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JUSTICE ONLINE: ARE WE THERE YET?

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Major changes are being introduced in the way justice is delivered by the courts of England and Wales. Although reforms including online claims systems and digitised case files have been generally welcomed, some judges have expressed concerns that other reforms — such as video hearings — are being introduced "in the name of cost reduction but at the cost of justice". My lecture considers how successful the reforms have been so far.

This paper is being distributed at the last of a series of three annual Gresham lectures. The first was delivered on 22 February 2017 and is available on the Gresham College website. A 10-page paper called *Justice Online: Just as Good?* can be downloaded from the lecture page: https://www.gresham.ac.uk/lectures-and-events/justice-online-just-as-good and click "Word Transcript". New readers may care to start there. For the second lecture on 20 February 2018 – *Justice Online: Getting Better?* – I produced a six-page summary: https://www.gresham.ac.uk/lectures-and-events/justice-online-getting-better and click "PDF Transcript".

Although this summary of my lecture on 21 February 2019 completes the trilogy, I have written — and regularly update — a much longer paper on the reforms. It is now available free of charge and hosted by the Legal Education Foundation here: https://long-reads.thelegaleducationfoundation.org/ In due course, readers should consult a new website being developed at www.onlinecourts.org.

A Brief History

The reform programme was first announced in March 2014. Chris Grayling, the lord chancellor, said the Treasury had agreed to fund it with a one-off investment averaging up to £75m per annum over the five years from 2015/16. By 2016, this had doubled to more than £100m per year over six years. An additional investment of £270m for the criminal courts took the total over £1bn. Even though the reforms were intended to generate substantial savings, it was an extraordinarily welcome investment at a time of financial stringency.

Responsibility for implementing the reforms fell to HM Courts and Tribunals Service (HMCTS), an executive agency of the Ministry of Justice. Although HMCTS made use of outside consultants, it did not outsource the entire project as other government departments have done in similar circumstances. It was a wise decision. It meant that HMCTS kept control of the project at every stage. It also ensured that HMCTS owned the intellectual property generated by the project.

This was not another huge IT project, designed by outsiders, that was obsolete before it was introduced. It was a myriad of different schemes, designed largely by judges to meet the needs of court users. It crept up on them almost by stealth.

Progress

By the end of 2016, a great deal of progress had been made in digitising case-files in the Crown Court, where serious criminal cases are tried. This not the sort of reform that sets the pulses racing and it went unnoticed by the wider public. But it transforms the way courts work. No longer do they need back-offices with folders full of

paper and people to file them. No longer do judges need to come to court to read case files or take heavy bundles home with the risks that items will be lost. Documents can be filed online. Everyone involved the case has online access, from wherever they are, to whatever they are entitled to see.

The year 2017 was a frustrating one for those following the reform project. Draft legislation designed to support the reforms was lost when the prime minister called a snap election; only a few provisions were brought back the following year. Those involved in the reforms seemed remarkably unwilling to discuss the progress that was being made.

By 2018, the initial projects were available for people to see — and use. Some of the most popular processes could be accessed online. These included pleading guilty to minor traffic offences. People could bring or defend a civil claim worth up to £10,000. You could seek a divorce or apply for probate of a will. And people who had been refused social security payments could appeal online.

Users soon found that the software was programmed for only the most straightforward of cases. To begin with, at least, it could not handle anything out-of-the-ordinary.

But it was right to start small. A fundamental principle of the design was to pilot each step of the process on selected users before providing it more widely. Once it was available to the public as a whole, it could be extended to cover more options. At each stage, the designers could change anything that had not worked as intended. Individual parts of the jigsaw could be slotted into different puzzles.

Halfway There?

With the reform project roughly at its halfway stage, HM Courts and Tribunals Service will have spent £546m, which is £83m less than had been allowed for. Benefits were put at £158m, which was more than had been expected. But there were significant concerns about how well the project was going.

The National Audit Office (NAO) scrutinises public spending on behalf of parliament. It is independent of the government and its head, known as the comptroller and auditor general, is an officer of the House of Commons. The NAO's report *Early Progress in Transforming Courts and Tribunals*, published in May 2018, was the first objective overview of the HMCTS reform programme. Although its findings were played down on publication day by David Gauke, the lord chancellor, and Susan Acland-Hood, chief executive of HMCTS, they cannot have found it comfortable reading.

"HMCTS faces a daunting challenge in delivering the scale of technological and cultural change necessary to modernise the administration of justice and achieve the savings required," the NAO report concluded. "It has responded to early concerns by extending the timetable and improving its governance and programme management. But there is a long way to go to achieve the planned transformation and overall HMCTS is behind where it expected to be at this stage."

This is how the committee summarised its conclusions and recommendations:

- We have little confidence that HMCTS can successfully deliver this hugely ambitious programme to bring the court system into the modern age.
- HMCTS has failed to articulate clearly what the transformed justice system would look like, which limits stakeholders' ability to plan for, and influence the changes.
- Despite the revised timescale, HMCTS's imperative to deliver at such a fast pace risks not allowing time for meaningful consultation or evaluation and could lead to unintended consequences.
- HMCTS has not adequately considered how the reforms will impact access to, and the fairness of, the justice system for the people using it, many of whom are vulnerable.

- One third of the way through the programme, the Ministry of Justice still does not understand the financial implications of its planned changes on the wider justice system.
- We remain concerned that the Ministry of Justice is taking on significant amount of change, without a clear sense of its priorities, at a time when it is facing severe financial and demand pressures.

In February 2019, the Ministry of Justice and HMCTS published detailed responses to the Public Accounts Committee recommendations:

- As of January 2019, we have fully delivered 20 of the 23 indicators we planned to meet at this stage, and which we provided to the committee in June 2018. This includes the national rollout of four new digital services and two new private beta services.
- We have also opened our first Courts and Tribunals Service Centres in Stoke and Birmingham and started to support new national services through these centres. Considerable steps have also been made in our enabling services, where the Video Hearings project has launched further pilots and our bulk scanning and printing services are now available. Crime has also made good progress in taking more cases through the digital Single Justice Service, and the early version of Common Platform has been developed.
- Reform to our services means catering better to the needs of the people who rely on it. This boils down to designing our processes around them wherever we can, instead of asking the public to conform to what we think the process ought to be. In practice, it means more cases started, handled and prepared online or by video; better information flows and communication between the people involved, and to and from the court; better tools to understand what is happening, when it is happening, and why, including better online and telephone access and a better-functioning back office to support users; and more varied tools to resolve cases, drawing on mediation, online settlement and judicial led online resolution. It does not mean the end of oral hearings; the courtroom; or even – for the public, at least – paper.
- Reform does not in any way challenge or compromise the independence of the judiciary. This essential tenet of the justice system remains steadfast. Access to the justice system will not be diminished; it will be enhanced through the addition of new routes that complement, but don't necessarily replace, the old. Our justice system will remain as open and transparent as it is now. The public and media will continue to be able to see, hear and read about hearings and judgments, whether they are made in, or away from, the hearing room.
- The physical hearing room, and face-to-face interaction, will still play a critical role in the administration of justice. The sincerity, gravitas, integrity, along with the many traditions and ceremonial aspects, of the courtroom will not change. And many familiar roles – ushers, clerks, advisors, security officers – will continue with the important work of supporting proceedings and making sure they run smoothly.
- We will be establishing an advisory panel to support analysts as well as ministers on evaluating, assessing and reviewing the reform programme.

Continuous Online Resolution

The most innovative reform being introduced this year is called continuous online resolution. What we've seen so far has involved digitising and enhancing existing processes. This involves an entirely new route to justice.

People who need help with daily activities because of a long-term illness or disability may now claim a recurring personal independence payment from the Department of Work and Pensions (DWP). Those who are turned down after a reconsideration may appeal to the Social Security and Child Support Tribunal. That appeal can already be launched online and around 3,300 have been lodged since last July. Although some appeals may be decided on the papers, most now go to an oral hearing followed by a written decision.

Though tribunal members try to put users at their ease, most appellants find the prospect of an oral hearing intimidating. They have to turn up in person and wait for their appeal to be called on. The hearing may be over in moments if they have the doctor's letter that the tribunal had requested. Or it may be inconclusive if the appellant doesn't have the necessary information readily available.

What's now planned is a form of early neutral evaluation. Tribunal members will assess each appeal and consider whether further evidence is needed. That can be posted in or uploaded it using a mobile phone.

Next, the tribunal will issue a reasoned view of the case. The appellant can then accept this or reject it — as can the DWP. Either party can still insist on an oral hearing, but this is likely to be rare. Around two-thirds of the appeals in personal independence payment cases are currently successful, mainly because appellants clarify their evidence ("when I said I played football regularly, I meant table football").

This appeal process will be piloted using real appellants in the coming weeks. But the next stage, planned for later this year, is even more innovative.

Judge John Aitken, president of the social entitlement chamber of the First Tier Tribunal, refers to it as a "forum" — though others will recognise it as a glorified WhatsApp group. Submissions and documents can be posted on the case file by the appellant and the DWP. Tribunal members can ask questions online. Unlike an oral hearing, the parties and tribunal members won't need to be in the same place. Unlike a video hearing, they won't need to take part at the same time.

This has huge advantages. The appellant has enough time to look up the details needed by the tribunal and — perhaps with the help of a relative or friend — upload them from home in the evening. A DWP official, who would not normally trouble to attend the hearing, will see those details at work the next morning. Once that information has been considered, the DWP may concede the appeal. If not, officials will soon learn how much weight the tribunal attaches to evidence and arguments of this nature.

The system is highly attractive to the tribunal members, many of whom sit part-time. A medically qualified member could log on from home over the weekend and assess the evidence uploaded in a batch of cases. Each written comment on the case — whether made by the parties or by the tribunal — will be saved like an email trail. It will be invaluable in the event of an appeal. The record should also be available for inspection by press and public.

Gov.uk

One flaw in the current system is that the courts and tribunals website is currently headed *GOV.UK* on every page. In previous Gresham lectures I argued that this was inappropriate for claims against the government. Courts must be seen as independent of the parties.

That argument seems to have been heeded at last. Even though the people who run the government websites don't like people interfering with their templates, I am assured that before long all pages will be headed *HM Courts and Tribunals Service*. We wait to see whether the URL — the "address" of the web page — will change too.

Judicial Ways of Working

Until the beginning of last year, most of the judiciary had little or no involvement in the reforms. Senior judges approved what was being done but judges up and down the country had very little say in it.

At the end of April 2018, all members of the judiciary in England and Wales were asked for their views on the courts and tribunals reform programme. Papers prepared by senior judges were sent to judicial office-holders in the civil, criminal, family and tribunals jurisdictions. Each paper was called *Judicial Ways of Working 2022*, presumably referring to the target date for completion of the reforms.

It outlined six "ways of working" and how they might be achieved:

Use of digital systems: The judiciary will have the benefit of standardised digital case management systems and paperless working.

Use of technology for hearings: Judges will decide whether to conduct hearings by telephone, video-link, online or in person. If users struggle with technology, they should receive the appropriate assistance or alternatives through the "assisted digital" service provided by HMCTS.

Cases dealt with proportionately: Judges will always hear the more complicated and sensitive cases. Legal advisers or case officers may be authorised to deal with certain specified types of more routine work, such as applications to extend time for compliance with an order when there is no risk to the trial date or uncontested special measures applications. Alternative dispute resolution methods should also be used more widely, if suitable, to secure speedier and fair outcomes.

Use of simpler, accessible procedure rules: There should be clear procedural rules for those accessing justice online, with consistent, predictable and easier-to-understand processes. People should get help when they need it.

Authorisation to perform routine judicial functions: The appropriate use of well-trained, legally-qualified legal advisers should allow a greater share of judicial time to be spent on decision-making and substantive case management — with less time spent on routine paperwork. There should be enough supervision to ensure no detriment to the quality of justice.

In January 2019, the *Judicial Ways of Working* papers were formally published by the judiciary along with the judges' responses.

On staffing, the judicial engagement group had suggested ways in which the inevitable staff reductions could be made more workable. HMCTS had agreed to rework its proposals.

It had been agreed that courts would be staffed to agreed minimum levels and that all courts would have an appropriate number of listing officers based at the court itself.

Senior judges were acutely aware that many civil courts were in a very poor state of repair. Ensuring that their condition was significantly improved remained a priority.

The civil judiciary had raised a variety of concerns about video hearings. HMCTS had assured the senior judiciary that all video hearings would be accessible to the public. Those that were not held in open court could be viewed on screens.

Judges accepted that preliminary hearings involving legal representatives could be dealt with in this way. Video hearings could also benefit vulnerable witnesses and those who could not travel to court.

But most judges took the view that trials involving oral evidence were not suitable for video hearings. Judges needed to watch not only the witness who was giving evidence but also the parties, their representatives and their supporters in court. If witnesses were giving evidence by video, the judge could not be sure whether there was anyone behind the camera prompting the witness. Judges were also concerned about the potential loss of gravitas and the risk to the security and confidentiality of the proceedings, given the ease with which they could be recorded and posted on social media.

It had been agreed that senior judges — heads of division — would decide which categories of hearing could take place by way of video hearing. In an individual case, it would always be for the judge hearing the case to decide whether to allow a hearing to be conducted in this way.

A pilot scheme in the tax tribunal — as well judicial experience of video links — suggested that video hearings put additional physical and mental strains on judges. These needed to be understood and addressed.

The courts were a long way from the possibility that any final hearing with contested evidence would be regarded as suitable for a fully video hearing —with all those involved, including the judge, taking part remotely.

Many judges expressed concern about the use of case officers. Since they would all be legally qualified, it had been agreed that they would now be called legal advisers.

Judges had questioned whether the necessary information technology would be available. Many judges through that the IT was of sufficient quality but training was vital to the success of reform.

The judiciary would continue to be closely involved in the development of the common components, including the judicial user interface.

During 2019, the pace of reform was expected to accelerate. Judges were told that their input into the design of specific projects would be critical, as would their involvement in training. Reform would succeed only if they continued to share their knowledge and experience.

Conclusions

One judge said to me: "we have to do this; it has got to be made to work."

To coin a phrase, no deal is not an option.

I called this lecture "Justice online: are we there yet?" In the early stages of this project, there were deep debates about what to call the online court. Those fell away as people realised that there was never going to be an online court, as such. There would be courts and tribunals — just as there are now — with processes and procedures that could be accessed online.

Developing those will continue — I suspect indefinitely. So no, we're not there yet. Perhaps we never will be. But we are already a lot closer than we were.