

i Opinions expressed in this report are those of the author and should not be taken to be those of The Legal Education Foundation.



## Ask the judges

At the end of April 2018, all members of the judiciary in England and Wales were asked for their views on the courts and tribunals reform programme. Papers prepared by senior judges were sent to judicial office-holders in the civil, criminal, family and tribunals jurisdictions. Although the four papers were not formally published, they were widely available.

Each paper was called *Judicial Ways of Working 2022*, presumably referring to the target date for completion of the reforms. This chapter summarises what the judges were told.

### Civil

The civil paper outlined six “ways of working” and how they might be achieved:

- 1. Use of digital systems:** The judiciary will have the benefit of standardised digital case management systems and paperless working. First, though, case progression and other administrative processes will be reappraised so they are more efficient and effective than current ways of working.
- 2. Use of technology for hearings:** Judges will decide whether to conduct hearings by telephone, video-link, online or in person. There will be no compromise to the principles of transparency, access to justice and open justice. If users struggle with technology, they should receive the appropriate assistance or alternatives through the “assisted digital” service provided by HMCTS.
- 3. Cases dealt with proportionately:** Judges will always hear the more complicated and sensitive cases. Legal advisers or case officers may be authorised to deal with certain specified types of more routine work, such as applications to extend time for compliance with an order when there is no risk to the trial date or uncontested special measures applications. Alternative dispute resolution methods should also be used more widely, if suitable, to secure speedier and fair outcomes.
- 4. Use of simpler, accessible procedure rules:** There should be clear procedural rules for those accessing justice online, with consistent, predictable and easier-to-understand processes. People should get help when they need it. In the absence of legislation, the

Online Procedure Rule Committee that was recommended by the Briggs report is in abeyance. So that reforms can be piloted in the meantime, judges are considering whether to ask the Civil Procedure Rule Committee to draw up rules instead.

5. **Authorisation to perform routine judicial functions:** The appropriate use of well-trained, legally-qualified legal advisers should allow a greater share of judicial time to be spent on decision-making and substantive case management – with less time spent on routine paperwork. There should be enough supervision to ensure no detriment to the quality of justice. Delegation of work to case officers (applicable in other jurisdictions, but in civil cases only for a legislation-dependent online court) will be subject to judicial oversight and supported where necessary with legislation and/or procedural rules.
6. **A modern estate, properly staffed:** A reduced estate should not compromise the quality of justice administered. The HMCTS board has agreed that money saved will be used to fund investment in more modern buildings. They should be equipped and maintained to a higher standard. Buildings also need to be properly staffed to support the administration of justice and to provide for the needs of some of the most vulnerable in society.

There was more detail on each of these points.

On **digital working**, there were plans for a single IT system covering civil, family and tribunal cases. Outdated systems would be replaced. The system should be easy for judges to use. Listing cases for hearings will remain a judicial function.

Judges will have access to **hearings technology**, but it will for them to decide whether to conduct hearings by telephone, video-link, online or in person. There will be no compromise to the principles of transparency, access to justice and open justice. Justice must be seen to be done. As a minimum, the public and the media should be able to see and hear as much as they can at present.

To ensure that **cases are dealt with proportionately**, judges will always hear the more complicated and sensitive cases. Legal advisers or case officers may be authorised to deal with certain specified types of more routine work. Alternative dispute resolution methods should also be used more widely, if suitable, to secure speedier and fair outcomes. Unrepresented parties should be advised to treat litigation as a last resort. Up-to-date guidance should be provided.

The judiciary is well aware that the legislation needed for a single set of **online procedure rules** covering civil, family and tribunals has been delayed, perhaps even indefinitely. It may be necessary to make new rules for specific pilots.

**Routine judicial functions** will be performed by *legal advisers*. They will be trained, supervised and (normally) co-located with judges. The parties will, as a matter of right, be able to have the decision of any legal adviser reviewed by a judge.

Under the Courts and Tribunals (Judiciary and Functions of Staff) Bill<sup>1</sup>, *case officers* will undertake routine, administrative work. A case officer will manage a case and may conduct simple telephone mediation. The parties will, as a matter of right, be able to have the decision of a case officer reviewed by a judge.

There should be a **modern court estate**, properly staffed. Supplementary provision of justice facilities, previously described as “pop-up courts”, should be available where there is need. Any flexible operating system should not mean longer working hours for the judiciary. Judges should not be required to work anti-social hours.

## Criminal

In the spring of 2018, Sir Brian Leveson looked back at the review of efficiency in criminal proceedings he had published three years earlier. Its aim, said the head of criminal justice, was to ensure that “the police did not prepare files unnecessarily, the CPS always identified a lawyer with whom the defence lawyer could engage to progress a case efficiently, the defence lawyers did not unnecessarily have to spend time (and thus money) queueing up to visit their clients in custody or attending unnecessary hearings and, finally, court administration did not have to move vast quantities of paper about with ever increasing risks of documents becoming detached or not being in the right place at the right time”.<sup>2</sup>

Three years on, Sir Brian Leveson said, there was now less space for legislative initiative. But the judges needed to make the best use of limited resources and persuade the government that further cuts would not improve efficiency.

“Judges of the Crown Court have led the way in digital working. Almost all cases are run without paper through the Digital Case System, saving millions of pages. Evidence can be displayed via ClickShare; video-links are used for vulnerable witnesses; and defendants can attend directions hearings via video-link from custody. Many defendants in custody are sentenced via the video-link, at the discretion of the judge. At the request of the judiciary, HMCTS is now considering how better to make digital evidence (such as CCTV footage) available to the jury in their retiring room during deliberations.

“Magistrates and District Judges (Magistrates’ Courts) too have been working digitally for some years. They receive their case papers (and other documents) via their iPads from the Court Store. The Common Platform is being developed for use in both the Magistrates’ Courts and the Crown Court. It aims to automate aspects of case progression and other administrative tasks including resulting. Judicial case management in the criminal courts will remain of fundamental importance and there will still be a need for case progression officers in the Crown Court and legal advisers in the Magistrates’ Courts to assist the implementation of judicial case management decisions. The principles of Better Case Management and Transforming Summary Justice which have led to real improvements in case progression will inform the development of the Reform Crime Programme.”

The six ways of working outlined for judges in the civil courts were also relevant to their colleagues in crime, though with some modifications. Criminal trials will continue to be heard in court – although in the single justice procedure it will be for the bench to decide whether or not a trial should be heard in a courtroom. Some hearings will take place outside the courtroom, either by telephone or through a fully video hearing. The role of case officers – and whether they must be legally qualified – has not yet been finalised.

## Family

Introducing the family paper,<sup>3</sup> Sir James Munby, president of the Family Division, said he hoped the family court would move increasingly to an online paperless environment where applications were issued online and where both the court file and the hearing bundle were electronic.

“Online applications are being piloted at present: the online divorce project and the online probate project are both advancing at a good pace,” he continued. “The reform teams are working on pilots for the online issue of private law cases and public law (care) cases, as well as the online issue of financial remedies cases.”

But there would be less use of fully video hearings than in other jurisdictions. For family cases heard by magistrates, case officers would take over some of the work done by legal advisers.

Like their colleagues in other jurisdictions, the family judges were told about the six ways of working. On the subject of cases being heard proportionately, they were told that judges would always decide unresolved disputes. “Certain specified types of more routine work may be completed by authorised legal advisers or case officers – or may be resolved online. Non-court dispute resolution methods should also be used more widely, if suitable, to secure speedier and fair outcomes.”

## Tribunals

The tribunals paper was introduced by Sir Ernest Ryder, senior president of tribunals. “Tribunals justice is specialist, innovative justice that is delivered swiftly by independent judges and panel members whose function is valued by the public,” he said. Despite this, “there are lengthy delays that are inimical to justice; process and language that is unintelligible to all but the specialist user; and a system that is so costly that access to justice is impaired by the lack of affordable representation.”

His solution to the problem? “The judiciary must maintain quality by retaining the protections of our procedures – including the use of face-to-face determinations – while providing proportionate, simpler and more accessible processes across a range of cases. We can achieve that by developing digital ways of working which incorporate the same protections but deliver better quality outcomes in terms of access to justice, the user’s perception of the value of the essential role we perform and the timeliness of our decision-making.”

Sir Ernest Ryder outlined nine projects dealing with the way tribunal judges and panel members worked.

1. **Online dispute resolution:** This will deliver four key components out of the social security and child support project that can be used by other tribunals where appropriate: (1) *Track your Appeal* (an online notification system); (2) *Submit your Appeal* (online applications); (3) *Continuous Online Dispute Resolution*; and (4) a *Digital Evidence sharing component* that will be delivered with the Department for Work and Pensions as well as other respondent government departments.
2. **The judicial interface:** This project will provide access to a judicial platform that will deliver a standard method of digitally identifying a judge’s caseload, all documents relating to the cases allocated to the judge in digital form and tools to help the judge and leadership judges allocate cases and identify them for case management, for online resolution, for alternative dispute resolution and for full hearing.
3. **Video hearings:** This project is being tried in the Tax Chamber and the Immigration and Asylum Chamber. It involves case management and a limited number of simple contested hearings. The appellant, the appellant’s representative, the presenting officer on behalf of the appropriate agency or government department and the judge are in different locations and are able to have simultaneous conversations, simultaneously present documents online and have privileged discussions in a digital forum which replicates a relatively formal public

hearing. The proceedings are available for the public to see over screens in the hearing room where the judge is conducting the hearing.

- 4. Scheduling and listing:** This project is in its infancy and will initially consider the development of what is known as the magistrates' rota – a digital system that can be used to book the sittings of fee-paid judges and panel members. When developed, it will extend the present itinerary system in the courts to the tribunals, enabling leadership judges to agree itineraries and patterns with their judges and allowing judges to book leave, official business and sickness into a single digital record for each judge. We hope the system can also be developed to enable tribunals whose judges are peripatetic to book hearing rooms and chambers across the courts and tribunals estate and that it will be linked to a new system of expenses claims so that sittings can be reconciled with the expenses they properly generate.
- 5. Common Components:** The *common components project* brings together functions that have been designed in digital form to replace existing paper processes. They will be made available to any tribunal that can use them. Examples include the judicial interface, the digital platform accessed by the judicial interface, Track my Appeal, Submit my Appeal, evidence-sharing and document and evidence management. Components that permit fees to be paid by an applicant and that provide for the identification of appellants are also in development.
- 6. Civil, Family and Tribunals digital process:** Work has been undertaken to identify a series of standard processes that exist in all civil, family and tribunals procedures. The government intends to legislate to give powers to an Online Procedure Rules Committee. A shadow online advisory group under the chairmanship of Mr Justice Langstaff is considering high-level rules that will facilitate digital working. In addition, the Tribunal Procedure Committee will advise on whether any rule changes are necessary. Before a procedure is made the subject of any future online rules, the senior president of tribunals and the relevant chamber president will consider whether proposed rules are better than those that exist at present.
- 7. Case officers and registrars:** The tribunal case worker project successfully ended in 2017 and there are now 32 tribunal case workers across the tribunals. The tribunals have a long tradition of identifying authorised functions under the supervision of judges which can be performed by legally qualified registrars and legal advisers and specially trained case officers. Each of these case officers works directly to a group of judges to whom they are responsible for their decision-making. No decision represents a final determination of an appeal save in certain limited circumstances, such as strike-out. All decisions made by registrars and case officers are automatically reviewable on application to a judge without an appeal.
- 8. Upper Tribunal and RCJ project:** The Upper Tribunal and Employment Appeal Tribunal are part of one of the largest projects, designed to digitise all appeal processes in the Royal Courts of Justice (RCJ) in London, including judicial review. This project will take existing technology in the Rolls Building known as CE-File and develop it and other components to provide a digital process that replicates the best of the Upper Tribunal/Employment Appeal Tribunal/judicial review processes. Each chamber will be represented on a project board and the development of this service will be overseen by the vice president of tribunals.

**9. Courts and Tribunals Service Centres:** Tribunals already have extensive arrangements for the administration of their business through back offices and jurisdictional support teams attached to presidents' offices. The move to create more service centres will not affect existing practice in tribunals although the benefit of cross-jurisdictional support and digital working are intended to be greater. Each service centre will be scrutinised by the Tribunals Judiciary Executive Board to ensure that existing ways of working are preserved or improved.

Finally, the tribunal judges are introduced to the six ways of working that I have discussed already. On proportionate case working, Sir Ernest Ryder says this: "The judiciary will always hear contested cases. Registrars and case officers may be authorised to undertake certain specified types of more routine work. Some specified types of work may be resolved online. Alternative dispute resolution methods such as judicial mediation, early conciliation and early neutral evaluation will be used more widely to help parties resolve their disputes more efficiently and effectively."

## References

1. <https://services.parliament.uk/bills/2017-19/courtsandtribunalsjudiciaryandfunctionsofstaff.html>

---

2. *Judicial Ways of Working – 2022 Criminal*, April 2018, unpublished.

---

3. *Judicial Ways of Working – 2022 Family*, April 2018, unpublished.

---

© 2018 The Legal Education Foundation

© Joshua Rozenberg

*Opinions expressed in this report are those of the author and should not be taken to be those of The Legal Education Foundation.*