ON-LINE DISPUTE RESOLUTION AND ADMINISTRATIVE JUSTICE

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In a very low-key, very thin (16-page) document entitled Transforming our Justice System, published in September 2016, the Government announced that it was investing more than £700 million in order to modernise courts and tribunals plus over £270 million on the criminal justice system. The cost of the modernisation programme has been estimated at more than £700 million, with a further £270 million allocated to the modernisation of the criminal justice system. Most of this will be spent on digitising court and tribunal procedures.

The Government anticipates that, over time, the work of courts and tribunals will use a mixture of on-line, virtual and traditional hearings but, as new technologies bed down, more and more cases or parts of cases will be carried out virtually or on-line.

The report makes it clear that all cases should be started on-line and that some cases will be handled completely on-line. There will be a new, highly simplified procedural code and an on-line form will guide people through their application and the progress of their case.

The reform programme assumes a wholesale shift to accessing justice digitally although it says that people who are not comfortable with this will be supported. This is important because, although the report notes that, in GB, 86 per cent of homes had access to the internet access in 2016, only 49 per cent of households with one adult aged 65+ had internet access; one in 10 adults, including one in four disabled adults, has no access to the internet; and there is a small core of non-internet users who do not intend to get connected. However, it should be noted what is known as the ‘digital divide’ has been narrowing in recent years. According to a survey

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1 This paper was prepared for and presented at a workshop on research on users’ perspectives of administrative justice, organised by the UK Administrative Justice Institute (UKAJI) and held on 26 January 2017. A summary of the workshop is available at www.ukaji.org.

carried out by the Oxford Internet Institute, there has been a rise in internet access for lower income groups, people with no formal educational qualifications, retired people, and individuals with disabilities in recent years and this is set to increase.

In the civil courts, the report states that the entire process of civil money claims will be automated and digitised by 2020. These claims account for more than four fifths of the 1.6 million claims issued each year, with a large majority (83%) uncontested.

In tribunals, the report acknowledges that tribunal hearings are increasingly adopting a more inquisitorial and problem-solving approach. Nevertheless, it proposes that tribunals will be ‘digital by default’, ‘with easy to use and intuitive on-line processes put in place to help people lodge a claim more easily but with the right levels of help in place for anyone who needs it’. The report also says that ‘those who use tribunals will have access to specialist judicial expertise using tools and technology they use routinely in other parts of their lives’. Just what that means is not spelled out.

In the next 18 months, on-line dispute resolution in tribunals will be tested in Social Security and Child Support Tribunals, with people making their appeal and receiving a response on-line, and with tribunal judges providing dispute resolution through ‘continuous on-line hearings’. The report goes on to say that, by 2020, tribunals will offer a range of choices, ranging from virtual hearings, on-line decision making, early evaluation, mediation and conciliation to the traditional face-to-face hearing. Cases will be resolved at the right level for the issues at hand.

What are we to make of these proposals? Our view, like that of Robert Thomas and Joe Tomlinson in their recent report, is that on-line decision making has considerable potential. It could, for example, improve access to justice if those who currently don’t appeal or, if they do appeal, opt for a ‘paper hearing’, find on-line procedures less off-putting. It could also make it

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easier for people with disabilities or child care responsibilities, and those who live a long way from a hearing centre, to take part in a hearing. However, the proposals raise many questions and, if they are to succeed, great care will need to be taken to overcome them.

The speed with which the MOJ is proposing to implement the proposals is quite breath-taking, some might regard it as reckless. In the case of tribunals, on-line dispute resolution in social security and child support tribunals will be introduced and tested over the next 18 months and a new on-line system of dispute resolution will be in place by 2020. The MOJ describes the reform programme as ‘one of the largest and most ambitious justice reform programmes ever attempted’ but it is hard to see how this can be achieved in such a short time. Our response is ‘what is the hurry?’ It is somewhat reassuring that the MOJ is proposing to pilot its reforms in one tribunal rather than introducing them in all tribunals at the same time, although the tribunal it has chosen is the largest and its clientele one of the most challenging. But, wouldn’t it be better for the MOJ to take longer over introducing on-line dispute resolution into social security and child support tribunals to ensure that it gets it right. By taking longer, it could pilot the reforms and learn from a careful evaluation of these pilot schemes, and could consult with interested parties before rolling out the new system nationally. What is being proposed is incredibly complicated, and should be broken down into many components, each of which should be piloted and evaluated. Our response to what is being proposed is ‘more haste, less speed’.

Considering the cost of the reform programme and the extremely ambitious transformation of the dispute resolution that is proposed, it is quite extraordinary that the report contains no commitment to consulting the views of users and/or advice agencies and no commitment to monitoring or evaluating the reforms as they are rolled out. These are serious omissions.

On-line methods have been used for some time by the Traffic Penalty Tribunals. On-line methods were introduced when parking offences were decriminalised in 1993 and research by Caroline Sheppard and John Raine indicates that, by and large, the use of on-line procedures appears to have worked well.5 All the documented evidence for each case is scanned into a

computer that both the parties can look at and comment on. An on-line messaging system enables tribunal adjudicators to adopt an on-line inquisitorial approach. Telephone assistance is available and if they prefer, appellants can attend a hearing in person. In Sheppard and Raine’s study, 30% of appellants did so.

When asked whether the computer had been a help or a hindrance during the hearing, 31% of appellants told Sheppard and Raine that it had helped, 36% said that it had made no difference, 27% expressed no opinion, 6% said that it hindered the process. Although appellants as a whole rated the tribunal highly in terms of its fairness, the formality and informality of hearings, their understanding of its powers, and their expectations, those who had done everything on-line were significantly less likely than those who attended a hearing in person to regard the hearings as independent and impartial than those who had (36% vs 57%). It would seem to be the case that people felt more confident when they have face-to-face contact with decision-makers than when they do not.

The question is whether on-line dispute resolution can work equally well in jurisdictions where the issues are more complex than parking and where the appellants are less likely to be familiar with using on-line procedures. The portrayal of the problems encountered by Daniel Blake in Ken Loach’s film raises some very serious questions.

When the MOJ was considering how to respond to the Leggatt Report, which foregrounded the users’ perspective, we were commissioned to review the literature on users’ experiences, perceptions and expectations of tribunals. Although the ‘user perspective’ was dominant at the time, and *Transforming our Justice System* states that the transformation of the courts and tribunals ‘will be based on justice, proportionality and accessibility to all’, the ‘user perspective’ is clearly no longer as central today as it had been for Leggatt.

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The literature review was commissioned to answer some specific questions about access to tribunals, including barriers created by users’ ‘lack of knowledge. We looked at 30 primary sources covering a wide range of tribunals, including those dealing with disputes relating to child support, employment, immigration, leasehold valuation, mental health, parking and social security. This enabled us to distinguish between two kinds of knowledge, knowledge about substantive rights within the system and knowledge about procedures. We concluded that, although barriers are undoubtedly created by lack of knowledge of procedures, a lack of knowledge or understanding of substantive rights is more of a problem.

The literature we reviewed drew attention to the many difficulties experienced by physically disabled applicants. It also made it clear that, in many tribunals, appellants were overwhelmed by the paperwork they were sent and didn’t know what would happen at a hearing. However, in the case of Traffic Penalty Tribunals, it was clear that appellants thought that on-line procedures had enhanced the openness of the system because they could see all the documents that were available to the adjudicator online. This is clearly an important consideration.

At the time, there had not been any research on the optimal balance between how long appellants had to wait for a tribunal hearing and how long the hearing took. However, it was evident that delays in waiting for a hearing were experienced as very stressful. This is also relevant because on-line hearings could resolve disputes more quickly.

The publications we reviewed indicated that claimants experienced tribunal hearings as more formal than they had expected but provided little evidence to support Leggatt’s contention that ‘a combination of good quality information and advice, effective procedures and well-conducted hearings, and competent and well-trained tribunals members would make it possible for the vast majority of appellants to put their case themselves’. However, since our review was undertaken, it is clear that there have been some significant changes in the ways in which hearings are conducted that have made it easier for appellants to put their cases, especially if they have received pre-hearing advice. Although the research findings summarised in our literature review are not without interest, we have concluded that its relevance to the task of conducting research on the users’ perspectives today is quite limited.

Where does this leave us? We shouldn’t be luddites and shouldn’t turn our back on the enhancements to well-being that on-line procedures could bring. After all, information
technology has enhanced well-being in all kinds of ways. Thus, there is every reason to think that, in principle, on-line procedures should be able to enhance the process of dispute resolution. Whether the proposals outlined in *Transforming our Justice System* will do so is another matter. The Treasury will only have been persuaded to allocate funds for the MOJ’s digitisation programme if it was clear that ODR was ‘value for money’, i.e. if it was persuaded that it could deliver more for less. UKAJI will need to ensure that ‘more’ means ‘more justice for more people’. If it does, the cost of digitisation will have been a price worth paying.

To ensure that this is the case, we put forward the following guidelines:

1. The MOJ must ensure that people who are not comfortable with information technology are properly supported and that they are not disadvantaged.

2. Appellants must be offered a range of choices, ranging from on-line hearings to traditional face-to-face hearings. This is especially important because of the evidence showing that the success rate in hearings attended by appellants is much greater than the success rate in paper hearings.

3. The effects of on-line procedures on appeal outcomes will need to be monitored. In addition, monitoring should seek to compare the experiences of those who conduct their appeal on-line with those who choose to appear in person.

4. Since social security appeals are now much more inquisitorial, on-line appeals will need to build in an inquisitorial function. It is therefore very important that the MOT develops on-line procedures that will enable tribunal judges to question appellants and elicit the information they require.

5. On-line Dispute Resolution (ODR) in Social Security and Child Support Tribunals should be introduced incrementally and each component of ODR should carefully monitored and evaluated. Lessons from these exercises will make it less likely that mistakes are made and more likely that the full-scale implementation of ODR is as successful as possible.
6. The MOJ will need to devise methods of checking the identity of appellants in proceedings that are conducted on-line. It will also need to address issues of confidentiality.

7. Some of the access problems could already have been resolved if MOJ had explored the potential of remote hearings using Skype or FaceTime. Instead of going to a remote hearing centre, appellants could have taken part in hearings at the local library or in their own homes. In addition to promoting ODR, the MOJ should now experiment with the use of remote hearings in this way.