

European Civil
Justice Systems

Delivering Dispute Resolution

Recent review on the
resolution of disputes in
England and Wales

Christopher Hodges

Report

FLJS

www.fljs.org

The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**
and **Wolfson College, University of Oxford**

The Foundation for Law, Justice and Society

European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of civil justice systems, including alternative dispute resolution and regulatory redress systems, aspects of system design, procedure funding and outputs. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness, in terms of cost, duration, and outcomes in redress and achieving desired behaviour.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.

Executive Summary

This Report summarizes the main points of two recent reviews on the resolution of disputes in England and Wales. One is a study by Professor Christopher Hodges and the other is a Report for the Welsh Government chaired by Lord Thomas of Cwmgiedd, former Lord Chief Justice of England and Wales. There are strong similarities between their conclusions.

- **The justice system has broken down in England and Wales.** There are too many individual, competing, and overlapping options, which confuse potential users. The justice system should be considered as a whole and not as a number of uncoordinated parts. **The system needs to be reconstructed as an integrated single entity.**
- **Many major dispute resolution pathways are inadequate in delivering justice and should be reviewed.** An adversarial system inherently involves levels of cost and delay that defeat people's desire or ability to reach just resolution of their disputes.
- Experimentation with digitized procedures offers opportunities to modernize processes, with considerable benefits. The models of new processes that are emerging in consumer Ombudsmen, the Online Court, all leading Tribunals, and other systems have considerable similarities.
- But digitization can exclude a significant number of people and small businesses, who need personal assistance during, after, and especially before starting any formal process.
- **Every dispute resolution pathway should be reviewed against its ability to provide satisfactory answers to three questions:**
 1. *How do people identify and access information, advice, support, and assistance in solving their problems?*
 2. *How do we ensure that dispute resolution pathways are simple, effective, and cost-effective and deliver justice to people and organizations?*
 3. *How do we identify systemic problems, and address them so as to reduce risk of future recurrence?*
- The areas that perform best against the criteria of these three issues are those in which dispute resolution is delivered through online platforms and modernized Ombuds or Tribunals, which operate under the oversight of regulatory authorities with rules/laws derived from a principles-based matrix, and which deliver both individual but also extensive digital information and feed back extensive data on issues that can then be addressed by relevant interventions.

The Research

Two major reviews of the justice system published in 2019 cover between them England and Wales. In *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales*, Professor Christopher Hodges reviews and compares the numerous dispute resolution pathways that exist for the major types of disputes, covering disputes involving consumers, property, families, employment, small and medium-sized entities (SMEs), large companies, personal injuries (from road traffic to workplace and healthcare), and claims against the State, including judicial review, administrative appeals, the public Ombudsmen, public inquiries and coroners).¹

In *Justice in Wales for the People of Wales*, the Commission for Justice in Wales, chaired by Lord Thomas of Cwmgiedd, reviews all civil, administrative, and criminal aspects of the Welsh justice system. A major aspect of the Welsh Report is a call for devolution, so that justice sought by people in Wales should be delivered by Welsh institutions, judges, Tribunals, and Ombuds. It asserts that justice should be devolved to Wales and not controlled from Westminster: 'Policy and spending on justice should

be aligned with other policies, particularly those which are devolved to Wales, such as health, education and social welfare.'

Both reviews conclude that the present system is not working. There are too many barriers, as well as too many pathways, for real people and businesses to satisfactorily resolve disputes that arise in the course of doing business or going about their daily lives. The Wales Report called for expansion in the use of Tribunals and the Welsh Ombudsman system, supporting proposals of Professor Hodges. In covering also criminal and family justice, it noted the collapse of traditional high street legal advice services, the existence of 'advice deserts', and serious operational difficulties throughout the justice system caused by lack of resources. Both reviews propose a system which recognizes that all forms of dispute resolution should be part of a single justice system. Dispute resolution should contribute to a fairer and more equal society, but it can only do that if the system is cohesive and coordinated from informal resolution, through ombudsmen, right up to the courts and tribunals.

Three Functions of Modern Dispute Resolution Systems

Hodges identifies three broad questions about the functions that a modern justice system should deliver:

1. *How do people identify and access information, advice, support, and assistance in solving their problems?*
2. *How do we ensure that dispute resolution pathways are simple, effective, and cost-effective and deliver justice to people and organizations?*
3. *How do we identify systemic problems, and address them so as to reduce future risk of recurrence?*

These three functions are examined in turn.

Function 1: Information, Advice, Assistance, Support

The traditional model is that people start their dispute resolution journeys by obtaining assistance from lawyers or other advisers, such as at Citizens Advice. But two problems have occurred with that model of providing assistance. First, advisers need to have some funding, even if they act *pro bono*, and the State has substantially withdrawn funding for legal aid for lawyers and funding for Local Authorities and charities. This can leave some people helpless, especially if faced with law or processes that appear complex to them. The LPRS study of 2014² found that of those who had used a formal resolution process but not obtained any legal or professional help, most (84 per cent) had sourced their own information or advice, for example from the internet, leaflets, family or friends, or the other side of the dispute. Only 4 per cent of adults with a problem who had used a legal process or resolution service did so without obtaining any information, advice, or help at all. Furthermore, many problems go unraised and hence unresolved.

Second, it is misleading to characterize people's problems as necessarily or exclusively *legal* problems. As Dame Hazel Genn showed twenty years ago and many others have confirmed since, people experience *problems*, which may or may not have a legal component but might have multiple aspects.³ The (most recent) survey of legal problems in England and Wales (LPRS), conducted in 2014/15, concluded:⁴

Thus the problems that result in formal legal action are a very small part of a much larger pool of problems that people experience and, for the most part, deal with alone or without legal or professional help. These findings are in line with those from previous surveys. Understanding the overall picture and the extent to which individuals are able to deal with their problems through less formal means is important in considering what access to justice represents for different groups, and how people can best be supported in resolving issues effectively and quickly.

If the root causes of problems are not addressed, multiple problems can proliferate for individuals. Clusters can involve illness, disability, mental health, debt, housing, social support and entitlement, employment, and other issues. The Low Commission raised serious concerns over the number of people who have multiple social problems. It proposed a strategy for provision of advice and legal support on social welfare law, which would include:⁵

- *a public legal education system, making full use of the internet and embedding information about social welfare law issues in community settings locally;*
- *national helpline and website services, providing information and advice on all aspects of social welfare law, building on and developing current services;*
- *local advice networks of generalist and some specialist advisers for each local authority area, providing face-to-face information, advice, and legal support;*
- *access to specialist national support providing information and advice for frontline agencies.*

The contemporary solution is to provide more information on websites so that people can self-help. Indeed, the websites of Resolver, Citizens Advice, and consumer Ombudsmen now receive millions of hits annually, and their chatline and phone assistance are also widely used. But it is clear that many people are unable to access, use, or understand online information. Moreover, as mentioned above, if they are faced with law or processes that appear complex to them, there is a need for ongoing assistance to help people advance their claim. For example, consumers and traders who had EU cross-border disputes used to use the national ECC-NET advice offices, with some success. That system was replaced when the EU online (ODR) platform was introduced for consumer claims, but it was not designed with the facility for people to talk to the experienced ECC-NET officers or for them to access case files. The ECC-NET

offices were therefore unable to intercede as they had previously between consumer and trader to reach solutions, yet people continued to ask them for assistance. Intelligent users still wanted to talk to someone to confirm even straightforward but unfamiliar instructions on the screen in front of them and ask about their options. People who had less facility would have been defeated.

The new Online Court system may enable users to talk to a case officer *after* a case has been commenced, but where do people get trusted assistance at the outset of deciding what to do about their problem? A significant function of solicitors when legal aid was widely available was in offering information, assistance, and advice, filtering out poor cases, triage, and providing assistance in bringing a complaint through a claim process. The relevance of these functions can now be seen by their absence since the withdrawal of legal aid in 2014 in employment, family, and social entitlement cases and in the rise in Litigants in Person. Solicitors are right that if their services are required then legal aid is essential. But if the State cannot fund them or other providers, new solutions have to be found.

There is an urgent need to review the advice landscape and provision of advice and assistance for both people and businesses, especially SMEs, which comprise over 99 per cent of the UK's 5.7 million businesses.⁶ A number of interesting experimental innovations have occurred. One is offering legal advice in doctors' surgeries. Another is the emergence of 'problem-solving courts' in administrative justice⁷ and in Family Drug and Alcohol Courts (FDAC)⁸ where judges, social workers, and psychologists support parents to quit addictions so as to prevent removal of their children.

But general assistance needs to be delivered at locations that people routinely visit in their everyday lives, such as supermarkets, doctors etc., rather than expecting people to seek out assistance in specialist advice centres. The system should provide an initial stage of information and help, which integrates the support from a range of specialist services — healthcare professionals,⁹ mental health nurses, debt advisers, personality counsellors, employment counselling, social entitlement assistance, and so on) — all adequately coordinated and with appropriate funding.

Function 2: The Dispute Resolution Pathway

Failure of the Adversarial Model

The adversarial model of dispute resolution is no longer fit for purpose in delivering justice for the claims that most people and most businesses have. It is based on testing facts and arguments through combat. But even civilized debate is inherently expensive. It involves too many people—initial advice, lawyers for both sides, court administrators, and a judge. An inquisitorial model involves fewer people and can be less costly, as the German civil procedure model shows. An adversarial model encourages people to mistrust and fight each other. This does not support an integrated, cooperative society.

Concern over the cost and length of legal processes has been with us for decades. Many attempts have been made to tinker with the system, but the inherent flaw in an adversarial model has not been addressed. Successive reforms of civil procedure (Woolf, Jackson, Briggs) and of funding and costs (CFAs, BTE, ATE, recoverability, QOCS, DBAs, fixed costs)¹⁰ have not solved the issues of cost or cost-proportionality and have produced a raft of major unintended consequences (Case Management Companies, referral fees, allegations of ‘compensation culture’, whiplash claims, holiday claims, access fees). The problem is actually insoluble within the existing architecture.

As John Sorabji has shown, the central aspect of Lord Woolf’s reforms was to accept that a new balance had to apply between, on the one hand, ensuring that accurate and substantive justice is done in each individual case and, on the other hand, ensuring that the state’s limited resources for delivering justice remain available to all at reasonable cost and without unreasonable delay, as a result of individual parties consuming disproportionate resource in individual cases.¹¹ Woolf was inevitably driven to seek the substantive delivery of ‘proportionate

justice’ in order to maximize the number of people and cases who obtained justice.¹² Absolute forensic justice is simply unattainable in human societies, and it is, therefore, important to maximize the number of situations in which some justice is attained rather than not.

Meanwhile, legal disputes are increasingly not raised or have migrated to pathways that are not dependent on lawyers or courts, where these exist. The number of claims issued in the High Court Queen’s Bench Division has fallen steadily from a high of 18,505 in 2007 to 8,400 in 2017.¹³ In 2016, over 80 per cent of commercial cases handled by London law firms involved an international party.¹⁴ The vast majority of large business-to-business disputes are resolved through arbitration.

The County Court Small Claims track was created to be an informal and cost-free means of dispute resolution, but it is nowadays used only for debt claims by individuals or (predominantly small) businesses (since 2018 through Money Claim Online), possession cases by (individual or corporate) landlords, plus personal injury claims that fall out of the negotiation process established under the Injury Portal, and other residual types of claims such as serious neighbour disputes.¹⁵

The Foundations of a New Vision

Three major expansions have occurred that can give rise to a new vision of dispute resolution. There has been diversification in *techniques* (mediation and other ADR techniques in addition to adjudication), in *technologies* (online process, use of artificial intelligence), and in *pathways* (Ombudsmen have replaced lawyers and courts in consumer–trader disputes, and are set to do so in the property sector; new regulatory bodies have been created for disputes involving small businesses).

1. Wider Techniques: ADR and Mediation

Alternative dispute resolution (ADR) focuses on restoring the social relationships between people through any technique other than adversarial argument and external imposition of a solution on the parties.¹⁶ A range of techniques can be used to facilitate resolution by the parties' agreement with assistance from a neutral third party. The Woolf reforms made mediation a mainstream technique and tried to prioritize it as the standard form of dispute resolution technique both before and during a court claim.¹⁷

But mediation has not solved the problem for courts. There are two reasons for this — failure to integrate mediation and mediators *into* the pathway, and hence the need for parties to pay for mediation separately. Mediation is still kept separate from the pathway that is taken by a civil claim — mediators remain independent and need to be arranged and paid for separately. Two examples of this lack of integration are in employment and family disputes.

In employment disputes, a claimant has first to notify ACAS,¹⁸ which then contacts both sides to offer its conciliation services. But it is not mandatory to use ACAS, or any other mediation provider. The claimant just needs a piece of paper before being able to start a claim in an Employment Tribunal (ET). Judicial mediation can be offered in an ET and has a 70 per cent success rate. In 2017/18, 1,300,000 people contacted ACAS. The ACAS conciliation stage resulted in resolution of 25.8 per cent of cases (plus no further action being taken in 29.6 per cent).¹⁹ However, 8.5 per cent of parties could not be contacted, 16.3 per cent declined to participate, and 19.6 per cent continued to an ET—a total of 44.4 per cent. There were only 109,364 formal notifications of claims to ETs, with 38,491 disposals and 9,489 ET decisions. If people had to pass through ACAS and be subject to a process in which automatic investigation of their case led to communication between the parties facilitated by ACAS, more cases would settle at that stage and fewer would proceed to an ET.

A further example of lack of integration of mediation is in family disputes. The Children and Families Act 2014 made attendance at a family Mediation

Information & Assessment Meeting (MIAM) mandatory before a person can make a relevant family application, save where there is evidence of domestic violence or of a risk of domestic violence.²⁰ But attending a MIAM is not the same as agreeing to a mediation. Numbers of people attending family mediation (which needs to be paid for) have remained low. Research published in 2015 found that only 19 per cent of a sample of 300 applicants had attended a MIAM before commencement of proceedings and 81 per cent had not done so.²¹ Since the withdrawal of legal aid from most family cases in 2014, the number of MIAMs has fallen dramatically.²²

In contrast, consumer Ombudsmen provide an integrated dispute resolution pathway in which mediation is a stage in a seamless process. The Consumer Ombudsman case handler's investigation of the facts by engaging with both sides inherently provides an opportunity for communication between the parties that resolves usually the vast majority of cases. Neither party needs to pay more for the 'mediation' process, it is automatically part of the pathway. The outcomes are efficient, speedy, and cost-effective resolution of cases. The consumer Ombudsman process can assist in rebuilding consumer loyalty and trust with traders.²³

2. New Technologies: Digitization

All significant dispute resolution processes have or are adopting online processes. The courts and tribunals in UK are undergoing a 'hugely ambitious'²⁴ £1.2 billion upgrade with adoption of online technology and the creation of HM Online Court.²⁵ This massive project is being undertaken in discrete steps and is accompanied by experimentation in new ways of working that are being trialled for particular areas. The techniques include digital files, online processes, case management by officials or judges, and hearings by telephone and now also online. All of these changes would reduce cost and time.

Some areas are already a success, such as the upgraded Money Claim Online (MCOL) service,²⁶ which issued over 25,000 claims between March and September 2018, with the ability for without prejudice offers to be made and accepted, and with 90 per cent of users being satisfied or very satisfied.²⁷

Another example is the Intellectual Property Enterprise Court (IPEC), the streamlined procedure of which has scale-recoverable costs for cases up to £250,000, generally capped at £50,000, and robust case management.²⁸ A small claims track applies where the value of the claim is not more than £10,000.²⁹ The model is being piloted from January 2019 in some other Business and Property Courts.³⁰

But going online does not solve the overall problem — because others already use the same technology, and other mechanisms can be preferable to the court pathway for a number of reasons, as will appear below. Online dispute resolution has been around for over a decade, such as in Online Dispute Resolution (ODR) platforms operated in-house by online traders or by commercial providers. Every leading consumer Ombudsmen in the UK adopted online processes some years ago and have continued to develop sophisticated IT and artificial intelligence that can assist consumers, traders, and Ombudsmen in analysing and resolving the substance and emotional impact of cases.³¹ We will discuss below the considerably increased functions that effective Ombudsmen deliver, beyond dispute resolution.

Another example of early adoption of IT was the Injury Portal³² developed by the insurance industry to be the single entry port for road traffic injury claims over £1,000 and with an upper limit of £25,000, roughly from 2010, and from July 2013 extended to Employers' Liability and Public Liability claims valued at under £25,000. The online format provides standard information fields and expert reports, fixed recoverable costs, and has been a success with a significant percentage of cases settled without court involvement. In 2017/18, 701,638 claims entered the system, 171,734 packs were created for approval of settlement by the court, and 73,823 packs were created for continuing in the litigation process, the remainder being dropped or agreed. The Portal has been in effect restricted to use by lawyers, but a new model is under development for claimants to use in person. It would be interesting to see if trust or settlement were increased if there were an independent intermediary involved, rather than the current basic model of negotiation between claimant/lawyer and insurer.

A notable similarity is emerging across the processes adopted by different online dispute resolution systems. It should not be surprising that a switch to a digital process transcends a paper-based adversarial process. Thus the online modes of operation of the Traffic Penalty Tribunal, all leading consumer Ombudsmen, the British Columbia Civil Resolution Tribunal, the Online Court, and Tribunals such as the Social Entitlement Chamber and Immigration and Asylum Chamber have strong similarities in use of online application pages, uploading of evidence, accessibility between parties and the judge, electronic taking of evidence, and so on. In those systems with significant throughput, case management is typically undertaken by case officers, sometimes assisting ultimate decision-makers. The process often includes communication between the case officer and both parties that can form the basis of mutual explanation and mediated negotiation.

Sir Geoffrey Vos, Chancellor of the High Court, said in 2018:

*So far as disputes are concerned, technology must change the way we deal with them. ... the millennial generation, which expect to be able to obtain everything they want in an instant on their mobile devices, will not make an exception for justice. ... This online world has allowed the litigant in person to flourish. ... In my view, online dispute resolution, mediation and ombudsman platforms will absorb much of the small legal work in years to come.*³³

3. New Pathways

Various types of disputes have migrated to new pathways, involving new intermediaries. People choose alternatives that are perceived to be more accessible, user-friendly, free, quick, and effective. Examples have occurred in disputes involving consumers, tenants, SMEs, and employees, each of which are outlined below.

Consumers

Consumer claims are now rarely brought in County Courts and Small Claims tracks but through a combination of complaining direct to traders, using an online complaint platform (such as that of

Citizens Advice and especially Resolver³⁴), and then to a sectoral Ombudsman. Electronic files can be passed on between a platform and an Ombudsman, without the consumer or trader having to start again. In 2018, seven of the leading consumer Ombudsmen received over 2 million contacts from consumers, compared with roughly 2 million cases of *all types* started in County Courts. For many disputes, the consumer Ombudsmen, who are typically *free* to consumers, aim to resolve issues faster than County Courts, whose average times in the last quarter of 2018 for those cases that went to trial was 34.4 weeks after issue for a Small Claim and 57.7 weeks for Fast and Multi-Track claims.³⁵ Given more attractive choices, consumers have voted with their feet.³⁶

Although private Ombudsmen are ultimately funded by business sectors, they are regulated to ensure appropriate independence and governance, such as ensuring their structural and operational independence from funders, transparency, and increasing professionalism of the profession of Ombudsmen.

Consumer Ombudsmen and regulatory authorities have also been highly successful in delivering large sums to consumers, and much more swiftly and cheaply than collective litigation procedures.³⁷ This regulatory technique is now commonplace, and especially effective when the Ombudsman and regulator work together. Consumer Ombudsmen can respond to multiple individual cases in a number of ways.³⁸ They are good at processing multiple similar small claims, as has been demonstrated by their handling hundreds of thousands of payment protection insurance (PPI) claims. Second, many UK regulatory authorities have delivered mass redress extremely swiftly, either as a result of exercise of powers to order collective redress, or to accept undertakings to that effect.³⁹

Property

A similar revolution is likely in the property sector, prompted by the introduction of one or more new regulators who apply new statutory Codes of Practice, and the creation of a single information and disputes pathway involving a single portal plus the Property Tribunal and various Ombudsmen, ideally

integrated. After a consultation in 2018 based on the premises that the landscape was confusing and had various gaps and inconsistencies,⁴⁰ the Government set out in January 2019 a general vision for a new integrated 'service to cover all housing consumers including tenants and leaseholders of social and private rented housing as well as purchasers of new build homes and users of all residential property agents'.⁴¹ It would be fronted by a Housing Complaints Resolution Service that would provide a single point of access for information and redress.

SMEs

New intermediaries have been created to address various problems of SMEs, either generically (late payment by major customers) or in sectors (abuse of tied tenants by pub owners):⁴² the Groceries Code Adjudicator (GCA),⁴³ the Pubs Code Adjudicator (PCA),⁴⁴ and the Small Business Commissioner (SBC).⁴⁵ These bodies have been given a number of powers, such as the ability to provide mediation or arbitration services but also to investigate evidence and demand changes in compliance with codes of good practice. Since suppliers to large supermarkets fear retaliation if they object to their major customers about late payment, the GCA has power to inspect the practices of supermarkets without revealing any individual complainant. This model has achieved notable success in improving the practices of the major supermarkets in compliance with the statutory Code.⁴⁶

The success of new intermediaries and pathways suggests the need to reform other types of disputes. Leading candidates are clinical injuries, claims by citizens against the State, and employment disputes, as summarized below.

Clinical Injuries

Under the current system, patients who are injured whilst under the care of the NHS must bring a claim alleging negligence and must pursue and establish their claim through an adversarial, polarizing system that obstructs patients from accessing information, fails to offer engaged care, incurs huge cost for both patients and the NHS, and leads to an NHS culture of blame, fear, and lack of openness that does not support learning and improvement.

The vast majority of claims against the NHS involve small sums: in 2017/18, 63 per cent of successful claims were for less than £25,000.⁴⁷ The system takes time and effort (and hence cost) to investigate claims in which the legal test depends on whether or not negligence has occurred. Disproportionality inevitably arises between costs and possible benefits. The test inevitably means that a significant number of clinical negligence claims will fail (45 per cent in 2017/18).⁴⁸ Once they have been investigated, many can be resolved fairly swiftly, but a significant number reach trial, of which a high percentage fail. In 2017/18, 69.6 per cent of the 16,338 clinical claims were resolved without formal court proceedings, and in the early stages more claims were resolved without payment of damages than with payment of damages.⁴⁹ Just under one third of claims end up in litigation, with less than 1 per cent going to a full trial (where most end in judgment in favour of the NHS).

Reasons why people bring legal claims include where they perceive it as the only option through which they can reach the truth, or hold someone to account, or ensure that 'the same thing does not happen to others', especially if they perceive that they were denied a caring and open response.⁵⁰ Alternative approaches that are caring, fully open, and which provide learning would improve responses for patients and families and be more effective than litigation as the sole option currently available. But we retain an adversarial system based on investigating and proving fault, both of which drive people apart and ferment mistrust rather than understanding and healing. The logic points towards an improved approach to responding to complaints and switching injury claims to being decided by a trusted independent intermediary, such as an Injury Ombudsman akin to an administrative redress scheme, as used with great success in all Nordic states.⁵¹ The continuation of a negligence test and an adversarial compensation system is a major barrier preventing the establishment of an 'open culture' in the NHS, as it wishes to do.⁵²

Citizens and the State

Too many citizens have problems when they interact with the State but fail to complain or take matters further. Major reasons are lack of (and asymmetry in)

resources and power, feelings of helplessness, cost and time involved, and the belief that nothing would change.

A 2015 survey found that although most people believe you should complain if you are unhappy about a public service (90 per cent), just one third of people (34 per cent) who were unhappy after using a public service in the Ombudsman's remit had actually made a complaint, leaving 64 per cent who did not complain despite being unhappy.⁵³ Of the main reasons why people who felt unhappy with a public service did not complain, 29 per cent thought that complaining does not make a difference, 14 per cent thought it would be more hassle than it was worth, 9 per cent felt it would be too time consuming, 7 per cent did not know where to go to make a complaint, and 6 per cent did not think it would be taken seriously.

A large survey of legal needs in England and Wales in 2014/15 found that people tackled their problems in a variety of ways: 35 per cent obtained legal advice; 34 per cent tried to tackle them alone, 15 per cent got help from family or friends, while 13 per cent did nothing.⁵⁴ Almost one in ten such needs were handled alone for 'fear that doing otherwise would cost too much — either the cost of an adviser's service or the cost of court fees.'⁵⁵

A 2016 Citizens Advice survey found that as many as 15 million people who had a poor experience with a public service had not registered the problem as a complaint and that people generally do not make formal complaints after poor public service.⁵⁶

Citizens Advice reported a 63 per cent increase in requests for help to complain about public services over the previous four years; 45 per cent of people having experienced poor public service recently, but only 22 per cent of them going on to make a formal complaint. However, 73 per cent used informal channels to share their frustrations, with one in five younger people turning to social media. Citizens Advice has reported that the feedback and insights of specific groups is being missed.

There are too many options. The complaint mechanism for every Department of State is different, there are different appeal mechanisms

inside and outside bodies, including to many Tribunals and public Ombudsmen, and judicial review, all with different criteria and procedures. This complex and confusing system is ripe for reform and simplification.

Employment

In the employment area, a sequence of new regulatory authorities has been created, replacing the private enforcement model to protect workers from abuse. The authorities include the Equality and Human Rights Commission to address breaches of human rights exploitation and equality legislation, the Gangmasters and Labour Abuse Authority (GLAA) to deal with labour exploitation across the

economy, notably under the Modern Slavery Act,⁵⁸ the section in HM Revenue and Customs that enforces the National Minimum Wage⁵⁹ and National Living Wage laws, and the Employment Agency Standards (EAS) Inspectorate to enforce regulations covering employment agencies, particularly focusing on vulnerable agency workers. The last three of these agencies are coordinated under the Director of Labour Market Enforcement,⁶⁰ and there is a proposal that they be merged, making possible the simplification of employment law into a statutory Code overseen by a generic regulator. The information and dispute resolution pathway could be unified by expanding the role of ACAS, then linking directly into the Employment Tribunal.

Function 3: Delivering Change to Reduce Future Risk

It is not enough for a State to ensure that the disputes that arise are justly and fairly resolved. It is important to use the information gathered to reduce the incidence of similar problems and the risk of future problems. Users have related to a number of agencies that they want the system to change and improve:

- The Public Accounts Committee reported in December 2017 that 'There is a growing body of evidence that when things go wrong many people simply want an apology, or want to know that the issue is being dealt with and it won't happen again.'⁶¹
- The Parliamentary and Health Service Ombudsman (PHSO) stated in 2015: 'People bring their unresolved complaints to us because they want an explanation, an apology and for the service to improve for others.'⁶²
- Citizens Advice reported in 2016 that 52 per cent of people who experienced poor public service said they didn't complain because they felt 'it wouldn't change anything.'⁶³

The historical theory is that enforcement of breaches of law, whether by public or private means, produces future observance, largely through an undue emphasis on the power of deterrence. However, empirical evidence and behavioural science on why people observe or break rules shows that deterrence plays a limited (or no) role in affecting future behaviour, and that other incentives and mechanisms, notably organizational culture, are far more effective.⁶⁴

What is required is a system that captures extensive information on problems (whether they are concerns or formal claims), feeds the aggregated data back (publicly and otherwise), and provides for internal and external interventions in organizations, directed at affecting behaviour and especially culture.

Decisions by courts or arbitrators do not change behaviour or culture. More sophisticated intervention systems are needed, which we generally find operating through sophisticated organizational and public regulation regimes and rarely through private enforcement systems.

Merely publicizing problems is usually not enough. For many years, the public Ombudsmen and Tribunal Judges have highlighted repeated problems with public services in detailed Reports, calling for change, but little occurs. Some recent examples are as follows. A Report by Justice⁶⁵ highlighted poor decision-making by the Home Office in immigration and asylum appeals leading to some 50 per cent of decisions not being upheld on appeal in the First-tier Tribunal (Immigration and Asylum Chamber), compared with 25 per cent historically.⁶⁶ One in four complaints to the Parliamentary Ombudsman in 2016/17 related to failure in decision-making.⁶⁷ The Local Government and Social Care Ombudsman has set itself the goal 'to move the conversation about our work away from simplistic complaint volumes, to the lessons that can be learned and the wider good we can achieve through our recommendations to improve services for the many'.⁶⁸ Innumerable reports have been issued about the NHS, from within⁶⁹ and outside,⁷⁰ with seemingly little impact on culture. Academic studies reach similar findings, such as Halliday's study of three local authorities' approaches to decision-making regarding homelessness, which showed considerable variation in organizational approaches and ability to internalize any learning from judicial review decisions.⁷¹

In contrast, consumer markets work well where businesses, Ombudsmen, and regulatory authorities work as part of a coherent integrated system to identify data, feed it back, intervene, and make changes to reduce future risk. Results are improved where the focus is expressly on an open, ethical

culture.⁷² Dispute resolution systems need to operate as part of larger systems that are directed at identifying problems, especially through aggregation of data, and supporting interventions to deliver changes in behaviour and culture. Dispute resolution systems need to be integrated with regulatory systems, so as to use data to drive the ability to identify and address possible improvements in performance, behaviour, and culture.

Examples of good practice of such information-sharing initiatives include the Financial Ombudsman Service's publishing data on the types of complaints

made against named banks. It holds regular meetings with the Financial Conduct Authority and with individual banks to feed back findings from their data. In the energy sector, tripartite working occurs between the regulator Ofgem, the Energy Ombudsman, and Citizens Advice, wherein data is shared and an action plan is agreed to determine who will do what in working with the relevant company, and who will act to reduce consumer detriment. The Ombudsman also uses the economic stress model to analyse if any companies might be at risk of liquidation and which others might be best placed to take over the customer base if needed.

Implications for Policy

The dispute resolution landscape now comprises many options — courts, tribunals, numerous regulatory bodies, various kinds of Ombudsmen, private arbitrators, and many mediators, some of whom are organized into structures (like ACAS for employment cases) but many of whom are not (in family and commercial cases). All of these bodies and pathways comprise a *single* justice system—and should be considered as such. But this diversity and complexity now requires integration and simplification.

A new vision of the justice system is required. The system is now too complex, and not delivering justice often enough, nor contributing to reducing the future incidence of problems. In reviewing the design of the system, it is important not to consider limited options (such as courts or lawyers) but to observe the first rule of policy analysis and Better Regulation, which is to consider *all* the options.⁷³

We need a system that delivers three elements for people and organizations: assistance in problem-solving, dispute resolution, and learning and improving.

A new system could save considerable costs. Some facilities need to be organized and funded by the State. But disputes involving consumers, properties, and businesses can be funded by businesses, as most consumer Ombudsmen are now. But both users and payers rightly require the speed and efficiency that is delivered by new mechanisms, technology, and techniques. They also expect the system to deliver not just dispute

resolution but also provision of easily accessible information, advice, and support, and arrangements that deliver a reduction of future risk.

The system should also support a cohesive society. A fundamental review by the Legal Services Board concluded that access to justice is fundamentally about *outcomes and relationships* more than legal processes.⁷⁴ It noted:

*justice is more than the resolution of disputes: it includes just relationships underpinned by law. ... Justice is underpinned by legal knowledge, legislative frameworks, dispute resolution and the infrastructure of the legal services market and the court system as well as by the outcomes that consumers secure. Access to justice is the securing of these just outcomes rather than the process of dispute resolution.*⁷⁵

The national dispute resolution system needs fixing. Justice is too often not satisfactorily delivered — access to justice is not enough, it needs to be *delivered* so as to successfully resolve disputes rather than just offering a means by which to raise them. The current system fails to solve the root causes of problems, to support learning, and to prevent future problems from arising. The landscape of advice for citizens, tenants, consumers, families, workers, and small businesses is disorganized and confusing. The right assistance is not being delivered in an effective and timely fashion. Every taxpayer is paying for the right to a well-functioning mechanism for resolving disputes, and it is paramount that the whole system should be both effective and efficient. It is time for change.

Notes

- ¹ C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England & Wales* (Hart, 2019).
- ² R. Franklyn, T. Budd, R. Verrill, and M. Willoughby, *Findings from the Legal Problem and Resolution Survey, 2014–15* (Ministry of Justice, 2017).
- ³ H. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart, 1999) and subsequent studies.
- ⁴ Franklyn et al., *Findings from the Legal Problem*. See earlier *Evaluation: How can we measure access to justice for individual consumers? A discussion paper* (Legal Services Board, 2012).
- ⁵ *Getting it Right in Social Welfare Law*. The Low Commission's follow-up report (The Low Commission, 2015).
- ⁶ C. Rhodes, *Business Statistics. Briefing Paper* (House of Commons Library, 2017). An SME is defined as employing up to 249 people.
- ⁷ *Problem-solving courts: An evidence review* (Centre for Justice Innovation, 2015).
- ⁸ J. Harwin, B. Alrouh, M. Ryan, and J. Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014).
- ⁹ S. Beardon and H. Genn, *The Health Justice Landscape in England & Wales. Social welfare legal services in health settings* (UCL Centre for Access to Justice, 2018).
- ¹⁰ Conditional Fee Agreements; Before-the-Event costs insurance; After-the-Event costs insurance; Damages-Based Agreements; qualified-one-way-cost-shift rules.
- ¹¹ J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014).
- ¹² *Ibid.*, 21.
- ¹³ See successive quarterly Ministry of Justice *Civil Justice and Judicial Review Tables*, and *Civil Justice Statistics Quarterly*.
- ¹⁴ The Lord Chancellor, the Lord Chief Justice, and the Senior President of Tribunals, *Transforming Our Justice System* (Ministry of Justice, 2016).
- ¹⁵ See *Civil Justice Statistics Quarterly, England and Wales, October to December 2018 (provisional)* (Ministry of Justice, 2019).
- ¹⁶ S. Roberts and M. Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (Cambridge University Press, 2005).
- ¹⁷ Civil Procedure Rules 1999, inspired by Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1995); Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996).
- ¹⁸ See Employment Tribunals Act 1996 ss. 18, 18A and 18B.
- ¹⁹ *Good Work Plan* (HM Government, 2018), 36.
- ²⁰ Children and Families Act 2014, ss. 1 and 10. See *A Brighter Future for Family Justice: A round up of what's happened since the Family Justice Review* (Department for Education and Ministry of Justice, 2014).
- ²¹ B. Hamlyn, E. Coleman, and M. Sefton, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes: Quantitative research findings* (Ministry of Justice, 2015).
- ²² *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum. Submitted to the Justice Select Committee on 30 October 2017* (Ministry of Justice, 2017) Cm 9486, para 161.
- ²³ From 2014, Ombudsman Services resolved some disputes with energy and communications companies within thirty minutes. The LPRS study found that problems with purchasing goods and services were resolved more quickly than those involving relationship break-up or personal debt: Franklyn et al., *Findings from the Legal Problem*.
- ²⁴ House of Commons Committee of Public Accounts, *Transforming courts and tribunals*, Fifty-Sixth Report of Session 2017–19, HC 976, 20 July 2018.
- ²⁵ See *Spending Review and Autumn Statement 2015: key announcements* (HM Treasury, 2015); *Response to the proposal on the provision of court and tribunal estate in England and Wales* (Ministry of Justice and HM Courts & Tribunals Service, 2016); *Modernisation of justice through technology and innovation* (HM Courts and Tribunals Service, 2016); Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016); *Early progress in transforming courts and tribunals* (National Audit Office, 2018); *HMCTS response to Public Accounts Committee report on court reform programme*, 20 July 2018, at <https://www.gov.uk/government/news/hmcts-response-to-public-accounts-committee-report-on-court-reform-programme>
- ²⁶ <https://www.moneyclaim.gov.uk/web/mcol/welcome>. See *Money Claim Online (MCOL) — User Guide for Claimants*.
- ²⁷ *Reform Update. Autumn 2018* (HM Courts & Tribunals Service, 2018), 12.
- ²⁸ CPR, Part 45 rules 45.30–45.32 and see also PD 45 Section IV.
- ²⁹ CPR, Part 63 rule 72.
- ³⁰ *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals* (Ministry of Justice, 2019), ch 7 para 3.
- ³¹ Ombudsman Services has undertaken a Transformation Programme in 2018 which has switched 70 per cent of consumer traffic from phone to online. The technology assists in identifying vulnerable consumers. The Financial Ombudsman Service developed a digital analytical tool to assist with processing the large number of Payment Protection Insurance claims that it received: see R. Thomas, *The impact of PPI mis-selling on the Financial Ombudsman Service* (2016). <http://www.claimsportal.org.uk/>.
- ³² Sir Geoffrey Vos, 'The Law Society's Inaugural Lecture on the Future of Law', 8 May 2018.
- ³³ www.resolver.co.uk. Resolver has grown massively since commencing in 2014, and in 2018 its 15 million site visits and 1,400,000 case files exceed the traffic of Citizens Advice, which in 2017/18 advised 1.4 million clients.
- ³⁴ *Civil Justice Statistics Quarterly, England and Wales, October to December 2018 (provisional)* (Ministry of Justice, 2019).
- ³⁵ The regulatory model was enshrined in EU legislation under Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).
- ³⁶ C. Hodges and S. Voet, *Delivering Collective Redress: New Technologies* (Hart, 2018), ch 5.
- ³⁷ C. Hodges, 'Best Practice in Customer Care in UK', in C. Hodges, I. Benöhr, and N. Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).
- ³⁸ C. Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques', *European Review of Private Law* 23 (2015): 829–74.
- ³⁹ *Strengthening consumer redress in the housing market. A Consultation* (Ministry of Housing, Communities & Local Government, 2018).
- ⁴⁰ *Strengthening Consumer Redress in the Housing Market. Summary of responses to the consultation and the Government's response* (Ministry of Housing, Communities & Local Government, 2019).
- ⁴¹ R. Blackburn, J. Kitching, and G. Saridakis, *The legal needs of small businesses: An analysis of small businesses' experience of legal problems, capacity and attitudes* (Legal Services Board, 2015); *Tied Up. Unravelling the Dispute Resolution Process for Small Firms* (Federation of Small Businesses, 2016); *Treating Smaller Businesses Like Consumers — Unfair Contract Terms* (Federation of Small Businesses, 2017); K. Larkin, V. Clarke, C. McDonnell, and M. Turner, *The legal needs of small businesses 2013/2017* (BMG Research, 2018).
- ⁴² See *GCA compliance and monitoring policy* (Groceries Code Adjudicator, 2016).
- ⁴³ The Small Business, Enterprise and Employment Act 2015, Part 4. The Pubs Code etc. Regulations 2016, SI 2016 No. 790.
- ⁴⁴ Enterprise Act 2016, s1.
- ⁴⁵

-
- ⁴⁶ *Groceries Code Adjudicator Annual Report and Accounts 2015–2016* (Groceries Code Adjudicator, 2016); Press release, GCA achieving significant progress for suppliers (Groceries Code Adjudicator, 2016); 62 per cent in 2016, 70 per cent in 2015, 79 per cent in 2014; Investigation into Co-operative Group Limited (Groceries Code Adjudicator, 2019).
- ⁴⁷ *Annual Report and Accounts 2017/18* (NHS Resolution, 2018).
- ⁴⁸ *Annual Report and Accounts 2017/18*.
- ⁴⁹ *Annual Report and Accounts 2017/18*.
- ⁵⁰ For a recent overview of extensive research, see Y. Birks, F. Aspinall, and K. Bloor, *Understanding the drivers of litigation in health services* (University of York and The King's Fund, 2018).
- ⁵¹ S. Macleod and C. Hodges, *Redress Schemes for Personal Injuries* (Hart, 2017).
- ⁵² Rt Hon Jeremy Hunt MP, Speech at Global Patient Safety Summit, Lancaster House, 10 March 2016, <https://www.gov.uk/government/speeches/from-a-blame-culture-to-a-learning-culture>; House of Commons Public Administration and Constitutional Affairs Committee, *Will the NHS ever learn? Follow-up to PHSO report 'Learning from Mistakes' on the NHS in England Seventh Report of Session 2016–17* (2018) HC 743, 17 January 2017.
- ⁵³ *What do people think about complaining?* (Parliamentary and Health Service Ombudsman, 2015).
- ⁵⁴ *Online survey of individuals' handling of legal issues in England and Wales 2015* (Ipsos MORI, 2016). 54 per cent of all those who responded had experienced at least one legal issue in the previous three years.
- ⁵⁵ *Ibid.*
- ⁵⁶ *Learning from mistakes: How complaints can drive improvements to public services* (Citizens Advice, 2016).
- ⁵⁷ *Ibid.*
- ⁵⁸ Immigration Act 2016.
- ⁵⁹ The National Minimum Wage Act 1998, as amended, including by the Employment Act 2008. See *National Minimum Wage and National Living Wage. Calculating the minimum wage* (Department for Business, Energy & Industrial Strategy, November 2018).
- ⁶⁰ Director of Labour Market Enforcement, *United Kingdom Labour Market Enforcement Strategy 2018/19* (HM Government, 2018).
- ⁶¹ House of Commons, Committee of Public Accounts, *Managing the costs of clinical negligence in hospital trusts*, Fifth Report of Session 2017–19, HC 397, 1 December 2017, para 5.
- ⁶² *RESOLVE News from the Ombudsman Service* (PHSO, December 2015).
- ⁶³ *Learning from mistakes: How complaints can drive improvements to public services* (Citizens Advice, 2016).
- ⁶⁴ C. Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Culture and Ethics* (Hart Publishing, 2015).
- ⁶⁵ *Immigration and Asylum Appeals — a Fresh Look* (Justice, 2018).
- ⁶⁶ Ministry of Justice, *Tribunals and gender recognition statistics quarterly: October to December 2017*, Main Tables (October to December 2017), Table FIA.3 Q3 2017/18.
- ⁶⁷ *Ibid.*, 7.
- ⁶⁸ *Building for the future. Annual report and accounts 2017–2018* (Local Government & Social Care Ombudsman, 2018).
- ⁶⁹ Recent examples: *Gosport War Memorial Hospital: The Report of the Gosport Independent Panel* (2018); A. Oates, *Learning from suicide-related claims. A thematic review of NHS Resolution data* (NHS Resolution, September 2018); M. Hutton, *Spinal Services. GIRFT Programme National Specialty Report* (NHS Improvement, 2019).
- ⁷⁰ *Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005–March 2009. Volume I. Chaired by Robert Francis QC*, HC375-1 (2010); *A promise to learn — a commitment to act. Improving the Safety of Patients in England* (National Advisory group on the safety of Patients in England, 2013); K. Evans, "Using the Gift of Complaints": *A Review of Concerns (Complaints) Handling in NHS Wales* (Welsh Government, 2014); Public Administration Select Committee — Sixth Report: *Investigating clinical incidents in the NHS*, 24 March 2015; *Learning not blaming: The government response to the Freedom to Speak Up consultation, the Public Administration Select Committee report 'Investigating Clinical Incidents in the NHS', and the Morecambe Bay Investigation* (Department of Health, 2015).
- ⁷¹ S. Halliday, *Judicial Review and Compliance with Administrative Law* (Hart, 2004).
- ⁷² C. Hodges and R. Steinholtz, *Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement* (Hart, 2017).
- ⁷³ See *Professional Policy Making for the Twenty-First Century* (Cabinet Office Strategic Policy Making Team, 1999); *The Green Book: Appraisal and Evaluation in Central Government* (HM Treasury, 2003); H. Bochel and S. Duncan (eds), *Making Policy in Theory and Practice* (Policy Press, 2007); *Principles for Economic Regulation* (Department for Business Innovation & Skills, April 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.
- ⁷⁴ *Evaluation: How can we measure access to justice?*
- ⁷⁵ *Ibid.*, para 3.6.

The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

Christopher Hodges is Professor of Justice Systems and Head of the Swiss Re/CMS Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford, and a Supernumerary Fellow of Wolfson College. His latest books are *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart, 2019); (with Russell) *Regulatory Delivery* (Hart, 2019); (with Voet) *Delivering Collective Redress* (Hart, 2018); *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart, 2016); (with Benöhr and Creutzfeldt) *Consumer ADR in Europe* (Hart Publishing, 2012); (with Stadler) *Resolving Mass Disputes* (Edward Elgar, 2013).

For further information please visit our website at www.fljs.org or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

FLJS+

www.fljs.org