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DRIVING SYSTEM CHANGE AND ADDRESSING INJUSTICE

THE OMBUDSMAN ASSOCIATION; KEYNOTE ADDRESS

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Introduction

1. It is an honour and a pleasure to have been invited to address this conference. Ombuds processes are a massively important and under-recognised part of the legal system in general and of dispute resolution in particular.
2. Since I became Master of the Rolls and Head of Civil Justice in January 2021, I have been trying my hardest to provide some coherence to the resolution of the many millions of small disputes that arise every year in England and Wales between citizens, between citizens and small businesses, between SMEs, and between all those and large businesses or the state. Cases that reach the court system are very much the exception rather than the rule. Yet, for many years, much in the world of dispute resolution has been viewed through the lens of court-based dispute resolution.
3. In talking about civil disputes, I include family cases and tribunal cases, whether employment tribunals or property tribunals that deal with cases between private parties or immigration and social security tribunal that deal with disputes between citizens and the state.
4. I am pleased to say that we are now on the brink of a revolution in dispute resolution. We are no longer fixated on court-based systems, but we are in the process of creating a truly holistic Digital Justice System. The statutory foundation for that system was enacted in sections 22-24 of the Judicial Review and Courts Act 2022. Those sections allow for the creation of an Online Procedure Rules Committee, the composition of which was announced last week. The OPRC will have oversight of the online court-based dispute resolution processes created by the HMCTS Reform Programme and the digital pre-action portals and other processes that resolve many thousands, if not millions, of disputes every year without the parties going anywhere near a court.
5. I am the first chair of the OPRC, and the other judicial members are the President of the Family Division and the Senior President of Tribunals. The three lay members announced last week are a solicitor, Brett Dixon, a tech expert, Gerard Boyers, and a representative of the advice sector, Sarah Stevens.

6. The vision of the future that lies behind the OPRC and the digital justice system for which it will provide the oversight and governance, is that anyone with an issue or dispute, individual or business, should be able, in this technological era, to go online to be directed to the dispute resolution process that is most appropriate for their problem. I see that as the first tier of a digital dispute resolution system. It will obviously need to offer **early legal services and advice** in appropriate cases. That is what the new Lord Chancellor calls: “ELSA”. There have been pilots in Middlesbrough and Manchester. In many cases, the first tier will simply direct an employee with a problem to, for example, the ACAS site, and the financial services customer with a problem to the Financial Ombudsman Service and so on.
7. The second tier of the Digital Justice System is the pre-action dispute resolution services and portals which many of those here today have provided, without fanfare, for many years. Some are privately funded. Some are publicly funded. Some are statutory and some are industry backed. It is still not entirely clear to me how many non-court-based dispute resolution services are available in the UK. But I know there are many. And I know they deal with many thousands of cases. The Housing Ombudsman dealt with 26,771 complaints last year. The FOS received 279,146 complaints in 2021/2022. ACAS received 91,000 requests for individual dispute resolution services in the same year. The Legal Ombudsmen received 4,573 cases, and so on and so on.
8. In the field of personal injury, the Whiplash portal, more properly called the Official Injury Claims Portal, has dealt with some 501,451 claims since its inception in 2021, and the RTA portal was dealing with some 600,000 claims every year before that.
9. I am optimistic that an SME portal will shortly be created to resolve disputes between small and medium sized enterprises without the necessity for court process.
10. I want to be absolutely clear that nothing I am doing or that the OPRC will do is intended to make life more difficult for ombuds services. The objective is to provide a level of coherence, integration, and greater accessibility. Everyone who has an issue ought to be able to obtain access to appropriate dispute resolution services online. Moreover, one of the advantages of the digital environment is that it abrogates the need to recreate the data relating to each case again and again if it proceeds from one dispute resolution environment to another. It ought to be possible to transmit the data set created by the whiplash portal, for example, directly into the court-based Online Damages Claim process through an application programming interface or API.

11. The objective is to create an online funnel through which any dispute, large or small, can pass with the ambition of providing resolution at the earliest possible stage, at the lowest possible cost, and in the shortest possible time.
12. The economic and psychological costs of leaving disputes unresolved is great. Individuals are far less productive at work if they are preoccupied with a personal issue such as a family dispute, a housing issue, or an employment problem. There is a great economic prize to be won if we can expedite dispute resolution and integrate dispute resolution processes.
13. It is, of course, essential that a state funded court-based dispute resolution process, staffed by an independent judiciary, is available to all citizens to resolve all disputes. But that does not mean that every dispute should be required to go to court as a first option, where other cheaper and less time-consuming options are available. People are voting with their feet. They are using industry-funded ombuds processes to good effect. They are using privately funded mediation services before starting court proceedings and they are using the available pre-action portals in ever increasing numbers. The digital justice system and the OPRC that is responsible for it seek to provide the architectural coherence and integration that has long been lacking.
14. So where does the OPRC fit in to this Digital Justice System. I emphasise that the OPRC is new and has not yet even held its first meeting in its fully constituted form. That said, I see the OPRC as being quite different from the existing Civil Procedure Rules Committee, Family Procedure Rules Committee, and the Tribunals Procedure Rules Committee.
15. First, the OPRC will not simply be making rules. Rules are anyway different in the online space. It is not necessary to have a rule that says that a pre-action dispute resolution portal must ask each party their name and address, because the programme will require them to do so before they will be able to proceed. The rule-making process for the online court-based dispute resolution process will be more high-level and will dictate the standards that the dispute resolution processes governed by it must attain. It may, for example, have a rule saying that no decision must be made without both parties having had an opportunity to make submissions. In reality, though, the platforms on which online dispute resolution services sit will themselves provide much of the structure. We already see this with Online Civil Money Claims (OCMC) and Damages Claims Online that are services close to being able to provide end-to-end online civil court-based dispute resolution services. Some 90% of all civil money claims are now brought online, and more than 300,000 money claims have already been brought through OCMC.

16. Secondly, a big part of the OPRC's activities will be to provide functional governance for the online platforms, making sure that the data created online is properly and appropriately handled and that the technological foundations of the processes are transparent and effective. By setting common technical standards, the digital development, which is already happening everywhere, can be coordinated
17. Under section 24 of the Judicial Review and Courts Act 2022, the OPRC can provide governance for pre-action portals, in which I include the ombuds services provided so successfully in so many sectors. Many have asked me why Ombuds services would want to be any part of the Digital Justice System I have described. The answer is three-fold.
18. First, if ombuds processes can come within the framework of the Digital Justice System, it provides the coherence and integration that has, thus far, been lacking within the various disparate parts of the entire dispute resolution process. As I have already intimated, I have for long thought that applying the standards of court-based commercial dispute resolution in the Business and Property Courts to every dispute, making the processes far too cumbersome and unwieldy. There are literally only 3,000 odd cases per annum in the Rolls Building and yet we apply those standards to the millions of small disputes that arise in tribunals and courts and that don't even get anywhere near a court. It is truly a case of the tail wagging the dog. Instead, we need to look holistically at the vast bulk of disputes that are resolved by multifarious processes, by ADR, by online portals, by ombuds people, by mediation and even by eBay and Amazon.
19. Secondly, bringing ombuds processes within the framework of the Digital Justice System improves access to justice, because it increases the chances of individuals with a sectoral complaint finding the appropriate process to have that complaint resolved.
20. Thirdly, it will allow the ombuds processes that are currently separate and governed by different rules and different procedures to become more joined up, both technically and in data terms. They will not be harmonised in any sense, but there will be an OPRC framework that will ensure they follow a fair and transparent procedure. Moreover, if an ombuds process fails to resolve a complaint to the satisfaction of the parties, it will be possible to transmit the data directly by API into the court-based part of the Digital Justice System.

Conclusions

21. It is incredibly important that our Digital Justice System is of the same, if not better, quality than our existing analogue dispute resolution processes. But we should not assume, as some do, that digitisation leads to less reliable and less just outcomes or that it excludes people altogether from the ability to vindicate legal rights. It is an essential principle of offering justice digitally that those who are unable to access the internet, or any digital offering, are provided with the same services in an accessible fashion. But that does not mean that we should deprive the vast majority of our digitally enabled citizens of dispute resolution processes that will be quicker and more cost effective for them.
22. In my view, sectoral ombuds processes are an essential part of our justice system and should be recognised and treated as such. The creation of a holistic Digital Justice System gives us the opportunity to deliver on that objective.
23. You may think that much of what I have been talking about passes like ships in the night alongside the nitty gritty of what your ombuds processes aim to achieve and are actually achieving. I realise that very few cases move directly from an ombuds process into the court system, whether digitally or at all. But that does not mean that the coherence of which I have been speaking is not a valuable prize. Many people with real problems are excluded from our current dispute resolution landscape because it is simply too hard to navigate. We owe it to these people to do everything we collectively can to produce an integrated and intuitive digital dispute resolution environment.
24. I look forward to answering any questions that you may have.