice in its broad sense not in the narrow sense of adjudicative justice.** This will help secure two fundamental changes in approach:

- first, it will help promote the development of more holistic and systemic forms of review, i.e., ones that look more widely than the courts and their processes, and thus focus on unmet legal need, the reasons why it arises and how to overcome them;

- secondly, where reviews properly look at how to improve the civil courts and their processes and access to them, they do so by considering the impact such changes may have on broader access to justice issues, e.g., what impact civil court reform may have on legal literacy, on the ability of parties to consensually settle their disputes fairly and expeditiously, on the structure and content of legal education for lawyers, and on the nature and availability of litigation funding – both public and private – on preventative and consensual justice. It will thus promote reviews that consider the wider impacts and consequences of court-focused reform, while also considering the effects of reforms that improve access to the other forms of justice upon the civil courts.

In these ways the recommendation will move the focus of reform so that it considers how to promote access to preventative, consensual and adjudicative justice and treats them as three parts of an interconnected whole. By shifting the focus of reform to include the first two forms of civil justice, it will necessarily have to consider questions of access that are prior to those that concern access to the civil courts. It will promote a more holistic and coherent approach to reform. Overcoming the definitional deficit is the essential first step to a more effective process of civil justice reform.

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

The second recommendation also underpins all others. It is intended to overcome the constitutional deficit in civil justice reform. It concerns our understanding of the civil justice system's status, which each of the four Reviews properly understood to be an essential branch of Government and public service. The constitutional deficit arises not because of the four Reviews, but for reasons outside them.

The constitutional deficit arises from a fundamental misconception concerning the civil justice system articulated in the Middleton Review when it described the civil justice system in this way:

> *'the demand for civil justice in its widest sense is growing and is likely to continue to grow. Justice – by which I mean the satisfactory resolution of disputes – is part of the service sector of the economy. As the economy matures and as wealth and income grow, the overall trend will be for people to want and be willing to pay for more justice.'*[366]

There is an obvious error here: the civil justice system is not part of the service sector of the economy. It is part of the judicial branch of the state. Civil courts exercise the judicial power of the state, rather than simply provide a service to consumers. It is, of course, obviously true to say that the civil justice system has as its focus the satisfactory resolution of disputes, which could be seen as such a service.[367] Where the civil courts are concerned, this is clearly achieved through court judgments that resolve disputes according to law through the application of a fair procedure. If this was all that the civil justice system was concerned with, then the view expressed by the Middleton Report might be correct. The civil justice system and the exercise of state power, however, goes far beyond simply resolving disputes. It has multiple functions: it delivers justice, not a service, through resolving disputes; it holds the state to account and promotes the rule of law; it provides the legal framework within which individuals and businesses order their affairs, thus helping to both minimise the formation of disputes, provide the basis on which they can understand when a legal dispute has arisen, as well as resolve their disputes consensually. The Middleton Report's error can be seen in the following.

First, the Middleton Report's approach would see court judgments equated with consensual settlement achieved, for instance, through a negotiation or mediation process. In both cases, disputes are resolved. This, however, fails to place any weight on the significant difference that exists between satisfactory dispute resolution achieved via a court judgment and that achieved by a consensual process. Only in the former is the dispute resolved through the application of the law and the values that Parliament and the common law have decided it should instantiate. Only court judgments can guarantee justice according to law. To equate the two forms of dispute resolution, and the type of justice they deliver, is to make a category mistake.

Secondly, the civil justice system is also the means through which individuals and businesses can hold the state to account through judicial review: it has what has been described as a state-checking function.[368] It thus promotes the rule of law through promoting compliance with its requirements by Government and other public authorities. It enables individuals and businesses to order their affairs consistently with the law and its obligations through being able to obtain advice and information on the law and how it is applied by the courts, as seen through court judgments. It thus promotes the rule of law through enabling individuals to act lawfully and minimise the prospect that legal disputes will arise: it thus promotes preventative justice.[369] Hence the fundamental importance of access to legal advice and information beyond the civil courts, and reducing unmet legal need, i.e., to access to

justice in the broad sense.

In both these instances, the civil justice system has nothing to do with resolving disputes: it promotes the prevention of disputes and social and economic growth.[370] It also enables individuals to engage effectively in alternative or non-court-based dispute resolution, as without an effective framework of law and accessible civil courts, that would not be able to take place effectively. The system thus also facilitates and promotes consensual settlement.[371] Stating that 'civil justice in its widest sense' is merely a matter of satisfactory dispute resolution is to present an etiolated view of it.[372] It ignores its state-checking role, its role in effective private ordering of individuals' and businesses affairs consistently with the law, and its role in both securing preventative justice and promoting consensual justice.

This leads to the third error: that the civil justice system is part of the service sector of the economy. Here there is a fallacy of composition. It is true that alternative or non-court-based forms of dispute resolution, such as mediation, can and do form part of the service sector of the economy. The same is true of the provision of legal advice by qualified lawyers. That that is the case does not properly entail that the provision of means to obtain legal advice or information, the civil courts, the judiciary, civil court judgments or the provision of enforcement form part of the service sector of the economy. They too may be services, but they form part of the judicial branch of the state. They have a constitutional purpose. They are a part of the state, in the same way that the Government and Parliament are, and in the same way that the criminal and family justice systems are part of the state. They are the means by which the state exercises its judicial power. That some aspects of the civil justice system do form part of the service sector of the economy does not thus entail that all aspects of it do. In fact, those elements that form part of the service sector depend upon the existence of an effective civil court system and fair and equal access to it if they are to operate effectively.[373]

These errors may, on one level, appear to be academic ones with no practical impact. The problem here is that they underpin an approach to the civil justice system that has been criticised by Genn among others as explaining the fact that it is under-resourced and under-appreciated: it underpins, for instance, the lack of effective access to legal advice, legal aid and legal representation.[374] This is most starkly explored by Dingwall and Cloatre who highlighted in 2006, when reviewing the impact of the Woolf Review, how

'successive U.K. governments have decided that, although civil justice may be a public service, it is not a public good in the sense that Lord Woolf asserted in his first report. Although, as Lord Woolf notes, governments have been reluctant to defend the policy in public, their communications with the Civil Justice Council made it clear that they see the system as providing only private benefits for individuals rather than collective benefits for the society as a whole.'[375]

In other words, successive Governments had adhered to Middleton's misconception of the civil justice system's role and importance. Adopting an approach that understands the civil justice system as simply a means to provide private benefits to individuals through it being part of the service sector is one that make it difficult to fully appreciate that the state should properly support it and then act upon that. If it is simply a means to provide private benefits through dispute resolution, conceptually it is no different from alternative or non-court-based dispute resolution and no different from the provision of that by the private sector. And, thus, it can be left to the private sector to provide such a service. This is an approach that can lead, consciously or unconsciously, to the state shrugging off its responsibilities or, at the least, not properly committing to the civil justice system and not properly committing resources to it. It is an approach that leads to the civil justice system being, as the Justice

Select Committee put it recently, under-resourced and under-appreciated.[376]

If reform is to be carried out more effectively in future, there needs to be a clear and unequivocal rejection of the error – the constitutional error as Lord Scott put it[377] – of seeing the civil justice system as part of the service sector and as merely delivering private benefits to individuals via dispute resolution. This needs to be complemented by an equally clear and unequivocal commitment to the understanding that the civil justice system, and access to it in its broad sense, forms part of the state and that it is responsible for delivering a range of public goods that go beyond dispute resolution. Such a commitment ought to be taken on by Government, but more importantly – and to embed it – it ought properly to be set out within legislation that both provides for a public right of access to civil justice and requires Government to give effect to that right not least through giving effect to the other recommendations made in this report.

The **second recommendation therefore is that Government and Parliament give effect to the principle articulated by the Woolf Review that the civil justice system, and access to it in its broad sense, is a public good that goes beyond dispute resolution**. This should inform the approach to all future reform, just as it should the state's approach to the civil justice system generally. In doing so, legislative provision should be made to the effect that the Government be required to place funding for the civil justice system on a long-term, sustainable basis so that it is genuinely and practicably accessible for all of society: see recommendation eight. It should also make provision for the creation of the Civil Justice Reform Institute, referred to in recommendation three, and the Access to Civil Justice Institute, referred to in recommendation five.

4.3 – Overcoming the institutional and evidential deficits

4.3.1 – Recommendation three – create a Civil Justice Reform Institute

Each of the four Reviews was what is now commonly called a 'task-and-finish' Review: each Review was given a discrete task and once that was completed it concluded its work. It had no continuing role once its recommendations were made and its report published.[378] Each such Review had several common features: three of the four were led by members of the senior judiciary; each was supported by a small group of individuals drawn primarily from the judiciary, legal profession and academia. They were, apart from the Civil Justice Review 1988, all led and broadly dominated by the legal profession.

There is a significant benefit in drawing upon the expertise of the judiciary and the legal profession where civil court structure and procedure is concerned. The same point can be made where litigation funding is concerned, albeit the legal profession will have a greater understanding of the practicalities and economics of it than the judiciary as they utilise it in cases that both proceed to litigation and those that do not. They will also be far more aware of the economics of operating successful legal practices, particularly solicitors' practices, than the judiciary. Members of the judiciary and legal profession are undoubtedly then essential participants in any process that considers improving access to justice, particularly access to adjudicative justice. Where the judiciary are concerned – given that any such reforms will necessarily effect the administration of justice – from a constitutional perspective their active and leading participation is also essential. If, however, future reforms are to operate on the basis that their focus is improving access to justice in its broad sense, then a different approach will need to be taken to both the means by which reviews are carried out and by whom they are carried out. Overcoming the institutional deficit requires institutional change. This and the next

two recommendations are intended to overcome this deficit and create institutions more fully able to effect reform.

The starting point for institutional change is the need to move away from court-centric task-and-finish reviews. To properly improve access to justice in its broad sense requires the creation of a single, permanent and overarching standing body or committee (supported by a permanent and well-resourced administration). This Civil Justice Reform Institute should be accountable to the Government and the judiciary.[379] It should be provided for in statute in analogous fashion to the Civil Justice Council.[380] It should have responsibility for: ongoing oversight of the civil justice system as a whole and its continuous improvement, which would include making the economic case for reform and improvement; and the implementation of reform proposals; in this it would go significantly further than the remit of the Civil Justice Council, which is centred on review and reform recommendations to the Lord Chancellor and the judiciary concerning access to the civil courts, rather than the civil justice system as a whole.[381] That it should be a permanent body would also enable it to take evidence on the impact of reforms that were implemented, to ascertain in real-time whether they are working as intended or were producing unforeseen adverse consequences within the system. It would thus be best placed to give effect to informational feedback on the efficacy of reform, something which none of the four Reviews were able to do. Equally, it would be able to ensure an ongoing and consistent commitment to reform implementation over the long-term that was attempted to some degree by the Woolf and Jackson Costs Review reforms.

A Civil Justice Reform Institute would be able to ensure that reform did not focus solely or predominately on specific parts of the system with other important parts not being focused on sufficiently. It would be better placed than a judicial or lawyer-led task-and-finish review to ensure that reform is carried out consistently with a commitment to improving access to justice in a broad sense.[382] It could, rather, ensure that a strategic and coherent approach was taken to reviewing the system, its constituent parts and how they effected each other. Most importantly, it could be responsible for devising a coherent, long-term and overarching civil justice strategy intended to promote access to justice in the broad sense. Such an approach would, importantly, also help reduce the prospect that reform could – as noted in respect of the four Reviews' implementation – be undercut by concurrent but separate reforms. For instance, a permanent body with overarching responsibility for devising reform could ensure that reforms to litigation funding, e.g., legal aid, were consistent with and supported reforms to access to consensual settlement processes and the civil courts rather than – as was the case with the Woolf and Jackson Costs Reviews – implemented in a way that undermined the effective implementation of their recommendations.

Creation of a permanent Reform Institute that had oversight of reform focused on access to justice in the broad sense would entail a move away from reform focusing on the civil courts and being carried out under the auspices of a senior, generally judicial, figure.[383] In this respect, the recommendation made by Sir Rupert Jackson, following completion of the Jackson Costs Review, that future such reviews should, as they had in the past, be carried out by a single, senior member of the judiciary ought not to be followed.[384] There are two fundamental reasons for this.

First, as Dingwall and Cloatre point out, as noted above, if a judge is appointed to carry out a review of civil justice then the outcome is likely to be one where the report places the court at the centre of the system: it leads to court-centricity.[385] Other aspects of the civil justice system will not receive the attention that is required if overall improvements to access to justice are to be made. To ward against this, it would be better if the approach adopted by Lord Hailsham in appointing the Civil Justice

Review 1998 were followed in future. That is to say, the new Reform Institute should have an independent chair, one drawn from outside the legal profession and judiciary. They should, however, have a breadth of in-depth experience of the civil justice system and of facilitating effective co-design where there are multiple stakeholders and perspectives that need to be considered in guiding effective reform and implementation. A non-courts-based perspective would help promote a wider-ranging perspective, one that could take proper account of the whole civil justice ecosystem.

Secondly, a move away from the single-judge approach would also facilitate a move away from the idea that they be supported in their work by a small group of individuals drawn primarily, albeit not exclusively, from the legal profession and professional court users. Rather than that approach, a more effective one will draw on the expertise of individuals in all aspects of access to justice when that is understood in its broad rather than adjudicative sense. It would thus enable expertise to be drawn from those with expertise in the provision of legal advice (e.g., citizens advice, pro bono advice and representation), in the needs of vulnerable individuals and those who are disadvantaged: it would facilitate, as the Justice Select Committee rightly put it, 'co-design' with all those who use the system rather than lawyer-led design.[386] It could also ensure that those with expertise in systems design – not least technological design, digitalisation and artificial intelligence – as well as the promotion of dispute prevention, early resolution and various forms of litigation funding, are involved, and so on.

Such an approach would not exclude the judiciary, legal profession or academia. As before, they would have a crucial role to play, as they did in the four Reviews. The aim of the new approach facilitated by the creation of a permanent Civil Justice Reform Institute is to ensure that the voices and experience of all relevant stakeholders, both professional and importantly non-professional, can properly be drawn on as members of both the Reform Institute and any of its sub-committees, including its implementation sub-committee (see recommendation four). It is an approach that is better able to place non-professionals at the centre of the reform process, to take account of the needs of citizens, than a purely or predominately professional perspective is able to do. It can thus better place users at the centre of the reform process than the approach that the four Reviews exemplifies is able to do.[387]

This new approach would not mean that there should be no judge-led reviews of the civil courts in future. If, for instance, evidence demonstrated a need to reform aspects of the CPR, then that could be done by a task-and-finish sub-committee of the Civil Justice Reform Institute. That sub-committee could then be chaired by a suitably qualified judicial or legal member of the Reform Institute, with its wider membership drawn from co-opted experts and other Reform Institute members. The same would apply to other areas of the system and reviews of them. Such task-and-finish sub-committees would enable the right expert stakeholders to provide their assistance to area-specific reviews, while enabling the Reform Institute to consider their recommendations by reference to the system as a whole. This latter could occur through any such sub-committee reporting its findings and recommendations to the Reform Institute's management committee for it to consider how they might affect other parts of the system and what, if any, consequential reviews or potential reforms to those other parts might be necessary. In this way appropriate expertise could be targeted effectively and its recommendations considered in a holistic way to ensure a coherent, systematic approach is taken to reform, one that was also consistent with the Reform Institute's overall, long-term strategy for the promotion of access to justice.

The creation of such a Reform Institute would have a further benefit. One of the background features of the four Reviews has been, and this has increasingly been the case in the 21st century, the prolifer-

ation of other reviews on an almost continuous basis, often before the last review's reforms had had any chance to operate effectively or for their flaws to become evident. While it can critically be said that the four Reviews themselves amount to near continuous reform over a forty-year period, the multiple other reviews initiated by the Ministry of Justice and its predecessors and the judiciary since the Woolf Review's recommendations were implemented has been almost overwhelming. There have been multiple reforms to litigation funding.[388] There has been one major reform of legal services regulation.[389] And, there have been numerous reforms of the County Court and High Court's structure, processes and civil procedure.[390] A single body with sole responsibility for reform would help to eliminate, or at the least reduce, reform fatigue through ensuring reform was considered and implemented in a structured, coherent, cost-effective and systematic fashion.

Creation of a Civil Justice Reform Institute could also facilitate proper scrutiny of its recommendations. Of the four Reviews only the Woolf Review was subject to any independent scrutiny before its recommendation were implemented: that was carried out by the Middleton Review because there had been a change of Government between the Woolf Review being commissioned and the time when its recommendations came to be implemented. Independent scrutiny was thus an accident of political timing rather than anything else. Creation of a permanent Reform Institute that is itself independent of Government and the judiciary would entail that its reform recommendations would, as a matter of course, need to be subject to independent, arms-length scrutiny by Government before being approved for implementation. Government would need to scrutinise them, not least where they required potential legislative change.

The **third recommendation is therefore to ensure that future civil justice reform is the responsibility of a permanent Civil Justice Reform Institute**. Its remit, going further than that of the Civil Justice Council, should be oversight of the civil justice system as a whole and to promote reform aimed at securing access to justice in its broad sense. It should make its recommendations to Government and the judiciary. It should also, as provided for in recommendation six, be ultimately responsible for reform implementation through a dedicated standing sub-committee. The Reform Institute should have an independent chair and its membership should be diverse and drawn widely so that it has representatives drawn from all aspects of the civil justice system as well as experts in technology and digitalisation. Its membership should be full-time and permanent (fixed-term) and be supported by a full-time permanent secretariat to support it. Such diversity would help further equal access to justice for all members of society through ensuring that the widest range of views and experience were brought to bear on future reform. Appointment should be through a public appointments process.

4.3.2 – Recommendation four – introduce accountable implementation

The Middleton Review highlighted how effective implementation of the Woolf Review recommendations could be frustrated by the judiciary and legal profession should they not accept them.[391] This raises a more general point: effective implementation of reform can be undermined without institutional and stakeholder buy-in. It can also be undermined where stakeholders, those who are required to give effect to a reformed system, do not fully understand or appreciate the nature of the reforms. History has shown these problems borne out across national civil justice systems, reducing the efficacy of reform at best, postponing or undermining its effect at worst.[392] A recent example is the problematic implementation of the stricter approach to the court's application of sanctions for procedural non-compliance to secure effective case management, which was introduced by the Woolf Review. Effective implementation was not secured until 2013, some fourteen years after it was introduced and after the Jackson Costs Review had reiterated the need for it to be applied properly and

consistently.[393] Another example is, as the Justice Select Committee concluded, the failed attempt to digitalise the civil courts through the HMCTS Reform programme.[394]

To overcome this aspect of the institutional deficit and improve the prospects of successful reform implementation, recommendation four focuses on managing implementation effectively and with appropriate accountability. **It requires future reform to be, as Middleton recommended in 1997, the responsibility of a *'clearly-identified person or body accountable for managing the [implementation] process and ensuring that the gains [from reform] are achieved'*.**[395] Such an implementation body should be responsible for managing all aspects of reform implementation across the civil justice system as a whole, including piloting and testing (see recommendation seven). Given the complex, multi-faceted nature of the civil justice system – including its reach across multiple organisations including HMCTS, the Ministry of Justice and multiple other Government Departments – and a move to approaching access to justice as more than access to adjudicative justice, it would need to be given the necessary statutory powers to enable it to carry out its responsibilities effectively, as well as sufficient resources and trained and experienced personnel to carry out implementation programmes effectively.[396] It would also need to ensure effective integration of its work with other stakeholders in the system, whether judicial, governmental or otherwise, not least to reduce duplication of cost and workload and to ensure that a holistic and coherent approach to reform was taken, i.e., that it did not become one more reform silo among existing ones.

The implementation body should be constituted by all stakeholders within the civil justice system. Appointments should be based on merit and expertise to secure a diverse membership from across the civil justice system. Some appointments may be by way of nomination, e.g., where the appointee is drawn from Government, HMCTS or the judiciary. Other appointments should be by public appointment process. It should be staffed by individuals who are well-experienced in change-management of complex systems and organisations. It should be expected that they remain in place for a significant period of time.[397] Longevity breeds both experience, ownership of work and effective accountability; the last can too often be undermined by individuals not remaining in place during a reform programme, moving jobs at regular intervals, as is not unusual within the civil service. To work most effectively, **it should be a standing sub-committee of the Civil Justice Reform Institute** to ensure effective co-ordination with, and accountability to, it and through that to the Government. To secure accountability it should report regularly to the Reform Institute's management board and Government. Its reports should also be publicly available to promote wider social accountability.[398]

To maximise the prospects of successful implementation, steps should also be taken to create clear lines of responsibility to the implementation body from all stakeholders in the system. Where the civil courts are concerned this should entail simplification of HMCTS's management structure, which currently operates under a partnership model. The Ministry of Justice and the judiciary are the two partners. It is not immediately obvious that the current structure is one that can optimise successful reform implementation. Consideration should also therefore be given to reforming the management of HMCTS by the two partners, i.e., by moving to the position adopted successfully in other jurisdictions where the judiciary is responsible for the management of the courts (and tribunals) service.[399] Such consideration is all the more urgent given the Justice Select Committee's conclusion that HMCTS's management 'failed to adequately acknowledge the extent to which the Reform Programme failed to deliver the necessary, and promised, digital transformation of the County Court'.[400] Improvements to its management structure and the introduction of a clear line of accountability to a new implementation body and through it to the Reform Institute's management board and Government should improve the prospect that future reforms to the civil courts, at the least, can be implemented

more effectively.

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

The first two recommendations focused on the structure of the reform process, expanding it to encompass the whole of the civil justice system rather than just the civil courts and their procedures. The third and fourth recommendations turned to the manner in which the reform process should be carried out. Here, recommendation five focuses on overcoming the evidential deficit.

Effective reform is evidence-based. Evidence is needed to help identify where there are problems, the nature of those problems and their causes. Evidence is also needed to support making the economic case for reform. One of the fundamental and consistent problems with civil justice reform, illustrated by the four Reviews, is that it is, as has been consistently pointed out, not evidence-based. As Twining concluded critically, the Civil Justice Review 1988 was 'theoretically incoherent [and] based on insufficient research'.[401] Similarly and consistently, Genn has powerfully criticised the absence of evidence where reform is concerned. As she put it in respect of the Woolf Review,

> *'The polemic of the Interim (Woolf) Report was based on anecdotal evidence and assumption combined with fragments of research material drawn from a number of different sources.'*[402]

And, as she has pointed out this is just one example of a general and endemic problem:

> *'A worrying feature of the civil justice reviews around the world was that they were in all cases conducted and concluded in the absence of any research or understanding of the dynamics of civil justice, or even a convincing description of the work of the courts and the magnitude of cost and delay. Most proceeded on the basis of anecdote and the partial views of different actors within justice systems (legal professionals, judiciary, and litigants).'*[403]

It ought to be obvious that without robust, reliable evidence it is not possible to properly ascertain if there are problems and, if so, what they are and what is causing them. Anecdotal evidence drawn from, for instance, judicial experience as to the level and incidence of CFA uplifts may accurately show the general picture. It may thus highlight how it is a cause of excess litigation cost. A wider perspective drawn from evidence from claims funded by CFAs that settle without any involvement by the courts or costs assessments might, however, give an entirely different picture: it may show the judicial experience to be atypical. If evidence is to be relied upon, the latter approach is the one that ought to be taken. If the causes are not properly identified, it is a matter of luck whether and if any proposed cures will produce any tangible improvements. It is also a matter of luck that reform does not target areas that are in fact working well while falsely perceived to be working badly. Effective reform cannot rest on luck. Future reform should be properly evidence-based so that there can be genuine identification of the causes of problems, which can then lead to solutions being properly targeted to them.

As problematic as the failure to secure evidence is the absence of clarity as to whether available evidence has been appropriately utilised in prior reviews. Zander has critically raised this point where the Woolf Review was concerned.[404] For instance, evidence was available to it that examined the causes of cost and delay in the civil courts and the expected effect case management would have on them. It did not support the Review's conclusion that the cause of cost and delay was excess

adversarialism. Nor did it support the view that case management would reduce litigation cost or delay. Hence it did not support either the purported cause of a problem or the purported cure. The Woolf Review provides no discussion of that evidence or reasons why its evidence and conclusions were rejected. This too is problematic. Properly evidence-based reform should stand scrutiny, not least because such independent scrutiny may highlight flaws in the approach taken to the evidence, whether those flaws stem from not taking account of relevant evidence or not taking account of it properly. The Woolf Review's failure to explain to what extent and how it took account of the countervailing evidence is a major weakness in its approach. It too is a type of failure of evidence-based policy-making that should not be repeated in future.

That Review commissioning has not proceeded on the basis of evidence does not, however, entail that the Reviews have not obtained some evidence. The approach they have taken has primarily been one that saw the commissioning of and calls for evidence (including evidence provided by management consultants and economists), which informed their consideration of reform proposals and final recommendations. Where the Woolf and Jackson Costs Reviews are concerned, evidence was obtained from open meetings around the country. The Jackson Costs Review was also at pains to obtain as much evidence as possible from the legal profession and others concerning the cost of litigation. Again, however, such evidence-gathering processes by the Reviews is not free of difficulty. Evidence received from open meetings and consultations is, again, primarily drawn from lawyers and professional court users. It runs the risk of being self-selecting. It may thus be partial rather than being such as to give a complete and objective picture. Such processes may therefore also lead to Reviews misidentifying issues as problematic when they are not. They may also result in the formulation of reform proposals that either do not tackle the actual cause of a problematic issue or are focused on areas that are, in fact, working without difficulty. Again, there is a need for robust, reliable evidence to test assumptions and reform proposals during a Review process if the evidential deficit is to be overcome, as much as there is for robust evidence to help promote the formulation of reform recommendations in the first place.

Finally, there is the issue of evidence-based assessment of reform implementation. This has consistently been the subject of widespread criticism where civil justice reform is concerned. For instance, where civil legal aid reform is concerned, the National Audit Office (NAO) has critically highlighted the Government's failure to secure data concerning the impact of reform.[405] Similar criticisms were also made by the NAO of the Government's failure to secure adequate data on the implementation of the HMCTS Reform programme.[406] Such criticism is equally applicable to the four Reviews. It is the general pattern for civil justice reform. It is so, despite the fact that the Middleton Review specifically and rightly drew attention to the paramount need for implementation of the Woolf recommendations to be subject to evidence-based monitoring. It underpinned Middleton's criticism of the fact that England and Wales had no equivalent to the US Rand Institute,[407] which carried out detailed qualitative and quantitative research into the operation of civil courts in the USA.[408] Middleton's recommendation was ignored. Just as there was no attempt made to conduct qualitative or quantitative studies of the impact of the Civil Justice Review 1988, no such approach was taken to Woolf implementation, bar a small number of empirical studies of reform carried out by the Civil Justice Council.[409] It, however, did not have the resources to conduct or commission detailed, longitudinal qualitative and quantitative research. The same is the case where the Jackson Costs Review's implementation is concerned. Without effective evidence-based monitoring against a background of clear success criteria for reform (which in future could be set by the Civil Justice Reform Institute) it is not possible to properly identify whether reforms are having their intended effect, no effect, are causing new problems or are exacerbating the problem they were intended to cure.[410]

The approach taken to evidence is one that cannot be replicated in future if reform is to be more effective. Genn, Zander and Middleton's concerns about both the approach to evidence and what needed to be done to improve it ought to have been long since acted upon, not least when it is evident that in other jurisdictions resources are put into the gathering and scrutiny of evidence concerning the operation of civil justice systems. That evidence-gathering ought to now be easier given digitalisation of parts of the civil justice system further supports a conclusion that there is little real justification, if there could be one, for not adopting an evidence-based approach. That being said, a consistent and valid complaint across all the four Reviews, which remains the case today despite the HMCTS Reform programme, is the failure to ensure that the civil courts and HMCTS have effective IT provision, which is required for effective data collection. Effective evidence-gathering thus also requires the civil justice system to be fully and effectively digitalised.[411]

The fifth recommendation then is that future reform should be evidence-based. That evidence should be qualitative and quantitative. Ideally, such evidence-gathering and analysis should be used to: identify the need for reform; shape and test reform recommendations; and monitor reform implementation and inform revisions to any reforms that are not achieving their objectives or that are leading to unforeseen adverse consequences. It should be drawn from across the whole of the civil justice system, so that a holistic and coherent approach to reform can be promoted. In this way, it should also importantly ensure that the views and experiences of non-professional users of the civil justice system are obtained properly through qualitative and quantitative research gathered both directly from such users and from local and grassroots organisations, support groups, Citizens Advice and relevant NGOs.

To complement the establishment of a Civil Justice Reform Institute (recommendation three), **responsibility for evidence-gathering should be given to a permanent research institute – an Access to Civil Justice Institute** – akin to the Rand Institute or the Nuffield Family Justice Observatory. It should have the power to obtain relevant evidence concerning the civil justice system and its operation. Such an Institute could be a freestanding one or, as this is likely to be the more cost-effective approach as it would utilise existing infrastructure, it could be established as a permanent body within a University. Such an Institute should be provided with the means to access data, including where necessary anonymised data, from across the civil justice system. Once established it should provide the Civil Justice Reform Institute with the evidence it needs to carry out its functions effectively. It should also – as a further benefit to effective civil justice policy-making and reform – provide the Government, the judiciary, HMCTS, Civil and Online Procedure Rule Committees and Civil Justice Council (as well as to other relevant bodies beyond the civil courts) with such evidence it obtains and analysis to assist them in carrying out their roles effectively.[412]

4.3.4 – Recommendation six – engage more fully with comparative approaches

Each of the four Reviews looked beyond England and Wales in their search for guidance on how best to effect reform. They particularly looked to how civil justice systems operated in the United States and other common law jurisdictions, with some consideration of European civil justice systems. This approach should be embedded into future approaches to further help overcome the evidential deficit. It should particularly be used to inform future reviews, and the work of any research institute and standing committee, both in terms of what types of reform have been seen to promote access to justice and which have not. It should be used to provide lessons on how best to implement reform and what approaches to avoid where they have led to failure or only partially successful implementation. This requires learning from overseas successes, such as the successful approach to digitalisation

carried out in Singapore or New Zealand, and failures, such as the difficulties experienced in Ontario where implementation of procedural proportionality is concerned.

In implementing this, recommendation six, care should, however, be taken. One criticism of the Reviews was that their approach to evidence from other jurisdictions was superficial. It was largely the product of short research visits where, for instance, discussions were held by the chair of the Review with judges and practitioners. Additionally, in some cases academic sources where consulted or advice was given by English academics concerning the operation of other jurisdiction's civil justice systems. The most detailed of such approaches was that provided by Professor Cranston for the Woolf Review concerning the operation of class actions in the United States and Professor Zuckerman on the nature of fixed recoverable costs in Germany.[413] Similarly, Professors Zuckerman, Peysner and Genn among others provided further academic advice to the Jackson Costs Review.[414] However, in some cases such evidence was criticised as being superficial. For instance, Lord Browne-Wilkinson questioned the advice concerning the German fixed recoverable costs regime on such a basis. He highlighted how that costs regime worked in Germany against the background of, for instance, a different approach to evidence-gathering and testing, the management of hearings, the structure of the German legal profession, how they are funded and a different litigation culture – all of which might be said to lead to pause for thought about wider reforms that might need to be introduced to enable such a costs regime to work effectively in England and Wales.[415]

To avoid the possibility of superficiality or partiality, gathering and assessing the nature and operation of other civil justice systems and what can be learnt from or adopted from them ought to be carried out by the research centre, which forms the focus of recommendation five. This should help ensure that such research is robust, systematic and, importantly, subject to critical assessment. This should also help ensure that any limitations on the utility of such information are brought to light and considered properly. It should also help ensure that any considerations, such as those highlighted by Lord Browne-Wilkinson, are considered properly; a point that highlights the need to consider wider aspects of the civil justice system than simply the operation of the civil courts and their procedure.

Recommendation six thus builds on the approach taken by the four Reviews. **It is that comparative study of other jurisdictions' approaches to access to justice should become more formally and rigorously integrated into future reviews.**

4.3.5 – Recommendation seven – successful reform requires piloting and testing

The civil justice system is inherently complex. It encompasses a range of different stakeholders, many of whom operate in separate areas. For instance, it covers citizens advice, pro bono advisory and advocacy groups, charities, trading standards, Ombudsman schemes, regulators and complaints bodies, as well as pre-action settlement schemes and providers. It equally covers, among others, academics, researchers, lawyers and their regulatory and representative bodies, and the civil courts and tribunals. Care therefore needs to be taken where reform is concerned. It needs to take account of the effect it may have across the system, rather than simply on any specific area: again, a holistic approach is necessary. Specific reforms may have consequences, beneficial or adverse, beyond the immediate focus of the reform – a point not generally, if at all, considered by the four Reviews.

To be carried out as effectively as possible, reform not only needs to draw on evidence from across the whole of the system so that as complete a picture of the nature and necessity of reform is available and capable of informing policy-development. It can and should also be carried out, where necessary, through the effective piloting of reform recommendations.[416]

The four Reviews have, latterly, accepted the importance that piloting can play in the development of effective reform. The Woolf Review, for instance, introduced into the CPR the use of pilot schemes to test the utility of proposed changes to the civil courts' practices and procedures. This power, contained in CPR Pt 51, is now well-used. It has, for instance, seen the successful testing and implementation of the specialist disclosure regime in the Business and Property Courts as well as the ongoing piloting and testing of Online Civil Money Claims.[417] The Jackson Costs Review also utilised pilot schemes to test, for instance, its proposals concerning the introduction of costs management, docketing proceedings and concurrent expert evidence.[418] Pilot testing was also used during the HMCTS Reform programme.

Recommendation seven builds on these developments as a means to overcome the evidential deficit. Specifically, this recommendation is that **future reform should build piloting into the review and implementation process. Future reforms, where necessary,[419] should be tested before being implemented on a permanent basis.** Oversight of such piloting and testing should be carried out by the Civil Justice Reform Institute, its implementation sub-committee and the Access to Civil Justice Institute working together. Such testing should be carried out consistently with clear evaluation criteria and relevant current best practice standards, particularly those concerning the evidence-base necessary for a pilot to yield statistically significant results.[420]

4.3.6 – Recommendation eight – successful reform requires sustainable funding

The four Reviews were carried out by small review teams, supported by small secretariats. They were supported by lawyers and other professionals providing their assistance on a pro bono basis. Where the Jackson Costs Review was concerned, it was, as noted above, also supported by the provision of pro bono assistance provided by law firms and accountancy firms.[421] It does not reflect well on our national commitment to effective reform that these Reviews and those who are carrying them out are dependent upon limited state funding and charitable support from the private sector.

A real commitment to reform calls on the state to provide adequate financial support for those who carry out it. As Susskind has put it by reference to the civil justice system as a whole, but is as applicable to how we carry out reform, sustainable funding needs to be put in place.[422] It needs to be put in place to enable the first seven recommendations to be implemented effectively and for the long-term. Such funding is an investment in reform capacity. It is an investment that, if made, would promote a range of public goods, such as economic growth, social welfare and better health outcomes across society. It is an investment in a more just, healthy and prosperous society

Recommendation eight thus focuses on financial support for access to justice. Future reviews and their implementation should be provided with sufficient financial support to enable them to be carried out effectively. It should be sufficient to fund the operation of the Civil Justice Reform Institute, its secretariat and its task-and-finish sub-committees that are established to look at discrete parts of the civil justice system as part of its overall review strategy, and its oversight of reform piloting and implementation. It should also be sufficient to fund the effective implementation and Access to Civil Justice Institute.

4.4 – Conclusion

It is a truism that successful reform is not easy to achieve. It requires the accurate identification of problems and weaknesses within a system. It requires the accurate diagnosis of their causes and

solutions that tackle those causes. It requires creative thought to identify practical improvements to already functioning systems or parts of systems. It then requires effective implementation. That, in turn, is not straightforward. It requires those who operate and use the system to fully understand and buy-into the proposed reforms rather than stymie them. It requires patience to give the reforms time to work. And, it requires implementation to be monitored carefully to ensure that it is both being effected properly and that it is achieving its aims. Where reform is shown not to be achieving those aims, remedial measures then need to be taken.

All of this ought to make it clear that reform ought to be an ongoing process, as Sir Anthony Clarke MR concluded about the civil justice reform process in 2009 – a point Lord Burnett CJ would go on to reiterate in 2018.[423] It is beyond time that we adopted a new and a reformed approach to civil justice reform: one, as has been adopted by the Civil Procedure Rule Committee to the introduction and revision of the Online Civil Money Claims Pilot Scheme,[424] which is based on continuous reform; one that is carried out consistently with this Part's eight reform recommendations. It ought also be clear that such reform ought to be based on an understanding that access to justice has a wider meaning than that which underpinned the four Reviews, that it ought to be carried out under the auspices of a permanent Civil Justice Reform Institute and that it ought to be properly evidence-based. If we are to truly promote the public's right to civil justice, civil justice reform itself stands in need of fundamental reform.

5 Conclusion

This report has provided an overview of the last forty years of civil justice reviews. It has reviewed the Reviews. It has not examined in detail every review that has taken place over that period. To do so would have required a detailed consideration of a much wider range of material than the four 'official' Reviews commissioned by Government and the judiciary. It has, however, referred to other reviews, for instance, the Heilbron-Hodge Review and the Middleton Review, where relevant.

The Review has highlighted the lack of institutional capacity that is needed for there to be effective, long-term, coherent and strategic reform of the civil justice system as a whole and access to it. It has highlighted definitional, constitutional, institutional and evidential deficits in the approach taken to past reform. Those deficits have underpinned the short-termist, reactive, ad hoc and evidence-light approach to reform that has been taken over the past forty years. It has also highlighted the court-centric nature of the civil justice reform process, which as a result has failed to look at wider issues of how reform can reduce unmet legal need and promote preventative and consensual forms of justice, as much as adjudicative justice before the civil courts.

If we are to improve our approach to civil justice reform, ensuring that it is remorselessly focused on increasing and improving access to justice, when that is understood rightly in a broad sense, we need to adopt a new approach. That new approach is encapsulated in the eight recommendations made in this report. Echoing Byrom, this report and its recommendations are intended to serve 'as both a call to action and the basis for an agenda',[425] which if implemented would transform our approach to civil justice reform.

If the steps identified here are taken, the quality of future civil justice reform and its implementation ought to be subject to a step-change in improvement over that which has characterised reform carried out since the 1980s. Such a change is not sought as an end in itself. It is an investment in a better, more legally literate society. 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, social welfare and better health outcomes, not least by avoiding or reducing the impacts that legal disputes and particularly unresolved ones produce.[426] It is thus, as the evidence demonstrates, 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. It is one that should be made.

Endnotes

1 The civil justice system ought to include: the civil courts (the County Court, High Court and Court of Appeal (Civil Division), the Unified Tribunals, their judiciary, the rules of court applicable to proceedings in those courts (and Tribunals), enforcement mechanisms, and those members of the legal profession who advise and represent parties to proceedings in those courts. It also ought to encompass Citizens Advice and other sources of legal information and advice, pro bono organisations (such as AdviceNow or Advocate), Ombudsman and regulatory redress schemes, means of alternative and online dispute resolution, and the provision of public and private litigation funding. In so far as the Civil Justice Reviews examined here are concerned, their primary focus has been the civil courts, their judiciary, rules of court, enforcement mechanisms and, to a lesser extent, litigation funding and alternative and online dispute resolution.

2 Civil Justice Review Body, Civil Justice Review 1988, (Cmd 394, 1988) at 8–9. The reviews resulted in a range of reforms enacted via, for instance, the Court of Chancery (England) Act 1850, the Common Law Procedure Act 1854, the Court of Chancery Act 1860, and the Judicature Acts 1873–1875. They also resulted in discrete, although wide-ranging procedural reforms, such as those that saw the replacement of the Rules of the Supreme Court 1875 with the Rules of the Supreme Court 1965.

3 See the five reports of the Royal Commission to inquire into the Operation and Constitution of the High Court of Chancery, Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into the Operation and Effect of the Present Separation and Division of Jurisdiction between the Courts.

4 The Committee on Supreme Court Practice and Procedure (Cmd 8878, 1953 (Final Report)).

5 Rushcliffe Committee Report on Legal Aid and Legal Advice in England and Wales (Cmd 664, 1945); Legal Aid and Assistance Act 1949.

6 Report of the Committee on Personal Injury Litigation (Cmd 369, 1968).

7 Civil Justice Review (1988); H. Woolf, Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, (HMSO) (1995); H. Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, (HMSO) (1996); H. Woolf, Access to Justice – Draft Civil Proceedings Rules, (HMSO) (1996); P. Middleton, Report to the Lord Chancellor, (HMSO) (1997); J. Bowman, Review of the Court of Appeal – Report to the Lord Chancellor, (HMSO, 1997); R. Aikens, Report and Recommendations of the Commercial Court Long Trials Working Party, (Judiciary of England and Wales, 2007); H. Brooke, Should the Civil Courts be Unified?, (Judicial Office, 2008); R. Jackson, Review of Civil Litigation Costs: Preliminary Report, (HMSO, May 2009); R. Jackson, Review of Civil Litigation Costs: Final Report,(HMSO, December 2009) (including his supplemental report, R. Jackson, Review of Civil Litigation Costs: Supplemental Report - Fixed Recoverable Costs, (Judicial Office, 2017); M. Briggs, Chancery Modernisation Review – Interim Report, (Judicial Office, December 2013); M. Briggs, Civil Courts Structure Review – Final Report, (Judicial Office, December 2015); M. Briggs, Civil Courts Structure Review – Final Report, (Judicial Office, July 2016).

8 Ministry of Justice, Review of Civil Legal Aid, (2023).

9 H. Heilbron & H. Hodge, Civil Justice on Trial – A Case for Change, (Joint report of The Bar Council and Law Society, 1993); Report of the Low Commission on the future of advice and legal support (Legal Action Group, 2014); Bach Commission, The Right to Justice, (Fabian Society, 2017).

10 These include: Civil Justice Council, Improved Access to Justice – Funding Options & Proportionate Costs - The Future Funding of Litigation - Alternative Funding Structures (2007); Civil Justice Council, Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions – Final Report (2008); Civil Justice Council, Access to Justice for Litigants-in-Person (or self-represented litigants, (November 2011); Civil Justice Council, Online Dispute Resolution for Low Value Claims, (2015); Civil Justice Council, The Law and Practicalities of Before-The-Event (BTE) Insurance – An Information Study, (2017); Civil Justice Council, Vulnerable Witnesses and Parties with Civil Proceedings, (2020); Civil Justice Council, Review of Pre-Action Protocols Interim Report, (2021); Civil Justice Council, Litigation Funding – Final Report, (2025).

11 These include most recently: House of Commons Justice Select Committee, Bailiffs: Enforcement of Debt (Seventeenth Report of Session 2017–19); Court and Tribunal Reforms (Second Report of Session 2019); The Future of Legal Aid (Third Report of Session 2021–22); Whiplash reform and the Official Injury Claim Service (Ninth Report of Session 2022–23); Work of the County Court (Fourth Report of Session 2024–25).

12 H. Woolf (1995) at 4. Also see, for instance, Civil Justice Review 1988 at 12 and 15; Heilbron-Hodge Report (1994) at 3–4; R. Jackson (May 2009, Vol. 1) at 1.

13 The Woolf Review, for instance, recommended the introduction of pre-litigation means of dispute resolution and the means by which the civil courts could encourage the uptake of non-court-based dispute resolution (or as it is more generally known, alternative dispute resolution): H. Woolf (1996), recommendations 97–102. That these forms of dispute resolution are referred to generally as 'alternative dispute resolution' processes emphasises the court-centric bias: they are alternatives to litigation, which is implicitly understood to be the primary dispute resolution process.

14 N. Byrom, Where has my justice gone?, (Nuffield Foundation, 2024) at iv, which is available at https://www.nuffieldfoundation.org/wp-content/uploads/2024/Where-has-my-justice-gone.pdf.

15 M. Cappelletti, Access to Justice – A World Survey, Book 1, Vols. 1 and 2 (Giuffre – Sijthoff, 1978).

16 Constitutional Reform Act 2005, s.7.

17 Lord Thomas CJ, The Judiciary within the State – Governance and Cohesion of the Judiciary, (2015) at [53]–[54], which is available at https://www.judiciary.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf; Sir Ernest Ryder SPT, The Duty of Leadership in Judicial Office, (2018), which is available at: https://www.judiciary.uk/wp-content/uploads/2018/10/speech-by-spt-leading-judiciary-sept2018-v1.pdf.

18 The Lord Chancellor's Judiciary-Related Functions: Proposals (the "concordat"), a copy of which is contained as Appendix 6 to the House of Lords, Constitutional Reform Bill - First Report (2003–2004 session). It is available at: https://publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/12502.htm.

19 Report of the Royal Commission on Assizes and Quarter Sessions (Cmd 4153 of 1969) (the Beeching Commission).

20 See further The Second Report of the Royal Commission to inquire into the Operation and Constitution of the High Court of Chancery, Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into the Operation and Effect of the Present Separation and Division of Jurisdiction between the Courts (Cmd 631 of 1872) (Second Judicature Commission Report (1872)).

21 Civil Justice Review 1988 at 8–9; Report of the Review Body on the Chancery Division of the High Court (Cmd 8205 of 1981) (Oliver Report).

22 Royal Commission on Legal Services (Cmd. 7648 of 1979) (Benson Commission).

23 Benson Commission at 723–724. And see Civil Justice Review at 9.

24 As noted in the Civil Justice Review 1988 at 9.

25 Government Response to the Benson Commission (Cmd 9077 of 1983) cited in the Civil Justice Review 1988 at 9.

26 See 2.2.3, below.

27 Government Response to the Benson Commission (Cmd 9077 of 1983) cited in the Civil Justice Review 1988 at 9.

28 Civil Justice Review 1988 at 1.

29 Civil Justice Review 1988 at 1.

30 Where housing was concerned the Review was instructed to look beyond the work of the civil courts and to consider housing matters that fell within the ambit of the Tribunals. This was the first real consideration of an area where responsibility for a specific type of dispute fell across the jurisdiction of the courts and tribunals. Consideration, however, of specific problems that would arise from the bifurcated jurisdiction of the courts and tribunals, particularly in the area of housing and property disputes, would not arise until 2018: see, Avon Ground Rents Ltd v Child [2018] UKUT 204 (LC); Civil Justice Council, Report on Property Chamber Deployment Project for Civil Justice Council (2018); Civil Justice Council, Final Interim Report of the Working Group on Property Disputes in the Courts and Tribunals, which is available here: https://www.judiciary.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf.

31 Civil Justice Review 1988 at 1.

32 Civil Justice Review 1988 at ii.

33 Civil Justice Review 1988 at 1.

34 This approach had been identified during the course of the Law Commission's 1984 seminar: Civil Justice Review 1988 at 9.

35 J. Plotnikoff, The Quiet Revolution: English Civil Court Reform and the Introduction of Case Management, 13 Just. Sys. J. 202 (1988) at 204–205.

36 J. Plotnikoff at 205–206.

37 Civil Justice Review 1988 at 10.

38 Civil Justice Review 1988 at 10–11.

39 Civil Justice Review 1988 at 1.

40 A complete list of all written responses and of those who provided oral evidence is set out in Appendix 2 to the Civil Justice Review 1988 at 169–181.

41 Civil Justice Review 1988 at 11.

42 Civil Justice Review 1988 at 10.

43 Civil Justice Review 1988 at 162–167.

44 The substance of this reform was not implemented until the Central London County Court was relocated to the Royal Courts of Justice following the closure of its premises in 2021 rather than for the positive reasons advocated by the 1988 Review.

45 Civil Justice Review 1988 at 154–155.

46 By 1988, this particular recommendation had been an ongoing one since the mid-19th century.

47 In itself this was not a novel suggestion, it having been raised as a beneficial development by the, then, Mr Justice Woolf in 1985; ten years before he would recommend its introduction in the Woolf Review, see below. See J. Plotnikoff (1988) at 203.

48 Civil Justice Review 1988 at 155–157.

49 Civil Justice Review 1988 at 157–158.

50 Civil Justice Review 1988 at 158–159, recommendations 47–61.

51 Civil Justice Review 1988 at 159, recommendations 59–62.

52 Rules of court made under section 64 of the County Courts Act 1964 permitted small claims to be referred to informal arbitration where that was able to provide a quicker and more cost-effective means to resolve the dispute. The power to make such rules remains in force, albeit no rules of court are currently made under it.

53 Civil Justice Review 1988 at 159–160, recommendations 63–69.

54 Civil Justice Review 1988 at 160–161, recommendations 70–76.

55 Civil Justice Review 1988 at 161, recommendations 77–86.

56 That is an early version of docketing or judicial continuity, as would later be recommended by the Jackson Costs Review: see FN 148, below.

57 Civil Justice Review 1988 at 162, recommendations 87–91.

58 Civil Justice Review 1988 at 166–167.

59 H. Woolf (1995), Introduction.

60 H. Woolf (1995) at 5.

61 C. Glasser, Solving the Litigation Crisis, The Litigator (1994) 1 at 14, cited in H. Woolf (1995) at 5. The view, as noted by the Woolf Review, was understood to be not unique to England and Wales but was, rather, a worldwide problem: H. Woolf (1995) at 4; A. Zuckerman, Civil Justice in Crisis, (OUP, 1999).

62 A. Zuckerman & R. Cranston, Reform of Civil Procedure, (OUP, 1995) at v.

63 Report of the Independent Working Party of the General Council of the Bar and the Law Society, Civil Justice on Trial – The Case for Change, (June 1993) (The Heilbron & Hodge Report).

64 The Heilbron & Hodge Report, Foreword.

65 H. Woolf (1995), Introduction.

66 Ibid.

67 Heilbron & Hodge Report at 1; H. Woolf (1995) at 5, 6 & 29.

68 Final Report of the Committee on Supreme Court Practice and Procedure (Cmd 8878), 1953 at 9 – 10, 319 (Evershed Report).

69 H. Woolf (1995) at 5.

70 H. Woolf (1995) at 207.

71 Civil Justice Review (1998), recommendation 28.

72 Heilbron-Hodge (1994), recommendations 9–12.

73 H. Woolf (1996) at 328.

74 H. Woolf (1996), Introduction.

75 H. Woolf 91996), Introduction.

76 H. Woolf (1995) at 237–239.

77 H. Woolf (1995) at 236.

78 H. Woolf (1995) at 241–248; H. Woolf (1996) at 334–347.

79 H. Woolf (1995) at 249.

80 H. Woolf (1995) at 248.

81 H. Woolf (1996), Introduction.

82 H. Woolf (1995) at 240; H. Woolf (1996) at 332–334.

83 See the Jackson Costs Review and Briggs Review, below.

84 J. Plotnikoff at 205–206, noted above.

85 H. Woolf (1996) at 350.

86 H. Woolf (1995) at 249, 251–262; H. Woolf (1996) at 350–369.

87 Heilbron-Hodge (1994), Appendix 2. Working Groups were established in the following areas: court structure; alternative dispute resolution; discovery and documentary evidence; interlocutory and pre-trial procedure; trials, the relationship between the County Courts and High Court; the funding of litigation; and, appellate procedure.

88 H. Woolf, Access to Justice – Draft Civil Proceedings Rules (HMSO) (1996).

89 H. Woolf (1996) at 328–331.

90 J. Bowman (1997).

91 See, P. Coulson, Civil Procedure 2025, (Sweet & Maxwell) Vol. 1 at 52.0.2.

92 H. Woolf (1995), Introduction.

93 The recommendations incorporated the 124 recommendations initially made in the Interim Report. H. Woolf (1995) at 223–233; H. Woolf (1996) at 299–326.

94 Civil Justice Review 1988, recommendation 41; Heilbron-Hodge Review, recommendations 40–42.

95 The subject headings were: case management; fast track; fast track costs; multi-track; sanctions; the supporting structure; Pre-Action Protocols; Offers; Practice and Procedure; Expert Evidence; Appeals; Medical Negligence; Housing; Multi-party actions; The Crown Office List; Other specialist jurisdictions; Information Technology; Small claims in the county courts; Litigants-in-person; Alternative approaches to dispensing justice

96 Heilbron-Hodge Report (1994), recommendations 1–3.

97 As had been recommended by the Civil Justice Review 1988, recommendation 1.

98 Thus, repeating previous such recommendations concerning the replacement of the existing rules of court with a new single set of rules applicable to all civil proceedings: Civil Justice Review 1988, recommendation 28 and Heilbron-Hodge Report (1994), recommendation 11.

99 H. Woolf (1996) at 305–307.

100 Also see Civil Justice Review 1988, recommendation 41.

101 Also see Heilbron-Hodge Report (1994), recommendations 40–42.

102 H. Woolf (1996) at 322–324.

103 The guiding principle that litigation should be conducted in ways that ensured that the cost and time incurred in litigating was proportionate to the nature and value of the dispute. For a detailed examination of the nature of proportionality, see J. Sorabji, English Civil Justice after Woolf and Jackson, (CUP, 2014).

104 H. Woolf (1996) at 274–275.

105 H. Woolf (1996) at 299–322.

106 Civil Justice Review 1988, recommendations, 47, 49–50. Recommendations to provide greater assistance to litigants-in-person were also made in the Heilbron-Hodge Report (1994), recommendations 19–21.

107 H. Woolf (1996) at 325–326.

108 H. Woolf (1996) at 326.

109 This was the first major official review commissioned by the judiciary rather than the Government.

110 See below in respect of the Jackson Costs Review's approach to disclosure reform.

111 R. Aikens, Report and Recommendations of the Commercial Court Long Trials Working Party (Judiciary of England and Wales, 2007), which is available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/rep_comm_wrkg_party_long_trials.pdf.

112 Second Judicature Commission Report (1872).

113 H. Brooke (2008), which is available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/brooke_report_ucc.pdf.

114 The history of the Review's genesis is set out in M. Briggs (December 2015) at 7.

115 H. Brooke (2008) at 2–4. The unification of the County Courts was to be achieved in 2013 as a consequence of efficiency-based reforms and reforms aimed at promoting greater, flexibility, deployment of the judiciary: see Crime and Courts Act 2013, s.17, which implemented the results of the Ministry of Justice's consultation exercise on the recommendations set out in the Brooke Report: see Ministry of Justice, Solving Disputes in the County Courts - A consultation on reforming civil justice in England and Wales, (CP6/2011), esp. at [244]–[253], and Solving Disputes in the County Courts - A consultation on reforming civil justice in England and Wales - The Government Response, (CM 8274) which are available at: https://assets.publishing.service.gov.uk/media/5a7c2a16ed915d1d1741c825/8045.pdf and https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/solving-disputes-in-cc-response.pdf.

116 R. Jackson (May 2009, Vol. 1) at 1.

117 J. Peysner A Blot on the Landscape, in D. Dwyer (2009) at 157.

118 R. Jackson (May 2009, Vol. 1) at 1, 96–98.

119 R. Jackson (May 2009, Vol. 1) at 2, 18–38. J. Peysner, Access to Justice – A Critical Analysis of Recoverable Conditional Fee and No-Win No-Fee Funding, (Palgrave, 2014) provides the definitive account of the development of, and policy behind, CFAs and the cost wars.

120 Sir Anthony Clarke in D. Dwyer (2009) at 47.

121 R. Jackson (May 2009, Vol. 1) at 2–3.

122 R. Jackson (May 2009, Vol. 1) at 2.

123 Sir Anthony Clarke MR, The Woolf Reforms: A Singular Event or An Ongoing Process, in D. Dwyer, The Civil Procedure Rules Ten Years On, (OUP, 2009) at 48–49.

124 Andrew Parker replaced Lord Hunt, another solicitor, shortly after the Review commenced.

125 Germany, Hong Kong, Australia, New Zealand, the USA, and Canada.

126 R. Jackson (May 2009, Vol. 1) at 3–7.

127 R. Jackson (May 2009, Vol. 1 and Vol. 2), esp. see R. Jackson (May 2009, Vol. 2), Annex 3.

128 R. Jackson (May 2009, Vol. 2), Annex 1.

129 R. Jackson (May 2009, Vol. 2), Appendixes 1 to 7 on the judicial surveys, Appendixes 8 to 28 on other factual evidence.

130 R. Jackson (May 2009, Vol. 2), Annex 2.

131 R. Jackson (December 2009) at 3–4.

132 R. Jackson (December 2009) at 5–7.

133 R. Jackson (December 2009) at 4.

134 R. Jackson (December 2009) at 7–9.

135 See Civil Court Users Association, Membership Details at: https://ccua.org.uk/membership/.

136 R. Jackson (December 2009), Foreword.

137 R. Jackson (December 2009) at 70. 'I do not make any recommendation in this chapter for the expansion or restoration of legal aid. I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas . . . the maintenance of legal aid at no less than the present levels makes sound economic sense and is in the public interest.'

138 R. Jackson (December 2009) at 463–471.

139 As the exercise of the judicial power of the state is non-delegable, what was meant was the development of a scheme through which non-judges could be authorised to exercise certain judicial functions.

140 R. Jackson (December 2009) at 470.

141 R. Jackson (December 2009) at 59–65.

142 The recommendation concerning the establishment of a Costs Council had also previously been made by the Civil Justice Council in 2005: see, Civil Justice Council, Improved access to Justice – Funding Options and Proportionate Costs, (2005) at 63–64.

143 This was a particularly prescient recommendation and is now seen as good practice by the Council of Europe: see Consultative Council of European Judges, Opinion No. 26, Moving forward: the use of assistive technology in the judiciary, (Council of Europe, 2023) at [92(iv)], which is available at: https://rm.coe.int/ccje-opinion-no-26-2023-final/1680adade7.

144 R. Jackson (December 2009) at 470–471.

145 The common law rule that meant that a successful party could only recover from the losing party such costs as they had incurred under a legal obligation.

146 R. Jackson (December 2009) at 463–465.

147 R. Jackson (December 2009) at 463–470.

148 R. Aikens (2007) at 26–29.

149 R. Jackson (December 2009) at 464.

150 R. Jackson (December 2009) at 468–469.

151 M. Briggs (December 2015) at 7.

152 M. Briggs, Chancery Modernisation Review – Final Report, (Judicial Office, December 2013).

153 HM Treasury, Spending Review and Autumn Statement 2015, (Cmd 9162, 2015) at 69; M. Briggs (December 2015) at 4–7.

154 See, for instance: Lord Chancellor, Lord Chief Justice, and the Senior President of Tribunals, Transforming Our Justice System (2016), which is available at: 3 https://assets.publishing.service.gov.uk/media/5a803d9ae5274a2e8ab4f019/joint-vision-statement.pdf.

155 Joint Statement of Lord Chief Justice, the Senior President of Tribunals and the Lord Chancellor (28 March 2014), which is available at: https://www.judiciary.gov.uk/wp-content/uploads/2014/03/joint-letter-to-judges-and-staff-hmcts-reform.pdf.

156 HM Treasury (2015) at 69. This was initially to be achieved through one-off annual payments of £75 million over five years. The amount rose to over £700 million in 2015 when the programme was launched: see, Lord Chancellor, Lord Chief Justice, and the Senior President of Tribunals (2016) at 3, 'The Government is committed to investing more than £700 million to modernise courts and tribunals,' Doubts as to the actual expenditure have been made by, for instance, R. Stewart, Politics on the Edge, (Vintage, 2023) at 250–251.

157 M. Briggs (December 2015) at 7.

158 M. Briggs (December 2015) at 5.

159 As noted in The Judicial Working Group on Litigants in Person, Report, (Judicial Office, 2013) (The Hickinbottom Report), at 6 'According to the Government's own figures, 623,000 of the one million people who benefit from Legal Aid every year will be denied access to this aid from 1 April 2013, when the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 became effective.' The report is available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf.

160 A. Zuckerman, No Justice Without Lawyers—The Myth of an Inquisitorial Solution, CJQ 33 (2014) 355 at 356.

161 See Briggs Review, recommendations below.

162 M. Briggs (2015) at 42–43, 54.

163 M. Briggs (December 2015) at 4.

164 M. Briggs (July 2016) at 24. Also see the account of how the Review's recommendations where intended to promote access to justice generally in Sir Terence Etherton MR, The Civil Court of the Future, (June 2017) at [20]–[34], which is available here: https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf.

165 M. Briggs (December 2015) at 5.

166 Heilbron-Hodge Review (1994), Appendix 2.

167 M. Briggs (December 2015) at 2–3. The group was referred to by Briggs as 'the hard-working group'.

168 M. Briggs (July 2016) at 3.

169 M. Briggs (December 2015) at 2.

170 See, Judicial Ways of Working 2022 – Civil (Judiciary of England and Wales, April 2018) at 21, which is available at: https://www.judiciary.uk/wp-content/uploads/2019/01/jwow-civil-survey-1.pdf.

171 M. Briggs (December 2015) at 3.

172 M. Briggs (July 2016) at 6 -7, and see Annex 4, which sets out the statistical evidence obtained.

173 M. Briggs (December 2015) at 5.

174 M. Briggs (July 2016) at 4.

175 M. Briggs (July 2016), Annex 2 sets out the full list of those who submitted consultation responses.

176 A further visit to California was planned but did not take place due to the limited resources made available to the Review: M. Briggs (July 2016) at 8.

177 M. Briggs (July 2016) at 8.

178 M. Briggs (July 2016), Annex 3 sets out the full list of these meetings.

179 M. Briggs (July 2016) at 8.

180 M. Briggs (July 2016) at 8.

181 M. Briggs (July 2016) at 5.

182 M. Briggs (December 2015) at 75.

183 M. Briggs (July 2016) at 118, 121–123.

184 M. Briggs (July 2016) at 41 stressed the particular importance of this aspect of digital design for the proposed new court, 'It is not a design objective of the Online Court to exclude lawyers. The underlying rationale is that whereas the traditional courts are only truly accessible by, and intelligible to, lawyers, the new court should as far as possible be equally accessible to both lawyers and LiPs. In this respect the Online Court is to be contrasted with the CRT in British Columbia, where the governing legislation does exclude lawyers, save where the adjudicator decides otherwise on a case

by case basis. On the contrary, the current conception of the Online Court is designed to be as accessible to lawyers as it is to LiPs.'

185 M. Briggs (July 2016) at 118–120.

186 M. Briggs (July 2016), recommendations 8 to 13.

187 M. Briggs (July 2016) at 122–123.

188 J. Sorabji (2014), Chaps. 1 and 2.

189 J. Resnik, Precluding Appeals, 70 Cornell L.R. 603, 624 (1985), 'The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.'

190 J. Jacob (ed), The Supreme Court Practice 1993, (Sweet & Maxwell) Vol. 1 at vii.

191 Ibid.

192 I. Scott, English Civil Justice Review: Implementation and Further Reform, in I. Scott, International Perspectives on Civil Justice – Essays in Honour of Sir Jack I. H. Jacob QC, (Sweet & Maxwell(1990) at 120.

193 Lord Mackay LC, Hansard, HL Deb 23 November 1989, Vol. 513 at 141, which is available at: https://api.parliament.uk/historic-hansard/lords/1989/nov/23/address-in-reply-to-her-majestys-most#S5LV0513P0_19891123_HOL_11. As he would also set out, 'The Civil Justice Review examined the ways in which civil proceedings in England and Wales could be made simpler and cheaper. Many of its proposals can and will be implemented through better administration, or by secondary legislation using powers that are already in place. The review's central finding, however, was that there are too many relatively minor cases in the High Court. The results are that simple cases in that forum take too long and cost too much. Even more seriously, they reduce the time and resources available for the most complicated and sensitive issues. The aim of the legislation I now propose is that the High Court will eventually be reserved only for specialist cases, including judicial review, and general cases of unusual substance, importance or difficulty. The measures in the Bill therefore seek to ensure that in future all civil cases can be dealt with at an appropriate level. In particular, the Bill will enable general cases to be redistributed between the High Court and the county courts according to their substance, importance and complexity. The remedies available in the county courts, and the cost regime, will be brought more closely into line with those in the High Court in order to make transfers easier.', see Hansard, HL Deb 19 December 1989 Vol. 514 at 124, which is available at: https://api.parliament.uk/historic-hansard/lords/1989/dec/19/courts-and-legal-services-bill-hl#S5LV0514P0_19891219_HOL_88.

194 I. Scott (1990) at 116.

195 I. Scott (1990) at 117–118.

196 I. Scott (1990) at 116–117.

197 I. Scott (1990) at 120.

198 I. Scott (1990) at 119.

199 In so far as the Review's recommendations concerning reforms to court administration, i.e., to the court service, is concerned it is difficult to ascertain what changes were implemented.

200 Sir Henry Brooke summarised the criticism in 2004 in these terms, 'In January 2001 the Court Service published a consultation paper on Modernising the Civil Courts. This paper described the very serious difficulties very frankly. Six months later a judges' working group, led by Mr Justice Cresswell, published its own report. They started with a description of the problems which nearly every judge in the country faces every day. The list began: "insufficient staff – high staff turnover leading to the use of inexperienced staff – missing or chaotic files – court orders take too long to be drawn and are often drawn incorrectly – lack of proper administrative support for the judiciary".', cited in M. Zander, Cases and Materials on the English Legal System, (OUP, 2007) at 41.

201 Sir Henry Brooke, Technology and the Judicial Process, in Essays in Honour of Sir Brian Neill: The Quintessential Judge, (Lexis Nexis UK, 2003), noted how 'very little' was done to implement the Review's IT-related recommendations. It is also available at: https://sirhenrybrooke.me/2015/10/25/my-2002-essay-on-technology-and-the-judicial-process/.

202 For critical comment see, for instance, I. Ramsay, The Civil Justice Review: Rational Failure and Political Success, J.L. & Soc'y 416 (1988) at 418–419, noting the inadequacy of the approach to enforcement taken by the Review; J. Baldwin & R. Cunningham, The Abandonment of Civil Enforcement Reform, CJQ Vol. 29 (2010) 159, noting the continuing failure to reform enforcement from the Review onwards. The removal of Latin terminology would await the implementation of the Woolf Review and its general recommendation to abolish Legal Latin from the civil courts. Further attempts to reform debt enforcement followed on from the Government's attempts to reform the County Courts in 2011: see Ministry of Justice, Solving disputes in the county courts: creating a simpler, quicker and more proportionate system - a consultation on reforming civil justice in England and Wales, (March 2011), which is available at: https://assets.publishing.service.gov.uk/media/5a7c2a16ed915d1d1741c825/8045.pdf; and Ministry of Justice, Solving disputes in the county courts: creating a simpler, quicker and more proportionate system - a consultation on reforming civil justice in England and Wales – The Government Response, (February 2012), which is available at: https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/solving-disputes-in-cc-response.pdf.

203 House of Commons, Levelling Up, Housing and Communities Committee, Reforming the Private Rented Sector, (Fifth Report of Session 2022–23) at 4, which is available at: https://committees.parliament.uk/publications/33924/documents/185831/default/. And see, Reforming the Private Rented Sector: Government's response to the Committee's Fifth Report at 12, which is available at: https://committees.parliament.uk/publications/41806/documents/207184/default/.

204 Hansard, HC Deb 07 December 1989 Vol. 163 c316W, which is available at: https://api.parliament.uk/historic-hansard/written-answers/1989/dec/07/courts-and-legal-services-bill#S6CV0163P0_19891207_CWA_63.

205 See FN 7, above.

206 See FN 7 and 90, above

207 See FN 91, above.

208 P. Middleton (1997) at [4.9].

209 Middleton was supported solely by a small team of civil servants from the Lord Chancellor's Department. The Review was not supported, as the larger official reviews were by a working group or advisory committee. Given that it was a review of the Woolf Review that distinction is entirely understandable.

210 P. Middleton (1997), Executive Summary at [9].

211 P. Middleton (1997) at [2.14]–[2.15].

212 P. Middleton (1997) at [4.10]–[4.16].

213 The Civil Procedure Rules 1998 (SI 1998/3132).

214 P. Middleton (1997) at [2.48].

215 P. Middleton (1997) at [2.20], 'I do not accept the argument that limitations on the procedures that parties can currently adopt would reduce the quality of justice. Justice does not depend solely on an exhaustive decision-making process. Timeliness and affordability are equally aspects of justice. It is not justice, if a decision can only be reached after excessive delay, or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less cost is likely to result in a net improvement in the quality of justice in a world where resources are limited.' On which also see. A. Zuckerman, Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments, (1994) 14 Oxford Journal of Legal Studies 353.

216 P. Middleton (1997) at [1.4] and [1.7], noting there demand for access to justice is likely to grown and there is 'no infinite supply'.

217 P. Middleton (1997) at [2.45], 'Under my alternative, lawyers would be required to agree with their client an all-in fixed price - to cover the case up to and including a trial - at the start of each potential fast track case. The agreed figure would be notified to the opponent when the case was assigned to the fast track. At the end of the case, inter partes costs would be determined by a set percentage according to the stage reached (just as in the existing proposal). However, the percentage would apply to the lower of the two figures agreed by the parties. In other words, the winner would not be able to recover the difference if he or she had instructed a more expensive lawyer. This would prevent the stronger party from agreeing an artificially high figure as a deterrent, and would reinforce the incentive for litigants to seek a good price. Each court could publish the figures that were being agreed in its fast track cases to help people to choose a lawyer and to stimulate competition. Further work is needed on the details of such a scheme, in particular to determine how it might work where one party was a litigant-in-person, or where a large organisation had access to low-cost "in-house" legal advice. For example, it might still be necessary to set some form of minimum figure.'

218 P. Middleton (1997), Executive Summary at [5] and then [2.10]–[2.13], [2.19], [2.35], [2.41]–[2.46], and [2.49].

219 P. Middleton (1997), Executive Summary at 11.

220 A. Leggatt, Review of the Tribunals, Tribunals for Users, One System, One Service, (HMSO, 2001). Reform would come in the Tribunals, Courts and Enforcement Act 2007. The tribunals continue to be a no-cost-shifting jurisdiction.

221 P. Atiyah, The Damages Lottery, (Hart, 1997). And see, Compensation for personal injury in New Zealand : Report of the Royal Commission of Inquiry (The Woodhouse Report); Lord Sumption, Abolishing Personal Injuries Law - A project, (November 2017), which is available at: https://supremecourt.uk/uploads/speech_171116_d85b82486e.pdf.

222 P. Middleton (1997) at [4.7].

223 P. Middleton (1997) at [4.17]–[4.20].

224 P. Middleton (1997) at [1.1]–[1.3].

225 P. Middleton (1997) at [1.4].

226 H. Genn, Judging Civil Justice, (CUP, 2009).

227 Civil Procedure Act 1997, s. 1(3) and 2(7).

228 Civil Procedure Rule Committee, Simplifying the Civil Procedure Rules (CPR), which is set out at: https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about.

229 The latter went beyond but was consistent with the approach taken by the Woolf Review.

230 See, the Government Dispute Resolution Pledge, which is available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20130206101915/https:/www.justice.gov.uk/downloads/courts/mediation/drc-may2011.pdf.

231 CPR r. 1.4(2)(e) (1999 to 2024).

232 Civil Procedure (Amendment) Rule 2000 (SI 2000/221).

233 J. Sorabji, Judicial Assistance in England and Wales, in S. Voet & A. Uzelac, The Heroes of Judicial Periphery: Court Staff, Court Experts and Other Actors in the Shadows, (Hart, 2024).

234 Sir Henry Brooke (2003), provides a detailed account of the attempts to improve court IT during this period.

235 Sir Henry Brooke (2003).

236 The issue would be revisited by the Civil Justice Council in 2008 and the Government would reject its recommendation to introduce such a procedural mechanism: Civil Justice Council, Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure for Collective Actions – Final Report (2008).

237 J. Peysner in D. Dwyer (2009) at 163 noting the lack of agreement on the recoverability levels.

238 P. Middleton (1997) at [2.10]–[2–14], [2.35]; A. Zuckerman, Litigation Management under the CPR: A Poorly-used Management Infrastructure, in D. Dwyer (2009); A. Zuckerman, The continuing management deficit in the administration of civil justice, CJQ 2015, 34(1) 1; Lord Dyson MR, The Implementation of the Amendments to the Civil Procedure Rules, (18th Lecture in the Implementation Programme), (2014) CJQ 124.

239 R. Jackson (December 2009) at 386–387, 397, 'courts at all levels have become too tolerant of delays and non-compliance with orders. In so doing they have lost sight of the damage which the culture of delay and non-compliance is inflicting upon the civil justice system.' They had not become too tolerant. They had never ceased to be due to an ingrained procedural culture, which the Court of Appeal had failed to overcome as it had not spoken with one voice on the approach to case management and non-compliance with procedural obligations. As Zuckerman put it, cited in R. Jackson (December 2009) at 387, 'Even more corrosive of good management practice is the Court of Appeal inability to speak with one voice. The understanding of the overriding objective varies greatly amongst its judges, with some judges still holding the view that their only duty is to decide cases according to the facts and the law, no matter how long it takes and how much it costs. Management standards will not improve unless the Court of Appeal is willing to provide leadership.' And. See J. Sorabji (2014), Chaps. 6 and 7.

240 The Judicial Executive Board's acceptance of the report and its recommendations is noted in R. Jackson, The Role of Alternative Dispute Resolution in Furthering the Aims of the Civil Litigation Costs Review, (11th lecture in the Implementation Series) at [1.3], which is available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-eleventh-lecture-implementation-programme.pdf. The Judicial Executive Board (JEB) is the body of members of the senior judiciary who support the Lord/Lady Chief Justice in the discharge of the latter's statutory responsibility as Head of the Judiciary.

241 Ministry of Justice, Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations, (Consultation Paper CP 13/10, November 2010), which is available at: https://assets.publishing.service.gov.uk/media/5a7c19b240f0b61a825d673d/7947.pdf.

242 Ministry of Justice, Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations: The Government's Response, (March 2011), which is available at: https://assets.publishing.service.gov.uk/media/5a7c19b240f0b61a825d673d/7947.pdf. And see, S. Clark & R. Jackson, The Reform of Civil Justice, (Sweet & Maxwell, 2018) at 43.

243 Ministry of Justice (March 2011) at 4.

244 See, for instance, A. Zuckerman, The Jackson Final Report – Plastering over the Cracks to Shore Up a Dysfunctional System, (2010) 3 CJQ 263; K. Oliphant et al, Working Group on Civil Litigation Costs - On a Slippery Slope - A Response To The Jackson Report, (February 2011), copy on file with the author.

245 A summary of the implementation is provided in S. Clark & R. Jackson (2018), Chap. 6.

246 Its abolition was again recommended in 2025, see Civil Justice Council, Litigation Funding – Final Report, (2025) at 120 and recommendation 47.

247 R. Jackson (December 2009), Chap. 8. Its promotion was, again, further recommended in 2025, see Civil Justice Council (2025) at 126–127 and recommendation 56.

248 S. Clark & R. Jackson (2018) at 61.

249 Simmons v Castle (2012) EWCA Civ 1039, 1288; [2013] 1 WLR 1239; Summers v Bundy [2016] EWCA Civ 126.

250 S. Clark & R. Jackson (2018) provides a thorough account of the nature and extent of implementation.

251 See further, S. Clark & R. Jackson (2018) at 45.

252 S. Sime, S. Blake, J. Browne, The Jackson ADR Handbook, (4th edn, OUP, 2025).

253 S. Clark & R. Jackson (2018) at 45. For an outline of the approach taken see, Civil Justice Council, Review of Litigation Funding - Interim Report and Consultation, (October 2024) at 20–22.

254 S. Clark & R. Jackson (2018) at 43.

255 As described by Joshua Rozenberg; R. Jackson (December 2009) at 397 and see Judicial Office, Appointment of Appeal Judges for Costs and Case Management Appeals (29 May 2013).

256 Sir Rupert Jackson's various roles in implementation was taken on my Sir Vivian Ramsey, a High Court judge, from April 2012 to late 2013 due to the former's ill-health: S. Clark & R. Jackson (2018) at 46.

257 J. Sorabji (2014) at 230–232.

258 S. Clark & R. Jackson (2018) at 48–49. A 19th Implementation, scheduled to be given before what became the 18th, that had been intended to be given by Sir Vivian Ramsey was never delivered.

259 S. Clark & R. Jackson (2018) at 44 sets out the full list of the lectures.

260 Sir Rupert Jackson, Why Ten Per Cent?, (29 February 2012, 10th Lecture in the Implementation Programme), which is available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lj-jackson-speech-why-ten-percent-29022012a.pdf.

261 Lord Dyson MR, The Implementation of the Amendments to the Civil Procedure Rules, (18th Lecture in the Implementation Programme), (2014) CJQ 124.

262 Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 WLR 795; Denton v TH White Ltd [2014] EWCA Civ 906, [2014] 1 WLR 3926.

263 See above.

264 Courts and Tribunals Judiciary, Senior Judiciary Announces Review of Fixed Recoverable Costs, (11 November 2016).

265 R. Jackson, Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs, (Judicial Office, July 2017).

266 Jackson Fixed Costs Review at 13.

267 Jackson Fixed Costs Review at 13.

268 Jackson Fixed Costs Review at 13.

269 Jackson Fixed Costs Review at 13–14.

270 Department of Health, Introducing Fixed Recoverable Costs for Lower Value Clinical Negligence Claims: a Consultation, (January 2017); Department of Health, Consultation on Introducing Fixed Recoverable Costs in Lower Value Clinical Negligence Claims: the Summary of Consultation Responses, (February 2018).

271 Jackson Fixed Costs Review at 135.

272 Jackson Fixed Costs Review at 133–135.

273 Jackson Fixed Costs Review at 135.

274 Civil Justice Council, Fixed Recoverable Costs In Lower Value Clinical Negligence Claims, (October 2019), which is available at: https://www.judiciary.uk/wp-content/uploads/2019/10/Fixed-recoverable-costs-in-lower-value-clinical-negligence-claims-report-141019.pdf.

275 Department of Health & Social Care, Fixed recoverable costs in lower value clinical negligence claims - A consultation, (January 2022); Department of Health & Social Care, Fixed recoverable costs in lower value clinical negligence claims – Government Response, (September 2023).

276 In May 2025, the Civil Procedure Rule Committee noted that the issue continued to be under review by the Government and there were no active plans to implement such a scheme: Civil Procedure Rule Committee, Minutes, (May 2025) at 11, which is available at: https://assets.publishing.service.gov.uk/media/6870d5a6a08d3a3ca3b67a92/Approved_v2_-_CPRC_Minutes_-_MAY_2025_-_annual_open_meeting_-_amended.pdf.

277 Ministry of Justice, Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals - Consultation, (28 March 2019).

278 Ministry of Justice, Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals - Government Response, (September 2021).

279 Ministry of Justice, Fixed recoverable costs: consultation on issues relating to the new regime, (July 2023). The consultation arose due to a proposed judicial review of aspects of the regime.

280 See the Ministry of Justice Note on the provisions, which is available at: https://www.justice.gov.uk/documents/frc-public-notice-updated.pdf?redirected.

281 The Civil Procedure (Amendment No. 2) Rules 2023 (SI 2023/572). Judicial Review proceedings were also commenced concerning the provisions. Those proceedings were discontinued given amendments to the regime agreed by the Ministry of Justice, which were implemented by Civil Procedure (Amendment) Rules 2024 (SI 2024/106): see J. Hyde, Fixed costs JR dropped after government concessions, (Law Gazette, 28 March 2024), which is available at: https://www.lawgazette.co.uk/news/fixed-costs-jr-dropped-after-government-concessions/5119221.article.

282 Lord Thomas CJ & Sir Terence Etherton MR, Civil Courts Structure Review: Joint statement from the Lord Chief Justice and the Master of the Rolls, (Judicial Office, 6 January 2017), which is available at: https://www.judiciary.uk/guidance-and-resources/civil-courts-structure-review-joint-statement-from-the-lord-chief-justice-and-the-master-of-the-rolls/.

283 Ministry of Justice, Transforming our justice system: summary of reforms and consultation, (September 2016), Chap. 3, which is available at: https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf. Ministry of Justice, Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals - Government response, (February 2017), which is available at: https://assets.publishing.service.gov.uk/media/5a804b7040f0b62302692a86/transforming-our-justice-system-government-response.pdf.

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285 J. Rozenberg, The Online Court: will IT work?, (2018) at 28.

286 The Lord Chief Justice's Report 2016 (Judicial Office) at 7, which is available at: https://www.judiciary.uk/wp-content/uploads/2016/11/lcj-report-2016-final-web.pdf.

287 M. Briggs (July 2016) at 54.

288 Prison and Courts Bill 2017, cls. 37 to 46, which is available here: https://publications.parliament.uk/pa/bills/cbill/2016-2017/0170/17170.pdf.

289 The Bill is available here: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0430/190430.pdf.

290 See its sections 19 and following, which are available here: https://www.legislation.gov.uk/ukpga/2022/35/pdfs/ukpga_20220035_en.pdf.

291 W. Ury, J. Brett, S. Goldberg, Getting Disputes Resolved, (PON, 1993). That England and Wales does not appear to have considered developments in dispute resolution system design that have followed on from their initial work could be said to be one more consequence of its historic, piecemeal and time-limited Review approach to reform.

292 S. Salter and D. Thompson, Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal (2016) 3 McGill J Disp Resol 113 and https://civilresolutionbc.ca; J. Sorabji, The Online Solutions Court – a Multi-Door Courthouse for the 21st Century, (2017) 36(1) CJQ 86.

293 M. Briggs (July 2016) at 8; JUSTICE, Delivering Justice in an Age of Austerity, 2015, which is available at: https://files.justice.org.uk/wp-content/uploads/2015/04/06172133/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf; Civil Justice Council, Online Dispute Resolution for Low Value Claims, (2015), which is available at: https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

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295 M. Briggs (July 2016) at 50.

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297 See, for instance, Sir Colin Birss, Online Dispute Resolution Forum: Keynote speech, (June 2022), which is available at: https://www.judiciary.uk/speech-by-lord-justice-colin-birss-online-dispute-resolution-forum/; Sir Geoffrey Vos MR, Online Procedure Rule Committee - Launch of Public Engagement Document Inclusion Framework and Pre-Action Model for the Digital Justice System, at [16]–[34], making the point, without referring to it, that what would have been Tier One for the Online Court was now to be dealt with by the private sector outside the digitalised civil courts, which is available at: https://www.judiciary.uk/wp-content/uploads/2025/07/Speech-by-Sir-Geoffrey-Vos-Master-of-the-Rolls-Law-Society-Event-16-July-2025-.pdf.

298 Sir Geoffrey Vos MR, The Future of Courts, (May 2024), at [3] 'Instead of expanding the court-based portals to cover the pre-court space, the DJS facilitates digital connections between: (i) the numerous existing non-court public and private dispute resolution services, and between (ii) those services and the digital courts and tribunals.' which is available at: https://www.judiciary.uk/wp-content/uploads/2024/05/UCL-The-Future-of-Courts-OPRC-DJS.pdf.

299 A point apparent in the description of the end-point reached, de-scoping of work from the Reform programme, and the need for HMCTS to secure additional funding to complete the digitalisation of the County Court. See N. Goodwin, Update on the HMCTS Reform Programme, (Letter to Sir Geoffrey Clifton-Brown MP, Chair of the Public Accounts Committee, 13 February 2025), which is available at: https://committees.parliament.uk/publications/46829/documents/240988/default/.

300 N. Goodwin, ibid.

301 See FN 268, above.

302 CPR Update 90 (August 2017). For a summary of the development of the pilot scheme, that when introduced it was described as piloting an 'online court' with that name changed in 2019 to that of the 'Online Civil Money Claims pilot scheme' and the introduction of mediation into the scheme in 2024, on a voluntary basis, and then 2025 on a mandatory basis, see P. Coulson et al, Civil Procedure 2025, (Sweet & Maxwell) Vol.1 at 51.2.4.

303 Sir Geoffrey Vos MR, Evidence to the Justice Select Committee, (18 March 2025) at 5 'I am very disappointed that we are going to reach the end of reform with only 23 percent of cases beginning and ending with digital, and all the rest ending up on paper.', which is available at: https://www.judiciary.uk/wp-content/uploads/2025/03/MR-and-DHCJ-Justice-Select-Committee-transcript.pdf.

304 See FN 157, above.

305 S. Salter & D. Thompson, Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal, (2016) 3 McGill J Disp Resol 113.

306 Ministry of Justice, Increasing the use of mediation in the civil justice system, (July 2022), which is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093682/mediation-consultation-web.pdf. The two Civil Justice Council Reports were: Civil Justice Council, Compulsory ADR, (June 2021) and Civil Justice Council, The Resolution of Small Claims, (January 2022).

307 Civil Justice Council (2021) at A33-A34, for instance.

308 See, for instance, The Judicial College Strategy 2021–2025, (Judicial Office, 2021) at 16, which is available at: https://www.judiciary.uk/wp-content/uploads/2022/07/Judicial_College_Strategy_2021-2025_WEB.pdf.

309 See, for instance, the Chancery Masters Guidelines for the Transfer of Claims, (2015), which is available at: https://www.judiciary.uk/wp-content/uploads/2015/05/transfer-guidelines-ch-masters.pdf.

310 The limit remains at £350,000, an increase introduced to give effect to one of the recommendations made by the Brooke Review, which pre-dated the Briggs Review by seven years: see Explanatory Memorandum to the County Court Jurisdiction Order 2014, which is available at: https://www.legislation.gov.uk/uksi/2014/503/pdfs/uksiem_20140503_en.pdf.

311 CPR PD3E and PD51, section 20.

312 Civil Justice Council, Report on Property Chamber Deployment Project, (October 2018), which is available at: https://www.judiciary.uk/wp-content/uploads/2018/11/property-chamber-deployment-project-report-oct2018.pdf.

313 Civil Justice Council, Enforcement – Final Report, (2025) at [1.8], which is available at: https://www.judiciary.uk/wp-content/uploads/2025/04/CJC-Report-on-Civil-Enforcement-April-2025.pdf. Some claims can, however, be enforced through digital processes, e.g., claims that were conducted under the digital money claims online process. See, for instance, Money Claim Online (MCOL) user guide (2025), which is available at: https://www.gov.uk/government/publications/money-claim-online-user-guide/money-claim-online-mcol-user-guide.

314 Civil Justice Council, Enforcement – Final Report, (2025).

315 Civil Justice Council, ibid at [6.34].

316 Law Society, Online court services: Delivering a more efficient digital justice system, (October 2023) at 4, which is available at: https://www.lawsociety.org.uk/topics/research/online-court-services.

317 HMCTS Civil Quarterly Statistics: July to September 2020 (https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2020/civil-justice-statistics-quarterly-july-to-september-2020);July to September (2023) (https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2023/civil-justice-statistics-quarterly-july-to-september-2023#defences-including-legal-representation-and-trials);July to September 2025 (https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2025/civil-justice-statistics-quarterly-july-to-september-2025#defences-including-legal-representation-and-trials)

318 See FN 160; A Zuckerman (2014).

319 I. Ramsay, The Civil Justice Review: Rational Failure and Political Success, 15 J.L. & Soc'y 416 (1988) at 416.

320 Discussed in K. Vorrasi, England's Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England and the United States, 30 J. Legis. 361 (2004) at 374.

321 A rough indication of the pace of change is that there are at least three sets of amendments to the Civil Procedure Rules each year and, since 1999, there have been (as of December 2025) 192 sets of amendments to its Practice Directions.

322 S. Sime, Proportionality and Search-Based Disclosure – Lord Woolf's Recommendations on Disclosure, in A. Higgins (2020) at 167–168.

323 For a discussion see, S. Sime (2020).

324 S. Rosenbaum, The Rule-making authority in the English Supreme Court, (1917, Hardpress reprint) at 74, citing the Report of the Lord Chancellor's Legal Procedure Committee (1881).

325 See 2.2.3, above.

326 Fenn et al cited in M. Zander, The Woolf Reforms: What's the Verdict?, in D. Dwyer (2009) at 424–425.

327 It is interesting to note that in Norway, which introduced Woolf Review-inspired reforms through its Disputes Act (2005), has also witnessed a significant and subsequent increase in litigation cost, see Report from the Judicial Commission, The Third Power – The Changing Courts (Den tredje statsmakt - Domstolene i endring), (2020) at 303–316.

328 T. Goriely, R. Moorhead & P. Abrams, More Civil Justice? The impact of the Woolf reforms on pre-action behaviour: Research Study 43, (The Law Society & The Civil Justice Council, 2002) and Fenn et al cited in M. Zander (2009).

329 It should be noted that the problems that arose from increased costs arising from Conditional Fee Agreements was also a major reason for the Jackson Costs Review's establishment.

330 It can also be said to have increased procedural complexity through its introduction of costs management, costs budgeting, and qualified one-way costs shifting, amongst other things.

331 M. Briggs (December 2015) at 54–55. Again though it should be noted that this conclusion was not backed up by detailed qualitative or quantitative evidence as to where, how and to what extent costs remained disproportionate.

332 UTB LLC v Sheffield United Ltd [2019] EWHC 914 (Ch); [2019] 3 All ER 698 at [4], [53]–[54], [58], emphasising how the reform was designed to render costs reasonable and proportionate.

333 The Government is, at the time of writing, engaged in consulting on the operation of the fixed recoverable costs regime: see Ministry of Justice, Fixed Recoverable Costs (FRC) Interim Implementation Stocktake, (2025), which is available at: https://assets.publishing.service.gov.uk/media/6908bdb45e080b1224898185/frc-stocktake-consultation-document.pdf.

334 See CPR PD 51ZE.

335 See FN 299, above.

336 A. Zuckerman, Zuckerman on Civil Procedure – Principles of Practice, (Thomson Reuters, 2025) at [1.26]–[1–33]. An understanding that is explicit in CPR r.1.1 and the approach to relief from the adverse consequences for procedural non-compliance by parties to civil litigation; see Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 WLR 795.

337 M. Zander (2009) 425, See also R. Jackson (May 2009) Vol. 1 at 1 'Pre-action protocols and the requirements of the CPR have led to "front loading" of costs. Also the detailed requirements of the CPR and the case management orders of courts cause parties to incur costs which would not have been incurred pre-April 1999.' Also see T. Goriely, R. Moorhead & P. Abrams (2002), on the increase in costs arising from the introduction of the Pre-Action Protocols.

338 World Justice Project (2023), Rule of Law Index 2023: United Kingdom, at 173, cited in N. Byrom (2024) at vi;

339 See, for instance, the Civil Court Statistics published quarterly by the Ministry of Justice.

340 House of Commons, Justice Select Committee, Work of the County Court, (HC 677, 2025) at 10 and following, which is available at: https://committees.parliament.uk/publications/48940/documents/256865/default/.

341 See 3.3, above.

342 Ibid at 29.

343 Ibid at 54.

344 N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson, Access to Justice, Digitalization and Vulnerability, (BUP, 2024) at 21; J. Sorabji (2024) at 15.

345 Report of the Chancery Commission (1826); J. Sorabji (2014), Chaps. 1 and 2.

346 N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson, (2024) at 21–28.

347 N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson (2024) at 21. Also see N. Byrom, Where has my justice gone? - Current issues in access to justice in England and Wales, (Nuffield, 2024) at v, which is available here: https://www.nuffieldfoundation.org/wp-content/uploads/2024/Where-has-my-justice-gone.pdf.

348 It was criticised at the time for treating access to justice as access to the court: see, I. Ramsey (1988).

349 R. Jackson (December 2009) at 68–70.

350 It is not, however, suggested that it would be appropriate for the proposed Civil Justice Reform Institute, see **recommendation two**, below, working with a wider definition of access to justice to consider or make recommendations concerning questions such as whether there should be a justiciable, substantive right to public justice as explored by the Bach Commission. That is a question of substantive public policy that is more properly for Government and Parliament.

351 United Nations' Secretary-General cited in N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson (2024) at 26. Logically, prevention should come before resolution. Also see M. Weston, The Benefits of Access to Justice for Economies, Societies, and the Social Contract, (2022), which is available here: https://cic.nyu.edu/wp-content/uploads/2023/06/6c192f_c240bf284a8b40a19e715c152af1b4f0-1.pdf.

352 J. Sorabji (2024) at 15–16.

353 N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson (2024) at 27, noting how evidence shows that individuals who have 'low levels of legal confidence and low perceptions that justice is accessible' is associated with them being less likely to seek legal advice.

354 N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson (2024); G. Hadfield & J. Heine, Life in a Law-Thick World: Legal Resources for Ordinary Americans in S. Estreicher & J. Radice, Beyond Elite Law (CUP, 2016).

355 N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson (2024) at 22–23 and 26–28; and see, Justice Select Committee, The Future of Legal Aid (2021) at [3], 'Legal Service Board data suggests that 3.6 million people have an unmet legal need involving a dispute each year.', which is available at: https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/70/7004.htm. Legal Services Board, Ten-Year Report Reveals That the Basic Legal Needs of Many in Society Are Still Not Being Met, (Legal Services Board, 2020), which is available at: https://legalservicesboard.org.uk/news/ten-year-report-reveals-that-the-basic-legal-needs-of-many-in-society-are-still-not-being-met; and see L. Curran, J. Ching & J. Jarman, Regulatory Leadership on Access to Justice, (LSCP, 2024) at 11–12, which is available at: https://www.legalservicesconsumerpanel.org.uk/wp-content/uploads/2025/04/25.04.01-Regulatory-Leadership-on-Access-

to-Justice-Report.pdf. Also see P. Pleasance, N. Balmer, C. Denvir, How People Understand and Interact with the Law, (Cambridge, 2015).

356 Access to Justice Foundation cited by N. Creutzfeldt, A. Kypriandes, B. Bradford & J. Jackson (2024) at 27.

357 A point emphasised by L. Curran, J. Ching & J. Jarman (2024) at 43.

358 L. Curran, J. Ching & J. Jarman (2024) at 16, noting the literature that establishes the connection and concluding 'The literature is clear that unmet needs disproportionately harm the most vulnerable in society and therefore prevent them from accessing protections offered under the rule of law. Lack of preventative action in the early stages of a problem and the low awareness of the legal dimensions and potential for problem resolution (described above) exacerbates problems, often leading to escalation. This causes further inequality. It leads to further downstream costs in other areas including poor health outcomes, specifically poor social determinants of health outcomes, in, for example, housing, sufficient income, and wellbeing'.

359 See, for instance, J. Uraz, The Impacts of Reduced Access to Legal Assistance: Evidence from England and Wales (2025), which is available at: https://ilag2025.jura.uni-koeln.de/sites/ilag2025/URAZ_Juliet_Nil_June_2025.pdf; J. Organ & Jigafoos, The impact of LASPO on routes to justice, (Equality & Human Rights Commission, 2018), which is available at: https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf; Amnesty International, CUTS THAT HURT - The impact of legal aid cuts in England on access to justice, (2016), which is available at: https://amnesty.org.uk/files/aiuk_legal_aid_report.pdf; The Law Society, Written Evidence to the Justice Select Committee Inquiry on LASPO, which is available at: https://committees.parliament.uk/writtenevidence/50493/pdf/.

360 The Briggs Review gets closest to doing so through its Tier One and Tier Two online court proposals. It, however, adopted a court-centric approach to providing those tiers through a court-based, digital website. Thus it too adopted a court-centric approach rather than one that considered by reference to how unmet legal need arises how it could be tackled effectively. By focusing on the courts, reform to the courts was the only cure in town.

361 R. Dingwall & E. Cloatre, Vanishing Trials?: An English perspective, Journal of Dispute Resolution 7 (2006) 51 (2006) at 64.

362 Legal Services Board, 2023 Individual Legal Needs Survey: Exploring Unmet Legal Needs, (2024), which is available at: https://legalservicesboard.org.uk/wp-content/uploads/2025/01/ILNS-unmet-needs-topic-report-FINAL.pdf.

363 M. Galanter, Reading the Landscape of Disputes: What we know, don't Know (And Think We Know) about our Allegedly and Contentious Society, (1993) UCLA Law Review, (Vol. 31: 4) 4.

364 Estimates consistently range from 2–4% of issued claims result in judgment; see Ministry of Justice, Civil Court Statistics.

365 M. Zander, The State of Justice, (Sweet & Maxwell) (2000) at 49.

366 P. Middleton (1997) at 10.

367 J. Jolowicz, On the nature and purposes of civil procedural law, in J. Jolowicz, On Civil Procedure, (CUP, 2000).

368 A. Kessler, Our Inquisitorial Inheritance, 90 Cornell L. Rev. 1181 2004–2005.

369 R (UNISON) v Lord Chancellor [2017] UKSC 51; [2020] AC 869 at [66]–[77]

370 H. Genn (2010) at 16–24.

371 R. Mnookin & L. Kornhauser, Bargaining in the shadow of the law, 88 Yale LJ 950 1978–1979; W. Felstiner, R. Abel, A. Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming, (1980) Law and Society Review (15) 631.

372 Middleton acknowledged the existence and importance of these, as he put it 'wider benefits' of the civil justice system makes his claim that the civil justice system is part of the service sector of the economy: P. Middleton (1997) at 10. Conceiving them as 'wider benefits', misconceives both their importance and that they are intrinsic to the civil justice system.

373 R. Mnookin & L. Kornhauser (1978–1979).

374 H. Genn at 36.

375 R. Dingwall & E. Cloatre (2006) at 66.

376 Justice Select Committee (2025) at 54.

377 M. Zander (2000) at 39, 'A policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function.' And see, Lord Thomas CJ, The Judiciary within the State – The Relationship between the Branches of the State, (2017) at [13].

378 Although, given that the Woolf and Jackson recommendations focused on civil procedural rule changes, both Lord Woolf and Sir Rupert Jackson continued to influence their implementation through their judgments.

379 NB: this recommendation is focused on civil justice. It is likely, albeit beyond the scope of this Report, that similar Reform Bodies ought to be of equal utility for the family, criminal and tribunals justice systems and that there ought to be effective co-ordination between them. However, given the nature of these other systems, a different approach to reform may be necessary.

380 Civil Procedure Act 1997, s.6.

381 Such a Body could be seen as in some ways as comparable to Middleton's vision for the Civil Justice Council be given a wider remit than the Woolf Review intended: P. Middleton (1997) at 5, 20, 53 and 55. This recommendation goes wider than Middleton as even with its expansive view of the CJC's remit: it remained a body focused on the civil courts, their processes, and access to them. At no stage was it suggested either by the Woolf Review or the Middleton Review that the CJC should have as wide-ranging a remit as that suggested here for the Civil Justice Reform Institute, i.e., one focused on review, oversight and implementation consistent with a broader definition of access to justice (see **recommendations three** and **six**).

382 For variants on this approach see: C. Hodges, Delivering Dispute Resolution, (Hart, 2019) at 553–554; J. Sorabji, A Model Civil Procedure Code for England and Wales, (OUP, 2024) at 3–6.

383 R. Dingwall & E. Cloatre (2006) at 64.

384 S. Clark & R. Jackson (2018) at 266.

385 See FN 373.

386 Justice Select Committee (2025) at 47.

387 The Briggs Review may have highlighted the need for user-centred reform and the development of a new online court that was litigant-in-person focused rather than focused on the needs of lawyers, but given the nature of the Review it did not consider evidence of such non-professional user experience. In one respect it did not need to, as it was highlighting the need for designers of its proposed online court take account of user-experience; a key point that underpins the recommendations in this Part: see M. Briggs (December 2015) at 4 and 8.

388 Including the introduction of conditional fee agreements in 1990 and their reform in 1999 and, again in 2012. The introduction of damages-based agreements in 2012. And, multiple changes to legal aid provision since 1980.

389 Legal Services Act 2007.

390 Variously referred to throughout this report.

391 P. Middleton (1997) at 53.

392 See, for instance, E. Sunderland, The English Struggle for Procedural Reform, (29) Harvard Law Review, (1925 – 1926) 725; J. Sorabji (2014), Chaps 6 and 7; D. de Saulles, Reforming Civil Procedure: The Hardest Path, (2019); S. Chiodo, Taking Proportionality Seriously: A Countercultural Approach, Western Journal of Legal Studies, 2025, 16:1, 19

393 Lord Dyson MR, The Implementation of the Amendments to the Civil Procedure Rules, (18th Lecture in the Implementation Programme), (2014) CJQ 124; Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 WLR 795; Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 WLR 3926. Similar difficulties in the same area have been seen in Australia: AON v Australian National University [2009] HCA 27, (2009) 239 CLR 175. In both cases effective reform required restatements by the Court of Appeal and High Court of Australia, respectively, of the nature and purpose of the civil justice system and civil procedure.

394 Justice Select Committee (2025) at 60.

395 P. Middleton (1997) at 53.

396 While this Review is not focused on the conduct of review implementation, reference could be made to the recommendations made concerning effective implementation in: Institute for Government, Reviewing reviews *Lessons from past independent policy reviews*, which is available at: https://www.instituteforgovernment.org.uk/sites/default/files/2025-04/Lessons-past-policy-reviews.pdf.

397 A specific successful example of this type of approach was adopted by the judiciary to effect implementation of the Jackson Costs Reforms. This took the form the creation of both the Jackson Steering Group, chaired by the Master of the Rolls, which was responsible for ensuring effective implementation of the Review's recommendations, and the creation of the 'Jackson Five', five senior Court of Appeal judges who were to sit on appeals concerning the interpretation and correct implementation of changes to the CPR effected as a result of the Review's recommendations.

398 P. Middleton (1997) at 53. The failure to create such a body in 1997 to oversee the implementation of the Woolf Review, which could then have overseen the implementation of all future reviews and civil justice reforms is one of the most significant structural reform failures of the past forty years.

399 For a discussion of alternative, successful models, see T. Bunjevac, Judicial Self-Governance in the New Millennium, (Springer, 2020).

400 Justice Select Committee (2025) at 59.

401 W. Twining, Benson and the Academics, (1980) 43 MLR 558 at 563 cited in I. Ramsey (1988) at 491–420 in his broader criticism of the absence of a proper empirical basis of the Review's recommendations.

402 H. Genn, The Pre-Woolf Litigation-Landscape in the County Courts (unpublished) cited in M. Zander (2009) at 419.

403 H. Genn (2009) at 62–63.

404 M. Zander (2009) at 419–420.

405 National Audit Office, Implementing Reforms to Civil Legal Aid, (2014) at 8, where it identified the need for data collection. In 2024 it would criticise the failure by Government to have collected data: National audit Office, Government's management of legal aid – Ministry of Justice, Legal Aid Agency, (2024) at 31.

406 National Audit Office, Progress on the courts and tribunals reform programme, (2023) at 10.

407 The importance of the Rand Institute and its evidential studies is also noted by M. Zander (2009) at 420. He notes how is critique of the case management in the USA, not least its finding that it increased litigation costs significantly, was available to the Woolf Review, but yet was also not discussed by the Review. It may have been the case that the Rand Study was not relevant evidence, as it studied the effect of case management in a civil justice system where case management was intended to facilitate the court's ability to secure justice on the merits of disputes in each claim before the court, whereas the approach promoted by Woolf and embedded in the CPR saw case management have a more nuanced purpose (J. Sorabji (2014) at 204–205). It was intended in England and Wales to promote access to proportionate justice not justice on the merits in each case. The different purpose may have resulted in different consequences. It may not have done. In any event, it ought to have been fully considered and evidence should have been obtained to test whether the different purpose to guide case management in England and Wales did produce different results from those in the United States.

408 P. Middleton (1997) at [2.14]–[2.15], noted above at 3.2.2.1.

409 For instance that conducted by T. Goriely, R. Moorhead & P. Abrams (2002).

410 The absence of specific success criteria was a criticism specifically levelled at the Civil Justice Review 1988; see I. Ramsey (1988) at 416.

411 Such evidence-gathering could also be assisted through the publication of key performance indicators for the civil courts, so that they and the extent to which they are met can be subject to public, academic and political scrutiny not least by those who are engaged in the examination of the efficacy of any reforms and those engaged in determining if and what reforms may be necessary. This is done in Singapore and has been recommended by the Justice Select Committee (2025) at 12.

412 The continued existence of the Rule Committees and the Civil Justice Council is not simply an assumption, it is a necessity. The former would remain the essential means by which the procedural rule-making power was exercised, and exercised in a way that was democratically accountable. The latter's continued existence recognises the need for independent scrutiny of the system from a court-centred perspective and that there should be a plurality of means through which reform proposals can be devised and made.

413 H. Woolf (1995) at 81 and 248.

414 R. Jackson (December 2009) at 11.

415 Lord Browne-Wilkinson, The UK Access to Justice Report: A Sheep in Woolf's Clothing, [1999] 28 Western Australian Law Review 180. Also see, Civil Justice Council, Review of Litigation Funding – Final Report, (2025) at 51.

416 A conclusion also drawn by the Justice Select Committee (2025) at 47 in the light of the failed attempt to digitalise the County Court effectively by HMCTS.

417 CPR PD51U and now PD57AD and CPR PD51R, respectively.

418 See J. Sorabji, Prospects for Proportionality: Jackson Implementation, (2013) CJQ (32) 213 for a discussion of the pilot schemes.

419 In some cases piloting and testing may well not be necessary. Whether or not it is in any specific circumstance should be a matter for the assessment at the time policy is being developed. Care will also need to be taken to ensure that the use of piloting does not promote a 'perfect is the enemy of the good' approach, where it becomes a means to delay the implementation of reform.

420 See, for instance, the guidance on evaluation in HM Treasury, The Magenta Book – Central Government Guidance on Evaluation, (2020), which is available at: https://assets.publishing.service.gov.uk/media/5e96cab9d3bf7f412b2264b1/HMT_Magenta_Book.pdf. Also see N. Byrom, Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice (2019).

421 R. Jackson (May 2009) Vol. 1 at 3–5.

422 R. Susskind, Online Courts and the Future of Justice, (OUP, 2019) at 84.

423 Sir Anthony Clarke MR in D. Dwyer (2009); Lord Burnett CJ, The Age of Reform, (2018) at [39], which is available at: https://www.bailii.org/uk/other/speeches/2018/BAILII5.html.

424 CPR PD 51R.

425 N. Byrom (2024) at 70.

426 On which see: M. Maqueda & D. Chen, The Role of Justice in Development - The Data Revolution, (World Bank, 2021), which is available at: https://documents1.worldbank.org/curated/en/423061624976141321/pdf/The-Role-of-Justice-in-Development-The-Data-Revolution.pdf; M. Weston, The Benefits of Access to Justice for Economies, Societies, and the Social Contract - A Literature Review, (OGP, 2022), which is available at: https://www.opengovpartnership.org/wp-content/uploads/2022/05/The-Benefits-of-Access-to-Justice-for-Economies-Societies-and-the-Social-Contract-A-Literature-Review.pdf; OECD, Making Justice Systems More Effective and People Centred Advancing a Responsive Rule of Law, (2025), which is available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/11/making-justice-systems-more-effective-and-people-centred_d705c01f/e02fd90b-en.pdf.

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