



Annual Update May 2016

# Digital Delivery of Legal Services to People on Low Incomes

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The  
Legal  
Education  
Foundation

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# 1. Law, Technology and Access to Justice

## 1.1. Introduction Roger Smith OBE

This paper follows a report published a year ago<sup>1</sup> and supplemented by quarterly updates<sup>2</sup>. It is striking how much has changed over the last year. The Dutch world-leading Rechtwijzer programme has settled into its second incarnation in version 2.0, incorporating Online Dispute Resolution (ODR). An English language variant has been developed in British Columbia, MyLawBC which 'soft launched' in March. An English version is being road-tested by Relate and will come on stream within months. In terms of Online Dispute Determination (ODD) for small claims, British Columbia proceeds with implementation of its Civil Resolution Tribunal (CRT) and Lord Justice Briggs has argued, in a report published in January 2016, that England and Wales should follow suit. Both envisage a 'garnering' first stage to a small claims process that will overlap with existing provision. There is the sense of the arrival of a tipping point, at least in England and Wales.

The Law Society annual Legal Aid Conference in March ended with a session that covered developments in private practice, the Non Governmental Organisation (NGO) sector and the courts. Audience reaction was noticeably without the scepticism raised at earlier events.

In the midst of a rapidly changing field, it may be hard to distinguish the most important trends but valuable to do so in terms of understanding – and to provide reference points for the future. It is, for example, useful to look again at the five priorities identified for legal services for poor people in the United States (USA) at a Legal Services Corporation (LSC) technology summit in 2013. Its priorities were:

- state-wide legal portals;
- sophisticated document assembly programmes;
- adapting to mobile technology;
- applying business process analysis; and
- developing expert systems.

<sup>1</sup>available at <http://www.thelegaleducationfoundation.org/digital/digital-report>  
<sup>2</sup><http://www.thelegaleducationfoundation.org/digital/digital-report>



Unavoidably, these reflect the domestic situation in the USA and the role of the LSC but they have a wider relevance. Adaption to mobile technology would now be routine. Most new websites would use responsive design as standard to adapt to phones, tablets or larger screens. The potential of expert systems – certainly in the form of the full-blown possibilities of expensive Artificial Intelligence (AI) systems such as IBM’s Watson or Google’s DeepMind – is still some way off in a field where clients are poor; fees are low; grants are rare; and governments hard pressed. Document assembly programmes, however, remain fertile ground.

Below are the five most important global trends for 2016 in the field of legal services for people on low incomes:

- (a) the development of guided pathways for advice and information (led by the Dutch Rechtwijzer now rebranding as Rewired and making a first domestic UK appearance for Relate later in the year);
- (b) the emergence of national brands using an internet presence to deliver low fee services often linked with unbundling to open up ‘the latent legal market’ of potential low income clients (led by England and Wales where legal services have been significantly deregulated);
- (c) exploration of automated document assembly (initially led by the USA);
- (d) experimentation with various forms of virtual legal practice (widespread in the USA and taking off in England and Wales) – with the potential of video connection through Skype and similar products beginning to be explored; and
- (e) ODR (as in Dutch Rechtwijzer 2.0) and ODD (led by British Columbia’s CRT and with interest high in England and Wales in the final report to be issued by Lord Justice Briggs in relation to the Civil Courts Structure Review during the year).

An important element of current trends is their international nature – dictated by the global forces of technology as they overwhelm the profoundly national nature of law. Hitherto, there has been some influence across governments in the field of legal aid based on ideas – such as quality assurance or legal needs surveys developed in the UK and then followed across the world.

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The development of guided pathways for advice and information is one of the most important global trends for people on low incomes.

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Now, commercial forces are adding their weight to cross-border influence. Modria is a USA firm – spun off from the online resolution procedures developed initially for eBay and PayPal – that has developed the software behind a number of Dispute Resolution packages, including later editions of the Dutch Rechtwijzer which it has developed jointly with the Hague Institute for the Internationalisation of Law (HIIIL). The two in combination have driven developments in British Columbia and England and Wales. The Californian Courts have purchased programmes developed for self-represented litigants by the Justice Education Society of British Columbia. These types of cross-border relationships are bound to increase and have exciting potential.

Government is influencing developments in new ways. In many jurisdictions – not least England and Wales – funding for traditional legal services through (what we would call) legal aid has been restrained, if not savaged. However, government has become a player in the new field in two ways. First, in jurisdictions like England and Wales it has deregulated professional barriers and opened up legal practice to new sources of funding and new forms of provision. There may be mixed views on the desirability of these reforms overall but they have undoubtedly accelerated the ‘national brand’ revolution. Second, the possibility is opening up that government policy on courts

(particularly in relation to their going online) will influence the delivery of online advice prior to proceedings. This may create a once in a lifetime opportunity for cash investment as governments are dazzled by the prospect of realising large sums from the sale of physical courts in favour of cheaper virtual determination.

For those committed to access to justice, this is an exquisitely difficult moment. On the one hand, it is difficult not to be excited by the potential of technology to deliver legal services at a cost which might finally make them much more accessible than they have ever been. At the cutting edge of innovation, there is an excitement that has been lacking in legal services for those on low incomes since the 1960s and 70s. On the other, there is the obvious danger that a group of clients – plus lawyers and advisers – will be passed over in the dash for technology. In England and Wales, we might see a reconfiguration of what used to be a relatively coherent nationwide network of legal aid practices. Clients might split between those who are able to access a wide range of innovative services on the internet and a group who are excluded through lack of access and the necessary skills. In the worst case, ‘advice deserts’ would grow ever larger as local authorities cut back on funding and national internet-based information provision was unable to compensate.



Estimates of the size of the population without effective access to the internet are contentious. The truth is that nobody knows and, anyway, it is a moving target. It was estimated in the last report as up to 50% of the population formerly entitled to legal aid. Tech enthusiasts say that is way too high: most practitioners in the field argue that it is too low. The least useful way of estimating access is the percentage of the population that can physically access the internet – since pretty well everyone can get to an internet-enabled library and mobile phones usually carry internet access.

The real barriers relate to language skills, technical competence, cultural acceptance and cognitive ability (and this is assuming that people are aware of their rights in the first place). The effect of these will undoubtedly reduce as time passes and familiarity increases. However, for the time being, the excluded class (whatever its actual size) is sufficiently great to require policy makers to accommodate it. Digital provision needs supplementing with physical face-to-face assistance – just as best experience in the USA suggests that large groups of litigants can represent themselves in courts if they are provided with appropriate assistance. A senior administrator in Orange County which successfully introduced e-filing in its Superior Court reported: “We found that not many people feel very comfortable with e-filing on their own. But, they will do when they are in a class together with others”.<sup>3</sup> A fertile field for further experiment may well be the most effective ways in which litigants in person may be assisted to adapt to digital. We should recognise three classes of potential user for whom one of the biggest challenges for those designing new online dispute systems will be to provide appropriate assistance for each group:

- the digitally literate;
- the assisted digitally literate;
- the digital illiterate.

<sup>3</sup>Alan Carlson to Roger Smith, January 2016



# 50%

**Estimated percentage of the population without effective access to the internet formerly entitled to legal aid**

## 1.2. General Developments

Macro studies of the impact of technology on the practice of law tend to be of two kinds. First, there are reviews like those produced by Professor Susskind, most recently *The Future of the Professions: How Technology Will Transform the Work of Human Experts*<sup>4</sup>, which are general in their analysis. Secondly, there are survey-based material such as that produced by the Boston Consulting Group and Bucerius Law School or the Law Society.<sup>5</sup> Whatever their nature, reports tend to repeat a number of points:

- (a) Technology is advancing at speed and with geometrical progression. 'Moore's Law' is often quoted at this point. Intel, the chip manufacturer and company of which Moore was a co-founder and which contributes to his current near \$7bn worth<sup>6</sup>, records on its website: 'In 1965, Gordon Moore made a prediction that would set the pace for our modern digital revolution. From careful observation of an emerging trend, Moore extrapolated that computing would dramatically increase in power, and decrease in relative cost, at an exponential pace.'<sup>7</sup> His prediction was actually about size: the number of transistors in an integrated

circuit would double (initially he said every year but by 1975 he had modified it) every two years. Size translates into speed – and cost. Talking to the New York Times recently, Moore (then 86) illustrated how partial the skill of prediction might be: "The importance of the Internet surprised me," said Moore. "It looked like it was going to be just another minor communications network that solved certain problems. I didn't realize it was going to open up a whole universe of new opportunities, and it certainly has. I wish I had predicted that."<sup>8</sup> So, you can get speed right but miss application – a timely reminder of the serendipity of prediction.

- (b) Bill Gates usually gets a mention with his quote that "We always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten. Don't let yourself be lulled into inaction."<sup>9</sup> The relatively slow pace of change among lawyers over the last decade may well hide geometrical expansion in the years to come.

<sup>4</sup>with Daniel Susskind, OUP, 2015

<sup>5</sup>How Legal Technology will change the Business of Law, 2016, [http://www.bucerius-education.de/fileadmin/content/pdf/studies\\_publications/Legal\\_Tech\\_Report\\_2016.pdf](http://www.bucerius-education.de/fileadmin/content/pdf/studies_publications/Legal_Tech_Report_2016.pdf); <http://www.lawsociety.org.uk/News/Stories/Future-of-legal-services/>

<sup>6</sup><http://www.forbes.com/profile/gordon-moore/>

<sup>7</sup><http://www.intel.com/content/www/us/en/silicon-innovations/moores-law-technology.html>

<sup>8</sup>[http://www.nytimes.com/2015/05/13/opinion/thomas-friedman-moores-law-turns-50.html?\\_r=0](http://www.nytimes.com/2015/05/13/opinion/thomas-friedman-moores-law-turns-50.html?_r=0)

<sup>9</sup>wg <http://abcnews.go.com/Technology/PCWorld/story?id=5214635>

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- (c) Clayton Christensen is often not far behind with his notion of ‘disruptive innovation’ – a process by which a product or service takes root initially in simple applications at the bottom of a market and then relentlessly moves up market, displacing established competitors.<sup>10</sup> Examples will include such businesses as Amazon’s shake up of high street stores. A number of large commercial funders are betting on a similar process happening within the legal profession.
- (d) There is usually a reference to the development of ‘The Internet of Things’: The Internet of Things revolves around increased machine-to-machine communication; it’s built on cloud computing and networks of data-gathering sensors; it’s mobile, virtual, and instantaneous connection; and they say it’s going to make everything in our lives from streetlights to seaports ‘smart’.<sup>11</sup> If this is so, then it is unlikely that wifi will revolutionise our control of heating but not our access to legal services.
- (e) And there is the promise of AI – probably referencing IBM’s Deep Blue victory at chess over Garry Kasparov in 1996-7; IBM’s Watson’s victory in 2011 at the game show Jeopardy over the best two human performers between them, IBM breathlessly reported “they’d racked up over \$5 million in winnings on the television quiz show Jeopardy. They were the best players the show had produced over its decades-long lifetime”<sup>12</sup>; and a very recent series of games successfully pitted Google’s DeepMind against the best human player of the game Go.<sup>13</sup> And what are these machines and what can they do? Well IBM describes its offering as “a technology platform that uses natural language processing and machine learning to reveal insights from large amounts of unstructured data”. It can analyse unstructured data and, in IBM’s selection of key functions can answer your customers’ most pressing questions; quickly extract key information from all documents and reveal insights, patterns and relationships across data.<sup>14</sup>

<sup>10</sup> <http://www.claytonchristensen.com/key-concepts/>; <https://clp.law.harvard.edu/event-post/disruptive-innovation-in-the-market-for-legal-services/>

<sup>11</sup> <http://www.wired.com/insights/2014/11/the-internet-of-things-bigger/>

<sup>12</sup> <http://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/>

<sup>13</sup> <http://money.cnn.com/2016/03/09/technology/google-deepmind-go/index.html>; Guardian 14 March 2016

<sup>14</sup> <http://www.ibm.com/smarterplanet/us/en/ibmwatson/what-is-watson.html>



## 1.3. Application to Law

Most consideration of the impact of technology on law covers high value commercial work where potential rewards will encourage the outlay of investment.<sup>15</sup> One recent commercially focused study identified three categories to the Legal Tech landscape:

- enabler technologies
- support process solutions
- substantive law solutions.<sup>16</sup>

*Enabler technologies* are focused on facilitating digitisation. Some of these offerings, such as cloud storage tools and cybersecurity solutions, have been developed by general tech vendors and are relevant for a variety of industries whereas others, such as legal collaboration platforms, have been created to manage processes specific to the legal profession.

*Support process solutions* infuse new efficiencies into law firms' case-management and back-office work, in processes ranging from human resources management and business development to customer relationship management and accounting, billing, and finance. Most law firms use such solutions, but the degree of sophistication and level of integration into daily work vary. Overall, the legal profession still lags behind other professional services in deploying the software used in these solutions.

*Substantive law solutions* go to the heart of the commoditisation of law of which Richard Susskind has been such a prophet: they support or even replace lawyers in the execution of core legal tasks in transactions and litigation cases. This category contains numerous subcategories. For example, one subcategory focuses on commoditised law solutions that offer online services for highly standardised legal cases, mainly in consumer law. Another subcategory, basic support solutions, facilitates the execution of low-skilled legal tasks, such as the drafting of standard letters or deadline control, or helps automate repetitive tasks, including simple contract drafting and contract analysis. Once problematic provisions are found in a contract, analysing them is neither a commoditised nor a low-skilled task. However, the process of screening documents to determine which of them merit a closer look clearly requires far less skill. Yet another subcategory contains advanced support solutions that help lawyers manage more complex aspects of their legal work, such as analysing data from previous court and judge decisions to assess the odds of a client winning a case. Although some law firms are already using some of these substantive law solutions, their adoption is still below the rates for enabler technologies and support-process solutions.

<sup>15</sup> eg [http://www.bucerius-education.de/fileadmin/content/pdf/studies\\_publications/Legal\\_Tech\\_Report\\_2016.pdf](http://www.bucerius-education.de/fileadmin/content/pdf/studies_publications/Legal_Tech_Report_2016.pdf)

<sup>16</sup> Boston Consulting Group and Bucerius Law School, see above.



The advantage of this threefold analysis is that it stresses developments like secure-based cloud storage of data which are general and which will have profound consequences for all businesses – including law. For example even law centres, like that in Avon and Bristol, are now sending dictation for typing in India. Secure storage and data transfer in the cloud facilitate such developments. Cloud computing also facilitates sharing between groups of lawyers in potentially new ways; may help to integrate pro bono assistance with paid for services in new ways; may create new ways in which clients and lawyers can relate through shared access to the same documents; and allows lawyers – as anyone else – to work from anywhere. It is a good example of a general ‘enabler’ technology with potentially profound consequences for the organisation of legal practice, facilitating collaboration and joint working which would be possible but much more difficult without it.

The Law Society of England and Wales identified a mix of specific and general technology in its recent review of the future of legal services. It found that technology is impacting on legal services in five main ways:

- enabling suppliers to become more efficient at procedural and commodity work;
- reducing costs by replacing salaried humans with machine-read or AI systems;

- creating ideas for new models of firm and process innovation;
- generating work around cybersecurity, data protection and new technology laws (including, crime, corruption, online purchase rights, copyright);
- supporting changes to consumer decision-making and purchasing behaviours.<sup>17</sup>

In addition, the Law Society also, on the one hand, identified the growing use of technology in the operation of the courts, civil and criminal and, on the other, the increasing importance of social media as a major route for clients to contact service providers.

The Society’s analysis may underestimate the way in which technology is impacting on the organisation of the law firm – an issue considered below.

The next section:

- looks at how technology is affecting, the way in which law practices are organised;
- discusses the major ways in which technology is affecting how law is practiced in the context of services for people on low incomes;
- focuses on the potential impact of the growth of ODR, based largely on the proposals from a recent report in England and Wales.

<sup>17</sup><http://www.lawsociety.org.uk/News/Stories/Future-of-legal-services/>



## 2. Technology and the organisation of legal practice for people on low incomes

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### 2.1.1. Introduction

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The questions for technology in relation to legal practice for people on low incomes are whether it can both bring down the price and widen access so that ‘need’, what Richard Susskind has called ‘the latent legal market’, can be released. For England and Wales, that means asking whether ‘build it high, sell it cheap’ commercial practices can compensate for the cuts to services once provided at the public expense under legal aid.

**Relevant elements include:**

*Deployment of the same ‘enabling technologies’ and ‘support processes’ as commercial practices*

The requirements of running a profitable legal aid firm in difficult times have led to the development of various forms of sophisticated case management software and many solicitors have integrated both generally enabling software


– e.g. cloud computing – and the second level support systems.<sup>18</sup> Some firms have the capital and the inclination to make the required investment for third level specific systems aimed at low income, high volume cases – including those that might be allied with ‘latent legal market’ work e.g. conveyancing.<sup>19</sup>

Technology may open up new ways of collaborating that can even the playing field between small and large practices: “... technology trends will allow solo and small firm attorneys to access more information less expensively, to create and join communities of attorneys, and to collaborate within these communities in a way that is similar to having the networking and support that attorneys enjoy in large firms. The net effect of these trends will empower these attorneys to compete at a higher level with larger firms.”<sup>20</sup>

<sup>18</sup> eg the unfortunately initialised SCAMS: see [http://www.scams-law.com/products/legal\\_aid.html](http://www.scams-law.com/products/legal_aid.html)

<sup>19</sup> eg <http://www.conveypro.co.uk>

<sup>20</sup> B Janis ‘How Technology is Changing the Practice of Law’; [http://www.americanbar.org/publications/gp\\_solo/2014/may\\_june/how\\_technology\\_changing\\_practice\\_law.html](http://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html)



*Deployment of similar e-filing, e-discovery and information digitalisation as commercial practices*

There is no reason why the same systems that operate in large commercial cases and transactions should not be used in what we might call a 'poverty law' practice. The impact, however, is likely to be smaller because most disputes or transactions will not entail the same volume of material to be processed – though one could conceive that in large class actions or employment cases, there might be a similar need. There are wider implications to this: it probably means that 'poverty law' practices are not as vulnerable to the job losses likely to occur in the commercial world.

This might be one area where such practices, vulnerable though they may be to cuts to government expenditure on legal aid, are protected from the colder winds of technological change. However, if the courts proceed, as they are pretty well bound to do, with plans for e-filing and online procedures then there will be a premium on firms with the technology that will interface as seamlessly as possible with the court systems. Greater use of digitised procedures is likely to lead to simplification of court procedures in the interests of automated processes.

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## 2.1.2 Artificial Intelligence (AI)

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The potential for AI has been noted above. We are, however, probably a long way from its deployment in poverty law practice to any large extent. The leading firm seeking to make use of the potential of IBM's Watson in the law is ROSS Intelligence. This is from the firm's website:

*'ROSS is an artificially intelligent attorney to help you power through legal research. ROSS improves upon existing alternatives by actually understanding your questions in natural sentences like – "Can a bankrupt company still conduct business?" ROSS then provides you an instant answer with citations and suggests highly topical readings from a variety of content sources.'*<sup>21</sup>

It has been described on a crowdfunding website seeking funds as 'A Siri for the Law'<sup>22</sup> ROSS was developed in Canada and its business is now based in the USA – where it claims that it is being trialled in a beta version with 20 global law firms.

ROSS is making considerable waves in terms of publicity but has yet to be deployed in the UK and, when it does, it is likely to be in commercial, high income areas. Certainly, the first tentative steps in the deployment are being taken in those areas – witness the recent alliance between accountants Deloitte and AI firm Kira Systems: The alliance will combine Deloitte's business insights in cognitive technologies with Kira Systems' advances in machine-learning in creating models that quickly read thousands of complex documents, extracting and structuring textual information for better analysis. This capability holds broad applications for the marketplace, said Craig Muraskin, Deloitte LLP, managing director of Deloitte's USA Innovation Group, as the extensive review of documents goes into many pressing business activities, including investigations, mergers, contract management, and leasing arrangements. "Wading through miles of corporate jargon hunting for key words and patterns can consume considerable time and resources," said Muraskin. "By teaming with Kira Systems we can help organizations reduce their review time while redeploying talent to higher value activities – let's save our eyes for more strategic matters."<sup>23</sup>

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The most prosperous law practices in 2020 will be those that use Artificial Intelligence.

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<sup>21</sup> <http://www.rossintelligence.com/lawyers>

<sup>22</sup> <https://wefunder.me/ross>

<sup>23</sup> <http://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/deloitte-forms-alliance-with-kira-systems-to-drive-the-adoption-of-artificial-intelligence-in-the-workplace.html>



You can, however, imagine in time how law and practice relevant to poverty law practice could be parcelled up and managed by AI. The market disruption created by AI might be like the changes in the car industry. On the one hand, Tesla seeks to re-engineer the car. On the other hand, conventional car manufacturers are incorporating technical improvements such as Park or Brake Assist. AI might in time develop a capacity to absorb the whole of, say, housing law and transform its practice. However, it would be a much easier step for AI programmes to revolutionise the presenting of arguments in court – buttressing rather than threatening existing advocates and their structures of practice. You could, for example, scan all relevant speeches, judgements and other information to identify the arguments which would best sway individual justices of the Supreme Court.

Much of the internalised knowledge, judgement and experience in presenting argument at the highest level, currently so valued of barristers, could be digitalized but we are some way from that. However, an author for the American Bar Association (ABA) notes the potential effect of Moore’s law and states in general terms:

“The most prosperous law practices in 2020 will be those that are able to successfully adjust their business models to use artificial intelligence-type tools while at the same time promoting and delivering the part of the legal service value proposition that the machines are not able to provide.”<sup>24</sup>

<sup>24</sup>Blair Janis ‘How Technology is Changing the Practice of Law’: [http://www.americanbar.org/publications/gp\\_solo/2014/may\\_june/how\\_technology\\_changing\\_practice\\_law.html](http://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html)

## 2.2. Website-led practice and the creation of national brands

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Historically, legal practice – particularly on the High Street – has been led by its physical location. Traditional advice was to locate near a bus stop. Practices can now be entirely virtual (dealt with as a separate category below) but you can certainly see the attempt to create national brands based largely on an advertised website based presence. This was the way in which Co-op Legal Services blazed the trail – led by various matrimonial packages. Quality Solicitors is following with a more traditional spread of work allied to the retention of firms with some degree of their own identity. Slater and Gordon was going in the same direction in personal injury.

LegalZoom went this way in the USA and is currently preparing (in the UK) for a 2016 launch of its services to businesses and consumers. LegalZoom UK Chief Executive Craig Holt said:

“We’re meticulously and patiently building something the likes of which has never been seen in the legal market – and remain open to other acquisition opportunities to further that aim. Our consumer and business clients deserve only the very best and we’re going to make sure we take the time to deliver just that.”<sup>25</sup>

Some of these ventures have encountered problems – most well-known would be Co-op with its general troubles and Slater and Gordon with issues relating to its purchase of Quindell. However, the change of perspective from the local to the national, aided by a national website, is likely to continue. It allows firms to base their lawyers anywhere in the country and, in particular, anywhere that costs are low – no doubt some of the thinking behind LegalZoom’s purchase of a Wakefield firm.

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The change in perspective from local to national, aided by a national website, is likely to continue.

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<sup>25</sup><http://www.insidermedia.com/insider/national/conveyancing-specialist-acquired-by-legalzoom>

## 2.3. Unbundled services, often fixed price

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Often linked to website-led practices aspiring to be national brands is the provision of unbundled services whereby the client purchases only a discrete element of the total service required. The ABA maintains a website with resources on the topic.<sup>26</sup> The Law Society issued a practice note on the topic in March 2015.<sup>27</sup> Its list of areas where unbundling might be appropriate contain many which are relevant to a poverty law practice:

- aspects of small personal injury claims;
- actions against the police (this might be rather contentious);
- consumer claims and general civil disputes;
- aspects of family law;
- aspects of housing and immigration law.

Unbundling is not inherently a website or technology based technique. It was initially promoted by an American lawyer, Forrest S Mosten, as a DIY approach to family law.<sup>28</sup> However, technological developments mean that it is well suited to forms completed over the internet with or without the participation of a lawyer in person, by phone or by video connection. Co-op Legal Services initially led with a wide range of unbundled services – though, interestingly, these are given less emphasis on its current website.

Nor are unbundled services inherently linked to fixed prices though that is often the intention: they allow the work undertaken by the law firm to be closely circumscribed.

<sup>26</sup><http://apps.americanbar.org/legalservices/delivery/delunbund.html>

<sup>27</sup><http://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/>

<sup>28</sup>See eg 'The Unbundling of legal services: increasing legal access' FS Mosten in *Shaping the Future: new directions in legal services* e.g. R Smith, Legal Action Group, 1995.



## 2.4. Virtual legal practice

Virtual legal practice has different meanings. For this purpose, we might adopt a definition of USA legal analyst Stephanie Kimbro and reported by the ABA's Joshua Poge: In Stephanie Kimbro's *Virtual Law Practice: How to Deliver Legal Services Online*, she defines a virtual law practice as 'a professional law practice that exists online through a secure portal and is accessible to both the client and the lawyer anywhere the parties may access the Internet.' Mr Poge, who is the head of the ABA's Legal Technology Resource Center, points out that in ABA surveys larger firms tend to use a different definition relating to the way in which they communicate with their clients.<sup>29</sup>

In England and Wales, a well publicised example of a virtual legal practice (among a number practising in this way) would be Scott Moncrieff and Co (or Scomo) which has a website and series of

associated practitioners without a major office fixed base and which offers legal advice throughout England and Wales, through face-to-face contact or online, via Skype or by phone.<sup>30</sup>

A virtual legal practice can take a variety of different forms, some of which are entirely compatible with a physical office and are, for example, ways of making the most of limited resources. For example, New Mexico Legal Aid in the USA kept together its specialist foreclosure team in one location and uses Skype to communicate with clients over the particularly sparsely populated state. The head of New Mexico Legal Aid, Ed Marks, spoke at a LSC conference about how video connection made up to 85% of the work location independent.<sup>31</sup> If acceptable access can be established for clients then the potential of video connection through technology such as Skype

**Amount of work made location independent by video connection in New Mexico**




85%

<sup>29</sup><http://www.americanbar.org/publications/techreport/2014/virtual-law-practice.html>

<sup>30</sup><http://www.scomo.com/about-us.html>

<sup>31</sup> LSC Technical Initiatives Grants conference, St Antonio, Texas, January 2016.



seems to be large and could go some way, as in New Mexico, to giving access to specialist providers even in remote locations – or even to generalist ones where there might otherwise be an ‘advice desert’ without physical provision.

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If acceptable access can be established for clients then potential connection through technology such as Skype seems to be large.

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### Linked signposters and organisations

There are a variety of arrangements which can link practices with other websites which provide a signposting function. LegalBeagles, a free forum for legal and debt matters, for example, directs users to a price comparison website which it runs: “We are delighted to announce the launch of our new legal services price comparison website LBcompare: *lbcompare.co.uk* – Here you will find the definitive list of all UK law firms and those offering PPI reclaims services. LBcompare is the UK’s first fully browsable legal price comparison website where, unlike other comparison websites, registration is not required and no personal data is harvested. As with our LegalBeagles forum we are proud to be consumer focused, independent and transparent.”<sup>32</sup>

It is not clear whether firms pay for their listing.

<sup>32</sup><http://legalbeagles.info/fos-adjudication-highlights-need-for-advisers-to-review-clients-entire-portfolios-scott-robert/>

## 2.5. Social media

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An interesting suggestion in the recent Law Society of England and Wales paper is the prospective importance of the 'connected consumer' who will be drawn to a provider through social media.<sup>33</sup> A report on the impact of technology for the ABA suggested rather light use of social media by lawyers, and this is likely to be even more the case domestically. The major use actually seemed more related to advancing the careers of lawyers rather than reaching out to the interests of clients. Its survey found that 57% of its surveyed firms are on LinkedIn; 35% on Facebook and 29% blogged. Twitter use was lower.<sup>34</sup> Overall, the impact seems, as yet, pretty marginal. However, Hackney Law Centre shows the creative way in which it could be used. A report of a recent Legal Voice conference stated: Miranda Grell, business development manager at Hackney Community Law Centre (HCLC), said social media had an equally valuable role to play in the not for profit sector.

HCLC has used its social media presence – mainly on Facebook and Twitter – to give it a vastly raised and more respected profile, she said it had also revamped its website which had previously been 'awful'. It didn't have a purpose. It was difficult to navigate and people couldn't use it to get any idea what we could help them with.

The HCLC now uses social media to connect with numerous different audiences: Hackney residents with legal problems; local volunteers; people interested in social justice issues; potential business partners; journalists and academic researchers, among others. A local atheist church had made a donation of £500 to HCLC after finding out about its work on social media. One of its grant funders had been delighted to be thanked on Twitter after the solicitor whose post it funds won a prestigious legal award. It also uses Twitter to publicise its successes – such as a recent halted eviction – and advice sessions that it runs in a local library.<sup>35</sup>

<sup>33</sup>Law Society Future of future-of-legal-services-3.pdf, p44

<sup>34</sup><http://www.americanbar.org/publications/techreport/2015/SocialMedia.html>

<sup>35</sup><http://www.legalvoice.org.uk/2016/03/08/legalvoice-2016-conference-reports/>



## 2.6. Regulatory restrictions, permissions and provisions

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In the USA, the unauthorised practice of law by non-lawyers is largely prohibited (though there are states that allow certain forms of limited practice akin to the example of our licensed conveyancers). That has not been the case in England and Wales where regulation has been effected by reference to very specific activity e.g. elements of the probate, conveyancing and court processes. The major effect of recent changes of regulation has been through the approval of Alternative Business Structures (ABS). These allow the third party ownership of law firms and a wide range of business arrangements. This is another provision which has no direct bearing on technology

but a major indirect one in that it has provided a route for the capital to enter the market and to finance, in particular, the drive for new national brands of providers aimed at the 'latent legal' market. As would be expected and as noted above, not all of these have been successful. Several are, or have been, on the brink of failure but commentators who take heart from that as an indication of a faulty model should probably think again. It seems likely that traditional High Street practice in law will be as vulnerable to national, website-based brands as other forms of retail have been to a company like Amazon.

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The major effect of recent changes of regulation has been through the approval of Alternative Business Structures.

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## 2.7. Other market providers

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There is a practice implication to the increasing role likely to be played by technology and to the minimal impact of formal regulation on much of the process of legal advice. There are likely to be a range of new entrants from outside the legal profession who seek to maximise their capacity to deploy the initial capital investment – both in terms of providing services direct to clients or subcontracting elements from other providers. These may involve harnessing a national brand – like the Co-operative – to legal

practices which are, in themselves, relatively conventional or it is foreseeable that they might have much more emphasis on the delivery, the brand and the engineered process. The final distribution of market share is unknowable at the present time. It will depend on economics, finance and the value of solicitors' reputation as a profession. For corporate work, accountants like PWC, are likely to be the big challengers – but for reasons that go beyond their capacity to deploy technology.

## 2.8. Conclusion

First, the potential impact of technology on the work of solicitors in particular (let us leave barristers out of account for the purposes of this paper) is likely to be enormous. Perhaps understandably, in its paper on the future, the Law Society makes no explicit prediction of exactly how many of its members may be adversely affected by developments in technology and the other drivers of change that it identifies (including globalisation, buyer behaviour, external investment and competition from others). It does conclude that change will be essential to survival: 'A substantial majority of the managing partners and chairs of the 304 law firms who responded [to a previous survey] acknowledged that the market for legal services has changed permanently in fundamental ways, and almost 67 predicted that this pace of change will only increase. At the same time, only about 13% of respondents expressed high

confidence in their firms' ability to keep pace with the changes in the marketplace (down from almost 24% in 2011).<sup>36</sup> It pointed to the growth of in-house lawyers (now amounting to a quarter of those practising).

The Boston Consulting-Bucerus study, though mainly concerned with commercial work, noted the wider impact:

Expanding our view beyond the corporate law profession, we see that ordinary consumers are the real leaders in the adoption of legal tech. They are availing themselves of online services (such as preparing wills, standard contracts, and small claims) provided directly to them by vendors.

It predicted that:

In the future, the business of law will require fewer general support staff members, junior lawyers, and generalists – and more legal technicians and project managers. Indeed, tech skills in the areas of digital communication and collaboration, computer and data science, and statistics will become the coin of the realm in this profession. In some law firms, new roles including legal process managers and general legal technicians will emerge.



# 13%

**Respondants expressed high confidence in their firms ability to keep pace with changes in the marketplace**

<sup>36</sup>p59

Their advice was that large firms need to invest in technology and smaller ones need to specialise:

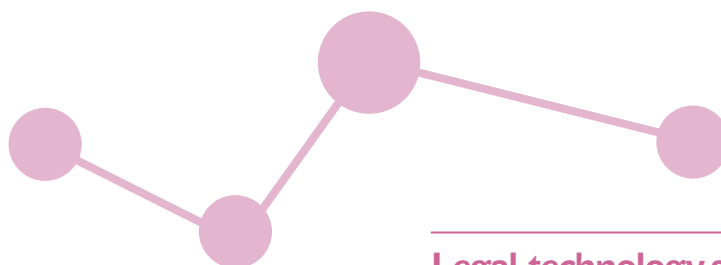
lawyers will need holistic legal project management skills as well as a knowledge of software. Those who gain experience outside the legal profession can also bring a valuable breadth of knowledge and skills to their roles. Meanwhile, individuals performing low skilled, standardised legal work are the likeliest to be made obsolete by technical tools that leverage law related decision trees and intelligent search algorithms. And many non-legal positions (such as general support staff) will be transitioned to roles that don't require specialised legal education but only some degree of legal experience and knowledge of legal technologies.

The consequence will, in the Boston Consulting/Bucerus view, be dramatic: findings from a survey of law-firm partners and legal-technology providers suggest that legal-technology solutions could perform as much as 30%–50% of tasks carried out by junior lawyers today.<sup>37</sup> It should be noted that

predictions like this have given rise to fertile scholarly discussion. In a widely reported draft article put out for consultation, two American authors trace the likely effects in specific areas and argue that most writing on the computerisation of legal services overstates the likely employment impacts.<sup>38</sup> They suggest that a more likely figure for job losses might be around 13%.

The combined and interactive effect of different factors – economic and demographic change, regulatory reform etc. – makes it hard to be precise. However, we can identify a number of elements from the above. The impact of technology, given a relatively steady state in regulation and work, would seem likely to depress the need for solicitors, probably in the region of, say, somewhere between 10% and 40% overall. There are currently around 130,000 solicitors with practicing solicitors: this could reduce, therefore, to something around 100,000 to 120,000. These are pretty speculative figures.

30–50%




13%

**Legal-technology solutions could perform 30%–50% of tasks carried out by junior lawyers, with the potential for 13% job losses.**

<sup>37</sup> p3

<sup>38</sup> Can Robots be Lawyers? D Remus and F Levy Article for consultation: SSRN-id2701092



Technology could increase some forms of work. It will undoubtedly increase the number of para-legal workers of one kind or another – legal technicians, knowledge experts etc. Regulators will face a strategic choice: these could be brought within the solicitor ‘brand’ or excluded. That would make a difference to numbers but not functions undertaken. There will be fewer people with high level professional responsibility for advising clients.

Second, there are implications for education and training. It is surprising that these are not considered in more detail by the recent Solicitors Regulation Authority (SRA) proposals which look, in this context, somewhat reductionist with their traditional division into knowledge and a traditional set of skills which make no reference to technology’s impact.<sup>39</sup>

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There will be fewer people with high level professional responsibility for advising clients.

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In the past, part of lawyers’ role has been as the gatekeeper of otherwise arcane knowledge and procedure. So, there has been a premium on a good memory and detailed knowledge. But, the BCG-Bucerus study asserted: “To supply the legal market with lawyers who have the knowledge and skills essential for success in a landscape reshaped by legal tech, law schools, and law firms will have to invest in developing students’ and lawyers’ technical and business acumen. To do so, schools may need to expand the mandatory curriculum beyond fields of substantive law by offering an additional course introducing case management processes and legal technology. More specific legal-tech skills (such as database management, statistics, analytics, and digital communications) can be taught in electives and clinics throughout the course of the law degree. As a rule of thumb, the closer a law student gets to his or her job entry, the higher the need for these non-legal skills.<sup>40</sup> The extent to which this emphasis is manifest in proposals from the SRA is somewhat doubtful.<sup>41</sup> ‘American law schools are slowly trying to instill some business acumen into future lawyers, though in Europe and elsewhere law remains distressingly academic.’<sup>42</sup>


<sup>39</sup><http://www.sra.org.uk/sra/policy/training-for-tomorrow/resources/policy-statement.page>

<sup>40</sup>as above 12

<sup>41</sup> see eg <http://12b.thelawyer.com/dangerous-dumbing-down-academics-slam-sra-training-proposals/>

<sup>42</sup> ‘A Less Gilded Future’ The Economist <http://www.economist.com/node/1865114>





On this occasion and in this context, England and Wales would seem to be located well within its European core.

This development can be put in different ways. One would be that lawyers are becoming more solvers of problems than repositories of knowledge. Another way of putting the same point would be that 'this means that the lawyer is now seen (and operates) more as a risk manager – someone who knows the intricacies of the information and the processes, and from that level guides the client through the legal knowledge maze to an appropriate set of solutions.'<sup>43</sup>

Third, we should consider whether there will be a split in the profession between a technology-orientated high quality majority sector and what may be a large number of practitioners competing for work without much technology beyond a cloud based computing system and a phone, iPad or laptop. To some extent, this is likely – particularly given the skills and resources of the different client groups involved. These would be variants of Micky Haller, the 'Lincoln Lawyer' starring in Michael Connelly's novel of the same name – practising in his case from the back seat of a car.<sup>45</sup> However, the onward attraction and market advantage of technology makes this perhaps unlikely. Even where a car serves as an office, the effect is likely to be obscured by a flashy website, cloud based technology and specialist software. Video communication like Skype adds to the flexibility of working practices that can still be compatible with remote connection.

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[there} may be a large number of practitioners competing for work without much technology beyond a cloud based computing system and a phone, i-pad or laptop.

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<sup>43</sup>Fabian Horton: <https://www.collaw.edu.au/insights/ilaw-technology-changing-legal-profession/>

<sup>45</sup><http://www.michaelconnelly.com/novels/thelincolnlawyer/>



Finally, there is the question of how the NGO sector will respond to technology. This is partly a question of the availability of the necessary capital and partly an issue of its perception, as a whole, of the relative value of communicating via technology in addition to face-to-face. There are certainly some sources of finance in most countries. In the USA, the Legal Services Commission runs its Technological Initiatives Grant (TIG) program – using about 1% of its total resources to fund a competitive funding programme for technology projects. In this country, the Legal Aid Agency is not currently so imaginative though there is no reason why it should not be. Relate has obtained finance to implement its version of the *Rechtwijzer* programme.<sup>46</sup> The Legal Education Foundation (TLEF) and others foundations have also funded various initiatives. The current project to upgrade the Citizens Advice Bureau (CAB)

website could be seen – though is not presented – as a move towards making the CAB a website-facing service with secondary physical backup.<sup>47</sup> Much existing NGO provision is heavily invested in the importance of a community and face-to-face orientation. If it is true, as asserted in last year's report, that effective access to the internet is not yet above 50% of the relevant population, then this orientation would need to continue if agencies are to get to some of the hardest to reach groups – those with low technology and language skills, for example. However, internet-orientated provision should be able to provide agencies with a way of leveraging their services by adding, ultimately, significant numbers of additional users at minimum additional cost. In large metropolitan areas, that might operate as a driver towards regional provision – e.g. over London as a whole – rather than local e.g. by borough.



1%

**The Legal Services Commission uses 1% of its total resources to fund a competitive funding programme for technology projects**

<sup>46</sup><http://www.legalfutures.co.uk/latest-news/exclusive-relate-to-launch-uks-first-divorce-odr-system>

<sup>47</sup><http://blog.cab-alpha.org.uk>

# 3. Technology and how law is practised

## 3.1. Introduction

This section of this report looks at progress in the following uses of the digital delivery at the cutting edge of the delivery of legal services:

- (a) automated document assembly;
- (b) 'guided pathways';
- (c) holistic approaches (from information to resolution – Online Dispute Resolution);
- (d) 'gamification' ('the concept of applying game mechanics and game design techniques to engage and motivate people to achieve their goals.')
- (e) the use of video.

These are all techniques which, at the present time, seem to represent the cutting edge of the innovative use of the internet to deliver legal services. They are all approaches which can be – and are – deployed by a variety of forms of legal practice. For example, the concept of 'guided pathways' or 'conditional logic questionnaires' are effectively the same and deployed respectively by e.g. The Rechtwijzer and a commercial company like Siaro.<sup>49</sup> Videos are used as a medium of

communication by a whole host of providers, including government departments, courts and NGOs. Automated document assembly is widely used on a similar basis.

### Automated Document Assembly

Automated document assembly provides one of the most straightforward ways of using the internet in an active way. The user is given sufficient information to answer simple questions and underlying software incorporates those answers within a standard form to produce a completed document. An early example of this is provided by A2J author. This is how it describes itself:

*'Access to Justice Author (A2J Author<sup>®</sup>) is a cloud based software tool that delivers greater access to justice for self-represented litigants by enabling non-technical authors from the courts, clerk's offices, legal services organizations, and law schools to rapidly build and implement user friendly web-based interfaces for document assembly.'*

<sup>48</sup><https://badgeville.com/wiki/Gamification>

<sup>49</sup> See presentations by Corry van Zeeland and Alan Larkin at Legal aid Annual Conference 2016 Law Society, 17 March 2016



These interfaces, called A2J Guided Interviews, take complex legal information from legal forms and present it in a straightforward way to self-represented litigants. A2J Guided Interviews remove many of the barriers faced by self-represented litigants, allowing them to easily complete and print court documents that are ready to be filed with the court system. Those robust features have led to proven results – 3 million A2J Guided Interviews and 1.8 million documents assembled since 2005. A2J Author is available free to interested court, legal services organizations, and other non-profits for non-commercial use.<sup>50</sup>

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[there have been] 3 million Guided Interviews and 1.8 million documents assembled since 2005.

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The A2J software has venerable origins, dating back to a project that began in 1999 but largely originates in its present form from a collaboration between Chicago-Kent College of Law's Centre for Access to Justice and Technology and the Center for Computer Assisted Legal Instruction.<sup>51</sup> It has been heavily supported financially by the USA LSC; uses a widely used document assembly programme called 'Hotdocs' which allows you 'to transform your frequently used documents and forms into intelligent templates that enable superfast production of custom documentation.'<sup>52</sup> Typically, an A2J authored system – and it is widely used over the USA – allows the user to proceed down a road, drawn in cartoon form, towards a courthouse, answering questions posed by a cartoon avatar. The ultimate result is that the form for which it has been programmed can be printed out at the end of the process. A close equivalent domestically is the CourtNav system developed by the Royal Courts of Justice CAB with assistance from Freshfields and TLEF.<sup>53</sup>

<sup>50</sup> <https://www.a2jauthor.org>

<sup>51</sup> <http://www.a2jauthor.org/content/history-a2j-author>

<sup>52</sup> <http://www.hotdocs.com>

<sup>53</sup> <http://courtnav.org.uk>



Automated document assembly is potentially suitable for the completion of any legal document. It has been used by a group of health care and other professionals in the UK to offer a cheap (£10) completed advance statement and advance decision in relation to medical and nursing preferences at the end of life.<sup>54</sup> The Legal Services Society of British Columbia offers a free simple will making service based on the technique at its *MyLawBC.com* website.<sup>55</sup> A British company, Epoch, has developed Rapidocs and markets a range of ways in which it can be combined with forms of legal practice:

We've developed an innovative system called Rapidocs®, which makes the process of creating even complex legal documents quick and easy. Essentially, Rapidocs® replicates online the face-to-face question and answer session a solicitor would normally have with a client when drafting a legal document. The system includes extensive guidance notes and plain-English explanations so that anyone, even those with no legal knowledge or experience, can complete a document conveniently at a time and place that suits them.<sup>56</sup>

Thus, automated document assembly can be used in three different ways:

- as a stand alone document production service;
- with various optional forms of assistance – e.g. telephone chat facility for the user that gets stuck
- or integrated within a service where the software is supporting a practitioner advising a client in what appears to be a traditional way.

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Automated document assembly...has been used by by a group of health care professionals in the UK to offer a cheap (£10) advance statement for ..end of life care.

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<sup>54</sup><https://www.mylivingwill.org.uk>

<sup>55</sup><http://mylawbc.com/paths/wills/>

<sup>56</sup><http://www.epoq.co.uk/aboutepoq/>



Unsurprisingly, given its relatively simple but effective approach, the USA LSC decided that increasing the reach of document assembly should be one of the goals selected by its 'Technology Summit' in 2013.

The vision is that plain language forms will be produced through plain language interviews for all frequently used court and legal forms (e.g., a consumer letter). Users will answer questions regarding their legal matter, and the intelligent forms system will use the information to generate the appropriate form and display it for review. The forms will be translated into all locally appropriate languages (but produce English language forms for filing) ... The document assembly system will provide 'just in time' legal information (such as the definition of legal terms used in the form, as questions in the interview are reached), links to fuller discussions of legal options and implications, and links to unbundled legal advice providers to enable users to obtain professional assistance with specific issues at affordable rates. Documents in process will remain on the system for a limited time to allow users to complete them in multiple sessions.<sup>57</sup>

The LSC had the foresight to see how the value of assisted document assembly could be increased if combined with automated e-filing of court documents:

Completed documents may be e-filed and filing fees paid through the system using a credit card. Court orders and notices will be generated using the tagged information and the same document assembly process (augmented by court workflow systems). Document assembly/e-filing systems will deliver filed documents electronically to process servers for service.<sup>58</sup>

Documents can be sold to repeat users in a standard form and low price even without automated completion. London law firm charity specialists Bates, Wells and Braithwaite offer a suite of documents for charities under the name "Get Legal" which can be downloaded, customised and paid for at significantly less than bespoke versions would cost. They received TLEF assistance to make the exercise economically viable for small charities. Examples among their most popular downloads are agreements include an anti-harassment and bullying policy, the sort of document that many NGOs would wish to have at a reasonable cost (£30).

<sup>57</sup><http://www.lsc.gov/media-center/publications/report-summit-use-technology-expand-access-justice>  
<sup>58</sup> As above

## 3.2. Guided Pathways

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One step beyond automated document assembly is the use of 'guided pathways' or 'conditional logic questionnaires' to take a user through the 'journey' of answering relevant (and only relevant) questions before obtaining the answer to their question. This is the approach associated with the Dutch Rechtwijzer project (discussed below) but the software, soon to be renamed Rewired, is being rolled out in British Columbia (as *MyLawBC.com* published by the Legal Services Society) and in England and Wales (by Relate, forthcoming). These are standalone systems for giving DIY assistance to users. The same idea is being developed by others in different contexts. For example, in the UK, Alan Larkin has developed Siaro, which explains itself below.

*MyLawBC* provides a number of guided pathways and will provide more as the website is populated. This is the description of the part of drawing up a separation plan:

This guided pathway will help you make a plan for resolving the family law matters involved in your separation or divorce. It will give you tools and information to help you figure out if you and your spouse can work together to resolve your matters without going to court. This pathway will give you the best available resources for your situation. It gives you a toolkit to help you understand and work on your family matters. And it gives you information on who can help you, such as professionals to help you and your spouse to work together, or where you can get legal advice. **Note:** This pathway deals with what the law says about the children of your relationship. It doesn't deal with children from previous relationships. This pathway will take you approximately 20 minutes to complete. Your answers are anonymous. See our privacy policy for more information.<sup>60</sup>

<sup>59</sup><http://www.siaro.co.uk>

<sup>60</sup><https://mylawbc.modria.com/family/make-a-plan>



You are offered a call to a family lawyer or to a mediator at the beginning and throughout the process. As you move through the pages, you have to answer questions that identify more closely your situation – e.g. number of dependent children – and are offered short explanations of the consequence of your answer. The intention of the website is made clear:

Answer questions about your situation. Learn about the law as you go.<sup>61</sup>

Having answered questions as to your situation, you are then invited to rate communication with your spouse on a relative scale from ‘very well’ to ‘poorly’; then presented with options and likely costs (the going rate for a BC two day trial is apparently just under \$40,000). You can end up, if you opt for it, with a settlement negotiated online through the website using its ‘dialogue tools’ with your partner. The proposed Relate website will operate in much the same way.<sup>62</sup> Trials with both have suggested high satisfaction rates with users but time will be needed really to stretch the systems and test them fully.

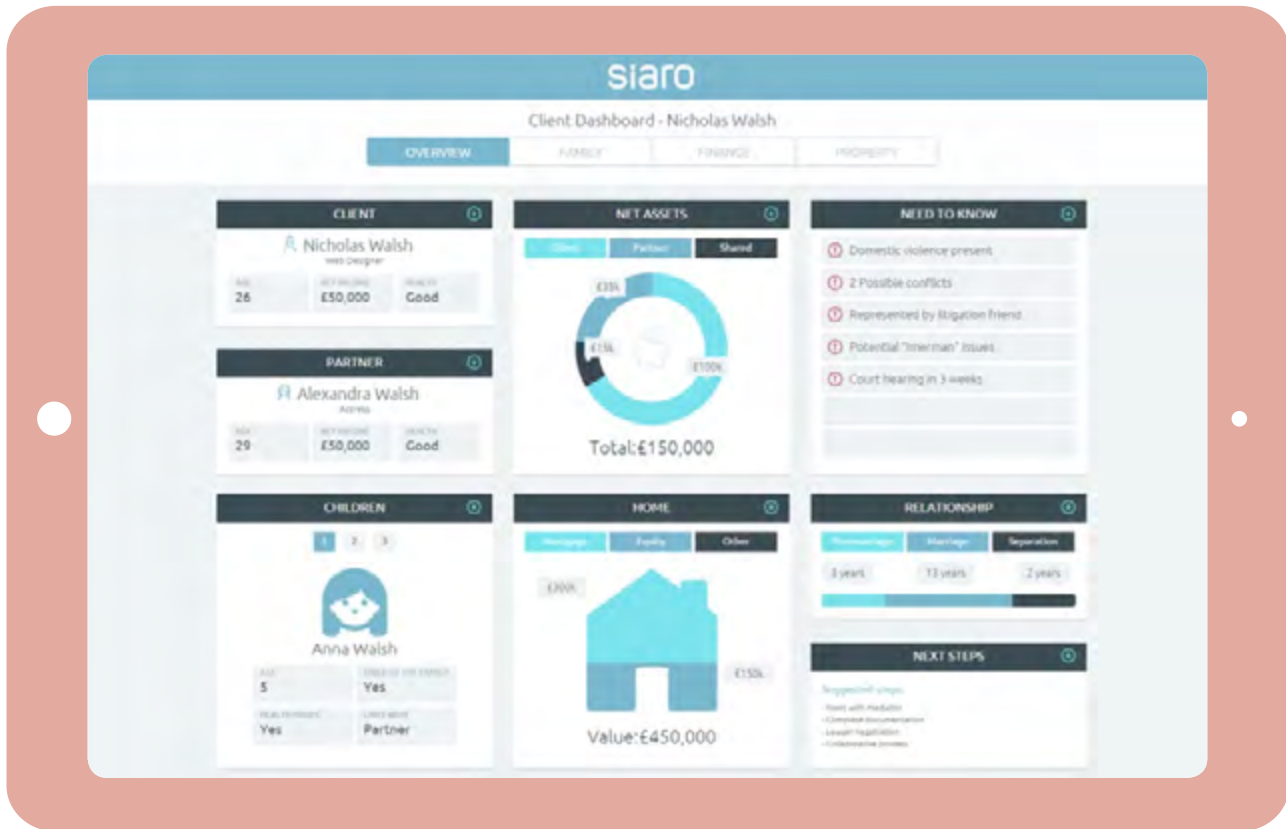
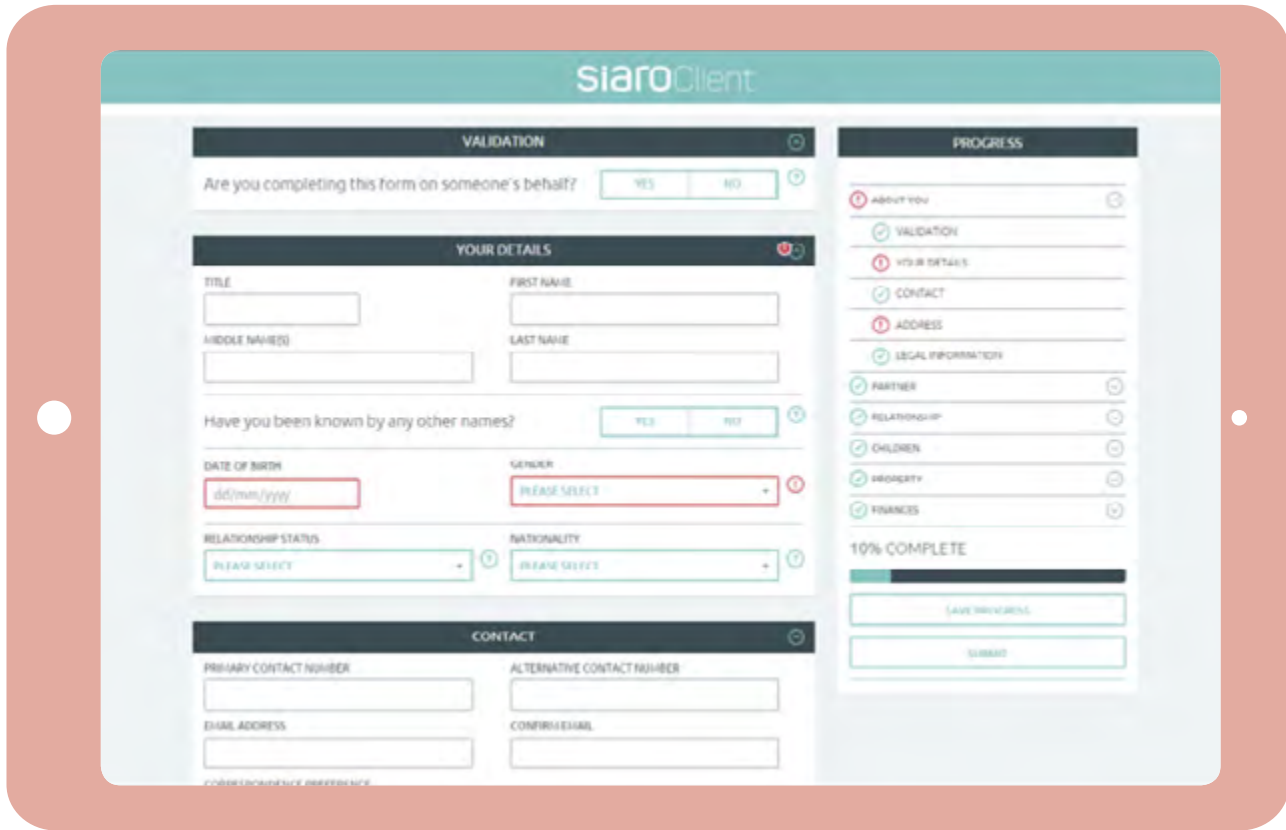
The idea has applications in supporting private practice. A programme called Siaro works in much the same way by taking a user through a guided pathway except that the information gleaned by the process of asking questions to the user/client is produced in a form available to the lawyer on a first meeting. It is also displayed visually in a ‘data visualisation’ which flags up a variety of matters, including issues to pursue. All of this means that considerable time can be saved in the initial interview because the details are filled in by the client in their own time before any initial meeting. It is a very simple idea but one which would seem to have tremendous possibilities in cutting costs while potentially raising standards. The system is compatible with various platforms allowing the user/client a wide range of options to use to complete it. Its founder, Alan Larkin, sees it as a way of accommodating unbundling (parts of the case left to the client) but minimising the risk because the programme gives the lawyer an overview of the whole process.<sup>63</sup>

<sup>61</sup> <https://mylawbc.modria.com/family/make-a-plan>

<sup>62</sup> Corry van Zeeland Legal Aid Annual Conference 2016 17 March 2016

<sup>63</sup> See <http://www.siaro.co.uk>





### 3.3. Holistic Approaches – online dispute resolution

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The Dutch Rechtwijzer, (soon to be renamed Rewired), has changed the game in relation to the provision of advice and information through ‘guided pathways’ in two ways. First, it provided a new interactive paradigm for use of the internet to provide advice and information that instantly made almost every other website look old fashioned. That was the achievement of its first incarnation, Rechtwijzer 1.0. Second, with Rechtwijzer 2.0 it incorporated a world-leading system of ODR within the guided pathway approach.


and should come on line later in the year. In the context of the next section of this report, it is important to stress that the programme, at least at present, works towards ODR: the next section considers the issues raised by programmes, largely emanating from the court structure, which aim at ODD. The two concepts undoubtedly overlap. There is no reason why, on the one hand, a judicial phase could not be inserted in the Rechtwijzer sequence and why, on the other, that proposals for a small claims court ‘stage one’ could not incorporate a funnel that stretches back from the world of the court into that of advice. Indeed, the maximum overlap is perhaps desirable. Nevertheless, the two approaches come from different directions; are driven by different institutions in different sectors; and are, initially at least, directed to the solution of different problems. Crucially, one emanates from the courts and the other from the advice sector. For the time being, there would seem to be a meaningful distinction, used in this report, between systems aimed at ODR – seeking consensus between the parties and deploying techniques such as mediation, conciliation and neutral evaluation – and those whose aim is ODD – where the ultimate aim is a final

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#### For the time being there would seem to be meaningful distinction between ..Online Dispute Resolution and Online Dispute Determination.

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The programme was originally funded by the Dutch Legal Aid Board and developed by the Hague Institute for the Internationalisation of Law (HIIIL). As has been noted, it provided the basis for MyLawBC whose guided pathways have already been discussed. The Rechtwijzer is also being modified for Relate in England and Wales. The Relate website is being tested



determination of a judicial nature, albeit that other dispute resolution techniques, such as mediation, may be offered along the way. This distinction is the justification for dealing separately and in the next section with proposals like those of the recent report by Lord Justice Briggs in England and Wales or those developed in British Columbia in relation to its CRT.<sup>64</sup>

The promise of Rechtwijzer 2.0 is enormous. It intends to offer, when finalised, a seven stage approach to the resolution of divorce and relationship breakup. And it intends to do this on a self-funding basis as users pay for elements of the process. The stages, at least as originally conceived are:

- (1) Diagnosis and Information (intended to be free);
- (2) Intake (intended as fee-based);
- (3) Dialogue between the parties (free – included in the entry fee);
- (4) ‘Trialogue’ – an opportunity for online mediation (fee-based);
- (5) External online adjudication if required (also fee-based and conceived as part of the trialogue process);
- (6) External online review (fee-based), and
- (7) After care.

Rechtwijzer 2.0 was only launched in November 2015. As at mid-March, it has been used in 700 cases with 217 finalised.<sup>65</sup> Users are a combination of those eligible for a subsidy from legal aid (currently around 40%) and those paying from their own means (around 60%). The current cost for using the system is around £350 (390 euros). Dutch legal procedure requires agreements in family cases to be reviewed by a lawyer. At present lawyers are paid a standard fee for this work (just under £250): negotiations are afoot to make this a sliding scale.

As yet, very small numbers have been taken through the Relate pilot though initial findings on satisfaction seem high. The programme unashamedly nudges couples towards agreement; contains ‘red flags’ designed to identify threat of overbearing relationships and domestic violence; and pushes users to the ‘positive framing’ of their issues. It provides a structured process for resolution of the various issues to be decided. Mediators can be asked to intervene to bring the parties together if they are stuck.

<sup>64</sup>See Civil Courts Structure Review <https://www.judiciary.gov.uk/civil-courts-structure-review/>

<sup>65</sup>Figures given at Law Society Legal Aid Annual Conference 2016 on 1 March 2016 by Corry van Zeeland

The Rechtwijzer 2.0 approach is so important as the potential paradigm for wider development that it requires rigorous external testing – both in the Netherlands and in England and Wales. There are 33,000 divorces a year in The Netherlands and 120,000 in England and Wales.

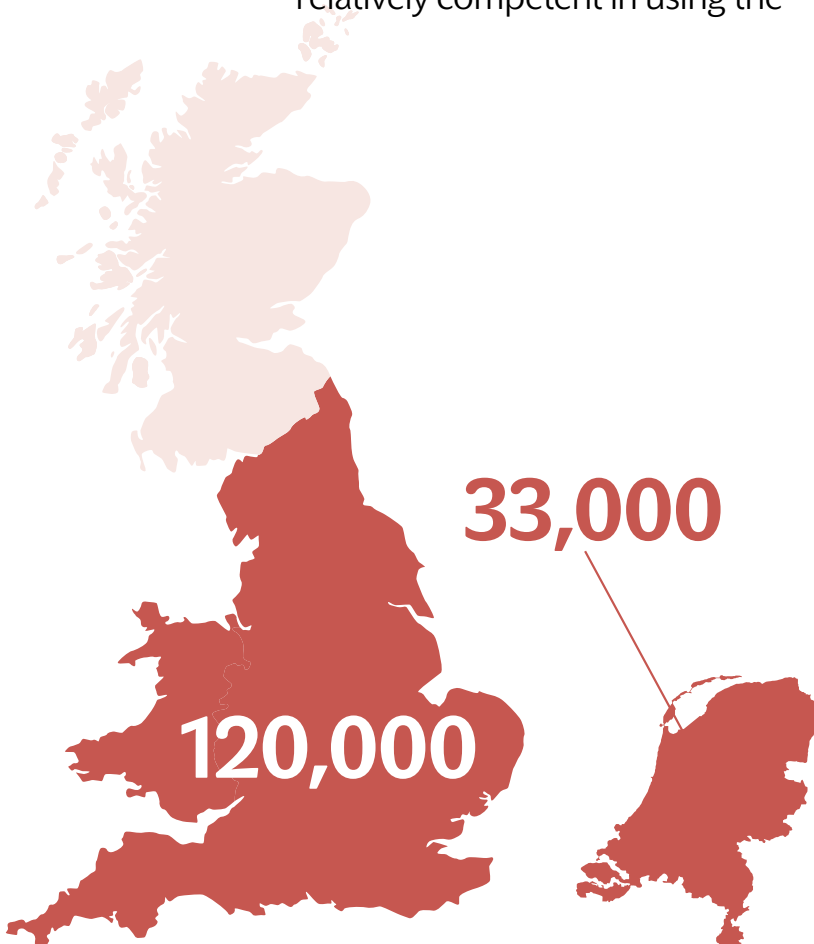
The underlying approach of the programme is very much that developed by divorce lawyers themselves in approaches like collaborative lawyering. One could imagine the Rechtwijzer approach being absorbed within an approach to divorce that consisted of a cheap internet-based resolution appropriate for those in basic agreement on major issues and relatively competent in using the

internet; lawyers who integrated a Rechtwijzer style programme – which a programme like Siaro could easily incorporate into a lawyer-focused context – within their practice so that conventional lawyer time was focused only on the issues where it was really required; and cases where lawyers operated in a conventional way either because the parties could afford that or the circumstances of the case demanded it e.g. where one party was hiding assets; there was a threat of domestic violence; or the parties were unable to use the internet. In that sort of division of resources, it would be reasonable for legal aid to be available where a lawyer really was required for clients.

Such a result would undoubtedly change the pattern of practice. Much of the repetitive work involved in divorce would be automated – with the consequent result of loss of fees. On the other hand, astute practitioners might incorporate automation within a practice that incorporated individualised assistance. That would duplicate the same sort of apparently successful role played by Epoch, for example, in supplementing automated assembly of wills with individualised assistance.

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**Divorces per year in  
England and Wales and  
The Netherlands**



## 3.4. Gamification

The notion of using simulations for training purposes is well established. It is only a short step beyond that to using internet-based games to develop skills and knowledge. One of the great proponents of this approach in the USA has been Stephanie Kimbro.<sup>66</sup> She argues the benefits of gamification within law firms as a way of increasing skills and shared identity:

Why is the use of gamification increasing? More of our workplace productivity has become automated. Human and technology interaction are commonplace and workers are spending more time communicating online with technology than they are meeting and working with people face-to-face. This creates a work environment that is less human-centered. Employees are not engaged with their work and have no psychological connection to the company. This makes it more challenging to build a company culture that fosters collaboration and human communication and interaction – factors that are often essential to innovation. Even increasing the productivity of a business becomes more challenging when the work becomes more rote and is less human centered. Gamification can help increase productivity and communication and collaboration among members of a company. Carefully designed

gamification projects that tap into intrinsic motivation can align the individual interests of the employees with the business goals of the company.<sup>67</sup>

Kimbro goes beyond the idea of using games to create stronger corporate identity. She also argues that they can be used to increase the engagement of users who might otherwise be resistant to sources of information and advice. She reports:

“The legal profession has been experimenting with games and simulations for the past several years and to a smaller extent, imbedding gamification elements into online projects.”<sup>68</sup>


The difficulty, she admits, is that many of these games have not actually been very good:

There are lessons to be learned from these past experiments and the development of games that are currently occurring. In the past, the majority of games related to legal services have been focused on legal education for school-aged children, continuing legal education for lawyers, or helping law students study for the bar exam or practice their skills in a virtual courtroom.

<sup>66</sup> See eg ‘Gamification for Law Firms’ - [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2578110](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2578110)

<sup>67</sup> <http://www.slaw.ca/2015/04/16/thursday-thinkpiece-kimbro-on-gamification-for-law-firms/>

<sup>68</sup> [37](http://poseidon01.ssrn.com/delivery.php?ID=79902603102600501609300209307710011109036021082090052093115017070026014097119097025049022043006054025039123124008104069067000005043060008021009072085088087027085103069038083104109087113121068075096118116107120019092096097107124096104094102081123072024&EXT=pdf. 'Increasing Online Engagement between the Public and the Legal Profession with Gamification' S Kimbro 'Increasing Online Engagement between the Public and the Legal Profession with Gamification' S Kimbro</a></p></div><div data-bbox=)



There are a handful of flash-based, browser – based games that are intended to appeal to adults but the graphics and technology behind them has quickly become dated leaving some to question as to how often they are found online much less the frequency and level of use. Some legal service organisations, law firms and even law students have been developing smartphone applications that address specific legal issues. These apps themselves may employ some game mechanics. There are a handful of initiatives in progress that are more focused on providing assistance to the general public on different aspects of the legal justice system.<sup>69</sup>

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We think self represented parties could benefit from an online interactive “serious game.”

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One of Ms Kimbro’s examples is the A2J software discussed above. My own view is that this is not really a gamification as such: it is a visualisation. One undoubted example of gamification is a game about self-representation being developed by the NuLawLab based at Northeastern School of Law:

“We think self-represented parties could benefit from an online interactive ‘serious game’ simulating aspects of an actual legal proceeding. Self-represented parties are asking for practical tools and skills that they can apply in practice ... Games have proven to make a positive impact on cognition and behavior because they are experiential learning environments that allow users, through trial and retrial, to attain the necessary (virtual) experience that will help guide future action in reality.”<sup>70</sup>

This is a project which has received a grant from the LSC Technical Initiative Grant programme and is being developed with New Haven Legal Assistance and Statewide Legal Services of Connecticut.

<sup>69</sup> See previous page

<sup>70</sup> <http://nulawlab.org/view/online-simulation-for-self-represented-parties>



The game can be experienced at <http://ctlawhelp.org/represent>. Readers should make their own assessment of its effectiveness. For myself, I would say that its greatest value is in beginning to show what can be done with the medium rather than what has actually been achieved. RePresent is a cartoon representation of a court case in which the player clicks answers to questions and proceeds through to the hearing. A bar shows how well you are doing. Wrong answers are corrected. I am not sure how engaging it would be though the information would undoubtedly be useful for someone conducting their own case. RePresent can be contrasted with the children's game, Changeville, available at <http://www.changeville.ca.gov/#/welcome>. This is a visualisation of a town in which different buildings contain source of different information and sources of interactivity. The visuals are engaging and there is accompanying audio. Changeville is visualised as if it were a game, something different from the issue directly being covered. For example, 'Break Up Street' contains different houses which your avatar can visit and you can encounter different ways in which you, as a child, might be improperly involved in the breakup of your parents' relationship and can learn about what rights you should expect to be respected.

Both can probably be criticised as being clunky and not up to the standard or expectation of commercial games with which likely users would be familiar.

We need research on how well gamification works in practice. The promise looks immense but, to be properly effective, considerably more development work needs to be done and this will necessarily entail more funding. Interestingly, Sarah Day O'Connor, the retired USA Supreme Court Justice, is involved with a not for profit organisation, iCivics, which has developed a number of games to illustrate constitutional issues. One deals with running a rights law practice and another ambitiously seeks to introduce young people in a simulated bid for the USA Presidency, 'Win the White House'. These are worth downloading and exploring but, to be honest, still have some way to go in terms of increasing interest while holding their value as educational materials.

You can, however, sense the promise of the possibilities from both the games that are beginning to appear. Once developed further, you could see how both commercial practices and NGOs might use them on their websites to draw potential users in and to transmit skills and information which would be helpful.

## 3.5. Video

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There is an almost limitless way in which videos can be used to communicate information and advice. We need research into which techniques are the best. It is interesting to look at the Government's '*Sorting Out Separation*' website.<sup>71</sup> This came under widespread criticism – not least in last year's report. Perhaps as a consequence, there has been a cull of some of the videos that took too rosy a view of how separation could be dealt with. The videos that are left purport to be of real people and much more acceptably raise the issue of negotiating settlements to difficult issues rather than just asserting that mediation will, by itself, act as a resolution to a problem. The videos are short and have simple messages – more about process than solutions.

Video is beginning to be used as a marketing tool by law practices, particularly in the USA. This is the advice of an enthusiast writing for the ABA:<sup>72</sup>

### *Leaving the 'online' in online video*

- Understanding that video is an online social medium is critical to its marketing success. We have borrowed what we've learned from successful blogs.
- Publish frequently: Volume matters in gaining followers and viewers. We publish approximately one new video per week, making them available to clients who access our videos through a subscription.
- Keep videos short: Like blog entries, shorter is better. Based on our experience, online video is best at 1½ to 3 minutes. We may go up to 5 minutes for a very technical topic.
- Tag and share: Like blog entries, tag content and share it through social networks and use syndicators to push out content.
- Account for a short shelf life. Videos have a limited shelf life, so do not make one that will take too long to produce, otherwise the information will be outdated by the time you release it.
- Integrate. Integrate online video into your other forms of marketing. For example, you may find that marketing both through email and video may yield a better result than each of these media alone.
- Measure results. Like all online media, you can measure views, referrals and the number of times videos are shared. Monitor this information and learn what works for you.

<sup>71</sup> <http://www.sortingoutseparation.org.uk>

<sup>72</sup> Adam L Stock 'How Lawyers are Using Video' [http://www.americanbar.org/publications/law\\_practice\\_magazine/2011/november\\_december/how\\_lawyers\\_are\\_using\\_video.html](http://www.americanbar.org/publications/law_practice_magazine/2011/november_december/how_lawyers_are_using_video.html).



The following is a further observation from the USA:<sup>73</sup>

Two websites started to change the value and importance of videos as an effective marketing tool. First is the growth of YouTube into a powerful search engine that is now owned by Google. That combination started giving increased significance to video as a better form of content than the written word. The second website is Facebook, which has led to social media as a mass distributor of video – and a natural tie to networks and possible prospects. These two elements – increased Search Engine Optimisation and visibility through social media – have made video all the more important.

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## [YouTube and Facebook] have made video all the more important.


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A visit to YouTube will provide you with a plethora of lawyer and law-related videos that run the gamut from bankruptcy law, real estate, divorce and driving under the influence to mergers and acquisitions, tax law, and commercial litigation.

Quality and usefulness range from outstanding lectures to replays of TV commercials. Video is an alternative to reading another website page. It also goes well beyond direct new client or matter generation to cover areas of media relations, client retention, careers and hiring, branding and firm messaging.

Some organisations go beyond individual videos embedded in their websites or distributed to clients to the creation of a whole YouTube channel. One example would be Shelter which maintains a channel with a range of different videos – some educational and some campaigning. It has to be said that numbers of views are not high – suggesting perhaps that a YouTube channel is not that effective a way of reaching those potentially affected by a legal problem. For example, a video of 'How to get your unprotected deposit back' got only 54 views over four months. That might be explained by the opening visual simply being a person sitting by a computer. But, a cartoon version of three steps on eviction got only 487 views over the same period. Clearly, there is an issue about how such provision is marketed and contextualised with other services to maximise its effectiveness.

<sup>73</sup>M Buchdahl 'Law Firms Embrace Video for Online Marketing' <http://webmarketingtoday.com/articles/Law-Firms-Embrace-Video-for-Online-Marketing/>



It is interesting to take a subject which is common to different jurisdictions to see what lessons you can learn. To a large extent, this may well be a matter of personal taste. But, personally, I like videos which present an apparently real person (even if played by an actor) acting in a real court situation – so that you get to see what it looks and feels like to represent yourself. A good example of this genre is the LawAssist small claims video prepared for New South Wales Australia. A number of such videos are prepared by courts and tend to have a judicial presenter.

A somewhat typically intimidating presentation is made by a judge in an Oregon video on modification of custody: the judge just looks too intimidating. My own view is that judges, in general, do not make the best presenters. However, an example of a successful and more advanced skills training video is provided by the Criminal Bar Association which pulls together simulation, actors and real judges is provided at <http://www.theadvocatesgateway.org/a-question-of-practice>.<sup>77</sup>

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A successful and more advanced skills training video is provided by the Criminal Bar Association at the Advocates Gateway.

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<sup>77</sup>the website receives funding assistance from TLEF.

## 3.6. Conclusion and Back to Basics

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The five techniques discussed above are all 'platform independent' in that they can be deployed in a range of different practice environments – governmental, private or by NGOs. In the short term, they would seem likely to make more difference to the practice of law for people on low incomes than the outer reaches of the possibilities to be glimpsed through AI – for all the current speculation of what AI might deliver in terms of replacing lawyers by computers.

The impact of the Rechtwijzer is beginning to be seen and the vision that it encourages of fuller use than currently of the interactive possibilities of the internet. MyLawBC and Relate begin to show English language versions of "guided pathways". It will be interesting to see how other advice providers react to what might fairly be portrayed as a vision of the future.

The two domestic general websites – *advicenow.org.uk* and *citizensadvice.org* must be in danger of looking old-fashioned by comparison – despite the fact that both have revamped their content. Repeated below is the attempt last year to identify the criteria behind a good website. The Rechtwijzer would probably score about 100% with the full bonus for justification of expenditure and some marks held back pending objective evaluation. The two domestic general advice websites would score less well. There is a real opportunity here for cross-jurisdictional development and discussion of best practice and perhaps even the creation of some form of kite mark to signify compliance with best practice.

Description	Individual score per heading	Overall score per section	Max score
Meets basic standards	x	0	0 (from-100)
Not misleading			
No technical failings			
Not offensive/discriminatory			
Adequately protects data			
Up to date			
Accessible			
Transparent ownership			
User orientated	x		25
Aimed at target audience			
Specific, practical, relevant			
Balanced			
In plain language			
Structured round key points and with route maps			
Evaluated and adapted user feedback			
Functionally integrated with individualised assistance	x		25
Supplementing the website			
Within the website			
Meets commercial standards of design	x		25
Has responsive design			
Effective use of graphics, video and audio			
Attractive presentation			
Interactivity and orientation to resolution	x		25
Interactive with user and using guided pathways			
Oriented to resolution of dispute			
Providing sample letters and forms			
Provides automated document assembly			
Assistance with necessary skills			
Emotionally supportive			
Justifying expenditure	x		Bonus + 10
More cost efficient or effective than alternatives			
Financially self-sustaining			
<b>Total</b>			<b>100</b>

# 4. Technology and Online Dispute Determination

## 4.1. The Briggs' Report

The role of technology and the courts is given a focus within England and Wales by the recently published Interim Report by Lord Justice Briggs of the *Civil Courts Structure Review*.<sup>78</sup> This argues for 'the opportunity to use digital tools and modern IT to improve the issue, handling, management and resolution of cases of all kinds'.<sup>79</sup> TLEF produced a response to the review which this largely follows.<sup>80</sup> Implementation of the recommendations of the review would catapult the courts of England and Wales into the forefront of courts around the world in the adoption of technology, with Lord Justice Briggs' proposal for an online small claims court. This report is, therefore, tailored around the recommendations of the Briggs review even though British Columbian proposals for a CRT although remarkably similar to that which he recommends are actually further advanced towards implementation. To those outside England and Wales, this approach might seem a little parochial. On the other hand, it gives a particularity – and, indeed, an urgency – to the analysis.

The Briggs' Report has precipitated a degree of opposition from lawyers.<sup>81</sup> However, though there might be some confusion as to whether we are passing through a second machine age<sup>82</sup>, a third one<sup>83</sup> or a fourth technological revolution<sup>84</sup> there can be little doubt that technological changes are occurring with direct and indirect implications for the court and legal system. Lord Justice Briggs sets out<sup>85</sup> 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.

<sup>78</sup> published in December 2015 by the Judiciary of England and Wales  
<sup>79</sup> Para 1.7.1

<sup>80</sup> The full response is available at <http://www.thelegaleducationfoundation.org/digital/civil-courts-structure-review-lord-justice-briggs>


<sup>81</sup> eg [http://www.barcouncil.org.uk/media/423295/2016.03.08\\_civil\\_court\\_structure\\_review\\_-\\_bar\\_council\\_response\\_to\\_interim\\_report\\_-\\_final.pdf](http://www.barcouncil.org.uk/media/423295/2016.03.08_civil_court_structure_review_-_bar_council_response_to_interim_report_-_final.pdf)

<sup>82</sup> The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies Erik Brynjolfsson and Andrew McAfee, Norton, 2014

<sup>83</sup> <https://medium.com/message/failing-the-third-machine-age-1883e647ba74#.sw3y3n6y1>

<sup>84</sup> The Fourth Industrial Revolution K Schwab, World Economic Forum, 2016

<sup>85</sup> in Para 1.8



These need the following gloss. The rapidly declining numbers using the small claims procedure and the employment tribunal probably illustrates the effect of increased fees. The move to the use of more IT is attractive precisely 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 domestic 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.<sup>86</sup> 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.<sup>87</sup> We have no problem with segmentation of the court structure. This is a well-established practice on which the courts are organised. The creation of a functionally separate online court (see below) might be undesirable for the reasons below and the words 'tiered' or 'divided' would imply more permeability between parts of the court than the words in the Report might suggest.

The 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:

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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.<sup>88</sup>

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<sup>86</sup>R v Witham [1998]QB 575

<sup>87</sup>Para 3.15

<sup>88</sup>Para 6.5



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 offline. 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. On balance, the small claims court should perhaps not be described 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.


Lord Justice Briggs' proposals for an online small claims court are almost identical to those which are considerably more advanced for British Columbia's CRT. This is designed to come on stream sometime this year and 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 CRTA 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.<sup>89</sup>

<sup>89</sup><https://www.civilresolutionbc.ca/faqs/>



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 put as mandatory from near to the beginning or proposed as much more of a pilot. The second would be preferable. 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.

There are a number of other jurisdictions whose experience it would be useful and important to consult. For example, the USA 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 amiss (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 CRT 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.<sup>90</sup> *The Rechtwijzer v2.0* began work at the end of last year. All these – and, no doubt, others – need to be evaluated.

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..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.

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<sup>90</sup><http://www.londontribunals.gov.uk>  
<sup>91</sup> Para 6.7



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'.<sup>91</sup>

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.<sup>92</sup> It is also close to the procedure proposed for British Columbia's CRT (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 need 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.

The Recjhtwijzer provides another model for Stage 1 with its sophisticated guided pathway approach to determining the issues at stake for the parties. 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 USA State of California, for example, has a range of self-help provision for litigants in person, both on and offline.

<sup>92</sup>ref

It might be that Stage 1 should be shared by the courts with the independent advice agencies providing online assistance already – the Citizens Advice Bureau 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;
- for those who are experienced users, online electronic filing (when provided) as for the rest of the courts.

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.<sup>93</sup>

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It might be that Stage 1 should be shared by the courts with the independent advice agencies providing online assistance already.

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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?

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

<sup>93</sup>ref and more



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.

The Interim Report suggests that a list of cases which should, 'at least provisionally', be kept away from Online Determination.<sup>94</sup> They are:

- most housing possession cases;
- injunctions and non-monetary relief claims;
- class claims;
- claims by or for minors and other protected parties.

It might be preferable to consider the nature of claims, rather than types of cases, which would be unsuitable for ODD. If we can safely identify these – and see online procedures open to 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. The general nature of cases which are, prima facie, unsuitable for online resolution might include:

- Those with a high degree of factual dispute;
- Those involving a complicated matter of law;
- Those where one or more litigant is unable or unwilling to handle satisfactory online resolution.
- Those where there is the threat of violence between the parties.
- Those where public policy suggests it is unsuitable or the issue at stake is a matter of public law.


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It might be preferable to consider the nature of claims, rather than types of cases, which would be unsuitable for Online Determination.

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<sup>94</sup>Para 6.43

<sup>95</sup>Chapter 2, Digital Delivery of Legal Services to People on Low Incomes R Smith, TLEF, <http://www.thelegaleducationfoundation.org/digital-report>




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. The 2015 report from TLEF suggested 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%.<sup>95</sup> 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.

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. The courts might, therefore, avoid a ‘big bang’ approach and 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 through experience 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.

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.

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 says that the target for resolution of a small claim is 30 weeks. He suggests 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 is set by Amazon's next day delivery service.

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 timeframe – 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 the private sector would also be provided.


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 what kind of cases are

being expected in different routes through the courts. We also need figures to provide operational targets.

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 experience of other jurisdictions that have more experience than we have (because of the formerly relatively high levels of legal aid and representation in our jurisdiction).

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.<sup>96</sup> 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 such as the Royal Courts of Justice CAB. Any restructuring of the courts must allow for expenditure on,

<sup>96</sup>Alan Carlson, Orange County Superior Court, conversation with Roger Smith, January 2016



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 spine 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 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.



## 4.2 Conclusion

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Thus, the general thrust of Lord Justice Briggs' Interim Report is to be welcomed. However, it would be prudent to hold back decisions on actual expenditure until the experience of other jurisdictions can be explored, however impatient that might make ministers and the Treasury.

This is an opportunity to reform the courts for a generation. Unfortunately, poor implementation carries enormous risk of the waste of public funds.



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