

Increasing the General Civil Jurisdiction of the County Courts in Northern Ireland

Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland which comprises 650 self-employed members who operate on an independent referral basis. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy, serving the administration of justice and upholding the rule of law across this jurisdiction. Northern Ireland's independent referral Bar represents one of the cornerstones of our legal and justice system with an important history of providing expert impartial representation across a range of areas. The existence of a strong and independent Bar serves the public interest, facilitates the protection of the rights of citizens, the enforcement of their duties and is fundamental to the efficient and effective administration of justice.
2. The Bar welcomes the opportunity to respond to the Department of Justice's consultation on increasing the general civil jurisdiction of the county courts in Northern Ireland. We previously commented on this issue in response to the Access to Justice 2 Review in 2015 and the Review of Civil Justice published in 2017. This paper details the collective response of the Bar to the two main options currently being put forward by the Department, incorporating the views from the wider membership and our specialist bar associations such as the Personal Injury Bar Association.
3. Our main submission is that the jurisdiction of the county court should not be increased to either £60,000 or £100,000 at the present time. Both options represent a misguided attempt to alter a civil justice system that is already operating effectively. One of the recognised benefits of the county court is the straightforward and uncomplicated procedure employed; it is easily accessible, inexpensive and does not require detailed pleadings. This system is specifically designed to deal with smaller value proceedings and cannot presently accommodate lengthy cases, complex pleadings and the use of expert evidence. Therefore we do not agree that the changes outlined will meet the Department's aim of making the system "*faster, more convenient and more efficient*" as the consultation paper does not adequately address important issues linked to any jurisdictional increase around resourcing and the creation of Civil Hearing Centres. Our response below elaborates on these points and is structured according to the questions set out in the consultation document.

91 CHICHESTER STREET
BELFAST, BT1 3JQ
NORTHERN IRELAND

Email
judith.bailie@barofni.org

Direct Line
+44(0) 28 9056 2132

Website:
www.barofni.com

Q1. Which of the following options do you believe would help to create the most effective and efficient system for civil proceedings:

- Increase in county court jurisdiction to £60,000, with an increase in the jurisdiction of district judges to £20,000; or,

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- Increase in county court jurisdiction to £100,000, with an increase in the jurisdiction of district judges to £35,000.

4. The Bar does not agree that either of the two options outlined would help to create an effective system for civil proceedings. We take the view that one of the many strengths of our existing county court system's current limit of £30,000 is its efficiency and speed in disposing with civil bills. A 100 per cent increase in the jurisdiction from £30,000 to £60,000 would fundamentally change the character of the county courts in Northern Ireland. Further consideration would need to be given to adequate resourcing and provision for the increased duration of trials, the approach to pleading and the greater usage of expert evidence before the county court which are not addressed in this consultation paper.
5. The suggestion that the jurisdiction could be increased further to £100,000 is very concerning as it will have a negative impact on the resources of the county courts and the ability to dispose of cases in a timely manner, particularly given that higher value cases tend to involve much more complex issues. For example, the current fifth edition of the *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland* provides guidance on the appropriate level of compensation for a range of injuries. Under option 2 a number of serious injuries, such as minor brain damage, severe Post Traumatic Stress Disorder and moderate to severe asbestosis would potentially be dealt with in the county courts. These are often significant cases involving complicated issues and we do not agree with the suggestion that they can be dealt with properly in the county courts without impacting on the timeliness of justice for vulnerable individuals and across a range of other cases.
6. We note the suggestion that increasing the county court jurisdiction to £100,000 would result in the High Court becoming a "*centre of excellence, hearing only those high value and complex cases which merit being heard in that division*". However, the consultation paper makes no reference to the likelihood of a much greater volume of appeals to the High Court from the county court if there is a significant increase in the jurisdiction of the county court. The automatic right of appeal to the High Court will mean that contested cases that were disposed of by one hearing in the High Court will now be liable to be the subject of two hearings at county court and High Court levels with an increase in costs and court time. In addition, the very limited statistics provided in the paper show that the number of disposed cases where the value of the award is known is small and therefore the total volume of cases which will be impacted by the changes and removed from the High Court to the county courts by any change in jurisdiction cannot be estimated with much confidence. The idea that the two options under consideration will provide a clearer jurisdictional division than

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exists at present and greater certainty for plaintiffs as to the correct venue for their cases also seems to be based on anecdotal evidence at paragraph 71 which suggests that cases are being wrongly issued in the High Court due to a “*perceived potential to recover higher damages and costs*”.

7. The Bar is unaware of this being an issue or any dissatisfaction with the way in which the current system operates in this regard. The consultation paper also notes at paragraph 44 that a statutory mechanism already exists which allows cases to be transferred from the county courts to the High Court or vice versa where it is believed that it has commenced in the wrong venue. Any systemic problem of cases being wrongly heard in the High Court can already be addressed through these existing procedures yet the number of remittal applications received to transfer cases from the High Court to the county court has decreased by 42 per cent since 2014, according to the Department’s own analysis. This suggests that cases being commenced wrongly in the High Court is not a particular issue.
8. The paper also submits that an increase to £100,000 is reflective of the position in England & Wales and Scotland where generally the highest civil courts only assume jurisdiction for cases in excess of this figure. However, no reference is made to the significantly greater costs currently facing the public in accessing justice and the time involved in doing so in these jurisdictions in comparison to Northern Ireland. The Review of Civil Justice even acknowledged a fundamental observation that “*comparing the costs experience in England and Wales with Northern Ireland is comparing apples and oranges*”. Therefore it is difficult not to conclude that the DOJ’s suggested approach risks introducing into NI as a small jurisdiction a level of bureaucracy, delay and potential cost that is currently missing.
9. Meanwhile the Bar remains open to the proposal for county court civil business to be consolidated into four hearing centres across Northern Ireland. In response to the public consultation on the Civil Justice Review, members highlighted problems around mixed lists with civil business often being listed alongside other ongoing business and resulting in criminal cases involving juries or family cases taking precedence. Significant concerns were highlighted about the priority assigned to civil cases given that they are often not reached or can be adjourned for several weeks, particularly in the county courts outside Belfast. Meanwhile parties involved in these cases are forced to compete for space with those involved in criminal and family cases in court venues with limited space and consultation facilities. The Bar takes the view that the establishment of four properly resourced hearing centres for county court civil business could help to address these issues and bring a renewed focus to the more efficient listing and disposal of civil cases.

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10. We also responded to the paper prepared by the Presiding County Court Judge and the Assigned Civil County Court Judge on proposals for the creation of County Court Civil Hearing Centres in Northern Ireland in May 2019. We still remain of the view that the creation of Civil Hearing Centres could help to address the listing problems identified and are vital in advance of any increase to the jurisdiction of the county court. We note the reference in the consultation document to the creation of these centres, such as the Armagh pilot, as a “*pathway for future change*” at paragraph 57.
11. Feedback from members generally indicates that the Armagh Hearing Centre has operated successfully and resulted in the more efficient listing and disposal of civil business across the Newry, Armagh, Craigavon and Dungannon areas. However, the second phase of this with an additional venue in Belfast in 2020 was postponed due to covid-19. We note the suggestion that rationalised civil business being undertaken in hubs in Downpatrick, Londonderry, Enniskillen and Armagh may offer learning around the future structure of civil business. Detailed further consideration will still need to be given to the location of these centres in order to ensure access to justice as court users should not be disadvantaged because they live in rural areas or cannot easily access public transport. These new centres would also potentially require significant investment from the NICTS. The Bar queried the likelihood of these centres being taken forward in response to the Review of Civil Justice and we are no clearer as to the prospect of this from the DOJ’s consultation paper. The reference to it potentially being “*some time before Civil Hearing Centres are implemented*” implies that the model envisaged by the Review of Civil Justice will not be in operation in the near future, if at all. We consider that it is not satisfactory to increase the jurisdiction of the county court in advance of ensuring that the necessary structure and resources are in place to deal with the changes given the potential impact on access to justice.
12. Furthermore, the two options posed by the Department will impact on judicial capacity in the county courts. The Review of Civil Justice recommended that no fewer than five judges be assigned to the Civil Hearing Centres to deal exclusively with civil matters, with sufficient funding and resources allocated to support them. Further consideration would also need to be given to the allocation of these judges across any Civil Hearing Centres based on evidence showing the number of cases arising in certain areas. It is also unclear as to whether any administrative capacity will be provided to support new judges to deal with more complex cases under the Department’s two proposed options given that these will likely require more court time in terms of dealing with interlocutory applications as well as hearings. The Bar considers that it is not acceptable to consider increasing the jurisdiction of the county court without addressing issues around judicial capacity in advance which the consultation document does not adequately address.

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13. It is also unclear as to the impact that any changes to the jurisdiction of the county court will have on business in other areas, such as the family courts. Whilst a proposed increase to financial boundaries might not appear to impact directly on the work of the family courts, it is worth noting that it raises issues which should be taken into consideration by the Department. Cases heard within the family courts require the utmost sensitivity given the challenging nature of the highly emotive and complex issues often involved. Barristers representing all parties in these proceedings are acutely aware of the potential impact of proceedings upon children and families. Confidential and sensitive client discussions are often required and must take place in line with the Bar's Code of Conduct which necessitates adequate consultation facilities to ensure the proper administration of justice. There is already concern amongst family practitioners that existing consultation facilities across the court estate are often unavailable and inadequate. These have been further restricted due to safety measures taken to address covid-19 and it seems likely that an increase to the county court jurisdiction will only exacerbate this issue further.
14. Furthermore, the consultation deals with the potential for Civil Hearing Centres yet there is no reference to the Civil and Family Justice Review's recommendations which focused on the centres as providing a venue for both civil and family proceedings. At present it remains unclear whether family business could end up being incorporated into the hearing centres model at some point in the future. We would query whether the lack of any clarity on this will see the centralisation of family justice into particular areas of Northern Ireland by default which could create access to justice issues for court users. In addition, the Review of Family Justice appeared to align the establishment of such centres with the creation of a single-family court which the Bar remains opposed to given that little evidence exists to suggest that such a move would be appropriate for this jurisdiction.

Q2. Given that clinical negligence cases tend to be more complex than other tort actions, should the Department either:

- Reserve clinical negligence as a High Court only actions; or,
- Maintain the current county court jurisdiction of £30,000 for clinical negligence claims only

15. The Bar takes the view that clinical negligence is a highly specialised area of practice where there is often considerable complexity in establishing the facts of a case. Our members indicate that proceedings often tend to involve expert evidence on issues such as breach of duty, causation and the level of damages. The consultation highlights that clinical negligence cases with a value of less than £30,000 can currently be heard in the county court or in the High Court. However, there are difficulties with

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clinical negligence cases proceeding in the county court in practice as they can be included in lists with other cases resulting in a risk that they will not be reached. In the event of an adjournment, significant witness expenses, involving experts from outside the jurisdiction, can be incurred. These cases are also likely to require more court time due to the number and length of review and interlocutory hearings often required to deal with more complex legal issues yet it can be difficult to secure listing for more than one consecutive day in the county court. Consequently, these cases typically end up being heard in the High Court.

16. We note that the Review of Civil Justice did not go as far as to suggest that clinical negligence cases should be the reserve of the High Court, instead recommending that they should “usually” be heard in the High Court and only in the county court if “sufficiently straightforward”. However, the Bar takes the view that it would be very difficult in practice to assign clinical negligence cases based on complexity, particularly where key issues in a case may not emerge until the medical evidence is disclosed. As highlighted above, the Bar is opposed to the Department’s two options for increasing the jurisdiction of the county court but if this change proceeds regardless then it will be essential that clinical negligence cases are reserved as a High Court action.

Q3. Should the county court judges have a statutory power to remove cases from the county courts to the High Court?

17. The Bar notes that Section 31 of the Judicature Act (Northern Ireland) Act 1978 provides only the High Court with the power to deal with remittal and removal applications. The county courts do not have the power to transfer cases to the High Court. The Review of Civil Justice recommended that the county courts should have the ability to remove cases to the High Court, with remittals remaining with the High Court. The Bar still queries whether any evidence exists to show that the present system in this area requires change, as highlighted in our response to the Review of Civil Justice. The Department’s own analysis at paragraph 45 shows that only a small number of cases (49) were removed from the county courts to the High Court in 2019, a figure that has remained relatively steady since 2014.
18. Whilst a system in which county court judges have a statutory power to remove cases from the county courts to the High Court is plausible, we remain unclear as to the need for this change at the present time. It is also worth noting that appeals from decisions by the Master are generally issued within seven days and heard within a matter of weeks at present. It is unclear as to whether this new power will involve an appeals process with a paper exercise before a High Court Judge, as envisaged by the

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Review of Civil Justice, or whether this will involve possible oral hearings for removal actions in the county court which could result in additional delays. If the DOJ proceeds with this proposal then we expect that the potential powers for the county courts could operate in a similar fashion to the High Court's current power to remove cases where, given all the circumstances of the case, it would be more appropriately heard and determined in the High Court. Meanwhile in family cases, judges are already familiar with transferring cases on grounds such as the complex or conflicting evidence, the number of parties, any novel points of law or questions of general public interest.

Q4. Should the jurisdiction of the small claims court be increased to £5,000?

19. The Bar notes the recommendation for an increase in the jurisdiction of the Small Claims Court to £5,000. In line with our response to the Review of Civil Justice, we remain concerned that such an increase in the financial jurisdiction may result in the informal procedures of the small claims court becoming overly complex with lawyers being instructed for the 'non-consumer' party, risking inequality of arms for those consumers who are not legally represented. We welcome the recognition that personal injury or road traffic cases should not be introduced in the small claims court. However, we still do not see any evidential basis presented in the consultation paper as to the necessity of an increase in jurisdiction from £3,000 to £5,000; paragraph 82 only notes that the number of claims in 2009 was 13,839, representing 30% more than the 9,744 received in 2019. Whilst there is no mention of it in the consultation paper, the Review of Civil Justice also linked the change in jurisdiction to a suggested pilot scheme for online dispute resolution for money damages cases under £5,000 which the Bar remains concerned about given the potential impact on access to justice for the public and the creation of a two-tier civil justice system.

Q5. Should the general civil jurisdiction in respect of defamation cases be increased to £10,000?

20. The Bar agrees with the Review of Civil Justice recommendation that county courts should not deal with defamation cases over the value of £10,000 if the jurisdiction of the county court is increased to either £60,000 or £100,000. However, as already outlined above we do not accept that either of these options are appropriate at this time.

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Q6. Do you have any comments to make on any of the draft impact assessments?

21. The Bar takes the view that the consultation document does not adequately set out the case for such a radical change in the fundamental nature of the county court and the potential impact on the public. The paper and draft impact assessments do not clearly quantify the possible impacts which will ultimately be experienced by court users seeking access to justice; the potential for proceedings becoming more complex and subject to delay due to resourcing issues are just two pitfalls which the Bar still believes require further exploration in the context of the county court which are acknowledged in the regulatory impact assessment. Restraints placed on the legal aid fund have already had a negative effect in terms of access to the civil courts in recent years and it is vital that these proposed changes do not result in any further damaging impacts for the public. The regulatory impact assessment also appears to suggest that a key benefit will be further *“potential cost saving to Legal Aid budget if cases previously heard in the High Court were instead progressed through the county courts”*.
22. The Department also appears to accept at paragraph 26 in the consultation document that it does not have a *“credible evidence base”* from which to propose change given the incomplete picture on the value of cases in the civil justice system yet it discounts the maintenance of the status quo as a valid option. There are various points relating to the need for cases to be better directed to the most appropriate venue and reducing the number of remittals from the High Court to the county court which, as explained above, are unwarranted as this is not a particular issue at present. The references in the regulatory impact assessment to cross border issues and the civil justice systems in England & Wales, Scotland and the Republic of Ireland make no mention of the much greater costs to the public in obtaining justice in these jurisdictions. We also find it difficult to accept as a *“key assumption”* that there would be *“no capacity issues”* or impact on disposal times, judicial resources and access to justice following increases in the financial jurisdictions of the small claims court, district judges and county courts. We have already highlighted previously our concerns around NI’s venues for civil business being *“fit for purpose and accessible for all citizens”* at present. As outlined in our response to the Civil Justice Review, we remain opposed to an increase in the jurisdiction of the county court without the necessary supporting evidence base and resources which we do not believe have been adequately addressed.
23. Furthermore, there are various references throughout the document to covid-19 and the inability to predict with any certainty whether there will be a wider impact on the economy, GDP and interest rates in the longer term which could also affect caseload

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volumes and litigation activity. Barristers have demonstrated throughout the pandemic that they are motivated by a strong sense of duty to continue to serve the administration of justice to the fullest extent possible. As we continue to move from urgent and agreed business only to a focus on case progression and business as usual, the DOJ will undoubtedly intend to capitalise on any new ways of working involving technology across the court system based on the 'Modernising the Courts and Tribunals in Northern Ireland' Vision Statement, the draft NICTS Digital Strategy, the overarching Department of Justice Digital Justice Strategy 2020-2025 and the NICS Digital Transformation Programme. These already sit alongside various strategic reviews of the justice system conducted in recent years, such as Access to Justice 2, the Reviews of Civil and Family Justice and the Review of Serious Sexual Offences.

24. There is a need to build greater coherence across these various plans and to develop these existing reform programmes incrementally and in tandem with digitisation. Modernising our courts and tribunals, partly through digitisation and better use of existing and new technologies, is important work for the administration of justice. Covid-19 has already had a significant impact on all those working across the justice system. However, any reforms for the longer term need to be carried out in the right way, with proper prior research, consultation and evaluation, and a clear vision and understanding about the aims, effects and implications of any changes. We must also be realistic about the financial investment and resources that will be required to ensure that the quality and fairness of our justice system is upheld as well as the possible implications for the physical court and tribunal estate. Despite the references to covid-19 throughout the document, the Department appears not to have given adequate consideration to how the increase in the jurisdiction of the county court will be properly resourced and fit into this wider modernisation agenda and to provide adequate reassurance that it will not have a negative impact on access to justice for the public.