FORUM OF INSURANCE LAWYERS

Informing Progress – Shaping the Future

The Privatisation of Justice

A FOIL Position Paper

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This paper was first published following the FOIL 'Privatisation of Justice' event on 7 May and finalised after the Roundtable event in Birmingham on 29 October. It reflects the presentations and discussion at those meetings, and consultation with FOIL members.

Background

Whether you are handling claims in a FOIL member firm or as an insurer it will have been inescapable over recent years that the volume of claims which are issued and those which proceed to trial have been reducing. In fact, the pattern has been the same for a substantial period. Professor Hazel Genn spoke in 2012 of the "*wholesale shift in the resolution of civil (and family) disputes out of the public realm.*"[1] At that time, she reported that, whilst the position was different in various European jurisdictions, the shift was also being observed in common law jurisdictions in North America and Australia. By 2020, Dr Carlo Giabardo from the University of Girona was reporting that the same shift was happening "*almost everywhere*"[2]. He noted, "*…. an ongoing replacement of a public system of adjudication with various private Alternative Dispute Resolution (ADR) forms as the main modality to solve conflicts between individuals…*" and "*….all the major common law states, the European Union and continental countries, almost without exception, are all moving towards a system in which litigation and court adjudication are a means of last resort.*"

Developments over the past two decades in England and Wales have reflected the shift: a greater focus on the use of ADR; the introduction of the Claims Portal in 2010 and its

[1] 'Why the Privatisation of Civil Justice is a Rule of Law Issue' 36th F A Mann Lecture, Lincoln's Inn, 19 November 2012: https://www.ucl.ac.uk/laws/sites/laws/files/36th-f-a-mann-lecture-19.11.12-professor-hazel-genn.pdf

[2] Private Justice: The Privatisation of Dispute Resolution and the Crisis of Law. University of Wolverhampton Law Journal: https://www.wlv.ac.uk/media/departments/faculty-of-social-sciences/documents/wolverhampton-law-journal/edition-4/(2020)-4-WLJ-14.pdf

extension to a wider range of claims; and the introduction of the OIC in 2021, have all moved claims out of the public sphere, to various privately funded means of dispute resolution.

The trend has found favour with government, particularly in view of the challenges the MOJ has faced in delivering a traditional civil court-based service. Despite reduced numbers of issued claims and dwindling trial volumes, there are significant county court backlogs. It was reported in June this year that the time it takes for small claims to reach trial had risen by 30 weeks since 2010. For more complex, higher value claims, the period to trial had reached 80 weeks.

After a significant programme of court closures, the last government struggled to address the poor condition of the court estate. In December 2022, the Law Society published a report on the state of court buildings based on a survey of 500 members. It highlighted a crumbling estate, with poorly maintained buildings in a state of disrepair with leaking roofs and toilets, a lack of cleanliness, and a lack of heating/air conditioning. 28% of respondents to the survey reported that court buildings were "*not at all fit for purpose",* with a further 55% reporting that they were only fit for purpose "*to some extent*".[3] FOIL's own consultation with its members in 2023 confirmed the Law Society's conclusions. Concerns over RAAC in public buildings have affected some courts but complaints are widespread including reports of court buildings rat infested and affected by asbestos.

£220m of funding for court repair and modernisation was announced by the Conservative government in August 2023, for court repair and modernisation over a two-year period. In reality, it was insufficient to tackle the long-term problems. The position seems unlikely to change under the new Labour administration. An additional £1.9bn departmental spend for the MOJ was announced in the October 2024 Budget but the money was earmarked for prison and probation service expansion, the Crown Court service and the criminal prosecution services. There was no commitment to additional civil justice spending. It seems likely that solutions to deliver civil justice without the need for state resources will remain an attractive prospect for ministers trying to balance the books, with the criminal and family justice systems invariably identified as taking first priority.

Recent Developments

There is increasing noise surrounding alternative methods of dispute resolution as a means of delivering justice quicker and more efficiently. In 2021 the Civil Justice Council considered the question of whether parties to a civil dispute could be compelled to

[3] https://www.lawsociety.org.uk/topics/research/are-our-courts-fit-for-purpose

participate in an ADR process.[4] The working group noted that the OIC is an existing example of compulsory mediation and concluded that "*Introducing further compulsory elements of ADR would be both legal and potentially an extremely positive development*." The 2023 Court of Appeal case of *Churchill v Merthyr Tydfil County Borough Council*[5] confirmed that finding, holding that the court can order the parties to engage in a non-court-based dispute resolution process.

In May this year the MOJ introduced compulsory mediation in many money claims worth up to £10,000. It announced then that the policy would be extended later this year to cover all small money claims under £10,000, including those issued through the Online Civil Money Claims service (OCMC). The MOJ also made a commitment to integrate mediation into higher value, complex claims, which will require the engagement of third-party providers.

It remains to be seen whether the new Labour administration will adhere to those proposals, but solutions with the potential to reduce the need for government expenditure are likely to be given serious consideration. If the new Justice Minister is looking for independent advice on the issue, in addition to the support provided by the Civil Justice Council to mandatory mediation in 2021, the Civil Justice Council's 2023 Final Report Part 1 into the role of Pre-Action Protocols (PAPs) proposes the mandating of some form of dispute resolution process before proceedings can be issued.[6] It is worth noting that in the case of *Churchill v Merthyr Tydfil County Borough Council*, not only were several heavyweight organisations allowed to intervene in view of its importance to civil justice (including the Law Society and the Bar Council) but the decision came from the top, from a Court of Appeal made up of the Master of the Rolls, Sir Geoffrey Vos; the Lady Chief Justice, Lady Carr; and the Deputy Head of Civil Justice, Lord Justice Birss. If the government is looking for high level support to retain the focus on ADR, it is not difficult to find.

In respect of litigated claims, the Claims Portal introduced in 2010, was the first step into civil justice delivered online through a newly developed digital process. In his Review of the Civil Court Structure in 2015, the then Lord Justice Briggs set out his vision for delivering access to justice through an online court, providing an integrated service from

[4] https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf

[5] https://www.judiciary.uk/judgments/james-churchill-v-merthyr-tydfil-county-borough-council/

[6] https://www.judiciary.uk/guidance-and-resources/civil-justice-council-publishes-final-report-on-pre-action-protocols/

pre-issue guidance and support through to determination. He acknowledged the ambition of the HMCTS Reform Programme, that the whole of the civil courts should be digitalised. The advent of the Online Procedure Rules Committee (OPRC) in 2023, arising from Lord Justice Briggs' report, is part of the delivery of that change process, to modernise the civil justice system and embrace the benefits that new technologies such as AI (including generative AI) will have to offer in the administration of justice.

The CJC's recommendations in its 2023 Final Report Part 1 on the Review of the Pre-Action Protocols, place much more emphasis on the pre-action stage of civil justice, with the extension of digitalisation into the pre-action space (and the potential value of that to litigants) seen as "*beyond dispute*". Recognising that government funds are limited, the CJC sees a role for private portals to assist parties to meet their pre-action obligations which, if court proceedings are required as a last resort, can engage seamlessly with HMCTS. In signs that the recommendations will be taken forward, the minutes of the meeting of the OPRC in July 2023 recorded the need for the Committee to "*consider how providers of pre-action portals and early legal advice and information would interact with the digital justice system."*

Seen together, the recent reforms introduced by the Conservative government are clearly in line with the trend identified over a decade ago by Professor Hazel Genn: a significant shift towards resolution of disputes through non-judicial means.

It seems unlikely that the change in government will significantly alter that. With its stated aim of only delivering changes which are fully costed, the Labour government will be forced to recognise the same challenges in the delivery of civil justice which the previous administration faced: a severe lack of funding and a current regime suffering from delay and decay. Whilst the new government has had little to say so far on ADR within the civil justice system, there were indications at the FOIL 'Privatisation of Justice' event that the CJC's proposals on pre-action process reform (which include mandatory pre-issue engagement in a dispute resolution process) enjoy cross-party and civil service support, suggesting that a radical change in policy is unlikely.

The process of reform is already underway, with policy decisions likely in the short and medium term which will affect the delivery of civil justice over the next decade. It is vital that FOIL members and their clients are part of the debate on the future shape of civil justice.

FOIL's Position

ADR

1. FOIL is a firm advocate of the benefits of negotiated settlement to resolve a dispute wherever it is appropriate, to reduce claim lifespan and costs. In support of that principle, FOIL has been a long-term supporter of ADR including mediation. In much of the general insurance claims work FOIL members handle, a Joint Settlement Meeting (JSM) is the preferred form of ADR. As a result of pre- and post- issue ADR the vast majority of claims handled by FOIL members settle early, often pre-issue, with only a very small minority proceeding to trial.

2. The pre-issue space is critical to achieving early settlement and reducing costs. In its response to the Civil Justice Council Review of Pre-Action Protocols, FOIL was supportive of the proposal to introduce mandatory obligations to try to resolve or narrow the dispute pre-issue. It agreed that compliance with the PAPs should be mandatory and supported the introduction of a meaningful and effective sanctions regime to ensure compliance. It is vital that the PAPs have 'teeth'. FOIL welcomes the CJC's recognition that dealing with PAP compliance at the end of the proceedings does not encourage a culture of compliance.

3. The introduction of the extended FRC regime in October 2023 has highlighted the need for a clear steer on pre-issue conduct. With limited recoverable costs available pre-issue, there will be temptation to issue early, to move to the post-issue stages of FRC. There is currently a lack of clarity on what can be expected from the parties pre-issue. With no provisions currently set out in the PAPs, it would be very helpful for work to be undertaken as part of the current review of PAPs, to incorporate guidance, which is likely to assist in reducing the volume of issued claims. The provisions within the FRC regime to penalise unreasonable behaviour will be important in ensuring that claims are not issued prematurely for costs reasons.

4. FOIL welcomes the proposed 'cards on the table' approach envisaged by the CJC. In particular, the need for adequate disclosure of information and documents pre-ADR, to ensure the efforts to resolve or settle the dispute are fully informed and to enable full engagement in the process. The incubation of claims is unhelpful and increases costs. One of the problems of the current regime is the ability of claimants to progress claims at the outset behind a veil of secrecy, with few details revealed until the claim is fully developed, with several medical reports already obtained. This approach provides no

opportunity for the defendant to be involved in issues around medical evidence and rehabilitation and significant hampers attempts at early settlement. The PAPs must encourage a more collaborative approach. In its response to the CJC, FOIL also argued for changes to the pre-issue expert evidence process, focusing on the early disclosure of core evidence and sequential exchange of secondary evidence, much of which, if disclosed early, may be accepted by the defendant, removing the need to obtain their own evidence.

4. The timing and timescale for ADR is important. Sufficient time must be allowed for preparation before the ADR goes ahead and enough time allowed for the process to be completed before the claim can proceed to litigation.

5. It is important to recognise the importance of flexibility in choice of process. There is a need for balance and proportionality – the PAP requirements should be in line with the value and complexity of the claim. FOIL was supportive of the CJC's decision not to recommend a specific ADR process pre-issue and instead leave the parties to make a decision on an appropriate method. There is a need for a full menu of options. For example, whilst full mediation may be disproportionate in modest claims, a short, time-limited option may be cost effective. Early Neutral Evaluation can be very effective in addressing quantum. It is noted, for example, that the MIB uses adjudication to resolve hundreds of claims each year arising from accidents involving untraced drivers. A serious attraction of ADR is the ability of the parties to shape the process to suit the claim.

6. In the second part of its Final Report, still to be published, the CJC will consider potential reforms to specific PAPs and/or the creation of new litigation specific PAPs. The working group has proposed the introduction of a PAP for abuse claims (which FOIL supports) and a PAP for foreign accident claims (where FOIL felt the development work would outweigh the benefits). FOIL believes the development of a Credit Hire PAP is worthy of serious consideration, to build on the caselaw which has improved the position on pre-issue disclosure and ensure that Credit Hire claims are handled in accordance with bespoke pre-issue obligations, delivering benefits in claims where there is often a lack of voluntary co-operation between the parties. The Pre-Action Protocol for Personal Injury and Road Traffic Damage-Only claims published in Northern Ireland in early 2023, which addresses pre-issue credit hire issues, was welcomed by insurers and defendant representatives.

7. In responding to the MOJ's consultation on 'Increasing the Use of Mediation in the Civil Justice System' (considering mandatory mediation in the Small Claims Track (SCT)), FOIL raised concerns at the potential for mandatory mediation to merely increase costs

if an increased volume of claims did not settle as a result of the mediation. The issue is of even greater concern in higher value claims where the costs incurred in mediation will be much higher. It is recognised, however, that some organisations such as NHS R and companies engaged in heavyweight commercial litigation, equally concerned to ensure their dispute resolution processes are cost effective and value for money, have been prepared to use ADR more readily, an indication that they believe the benefits outweigh the costs of the process.

8. The decision in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA 1416, (and the subsequent changes to the Civil Procedure Rules (CPR) arising from the Civil Procedure Rules Committee (CPRC) consultation on consequential amendments) coming into effect on 1 October, has changed significantly the role of ADR within the civil justice regime. Under the proposed amendments to the rules the promotion and use of ADR will be an essential part of dealing with a case justly and at proportionate cost under the Overriding Objective, and under the rules on case management the judiciary will be expressly required to consider whether to order or encourage the parties to participate in ADR.

9. If the CJC's recommendations on mandatory ADR in the Pre-action Protocols are accepted and implemented, when coupled with the power of the judiciary to order ADR post-issue, the use of some form of ADR is likely to become almost obligatory.

10. The government has expressed interest in adopting a system similar to the mandatory mediation regime which operates in Ontario, Canada. The system has operated since 1999 and requires the parties in a wide range of disputes to have participated in mediation within 180 days of the first defence being served unless the court orders otherwise. The scheme has wide support amongst plaintiff and defence lawyers. Whilst this is clearly a system which has worked well in Ontario, the civil justice regime there is very different to that in England and Wales, having more in common with pre-Woolf reform litigation in this jurisdiction. Statutory notification is required in Ontario for some forms of claim but there is no established pre-issue process or PAP regime and therefore no culture of pre-action settlement. In claims where no advance notice is required by statute it is common for the first contact between the parties to be by way of service of proceedings. Once proceedings have commenced it can be very difficult for a defendant to obtain disclosure. Before mandatory mediation was introduced it was common for claims to have a long-life cycle, with settlement most likely at the court-door. Against that background mandatory mediation is welcomed by the parties and their lawyers, as a means to obtain information and documentation about the claim and speed up the process of investigation and settlement. In effect, mandatory mediation offers a means to explore the issues and negotiate a settlement which is not otherwise

available. The position in England and Wales is very different, with the civil justice process being focused on early resolution from the outset, including pre-issue, and with rules throughout aimed at encouraging early resolution, including the strong steer provided by Part 36 of the CPR.

11. Even under the Ontario regime, the rules provide that in Road Traffic Accident (RTA) claims where the parties have already mediated under Section 258.6 of the Insurance Act (allowing either party to require a mediation in those claims), the standard rules on mandatory mediation do not apply where mediation under the Act has taken place less than a year before the delivery of the first defence – with a view to avoiding duplication and wasted costs.

12. Mandatory mediation is also a feature of civil litigation in New York State, USA. Use of mediation has increased over the past 20 years through judges ordering parties to mediate (in a similar way to *Churchill*) and by the introduction of a mandatory requirement that parties engage in good faith in mediation within 90 days of commencement of the lawsuit. ADR forms a specific part of the justice process, with a judge able to refer a claim to mediation within the court process using either a mediator employed by the court service (and sometimes chosen by the judge) or a private-sector mediator using a panel process. In New York State, mediation is perceived by the parties and their representatives to be a valuable tool. The vast majority of cases settle at some stage during the mediation cycle or with the continued assistance of the mediator after a mediation.

13. As in Ontario, the differences in the civil justice process in New York State make it difficult to draw comparisons with England and Wales:

- As in Ontario, in New York State there are very few pre-suit provisions, with no equivalent of the pre-action protocols. Judge-led and mandatory mediation post-issue provide a catalyst for discussion between the parties and the judge with regard to disclosure of documents and the other information that will be required for the mediation to be meaningful. As one practitioner explained, "*90 days is too early to resolve the dispute but it does allow us to sift through and narrow the issues".* In England and Wales this is delivered in the pre-action stages.
- US claims are not costs bearing. In an environment where success in bringing or defending a claim will still result in significant expenditure in legal costs there is almost no claim where it is not worth making a payment to buy off liability, significantly increasing the commercial pressure to settle early.

- Practitioners report that it is not the mandation of mediation that makes the New York State regime a success but, instead, the buy-in from the judiciary and legal representatives. Mediation has become a standard feature of civil justice with an understanding that it will be used in almost all claims. This has encouraged practitioners to engage in the process and appreciate the advantages it offers, leading to meaningful disclosure and discussion which will often lead to settlement. This 'virtuous circle' is likely to arise in England and Wales through greater use of '*Churchill*' court-ordered ADR without compulsion.

14. Taking into account the position set out above, FOIL does not believe that further extension of mandatory mediation beyond the reforms already announced would be beneficial:

    - The use of ADR is likely to increase in any event as a result of the CJC proposals and Churchill reforms.
    - The CJC/Churchill regime will allow for a range of ADR methods to be adopted, not just mediation, to suit the circumstances of the claim. The MOJ committed in its response to the 'Increasing the Use of Mediation in the Civil Justice System' consultation[7] to exploring the role of other integrated dispute resolution services in higher value civil disputes, not only mediation, and FOIL believes that is the right approach.
    - Judicial discretion on the use of ADR, (alongside the strong steer provided by changes to the Overriding Objective and the requirement that its use be considered by the judge in every case) will reduce the risk that mediation may merely increase costs without delivering benefit. It will allow ADR undertaken pre-issue to be factored into the decision-making on the issue post-issue.
    - The introduction of mandatory mediation, perhaps at a fixed stage in the proceedings in line with the North American models, would reduce flexibility. There is a risk it would encourage gaming, potentially discouraging committed adherence to the PAP requirements and early negotiations. Whilst targeted mediation at the right time may prove to be beneficial,

[7] https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system/outcome/increasing-the-use-of-mediation-in-the-civil-justice-system-government-response-to-consultation#:~:text=these%20case%20types.-,The%20Civil%20Procedure%20Rules%20will%20be%20amended%20to%20enable%20implementation,across%20all%20small%20claims%20proceedings.

requiring it as a compulsory step in all claims is likely to increase wasted costs.

15. In its response to its consultation on Increasing the Use of Mediation in the Civil Justice Process, the government confirmed its commitment to integrating mediation within higher value claims in the County Court. With respect, FOIL would argue that that has been achieved effectively by the *Churchill* decision. FOIL agrees with the government's conclusion that accreditation and regulation of the ADR sector is best left to the relevant professional bodies. In line with the experience in Ontario, FOIL does not believe that statutory regulation of the section would deliver proportionate benefits.

16. If the government wishes to extend mandatory mediation to higher value claims, FOIL would argue that personal injury claims do not provide the best starting point. They are handled in the main by experienced specialist lawyers, involving an experienced professional defendant for whom cost control is an important aspect of litigation. Formal negotiation/ADR is already an established feature of these claims, with very few proceeding to trial. It is likely that other types of money and damages claims, where settlement rates are currently lower, may benefit more from mandatory mediation requirements.

17. FOIL notes that judicial-led mediation is being considered by the MOJ. It is understood this would involve a judge reading the papers and setting out a provisional view on how the claim was likely to progress and be concluded at trial – in effect, a form of Early Neutral Evaluation. There are concerns that the process would become in effect a trial before trial, with the steer on the likely outcome of the claim becoming the de facto decision of the court. This risks prejudicing the outcome of a claim without full information and the safeguards provided by the opportunity to assess the full facts and hear the evidence. Coupled with the pressures of Part 36, it may be difficult for a party to disregard the preliminary decision and exercise their right to pursue a claim to a full court hearing. It is important that the right to trial is recognised: if the right is compromised by excessive steers towards settlement, access to justice is likely to be seriously impacted.

18. FOIL would argue that in view of the current flux in the rules arising from the CJC's recommendations and the *Churchill* decision, the more appropriate next step would be the introduction of the CJC recommendations on changes to the Pre-Action Protocols, including the requirement for mandatory dispute resolution steps before issue. Monitoring the effect of those changes, alongside the new judicial powers to order ADR post-issue, will enable an assessment to be made of whether those provisions together deliver a significant increase in use of ADR. Given the very small volume of personal

injury claims which currently proceed to trial it is unlikely that further use of ADR will reduce trial volumes significantly, although with improved use of ADR pre-and post-issue under the new rules there is the potential for claims to be settled earlier than is achieved at present.

19. Allowing the first phases of reforms to bed down before considering further changes has proved to be a valuable approach in the past. In his 2009 Final Report on civil litigation costs, Lord Justice Jackson, as he then was, adopted a phased approach to fixed recoverable costs. Recommending in 2009 that costs be fixed in the Fast Track, he advised that extension of the regime "*should be reconsidered after experience has accumulated…"* His Supplemental Report published in 2017, noted that the reforms based on his earlier recommendations had "*now bedded in*" and it was *"now opportune to consider extending FRC*". This incremental approach, over several years, building on experience, reduces the risk of 'unforeseen consequences' which have often hampered the effective implementation of reforms in the past.

20. There must be joined-up thinking on the use of ADR. The CJC's recommendations (to strengthen the PAPs and place greater focus on the pre-issue stages of litigation) and the work of the OPRC (extending into the pre-issue sphere and aiding a seamless transition from pre-litigation to proceedings) highlight that civil justice must be viewed holistically. An approach which draws a hard line between pre-litigation and proceedings is outdated. It is important that pre-issue steps, including engagement with ADR, are factored into post-proceedings case management decisions and not required to be repeated after issue.

21. Much of the recent consideration and discussion around increased use of ADR has focussed on processes, particularly JSMs and mediation, which are generally utilised either alongside court proceedings or on the basis that, if they do not result in settlement, court proceedings will follow. Arbitration, as a method of ADR, takes the concept of privatisation of justice one step further: the replacement of the court process with a formal, statute-led procedure with discrete rules on process and costs, which replaces the court process in its entirety.

22. Although arbitration is a well-established method of dispute resolution, used frequently in heavyweight commercial, property and insurance disputes, sometimes as a result of express contractual or policy requirements, it is rarely used in personal injury claims.

23. The launch of PIcArbs in 2015 sought to change that by offering a tailored arbitration process for personal injury and clinical negligence claims. Developed by Andrew Ritchie QC, as he was then, the process was guided by the Civil Procedure Rules, including adherence to the PAPs, before the commencement of arbitration governed by the

Arbitration Act 1996. The key features were an online and paperless process, use of an arbitrator chosen by the parties or from the PIcArbs panel, and no costs budgeting (although costs savings were promoted as a key benefit). Some of the drivers for the development echo current issues, with limited MOJ funding, increases in court fees to include enhanced fees (where the fee charged is more than the cost of providing the service), and significant court delays making litigation less attractive. In addition, it was the era of *Mitchell,* with the courts taking a stringent approach to breaches of procedural orders and time-limits, with applications regularly required to challenge tough court-imposed sanctions.

24. Alongside other stakeholders FOIL ran events to profile the new service and there was considerable press interest, but the new service did not gain traction and it is hard to find anyone with direct experience of what the service had to offer. By 2020 the service had petered out, blamed in part on the growth of JSMs and reduced volumes of claims going to trial, reducing the imperative for a litigation alternative.

25. Arbitration is being mentioned again in the light of the current focus on ADR. A recent Insurance Post article by claimant solicitors, Winns, highlighted its advantages of earlier settlement and faster access to justice. With market forces having seen off PIcArbs, but with many of the issues which prompted its introduction still remaining, it is unclear at present if there is a market appetite to look at arbitration again as an alternative to litigation.

26. A key element of the civil justice regime envisaged by the CJC in its Review of PAPs, and *post-Churchill,* is collaboration: an approach to dispute resolution which recognises the value of early disclosure, discussion, mutual decision-making and dispute resolution. A greater focus on pre-action behaviour and ADR does not remove the adversarial elements of litigation, and it is important to note that ADR does not mean settlement, but the changes will create an expectation that parties will work together and behave reasonably (or face costs consequences and other sanctions). FOIL welcomes the opportunity to work with other stakeholders, including claimant representatives, to identify areas of common interest and ensure the aims of the new regime are successfully delivered.

Digitalisation and Portals

1. FOIL recognises and supports the significant benefits to be obtained through the digitalisation of the civil justice process. As long ago as 2015, when Lord Justice Briggs was consulting upon radical proposals to introduce an Online Dispute Resolution process (ODR), FOIL welcomed the initiative in its response:

> *"Professor Susskind and his advisory group make a compelling case for a radical rethink of the way that disputes are resolved. Although he notes that "for many lawyers and judges, our recommendations and the contents of the report may appear rather alien and even disruptive" FOIL would seek to reassure Professor Susskind, and Lord Justice Briggs, that many lawyers are open to the idea of radical reform. FOIL is committed to change which improves access to justice, delivered at proportionate cost. As technological solutions emerge and improve it is essential that they are examined in detail to assess the role they can play in improving the current system."*

Digitalisation is not a new concept: FOIL member firms' practices are highly automated and digitalised to better deliver efficient, cost-effective services.

2. FOIL's direct involvement in digitalisation projects dates from 2008 when, then FOIL President, Anthony Hughes was a member of the working group which led to the development of the Claims Portal and the accompanying Pre-Action Protocol. In 2021 FOIL joined the HMCTS initiative to roll-out the Damages Claims Portal (DCP), for digital issue of claims in the county court, working with FOIL members which joined the pilot and liaising with and lobbying the HMCTS development team as the roll-out progressed. FOIL is represented on the Official Injury Claims Portal Advisory Group (OICAG), the group of stakeholders established to monitor the function and impact of the service.

3. The difficulties which arose with the development of the Claims Portal are well-known, with problems in the system hampering its introduction and early development. In part, the problems arose from a tight timescale, leading to the launch of the Portal before the rules and IT infrastructure were in place. As Anthony Hughes recognised at the time, "*It was a bit like starting to build a house when the plans are only in draft form and therefore almost inevitably going to change."*

4. Whilst there was enthusiasm amongst FOIL members for the potential presented by the DCP in 2021, the pilot proceeded fairly slowly. Tight time scales were identified as a hurdle to defendant firms signing up: firms needed time to prepare business

plans, assess the impact on existing systems and consider training requirements which all take time. There was a feeling that the issues which arise within large scale businesses in making radical changes to their processes were not fully recognised.

5. The difficulties in developing and rolling out the DCP took two main forms. Firstly, through the lack of measures to link the digital process with its business users. The lack of an API, to assist in integrating systems; the lack of a shadow training model, to avoid the need to train staff on live cases; and the initial requirement that an individual take responsibility as a super-user, with prime responsibility for linking the user firm with the DCP, were all identified early on as barriers to early adoption. Secondly, the system as built did not always accord with the court rules governing the processes it handled, leading to frustration amongst users struggling to align rules and IT which had been developed independently from one another.

6. The speakers at the FOIL 'Privatisation of Justice' event identified a number of considerations which impact on the effectiveness of digital processes. Alongside the need to use the best technology available, there are wider issues in the way new processes are delivered:
    - FOIL would endorse the comments from Eddie Longworth, of JEL Consulting, at the FOIL event, on the need to take time, to avoid knee-jerk reactions for short-term benefit. Seeking to deliver to unrealistic timescales is likely to be counterproductive. The use of pilots can provide an opportunity to assess the value of changes before they are implemented fully. For example, FOIL welcomes the CJC's acknowledgment that "*it is entirely appropriate that a cautious and incremental approach is taken to digitalisation of the PAPs".*
    - Recognition of the complexity of digitalisation projects. The difficulty of delivering an effective service cannot be overstated. To give one example, unlike the DCP, the OIC is API-based but the MIB has been required to work hard with professional users, both before and after roll-out, to ensure the portal works with the numerous case management systems used in professional firms.
    - Required functionality must steer technical development, not vice versa. The use of Minimum Viable Product solutions may deliver quicker solutions but can bog down usability and development further down the line. As the CJC notes in its Part 1 Final Report on Review of the PAPs, "*It is particularly important that the technological limitations of any mandatory pre-action*

portal do not end up dictating the content of pre-action rules to accommodate the technology".

- FOIL would support the need for collaboration highlighted at the FOIL event by Matthew Jarvis from Nuvalaw. With policy arising from the government and the senior judiciary, the development of digital solutions must bring together lawyers and their clients; the CPRC and the OPRC who draft the rules; HMCTS, with responsibility for delivering on the reform programme; and the technology experts who build the systems. Without this joint input systems can suffer from built-in weaknesses and shortcomings and ultimately fail to deliver. The collaboration must start at the outset of projects, to avoid early key decisions being made without full visibility. It is recognised that collaboration does require full commitment from users as well as developers: end-users must show a willingness and be prepared to allocate the time and resource necessary to be fully involved in development projects and pilots.
- It is important that lawyers and their clients also collaborate. Eddie Longworth highlighted the differences: claims professionals are rarely lawyers; lawyers are not technologists. The same requirement for dialogue and collaboration as arises between the government, stakeholders and service providers in reforming the civil justice system is also essential in developing how lawyers interact with their clients and the tools they use.
- As noted at the Roundtable event, digital natives, who have grown up with information technology and digital solutions, should be included as an important part of the collaboration.
- FOIL would welcome greater consultation and liaison between the CPRC and the OPRC and end-users, on the development of the rules. The expertise of the Committees is unquestioned but FOIL believes greater involvement and input from lawyers and other stakeholders could provide useful comment on procedural detail, to anticipate problems before the rules become law.
- The OPRC is a vital organisation with a unique jurisdiction extending across the pre-issue and post-issue space. Its work will be critical in bringing into effect digital justice. It is understood that the early general election disrupted the passing of secondary legislation to specify the jurisdiction of the OPRC but the current position is not clear. It is noted that the OPRC has published no minutes since October 2023 and although it was announced in July 2024 that an OPRC sub-committee had been put in place, the nature of its work has not been publicised. Given the importance of the OPRC's role, FOIL would

welcome further information and engagement, to assist FOIL in considering how it can best prepare for and support the OPRC's work.

- Integration and consistency are key to efficiency. It is noted that, at a basic level, the OIC and the Claims Portal are not yet integrated. The lack of an API within the DCI has been a major issue for FOIL members and has significantly hampered its operation.: it is disappointing that there are still no plans to address the issue. FOIL welcomes the recognition from the OPRC of the importance of interaction between pre-action processes and the digital court service.
- Recognition that one size does not fit all. The need for flexibility goes beyond recognising that civil litigation is not a monolith, with different types of claim requiring differences in approach. It is also relevant when dealing with stakeholders and professional users. The legal profession is a diverse entity: solutions must not only meet the needs of high street practitioners but also deliver for multi-national companies.

7. There should be a sharing of ideas and solutions across the justice system, with a view, where possible, to avoiding a silo mentality, making use of common experience and developments across the civil, criminal, family and tribunal jurisdictions.

8. The issue of funding is crucial. In making its recommendations on the digitalisation of pre-action processes, the CJC recognises that government funding is likely to be limited: "*Given the resources required to create and maintain pre-action portals that fully integrate with digital court processes, it is likely that they will have to be funded by industry*." The development of a more generic PAP portal would be more straightforward, with the CJC indicating that funding from the MOJ/HMCTS might be forthcoming.

9. Insurance industry funding has been critical in achieving digital reform to date, with private funding behind the development of the Claims Portal and the OIC. The IT and AI sectors are active currently in developing digital solutions, both bespoke and available on the open market. The question of who pays to deliver civil justice reform is critical: the potential for products and/or funding from the private sector will be key in shaping government decision-making. There is a need for an on-going dialogue within the claims sector and government, to ensure appropriate and deliverable decisions are made on funding.