Oven ready?

In this election year, **Andrew Hogan** has some cheap and easy suggestions for improving access to justice

The year 2024 is passing. It is an election year. At the time of writing, the opinion polls show the Labour Party on 47%, the Conservatives on 20%, the Liberal Democrats on 9%, the Greens and Reform UK level pegging on 8% (www.ipsos.com/en-uk/uk-opinion-polls). Although an electoral race is never over until it is over, the smart money is that the next administration will be a Labour one.

Whatever the political stripe of the next administration, it faces a long series of unenviable tasks. But it can be forgotten that before the modern period, government's role was far more limited: defence of the realm, a sound coinage, and the provision of law and order.

It is the last of these irreducible minima of government provision that is the concern of this article. If we take the provision of access to justice for civil disputes as one of the topics wrapped up in the overall provision of law and order, it is readily apparent to those who work in the civil justice system that it is in a state of crisis, and at the current time my prognosis is that things are likely to get worse.

A new government will not have a magic wand to make things better over night: moreover, it will have no money, due to the direct financial straits that the economy is in, with a multiplicity of other demands for public expenditure.

Instead, within the confines of this article let use explore what concrete steps a new government might take (1) within the first 12 months of office to improve access to civil justice, on the basis that (2) it must not involve significant public expenditure and (3) such steps should be achievable through secondary legislation, rule changes and practice directions, rather than requiring primary legislation and (4) the emphasis should be on facilitating access to justice to make existing rights real and practical, not creating substantive new rights or duties or imposing fresh burdens through changes to substantive law.

DEFINING ACCESS TO JUSTICE

At its simplest, access to justice refers to the ability of persons to obtain a fair and just resolution of their disputes through a settled and predictable legal system. It involves ensuring that people have the knowledge, resources, and services to address legal issues, navigate the legal system, and achieve a just outcome. Very broadly, this will encompass ensuring the availability of legal representation, legal information, fair legal processes, and the effective enforcement of decisions.

INCREASING ACCESS TO JUSTICE

There are many ways by which access to justice could be increased, but many of these will fall short of the four requirements I have identified above. Thus, while increasing the population's general awareness of their rights and remedies through legal education might be seen as a 'good thing', this will take far longer than 12 months; and if delivered through the education system, many years.

Alternatively, facilitating legal representation or assistance by making legal services more affordable through expanding legal aid, or encouraging pro bono services, or most controversially capping the amounts lawyers can charge, through scale fees, might help those who cannot otherwise afford legal representation - but would either not be affordable, or not be deliverable within 12 months.

Simplifying legal processes is attractive in theory, but past attempts always fall short both in the concept and the delivery. The failure of the Woolf Reforms is obvious whenever you pick up the latest version of the White Book containing the Civil Procedure Rules: now longer and more detailed than the Rules of the Supreme Court or County Court rules ever were; but this always takes years of consultation and implementation.

Technology and innovation are promising, and each year one reads articles about how online dispute resolution, the online court legal apps, and other technological innovations can make legal assistance more accessible and efficient. But these are costly innovations, and what is required is something that is achievable without substantial public expenditure.

But perhaps the answer is as much political as it is legal, or at least economic in its approach. If the public sector is falling short in its delivery of justice, can the private sector come to the rescue, with its reserves of capital and expertise, motivated by the profit motive? In this respect, alternative dispute resolution (ADR) such as mediation and arbitration might provide more accessible, quicker, and less costly ways of resolving disputes; but at the moment there is a shortage of incentives for their adoption, and the provision of ADR is sporadic, rather than systematic at the level of individual cases.

There are potentially any number of barriers hindering or precluding people from enjoying access to justice, but I would identify two principal ones at the moment. The first is the court system for administering justice, which is simply not fit for purpose, as it is slow and inefficient. The second is the cost of justice, principally civil litigation, which acts as a barrier to entry, often closed in the face of those who need justice most.

COURT SYSTEM AND ADMINISTRATION OF JUSTICE

The courts of England and Wales face challenges that can slow down their operations and affect their efficiency in delivering access to justice. Three significant problems contribute to these delays and inefficiencies.

First, limited resources and funding: courts operate with finite resources, which leads to shortages in judicial and administrative staff, outdated technology, and inadequate physical infrastructure. This underfunding strains the system, making it difficult to process cases efficiently, leading to delays in scheduling hearings and prolonged resolution times.

Second, there are high case volumes. The volume of cases entering the judicial system frequently exceeds the capacity of courts to process them in a timely manner. This is compounded by the increasing complexity of some legal issues, requiring more detailed investigation and longer hearings. The rise in case volumes can be attributed to various factors, including legislative changes that impact the number of disputes coming to court, and societal changes that lead to new types of legal disputes.

Third, and above all, the administration suffers from inefficient case management and administrative processes. Inefficiencies in case management and administrative procedures can significantly contribute to delays. This includes manual and paper-based processes, inefficient allocation of cases to judges, and a lack of coordination in scheduling hearings and managing courtrooms. The reliance on traditional methods of communication and documentation can also slow down proceedings, especially when compared to the potential speed and efficiency of digital and online systems.

Addressing these issues would require money. On the basis that this is not available, the alternative is to encourage or require people who would use the state system to go private. This means taking cases out of the overburdened system through increased use of ADR. Encouraging or mandating the use of ADR mechanisms such as mediation and arbitration for certain types of civil disputes would significantly reduce the number of cases that reach trial. ADR can provide quicker, more cost-effective resolutions for parties, freeing up court resources and reducing backlogs.

THE ENGLISH RULE

The other great barrier to justice is the 'loser pays' system, also known as the 'English Rule' for legal costs, where the losing party is required to pay the winning party's legal costs. This rule is both a problem and an opportunity, in terms of facilitating or hindering access to justice.

On the one hand it can lead to the deterrence of frivolous litigation, both the pursuit of hopeless cases and the maintenance of hopeless defences. It can also promote settlement by encouraging people to resolve their cases out of court and avoid paying their opponent's costs or limiting their exposure to such costs. It also represents a perfect and early example (dating from 1275 at least) of the 'polluter pays' principle: for the party that has been wronged, the system of shifting costs to the losing party ensures that the winning party is better compensated, as they are not out of pocket for seeking justice.

But there are arguments that cut the other way too. The costs rules can be a barrier to the pursuit of justice. The risk of having to pay the other side's costs if the case is lost can be a significant deterrent for individuals with legitimate claims, particularly if they are of limited

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financial means. This fear can prevent individuals from accessing the legal system to assert their rights or defend themselves against wrongful claims.

The system can disproportionately adversely affect individuals and smaller entities when they are up against financially stronger opponents. Wealthier parties may engage in strategic litigation, using the threat of substantial legal costs to pressure the other side into abandoning their claim or defence, regardless of its merits.

Although there are insurance products available to mitigate the risk of paying the opponent's costs (such as after-the-event insurance), these can be expensive and may not be accessible to all. Further, the system has given rise to third-party litigation funding, which can help with accessing justice, but also introduces complexities and costs of its own.

At the current time, the system is too tilted in favour of wealthy and powerful litigants, who can outspend their opponents, with a commensurate risk that substantive legal rights will not be pursued by consumers or other individuals because they fear the costs consequences of losing too much. Thus, access to justice for individuals can be increased by 'tilting' the costs rules in their favour.

So with these thoughts in mind, let us offer an incoming administration three 'oven ready' reforms that would increase access to justice and comply with the four criteria noted above.

MANIFESTO FOR CHANGE

Increasing costs penalties for failing to use mediation or other ADR

In the recent case of *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416 the Court of Appeal concluded that the courts had power to compel parties to undertake mandatory ADR. However, the consideration of this power was at a high level of principle with no detail as to when, how, for how long the court should do so, and what the potential sanctions might be for refusing to engage in the process, or not engaging in it meaningfully. What is required is the promulgation of a Practice Direction referenced to part 1 CPR.

In a case involving individuals such as a boundary dispute, this could provide for a mandatory session with a mediator that informs them about the mediation process, its benefits, and its success rates in comparable cases.

It could mandate that parties attempt mediation before being allowed to schedule a trial date. Failure to comply without a valid reason could result in cost penalties. In order to make it 'sting' a party failing to comply should lose 50% of their costs, even if successful.

Taking cases out of the system and state sponsored arbitration

Justice delayed is justice denied. But the Ministry of Justice statistics (tinyurl.com/4n584u8d) speak volumes about the level of delay in the civil justice process: 'The mean time taken for small claims and multi/fast track claims to go to trial was 55.8 weeks and 85.7 weeks, 4.3 and 6.9 weeks longer than the same period in 2022 respectively. Compared to 2019, these measures are 18.7 weeks longer for small claims and 24.7 weeks longer for multi/fast track claims.'

Instead, a new Practice Direction after part 3 of the Civil Procedural Rules should give the parties direction to voluntary arbitration. Parties could be offered the option to resolve their disputes through arbitration in accordance with the Arbitration Act 1996. This would be a voluntary process, but parties would be encouraged to consider it as a faster, more flexible, and confidential alternative to court proceedings.

The Practice Direction would highlight the benefits of arbitration, such as its binding nature, the expertise of arbitrators, and the potential for a quicker resolution than through court proceedings. But the key components would be the creation of a list of approved arbitrators, all of whom would be deputy judges with listed areas of expertise, the promulgation of a standard arbitration agreement, and the setting of scale fees for arbitrators: albeit at a significantly enhanced level to the sitting fees currently paid to deputy district judges and recorders. The parties would have the option to choose their arbitrator: the list would serve as a resource for parties looking to select an arbitrator with the appropriate legal background and expertise for their case.

The implementation of this scheme would require collaboration between the Ministry of Justice, the judiciary, legal professionals, and ADR providers. To oversee the scheme's effectiveness and ensure it meets its objectives, a body could be established. This body would monitor outcomes, gather feedback, and make recommendations for improvements to ensure that the scheme effectively reduces the backlog of civil cases while providing fair and efficient resolutions for all parties involved.

Expanding qualified one-way costs shifting (QOCS) to all classes of asymmetric litigation

The Access to Justice Act 1999 and the Legal Aid Sentencing and Punishment of Offenders Act 2012 can be viewed as an exercise in the privatisation of legal aid. The withdrawal of legal aid for personal injury claims in 1999 meant that they were funded instead by market mechanisms: private conditional fee agreements and after-the-event insurance with recovery of these costs, through awards and settlements of costs.

After 1 April 2013, personal injury claims are still funded by a market mechanism: private conditional fee agreements, and a procedural rules-based mechanism, qualified one-way costs shifting (QOCS).

There is a parallel in personal injury litigation to be drawn between legal aid funding, which provided statutory discounted conditional agreements and statutory one-way costs shifting; and the current arrangements, which provide for conditional fee agreements and qualified one-way costs shifting, the latter now contained in the Civil Procedural Rules.

Yet whereas legal aid-based costs shifting provided costs protection for any recipient of legal aid, in any type of case, the current rules on qualified one-way costs shifting only apply to personal injury and clinical negligence claims.

There is scope to significantly increase access to justice by extending qualified one-way costs shifting to all forms of asymmetric litigation, where an individual would otherwise benefit from legal aid funding. This would simply require amendment of part 44 CPR and its associated practice direction.

If the public sector is falling short in its delivery of justice, can the private sector come to the rescue, with its reserves of capital and expertise, motivated by the profit motive?

Together with the willingness of solicitors to act on a conditional fee agreement in these cases, many cases where parliament or the common law have given people substantive rights, but costs problems preclude those rights being utilised, could be brought. In the abstract, this would increase economic efficiency in the wider economy, as those who have valuable claims would be able to vindicate them.

Three specific examples of case types where qualified one way costs shifting should be extended to include actions against the police, claims for discrimination in the County Court under the Equality Act 2010, and claims for professional negligence - which it should be noted are often brought by litigants whose personal injury and clinical negligence claims have been mishandled by solicitors. The irony in the rules is that the substantive claim would benefit from QOCS; but the action to remedy the lawyers' own negligence does not. Extending QOCS would not add a single pound to the cost of the legal aid budget, but would greatly increase access to justice.

All these reforms would require little by way of public expenditure and could be speedily implemented without the need for primary legislation. Each of them draws on the private sector for its resources and expertise; each of them needs enabling provision from the public sector. Each of them would go some way to increasing that public good, the stock of justice in this country.

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