The Online Court: will IT work?

Joshua Rozenberg QC (hon)

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Reform marches on

> **While the government appeared not to know when it would be introducing the legislation needed for court reform, HM Courts and Tribunal Service (HMCTS) was pressing on with closing down courts and digitising court processes. Most of this was happening away from the public gaze because Dominic Raab, who was justice minister for the second half of 2017, had ordered HMCTS staff not to brief journalists. It was not clear at the time why he was so anxious to hide his flagship project from public scrutiny. It was even less clear why HMCTS, which is meant to operate at arm's length from the Ministry of Justice, went along with it.**

Professor Dame Hazel Genn, co-director of the UCL Judicial Institute and the UK's leading socio-legal researcher, rightly said in October 2017 that "the lack of a clear flow of communication has been a cause of some complaint among the profession, the judiciary and academics".[1] She was "astonished" to find that the only regular source of information about the government's £1bn court reform project in the second half of 2017 was an obscure blog called Inside HMCTS.[2]

HMCTS had become more willing to brief journalists by the summer of 2018. The information that follows originated in the blog and has subsequently been updated.

Online Divorce[3] pilots began in January 2017 at the East Midlands divorce centre in Nottingham. Adam Lennon, who was in charge of the project, explained that the questions applicants were asked would depend on the answers they had already given.

For example, an applicant seeking a divorce based on a spouse's behaviour would not be shown guidance or be asked questions relating to a divorce based on separation. "The service also has built-in validation to minimise the possible reasons for rejection," he added. So the software would not allow an applicant who had been married for four years to seek a divorce based on five years' separation.

"The project is working in an agile way, building the service bit-by-bit," the manager added. "We've decided to launch a pilot of this early version of the divorce service now because we want to give people a simpler service as quickly as possible, rather than wait until the full online

service is ready."

But some of the problems identified during the pilot stage remained when the service went live in May 2018. One page of questions was clearly directed at applicants who had already identified themselves as husbands. They were asked to choose a reason for their divorce. One of the options was: "your wife has committed adultery with a man and you find it intolerable (unbearable) to live with them".[4]

Nobody would be surprised if a husband found it intolerable to live with his wife and her lover. But that is not something the courts need to know. What the question was trying to find out was whether a wife had committed adultery and her husband found it intolerable to live with *her*.

A similar insistence on unnecessary gender-neutral language made it much harder to understand guidance that the system offered a husband who was seeking a divorce, with his wife's agreement, after two years' separation.

It says: "The court will ask your wife if they agree to a divorce. If they don't agree, your application will be rejected and you'll need to choose another reason."[5]

Questioned about this use of language Susan Acland-Hood said[6] that HMCTS was simply following the advice it had been given.

In an example of the tail wagging the dog, a new divorce application form[7] was introduced in August 2017 for all applicants, the majority of whom were not then making applications online. The previous form was amended — under regulations[8] approved by parliament — to align it with the online form being piloted. It has a much clearer question-and-answer format and includes guidance notes printed alongside the relevant questions. The £550 fee can be paid by phone.

Users still had to print out the new form (in triplicate) and post it off. But it can be filled in and saved on a computer. In the same way as an online form will not let users give two contradictory answers to the same question, the printed form will not allow two alternative boxes to be ticked. It largely side-steps the pitfalls of gender-neutral language.

There was concern among family lawyers[9] that the printed form encouraged applicants to identify co-respondents unnecessarily. It does indeed invite them to identify the "person your partner [*sic*] committed adultery with". But it then says that "people do not generally name the person their spouse [*sic*] committed adultery with". And it warns applicants that if they do name a co-respondent then that person will normally become a party to the court case. "Your petition could be delayed if they do not respond," it adds, "and it could cost you more money to resolve that issue."

Speaking in April 2018, the Lord Chief Justice spoke warmly about the scheme.[10] "Since the online divorce pilot started in July last year," Lord Burnett of Maldon said, "roughly 1500 people have requested links to it. In the paper-based world, an uncontested divorce required an applicant to fill out a form and file it with the court and, in some cases, to be checked by a judge. 40% of those forms were rejected because they had not been completed properly. The new online process takes applicants 25 minutes to complete, compared to an hour for the paper forms. And because the online form is well designed, all but eliminating the scope for errors, the rejection rate has fallen to 0.5%. This has the potential to save significant amounts of HMCTS staff and judicial time."

A **Civil Money Claims**[11] pilot was launched in the summer of 2017 for litigants-in-person claiming less than £10,000. Clare Galloway, the service manager, explained that the pilot was "not intended to deliver the online court in its entirety": that would take some time. "Rather, this is the exciting first step in our journey that will eventually deliver a new and improved civil money claims service."

The reforms would be delivered in no fewer than 10 stages, she added. "A key principle of agile working is to break the overall project down in to a series of manageable releases so that we can design, build and deliver iteratively."

Writing at the end of June 2017, though, she seemed unaware that the necessary legislation was in jeopardy.

"Work to establish a set of concise, litigant-in-person-friendly rules will be required to support all new online procedures," she wrote. "The Ministry of Justice plans to introduce primary legislation to authorise the creation of a new Online Procedure Rules Committee for the purpose of making a new kind of procedure rules for selected classes of cases aimed at making litigation in courts and tribunals navigable for lay litigants as much as for lawyers and harnessing modern IT for that purpose. This will provide vital underpinning for the Civil Money Claims Project."

David Young, senior project manager for the civil money claims project, said in October 2017 that the service was currently being tested in what's called a private beta phase.[12] "We'll continue to refine the new service until we are satisfied that we have learnt as much as we can and at that point we'll allow everyone access to the new service". The public beta stage was planned for early in 2018.

"Over the coming weeks," he added, "our priority is to release additional functionality into both services which include introducing the without-prejudice negotiation and settlement platform for litigants-in-person and evidence upload and exchange."[13]

The online civil money claims service became available for general use in the week before Easter 2018, although no announcement was made until a few days later. "It was used 700 times in the first week, the lord chief justice said.[14] "On Maundy Thursday, a claim was lodged on-line at 14.02 and had been paid by 16.00."

Sir Terence Etherton told judges in April 2018 that the civil money claims service was now available to litigants-in-person and some legal representatives, although not yet all. "It so far deals with the making of claims and the response; the next stage, which is being developed, deals with the exchange of evidence."

It was envisaged that there would be a need for case officers – referred to as "authorised staff" in the lapsed 2017 bill. Their role was currently being developed by a committee chaired by Mr Justice Birss.[15]

The **Digital Probate Service** began accepting online applications in October 2017.[16] At first, it was available in the simplest cases: where only one executor was applying. Users were allowed to save an incomplete application and return to it when they had obtained missing information. They were able to pay probate fees online but they had to provide supporting documents in the traditional way.

Paul Downer, managing the probate project, said that applicants could use the new digital statement of truth. "This is a declaration made by the applicant that the information provided is true at the time of submission," he explained. "It removes the current requirement to swear

an oath, saving the applicant time and effort in travelling to a probate registry or solicitor's office."[17]

By far the most controversial of the announcements to appear on the HMCTS blog was a proposal to pilot **flexible operating hours**,[18] "letting people have their cases heard outside the current traditional 10am to 4.30pm court day".

In the past, one might have expected such news to be announced by the lord chancellor or one of his ministers on the Ministry of Justice website (or even in parliament, if it had been sitting). Instead, the plans were announced in a blog post by Susan Acland-Hood, chief executive of HMCTS, on 21 July 2017.

Different ways of working would be tested in six different courts from the autumn of 2017, she explained. Some magistrates' courts would sit as early as 8am while others would finish as late as 8.30pm.

Susan Acland-Hood accepted that lawyers had different views about flexible court hours. It was all about money, the chief executive conceded. "Keeping expensive buildings empty before 10am and after 4.30pm, rather than having fewer, better-maintained buildings open for longer hours, has a real cost."

But expecting lawyers to start much earlier or work much later has a cost for them too, particularly if they have child-care responsibilities. Within 10 days there were 68 responses on the website and almost all of those submitted by court users were critical. "As a disabled barrister with three children," one wrote, "the suggestion that in order to meet the commitments of my practice I would have to be ready to start work over an hour away from my home at 8am or alternatively not finish until 7pm (I will be affected by the Manchester pilot) is devastating enough for me to consider leaving the Bar." Child care was not normally available before 8am or after 6pm, she added.

"As for the suggestion that courts are empty before 10am and after 4.30pm," a QC pointed out, "it's obvious whoever wrote this has not seen a Crown Court robing room which is usually a hive of activity long before 10am." Another added: "The only reason we advocates are not in the building before 9am and after 5.30pm is because security will not allow it."

Writing for *The Times*,[19] Francis Fitzgibbon QC of the Criminal Bar Association made the point that a four-hour court day — 9.30pm to 1.30pm or 2pm to 6pm — would increase the chances that witnesses would have to return to court to complete their evidence the following day. Trials would take longer than in courts that sat for five-and-a-half hours a day.

Joe Egan, who was president of the Law Society, wanted to know what had changed since the last time all this was tried. "The Ministry of Justice tested the introduction of more flexible court sittings in the wake of the August 2011 riots, and as recently as 2013 in the criminal courts, with 42 magistrates' courts participating," he recalled.[20] "These previous pilots of flexible hours have been unsuccessful and we have seen no indication that this pilot is markedly different, nor that the reasons for the previous negative recommendations have been taken into account in the design of this pilot. The argument that these reforms are being built around the needs of our citizens overlooks the fact that court users have not actually been consulted on what their needs are."

To her credit, Susan Acland-Hood responded to her critics on Twitter. And a newly-recruited communications official replied to critics on the HMCTS blog, promising that "nobody will be expected to work from 8am until 8pm". In response, lawyers pointed out that they worked

those hours already, adding that HMCTS staff had little understanding of how the system operated.

But the most devastating responses of all came from two circuit judges. Judge Blair QC, who was appointed to the Western circuit in 2014, pointed out that no court buildings were empty before 10am or after 4.30pm. "As a judge," he wrote, "I usually start work at 8.30am and sometimes from as early as 7am. My ushers and clerks start work at the same sorts of times as I do. Barristers and higher court advocates are working in the building from 9am, having pre-court meetings with clients, opponents etc... I usually leave work at 5.40pm. Our court staff are also usually still working then."

Judge Ticehurst, the senior judge at Taunton Crown Court, said the flexible-hours experiment was misconceived and took no account of the realities of work in the Crown Court.

"In a small court centre like Taunton, if the scheme is to work, you will immediately need to find two more judges or recorders to cover the split shifts. We will need double the number of potential jurors. Prisoners will need to be brought to court by about 7.30am for a realistic start in the morning. At the moment, on occasions, some prisons do not get prisoners to us until 12 noon! Prisoners on the afternoon shift may not get back to their prisons until gone 8.00pm, by which time there will be no food or meals available for them."

And then Judge Ticehurst made threw down the gauntlet. "I am in the fortunate position of anticipating retirement within the next 18 months," he wrote. "It cannot come soon enough... As long as I am Resident Judge at Taunton Crown Court, the nonsense that is the flexible operating hours scheme will not happen here."

The response of the senior judiciary was to attack the messenger. "I regret the extent of the widely-broadcast misunderstandings and ill-informed comments from a range of sources," wrote Lord Justice Fulford in a letter published a week or so later.[21] "We must use our assets to the greatest possible (but always sensible) extent, without asking anyone to work longer hours than at present."

Lord Justice Fulford, who was judge in charge of reform, said the pilots would help establish whether the court estate could be used more effectively. And he pledged not to accept reform at any price.

"If it works, it works; if it doesn't, it doesn't. I am absolutely clear that a significant, detrimental impact on diversity in the professions or the judiciary is not a price the judges are willing to pay for more flexible operating hours. These pilots will simply help us understand if this would be the case." He went on to explain how the pilots would be planned and evaluated.

It was an impressive letter, but one that should have preceded Susan Acland-Hood's announcement rather than followed it. And, of course, it was not the last word.

In a four-page reply,[22] the chairman of the Bar took issue with the judge's complaints. Misunderstanding and ill-informed comments were understandable, argued Andrew Langdon QC, given that the proposals had been developed in a "somewhat piecemeal fashion" and had not been set out in a detailed consultation paper. Did Lord Justice Fulford mean to include the leaders of the Bar Council and the Criminal Bar Association among those he accused of making ill-informed comments?

The Bar chairman said that he and his fellow barristers had spent some time trying to explain their concerns to HMCTS and anyone who would listen.

"The theme of your letter," he told the judge, "seems to be that we need not fear a pilot, however misconceived the pilot is, because we can have confidence that the evaluation will demonstrate whether our expressed concerns are valid." But that depended on the evaluation criteria and whether they were designed to measure the consequences that barristers feared. HMCTS was leaving those criteria to be designed by the evaluators and there was some doubt over whether they would be available before the first pilot was due to begin in Newcastle.

And that proved to be the problem — or so we were told. In September 2017, HMCTS announced that the pilots would be postponed from the autumn of 2017 until February 2018, when a further announcement was expected. Kevin Sadler, deputy chief executive, said it had not been possible to recruit an external team that could evaluate the pilots with a "sufficient level of rigour".[23] Susan Acland-Hood responded to some of the concerns raised.[24]

February 2018 came and went without the promised announcement. Nothing more had been heard by the summer. It became clear that the proposal had not won the support of the incoming lord chancellor, David Gauke, and his courts minister, Lucy Frazer.

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