South Eastern Circuit Response to the report by JUSTICE, 'Delivering Justice in an Age of Austerity'

Introduction

1. The South Eastern Circuit represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. This is the response on behalf of the South Eastern Circuit ('SEC') to the report by JUSTICE, 'Delivering Justice in an Age of Austerity' ('the JUSTICE report').[1]

3. The JUSTICE report proposes:
   (a) a new model for dispute resolution;
   (b) that information, advice, assistance and representation be provided to litigants by means of an integrated online and telephone service.

New model for dispute resolution

4. JUSTICE appear to be recommending a fundamental shift in our civil justice system, from an adversarial system to an inquisitorial system. The SEC does not believe that it would be appropriate for this to happen without consideration by Parliament. If such a shift were to happen without proper safeguards, as proposed by JUSTICE, it would undermine access to justice and consequently the rule of law.

5. The JUSTICE report seeks to extrapolate from the Financial Ombudsman Service ('FOS') and other dispute resolution systems, suggesting that a similar system could be utilised across a broad range of civil disputes in the courts, including the High Court, even though these systems are designed to deal with much simpler and more uniform legal disputes and, in the case of the FOS, the outcome is not binding unless accepted by the consumer. This attempt at extrapolation underpins the entire report, and the SEC does not consider that it is valid.

6. The SEC makes the following observations about the proposed model for dispute resolution:

   (a) The proposed model envisages a registrar acting as the 'gatekeeper' and, wherever possible, the decision-maker in our civil justice system. According to the report, *'graduates who have passed their professional examinations'* may

[1] http://justice.org.uk/our-work/areas-of-work/access-to-justice/justice-austerity/.

become registrars (paragraph 2.29). It follows that JUSTICE is recommending that an individual who is not authorised to carry on reserved legal activity under the Legal Services Act 2007 and could not practise as a solicitor or barrister even under supervision could become a registrar and exercise the far-reaching powers set out in the JUSTICE report. Even if the role of the registrar were reserved to qualified lawyers, as SEC considers should be the case, it is not realistic to expect a newly qualified lawyer to be able to do anything more than issue fairly standard directions in most areas of civil work (and even then subject to review at the request of the parties);

(b) The report states, *'Using an investigative or proactive approach for all cases where a defence is lodged, the registrar will identify the relevant issues, the applicable law, the appropriate procedure and the evidence needed to resolve the case*' (paragraph 2.2). This is elaborated upon at paragraph 2.35, which states, *'In the first instance, the registrar will carry out an investigation to clarify the issues. Claims, defences, witness statements, documents relied upon and applications should be filed online as a matter of course… After further consideration of the filed materials, the registrar should communicate with the parties where further clarification, information or evidence is required, normally by email or telephone. Parties will have an opportunity to comment on the evidence provided by the other side'*. This approach would be much more interventionist and prescriptive than the fairly robust approach to case management in the present system, and it allows for only limited input from the parties. A judge would not normally prescribe the evidence which a party should adduce. It represents a fundamental shift away from our adversarial system, in which the parties are able to put forward argument as to the factual and legal issues in a case, and the appropriate procedure, and in which the onus is on the parties to identify the evidence upon which they rely. Such a fundamental shift should be considered by Parliament, and if implemented, should include appropriate safeguards for the parties. If the registrar failed to identify correctly what further clarification, information or evidence was required, it is unclear what the consequences would be, and this issue is not addressed in the report. For example, if the case were referred to a judge, who would pay the costs of an adjourned hearing if one or both of the parties were legally represented or had incurred other costs, and the judge decided that an adjournment were necessary? What if there were no adjournment and the case were lost because of the registrar's failures?

(c) The registrar will then decide, in private and on the papers, the '*best course of action'* (paragraph 2.35(b)). The registrar is entitled to strike out a claim, carry out 'early neutral evaluation', offer mediation to the parties, or refer the claim to a Judge. These are far-reaching powers, and the registrar is expected to exercise them based on limited information, without a hearing. Early neutral evaluation is carried out by a judge (who will not be the trial judge) and is intended to give the parties an indication of the view which a judge might take if the dispute went to trial: a junior court employee such as a registrar could not undertake this role. The registrar himself is the gatekeeper of determining whether he/she is capable of dealing with the claim, or whether it should be referred to a judge. This risks serious injustice to the parties;

(d) The registrar is entitled to strike out a claim on the basis that it has *'no reasonable prospect of success'.* It is not clear at what stage the registrar would be entitled to exercise this draconian power. The report does not appear to allow opportunity for intervention or representation, written or oral, by either of the parties, or for comment on the information which the registrar has obtained from the other party or parties, perhaps over the telephone or by email. Again, there is a risk of serious injustice, especially in circumstances in which the strike-out decision would be made by a registrar who might lack experience or might not even be qualified to practise, and who might be dealing with cases across the whole range of civil work and therefore in areas with which he/she had little or no knowledge. The SEC considers that striking out a case is an important judicial function, and that this should be carried out by a judge;

(e) JUSTICE envisages that registrars will '*refer to a judge only those cases where no other resolution is likely to be effective or appropriate'* (Executive Summary). Accordingly, unless, in the opinion of the registrar, no other resolution is likely to be effective or appropriate, a case will not be referred to a judge. This means that in the majority of cases, the matter will not be heard in open court or by an independent and impartial tribunal;

(f) In the event of a referral to a judge, the registrar *'may suggest to the parties what additional information or evidence might usefully be submitted to the judge'* (paragraph 2.35(b)(iv)). Again, this is much more interventionist and prescriptive than the fairly robust approach to case management in the present system, and the SEC considers that it blurs the line between legal advice and the determination of civil rights and obligations;

(g) The function of the judge would be limited to considering the information gathered in the 'investigation' carried out by the registrar. If the registrar has carried out the investigation badly or had failed to understand the law or indeed the significance of certain pleaded facts or information provided by one of the parties, there is an obvious risk of serious injustice. The report suggests that an appeal to a judge would ensure that the article 6 rights of unsuccessful litigants were not violated (paragraph 2.38[2]). Whether or not an appeal to a judge is sufficient to satisfy the requirements of article 6 depends on the scope of the review available on appeal. In circumstances where there has been no trial, limited opportunity for parties to adduce evidence, no opportunity for litigants to test that evidence at trial, and the review takes place after the evidence has been gathered by the registrar in his or her 'investigation' so that there is no opportunity for the judge to remedy any defects in the process, a review would not satisfy the requirements of article 6;

(h) The costs of introducing this new model for dispute resolution are likely to be high, as are the costs of maintaining the system, given the numbers of registrars needed to take on the much more 'hands on' role envisaged and the

[2] The paragraph number is missing but it is clearly intended to be paragraph 2.38.

likelihood of significant numbers of appeals to judges from litigants unwilling to accept a registrar's decision. Ongoing training will also be very costly.

Provision of information, advice, assistance and representation

7. The JUSTICE report proposes that information, advice, assistance and representation be provided to litigants. JUSTICE proposes *'the long-term goal of developing an integrated online and telephone service, which together will serve to provide effective access to information, advice and assistance'*. The SEC considers that this proposal gives rise to serious practical difficulties, some of which are set out below:

   (a) JUSTICE proposes the development of a *'comprehensive and effective telephone service… which is capable of providing accurate, substantive information and advice'* (paragraph 3.27). The costs of providing a multi-lingual (paragraph 3.33) telephone service at no charge (paragraph 3.35) for litigants throughout the United Kingdom, with waiting times kept to a reasonable duration and a call-back service (paragraph 3.29), would be exorbitant. These costs would include premises and equipment, staffing costs (e.g. salary, recruitment, management, holiday pay and cover, sickness absence etc) and training costs. The training costs would be extremely high as it would be necessary to provide extensive comprehensive training at the commencement of employment and on an ongoing basis given the complexity of the extensive subject matter;

   (b) JUSTICE envisages providing access to information in a wide variety of common disputes, including materials at various levels of complexity, and access to the statute law website. The proposal to provide more information to litigants is well-intentioned, but it would be difficult to provide a meaningful amount of information in a digestible form, and the report does not set out how this could be accomplished;

   (c) JUSTICE also proposes the introduction of interactive diagnostic tools to assist litigants in understanding the law and procedure applicable to their cases (paragraph 3.18). The SEC doubts that it is possible in practice to devise an online portal that operates like a decision tree so that a litigant can answer a series of questions in order to obtain legal advice. A decision tree could not capture the complexity, sophistication and nuances of the law of England and Wales. There is often no 'right answer', or even a straightforward answer, but a range of options with competing merits in a given case. Moreover, the body of information is not static; law evolves and changes on a daily basis. The SEC considers that distilling this material into a decision tree would be impossible, and notes that JUSTICE has not provided a single working example, even in a relatively simple area of law. A working example would show what advice would be given in a particular factual scenario and how it would be reached. Other practical questions arise which are not addressed by the report: Who would be engaged to distil the vast body of legal principles into questions that would give meaningful answers to all hypothetical scenarios that could arise? Who would fund the work? Who would keep up to date? Who would bear the risk of incorrect advice?

(d) The proposal to provide information, advice, assistance and representation to litigants potentially exposes the government to claims for negligence to which it is not exposed in the current system. At present, all legal advisers are liable if they give negligent advice and the advice causes loss. If, as the SEC anticipates would be the case, no liability were to be accepted for negligent advice which caused loss in the new system, this would need to be explained clearly to users at the outset.

Conclusion

8. The SEC understands the difficulties faced by litigants in person and by the courts following the cuts to civil legal aid and the reduction in available funding for civil claims resulting from the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The SEC has grave concerns about the dispute resolution model put forward by JUSTICE. If adopted, the proposed model for dispute resolution constitutes a fundamental shift from our adversarial system of civil justice and would undermine access to justice and consequently the rule of law. The proposal to develop a comprehensive integrated online and telephone service, including diagnostic tools, while well-intentioned, is practically impossible given the subject matter and would be exorbitantly costly to implement and maintain. The funds which would be devoted to this project could be better spent elsewhere.

9. The Foreword to the JUSTICE report by Baroness Helena Kennedy of the Shaws QC says that JUSTICE continues the necessary fight against legal aid cuts, but the report itself undermines this fight, as it suggests that its recommendations will fill the gap left by the cuts in legal aid. The SEC believes that this is wrong and that the recommendations made, if implemented, will do irreparable damage to our legal system and to its reputation internationally. A properly resourced and managed legal aid system can be self-funding, because it enables litigants to obtain advice about the merits of a claim at an early stage, recovers costs from the opposing party where claims are successful, and avoids unnecessary litigation and the concomitant burden on the courts. The answer to the problems faced by litigants in person and – now – by the court system in dealing with increasing numbers of litigants without legal advice or representation lies not in dismantling the adversarial system but in the restoration of an effective system of legal aid to provide early advice, and representation in meritorious cases.

SOUTH EASTERN CIRCUIT

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