Civil Courts Structure Review:

Comments by
The Legal Education Foundation

Authored by
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on

Interim Report by
Lord Justice Briggs

The
Legal
Education
Foundation

Introduction

1 The Legal Education Foundation (TLEF) is a charity with the Objective 'to promote the advancement of legal education and the study of law in all its branches'. In furtherance of this, it advances 'high quality thinking, training and practice in legal services so as to ensure legal needs are met' and seeks to 'understand the role that technology can play in achieving its objectives'. TLEF has, accordingly, funded both research into the role played by technology and projects designed to encourage innovation. It devotes a specific area of its website to the role of information technology: www.thelegaleducationfoundation.org/digital.

2 As a result, TLEF has a major interest in the recently published Interim Report by Lord Justice Briggs of the *Civil Courts Structure Review*.[1] This focuses on 'the opportunity to use digital tools and modern IT to improve the issue, handling, management and resolution of cases of all kinds'.[2] TLEF would not normally itself submit evidence to a consultation though it might encourage its grantees to do so. However, on this specific issue, the Foundation believes that it has experience and perceptions which might be of assistance to Lord Justice Briggs and the review process. Its submission is limited to the elements of the Report that relate to IT and digitalisation.

3 The principles underlining TLEF's comments to the Interim Report are set out below.

1 published in December 2015 by the Judiciary of England and Wales
2 Para 1.7.1

Our submission is limited to the elements of the Report that relate to IT and digitalisation.

Access to justice and to the courts is a constitutional principle

4

The Rt Hon. Ken Clarke, when Lord Chancellor, noted that access to justice was 'the hallmark of a civilised society'.[3] Access to the courts has been judicially described as 'a common law constitutional right'.[4] The right to a fair and public hearing is enshrined in the European Convention on Human Rights.[5] As a result, many of the principles set out by Lord Justice Briggs are not merely desirable: the core of them are constitutionally mandatory. The civil court system must be accessible, transparent and involve proportionate cost.

3 see http://www.theguardian.com/law/2011/oct/06/access-to-justice-legal-aid-cuts

4 Lord Justice Laws in R v Witham below

5 Article 6

The Rt Hon. Ken Clarke, when Lord Chancellor, noted that access to justice was 'the hallmark of a civilised society'.

IT is precipitating major change in society at large and that will - and should - transform the courts

5

There might be some confusion as to whether we are passing through a second machine age[6], a third one[7] or a fourth technological revolution[8] but there can be little doubt that technological changes are occurring with direct and indirect implications for the court and legal system. That is precisely why the Foundation has identified the issue as so important - to practitioners, trainers and the courts. Changes in the practice of law will feed back into changes in the education of its practitioners. Courts that ignore technology will seem increasingly remote from the everyday experience - and expectations - of their users.

6 The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies Erik Brynjolfsson and Andrew McAfee, Norton, 2014

7 https://medium.com/message/failing-the-third-machine-age-1883e647ba74#.sw3y3n6y1

8 *The Fourth Industrial Revolution* K Schwab, World Economic Forum, 2016

Courts that ignore technology will seem increasingly remote from the everyday experience - and expectations - of their users.

'The Reform Principles'

6 Lord Justice Briggs sets out[9] his reform principles. These are:

a User-focus.

b Accessibility.

c Proportionate and segmented nature.

d Built on a 'strong justice brand'.

e Transparency and accountability.

f Financial viability.

g Future proofing.

h With an appropriate human resources strategy.

7 We agree with these but add the following gloss. We suspect that the rapidly declining numbers using the small claims procedure and the employment tribunal illustrates the effect of increased fees. We support the move to the use of more IT so that costs and fees may be reduced and access increased. This is particularly important if legal aid is to remain at current levels. The duty at common law to retain access to the courts at proportionate cost has been judicially recognised (as noted above) and should be seen as, effectively, a constitutional right.[10] This is rather stronger than the reference in the report to the preservation of a 'justice brand' might suggest. We are concerned at the cross-subsidy provisions detailed in the Interim Report which could mean that fees from low income civil users may be funding the criminal courts, longer trials and family cases.[11] We have no problem with segmentation of the court structure. This is a well-established practice on which the courts are organised. We are, however, against the creation of a functionally separate online court (see below) We prefer 'tiered' or 'divided' to imply more permeability between parts of the court than the words in the Report might suggest.

9 in Para 1.8
10 R v Witham [1998]QB 575
11 Para 3.15

There should be departments dealing with different elements of introducing online provision within the court's structure but not a separate Online Court

8

The Interim Report deals with the advantages and disadvantages of creating a separate online court for small claims. At one level, this may be a question of semantics. However, the attention given to the issue in the Report suggests an underlying importance. The major advantage of a separate structure may well be psychological. It might assist those seeking to drive the project forward. On the other hand, it might tend to obscure the general direction towards online being expected of the system as a whole. Further, Lord Justice Briggs accepts that the term does not actually imply a wholly online process of determination. Instead, he says that: 'In fact, the true distinguishing feature … is that it would be the first court ever to be designed in this country, from start to finish, by litigants without lawyers'.[12] The prospective banishment of lawyers from the new court may not actually be an historical first. The small claims procedure was originally designed in response to consumer demand in the early 1970s as operating without lawyers. The intention for both small and large claims is that the court will deal with them through a series of procedures and methods of determination which may be both on and off-line. The danger of identifying small claims as specifically online is that, in practice, this might accentuate a process whereby it becomes a poorly funded area devoid of resources to the benefit of the rest of system. We are, on balance, against describing the small claims court as the online court. Small claims will be a largely but not wholly online procedure within a court structure, the vast majority of whose processes and procedures will eventually be online.

12 Para 6.5

Experience in other jurisdictions should be consulted before any final decisions on implementation are made

9 Lord Justice Briggs' proposals for an online small claims court are almost identical to those which are considerably more advanced for British Columbia's Civil Resolution Tribunal (CRT). This is designed to come on stream sometime this year to deal with small claims and a form of housing dispute relating to the common parts of apartment blocks (known as 'strata disputes'). The CRT already has experience that will be of value. For example, although intended to be voluntary, it has decided that it must, for practical reasons, become mandatory fairly soon after coming on stream. This is its explanation.

Why the move to a mandatory CRT?

- The original CRT provided for a voluntary tribunal, meaning that all parties (except strata corporations) must agree to resolve their dispute using the CRT.
- The voluntary model provides an opportunity to test and improve the CRT.
- However, we are learning that voluntary dispute resolution programs show low uptake and as a result do not improve access to justice or reduce costs.
- The proposed amendments will increase access to justice by bringing all parties to the table to resolve their disputes, while also maintaining a person's right to seek resolution in court.
- When fully implemented, the combined CRT and Provincial Court small claims jurisdictions will provide a cost-effective and accessible process for resolving small claims.[13]

13 https://www.civilresolutionbc.ca/faqs/

Experience in other jurisdictions should be consulted before any final decisions on implementation are made

10 If replicable in England and Wales, the finding of reluctance by users to choose the online system is relevant to how it is to be formulated. Either the proposal should be for it to be mandatory from the beginning or alternatively it should be proposed as a pilot. We favour the second. A continuing off-line adjudicating procedure - effectively as at present - seems to us crucial since it cannot yet be assumed that sufficient numbers of people can deal with online procedures. Evidence from the actual experience of the CRT will be important in this regard.

11 There are a number of other jurisdictions whose experience it would be useful and important to consult. For example, the US State of Ohio has an operating online system for tax appeals which is formulated on exactly the three stage model for a small claims jurisdiction posited in the Report. The Netherlands has an online system for the determination of divorce and ancillary measures which would move a prospective litigant through all three stages in one programme. As an immediate matter, before a Final Report and certainly before any move to implementation, a systematic evaluation of these should be made. Further, given the capacity of large IT projects to go wrong (as noted with some trepidation by Lord Justice Briggs), it would surely be prudent to delay any decisions on implementation of domestic systems until after there is some experience by others of systems that are actually in action. In matters of technology, early adopters do not always win out - particularly if they cannot afford to make a mistake. The Civil Resolution Tribunal in British Columbia is, as noted above, due to go live later this year. In this country, the work of the London Parking Adjudicator provides some experience of online provision - albeit in a specialist and limited area of work.[14] The *Rechtwijzer v2.0* began work at the end of last year. All these - and, no doubt, others - need to be evaluated.

14 http://www.londontribunals.gov.uk

Small claims; three stages and advice/ information

12 Lord Justice Briggs adopts the three stage or tier approach for the online court suggested by the Civil Justice Review committee chaired by Professor Susskind.

1 Stage 1 will be 'a mainly only automated process in which litigants are assisted in identifying their case (or defence)'.

2 Stage 2 'will involve a mix of conciliation and case management'.

3 Stage 3 'determination by judges … either on the documents, by video or face-to-face hearings but with no default assumption that there be a traditional trial'.[15]

13 This is a methodology which can be seen in the existing approach of the Board of Tax Appeals for the State of Ohio and, again, it would be prudent to seek some feedback on how it works.[16] It is also close to the procedure proposed for British Columbia's Civil Resolution Tribunal (see above). The extent to which courts and their officials can give advice on the phrasing of procedures can raise tricky ethical issues - e.g. in relation to independence and the avoidance of advice to litigants - and again it would be worth exploring how these are being dealt with. For example, in relation to the overlapping jurisdiction noted by Lord Justice Briggs in employment matters would a court official be correct (even allowed) to advise avoiding the tribunal and going to court because of lower fees? If so, how does this impact on Government policy? Stage 1 needs further consideration. There probably needs to be a number of routes into the court. Repeat players will not need the same assistance as those involved in litigation for the first time. There also needs to be integration between the general advice available and that provided by the court.

15 Para 6.7
16 http://bta.ohio.gov

Small claims; three stages and advice/information

14 There is another model for Stage 1 - the Rechtwijzer designed for, and now in operation by, the Dutch Legal Aid Board. This uses a sophisticated guided pathway approach to determining the issues at stake for the parties. It has impressed other jurisdictions and its approach is being copied in British Columbia by its Legal Services Society in a MyLawBC website (entirely separate from the Civil Resolution Tribunal and soon to come on stream) and by Relate in England and Wales (planned to be operational in the summer). Its model is to reach out to someone unsure of their position and to guide them through a series of interactive questions to the best way of presenting their case. In doing so, the websites go significantly beyond the traditional role of a court in helping someone to identify their problem. This is entirely appropriate for a website produced by a Legal Aid Board or other independent organisation: it might be problematic for a court - though the US State of California, for example, has a range of self-help provision for litigants in person, both on and off line. This needs further consideration.

15 It might be that Stage 1 should be shared by the courts with the independent advice agencies providing online assistance already - the Citizens Advice service and Law for Life through the citizensadvice.org.uk and advicenow.org.uk websites. Thus, there might be three ways through to the small claims court: external interactive website such as one of these two but linked to a court Stage 1 website; an interactive Stage 1 court website with such elements as online automated document assembly to assist unrepresented litigants; and, for those who are experienced users, online electronic filing (when provided) as for the rest of the courts.

Small claims; three stages and advice/information

16 Stage 1 will raise multiple questions that require strenuous user input (being sought for both the Dutch and British Columbia models). For example:

1 should the court Stage 1 website be mobile compatible (the CRT considers this necessary and is developing it)?

2 What personal assistance is, in practice, required by litigants in person? California runs, for example, classes for litigants in person and the lesson seems to be that people need face to face assistance to make maximum use of online provision. This will need to be costed into an online structure.[17]

3 How can litigants in person pay electronic fees if they have no credit or debit card?

4 How do you preserve channels for experienced users to access the court which contain shortcuts inappropriate for litigants in person?

5 How do you authenticate access by litigants in person to their electronic court file while maintaining sufficient privacy and security? Some courts in California are turning to forms of electronic identity cards that will do this:

6 How does the general small claims procedure relate to the existing provisions for bulk money claims?

17 for information on the California Courts Self Help Centers see http://www.courts.ca.gov/selfhelp.htm

Small claims; three stages and advice/information

17 Furthermore, the lesson from any IT project is that you need to build it on the iterative principle of 'building to fail' i.e. building in recognition that success will be built on successive failures as problems are ironed out after practical testing. Such agility may prove difficult for a court service. That might suggest, all the more, that not for profit agencies are funded for the best part of Stage 1. Certainly, the courts service needs to be bold enough to open up decision-making on Stage 1 to wide consultation. It is vital that user views and user-testing are deployed in developing online procedures to be used by litigants in person. This has been done with multi-disciplinary teams working on the issue in British Columbia and The Netherlands. The best way of institutionalising this process would be to establish a team with representatives from the main stakeholder groups - the major advice sector agencies, the money advice sector, the law centres and the legal profession. This could be chaired by a judge but the process must be collaborative.

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Suitable cases for online procedure: the value of a phased approach

18 The Interim Report suggests that a list of cases which should, 'at least provisionally', be kept away from online determination.[18] They are:

1 most housing possession cases.

2 Injunctions and non-monetary relief claims.

3 Class claims.

4 Claims by or for minors and other protected parties.

19 It might be preferable to consider the nature of claims, rather than types of cases, which would be unsuitable for online determination. If we can safely identify these - and see online procedures open to all the courts - then it will be easier to look at matters like uncontested divorce which would fit easily within the online structure but be outside any small claims court. The approach of the civil and family courts to the introduction of online procedures should proceed together. The IT considerations are the same.

20 The nature of cases which are, prima facie, unsuitable for online resolution might include those:

1 with a high degree of factual dispute.

2 Involving a complicated matter of law.

3 Where one or more litigant is unable or unwilling to handle satisfactory online resolution.

4 Where there is the threat of violence between the parties.

5 Where public policy suggests it is unsuitable or the issue at stake is a matter of public law.

18 Para 6.43

Suitable cases for online procedure: the value of a phased approach

21 In such cases, offline resolution must remain. The category of those unable to handle online resolution needs to be determined in practice. It certainly cannot be assumed that everyone will be able to handle exclusively online transactions - and this may prove to be a problem for British Columbia's proposed mandatory use of its online court. Research commissioned by TLEF suggests that, of the population formerly entitled to civil legal aid before 2013, the proportion of those willing and able to operate online may be as low as 50%.[19] It certainly cannot be assumed that effective access simply equates with access to the internet. That will be a maximum figure from which deduction needs to be made for those with insufficient language, cognitive and technical skills to use that access. On the other hand, we do not yet know definitively how many people can use access if assisted - though courts in, for example, California assert that person-to-person assistance - though not necessarily individually and often through collective classes - can make an enormous difference.

19 Chapter 2, Digital Delivery of Legal Services to People on Low Incomes R Smith, LEF, http://www.thelegaleducationfoundation.org/digital-report

Suitable cases for online procedure: the value of a phased approach

22 No advance position on the limits of access need be taken if the approach to implementation is phased, gradual and subject to the maintenance of existing systems. We can see by experiment what is possible. We would strongly recommend, therefore, the avoidance of any 'big bang' approach. The courts might begin with offering online as an option induced by lower costs to current small claims litigants without prejudice to how far this might ultimately extend as lessons are learnt. The experience of HMRC in raising participation levels in this voluntary way suggests that it works as users see the benefits. The concept of 'beta' testing is routine in the online world even if it is foreign to the usual model for creating judicial rules. Adjustment must be made.

23 The degree of judicial accountability for decision-making in the online procedure needs to be clear. Non-judicial members of staff may well be able to assist in procedural matters. Adjudication is, however, a judicial function which may not properly be delegated to someone without the independence to be expected of a judge. It would not surely be proper for a member of staff of the Ministry of Justice to decide disputes. There would need to be a method for the retention of responsibility by a named judicial figure for the final determination of claims.

Targets, monitoring and research

24 A major omission with many IT projects is lack of sufficiently specific initial goals and a failure adequately to measure performance. The courts need to enter into this reform with specific targets to meet. For example, Lord Justice Briggs reports that the target for resolution of a small claim is 30 weeks. He says that this is 'particularly by comparison with some neighbouring jurisdictions, reasonably satisfactory'. He does admit: 'that is not to say the targets … are invariably or habitually met'. He even accepts that the 'fast track' might not 'truly' be fast. The courts have to take their place in a world where, in sales transactions, user expectations are set by Amazon's next day delivery service.

25 An exciting dimension to the rebuilding of the small claims court would be to work backwards from user expectations. It would be possible to begin with a target time frame of - say 15 week determination of a 'routine' small claim. Furthermore, the courts might replicate private sector ways of working to begin also with a target price for the whole process from issue to hearing. The challenge would then be to build a system within those constraints. A framework for the measurement of success comparable to that in private sector would also be provided.

26 Lord Justice Briggs' Report is noticeable - and, perhaps, the more readable - for its lack of detailed statistics and its absence of consideration of independent research. This may be appropriate for a Report designed to induce debate: it will not be appropriate in the Final Report as we move towards decision-making and implementation. We need to know how many of and what kind of cases are being expected in different routes through the courts. We also need figures to provide operational targets.

Recognition of the Need for Help for Litigants in Person within the Court Process

27 The work of the civil courts, as the Interim Report makes clear, is being transformed by the demise of legal aid for large areas of work. This challenges the underlying assumption that both parties will be legally represented in the majority of cases. It challenges the role of the judge. It challenges how procedures can operate. We need to learn from the knowledge and understanding gained by other jurisdictions that have more experience than we have (because of the formerly relatively high levels of legal aid and representation in our jurisdiction).

We need to learn from the knowledge and understanding gained by other jurisdictions that have more experience than we have

Recognition of the Need for Help for Litigants in Person within the Court Process

28 TLEF is about to publish an examination of the work of the self-help centres in the California courts. A senior administrator in one of California's counties advanced the proposition that this provision more than saves its cost by empowering litigants who would otherwise be unable to handle working on their own. The provision provides online, telephone and physical assistance, offering major training programmes for small groups of self-represented litigants. The self-help centres have facilitated the integration of video and training within the court process beyond what is possible with the Personal Support Units in our courts or the limited assistance provided by organisations such as the Royal Courts of Justice CAB. Any restructuring of the courts must allow for expenditure on, employment and accommodation of staff whose job is to help litigants in person within the court service. The Ministry of Justice or the Courts themselves should urgently investigate how other jurisdictions, such as California, provide assistance in situations where legal aid is not available. A small team of full-time staff will be required, albeit that volunteers can be deployed. It would also seem likely that simply providing telephone assistance will not be enough. The success of courts in California, such as those in Orange and Los Angeles counties, in providing assistance through dealing with groups of litigants facing the same problems by way of collective training should be noted. It is through ways like this that jurisdictions without levels of legal aid at our traditionally high levels have learnt to cope with large numbers of self-represented litigants and we need to learn the lessons of this. There needs to be specific consideration in the Final Report of how to deal with the issues raised by litigants in person and whether court-based assistance such as that provided by the Personal Support Unit or the Royal Courts of Justice CAB can be better developed.

Conclusion

29 TLEF supports the general thrust of Lord Justice Briggs' Report. It:

1 welcomes the extension of online procedures within the civil courts - indeed, considers that they should extend throughout all courts.

2 Has the observations above on implementation.

3 Notes that the potential sale of court sites provides an unprecedented opportunity for the adequate funding of online court procedures for which a realistic ambition would be the best in the world.

4 Argues that any immediate allocation of funds for the development of online court procedures should be held until there is satisfactory research into the experience of other jurisdictions and adequate piloting of any domestic implementation. Any pressure from the Treasury to rush into inadequately designed and insufficiently trialled implementation must be resisted by Ministers, the court service and the judiciary. This is an opportunity to reform the courts for a generation. Unfortunately, poor implementation carries enormous risk of the waste of public funds.

Further information

Find out more about the Foundation
www.thelegaleducationfoundation.org

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