Proposed Modernisation of Courts in England & Wales: IT and the Online Court

Christopher Hodges[1]

Abstract

Problems of cost and funding in the civil procedure system of England and Wales have made courts unaccessible to citizens and small businesses. A radical response has been proposed to address this crisis in a Report led by the Judiciary. It is proposed to make a major investment in upgrading the information technology (IT) of the court process, and to shift all claims up to £25,000 into an online court. The online court would operate in three stages, with significant automated IT support, case management by case officers facilitating mediated solutions, and ultimately (in a fairly small number of cases) decisions by judges. The process is similar to that adopted in a number of consumer ombudsmen, but significant questions arise over whether it will be adequate, or sufficiently attractive to users, given various other options that may be more attractive. An important 'better regulation' issue arises over how policy is best made.

The ongoing civil justice crisis

The civil justice system in England and Wales has been suffering continuous crisis for several decades, the efforts of which have been particularly felt by consumers and small businesses, whose legal problems tend to involve modest value. The essence of the crisis is the clash between the complexity of the system and its funding. A system that is designed to be used by insiders, involving particular concern with satisfying 'due process' requirements, will inevitably require time and cost to operate. Successive attempts have been made to control costs, notably in reports in 1995/6 by Lord Woolf[2] and 2010 by Lord Justice Jackson,[3] but without addressing the disadvantage that an adversarial system inherently generates cost. For claims by individuals, that problem was masked by the post-War availability of legal aid, and it has been gradually revealed by successive cuts in legal aid which, coupled with recent increases in court fees, have produced significant falls in case levels and an increase in litigants in person. The recent increase in litigants in person has clogged attempts at judicial case management and forced judges to adopt an advisory role that does not sit well with their traditional independent role, leading to serious delays in court procedures. The Lord Chief Justice has said 'Our system of justice has become unaffordable to most. In consequence there has been a considerable increase of litigants in person for whom our current court system is not really designed.'[4]

In 2016, Lord Justice Briggs is leading a radical attempt to redesign the system so as to operate the vast majority of cases without lawyers, on the basis of a wholesale switch to information technology. Briggs has said:

> The single, most pervasive and intractable weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals, for that tiny minority still in receipt of Legal Aid, for those (mainly with personal injury claims) able to obtain no win no fee agreements with their lawyers ("CFAs"), for the few who obtain free advice and representation, and for substantial business entities. In short, most ordinary people and small businesses struggle to benefit from the strengths of our civil justice system described in the previous section of this chapter.[5]

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[1] Professor of Justice Systems and Fellow of Wolfson College, Oxford. Research funding is received from the Swiss reinsurance Company Limited, the European Justice Forum, and the international law firm CMS.

[2] Lord Woolf, *Access to Justice: Interim Report* (HMSO, 1995); Lord Woolf, *Access to Justice: Final Report* (HMSO, 1996).

[3] R Jackson, *Review of Civil Litigation Costs: Preliminary Report*, (TSO, 2009); R Jackson, *Review of Civil Litigation Costs: Final Report*, (TSO, 2010).

[4] *The Lord Chief Justice's Report 2015* (Lord Chief Justice, 2016).

[5] Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (Judiciary, 2016) ('Briggs'), para 5.23.

Existing online and mediation facilities

Some online facilities are already available in the court system. First, debt (not damages) claims may be initiated through a portal, Money Claims On Line (MCOL), which has reached a steady state of around 180,000 claims annually.[6] Second, since 2010 low value personal injury claims from road traffic accidents have been processed through an electronic portal developed by the insurance industry, unless they are defended.[7] This appears to have significantly improved communication of relevant information between claimant lawyers and insurers, and to have speeded up settlements, although there are some concerns about how the costs and time limits may drive undesirable behavior. Third, bulk claims, for example debt claims by utilities against customers, are processed by Secure Data Transfer (SDT) at a Bulk Centre based at Northampton County Court. The typical value of SDT and MCOL claims averages £1665 and median £644.[8]

The technique of referring claims to mediation has also been an integral part of civil procedure since implementation of the Woolf reforms in 1999, and it is general policy to prioritise alternative dispute resolution (ADR) options to use of courts. Briggs comments:[9]

> The rapid growth of [ADR] during the last 30 years leaves the civil courts as very much the last resort for the resolution of civil disputes. Negotiation, arbitration, mediation, early neutral evaluation and adjudication by ombudsman services and others together resolve far more disputes than the civil courts.

Since 2014, for claims under £10,000, if both parties tick a mediation box on the Directions Questionnaire,[10] the claim is referred to a free Small Claims Mediation Service managed at the Bulk Centre. Mediation is provided by a team of only 15 mediators, who are former court back office managers, operating by telephone for one hour, usually from home. They carry out four or five mediations a day, but are only able to service about 35 to 40% of the national demand. If the case has not been settled within 28 days of referral it is sent as a defended case to the local hearing centre.[11]

The Briggs solution: IT and no lawyers

After earlier reports by a committee of the Civil Justice Council[12] and by the charity JUSTICE,[13] firm proposals have been revealed that have major implications for the transformation of litigation and ADR in England and Wales.

First, the Chancellor of the Exchequer announced in December 2015 that £738 million would be spent in modernising the courts' IT systems. A significant part of this sum would be raised by sale of court buildings across the country (the court estate) closing 91 courts, with overall savings in Ministry of Justice expenditure of around £200m a year from 2019-20.[14] This long overdue investment would

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[6] Briggs, para 2.28.
[7] http://www.claimsportal.org.uk/en. This was introduced to support the Pre-Action Protocol for Low Value Personal Injury (PI) Claims in Road Traffic Accidents (RTAs), which became effective from 30 April 2010.
[8] Briggs, para 2.29.
[9] Briggs, para 2.22.
[10] A Directions Questionnaire must be completed by the parties, in cases in which in which a defence is filed, to assist the court in deciding on which management track to allocate the case: Civil Procedure (Amendment) Rules 2013 (SI 2013/262), rule 22. Separate questionnaires apply for the small claims track (Form N180) and the fast track or multi-track (N181).
[11] Briggs, para 2.30.
[12] Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims* (Civil Justice Council, 2015).
[13] *Delivering Justice in an Age of Austerity* (JUSTICE, 2015).
[14] *Spending Review and Autumn Statement 2015: key announcements* (HM Treasury, 2015).

enable courts to transform themselves by significantly modernising their procedure, escaping from 'the tyranny of paper' by adoption of online technology.[15]

Second, an interim consultation report by Lord Justice Briggs disclosed plans to create an Online Court (OC) for claims worth up to £25,000.[16] The objective is to take advantage of the investment in information technology (IT) to escape from the problems of high costs that are disproportionate to sums in dispute, by designing a system that can be operated without lawyers. The default position would be that the entire process would be IT-based, resting on changing the function of a judge to be more inquisitorial (like the German model), but attempting to provide assistance to parties by means of integral IT functions.

The Online Court

The OC would work in three stages: first, identification of issues, which would be largely automated; second, conciliation and case management by case officers; third, resolution by judges. This three tier model, which would be expected to involve numbers of claims that would be represented as a pyramid, is the model already successfully operated by leading consumer ombudsmen. Briggs explains the tiers as follows.[17]

Stage 1 will be a mainly automated process by which litigants are assisted in identifying their case (or defence) online ('Assisted Digital' provision) in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court, and required to upload (i.e. place online) the documents and other evidence which the court will need for the purpose of resolution. Stage 1 would be designed to 'provide online help at every stage in the process of completing the requisite online documents, as well as to provide simple commoditised online advice as to the bare essentials of the relevant law. By 'commoditised' I mean a description of the basic legal principles applicable to the litigant's dispute, rather than advice tailored to her particular facts.'[18] Briggs comments that the stage I, triage stage, carries the key to 'understanding why the OC concept may harness modern IT so as to provide a civil court structure uniquely suitable for litigating without lawyers.'[19]

However, Briggs notes limits to a digital system: 'Recognising that there is a substantial section of civil court users who would find it difficult or even impossible to conduct civil litigation through computers, it is being designed to ensure that they thereby suffer no impairment in their access to justice by the proposed digitisation of courts, by providing them with the requisite assistance. Forms of assistance currently being considered include online help, telephone help-lines and face to face human help.'[20]

Stage 2 will involve a mix of conciliation and case management, mainly by a Case Officer, conducted partly online, partly by telephone, but probably not face-to-face. Case Officers would be trained in the processes of investigation and conciliation which will be unique to that court.[21] They would not make final determination of substantive rights (however small the value at risk) or approve of the settlement of civil claims on behalf of children and other protected parties. These functions are inalienable

[15] 'The central assumption … is that it is now technically possible to free the courts from the constraints of storing, transmitting and communicating information on paper.' Lord Justice Briggs, *Civil Court Structure Review: Interim Report* (Judiciary, 2016), para 1.14.
[16] Briggs.
[17] Briggs, para 6.7.
[18] Briggs, para 6.9.
[19] Briggs, para 6.8.
[20] Briggs, para 4.14.
[21] Briggs, para 6.20. He notes the degree of specialism involved in such functions, stating that if these special functions were to be discharged on a part-time basis by County Court Case Officers, it is likely that they will again be less well focused and may be underfunded.

judicial functions.[22] Briggs refers to a spectrum within the general concept of case management between, at one end, sending standard directions to the parties in straightforward cases and, at the other, taking active and robust bespoke control of large complex cases in such a way as to bring them to a timely and just conclusion, by conciliation or trial, without disproportionate cost. The former routine end would be suitable for Case Officers, whereas the latter 'artistic' end must be done by judges.[23] There is likely to be a right to have the Case Officer's management decision taken again by the judge.[24]

It remains undecided whether the conciliatory role of the Case Officer should be primarily that of mediator or evaluator.[25] Briggs contrasts what he characterizes as an 'early neutral evaluation' (ENE) approach of the Financial Ombudsmen (which is highly successful in resolving over 80% of incoming complaints without the involvement of and ombudsman) with the more 'rough and ready' telephone mediation carried out in small claims by non-legally-trained officials in the County Court Bulk Centre (with a 70% success rate).[26] He prefers the latter simple mediation role for Case Officers.[27]

Stage 3 will consist of determination by judges, in practice District Judges (DJs) or Deputy District Judges, either on the documents, on the telephone, by video or at face-to-face hearings, but with no default assumption that there must be a traditional trial. There would also be a fourth stage, namely enforcement, which would be undertaken using electronic communications in a system that would be the same for all courts.

Briggs illustrates the way the procedure would work by the following example.[28]

> Suppose that A has a dispute with her builder B relating to works carried out at her house. After entering the common Court Service Portal and selecting the OC as the appropriate court (if necessary with online guidance), and after providing her name and contact details, A would be asked to identify the object of her grievance by reference to a series of tick boxes which might include her bank, her holiday company, her next door neighbour and her builder. Having ticked 'Builder' the software would present new questions designed to elicit the essential nature of the dispute, for example whether it was about the quality of the work, the amount charged or delays in completion. Ticking (or clicking) the appropriate box would reveal further successive pages, including a page requiring A to identify B and provide his (or if a company, its) contact details, to state whether the building works were covered by an agreement and, if in writing, requiring A to attach any electronic copy, or scan or photograph with her smart phone any paper copy, so that the central document required by the court for determination of the dispute would be lodged electronically from the outset. Further automated pages would question A as to the details of the dispute, in much the same way as a high street solicitor might do when taking instructions after A sought his assistance. The result of this process would be for the system to generate a document on screen broadly approximating to particulars of claim, which A would be invited to approve or amend, and certify as true. The system would then deliver that document and any accompanying evidence electronically to B (if an e-mail address had been provided by A), or request B to go online by sending B a letter or a text to his mobile phone. The software would then automatically take B through an investigatory process (if also a litigant in person) in broadly the same way, so as to generate the electronic approximation to a defence. These automated investigatory processes would have bypasses for litigants choosing to use lawyers, and for bulk issuers with departments of staff trained for the purpose.

It is worth stating at some length how Briggs sees the anticipated advantages of the new system:

> 6.11. This is intended to generate three substantial advantages over the current small claims process. First it enables the parties to communicate to each other the relevant details of and evidence about their case at the earliest possible stage, thereby providing a substitute for the pre-action protocols process used by solicitors in

[22] Briggs, para 4.22.
[23] Briggs, paras 7.28-7.29.
[24] Briggs, para 7.38.
[25] Briggs, para 7.18.
[26] Briggs, paras 7.18-7.24.
[27] Briggs, para 7.26.
[28] Briggs, para 6.8.

the conduct of most civil litigation. Secondly, it opens up opportunities for conciliation of their claims, whether as the simple result of the exchange of the stage 1 materials, or by mediation or early neutral evaluation, again well in advance of trial. In this context, it was a striking feature of the removal of Legal Aid from private law family proceedings, and the consequential dramatic increase in the proportion of litigants in person, that mediation rates fell sharply rather than (as had been hoped) rose, because litigants in person are less (if at all) aware of the advantages of ADR than lawyers. The introduction of the Mediation Information and Advice Meeting ("MIAM") in this type of litigation is intended to fill that gap, as a compulsory first educative step.
6.12. Thirdly, this stage 1 triage process enables the case, if not resolved by conciliation, to be managed and made ready for trial with all the requisite information available on an electronic file, thereby making more efficient the processes of judicial preparation and determination of those cases which cannot be settled earlier.
6.13. Stage 2 of the OC process is mainly directed to making conciliation a culturally normal part of the civil court process rather than, as it is at present, a purely optional and extraneous process, encapsulated in the 'alternative' part of the acronym ADR. By that I do not mean that it should be made compulsory. Rather it would build upon the current Small Claims Mediation Service by inviting the parties to engage in an appropriate form of conciliation, albeit respecting the refusal of one or more of them to do so.
6.14. A radical departure which stage 3 would make from current practice and procedure is that there would be no default assumption that a live claim would have to be settled at a traditional face to face trial. Rather, the traditional trial would be regarded as the last resort, if the alternatives of resolution on the documents, by telephone or by video conference were deemed to be unsuitable. A face to face hearing could also be confined to the determination of particular issues, where for example live evidence and cross examination was required.
6.15. Finally, the OC will mark a radical departure from the traditional courts (outside the small claims track) by being less adversarial, more investigative, and by making the judge his or her own lawyer. By that I mean that judges will receive no assistance in the law from the parties, and may well need more training, more frequently, in the law relevant to the caseload of the OC that they receive at present. I acknowledge that, even now, the DJs who decide cases on the small claims track already have to be their own lawyers, but the ambition of the OC will extend to a substantially wider caseload.

No cost shifting

In accordance with the objective of facilitating litigation without lawyers, it appears to Briggs to be inevitable that costs shifting will not extend (save perhaps in cases of misconduct) to recovery of legal costs, but be limited to court fees and some other expenses.[29] It has yet to be considered whether recovery of the costs occurred in obtaining private assistance with the use of computers would be permitted as an expense.

Scope: Types of Cases

Although the OC would in theory be capable of handling any type of case, it appears that it would respond to some but not other types. Briggs says that the OC is intended for 'the resolution of relatively simple and modest value disputes'.[30] In other words, the focus is simply on value: any case involving a sum under £25,000. It is, therefore, to be assumed that it is both designed and intended for every type of case. However, there is a lack of clarity here about what is in fact intended.

Briggs states:
6.1. The development of the [OC] is the single most radical and important structural change with which this report is concerned. It provides the opportunity to use modern IT to create for the first time a court which will enable civil disputes of modest value and complexity to be justly resolved without the incurring of the disproportionate cost of legal representation. In my view it offers the best available prospect of providing access to justice for people and small businesses of ordinary financial resources.
6.5. ... First, the OC is intended to be used for the resolution of relatively simple and modest value disputes. Simplicity is a requirement both because it is unlikely that first generation software will prove to be up to the task of accommodating complex issues and secondly because the traditional adversarial system is pre-eminently

[29] Briggs, para 6.60. No costs shifting is well established in the Employment Tribunal and the small claims track of the County Court.
[30] Briggs, para 6.5.

well-suited to the resolution of complex issues of fact and law. It is designed to accommodate disputes of modest value precisely because it is those disputes which continue to attract disproportionate cost, if litigated with the assistance of lawyers. Furthermore, it is probable that, at least in its early stages, the OC will be confined to the resolution of money claims, for reasons discussed later in this chapter.

Briggs states that the OC would handle 'relatively straightforward debt and damages claims up to a provisionally chosen value at risk of £25,000.'[31] He also sees no reason why personal injury cases should not be included, at least up to £5,000.[32] It is unclear whether the Qualified One-Way Cost shift for such cases introduced by Jackson[33] would continue, given Briggs' intention that the OC would essentially not involve cost shifting. However, Briggs provisionally thought that housing disrepair claims by tenants could be given voluntary but not compulsory admittance to the OC, and he notes that there is[34]

a wide measure of provisional agreement about classes of case which should, at least initially, be kept out of the OC. They include the following:

a) Claims for possession of dwelling houses, save perhaps for 'no fault' claims under s.21 of the Housing Act 1988 and claims where there is a mandatory ground for possession and no dispute that it applies.
b) Claims for injunctions or other non-monetary relief requiring the close attention of the court (such as specific performance or declarations).
c) Class claims (including bankruptcy or winding up).
d) Claims by or against minor children or other protected parties.

The Law Society has noted that alternative service models such as ODR represent an area with enormous potential for meeting the needs of the legal system and its users,[35] and that the number of firms undertaking predominantly retail market work (e.g. wills, probate, conveyancing, family, personal injury) has (uniquely, in relation to other areas) fallen since 2010/11.[36]

Rationale for the £25,000 jurisdictional cap

Briggs outlines the rationale for setting the jurisdictional cap for the OC at £25,000. The current small claims track limit is £10,000, but £1,000 for personal injuries litigation and housing disrepair, although this limit is likely soon be raised to £5,000 for personal injuries at least. Small claims cases worth up to £10,000 account for almost 70% of hearings in civil courts in England and Wales. However, the number of small claims going to hearing has fallen over recent years, from 51,046 in 2003 to 29,603 in 2013.

Experts consulted by Briggs thought that the 'Value at Risk' that would make a claim economically viable is somewhere between £25,000 and £100,000.[37] He considers that a value limit of £25,000 would be a better steady-state objective than £10,000, even if it were to be approached in two stages, by using £10,000 as a temporary initial limit.[38] That limit would already capture a very substantial part of the number of cases in the County Court. It would transfer a recognisable block of existing civil cases, leave the fast track and multi-track untouched.

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[31] Briggs, para 4.12.
[32] Briggs, para 6.48.
[33] Under the QOCS, from 1 April 2013, losing claimants would pay their own costs and any success fee, but not pay the winner's costs, and losing defendants would pay the winner's base costs: Civil Procedure Rules 44.13 to 44.17.
[34] Briggs, para 6.43.
[35] *The Future of Legal Services* (The Law Society, 2016), para 4.2.3.
[36] ibid, p 21.
[37] Briggs, para 5.38. He cited a recent survey by Citizens Advice that 71% of its clients would think twice before even contemplating litigation, and that only 14% would feel confident enough to represent themselves: para 5.40.
[38] Briggs, para 6.39.

Potential problems

Case investigation, advice, and responsive user-friendliness

All of the analysis in Briggs is about reducing the *cost* of a case. It is assumed that, since demand exists (claims that are not being brought in the court system), if cost can be reduced, usage will increase. But this overlooks other criteria on which users choose between different justice pathways. The ongoing delay in addressing problems with the civil procedure system and its costs and funding issues has meant that a number of alternative mechanisms have developed, some of which have been proving highly attractive to users, and to have significant potential. For example, many consumer-trader (C2B) claims are handled by a range of consumer ADR schemes, especially the Financial Ombudsman Service, Energy Ombudsman, Communications Ombudsman, Legal Ombudsman, Pensions Ombudsman, Furniture Ombudsman, and recently Consumer Ombudsman.[39] A series of different mechanisms and new intermediaries are springing up in relation to claims by small businesses, such as the Groceries Code Adjudicator,[40] the Pubs Adjudicator,[41] and the proposed Small Business Commissioner.[42] Serious thought is being given by the Scottish and UK Governments to whether to introduce inquisitorial style compensation schemes for personal injury claims, especially involving the National Health Service.

Perhaps the single fundamental reason why there has been significant growth in consumers using ombudsmen systems, and small businesses using the other new B2B intermediaries is that those mechanisms offer *user-friendliness* in delivering desired outcomes. It is not just that they are usually free, they are easy to access and simple to use, since the intermediary does all or much of the work, or at least guides the user to a significant extent. In the consumer systems, the key attraction lies in the ability to talk to a case handler in an ombudsman and receive *assistance* in identifying the nature of a problem, and how and where to take it further, albeit fully backed by IT, is critical. Case handlers in the leading ombudsmen—like lawyers—are trained to sift the information that consumers communicate and identify key facts and how they relate to relevant or irrelevant legal issues. Indeed, Briggs himself notes 'the common experience of DJs hearing small claims track cases at present is that the key facts and evidence remain buried in the minds of the litigants and in their ill-assorted bundles of documents even when they arrive at court for a trial.'[43]

In comparison, the process of an OC is still designed around the assumption that the problem that is inputted has already been identified as one involving *legal rights*, and therefore has to be processed and resolved on the basis that the only outcome will be determination of those legal rights, whether by negotiation or determination. Yet the other types of intermediaries noted above are designed to respond to *problems* and are capable of responding with flexible solutions to the underlying problem(s) that arise in an individual case, whether or not it includes legal rights.

Will the design of the OC respond to the needs of citizens and small businesses? As noted above, the OC is to be designed to provide 'commoditised' assistance but not individualised assistance tailored to the particular litigant or particular facts.[44] In how many cases, and for how many individuals, will the former be sufficient or satisfactory? The theoretical model that is being applied in this design is essentially that of ADR as it has developed in the context of litigation, mainly mediation before or

[39] See C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).
[40] Established under the Groceries Code Adjudicator Act 2013.
[41] Established under the Small Business, Enterprise and Employment Act 2015, Part 4. See *Pubs Code and Pubs Code Adjudicator: A Government Consultation - Part 2* (BIS, December 2015).
[42] Enterprise Bill 2015. *See Enterprise Bill: A Small Business Commissioner* (Department for Business, Innovation and Skills, July 2015), *Response to the BIS Consultation Enterprise Bill - A Small Business Commissioner* (BIS, September 2015).
[43] Briggs, para 6.10.
[44] Briggs, para 6.9.

during a legal case, which has already been identified by parties and their legal advisers as involving legal rights. In other words, the design viewpoint seems to be that of a judge at the end of the process, rather than a range of users with a range of problems that might or might not be amenable to a process involving determination of legal rights, or unassisted communication between parties. Is that the right approach? Briggs' distinction between ENE as said to be practiced by the Financial Ombudsman Service and mediation as practiced by the Bulk Centre officers can be questioned. The various consumer-trader ombudsmen in fact adopt a range of techniques in their triage and investigation stages, including 'mediation', and it is unhelpful to characterize what they do as solely ENE. Their objective is to see what people want, to see if they wish to agree to an agreed outcome, and to facilitate that outcome, before proceeding to a more formal investigatory and recommended resolution stage. The ombudsman process also includes, as an integral stage, a decision by the ombudsman, so the 'ENE' stage cannot be viewed in isolation.

The hope is that claimants will be assisted through stage 1 by the use of Assisted Digital support. But there must be risks. First, Briggs notes the need for individualised early assistance and advice for language reasons:

> There is a significant class of civil court users who are as challenged by the use of speech or paper as they would be by the use of computers, including the many who do not speak English as their first language, for whom the pro bono agencies are likely to continue to be fully stretched in providing vital assistance.[45]

Second, some people may not understand whether and what sort of legal claim they have, or that certain facts significantly affect that decision. Third, some people might just want advice or information, but need a human to explain its significance to them. Fourth, some people may wish to make spurious or ill-founded claims, and need to be weeded out later, or hope that the cost of doing so will not be taken by a defendant, thereby bringing the system into disrepute. Does the current increase in litigants in person indicate exactly what will continue to happen, possibly to an even greater extent in future, rather than be stopped? In other words, designing an *advice, triage and dispute resolution* system needs to do more than just focus on the processing of legal claims once they have been identified as such and verified, weeding out many that should not be allowed to enter the dispute resolution stage. All the best ombudsman systems provide the more holistic approach.

Other criteria against which users may compare pathways are cost and duration. Access to the OC will require a fee. Ombudsmen are also generally *free* to consumers, and their operations are swift. It will be interesting to compare the duration of the OC procedure against alternatives. The right to have Case Officers' decisions reheard by a judge does not generally exist in ombudsmen, consumer ADR or B2B type procedures, and inevitably adds to duration and cost. The inclusion of such a mechanism betrays an inability to escape from traditional court-process thinking, which is where the newer alternative models have founded their success.

The conclusion here is that an OC system, for all its improvements, may simply not be attractive to many consumers for C2B claims or many small businesses for problems with other businesses. If that predication is correct, it has important consequences for policy in deciding where to invest public funding. How much point is there in major investment in a system that is likely to provide few attractions where people are likely to prefer other solutions? The OC may be fine for some types of claims for which better alternatives do not exist, such as debt. But it should also be asked whether better alternatives could be designed for some claim types that are within the remit of the online court, such as property claims.

Vulnerability of funding

[45] Briggs, para 6.58.

A further concern is whether the amount of public funding required to maintain the future system will remain available. Briggs notes that there will be ongoing cost in maintenance and constant updating of an OC,[46] and notes about the adequacy and long-term funding of the Assisted Digital Service, which has says must be satisfactorily addressed and tested before there could be any question of making the OC compulsory.[47]

Conclusion

Modernization of court systems based on universal adoption of IT is warmly to be welcomed. Review of court-based litigation procedure is also welcome.[48] Costs can only be cut and cost-proportionality be achieved, if radical new approaches are adopted. But has focus of this review been wide enough? The plan has been developed by the Judiciary with Her Majesty's Courts and Tribunals Service, rather than by the Ministry of Justice. This is an unusual centre of gravity, and it has resulted in by-passing of requirements on civil servants to consider and evaluate *all* options and undertake fully costed impact assessments.[49]

What is needed is a comprehensive review of *every* type of dispute resolution technique, process and architecture—not just that of courts alone. A more holistic review might conclude that some case types could be switched into a new and more appropriate system. One candidate for that might be to encourage *all* consumer-trader issues into an enhanced ombudsman system. Another candidate might be to switch personal injury claims to investigative compensation scheme systems, which operate very successfully in all Nordic states. Various design features of the proposed OC suggest that there is a risk that it may not be preferred by users, given the availability of cheaper, quicker and—above all—more user-friendly systems in a number of important case types, such as all consumer-trader disputes and many business-to-business problems. The redesign of the OC has picked up some learning from how alternative systems operate—but not enough. There is a risk that an OC may represent a major investment of public funds in a system that users will not find sufficiently attractive, and may reject in favour of other options. If that were to occur, it would be a waste of public funds.

[46] Briggs, para 5.122.
[47] Briggs, para 6.58.
[48] H Eidenmüller and M Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29(3) *Ohio State Journal on Dispute Resolution* 261.
[49] See *Principles for Economic Regulation* (Department for Business Innovation & Skills, 2011); *Recommendation of the Council on Regulatory and Policy Governance* (OECD, 2012); *Guidance: Better regulation framework manual* (Department for Business Innovation & Skills, 2013); *Better regulation for better results - An EU agenda*, COM(2015) 215 final, 19.5.2015.