

Delivering Justice in an Age of Austerity

A Report by JUSTICE

Chair of the Committee
The Rt. Hon Sir Stanley Burnton



Established in 1957 by a group of leading jurists, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. We are a membership organisation, composed largely of legal professionals, ranging from law students to the senior judiciary.

Our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law. To this end:

- We carry out research and analysis to generate, develop and evaluate ideas for law reform, drawing on the experience and insights of our members.
- We intervene in superior domestic and international courts, sharing our legal research, analysis and arguments to promote strong and effective judgments.
- We promote a better understanding of the fair administration of justice among political decision-makers and public servants.
- We bring people together to discuss critical issues relating to the justice system, and to provide a thoughtful legal framework to inform policy debate.



JUSTICE

59 Carter Lane, London EC4V 5AQ
www.justice.org.uk

THE WORKING PARTY

The Rt. Hon Sir Stanley Burnton (Chair)

Sir Geoffrey Bindman QC

Andrea Coomber

Carlos Dabezies

Amanda Finlay CBE

Professor Rosemary Hunter FAcSS

Sir Paul Jenkins KCB QC

Andrew Lidbetter

Andrew Lockley

Ruchi Parekh (Rapporteur)

Nigel Fleming QC

Lucy Scott-Moncrieff CBE

Professor Richard Susskind OBE

Please note that the views expressed in this report are those of the Working Party members alone, and do not reflect the views of the organisations or institutions to which they belong.

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FOREWORD

As Chair of the JUSTICE Council, I am delighted to commend to you *Delivering Justice in an Age of Austerity*. It is an important report for a number of reasons.

It is the first fruit of the new strategy developed by our outstanding new Director, Andrea Coomber, to enable JUSTICE to meet the challenges that the justice system is facing on all fronts.

It marks the return of the original concept of the JUSTICE working party which has been responsible over the years for significant changes to our legal system.

It draws on the incalculable resource that our members represent with their accumulated insight and wisdom. Our new Director has recognised that they are a key asset and has called for their assistance. We have been overwhelmed by their response. The work of the organisation is all the richer for their contribution, as this report demonstrates.

This first working party report could not be more timely. As we all know, our civil justice and tribunal system is in serious trouble. While JUSTICE has been at the forefront in fighting savage cuts in legal aid, we also recognise that the system itself is in need of radical reform.

This report, small though it is, packs a real punch in terms of recommending how our courts and tribunals should be redesigned, offering ordinary people the chance to have their disputes resolved quickly and competently. The initial reactions to the recommendations in this report reflect how timely and significant a contribution it represents. There is much to do by way of follow up, but it is a splendid start.

And there is no rest for our members. Another group is busy working on ways of reforming complex and lengthy trials – primarily fraud, terrorism and serious crime – which represent a drain on the precious resources of our justice system, while potentially threatening the principles of fair trial. In the coming months, working parties of the membership will be established dealing with administrative justice reform, the challenges of an increasingly privatised justice system and mental health in the criminal justice system.

There is much talk about our justice system being the ‘Gold standard’, the best in the world. But litigants in person, advice workers, lawyers, and even judges, are painting a remarkably dire picture of the courts and tribunals in the wake of recent austerity measures. As JUSTICE continues the necessary fight against legal aid cuts, this report – in placing users at the heart of the system – offers real potential to address our justice crisis.

Helena Kennedy.



Baroness Helena Kennedy of the Shaws QC

EXECUTIVE SUMMARY

Our justice system is in crisis. Ongoing state retrenchment has resulted in an advice deficit that is making it increasingly difficult for ordinary people to navigate an adversarial justice system developed on the assumption that people will be legally represented.

In this report, we advocate fundamental change to the way disputes are resolved across the civil courts and tribunals. We offer our vision for a streamlined dispute resolution process that is designed to be accessed by unrepresented parties, supported by an integrated online and telephone information, advice and assistance portal. In summary:

- We propose a **new model of dispute resolution** in the civil courts and tribunals which, in principle, could be applied in any first instance proceedings.
 - This model will feature a primary dispute resolution officer – whom we suggest calling a registrar – who has been trained to specialise in particular types of disputes. Using an investigative or proactive approach for all cases where a defence is lodged, the registrar will identify the relevant issues, the applicable law, the appropriate procedure and the evidence needed to resolve the case.
 - On the basis of this proactive case management, registrars will get to the heart of cases quickly, drawing on their expertise and authority to resolve as many cases as possible using alternative dispute resolution methods. Registrars will refer to a judge only those cases where no other resolution is likely to be effective or appropriate.

- The model is designed to operate effectively and fairly, engaging directly with unrepresented parties, with the aim that the majority of disputes will be resolved quickly and informally and that, on the assumptions set out in the report, resources will be saved in the long term.

We recognise that while our proposed model entails a necessary reshaping of the workings of the civil courts and tribunals, it will not in itself be sufficient to bridge the current inequality gap in the justice system. In most situations, when people experience a legal problem, they will need accessible and affordable information and advice so that they can decide whether to bring a claim or how to respond to a claim. Accordingly:

- We focus on how technology can be used to deliver legal information, advice and assistance. We advocate the long-term goal of developing **an integrated online and telephone service**. This will serve to provide effective access to information, advice and assistance for the majority of those who would not otherwise have access to such services, while also freeing up scarce personally delivered services for those who need them most.
- We recognise that the development of a comprehensive online service will take at least two years from the agreement of funding. In the interim we advocate reconceptualising and strengthening telephone services, and maintaining funding for the existing online services which provide a developing basis and evidence of user demand for any future service.

I. INTRODUCTION

Context

- 1.1 Our justice system is reeling from the impact of ongoing state retrenchment. We have seen major cuts to legal aid and simultaneous reductions in local authority funding of advice and assistance. At the same time, cuts to the HM Courts & Tribunals Service (“HMCTS”) budget have led to reductions in court staff and court counter hours. The resultant advice deficit has made it increasingly difficult for ordinary people to navigate an adversarial justice system developed on the assumption that people will be legally represented. Many individuals are simply unable to bring good claims and enforce their rights,¹ or adequately defend claims brought against them, due to the inaccessibility of the justice system.

- 1.2 Statistical and widespread anecdotal evidence further suggests a sharp rise in the number of people representing themselves in our courts, with a knock-on effect on the ability of judges to hear cases in a timely and just manner.² The unprecedented scale of the legal aid cuts has undoubtedly triggered fresh concerns about access to justice. But even before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) came into force, the justice system was beyond the financial grasp of most people.³

¹A problem likely to be further exacerbated by the recent increase in the fees payable by claimants when starting court proceedings. Under the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015, claimants will now be required to pay an upfront fee of 5% of the value of the claim on all claims between £10,000 and £200,000. This follows the introduction in 2013 of Employment Tribunal fees, an unsuccessful claim for judicial review of which is currently on appeal to the Court of Appeal.

²See for example, House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (March 2015), chapter 6, available online at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>. See also *Ministry of Justice, Family Court Statistics Quarterly: July to September 2014* (December 2014), p.13, figure 7 (showing a halving of the number of cases with both parties represented and a corresponding rise in the number of cases with neither party represented), available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388811/family-court-statistics-quarterly-july-to-september-2014.pdf.

³See for example, Ministry of Justice (Kim Williams), *Litigants in Person: A Literature Review* (2011), available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217374/litigants-in-person-literature-review.pdf.

- 1.3 In March 2014, the Lord Chief Justice launched JUSTICE’s new strategy. Commenting on the substantially reduced budget for the justice system, Lord Thomas of Cwmgiedd said:⁴

“11. Some would say that with such dramatic reduction, our system will break. But that cannot be permitted. If it breaks we lose more than courts, tribunals, lawyers, and judges. We lose our ability to function as a liberal democracy capable of prospering on the world stage, whilst securing the rule of law and prosperity at home.

12. Our task is therefore to ensure that we uphold the rule of law by maintaining the fair and impartial administration of justice at a cost the State and litigants are prepared or able to meet. We can only do that by radically examining how we recast the justice system so that it is equally if not more efficient, and able to carry out its constitutional function...”

- 1.4 This report offers one model of such root-and-branch reform – focused on the civil courts and tribunals. While our Working Party did not consider family justice, owing to the considerable reforms that have been undertaken in the family jurisdiction,⁵ we see no reason why our proposals could not be extended to appropriate areas of family law in due course. The criminal justice system fell outside the scope of our work.

- 1.5 Reform of the justice system is an immense undertaking. During the course of our project, we came across and considered a number of possible measures which could contribute to the solution to the current crisis. However, for the purpose of this project – owing to resource and time constraints – we decided to focus on those areas which we believe could offer the most appropriate reshaping of the current dispute resolution landscape, with a view to fundamentally improving access to justice for ordinary court and tribunal users. It may be that for specific areas of the system, our model will not be appropriate; however, for most areas, we believe our proposed model will enhance access to justice.

⁴ The Rt Hon. The Lord Thomas of Cwmgiedd, *Reshaping Justice* (3 March 2014), available online at <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/Full-speech-of-Lord-Chief-Justice.pdf>.

⁵ See for example, s32(1)(a) Children Act 1989 (as amended by Part 2 of the Children and Families Act 2014) and Family Procedure Rules Practice Direction 12A, which provide for a maximum 26-week timetable in care and supervision cases, and Practice Direction 12B – the Child Arrangements Programme, which promotes use of alternative dispute resolution in such cases, following recommendations made in the *Family Justice Review, Final Report* (November 2011), available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf.

- 1.6 At the outset, we emphasise that nothing in this report should be interpreted as support for the programme of cuts to legal aid and broader cuts within the justice system. We acknowledge that there will always be cases in which a fair result can best be achieved by the involvement of lawyers, and these are likely to include many of the cases which, under our proposals, will be decided by a judge. JUSTICE has been at the forefront of the defence of legal aid and continues to fight against further reductions in the legal aid budget.⁶ The proposals in this report are aimed instead at reforming the justice system, so as to maximise access to justice for all court and tribunal users.
- 1.7 We recognise that our proposals will require investment in the short term. However, a long-term view of costs must necessarily account for the increased costs to the courts as a result of the rising number of litigants in person, which has been estimated at £3.4 million in the family courts alone.⁷ In contrast, adequate spending on legal aid often results in substantial savings,⁸ with an estimated £8.80 saved for every £1 of legal aid expenditure on benefits advice, according to a 2010 Citizens Advice study.⁹ On this basis, an accessible and efficient dispute resolution system combined with improved access to information and advice can offer important cost savings in the long term. The resolution of problems at the earliest possible stage represents an important economy not only for the justice system, but also for society as a whole.

⁶ See for example, JUSTICE briefings for MPs and Peers on the impact of the legal aid changes contained in the Legal Aid, Sentencing and Punishment of Offenders Bill and subsequent Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014, available online at <http://justice.org.uk/legal-aid-sentencing-and-punishment-of-offenders-bill/> and <http://justice.org.uk/briefings-2/briefings-2014/>. See also JUSTICE's intervention in the challenge to the residence-based requirement for legal aid eligibility, full information online at <http://justice.org.uk/plp-v-secretary-of-state-for-justice/>.

⁷ As calculated for 2013-14 by the National Audit Office in its report *Implementing Reforms to Civil Legal Aid* (November 2014), p.14, available online at <http://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>.

⁸ Cost benefit analyses from the UK and abroad indicate that legal aid not only pays for itself, but also contributes to significant public savings, see Cookson and Mold, *Social Welfare Advice Services – A Review* (May 2014), p.12, available online at <http://www.lowcommission.org.uk/dyn/1405934416401/Social-Welfare-Advice-Services-Final-Report-20140603-Main-Text.pdf>.

⁹ Citizens Advice Bureau, *Towards a Business Case for Legal Aid* (July 2010), p.2, available online at <http://bit.ly/1DkEIUn>.

An appetite for change

- 1.8 It has been said that “there are three things that can be done in relation to self-representation by litigants: one is to **get them lawyers**, the second is to **make them lawyers** and the third is to **change the system**”.¹⁰
- 1.9 When legal aid was more widely available, the emphasis was on *getting people lawyers*. While this approach was never entirely successful, it was necessary because court and tribunal dispute resolution processes require a working knowledge of complex law and complicated rules and procedures. The formal and adversarial approach which characterises court and some tribunal proceedings requires parties to:
- Know the law, the procedure and the unwritten rules about how to behave;
 - Identify the key legal issues, the evidence needed to support their case, and decide on how to present their case;
 - Extract the equivalent from the other side; and
 - Undertake the above within time frames designed for professionals who do this on a daily basis, not just at weekends and in the evenings.
- 1.10 Thus, the focus prior to the austerity measures was on *getting people lawyers* either at state expense (through legal aid), by authorising conditional fee agreements (which made litigation inordinately expensive for a paying party), or by reform of the legal services market to increase competition and drive down prices for privately paying clients. Legal services reform has resulted in some changes in the market place, with more web-based offerings and fixed-fee packages. However, the market is so lacking in transparency and predictability that the open-ended cost of lawyers in all but the simplest pre-packaged, fixed-fee offerings would be regarded as unaffordable by most people. More progress needs to be made in this direction, as is evidenced by the Ministry of Justice (“MOJ”) announcement last year of a review into affordable legal services by Dr Patricia Greer.

¹⁰ Deputy Chief Justice Faulks, Family Court of Australia, *Self-Represented Litigants: Tackling the Challenge* (February 2013), [3], available online at <http://njca.com.au/wp-content/uploads/2013/07/Justice-Faulks.pdf>. See also Trinder et al. for the Ministry of Justice, *Litigants in Person in Private Family Law Cases* (November 2014), pp.112-113, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf.

- 1.11 Since the government’s proposals on reducing civil legal aid, there has been significant discussion of how to ensure access to justice without the support that has traditionally been available from legal aid. In the absence of state funding for the *provision of lawyers*, the focus has shifted to *making people lawyers* – by substituting the provision of information and resources to assist people in taking cases forward themselves.
- 1.12 Even before LASPO came into force, the Civil Justice Council (“CJC”) Working Party on Litigants in Person (“LIP”) reported on its likely impact and recommended potential mitigating action.¹¹ Since then, both litigants and the profession have benefited from, among other initiatives: the handbooks for LIPs produced by the judiciary¹² and by the Bar;¹³ the Judicial Working Group on LIPs;¹⁴ the Chancery Modernisation Review with its chapter on LIPs;¹⁵ CourtNav;¹⁶ and the Law for Life Foundation for Public Legal Education, in particular its resources on “Going to Court”.¹⁷

¹¹ Civil Justice Council, *Access to Justice for Litigants in Person: A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011), available online at <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>

¹² Civil Sub-Committee of the Council of Circuit Judges, *A Handbook for Litigants in Person* (2013), available online at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/A_Handbook_for_Litigants_in_Person.pdf.

¹³ The Bar Council, *A Guide to Representing Yourself in Court* (April 2013), available online at http://www.barcouncil.org.uk/media/203109/srl_guide_final_for_online_use.pdf.

¹⁴ *The Judicial Working Group on Litigants in Person: Report* (chaired by Mr. Justice Hickinbottom) (July 2013), available online at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf.

¹⁵ Lord Justice Briggs, *Chancery Modernisation Review: Final Report* (December 2013), chapter 9, available online at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CMR/cmr-final-report-dec2013.pdf>.

¹⁶ Delivered by the Royal Courts of Justice Advice Bureau in partnership with Freshfields Bruckhaus Deringer LLP.

¹⁷ <http://www.lawforlife.org.uk/>. Amongst the resources it offers is the “Going to Court” series of ‘nutshell’ guides, developed jointly by the Royal Courts of Justice Advice Bureau and the Law for Life-run website Advicenow, available online at <http://www.advicenow.org.uk/going-to-court/>.

- 1.13 These initiatives considered how to make the best use of limited resources and how to help litigants in person to help themselves. They make a valuable contribution to tackling the informational and institutional disadvantage faced by litigants in person. However, a strategy focused on *making people lawyers* is necessarily limited; a disconnect between having access to some information and being able to effectively navigate the justice system will always remain.¹⁸

Changing the system

- 1.14 The focus on legal services reform or on pro bono as the potential answer to *getting people lawyers*, or on self-help services as a way of *making people lawyers*, fails to recognise that in the current climate, a justice system premised on most people being legally represented cannot offer effective access to justice.
- 1.15 This inevitable limitation and the need, therefore, to turn to the third option, *changing the system*, has been recognised in previous reports. The Judicial Working Group on Litigants in Person,¹⁹ chaired by Mr Justice Hickinbottom and reporting in July 2013, set out the importance of a positive approach to litigants in person in its report and, in particular, stated:

“2.5 ... We consider it vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of litigants in person, rather than vice versa.”

¹⁸ See note 10, Trinder et al., chapters 2, 5 and 6.

¹⁹ See note 14.

- 1.16 The Chancery Modernisation Review, carried out by Lord Justice Briggs, and reporting in December 2013, set out the problem as the “entrenched attitude that litigants in person are a problem to be managed away, rather than a group of court users with as much right to an intelligible and usable process as the majority who are professionally represented.”²⁰ He wrote:

“9.13 In that respect, I consider that three common misconceptions need to be put to one side at the outset. The first is that a shared concern about the unfairness of current practice and procedure vis a vis litigants in person can be properly addressed merely by taking steps on the periphery to ameliorate them. Access to justice is not provided by making practice and procedure only moderately unfair to litigants in person, rather than (as at present) seriously unfair to them.

9.14 The second misconception is to think that the unfairness to litigants in person inherent in practice and in procedure can be satisfactorily addressed at trial (or at some significant interim hearing) simply by the patience, courtesy and investigative court-craft of the experienced judge. In many cases, if not the vast majority, it will by then be too late, because the cumulative hurdles which litigants in person will by then have failed satisfactorily to overcome will have left them with insuperable disadvantages by the time they get to trial or to a hearing...

9.15 The third is that written descriptions of practice and procedure truly intelligible to the average litigant in person can be satisfactorily formulated by lawyers...”

- 1.17 Both judicial reports suggested that one way to maintain access to justice for unrepresented, unassisted and often unadvised litigants in person was for judges to take a more interventionist or inquisitorial approach. This was echoed by the Lord Chief Justice in his speech launching JUSTICE’s new strategy.²¹

²⁰ See note 15, p.105.

²¹ See note 4.

- 1.18 The combination of complex law, complicated procedures and the adversarial approach of courts and some tribunals means that litigants in person present as much of a challenge to the system as the system does to litigants in person. The system must be changed in relation to both the functioning of the courts and tribunals, and the provision of information and assistance to prospective litigants.
- 1.19 That is not to say that changes in the courts and tribunals are not already taking place. In the civil courts, judges are increasingly playing a more proactive case management role, sometimes even inquisitorial, in an attempt to do justice where one or more party is unrepresented.²²
- 1.20 The situation in the tribunals is especially relevant. The Franks Report on tribunals of 1957 listed their advantages over the courts as being “cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject”.²³ Whether this description holds true today is the subject of some debate. The increasing quantity and complexity of legislation in some tribunal jurisdictions have led to what many argue is the judicialisation of the tribunal justice system.²⁴
- 1.21 Tribunals have been alive to these issues, taking active steps to counter these concerns. In his valedictory 2012 report, the first Senior President of Tribunals, now Lord Carnwath, outlined possible developments for the future.²⁵ Calling for a system that adapts to user needs, he outlined possibilities of different working methods, including: online information and call centres; “triage” of appeals and applications by appropriately trained staff; and alternative resolution options offered by judges or trained staff, including explanation, early evaluation, and mediation.²⁶

²² The Working Party heard anecdotal evidence to this effect, particularly at the Third Civil Justice Council National Forum on Access to Justice for Litigants in Person (November 2014); district judges are amongst the first in the courts to have faced this problem. See also note 10, Trinder et al., pp.62-63, 74-75.

²³ *The Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd 218 (1957).

²⁴ See for example, the Administrative Justice and Tribunals Council’s *Annual Report 2009/10*, p.14, in which the “creeping judicialisation” of tribunals, and corresponding loss of informality, is identified as a concern, full report available online at http://ajtc.justice.gov.uk/docs/ar2010_web.pdf.

²⁵ *Senior President of Tribunals’ Annual Report* (February 2012), available online at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/spt-annual-report-2012.pdf>.

²⁶ *Ibid*, p.7.

1.22 Lord Justice Sullivan, current Senior President of Tribunals, set out a similarly ambitious plan for the future at the 2012 Conference of the Administrative Justice and Tribunals Council (“AJTC”). This included building on the successful use of registrars in the Special Educational Needs and Disability (“SEND”) jurisdiction for routine cases and envisaging a more active case management role for them to ensure identification of outstanding issues and to facilitate settlement. In this year’s Annual Report, noting the continuing period of austerity and the rise of litigants in person in the courts, Lord Justice Sullivan wrote:²⁷

“We must ensure that tribunals remain accessible with relatively informal and straightforward procedures. In this respect, while the courts have much to learn from tribunals, I am sure that tribunals have much to learn from the procedures adopted by Ombudsmen.”

1.23 As part of our inquiry, the Working Party met with judges, officials and staff from across HMCTS to discuss the recent innovations in the courts and tribunals aimed at making the dispute resolution process more accessible and efficient. These are explored in further detail in Chapter II and provide a potential blueprint for future development.

1.24 This report seeks to build on the innovation and momentum that is visible across the civil courts and tribunals. The following chapters outline our vision for a streamlined dispute resolution process that is designed to be accessed by unrepresented parties; and an integrated online and telephone information, advice and assistance portal which supports litigants through this reshaped justice system. Our proposals seek not only to address the growing access to justice gap as a result of recent funding cutbacks, but also to increase access for all court and tribunal users to a higher level than has previously been achieved. While recent austerity measures no doubt prompted this project, we hope our proposals will help reframe the debate as an “age of opportunity”.

²⁷ *Senior President of Tribunals’ Annual Report* (February 2015), p.6, available online at http://www.judiciary.gov.uk/wp-content/uploads/2015/02/senior_president_of_tribunals_annual_report_2015_final.pdf.

II. A NEW MODEL FOR DISPUTE RESOLUTION

Context

- 2.1 We have noted the effects of the recent significant austerity measures, both in terms of the civil legal aid budget and those affecting the justice system more broadly. This new reality – marked by a sharp rise in the number of people representing themselves – does not sit easily with an adversarial justice process. In cases that proceed in the absence of legal advice and representation, the first time that a suitably qualified person will review the issues in the presence of the parties is at the first case management hearing or trial. For a judge to offer the first “dispassionate” review in such cases is a wasteful use of highly qualified and expensive judicial time, a view echoed by the CJC Review.²⁸

Domestic Developments

- 2.2 A number of developments in the tribunals and civil courts offer inspiration for alternative approaches to dispute resolution. Most notable of these is the use in some tribunals of legally qualified and suitably trained registrars – originally legal advisers from magistrates’ courts – to undertake case management decisions, allowing judicial time to be focused on hearings. In the Senior President of Tribunals’ Annual Report 2014, Lord Justice Sullivan endorsed the use of registrars for this function, stating:²⁹

“Judicial leadership is a particular strength of the tribunals system, but I have always been of the view that judging is a vital part of a judicial leadership role. An effective partnership with administrators is essential if we are to have time to judge Judges are an expensive resource, and it is vital that we make the best use of their judicial expertise. Are we making best use of administrators and legally qualified registrars to undertake those aspects of case management that do not require high level judicial expertise?”

²⁸ See note 11, [80].

²⁹ *Senior President of Tribunals’ Annual Report* (February 2014), p.4, available online at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Tribunals/SPT+Annual+Report_2014.pdf.

- 2.3 Registrars are currently carrying out case management functions in the Special Educational Needs and Disability (“SEND”) and Mental Health jurisdictions of the Health, Education & Social Care (“HESC”) Chamber; the General Regulatory Chamber; the Administrative Appeals Chamber (Upper Tribunal); and the Employment Appeal Tribunal. The Social Entitlement Chamber has trialled their use, and other chambers are also exploring the use, or increased use, of registrars.³⁰ In the Mental Health jurisdiction of HESC, for example, 75% of all case management decisions are undertaken by five registrars.³¹
- 2.4 Anecdotal feedback from tribunal chamber presidents and judges suggests a number of advantages of using registrars: speeding up case management; better consistency in decision making; reduced risk of hearings being adjourned; and freeing up judicial time for hearings.³²
- 2.5 A similar approach is increasingly being adopted by the courts. In several jurisdictions, legal advisers exercise the jurisdiction of the court in relation to case management functions. For example, the Civil Procedure Rule Committee recently approved the introduction of a pilot scheme of legal advisers working at the County Court Money Claims Centre in Salford, subject to the ultimate supervision of a District Judge.³³ This builds on a growing trend of combatting financial constraints by using qualified lawyers to perform certain “judicial” tasks, and is in line with trends in the Family Court, Administrative Court and Court of Appeal.
- 2.6 There have also been developments in terms of court- and tribunal-annexed alternative dispute resolution (“ADR”). We have noted, in particular:

³⁰ Ibid.

³¹ Ibid.

³² See also *ibid.*, p.4.

³³ As detailed in the Minutes of the Civil Procedure Rule Committee, Friday 6 February 2015. The powers of the legal advisers include, for example, the ability to rectify a procedural error or set aside default judgments, subject to certain limitations, as set out in proposed Practice Direction 51J.

Mediation schemes in the Employment Tribunal, Property Chamber and SEND jurisdiction

- 2.7 The Employment Tribunal runs a successful judicial mediation scheme. In the year from September 2013, for example, 14 of the 17 cases that were the subject of judicial mediation were successfully mediated, saving a total of 130 hearing days had a judicial determination been required in those cases.³⁴ However, the introduction of fees for the mediation scheme in 2013 has led to a reduced number of cases being mediated.³⁵ Both Residential Property and Land Registration within the Property Chamber also have established procedures for judicial mediation.
- 2.8 The SEND jurisdiction now requires parties to consider mediation in each case. If they choose mediation, costs and expenses are paid. Families retain the right to go to the SEND Tribunal for a hearing, but they must have a certificate to show that mediation has at least been considered.³⁶

Small Claims Mediation Service

- 2.9 The Small Claims Mediation Service is a small but highly successful service offered free of charge for County Court cases.³⁷ The service employs 17 HMCTS staff who are appropriately trained in mediation. Each case is allotted a one-hour slot and the mediations are carried out through telephone calls. The mediators do not have the case files before them; they simply ring the parties, going back and forth between them and enquiring about the scope for compromise.³⁸

³⁴ See note 27, p.86.

³⁵ Ibid.

³⁶ Department for Education, *Special Educational Needs and Disability: A Guide for Parents and Carers* (August 2014), p.43, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344424/Special_educational_needs_and_disabilites_guide_for_parents_and_carers.pdf.

³⁷ A survey of Small Claims Mediation Service users found that 79.8% of survey respondents had successfully settled their claims at the mediation, see Rustidge, *Analysis of Qualitative Data: Small Claims Mediation Service* (April 2011-March 2012), p.5, available online at <http://bit.ly/1EUJbrs>.

³⁸ 97% of service users were satisfied with the professionalism of the mediator, and 95% were satisfied with the opportunity they had to participate and express their views, see *ibid*, p.4.

*Early neutral evaluation (“ENE”) pilot in the Social Security and Child Support Tribunal*³⁹

- 2.10 This was a judge-run pilot covering Disability Living Allowance and Attendance Allowance in 2007-2009. Where cases opted in for ENE, a reduced number of cases proceeded to a hearing as many cases lapsed or were withdrawn as a direct result of the ENE process; either the Department for Work and Pensions reconsidered its case and awarded the benefit, or claimants understood why they did not meet the benefit requirement and withdrew their case.
- 2.11 On average, the cases that opted in for ENE were resolved marginally more slowly and were marginally more costly than those that did not. The longer time frame for opt-in cases was at least partly because of the delay in listing these cases until after the ENE had been conducted. The comparison of unit cost is very close, but would be significantly different if the tasks undertaken by the tribunal judges were to be undertaken by a qualified but less costly legal adviser.
- 2.12 Our interviews with judges and staff indicated that important benefits of the process included the ability to guide individuals through the process and ensure that relevant evidence was available to enable a just decision to be made, as well as the issuing of directions. Thus, where opt-in cases proceeded to hearing, these were decided more quickly and with fewer adjournments.

³⁹ Ministry of Justice, *Evaluation of Early Neutral Evaluation ADR in the SSCS Tribunal* (January 2010), available online at <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/summary-evaluation-early-neutral-evaluation.pdf>.

Learning from other decision-making bodies

2.13 The Working Party looked at alternative methods of dispute resolution which operated in areas where individuals could not be expected to have legal advice and representation and where significant numbers of broadly similar cases required resolution: the Office of the Social Fund Commissioner, the Financial Ombudsman Service and the Traffic Penalty Tribunal. We noted how each of these:

- Used proactive case management to elicit facts and the necessary evidence;
- Communicated directly with people through telephone and/or web-based communication;
- Used teams of adjudicators or caseworkers to undertake these preliminary tasks, working in a managed environment overseen by a senior decision-making figure (i.e. Social Fund Commissioner; Financial Ombudsman; Chief Adjudicator);
- Developed consistency of decision-making under the guidance of the Commissioner, Ombudsman or Chief Adjudicator, enabling the team to deal with the majority of “ordinary” cases and successfully identify the extraordinary and refer to the senior decision maker; and
- Made the best possible use of resources by reserving the use of expensive senior decision makers for the most difficult or ground-breaking issues and for the task of oversight, and using lower paid, yet expert, trained and managed caseworkers to undertake the preliminary identification of issues, communication with claimants, seeking of additional evidence and reaching a preliminary view.⁴⁰

⁴⁰ Other adjudication schemes that work in different ways, but achieve the same result through a user-centric process also offer inspiration; an example is The Dispute Service Ltd., a not for profit company limited by guarantee which provides ADR services, mainly in the private rented sector.

- 2.14 It is often argued that systems such as these can only operate effectively in fora that are concerned with very simple or very standardised issues. By contrast, it is said that there are too many different types of cases in the civil courts for them to be susceptible to this sort of approach. We see no reason why some features of these systems cannot be applied to a range of disputes within the civil courts and tribunals, whether party v party or state v party. Arguably the more complicated the dispute, the greater the benefit of adopting an investigative approach at an early stage.⁴¹
- 2.15 We do not suggest that such an approach would work for all types of cases in either the civil courts or tribunals, but we suggest that it would be worthwhile identifying those areas where one or more of the following factors are present:
- There are high numbers of litigants in person;
 - There are difficulties for the court in extracting the information necessary for a just decision before the final hearing, often indicated by a high rate of adjournments;
 - There are high numbers of successful appeals;
 - The litigants have difficulty in understanding the relevant law and complying with the required procedure.
- 2.16 There has to be a better way to tackle such cases, using both human resources and technology, and an approach that aims to schematise, simplify and standardise.

⁴¹ This approach has been considered and advocated by others including the Administrative Justice and Tribunals Council, see AJTC, *Securing Fairness and Redress: Administrative Justice at Risk?* (October 2011) [87], available online at [http://ajtc.justice.gov.uk/docs/AJTC_at_risk_\(10.11\)_web.pdf](http://ajtc.justice.gov.uk/docs/AJTC_at_risk_(10.11)_web.pdf).

Civil Justice Council’s Online Dispute Resolution (“ODR”) advisory group

- 2.17 Professor Richard Susskind has been a member of our Working Party, in addition to chairing the ODR advisory group.⁴² We fully endorse the conclusions of the ODR report, and reach similar conclusions about how the justice system could be reshaped. There are three important ways in which we build on that discussion.
- 2.18 First, we propose a broader remit for our proposed dispute resolution model: we believe it could operate in most first instance proceedings across the civil courts and tribunals.
- 2.19 Second, we see our dispute resolution model as aligning well with “Tier Two” (online facilitation) and “Tier Three” (online judges) in the ODR report. While our approach uses a combination of online, telephone and in-person interaction, we believe that many of the same principles will apply. Hence our model, including our guiding principles, could provide assistance in further defining and implementing the parameters of the online facilitation and online adjudication. Some differences between the two approaches are likely to remain, as the legally qualified registrars in our model will potentially be carrying out a broader range of tasks than the facilitators.
- 2.20 Third, our proposals in Chapter III on an integrated online and telephone platform seek to fulfil a similar purpose to “Tier One” (online evaluation) in the ODR report i.e. offering the first port of call for individuals with potential legal problems and offering information, advice and assistance as their cases proceed.

A new model for dispute resolution

- 2.21 We propose a new model for dispute resolution in the civil courts and tribunals. In principle, the model could be applied in any first instance proceedings. We believe that our approach could be used across most chambers of the First-Tier Tribunal and in much of the County Court and the civil jurisdiction of the High Court.

⁴² Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015), available online at <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

- 2.22** Our model features a primary dispute resolution officer – whom we suggest calling a registrar – who will review all cases where a defence is lodged. Using an investigative or proactive approach, the registrar will identify the relevant issues, the applicable law, the appropriate procedure and the evidence needed to resolve the case.
- 2.23** Based on this proactive case management, the registrar can:
- a. Strike out a statement of case where appropriate;
 - b. Undertake an early neutral evaluation (ENE);
 - c. Undertake mediation; or
 - d. Refer the case to a judge where no other resolution is likely to be effective or appropriate. Examples include cases raising complex legal and factual issues, cases requiring oral evidence, potential test cases, or cases requiring interpretation of legislation or policy.
- 2.24** Our model builds on and goes further than the current use of registrars in some tribunals in that it involves proactive case management and, where possible, resolution of the dispute.
- 2.25** This system is designed to minimise the need for lawyers, with the aim that it:
- a. Increases access to justice. The system will be able to draw out the most pertinent information, even where litigants are representing themselves, thus levelling the playing field between parties to the greatest extent possible; and
 - b. Saves resources. The use of a registrar as set out below ensures that judicial time is spent only on those cases that require that level of judicial expertise. With the possibility of earlier resolution of disputes through the proactive identification of relevant issues, law and evidence – and the more cost effective approach of doing this on the papers, by telephone or online – fewer cases should need to proceed to full trial, offering further savings in court resources.
- 2.26** In the sections below, we map out what this model would look like, and how it might broadly operate within the courts and tribunals. We do not attempt to provide a complete blueprint, but do outline the important features of the model, suggest the areas for which the model (and parts of it) may be more or less suitable, and provide principles that will guide how the system should be designed.

Location

- 2.27 The model we propose should form part of the existing justice system and thus, should be placed within HMCTS. We considered but rejected the idea of designing a new, external body since this would add to the confusion of individuals seeking a resolution to their dispute, most of whom are already daunted by having to navigate the justice system. Moreover, individuals should be able to feel as though they have had their “day in court”, which is best achieved by adapting the existing system to incorporate the new dispute resolution model. This is not intended to preclude the separate development and use of non-court based dispute resolution options which, if independent, play a key role in the dispute resolution landscape and therefore, in ensuring access to justice.

The Registrar

Title

- 2.28 As noted above, we suggest the title of “registrar” for this new role. We appreciate that there may be problems with any recommended title. While we are not strongly attached to it, we see the title of registrar as fitting in with and matching the existing system. Some tribunals already employ registrars, who, in some chambers, are successfully carrying out case management functions. The High Court has registrars working within bankruptcy and admiralty; we do not believe this overlap in title will cause confusion about the distinct role of the High Court registrars.

Qualification, training and supervision

- 2.29 Registrars must be legally qualified. We believe that legal qualification is essential for the full range of tasks envisaged, including identifying what additional information or evidence might be required for a hearing by a judge, identifying which cases require judicial consideration and engaging in early neutral evaluation. Legally qualified registrars are also more likely to have the confidence to deal with and resolve cases coming into the system. However, if registrars work in teams, they could span a range of experience and therefore cost – from very experienced lawyers, including fellows of CILEx, to graduates who have passed their professional examinations.

- 2.30** Registrars will need to be appropriately trained, including in mediation. Registrars in tribunals who are currently undertaking case management responsibilities have generally been trained by a designated judge within the chamber. In light of the broader responsibilities undertaken in our proposed system, we recommend that training be organised by the Judicial College. The training will need to be ongoing, as is current practice for judges and tribunal members.
- 2.31** In order to ensure that registrars build up the expertise needed to effectively fulfil their role, we recommend specialisation in particular types of disputes. For example, a registrar might concentrate on landlord and tenant disputes, personal injury claims, debt cases, or the work of a particular tribunal, with the training focused on developing knowledge and skills in the appropriate categories of cases.
- 2.32** Registrars will also need to be appropriately supervised to ensure that they are supported in their role and are working to protocol. It will be important to build a reflexive system that monitors and builds on its own experience. The experience and expertise of judges (and subsequently, that of registrars) should be distilled into an online resource of guidance notes. This may serve both as a necessary building block for training a new cadre of registrars and as a tool for public education and guidance.
- 2.33** Given the importance and breadth of the proposed role, the terms under which registrars will be employed should include guarantees and obligations of independence.
- 2.34** Over time we envisage that this new entry level opening for young lawyers as registrars will develop and stimulate greater flexibility in judicial career patterns as well as those in justice administration. Experience as a registrar could lead either to more senior roles within the courts and tribunals or to a career in private practice.

Dispute resolution process

2.35 Below is an outline of how the new dispute resolution process could work in practice. The process will no doubt need to be modified and developed over time, based on early experience.

a In the first instance, the registrar will carry out an investigation to clarify the issues.

Claims, defences, witness statements, documents relied upon and applications should be filed online as a matter of course, while retaining the option of paper-based filing. There should be better use of simple, streamlined forms at this case management stage. The experience of the advice sector should be drawn on in designing these forms.⁴³ These forms should be continually refined and developed based on the experience of users.

After consideration of the filed materials, the registrar should communicate with the parties where further clarification, information or evidence is required, normally by email or telephone. Parties will have an opportunity to comment on the evidence provided by the other side.

b The registrar will decide, after consideration of the documents and any investigation and/or input from the parties, if the best course of action is:

i. Strike out

When striking out a statement of case, the registrar should provide reasons in writing why the claim or defence has no reasonable prospect of success.

Parties should have the opportunity to appeal to a judge, subject to appropriate time limits.

⁴³ See for example, Law for Life's Advicenow Project, *Meeting the Information Needs of Litigants in Person* (June 2014), which recommends a range of factors for consideration when designing forms for court users, available online at <http://www.lawforlife.org.uk/wp-content/uploads/Meeting-the-information-needs-of-litigants-in-person.pdf>.

ii. Early neutral evaluation (ENE)

The registrar should carry out ENE in all cases appropriate for this process (see paragraph 2.40 below for guiding principles). The default position should be ENE on the papers. The initial investigation process will have filled any gaps in the information provided by the parties, and evaluation on the papers should be possible for most cases suitable for ENE. Telephone or Internet hearings should be held as necessary. Hearings on court or tribunal premises should only be held in rare cases; cases requiring a full hearing are likely to be the types of cases that require judicial resolution.

The registrar's assessment is essentially an authoritative view on the likely outcome should the case proceed to resolution by a judge, based on the facts and law. This assessment should be set out in full in writing. Registrars should have the option of further explaining their assessment to the unsuccessful party via telephone.

Parties should be given the choice either to accept the registrar's assessment or to take the matter further (i.e. resolution by a judge). It is therefore important that the assessment includes a detailed explanation of the registrar's reasoning, offering the unsuccessful party an indication of how a judge would decide on the available information and evidence.

We are conscious that in cases where the unsuccessful party is well-resourced, there may be less incentive to stop at this stage. One way of discouraging unmeritorious litigation is to allow the registrar's evaluation to be taken into account by the judge when a decision on costs is made (in those cases where there is a power to make an award of costs). The registrar's assessment should not be made known to the judge until after judgment has been given.

Parties should be given a time limit within which they must accept or reject the registrar's assessment. We would suggest adopting a default position so that where no objection to the assessment is communicated within the time limit, the registrar's assessment serves to resolve the dispute. Where the ENE is accepted or where no objection is communicated, the registrar's assessment should be enforceable.

iii. Mediation

Where mediation is identified as the appropriate dispute resolution process, the registrar should offer the parties the opportunity to mediate, with an explanation of the process and the benefits involved. Extensive research shows that mediation is rarely successful if it is made compulsory and imposed on unwilling parties.⁴⁴ We recommend that mediation should only be carried out where both parties are willing to mediate their dispute. However, registrars should be trained to make the case for mediation persuasively where appropriate, so that parties view the option as an effective alternative to judicial resolution.

The registrar should be authorised to carry out the mediation him or herself. Provided they are appropriately trained in the skills and process of mediation, registrars offer the most efficient option for carrying out mediation. The registrar will have gained a detailed knowledge of the case following the initial investigation phase, and parties will not need to repeat their grievances to a third party mediator.

Mediations should be carried out by telephone or online, with mediation on court or tribunal premises only in exceptional cases.

Where agreement is reached through mediation, this should take the form of a Tomlin order, staying proceedings on the terms of the agreement with a right for either party to apply in relation to enforcement.

We would expect that in most cases, only one of ENE or mediation will be suitable, but we do not preclude the possibility of having both dispute resolution methods applied in a single case. However, in cases where mediation follows ENE, a different registrar from the one who offered an ENE should facilitate the mediation.

If the mediation is unsuccessful or where parties choose not to mediate, the registrar should decide if the case should proceed via ENE or to a full judicial hearing.

⁴⁴ See for example, Ministry of Justice (Genn et al.), *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure* (May 2007), p.202, available online at <http://webarchive.nationalarchives.gov.uk/http://www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>.

iv. Refer to a judge

Where the registrar has identified that the case requires resolution by a judge, the registrar may suggest to the parties what additional information or evidence might usefully be submitted to the judge. The registrar should be able to recommend the grant of legal aid where it may be available, including, for example, an application under the exceptional funding power. The aim would be to assist both the parties and the judge, whilst also avoiding delays at the hearing.

Once the case is referred to a judge, resolution on the papers or by telephone or online should remain an option for the parties. Further assistance from the registrar, acting under judicial guidance, should also remain an option if there are procedural issues for the parties to address. Subject to this, the judge will make his or her decision in the normal way. Reform of how court and tribunal hearings are conducted fell outside the remit of our Working Party, but we believe the subject is worthy of further consideration.

Appeals

- 2.36** All decisions by the registrar finally disposing of a case should be subject to a right of appeal to a judge. A decision as to the most appropriate dispute resolution process (for example, ENE or mediation), unlike a strike out decision, is not intended to be a final determination of the claim (see paragraph 2.35(b) above) as a route to a judicial determination is still provided. All appeals should be subject to time limits. It is not recommended that a permission stage be included in the appeals process, but the ordinary costs rules should apply in relation to unmeritorious appeals.

Interim procedural matters

- 2.37** As the model is implemented and developed, the precise powers of the registrar, including in relation to interim procedural matters, will require further consideration.

Compliance with Article 6 ECHR

Article 6 of the European Convention of Human Rights⁴⁵ provides for fair trial rights, so that in the determination of his or her civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Our model preserves the right for either party to secure a hearing before a judge in the ordinary manner and is therefore fully compliant with Article 6.

Guiding principles

- 2.39** At all times, the registrar must act, and be seen to be acting, independently and impartially.
- 2.40** In selecting the appropriate method of dispute resolution in each case, the registrar will need to be guided by certain principles which take into account:
- Relative levels of power and resources between the parties
 - ENE is likely to be more appropriate in situations of significant imbalance of power and resources. Mediation is likely to be more appropriate if the parties are relatively evenly matched in terms of power and resources, and less appropriate if there is a significant imbalance of power and resources between the parties.
 - For example, parties are likely to be better matched when both have legal representation. A significant imbalance of power and resources is likely to arise in individual v state disputes, or where only one party is legally represented. Asylum and mental capacity cases would never be suitable for mediation.
 - Degree of legal and/or technical complexity
 - The more legally and/or technically complex a matter is, the more difficult it will be to provide a fair and appropriate ADR process and the more likely it is to require resolution by a judge – although at the same time the court may need to adopt a substantially inquisitorial role if there is a litigant in person.

⁴⁵ Incorporated into domestic law by the Human Rights Act 1998.

- Question of fact v question of whether a process has been followed
 - Disputes over questions of whether a process has been followed are more suited to ENE; disputes over questions of fact are more suited to mediation.
 - For example, administrative law cases may be suitable for ENE but not for mediation. By contrast, factual disputes in employment law, discrimination law and contested probate may be more suitable for mediation.
- Levels of rights v interests in dispute
 - Disputes about rights are more suited to ENE; disputes about interests are more suited to mediation.
 - For example, social welfare benefits, immigration and human rights cases are likely to be more suited to ENE, while tort claims, debt recovery and housing repossession matters may be more amenable to mediation.
- Degree of rules v discretion in the legal/policy framework
 - Disputes concerning the application or interpretation of rules or policy are less suitable for mediation. ENE will be appropriate if there is a settled interpretation or strong precedent available. However, if it is a novel point the matter will require judicial resolution.
 - Where the decision maker would be exercising a discretion, there is likely to be more scope for mediation (subject to the considerations above), although ENE may also be appropriate if the outcome of the exercise is relatively predictable.
- Test case/public interest litigation
 - Matters likely to have significant precedent effect should be referred to a judge.

Implementation

- 2.41 We do not propose that our approach will work for all types of disputes in the civil courts or tribunals. As set out above, the most suitable areas would be where one or more of the following factors are present:
- There are high numbers of litigants in person;
 - There are difficulties for the court in extracting the information necessary for a just decision before the final hearing, often indicated by a high rate of adjournments;
 - There are high numbers of successful appeals;
 - The litigants have difficulty in understanding the relevant law and complying with the required procedure.
- 2.42 We believe our model will be immediately suitable for a number of chambers within the First-Tier Tribunal (including, for example, the Social Entitlement Chamber);⁴⁶ the Employment Tribunal;⁴⁷ small claims and fast track in the County Court; and some High Court divisions.
- 2.43 Early experience will offer an opportunity to carry out a detailed assessment of the model, allowing for improvements where difficulties arise in practice. We believe that the changes we are proposing can be implemented by changes in the procedural rules.
- 2.44 In jurisdictions in which the new dispute resolution model is proved to work, we would recommend it be applied to all cases coming in. While individual components are not compulsory (for example mediation will remain subject to the consent of all parties), the triage and dispute resolution system should apply to all cases in whichever jurisdiction it operates. In the long run, this will offer a completely streamlined system – encompassing proactive case management, early neutral evaluation, mediation and/or judicial resolution – and one that is faster, potentially cheaper, and more accessible than the current justice system.

⁴⁶ Although we recognise the reduction in the current workload of the Social Entitlement Chamber as the Department for Work and Pensions' welfare reforms become embedded, see note 27, pp.36-37.

⁴⁷ Following the introduction of fees in 2013, the Employment Tribunal is also experiencing a reduction in workload, with a number of judges from the Social Entitlement Chamber and Employment Tribunal currently assigned to other jurisdictions where the workload is more pressing, *ibid*, pp.58 and 70.

Cost of this system

- 2.45 We believe that over time, our system will be more cost-effective than the status quo. The registrar’s active case management and dispute resolution functions will in due course reduce both the amount of time and the number of judges needed to resolve cases. All other things being equal, a system in which cases are resolved earlier and by registrars – with far fewer cases proceeding to determination by highly paid judges – should deliver significant cost savings, while simultaneously maximising access to justice. Moreover, this very accessibility better enables our model to avoid the additional costs that are currently being borne by the system as a result of an increase in litigants in person.⁴⁸ In the short term, while registrars are being trained and settling into their role, it is likely that immediate savings in costs will not be seen.
- 2.46 We stress that the primary objective of our model is to increase access to justice for ordinary court and tribunal users, who are increasingly forced to navigate our complex legal system on their own. However, the fact that there is a real potential for cost savings in the long term should be an added reason to rethink how we currently resolve disputes.

⁴⁸ The cost for the family courts alone of the resulting increase in litigants in person has been estimated at £3.4 million, see note 7, p.14.

III. INFORMATION, ADVICE, ASSISTANCE AND REPRESENTATION

Context

- 3.1 Our proposed dispute resolution model, as outlined in the previous chapter, envisages a registrar using a proactive approach to reviewing cases coming into relevant jurisdictions of the civil courts and tribunals. A key benefit of this investigative case management is that the registrar can ascertain the relevant issues in the case and identify the relevant, but often missing, pieces of evidence. Unlike the status quo, litigants are not expected to know the law or legal procedure associated with their case. When unrepresented, they will not be at an automatic disadvantage as compared to their represented opponent.
- 3.2 While this is a necessary reshaping of the workings of the courts and tribunals, it will not in itself be sufficient to bridge the current gap in access to justice. We recognise that in most situations, when people experience a legal problem, they will need accessible and affordable information and advice so that they can decide whether, and if so when and how, to bring a claim or how to respond to a claim. Sound information and advice can thus play an invaluable role in dispute avoidance by helping to resolve problems at an early stage and by ensuring that disputes only proceed to the courts and tribunals when they are the appropriate forums for resolution. Finally, even in areas where our proposed model operates, some individuals will require high quality information, advice and assistance as the case proceeds.
- 3.3 In recent years, the programme of austerity measures has seen major reductions in the provision of civil legal aid as well as deep cuts to public service budgets and welfare benefits. The cumulative effect of these cuts has been that a greater number of people need a combination of information, advice, assistance and/or representation on wide-ranging issues such as debt, employment, housing and welfare benefits.⁴⁹ Meanwhile, the organisations which provide much needed support to individuals in these circumstances have long struggled with scarce resources, a situation worsened by cuts to civil legal aid and local authority funding.

⁴⁹ See for example, The Low Commission, *Tackling the Advice Deficit* (January 2014), which found evidence that the demand for advice in these areas is on the rise, available online at <http://www.lowcommission.org.uk/dyn/1389221772932/Low-Commission-Report-FINAL-VERSION.pdf>.

- 3.4 Our proposals in this chapter focus on how technology can be used to deliver legal information, advice and assistance. We are acutely aware that digital and telephone platforms will not be suitable or appropriate in certain categories of cases and for certain individuals. Despite the high percentage of the UK population with access to the Internet, there remains an (albeit likely to be shrinking) group of non-users of the Internet,⁵⁰ as well as those who will never be able to communicate adequately by telephone. We stress that certain circumstances – whether by virtue of the personal characteristics of the litigant or the nature of the legal issue in question – will always necessitate what is usually referred to as “face-to-face” advice, assistance and representation. We adopt the term “personally delivered”⁵¹ as a more precise term, as such advice and assistance is not always provided in the physical presence of the user, given already available technology such as video-conferencing.
- 3.5 We acknowledge the remarkable work of the advice and legal sectors in providing personally delivered advice and assistance to some of the most vulnerable people on a daily basis despite shrinking budgets. We also acknowledge the dedication of lawyers representing or assisting individuals in court who would otherwise get lost in the system, whether through legal aid, duty solicitor schemes or pro bono schemes (including student efforts), together with the help given by Personal Support Unit volunteers in an increasing number of courts.

⁵⁰ 22% of the British population is classed as non-Internet users, but with only 5% of the adult population deemed to be in fact out of Internet reach, see note 42, [9.5].

⁵¹ The alternative term “individual assistance” is offered by Smith and Paterson, who define such assistance as “not necessarily face to face but personal”, see discussion in R. Smith and A. Paterson, *Face to Face Legal Services and Their Alternatives: Global Lessons from the Digital Revolution* (2014), p.83, available online at http://www.strath.ac.uk/media/faculties/hass/law/cpls/Face_to_Face.pdf.

- 3.6 Notwithstanding the very real need for such personally delivered support and representation in many cases, we believe that a highly developed and integrated digital and telephone platform should be able to deal with a significant proportion of the current demand for information and advice services. A comprehensive and accessible digital platform is likely to free up the providers of personally delivered services to focus on those who require a greater level of assistance. It is important that the existence of digitally excluded groups does not inhibit the development of innovative and dynamic resources both online and over the phone.
- 3.7 We re-emphasise that none of the proposals in this chapter should be seen as a justification for further cuts to the civil legal aid budget. Rather, we are asking whether the current annual legal aid spend of £100m on civil advice is now directed at the right targets. In the context of the constraints imposed by austerity, we stress the need for urgent innovation, which inevitably requires government investment. In our view, the smart and efficient allocation of resources is crucial to creating a high quality information, advice and assistance service: one that can cater for large numbers of people cost-effectively, while freeing up resources to provide personally delivered services in those circumstances which require it.

Domestic developments

- 3.8 In recent years there has been much work done aimed at improving access to justice for litigants in person. We acknowledge the numerous initiatives on this subject, including but not limited to: the judicial working group reports; the CJC Online Dispute Resolution advisory group's report; the ongoing initiatives within the judiciary led by Mrs Justice Asplin;⁵² the Low Commission reports;⁵³ CourtNav;⁵⁴ Law for Life's Advicenow website;⁵⁵ the ongoing Citizens Advice digital service development;⁵⁶ numerous university law school services, such as Keele University's CLOCK initiative;⁵⁷ and the Bar Council's work on Contingent Legal Aid Funds.⁵⁸ Most recently, the government announced the court support strategy for litigants in person in the civil and family justice system.⁵⁹ Some of what we recommend in this chapter has previously been suggested, with some variation, including by some of the groups listed above. However, there has not yet been a move to a comprehensive online and telephone information and advice service, and we believe that the principles outlined in this chapter will assist in its development.

⁵² The three main strands of the work include: judicial training and cross-fertilisation between tribunal and court judges; the role of the profession in developing guidance for practitioners acting against LIPs; and a national network of LIP liaison judges, as described at the Civil Justice Council's Third National Forum on Access to Justice for Litigants in Person (November 2014), web summary available online at <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/web-summary-of-lip-forum-2014.pdf>.

⁵³ See note 49, and follow-up report *Getting it Right in Social Welfare Law* (March 2015), available online at <http://www.lowcommission.org.uk/dyn/1425469623929/Low-Commission-Report-Text-Proof-207050-.pdf>.

⁵⁴ See note 16.

⁵⁵ www.advicenow.org.uk.

⁵⁶ <http://alphablog.citizensadvice.org.uk/about/>.

⁵⁷ <http://www.keele.ac.uk/law/legaloutreachcollaboration/>.

⁵⁸ See for example, Europe Economics, *Contingent Legal Aid Funds: an Outline Feasibility Study for the General Council of the Bar* (November 2011), available online at http://www.barcouncil.org.uk/media/63928/claf_report.pdf.

⁵⁹ Ministry of Justice Press Release, *More Support for Separating Couples and Parents* (October 2014), available online at <https://www.gov.uk/government/news/more-support-for-separating-couples-and-parents>. This funds partnership working between the Personal Support Unit, the Royal Courts of Justice Advice Bureau, Law for Life and LawWorks.

- 3.9 At present the only publicly funded source of telephone help at the initial stage of a legal problem is the Legal Aid Agency’s Civil Legal Advice Telephone Gateway (“the Gateway”). There is no associated digital platform.⁶⁰ We make proposals below to fundamentally improve and expand upon the reach of the Gateway. In its current form, the Gateway does not make a significant contribution in volume terms to the public’s need for initial information and advice, perhaps partly because most people are not aware of the service. In addition, it is available only to those who qualify on means. The service is mandatory (i.e. an enquirer is obliged to obtain their initial assistance by this method) in three categories of case in which there is low demand.⁶¹ In other categories an enquirer may choose to call the Gateway rather than go directly to a solicitor or advice agency. In either case, a range of specialist providers can be accessed if the telephone operator judges that he or she cannot assist. The Gateway has been criticized for being poorly publicised, “confusing, bureaucratic, and dependent on the assistance of a third party legal expert...to secure a referral”,⁶² amongst other things.⁶³
- 3.10 Mention should also be made of private sector telephone legal helplines. Millions of consumers in the UK now have access to this benefit as an add-on to house or motor insurance, by virtue of taking out a credit card or as part of an employment benefits package. The volume of calls to such helplines dwarfs those to the Gateway, and the scope of free-of-charge help available to callers may typically extend to detailed advice or even the drafting of a letter. While this source of help is not available to the most vulnerable, the poor and many of those experiencing social welfare problems, it does demonstrate what can be achieved via a telephone hotline.

⁶⁰ Except for a pilot programme which enables an enquirer to work out whether they are financially eligible for legal aid: <https://www.gov.uk/check-if-civil-legal-advice-can-help-you>.

⁶¹ The three categories are debt, special educational needs and discrimination.

⁶² Public Law Project, *Keys to the Gateway: An Independent Review of the Mandatory Civil Legal Advice Gateway*, (March 2015), pp.74-76, available online at <http://www.publiclawproject.org.uk/data/resources/199/Keys-to-the-Gateway-An-Independent-Review-of-the-Mandatory-CLA-Gateway.pdf>. See also note 2, Justice Committee, chapter 3.

⁶³ For example, the variable experiences of Gateway service users, see note 62, Public Law Project, p.74-76. See also note 2, Justice Committee, pp.12-14.

3.11 We have also considered the role of legal expenses insurance (“LEI”) in providing access to legal advice and representation. As part of this we have looked at the LEI models that are currently in place in England and Wales and in various overseas jurisdictions.⁶⁴ In England and Wales take-up of LEI is lower than in some other European countries such as Germany, where there is a wide range of providers and the annual cost of premiums is relatively low. We consider that LEI has a role to play in increasing and promoting access to justice in England and Wales and there is scope to improve public awareness of its availability. It is, however, only one aspect of the overall picture and does not provide a solution by itself. (For a description of best practices on LEI from other jurisdictions, see the online Annexe to our report, available on our website.)⁶⁵

Global developments

3.12 A number of jurisdictions across the world are making concerted and creative efforts to provide legal information, advice and assistance – and even dispute resolution – through dynamic platforms. The UK falls well behind these jurisdictions and as such fails to exploit the opportunities for increasing access to justice. We have drawn much inspiration from developments overseas. Where relevant, examples are provided throughout this chapter of how technology (both abroad and in the UK) is being used to provide individuals with clear and, in some cases, tailor-made information and advice.

3.13 Our report is primarily aimed at the jurisdiction of England and Wales, although no doubt much of what we have to say will be relevant to Scotland and Northern Ireland. Each jurisdiction has its own challenges and must adopt a solution fitted to its needs. However, there is also benefit in the exchange of knowledge and best practices, which is already taking place between a number of jurisdictions⁶⁶ and can have cost advantages.⁶⁷

⁶⁴ With thanks to the following law firms for producing research papers on LEI in their respective jurisdictions: Herbert Smith Freehills LLP (England and Wales, Spain, Germany and Australia), Houthoff Buruma (The Netherlands), Advokatfirman Delphi (Sweden) and Blake, Cassels & Graydon LLP (Canada).

⁶⁵ <http://justice.org.uk/our-work/areas-of-work/access-to-justice/justice-austerity/>.

⁶⁶ See for example, MyLawBC, a new interactive online legal resource for British Columbia, established by the Legal Services Society of British Columbia and HiiL Innovating Justice, available online at <http://mylawbc.com/>. See also <http://devblog.mylawbc.com/2015/03/25/mylawbc-frequently-asked-questions-part-5/>.

⁶⁷ See for example the possible cost advantages identified in the Rechtwijzer case study below at p.35.

Online and telephone platform

- 3.14 In order to comprehensively meet the need for legal information and advice within existing resource constraints, greater reliance must be placed on services which can be provided online and by telephone. Both online and telephone services already exist, but they are poorly integrated, substantially reducing their utility. We advocate the long-term goal of developing an integrated online and telephone service, which together will serve to provide effective access to information, advice and assistance. In the medium term the aim should be to create a single nationally publicised and supported online platform, which would be regarded as a basic component of the legal system. We recognise that, in light of Dutch and Canadian experience, development of a comprehensive online advice and information service in the UK will take at least two years from the agreement of funding. In the interim we advocate re-conceptualising and strengthening telephone services, and maintaining funding for the existing online services which provide a developing basis and evidence of user demand for any future service.
- 3.15 Existing online and telephone services to some extent supplement rather than replace personally delivered advice. The aim for such services should be to replace personally delivered support for those who have the capacity to use them. We have seen this approach in many other areas of daily life and if we are to make the best use of scarce resources, we need to adopt a similar approach to legal problems. In this way, scarce resources for personally delivered support could be concentrated on those who have no effective access to material available online and by telephone, and those unable to adequately understand and use materials presented in that format. This group consists disproportionately of the elderly, those with learning difficulties, those with hearing or sight impediments, and those for whom English is not a first language. Sources of personally delivered advice must continue to exist so as not to further disadvantage those who may to some extent already be socially excluded.

Online information, advice and assistance

- 3.16 The UK currently falls behind those jurisdictions which have made efforts to utilise technology to provide innovative legal advice, assistance and dispute resolution through online platforms. We propose that the UK should prioritise the development of online tools and resources, following the lead set primarily by the Netherlands and also by British Columbia and New South Wales (“NSW”).⁶⁸ As shown by the Netherlands, with relatively modest investment and a quite short timeframe, an online platform can be developed, moving from comprehensive information and diagnostics tools to a more sophisticated dispute resolution system.

The Rechtwijzer system is provided by the Dutch Legal Aid Board and supported by the Netherlands Ministry of Security and Justice. It has been developed by Tilburg University (from 2006 – the first two generations) and by the Hague Institute for the Internationalisation of Law (“HiiL”) (as of 2012 – third generation). The technical design runs on ODR expert Modria’s software. The first generation, Rechtwijzer 0.0, was designed, in essence, as a choice facilitator. The next version, Rechtwijzer 1.0, was designed to provide people with diagnosis and triage advice including legal information, tools and referrals to suit their situation via an interactive website. The recently launched Rechtwijzer 2.0 demonstrates the progression into a dispute resolution system. The system guides users, taking them from problem diagnosis, through Q&A-based framing of their issue, to problem solving and facilitated negotiation, and finally to various forms of ADR (where parties fail to reach a solution themselves). The service was launched in its original form in 2007 with an initial investment of €2.3 million for the development of the first two models. The Dutch Legal Aid Board together with HiiL and Modria are building an international consortium around Rechtwijzer, with the Legal Services Society of British Columbia as the first organisation joining the partnership. The investment costs will therefore be lower for any new partners, who would gain access to an already developed platform. This would lower investment costs to around €200,000-€300,000 per module or less, if it is one that has already been developed, such as the divorce/separation module.⁶⁹

⁶⁸ For further information on these innovations see Smith, *Digital Delivery of Legal Services to People on Low Incomes* (December 2014), full report and working papers available online at <http://www.thelegaleducationfoundation.org/digital-report>.

⁶⁹ Information provided by Corry van Zeeland, Head of the Justice Innovation Lab, HiiL.

- 3.17 There are a number of features that an online platform must have in order to provide a viable alternative to at least some of what otherwise could only be personally delivered. First, it must provide access to relevant information in relation to a wide variety of common disputes. This should include material at various levels of complexity, so that it can be used by potential litigants in person in addition to lawyers and advice workers. The experience of registrars in the newly designed dispute resolution model, as well as telephone staff (see below), should feed into the development and updating of materials available online. Registrars and telephone staff will be able to monitor trends on areas of particular difficulty, which should be used to continually update and improve the online materials. The platform should also provide access to the statute law website. Paper-based materials should be provided at appropriate locations within communities for users for whom technology is less accessible.
- 3.18 Second, it should include interactive diagnostic tools to assist the user to understand the law and procedure applicable to the facts of their case. It should also be able to identify what information or evidence is likely to be required to resolve the dispute, and how this may be obtained. The health service provided a model in NHS Direct, which had interactive diagnostic tools as well as useful information on treatment and when to seek the help of a professional, integrated with a helpline staffed by trained medical staff.
- 3.19 Third, it should provide a dispute resolution pathway, providing a range of alternatives. This should include tools to assist in the preparation of correspondence and, where appropriate, a claim form or defence.

Advanced tools of this kind are already in place. Resolver, for instance, is a tool that helps consumers raise and resolve complaints with over 3,000 key services in the UK for free. It helps explain to the consumer their rights, helps prepare communications, records all their emails and phone calls in a case file, allows the consumer to add any supporting information, reminds them what to do, knows when to escalate and to whom, and if unresolved signposts the consumer to the potential next steps. Resolver is available online, responsive to mobile, and as an iPhone and Android App.

3.20 Fourth, the platform should provide a facility for ODR by allowing parties to engage in settlement negotiations through a secure space, extending to the exchange of documents. Secure online portals are already commercially available, so it may be possible to integrate this feature from the outset.

Rechtwijzer 2.0 is at present designed to deal with matrimonial disputes. Landlord and tenant and labour disputes and a guided pathway for people coping with debts are planned for the future. The negotiation component of the service provides automated legal guidance, based on answers given by the parties during the Q&A session. Should the parties fail to reach agreement on their own they will reach the ADR phase, which includes online mediation or adjudication. The service currently employs 11 certified family lawyers who assist at this stage. Mediation, adjudication and review by a family lawyer (which is mandatory for divorce cases) all take place via an online forum but in-person meetings are not precluded.

3.21 Fifth, in order to permit the platform to be used effectively by most prospective litigants, it should provide a means of requesting further assistance. The aim of the online platform is to enable individuals to address their concerns before they escalate and alternatively, to assist in taking their cases forward through the reshaped courts and tribunals themselves. However, some individuals may require further advice or assistance. Where appropriate, this should be available upon request by means of a chat-box or Skype (or similar) interface. This advice and assistance could take the form of unbundled legal services.⁷⁰ Thus, the system cannot be entirely free-standing, but rather should be like those in the Netherlands or Queensland,⁷¹ which do provide for some element of professional intervention.

⁷⁰ “Unbundling” refers to the provision of discrete legal assistance which can take multiple forms, for example assistance in reference to a specific task (i.e. drafting, negotiation or court appearances) or in relation to a specific legal issue. For more information, see *Law Society, Practice Note: Unbundling Family Legal Services* (May 2013), available online at <http://www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services/>. For an American perspective, see also Forrest Mosten, *Unbundling Legal Services in 2014: Recommendations for the Courts*, 53 ABA Judges’ Journal (Winter 2014), pp.13-14.

⁷¹ Queensland’s independent Self-Representation Service provides free, discrete task legal advice and assistance throughout the progress of the client’s civil litigation. Clients are not represented by assisting solicitors and remain responsible for the conduct of their proceedings. Further information available online at <http://www.qpilch.org.au/cms/details.asp?ID=564>.

3.22 Other features are desirable, but should not delay implementation. For example, multilingual content could be provided in due course, drawing on the example of LawAccess NSW.

LawAccess NSW is designed to be a “one-stop-shop” for the provision of legal services in the state of New South Wales. It provides referrals, legal information and self-help assistance. The services provided are designed around a central website. LawAccess NSW is widely accessible but is particularly aimed at those who struggle the most to access legal services, including indigenous and rural communities, and disabled people. Some online content is available in a host of international languages.

3.23 The platform we envisage would be substantially larger in scale and more sophisticated than any now existing, although examples of the functioning of most of the components have already been developed in other jurisdictions. We consider that both the level of funding required and the need for integration with other services suggest that the lead in development should be taken by the MOJ.

3.24 At the same time, however, we consider that the content should be developed jointly with other stakeholders, for example, advice networks and law firms. We consider that the technical development of the platform (and the telephone service, see below) is best managed by one or more specialist IT companies, possibly forming a consortium with heavyweight stakeholders such as the professional bodies, Citizens Advice and Law for Life. “Agile” software development, with the sort of flexible co-operation of stakeholders which has characterised the incremental development of the Rechtwijzer project, is far more likely to be realised by this combination of players. LawAccess NSW, launched as a joint project between the NSW Attorney General’s Department, the NSW Legal Aid Commission and the legal profession amongst others,⁷² offers a further example of the consortium approach.

⁷² See note 51, p.71.

- 3.25 This consortium would create a technical specification for the platform, and would ensure consistency in the presentation of the content of the various subject areas. This would build on the work that has already been done, especially as part of the MOJ's court support strategy to better meet the needs of litigants in person. Both the development of the content and the technical development of the platform would presumably be tendered, and the consortium would also oversee liaison between the software and content developers.

Telephone information, advice and assistance

- 3.26 The Civil Legal Advice Gateway was briefly described above. A recent MOJ-commissioned review found that the Gateway could be improved by increased focus on accessibility, expectation management, and accommodation of individual needs.⁷³ The Government's response to the review evidences limited engagement with its recommendations, stating instead that the research confirms that the Gateway is effectively meeting the needs of service users.⁷⁴ The most recent independent review indicates that the limited scope of that research has seriously impacted on its ability to accurately assess the Gateway's performance.⁷⁵ We acknowledge that the Gateway has not been without controversy and emphasize that it does not at present deliver the kind of service we envisage.

⁷³ Ministry of Justice, *Civil Legal Advice Mandatory Gateway: Overarching Research Summary* (2014), pp.20-22, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384307/cla-gateway-research-summary.pdf.

⁷⁴ Ministry of Justice, *Review of the Civil Legal Advice Mandatory Gateway* (2014), p.23, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384226/cla-mandatory-gateway-review.pdf.

⁷⁵ For example, due to the failure to consider the impact of the Gateway on individuals who did not access it but who would have been entitled to do so, or the accuracy and quality of the Operator Service, see note 62, Public Law Project, p.2.

3.27 A comprehensive and effective telephone service should be developed which is capable of providing accurate, substantive information and advice as well as signposting callers to other relevant services and advice providers. The experience in NSW with the LawAccess phone line provides a useful framework for similar developments in the UK, and what we propose owes much to the NSW model.

LawAccess NSW provides a state-wide telephone service in addition to its online features. The telephone service is generally considered a success,⁷⁶ which is largely due to the level of training and back-up, including online and hard-copy resources, provided to staff. The service is free and provides users with information about their legal problems and contact details for other services that may be of assistance. The telephone service can accommodate those using a Telephone Typewriter, the deaf and hard of hearing as well as offering interpreters.

3.28 Based on the available research evidence on telephone services,⁷⁷ we believe that several features are necessary for an effective telephone advice scheme. Across all features, the guiding principle should be that staff actively engage in helping to resolve the caller's problem, rather than simply providing information which the caller is then expected to follow up for themselves.

3.29 First, at the operational level, sufficient staff should be employed to keep waiting times to a reasonable duration. For callers who cannot get through immediately, there should be an opportunity to request a call back as an alternative to waiting on hold. At the very least, accurate information should be provided regarding the likely waiting time, and regarding times which are less busy.

⁷⁶ Although we acknowledge that the service is not without limitations, including reported difficulties in getting through to the helpline, and its limited operating hours; see for example Schetzer and Henderson for the Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs* (2003), p.94, available online at <http://bit.ly/1Ew0X9z>. See also National Pro Bono Resource Centre, *Pro Bono Partnerships and Models: A Practical Guide to What Works* (2013), pp.199-200, available online at: <http://bit.ly/1MsWIA8>.

⁷⁷ See note 51, chapter 3.

- 3.30 Second, staff answering the telephone should possess a range of relevant expertise, enabling them to give accurate and comprehensive advice in relation to a variety of the most frequent problems. Telephone staff should have access to the online information sheets and in due course, the developed digital platform. Oral advice should be followed up in writing, and where appropriate, with further minor assistance (for example, writing a letter on behalf of the client).
- 3.31 Third, staff on telephone duty should have access to specialist back-up advice for more complex problems. There should be time targets for the delivery of specialist advice. It should be possible for the specialist adviser to contact the caller directly, either online or by telephone.
- 3.32 Fourth, the service should provide for referrals, for example, in relation to those individuals who require face-to-face advice, where the legal issue is one in which ongoing legal support is likely to be needed and/or where another provider might be able to provide follow-up assistance more promptly. To this end, an up-to-date country-wide directory of service providers should be maintained by the telephone service. Referrals should be followed up to ensure they are actioned. In appropriate cases the telephone staff should contact a provider directly to ensure that an appointment can be made within a reasonable period.
- 3.33 Fifth, provision should be made for callers who cannot speak English adequately. This should take the form of ascertaining contact details and arranging a call back by a member of staff speaking the relevant language; in exceptional circumstances a conference call with an interpreter might be arranged.
- 3.34 Given that the online platform and the telephone service will ultimately be integrated, telephone staff should respond to requests on the online platform for further assistance. This might take the form of directing an enquirer to the relevant pages of the online platform, discussing the case in a chat-box, or directing the enquirer to the telephone service. Alternatively, like a telephone request, a request received on the online platform should be signposted or referred where appropriate.

- 3.35 In our view, the initial telephone call should be provided without charge in the interests of promoting access and administrative simplicity. Free early intervention – which in many cases will serve to contain disputes, particularly where problems are non-legal in nature – is likely to save public money in the long run.
- 3.36 However, we recognise that after the initial contact with the telephone service, further advice (by telephone or online), minor assistance or specialist advice will need to be means-tested. That further advice or assistance might be provided under the legal aid scheme or at a modest private hourly rate. We would not propose any change to the present arrangements for payment of a fixed fee to a law firm or advice agency which is contracted to provide that service.
- 3.37 The governance issues in relation to the telephone service are similar to those in relation to the online platform, given that we envisage that the two will be closely integrated. It appears sensible to us that control of the online platform and the telephone service be exercised by the same consortium. We acknowledge that since the Legal Aid Agency at present manages the Gateway via contracting it out, this may be the most realistic option for the future. The Gateway does not offer all of the features which we have identified as characteristic of an effective telephone advice service. We therefore propose that if the Gateway is used as the basis of our enhanced service, the development of the online platform is taken forward jointly with redevelopment of the telephone service from the outset.

IV. CONCLUSION

- 4.1 This report is our contribution to tackling a failing justice system. Complex and adversarial procedures in the civil courts and some tribunals necessarily put those unable to afford legal representation at a serious disadvantage. The consequence is a system in which access to justice has been severely compromised for ordinary people, while expensive judicial resources are used wastefully as judges attempt to fill the gaps left by the lack of legal advice and advocacy.
- 4.1 While the Working Party was created in response to the effects of recent state retrenchment, we acknowledge the many shortcomings of our system even before LASPO came into force. Our overarching aim has been to use this opportunity to find a solution that increases access to the civil courts and tribunals to a higher level than has previously been achieved. This approach entails a necessary revolution in the way justice is delivered.
- 4.3 The active investigative and case management role undertaken by the registrar in our proposals will help to level the playing field for those without legal representation. In proactively identifying the relevant issues, law, procedure and evidence required to resolve the case, the registrar will expertly perform the specialist functions which are beyond the capabilities of most litigants in person. The registrar's dispute resolution function will direct resources to a speedy and informal disposal of cases, with judicial time reserved for only those cases where that level of expertise and skill is required.
- 4.4 Our recommended integrated online and telephone portal enlists the power of technology in the endeavour to ensure access to justice for all. The service will have an important dispute avoidance and diversionary role, or, when court proceedings are necessary, will guide litigants through the reformed justice system. The portal will provide legal advice and assistance to the majority of those for whom such assistance would otherwise be out of reach, while freeing up scarce personally delivered services for those who need them most.

- 4.5 We recognise that our recommendations, however radical and far-reaching, cannot fully eradicate the current justice deficit. In particular, initiatives to defend and extend the legal aid budget remain critical. For some litigants, even in a reformed system, there will be no realistic alternative to legal assistance, and the availability of legal aid for this group is a pressing concern.
- 4.6 We call upon the judiciary, administration, government, and the broader legal profession to give serious consideration to our report. Our proposals offer an achievable framework for maximising access to justice for the ordinary citizen. At a time when such access comes at a premium, we hope the benefits of our proposals are clear.

V. ACKNOWLEDGMENTS

The Working Party would like to give particular thanks to Herbert Smith Freehills for its generous support (including the following individuals: Emma Cooke, Moira Cullen, Nehal Depani, Errol Donald, Nicolette Hayter, Andrew Lidbetter and Niamh O’Kane).

We are especially grateful to Judge Michael Walker for his invaluable advice; JUSTICE Fellows Ciar McAndrew and Nadia O’Mara for their assistance in preparing this report; and 39 Essex Chambers for kindly hosting a Working Party seminar.

We would also like to acknowledge and thank the following individuals and organisations who generously gave their time to meet with us, respond to our call for evidence, or otherwise support our work:

Advokatfirman Delphi

Judge John Aitken, President, Social Entitlement Chamber

Mrs Justice Sarah Asplin, High Court

Diggory Bailey, Office of the Parliamentary Counsel

Nimrod Ben-Cnaan, Law Centres Network

Judge John Bennett, Social Entitlement Chamber

Sarah-Jane Bennett, The Bar Council

Julie Bishop, Law Centres Network

Blake, Cassels & Graydon LLP

Lord Justice Briggs, Court of Appeal

Diane Burleigh

Peter Causton and UK Association of Part Time Judges

Natalie Ceeney, Chief Executive, HMCTS

Mr Justice William Charles, President, Administrative Appeals Chamber, Upper Tribunal

CILEx

Michael Collins, Ministry of Justice

Andrea Dowsett, Civil Justice Council

Judge Brian John Doyle, President, Employment Tribunal

Lord Dyson, Master of the Rolls

Peter Farr, Office of the Master of the Rolls

Haldane Society of Socialist Lawyers

Hardwicke Chambers

Mark Hatcher, The Bar Council

Jonathan Haydn-Williams, Goodman Derrick LLP

Judge Cathy Healy, Health, Education & Social Care Chamber
(Mental Health Tribunal)

Mr Justice Hickinbottom, High Court

Judge Mark Hinchliffe, Deputy President, Health, Education & Social Care
Chamber (Mental Health Tribunal)

Professor Christopher Hodges, University of Oxford Centre for
Socio-Legal Studies

Houthoff Buruma

Steve Johnson, AdviceUK

Mr Justice Robin Knowles, High Court

Mr Justice Brian Langstaff, President, Employment Appeal Tribunal

Nicholas Lavender QC, The Bar Council

The Law Society

Judith March, Personal Support Unit

Roy Marsh

Walter Merricks

MIND

Professor Forrest Mosten

Professor Martin Partington

Chilli Reid, AdviceUK

Hayley Rogers, Office of the Parliamentary Counsel

Graham Ross, Modria

Lord Justice Ernest Ryder, Court of Appeal

Caroline Sheppard, Chief Parking Adjudicator, Parking and Traffic
Appeals Service

Judge Shona Simon, President, Employment Tribunal (Scotland)

Karamjit Singh, Social Fund Commissioner for Northern Ireland

Lord Justice Sullivan, Senior President of Tribunals

HH Judge Phillip Sycamore, President, Health, Education & Social
Care Chamber

Tenancy Deposit Scheme

Lord Thomas of Cwmgiedd, Lord Chief Justice

Judge Meleri Tudur, Deputy President, Health, Education & Social Care Chamber

James Walker, Resolver

Mr Justice Nicholas Warren, Former President, General Regulatory Chamber

David Wurtzel, City University London

Corry van Zeeland, The Hague Institute for the Internationalisation of Law

Finally I would like to express the Working Party's (and especially my) enormous appreciation of the excellent work of Ruchi Parekh, who has acted as researcher, rapporteur and draftsman of our Report.

A handwritten signature in black ink, appearing to read 'St Stanley Burnton', written in a cursive style.

The Rt. Hon Sir Stanley Burnton



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