Darbyshire on the ELS 2017, update March 2019

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Author of
Darbyshire on the English Legal System, 12th ed. (London, Sweet & Maxwell 2017), here
Nutshell on the English Legal System 9th ed. (London, Sweet & Maxwell 2016) here
Sitting in Judgment – the working lives of judges (Oxford, Hart Publishing 2011), here

Research for this update was completed on March 7, 2019. Hyperlinks were checked on March 13, 2019.

Bibliography of this update

Ministry of Justice (MoJ) press releases, Judiciary website (for statistics and judges' speeches), Judicial Appointments Commission, *Westlaw* current awareness and many journals, *Lexis* (with a different set of journals), Law Society's *Gazette*, *New Law Journal*, *Times Law Reports*, Parliament website, *Legal Action*, BBC News and websites as listed in *Darbyshire on the ELS*.

Further reading and updating this document

www.newlawjournal.co.uk
Westlaw journals and current awareness, *The Times*, *The Guardian* and *Counsel*, *The Guardian* is available free, online. Other quality newspapers are available from *UK Newsstand*, an electronic subscriber database available from libraries. Some of this material below is cut and pasted, as can be seen from the quotation marks and acknowledgements.

Format of this update

The paragraph numbers signify updates to the same numbered paragraph in the textbook.

Brexit (page xliii) and Chapter 3 EU Law

The UK's global importance in legal services
To great relief, the City UK's December 2018 Report on UK legal services reports astonishing growth in the face of Brexit. Entitled *Legal Excellence, Internationally Renowned*, the report's abstract states

> "The report underlines the strong international reputation of English law and the sector's value to the UK economy. UK legal services employment grew nearly 9% to 342,000 jobs in 2017, with revenue generated by the top 100 firms up 10% to £24.2bn in the same year. The trade surplus generated by the sector has nearly doubled over the past 10 years to £4.4bn in 2017 and it is recognised across the world for its quality and excellence."

Geoffrey Vos, Chancellor of the High Court, who is in charge of the business courts, considers that the way forward, in the face of Brexit, is to make the UK courts the world leaders in Lawtech.

> "…the progression of big business towards internationalisation and the use of cross-border technologies which transcend, even ignore, national boundaries. I am talking, of course, about digital ledger technology, which is by definition, borderless, smart contracts that make use of the public blockchain, and, more regionally perhaps, LawTech and RegTech, which will rapidly change the face of even national financial transactions… We are implementing an investment of £1 billion in court information technology and modernisation intended to create a ground-breaking court system… We see more LawTech start-ups in the UK than anywhere else within the European Union put together. The LawTech Delivery Panel on which I sit is looking at ways in which we can make post-Brexit Britain the most technology friendly environment anywhere in the world, so that it will be a business location and legal jurisdiction of choice. ("Legal Excellence, Internationally Renowned", speech, November 29th, 2018.

In the meantime, Irelands' Taoiseach (Prime Minister), Leo Varadkar has said that Ireland could "take some [legal services] business from the UK". By September 2018, 1,644 solicitors from England and Wales had registered on the Irish Roll, as well as 175 from Northern Ireland, with the transatlantic firm, Eversheds, securing most registrations. (Law Society's Gazette, 4 January 2019).

Legal Consequences of Brexit

The Constitution
In December 2018, seven Supreme Court Justices ruled that a Scottish Bill, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, passed in March 2018, contained an invalid section, s. 17. It would have provided that any post-Brexit delegated legislation made by UK ministers that related to matters within the competence of the Scottish Parliament would be of no effect without the consent of Scottish ministers. The section was outside the competence of the Scottish Parliament because it sought to modify the Scotland Act and the UK Withdrawal Act, which were both Acts of the UK Parliament: *Reference by the Attorney General and the AG for Scotland* [2018] UKSC 64.

In January, the Scottish First Minister promised a new independence referendum "within weeks" of the UK Government's defeat on the proposed Brexit deal.

The impact on the status of the Channel Islands is uncertain. See Professor A. Sutton, "Relics of Empire or Full Partners of a New Global United Kingdom? The Impact of Brexit on the UK Crown Dependencies and Overseas Territories" Report for the Constitution Society, May 2018.

Monitoring Brexit

"Prepare for EU Exit" on the Gov.UK website here
The Constitution Unit

BBC News

Chapter 1 Understanding the ELS

1-003 The Rule of Law
See a speech delivered in Argentina by Gross LJ, in October 2018, How Can Judges Strengthen the Rule of Law? The rule of law was necessary in promoting the UN goal of sustainable development in "all major spheres of activity":

> "(i) Individual human rights – guarding against the midnight knock on the door and the show trial. (ii) Investment – who would invest in a country where assets are subject to capricious and arbitrary officialdom? (iii) Fighting corruption; no special treatment; no lost files; no convenient delays. (iv) Fighting terrorism – the Rule of Law alone will not defeat terrorism but successful counter-terrorism is hugely assisted by the value system inherent in the Rule of Law."

Chapter 2 Sources of English and Welsh Law

2-018 statutory interpretation
As an educative example, see the *Belhaj v DPP* [2018] UKSC 33, below.

2-036 persuasive precedent

In an April 2018 speech, "Reflecting on the Legacy of Chief Justice McLachlin" Baroness Hale, president of the UK Supreme Court, said there were four mainstream areas of the law where the Canadian Chief Justice's judgments had been regularly cited in the UK courts, proportionality, illegality, unjust enrichment and equitable compensation, and vicarious liability.

2-045 International law as a source of English law

See Lord Lloyd-Jones, UKSC Justice, "General Principles of Law in International Law and Common Law", speech February 16th, 2018.

Chapter 4 The European Convention on Human Rights

4-005 "Living instrument"
Judges of the European Court of HR, as well as UK judges take the view that the Convention is a "living instrument", which must be interpreted in its modern context, not just as the 1950 framers would have interpreted it. This requires judicial activism.

4-007 European Court of Human Rights
In October 2018, the Court received a request from the French Cour de Cassation for an advisory opinion. This is the first use of this procedure, which allows top courts to submit such requests.

Sharia Marriages
In January 2019, the Council of Europe warned the UK that they must legally require Muslim couples to register a civil marriage in addition to the religious ceremony because rulings of sharia councils "clearly discriminate against women in divorce and inheritance cases". The UK has been given until 2020 to comply.

4-031 Article 8 Right to respect for private and family life
In *Catt v UK* (43514/15) the Court held that there had been a violation, in retaining personal data on a police database about "domestic extremists". Collecting the data had been acceptable but retaining it had not, in the absence of safeguards such as time-limits.

4-043 Article 9 Freedom of thought, conscience and religion and 4-046 Article 10 Freedom of Expression
The Gay Cake Case
In this highly publicised case, *Lee v Ashers Bakery* [2018] UKSC 49, the appellants, bakers, had refused to supply a cake with the logo "Support Gay Marriage", on the grounds of conscience and religious belief. The UK Supreme Court held that articles 9 and 10 were engaged. There was no civil liability on the bakery for their refusal to express a political opinion contrary to their beliefs. There was no discrimination on the grounds of sexual orientation, because the bakers objected to the message not the customer. Articles 9 and 10 included the right not to be obliged to manifest beliefs that one does not hold.

4-064 UK Government responses to human rights judgments
The latest report to the Parliamentary Joint Committee on Human Rights was published in November 2018 on the Parliament website, "Responding to Human Rights Judgments". It reported five judgments by the European Court of HR against the UK in 2017-18 and "By population, the UK has the fewest applications of all [47] States: 6 per million" (p.12). The UK has still not allowed prisoners to vote but has now made it clear to prisoners that when they are in custody they lose their right to vote.

4-061 Evaluations: 20 years of the Human Rights Act
On November 9, 2018, the Joint Committee on Human Rights published a memorandum, Twenty years of the Human Rights Act: extracts from the evidence This is a really informative collection of extracts from the law, evaluative statistics and submissions of all interested parties, such as the Ministry of Justice, human rights bodies and charities representing children and the elderly.

Further Reading
See case reports and news on the website of the European Court of Human Rights

Chapter 5 Law Reform and the Changing English Legal System

5-009 Reform Campaigns
Media can prompt law reform. For example, *The Times* is claiming that its "Family Matters" campaign has led to the Lord Chancellor's introduction of a bill to end fault-based divorce: F. Gibb and J. Ames, "Times campaign prompts rewrite of divorce laws" February 8, 2019.

5-014 Sentencing Code
The Law Commission has completed a report on a project to propose a Sentencing Code. Sentencing is a complex mess, spread across an unforgivable range of legislation. They argue that it should be reduced to a single code to make the law easily accessible to the public and practitioners. The Government now needs to decide whether to enact a sentencing code.

Chapter 6 Civil Courts and Chapter 7 Criminal Courts (*and* also relevant to civil, family and criminal procedure and tribunals, Chapters 10, 11 and 12)

6-001 Court closures
In January 2019, data published by the *Guardian* and the House of Commons Library showed that half of magistrates' courts had closed since 2010, 162 of 323, plus 80 more courts and tribunals. Six more magistrates' courts are scheduled to close in 2019. Her Majesty's Courts and Tribunals Service (HMCTS) is considering whether to pay for taxis to ferry witnesses and defendants to courts. (O Bowcott and P Duncan, "Half of magistrates' courts in England and Wales closed since 2010", January 27, 2019). On January 25, 2019, the Judiciary published summaries of 10,000 judges' responses to its "Judicial Ways of Working" research on the judiciary website and the senior judiciary acknowledged that judges were worried about court closures.

NB, comment by Professor Nicky Padfield, illustrating the idiocy of closing Cambridge Magistrates' Court: editorial, [2018] Crim. L.R. 351.

6-005 New City of London "Cybercourt"
In 2025, a new flagship court with 18 courtrooms and civil and criminal jurisdiction is scheduled to open on the site of Fleetbank House. It will deal with cybercrime, fraud, economic crime and civil business and property cases. It will replace the Mayor's and City of London County Court, and City of London Magistrates' Court. Unsurprisingly, the July 2018 press release said "the court will reinforce the UK's position as a global legal hub".

6-005 Business and Property Courts
For detail, see Sir Geoffrey Vos, Chancellor of the High Court, speech, "The Launch of the Business and Property Courts in Bristol", speech January 12, 2018,

6-025 Crumbling courts
In November 2018, Burnett LCJ said "ramshackle" court buildings were suffering from "decades of neglect" and needed hundreds of millions of pounds for repairs.

6-025 Court fees
Amazingly, in July 2018, the Ministry of Justice reduced some civil court fees, because their own review showed that in some cases, the fees charged were above full costs recovery. In other words, the court was making a profit.

6-027 Court Reform/online courts/open justice
Monthly bulletins on the reform programme are on the HMCTS (Her Majesty's Courts and Tribunals Service) pages of the Government website here

On May 9, 2018, Parliament's spending watchdog, the National Audit Office, reported that HMCTS was behind schedule in courts modernisation,

> "By March 2023, HMCTS expects to employ 5,000 fewer full-time equivalent staff, reduce the number of cases held in physical courtrooms by 2.4 million cases per year and reduce annual spending by £265 million…HMCTS believes the reformed system will work better for all those involved, use court time more proportionately and make processes more accessible to users…The NAO believes there is a significant risk that HMCTS will not be able to achieve all it wants within the time available. HMCTS estimates there will be a funding shortfall of £61 million in future years…" (Press release).

On March 6th, 2019, HMCTS announced that it is delaying the courts reform completion date to 2023.

6-027 "Judicial Ways of Working"
Judges have rejected the Ministry of Justice's plans to hold contested criminal trials via remote video link. They have warned that further large cuts in court staffing would be "unworkable": O. Bowcott, *The Guardian*, Dec 20th, 2018, here. A January 2019 report by JUSTICE, Understanding Courts said that court users needed more help in understanding court processes so that they could participate fully, especially in view of the increase in people representing themselves.

The *Guardian* article refers to the fact that in 2018, the judiciary conducted an extensive survey of all judges and magistrates. The survey was divided into four, with responses sought on crime, civil, family and tribunal jurisdictions. After consultations and negotiations with HMCTS, the appropriate senior judges eventually published their responses (to the 10,000 judicial responses) on the judiciary website on January 25, 2019, here These documents are well worth reading, because they provide a lot more detail than the vague wish list *Transforming Justice* and they give a flavour of the real world of the courts as experienced by judges, as opposed to the hype in Ministry of Justice press releases.

On crime, Sir Brian Leveson, President of the Queen's Bench Division responded to judicial comments. He said judges were almost unanimous on the need for open justice, effective case management, sufficient trained staff, working technology and appropriate training. He reported a backtracking on the plan to deal with remands in the magistrates' court exclusively by video hearing. He reassured judges that trials would not be conducted online either in the

magistrates' court or Crown Court, with the exception of single justice hearings. The senior judiciary would decide which types of case were suitable for video hearings.

On family, the President of the Family Division, Sir Andrew McFarlane reported back. Family judges had the same concerns – open justice, staffing, case management, including how much would be delegated to court staff and, their biggest concern, fully video hearings. He said video hearings would not be extended beyond a current experiment with first directions hearings in financial remedy cases.

Assisted digital Judges were just as confused and concerned as I was about what was offered to court users in the "assisted digital" process. This was his responses,

> "There has been some confusion around what HMCTS referred to as 'Assisted Digital.'…HMCTS have clarified that 'Assisted Digital' both describes the process by which competent digital participants can be assisted to use the digital system to achieve access to the Courts; and describes the range of channels – telephone, webchat and face to face – in place for litigants who require support to interact with the system digitally. HMCTS recognise that 'Assisted Digital' may not be suitable for some users. Some may not want to stay on the phone to receive support; a centre may not be in travelling distance; or they may want to share a paper form with trusted friends to complete with them. As a result, HMCTS will continue to make provision for litigants to continue using paper documents (albeit that at the point at which the information on paper enters the system, the information transitions to a digital format, and converts back to paper when passing back to the litigant). HMCTS want to include the offer of a choice of channels into the design of 'Assisted Digital' to allow a user to choose the channel most suitable to their needs, as well as multi-channel movement where a paper form can be used in conjunction with text message notifications from 'Track Your Appeal.'"

On civil courts, Master of the Rolls, Sir Terence Etherton reported that "a huge amount of work" had been done by the various judicial and civil servant judicial reform groups to respond to the judges' concerns which were: staffing, the proposed service centres, listing, buildings, the scope and limits of video hearings (open justice again and judges thought they were being introduced to save cost), the proper use of legal advisers and effective IT, with training.

> "As to open justice, it is right to acknowledge at the outset that HMCTS agrees that all Video Hearings would have to take place in public (preferably in open court or in some other way in which the proceedings can be viewed by the public via screens). HMCTS is working, assisted by the Video Hearings judicial working group, on further proposals for this. Accordingly, everything we say below about Video Hearings is on the assumption that those hearings are, in one way or another, open and accessible to the public."

His and the other senior judicial responses demonstrated very significant backtracking on video hearings:

> "there was a small pilot in the First-Tier Tax Tribunal….3 out of the 8 cases could not proceed because of technical issues…The Tribunal judges involved in the other 5 were cautiously positive…The litigants themselves were positive… It has been agreed

> that the decision as to which categories of hearing could take place by way of Video Hearing will be for the senior judiciary (at Head of Division level). Thereafter, in an individual case, it will always be for the judge to decide…HMCTS had made a general assumption that it will be possible to hear 25% of specified money claims up to…£25,000 that are contested and reach a final hearing by way of Video Hearings…it has been revised to 10%...Reform will mean that fewer cases will reach a final hearing…there will be more successful mediations and more of the smallest disputes being resolved without an oral hearing…You can be reassured that participation in Video Hearings is not being forced on anyone…Much will depend on the quality of the IT and equipment…we are a long way from the possibility that any final hearing with contested evidence will be regarded as suitable for a Fully Video Hearing."

Judges were concerned about extending the use of judicial advisers or case officers, because case management is a judicial function. Sir Terence responded that legal advisers in civil courts were all legally qualified and had already carried out routine sifting successfully at the County Court Money Claims Centre for the previous four years. "There is agreement that in Civil, since all 'Case Officers' will be legally qualified, they will be referred to as 'Legal Advisers'".

In the response *on tribunals*, Sir Earnest Ryder, Senior President of Tribunals added to the information on case workers, or "authorised officers" as they are known under the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018. The existing activities of registrars in the Court of Appeal would be extended to other tribunals. For example, at the pre-hearing/triage stage:

> "The principle is that in a authorised officer facilitated process like the Court of Appeal, the Upper Tribunal and some but not all First-tier Tribunals, authorised officers will be permitted to assist the judge to facilitate access to justice by helping prepare materials (including standard directions, the agreement of issues and the compilation of an electronic bundle) before each hearing".

A *Times* survey of 1,500 barristers in November 2018 found that over 80% believed that the move to digital courts would damage principles of fair and open justice. They felt that the inability to see defendants and witnesses live would undermine justice. In 2016-17, video links were used in 137,000 cases. (F Gibb and J Ames, November 24, 2018).

10-070 Online courts

Lord Briggs, by now a Justice of the Supreme Court said "I confidently predict that online courts and tribunals around the world will eventually be much more convergent in their procedure than courts which are shackled to the paperbased processes which will be replaced." ("Dispute Resolution in Uncertain Times" speech, 22 January 2018, UKSC website).

BUT while the established Money Claims Online procedure is continually offered as an exemplar, a November 2018 paper produced by Birss J shows that the system is under resourced. There are problems with printing and scanning and a lack of proper testing.

In December 2018, HMCTS (Her Majesty's Courts and Tribunals Service) hosted an international forum about online courts. The closing speech was given by Sir Earnest Ryder here. The forum was mentioned on HMCTS courts modernisation updates, which are here.

In opening the forum, the Lord Chief Justice, Lord Burnett said "the citizen, the users of our courts, must be at the heart of the design process. We must ensure that modernisation is 'user-centred' in design and default, as much as it is digital by design and default. Importantly, the systems must be built to include what is described as "real time feedback"". He set domestic developments in their international context. There were online courts in British Colombia, Utah, Victoria, Dubai and Hangzhou, China.

In a press release on January 4, 2019, the Ministry of Justice said that more than 150,000 people had used online justice services in the previous 12 months, including divorce applications, civil money claims, probate applications, benefits appeals and online pleas in fare evasion cases.

In February 2019, the High Court accepted service of a copyright infringement notice by Instagram, in addition to email.

Artificial Intelligence
The Lord Chief Justice gave the Sir Henry Brooke Annual Lecture on June 7, 2018 and mentioned artificial intelligence:

> "There will inevitably be increased use of predictive analytics in the promotion of preventive dispute resolution and in the promotion of settlement. It is an approach some law firms are already using to help in advising their clients…Artificial intelligence is being used, for example, in medical diagnosis. In our legal world, work is being done to show how artificial intelligence can predict outcomes in the Supreme Court of the United States and the European Court of Human Rights. It will be helpful in shaping trial or appeal strategies, settlement processes such as Early Neutral Evaluation or forms of evaluative mediation. The success rates of the predictions are high."

On March 4, 2019 he also set up an advisory board on AI, to ensure that judges are fully informed about it. If you want to understand the basics of blockchain and smart contracts, consult YouTube. Algorithms will also be used in ADR and judging, used as a sort of early neutral evaluation process.

On February 19th, *Legal Futures* reported that a "robot mediator", an online tool using artificial intelligence, had helped to settle a dispute within the civil money claims system. Mediator Graham Ross had introduced the parties to Smartsettle ONE, developed in British Colombia.

6-031 Closed material procedure
In *Belhaj v DPP* [2018] UKSC 33, the UKSC was asked to interpret the Justice and Security Act 2013, which excludes the procedure from criminal cases. They decided that judicial review in a criminal case was included in the phrase "proceedings in a criminal cause or

matter" and so the procedure could not be used in such a case. There was an explanation in the green (consultation) paper preceding the 2013 Act. In a criminal case, the prosecution could apply for a public interest immunity certificate to protect evidence they did not want to disclose on the grounds of national security, or they could simply withdraw the prosecution.

6-033 Court of Appeal (Civil Division) Live Streaming
In November 2018, a high-profile dispute about the Olympic Stadium was live-streamed as a pilot. It is being evaluated before live-streaming is extended.

6-034 media access
In November 2018, courts and tribunals staff were issued with new guidance about cooperating with the media and the guidance was made public, in an effort to enhance open justice.

7-006 Setback for family drug and alcohol courts (FDAC)…and a rescue
In June 2018, the President of the Family Courts, Sir James Munby expressed his frustration at the "grim" and "profoundly disturbing" news that the FDAC National Unit had had to withdraw its application to the Life Chances Fund. Research had demonstrated the success of the courts. Children were more likely to be reunified with their parents than in the normal family courts and there was "significantly less family breakdown". Research also showed that local authorities saved £2.30 for every £1.00 spent.

Astonishingly, it was recently announced that a group of private backers had stepped in to develop a new partnership to support and grow these courts. The Centre for Justice Innovation will host and direct this team. See blog post February 14th 2019.

7-012 The Supreme Court
Having sat in Edinburgh and Belfast, it is due to sit in Cardiff for the first time in July 2019. For an indispensable two-page annual summary of the Court's work and ways of working, such as in giving judgments, see Brice Dickson's January analyses, the latest being "Supreme Justice – a year in review" *New Law Journal*, January 18, 2019, p. 18 (*Lexis*). The Court decided 67 cases in 2018, and appellants had a success rate of 39%. "The number of Scottish appeals does not seem to have dropped since the Courts Reform (Scotland) Act 2014 required Scottish appellants to obtain permission to appeal either from the Court of Session or from the Supreme Court itself." The trend towards single judgments continued, at 63%.

For a really informative lecture on the case law within the devolution jurisdiction of the UKSC, see the speech by Lady Hale, President, "Devolution and the Supreme Court – 20 years on", June 14, 2018, on the UKSC website here.

7-014 Evening courts
In December 2018, the Law Society's Junior Lawyers Division protested to the Minister of Justice that early morning and evening courts could badly affect junior lawyers, causing longer working days and hampering those with disabilities or caring responsibilities. This follows a decision to proceed with piloting flexible family and civil courts. The Ministry had dropped the plan to pilot flexible criminal courts.

Chapter 10 Civil Procedure

10-034 Swamping the court
Yet again the Court of Appeal has warned against lengthy and irrelevant skeleton arguments, in *Harverye v SS for the Home Department* [2018] EWCA 2848 Hickinbottom LJ warned that a case with straightforward issues was "all but lost in a plethora of paper".

10-056 Fixed costs
A pilot scheme for fixed costs in cases up to £250,000 is being piloted in 2019 in the Business and Property Courts in Leeds and Manchester.

10-058 Jackson Review – Did the 2012 reforms cut costs?
On February 7, 2019, the Government at last published the Post-Implementation Review of Part 2 of the LASPO (Legal Aid Sentencing and Punishment of Offenders) Act 2012.

> "The evidence available and the views expressed by stakeholders indicate that costs have been reduced, that fewer unmeritorious cases are being taken forward and that access to justice at proportionate cost is generally being achieved." (Press release).

10-062 McKenzie Friends
In 2016, concerned about the big increase in litigants in person, because of radical cuts in legal aid, the Lord Chief Justice set up a consultation on McKenzie Friends, sometimes privately hired to accompany them in court. A working party was then set up and Lord Chief Justice Burnett published the Judicial Executive Board's recommendations in February 2018:

> "The JEB remain deeply concerned about the proliferation of McKenzie Friends who in effect provide professional services for reward when they are unqualified, unregulated, uninsured and not subject to the same professional obligations and duties, both to their clients and the courts, as are professional lawyers. The statutory scheme was fashioned to protect the consumers of legal services and the integrity of the legal system. JEB's view is that all courts should apply the current law applicable to McKenzie Friends as established by Court of Appeal authority." (Reforming the Court's Approach to McKenzie Friends):

- It is the Government's job to consider how best to enable LiPs to obtain effective legal advice and help.
- A plain language guide for LiPs and McKenzie Friends should be published by a non-judicial body.
- The 2010 Practice Guide should be updated.
- The judiciary would refer the summary of consultation responses to the Lord Chancellor (Minister of Justice).

10-072 Online courts, ADR and ODR. Is access to justice enhanced or are people being short-changed?
See D Q Anderson, "The convergence of ADR and ODR within the courts: the impact on access to justice" (2019) 38(1) CJQ 126 (on Westlaw). The article considers the implications of the convergence of the two, in England and elsewhere, caused by the emergence of the court systems' absorption of ODR. From the abstract:

> "The complexion of justice within many judiciaries has changed dramatically through the influence of two global movements—the modern alternative dispute resolution (ADR) movement and the more recent development of online dispute resolution (ODR). The former wave led to the creation of multi-door courthouses, court-annexed mediation programmes and innovations such as judicial settlement conferences. In the last decade, the rapid growth of ODR has precipitated more changes in the administration of justice. Online courts have been designed in England and Wales (the Online Solutions Court suggested by Lord Briggs) and British Columbia (the Civil Resolution Tribunal). This paper discusses the impact of the ADR and ODR waves on **access to justice** within the courts. It examines how procedural justice and accessibility to the judiciary have undergone transformation as the courts have incorporated these two waves into the justice system. The paper also considers the implications of the increasing convergence of both waves within the justice system. It argues that **greater clarity is needed** concerning the changes to access to justice amidst the courts' embracing of innovation."

Research by others had shown that the closer the connection between ADR and the court, the clearer the court's signal that it endorsed its value and quality. On the other hand, sending parties out to private mediation risked inducing the perception that ADR "has no real value and is a poor substitute for litigation". On the other hand, if mediation is conducted by courts, in a directive way, it loses the value of its original essence: self-determination, with the parties reaching their own settlement. This danger has been noted in the UK and the US. If the "fourth party", technology, was harnessed to help diagnose problems, manage cases and facilitate settlements ("with accuracy and consistency, free from cognitive biases") it could free up the court, the "third party" to concentrate on its core functions, targeted high quality human interaction. There were also issues about procedural fairness: parties' perceptions about dignified treatment and even-handedness.

10-009 The Shorter Trials Scheme and the Flexible Trials Scheme
came into operation in all business courts, including the Rolls Building (London) and provincial courts on October 1, 2018 and are provided for in Practice Direction 57AB here
Shorter trials take up to four days, including reading time. Flexible trials are designed to limit disclosure and oral evidence, to cut cost and pre-trial waiting times.

Chapter 11 Alternatives to the Civil Courts: Institutions and Procedures

See above on ADR and ODR.

See Annual Reports of the Senior President of Tribunals

11-009 Administrative Justice Council
This informal body was formed in July 2018 and performs the same functions as the lost AJTC. It is chaired by the SPT and is hosted by the website of the charity, JUSTICE. Its membership includes judges, lawyers, civil servants working for ombudsmen and other complaints-handling bodies, and users of administrative justice. It is advised by a panel of 20 academics.

11-030 Tribunal Modernisation – the "Vision"
In a July 2018 speech, the SPT, Sir Earnest Ryder gave examples of the flexible use of judges in the cross-over in jurisdiction between courts and tribunals, which he said was a step towards the longer term goal of merging the courts and tribunals judiciary and incidentally, flexibility is further facilitated by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

> "At present there are 65 High Court judges who are assigned to the Upper Tribunal to undertake administrative law work… (more than both of the smaller two divisions of the High Court). My Vice-President is a member of the…Court of Appeal…the President of the Welsh Tribunals is a retired High Court judge…There are also 28 …circuit judges assigned to…the Upper Tribunal and 54…to the First-tier Tribunals. The Employment Appeal Tribunal (EAT) has both assigned High Court judges and specialist employment [circuit] judges…During…the last two years there have been 12 deputy High Court appointments among my Upper Tribunal judges…two High Court appointments from…tribunals judges…two High Court appointments from among the deputy Upper Tribunal judiciary and [altogether five Court of Appeal appointments]…There are at any one time 14 senior judges who are presidents of their tribunals or chambers."

He said that, in terms of recruitment diversity, workload allocation, system performance monitoring, appraisal and peer review, the tribunal system was the envy of the justice system.

He also detailed some digital pilots. For instance in Social Security and Child Support "We are designing and trialing questions in plain language that build intuitive application forms using judges, our expert panel members, behavioural psychologists and volunteer users who are asked about the language people prefer to use" and, for use in case management, judges would be able to access all case documentation stored on the cloud. They were also developing in-house piloted software that could be re-used across jurisdictions. ("Justice in a Modern Way").

The 2018 Act also allows for authorised court and tribunal staff to exercise judicial functions where delegated legislation permits this and allows for them to provide legal advice to magistrates and judges. Some can already do this but the power is framed widely. In the speech, Sir Earnest explained how tribunal case officers' and registrars' powers will be expanded. They make routine case management orders and ensure that these are complied with, and some registrars do early neutral evaluation.

In December 2018, the SPT produced a supplement to his annual report, The Modernisation of Tribunals 2018. He has always emphasised leadership and management, done by judges.

> "The Tribunals have an impressive business as usual leadership structure where the independent Tribunals and Chambers (each with their own president and leadership team) come together to discuss strategy, identify and implement assignment processes to match supply and demand, develop training and compare and contrast the performance data that is regularly discussed in the jurisdiction boards that bring together leadership judges in each major jurisdiction with their operational civil servants and analysts. Those business as usual structures provide the regular material for the Tribunals Judiciary Executive Board ('TJEB') to advise the Senior President."

They have developed a change network of over 40 judges and panel members. He said the tribunal judiciary were going forward with certain themes, such as recognising that one size does not fit all, enhancing and monitoring users' experience and a having tribunal estate of the same status as the court estate.

11-051 Should ADR be compulsory?
In their Final Report, ADR and Civil Justice (November 2018), the Civil Justice Council's ADR working group insisted that their focus was not mainly or exclusively on the issue of compulsion to mediate. Instead, they had realised that there were three challenges:

- Public and professional education on ADR
- Availability of ADR in terms of logistics, funding, quality and regulation and
- The encouragement of ADR by Government and the Courts.

They proposed an "online depot for information". They thought that the rules and case law were too generous to those whom ignored ADR. All court protocols, guidance and information and case management should presume that ADR must be attempted before a civil trial is made available but no "blanket compulsion" to provide evidence that ADR has been tried. ADR professionals and judges should talk ion a regular basis.

Further reading on ADR
Civil Justice Quarterly (2019) issue 1 (on Westlaw).

Chapter 12 Criminal Procedure

12-001 Breaking Point
In its July 2018 report on Criminal Legal Aid referred to below, in the section on legal aid, the House of Commons Justice Committee said

> "An effective criminal justice system is one of the pillars on which the rule of law is built; effectiveness also demands that the fabric of the criminal courts is maintained. The under-funding of the criminal justice system in England and Wales threatens its effectiveness, so undermining the rule of law and tarnishing the reputation of our justice system as a whole, which is widely admired… We therefore recommend that the Government conduct an urgent cross-departmental review of funding for all elements of the criminal justice system" (Summary).

12-022 Criminal Procedure Rules
Appeal judges regularly remind advocates that they are not an optional extra. As Lord Chief Justice Thomas said, in introducing a 2015 update, "This court will not hesitate to take the toughest line with those who fail to have either in this court or in the Crown Court the Criminal Procedure Rules at their fingertips".

12-038 Victims
On 10 September 2018, the Government launched a new Victims Strategy There is nothing novel about it as far as the criminal process is concerned, except that it promises to strengthen the Victims' Code and the powers of the Victims' Commissioner.

12-040 Vulnerable witnesses and defendants
From 2016, the Inns of Court College of Advocacy developed a free "Advocacy and the Vulnerable" course. By 2019, 4000 barristers had been trained. In July 2018, the Government launched a campaign to recruit 50 extra intermediaries in the South East.

12-050 Victim's right to review decision not to prosecute?
In *R. (on the application of C) v Director of Public Prosecutions* [2018] EWCA Civ 2092. The Court of Appeal held that EU Directive 2012/29 did not give victims a right to review in all cases. See case and comment at [2019] Crim. L.R. 55 (*Westlaw*). See also *R. (on the application of Hayes) v Crown Prosecution Service* [2018] EWHC 327 (Admin), report and commentary at [2018] Crim. L.R. 500.

12-056 The chronic problem about disclosure gets worse
Following the highly publicised collapse of some serious trials in 2017-18 through disclosure failures, the House of Commons Justice Committee launched an inquiry and reported in July 2018.

> "We conclude that disclosure failures have been widely acknowledged for many years but have gone unresolved, in part, because of insufficient focus and leadership by Ministers and senior officials. This was not aided by data collected by the Crown Prosecution Service which might have underestimated the number of cases which were stopped with disclosure errors by around 90%."

In December 2018, the new Director of Public Prosecutions warned that the CPS had suffered a 30% cut in staff over five years and could take no further cuts if it was to deal with the increasing complexities of large volumes of digital evidence. In 2017, the Attorney General, the Government Minister in charge of the prosecution process, launched his own review of disclosure which reported in December 2018. This is from the press release:

> "The Review found that the duty to record, retain and review material collected during the course of the investigation was not routinely complied with by police and prosecutors. Disclosure obligations begin at the start of an investigation, and investigators have a duty to conduct a thorough investigation, manage all material appropriately and follow all reasonable lines of inquiry, whether they point towards or away from any suspect. The Review found that this was not happening routinely in all cases. At the least this caused costly delays for the justice system and at worst it meant that cases were being pursued which the evidence did not support. The impact of these failings caused untold damage to those making allegations and those accused of them. The Government's Review has concluded that to enable lasting change, there must be a 'zero tolerance' culture for disclosure failings across the police and the Crown Prosecution Service (CPS)."

Articles: T. Smith, "The "Near Miss" of Liam Allan: Critical Problems in Police Disclosure, Investigation Culture, and the Resourcing of Criminal Justice" [2018] Crim. L.R. 711; I Dennis, "Prosecution Disclosure: Are the Problems Insoluble?" [2018] Crim. L.R. 829 (*Westlaw*).

12-080 Written directions to the jury
In *R. v Atta-Dankwa (Abena)* [2018] EWCA Crim 320, the appellant contended that her conviction was unsafe because the jury were incorrectly directed. The prosecution conceded

this fact. The Court of Appeal quashed the conviction and ordered a retrial. They said that circumstances giving rise to this appeal would not have occurred had the jury been given written directions, or a written route to verdict or both. They cited the Leveson Review and the Criminal Practice Direction.

12-087 Double jeopardy exception
In December 2018, Russell Bishop, was convicted of the murder of two girls in 1986, after a retrial. He was originally acquitted.

12-089 Court of Appeal criticises unmeritorious applications for leave to appeal
In *R. v James (Wayne) and joined cases* [2018] EWCA Crim 285, the CACD was heavily critical of lawyers in four unconnected cases who lodged new grounds of appeal after a High Court judge had rejected the appellant's written application for leave to appeal. In each case, the new lawyer was not the trial lawyer and the appellant had already received advice from their trial lawyer about whether there were grounds of appeal. Hallett LJ said

> "We acknowledge that on occasions legitimate grounds have been identified by fresh lawyers that trial lawyers have missed and miscarriages of justice have been avoided. However, such occasions are rare and all too frequently totally unmeritorious applications take up the precious time and resources of the staff and judges of the Court of Appeal Criminal Division. The burden on the Criminal Appeal Office is considerable. The four applications before us have taken days of judicial and officials' time to prepare for this hearing, thereby delaying consideration of meritorious applications. The burden on the trial lawyers can also be considerable."

She took the opportunity to remind all interested parties of the list of principles to be gleaned from statute and case law. See the report and commentary on this important case at [2018] Crim. L.R. 568.

12-100 Compensating miscarriages of justice
In *R (on the application of Hallam) v SS for Justice* [2019] UKSC the Supreme Court refused to depart from *Adams* (2011), in the light of *Allen v UK* in the European Court of Human Rights, where, on similar facts, no violation of Art. 6 was found.

Further Reading
Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (2017), reviewed at [2018] Crim. L.R. 418. The argument of the book is that there is an increasing obligation on the defendant to participate in the criminal process and this is unprincipled.

Chapter 13 Lawyers

13-003 The Solicitors Qualifying Examination
The SRA has announced that the SQE will be launched in autumn 2021. It is a two stage assessment, legal knowledge and practical skills. The four research professors who led the Legal Education and Training Review have criticised the SQE in a 2018 article in The Law Teacher. They criticised the assessment of competences as too rudimentary and said the "breadth of knowledge" component locked the SQE into an outdated model. It neglected legal tech, project management and design thinking. The SRA had done little to address the

lack of focus on ethics and professionalism exposed by the Legal Education and Training Review. (J. Ching et al, "Legal Education and Training Review: a five year retro/prospective", 5 November 2018, p 384, online.

13-003 Continuing Professional Development
In late 2018, the Bar Standards Board did a spot check on 707 barristers' records and found that 58% of them were compliant. A "significant number" were unaware of the new scheme or unclear about it.

13-004 Minimum salary
Young solicitors have deprecated the Solicitors Regulation Authority's decision to abandon a compulsory minimum salary for trainee solicitors. Research by recruitment consultancy Douglas Scott showed that a quarter of trainees are paid less than the recommended minimum. The Law Society announced in February 2019 that, as of May, the recommended minimum is £19,619 outside London and £22,121 in London. In the meantime, in December 2018, the Bar Standards Board announced that the minimum pupillage award from 1 September 2019 will be £18,436 for pupillages in London and £15,728 outside London.

13-090 Social exclusion
In February 2019, the Law Society invited trainee solicitors to apply for places on its Diversity Access Scheme, which aims to help with exceptional personal or financial obstacles to qualify.

33 per cent of barristers who answered the question on schooling for the 2018 Diversity Report said they were privately educated.

13-008 Bar diversity statistics
…for 2018 were published in February 2019 on the Bar Standards Board website here

In a February 2018 lecture, Lord Chief Justice Burnett said that the lack of gender diversity at the top of the legal professions hampered the recruitment of a diverse judicial bench.

13-012 Regulation
University College London is conducting an independent review of legal services regulation here

13-016 Increasing regulatory control over lawyers
New regulations require price transparency. This should have been done many decades ago. A survey of 50 firms by Legal Futures, however, showed that only 28% were compliant or even close to it. In February 2019, the Solicitors Regulation Authority said it would be doing "web sweeps" of 500 law firms to check if they were compliant.

13-015 Legal Executives
In July 2018, not before time, the Government decided that the Chartered Institute of Legal Executives, like the Solicitors Regulation Authority, could be a licensing authority for reserved legal activities: rights of audience, the conduct of litigation, "reserved instrument activities", probate work and the administration of oaths. It is the first lawyers' regulatory body to announce its intention to give its regulatory section structural independence.

13-016 Legal Ombudsman
In January 2019, they published on their website guidance on how they approach complaints handling.

13-040 Examples of new business structures and opening up new markets
The Co-op is taking part in two pilot schemes to speed up family procedures, digitally uploading divorce papers and (separately) financial orders to be signed off by a dedicated judge. Co-op Legal Services say the procedure takes 8 weeks. The legal comparison site, Law Superstore has been relaunched in 2019. Research by Hazlewoods in 2018 showed that 1000 lawyers work remotely via platforms such as Keystone Law, Excello Law, and Gunnercooke. At least one barrister, Andrew Thornton, has launched a DIY platform, without lawyers, to which small businesses can subscribe for basic legal advice. In 2018, Hodge Jones and Allen Ltd became the first law firm to be wholly owned (as a trust) by its 250 employees.

Maybe thanks to Brexit and the fact that UK lawyers will no longer benefit from the EU Directives giving them the right to establish in the 27 member states, the Law Society, representing solicitors, has been involved in UK-US trade discussions on legal services.

Lawtech
On 4 July 2018, the Lord Chancellor announced a professional panel, The LawTech Delivery Panel, to support and accelerate the development of lawtech. The press release gave examples of emerging technologies embraced by the legal services sector, such as "the Serious Fraud Office introducing a document review system, backed up by artificial intelligence, that can review 2,000 documents a day and law firms embracing automated digital contracts that allow for on-going monitoring of contract terms… In April of this year, the Prime Minister announced a £20 million fund to encourage work between businesses and researchers and help the service industry, including the legal sector, take advantage of new technologies." In November 2018, the Legal Services Board reported on innovation and the use of technology in legal services. ABSs, new providers and bigger providers were more innovative. Lawyers were not big users of facilities such as blockchain. In a November 2018 speech, the Lord Chancellor further promoted law tech. He said

> "I was reading recently about an experiment you may be familiar with where 20 experienced lawyers in the US and an artificial intelligence system went head to head. The lawyers came armed with their brains, the AI system with machine learning and deep technology. The challenge was to spot risks in every day contracts. I'm afraid to say that AI won with an accuracy level of 94% compared to 85% across the human lawyers. But arguably more importantly, the AI system took just 26 seconds compared to 92 minutes."

In January 2019, The Engine Room published research on Technology and Empowerment Round the World I quote from the summary:

> "This report demonstrates that, around the world, initiatives are already using technology to:
> - Help people diagnose legal problems themselves
> - Help people assess their entitlement to benefits or legal assistance
> - Provide people with legal information that is easier to understand and access
> - Give individuals legal information that is customised to their specific needs

- Support people through processes such as representing themselves or resolving disputes
- Generate legal documents
- Connect people to organisations that can provide assistance."

In "Blockchain – under lock and key?" N.L.J. 2019, 169(7828), 20, J Catanzaro shows how blockchain can be used in legal services, for instance in smart contracts and eliminating fraud.

The Law Society is investigating the use of algorithms in the justice system and is calling for evidence, here A survey by the Society's Junior Lawyers Division showed that almost half of them did not know what lawtech was.

Chapter 14 Judges

14-008 The separation of powers
For a thought-provoking intellectual analysis of the role of judicial leadership see the lecture by Ryder LJ, "Constitutional Norms and Modern Methods", (3 October 2013). Strong leadership was necessary to protect judicial independence from the encroachment of other limbs of the state and agencies, safeguard the rule of law and promote and steer innovation. Judges needed "identifiably independent voices in the existing £1Bn courts and tribunals modernisation programme which is not only the largest programme of its kind across Western justice systems but is also the most ambitious reform programme in England and Wales since the judicature acts of the 1870s". See also Supreme Court Justice Lord Hodge's speech on judicial independence, 7 November 2016, on the UK Supreme Court website, here.

14-008 Judicial independence
The UK media jump at any opportunity to criticise judges or the judiciary as an institution. The one thing they can very, very rarely complain about, however, is corruption. UK judges have a centuries-old reputation for being incorruptible, which is one of the reasons why foreign litigants fight to bring their cases into London. The security of tenure of judges was recognised by Parliament in the Act of Settlement 1701 after the Glorious Revolution in 1688, which brought William and Mary to the throne, deposing her father, James II.
On an international level, there is a constant struggle to fight against judicial corruption in some states. In November 2018, the 47 contracting states of the Council of Europe adopted a "common position" on how to guarantee integrity and fight corruption. Here is the press release.

The Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 allows judges to sit in different jurisdictions, providing flexibility to the court and tribunal system. This is not new and was promised by the Ministry of Justice and judiciary for several years. Nevertheless, the Act allows for something much more controversial: the delegation of routine tasks to appropriately qualified staff. This is much more controversial because staff are employees of HMCTS and must answer to their employer. They are not public office holders, like judges, enjoying the relative freedom of judicial independence. The same controversy has been

debated over the decades, in the context of magistrates' clerks and assistants, as can be seen in the chapter on magistrates.

14-041 Vacancies in the top court
In February 2019, the UK Supreme Court advertised for a new President and two or three new Justices. All details are here. The application window was very small, closing on March 1st.

14-044 Removal of judges, discipline and complaints
The annual reports of the Judicial Conduct Investigations Office are here on the judiciary website. The latest was published in November 2018.

14-059 Current Diversity Statistics
The annual statistics were published in July 2018 here In Lord Chief Justice Burnett's online comment, he explained:

- "29% of court judges and 46% of tribunal judges were female. 50% of non-legal members of tribunals were female.
- Around half of court judges aged under 50 are female. Females outnumber males among tribunal judges at all age groups under 60.
- 24% of Judges in the Court of Appeal and in the High Court were female.
- 41% of Upper Tribunal Judges were female…
- 8% of judges identified as BAME (7% of court and 11% of tribunal judges); non-legal tribunal members 17%."

At a speech at the 2018 Royal Society Diversity Conference, Rafferty LJ was proud to report that the judiciary was significantly more diverse than when she joined the bar in the 1970s:

> "A few examples: Of eleven Old Bailey judges, five are female, the highest number ever to sit there. A quarter of UK Supreme Court justices is female, including its President; just under a quarter of Court of Appeal and High Court judges is female; of the recent High Court appointments, five – 50% - is female, two are solicitors; the Senior and the deputy Senior Presiding Judges, the Vice-President of the Queen's Bench Division, the Vice-President of Court of Appeal Criminal Division and until recently the Vice-President of its Civil Division, and – if I can skate over it modestly– the Chairman of the Judicial College and Vice Chairman of the Judicial Appointments Commission are female. 41% of Upper Tribunal judges is female; half of all judges under 50 is female. 8% of judges identified as black and minority ethnic, including the Lord Justice who is President of the Investigatory Powers Tribunal. In 2017–18, across all judicial appointments, 62% went to a state school, 56% were the first in the family to go to university." (November 1).

14-061 Why is lack of diversity a problem?
There is a plethora of Anglo-American literature. Kate Malleson, however, is by far the best thinker and writer on judges in the UK. Read anything she has written. If you want to read a thought-provoking, well-informed intellectual analysis of the arguments and a new approach see L. Barmes and K. Malleson, "Lifting the Judicial Identity Blackout" (2018) 38 OJLS 357. Here is a paraphrase of/extract from the abstract:

> **"Abstract**—UK judges have traditionally operated behind an 'identity blackout'... the idea that influence from personal identity characteristics has no place in adjudication. Instead, it is claimed that legal knowledge, independence and impartiality alone justify judicial power…It is now accepted that differential viewpoints are relevant to judging, including those that draw on personal experience. However, the focus remains on the experiential knowledge (direct and indirect) of the individual judge rather than the collective identity of the judiciary as an institution. We argue that this focus is flawed empirically and normatively….[Courts should be] be understood as a particular form of representative institution and …[The judiciary should be] intentionally and explicitly drawn from across the major identity groups in the UK today"

14-076 Current attempts to enhance diversity
The Judicial Diversity Committee of the Judges Council published its Report on Progress and Action Plan 2018-19 on the Judiciary website, in June 2018.

There is a continuing shortage of judges (blamed by some judges on pension reforms and "low" pay). There should be 108 High Court judges and there are 93. Consequently, the Judiciary are still offering pre-application seminars for lawyers considering a first-time appointment application. As the press release said

> "The Pre-Application Judicial Education (PAJE) programme is a joint initiative from the Judicial Diversity Forum, which is made up of MOJ, Judiciary, Judicial Appointments Commission, Bar Council, Law Society and Chartered Institute of Legal Executives and coordinates action to remove barriers to candidates from underrepresented groups applying to be judges. Additional, targeted support will be available to those applicants from groups that are underrepresented in the judiciary via discussion sessions led by judges. This will give potential candidates insight into the realities of the role and offer an opportunity to address any perceptions they may have on barriers to judicial office. Development of the programme will be funded by the MOJ, with Forum partners contributing to further running costs." (Ministry of Justice, 25 April 2018).

In October 2018 the Diversity Committee launched a support scheme for under-represented groups thinking of applying for deputy High Court appointments, especially women, solicitors, BAME lawyers, employed lawyers, legal academics and those from a less advantaged background. The scheme offered work-shadowing a judge plus a one-day workshop. In another attempt to attract applicants to the judiciary, some videos of circuit judges talking about their work have been placed on the Judiciary website, in April 2018.

In a *Guardian* interview, the President of the UK Supreme Court, Baroness Hale called for better gender balance in the top court and swifter progress in promoting non-whites and lawyers from less privileged backgrounds. Most important, she said, was the aim that ordinary people could look at judges and say "these are our judges", rather than beings from another planet. (Online version, January 1, 2019).

The current judge shortage and the struggle to recruit
During the current shortage of judges, serving judges often complain about their working conditions or pay. As of January 2019, circuit and district judges have been asked to participate in an on-call rota on Saturday mornings, though they are unlikely to be on call

more than once in 36 weeks. High Court judges have long served on a standby rota for the emergency court.

Dr Sophie Turenne and Professor John Bell produced a report for the Senior Salaries Review Body in January 2018, entitled "The attractiveness of judicial appointments in the United Kingdom" here. They interviewed 59 lawyers, 56 of whom were practitioners, around half of whom had part-time judicial appointments. The summary listed these factors:

- "The gap between pay in practice and pay on the Bench has increased significantly, at the same time that judicial pensions have become less generous and subject to high levels of taxation."
- Lawyers were increasingly specialised and it could be unattractive to move to an area outside one's specialism, especially with little access to help from a judicial assistant or experienced judge.
- Increased workload, especially involving litigants in person.
- The flexibility which lawyers enjoy was perceived to be unavailable to judges.
- Courtroom conditions were criticised: failing IT systems, facilities unconducive to collegiate working and insufficient time for pre-reading and writing judgments.
- "A growing distance is perceived between the judiciary and the executive, and the government in particular. Potential judges are aware of the unhappiness of present judges and are wary of the convention that they should not return to practice if they should wish to leave the Bench."

14-082 training
Ryder SPT explained the importance and nature of Diversity and Judgecraft in a lecture in Wiesbaden on 12 November 2018.

> "In our leadership training and in advanced judgecraft training we focus on the broad questions of social and cultural including religious diversity as issues that are relevant to the quality of our decision making. We approach that question by reference to social, psychological, health and linguistic contexts because these contexts have been illustrated in our case law but we also acknowledge that the contexts are not limited to statutorily protected characteristics for the purposes of discrimination law. They may be wider in jurisdictions where the understanding of rituals and practices, language and behaviours, vulnerabilities and the needs of our users, is critical to the quality of the decisions we make as judges of fact and the arbiters of what is fair process."

In Ryder SPT's speeches and reports, he emphasises the tribunal sector's role in developing the Judicial College's leadership and management development training which is required of all tribunal leader judges.

He also referred to The Advocate's Gateway, which was provides a toolkit for advocates and judges in understanding people with vulnerabilities, such as those on the autism spectrum. The facility was developed in London from 2012 but has been promulgated by its creators in other jurisdictions.

Bibliography additions
G. Gee and E. Rackley, *Debating Judicial Appointments in an Age of Diversity* (London: Routledge, 2017).

Lord Hodge, Upholding the rule of law: how we preserve judicial independence in the United Kingdom, speech, November 7, 2016 and Preserving judicial independence in an age of populism speech, 23 November 2018, both on UKSC website.

Chapter 15 Magistrates

15-003 Appointment and removal
A new guide for applicants was published in August 2018 BECOMING A MAGISTRATE IN ENGLAND AND WALES It was published by the Judicial Office and they explain in the first footnote "The Magistrates HR Team is part of the Judicial Office and is responsible for, amongst other things, advising the Senior Presiding Judge on the appointment of magistrates and for processing new appointments." The Government publishes the list of advisory committee contact details on its web-pages and continually updates recruitment information, including an update on which areas are currently recruiting.

Reform
At the time of writing, spring 2019, the Parliamentary Justice Committee (a select committee which acts as a watchdog over Ministry of Justice policy) is conducting a follow up to its 2016 inquiry into the magistracy. Videos and pdfs of the evidence they have heard is on the Parliament website here. They have now been examining senior judges, representative magistrates and the junior minister who is answerable for magisterial policy. The main point to note is that the Ministry of Justice has failed to do many of the things it promised to do, and this is not helped by the increasing frequency with which the Lord Chancellor (Minister of Justice) and junior ministers have changed. For example, they have not developed a national strategy for magistrates, as recommended by the Justice Committee in 2016, so the senior judiciary and magistrates responsible for overseeing the magistracy have taken initiatives themselves to stimulate reform. These are some of the points from evidence gathered so far:

Morale
A 2017 survey showed that magistrates found their work satisfying, especially giving back to the community but were frustrated by delays, inefficiency and CPS disclosure failures. There were 38 visits around the country in 2017 by members of the senior judiciary. The survey and visits gleaned 10,000 responses on reform. The rate of resignations had slowed, after a glut perhaps caused by disaffection with new technology and the lack of training about it.

Liaisons with Her Majesty's Courts and Tribunals Service and the Senior Judiciary
The leadership structure of the magistracy had changed since 2017, to align it with that of the judiciary and to embed the magistracy in the judiciary. There is a Magistrates' Engagement Group, chaired by the National Lead Magistrate (selected on skills, not elected) and a district judge. Magistrates can have input on reform via their local group. Magistrates are also represented on other reform groups. Views from the Magistrates' Engagement Group are fed to the senior judiciary and on to HMCTS. The Magistrates' Leadership Executive works via the Magistrates' Liaison Group, which includes the Senior Presiding Judge, the Chief Magistrate's Office (she is the Senior District Judge, head of the professional magistrates and her office goes back to 1735), and the Magistrates' Association. That feeds final

recommendations to the Lord Chief Justice and hence to HMCTS. The MLE supports locally elected bench chairmen.

Relationship Between Lay Justices and District Judges (magistrates' Courts)
The select committee and the Magistrates' Association had been concerned about poor relationships. A good relationship had since been fostered, with the Chief Magistrate encouraging DJMCs to sit on the bench with lay justices, especially if they had spare time following a case collapse.

Recruitment
The Magistrates' Association felt that 15,000 magistrates was too few and magistrates "frequently" had to sit as a bench of two, including in trials, and there was a severe shortage in the family court. There were still problems with diversity: too many old magistrates and a lack of social diversity. Employers needed to be persuaded to release employees for service and educated about the benefits of the skillset acquired by magistrates, such as the ability to weigh evidence, listen and reach a judgment. It might help if employers had a legal requirement to release staff for public service such as sitting as a magistrate. There was a lack of awareness in the general population and people did not identify themselves as potential magistrates. Certain BAME groups were still underrepresented, such as Asians. Penelope Gibbs from Transform Justice said 17 per cent of lay tribunal members were BAME so this demonstrated it was possible to recruit better numbers.

The Ministry intended to halve the number of advisory committees selecting justices. The judicial office and HMCTS had been working on generating consistent procedures and standards. The Ministry is using new recruitment tactics such as social media, such as LinkdIn and Twitter.

Training
There was a need for more basic training and continuation training should be linked to the new appraisal system. Only £26 per magistrate per year was spent on training, £340,000, out of a budget of £10 million on judicial training. Funding came from the Judicial Office budget so it was up to the Lord Chief Justice. Nowadays training was generally conducted in courts. Magistrates are about to get LMS which is a training platform used by the mainstream judiciary.

Court Closures
Between 2010 and 2018 almost half of magistrates' courts were closed or threatened with closure. These had caused some magistrates to resign. When new magistrates were recruited to cities such as Brighton, they came from Brighton, not the outlying areas such as Wadhurst, 1.5 hours away. In some areas, magistrates now had to travel two hours to get to their local court. Magistrates were prepared to contemplate pop-up courts but they were concerned over security. Phil Bowen said that court closures destroyed localised justice and thus the legitimacy of the magistracy. Lady Justice Macur, Senior Presiding Judge said "there is a real issue about the community having ownership of certain events, particularly in youth offending where there needs to be a knowledge of the steps that could be taken to divert, hopefully, young people away from the courts".

Problem Solving Courts
Despite the fact that these had been supported by the Prime Minister and in 2016, a junior minister had supported a recommended working group, nothing had happened. In

Northamptonshire, there was an experiment with magistrates talking to young people about their referral orders, via the YOT team, but that scheme had not been copied.

Sentencing Powers
Magistrates were still in favour of implementing the Criminal Justice Act 2003 which would double their imprisonment powers to 12 months. Too many cases were sent to the Crown Court which should be heard by magistrates. Delays in the Crown Court were getting worse. The Government had an unfounded belief that this would result in an increase in custodial sentences, yet when magistrates' youth custodial powers increased from six months to two years, the youth custody population decreased from 3,500 to 900. A previous junior minister had promised to examine the issue but he had had two jobs since then.

A National Strategy for Magistrates
A review was promised by the junior minister in 2013. Nothing had happened so a national strategy plan had been initiated now by the Magistrates Leadership Executive, working with the Magistrates' Association and the Chief Magistrate. They had issued a discussion paper to magistrates. They were hampered by the loss of HMCTS staff. Under court reform plans, HMCTS would be reduced from 16,000 to 10,000. They were also hampered by lack of resources. Magistrates expenses rates were fixed in 2010. "We can see the efficiency of digitalisation, but a lot of the people who come in front of us are not particularly equipped to deal with that." (John Bache). "In the magistrates court we are dealing with high volume and low complexity. We are really desperately in need of a single digital file that travels the whole way through the system to avoid those issues of duplication of effort, re-keying and all the errors and so on. There are further efficiencies that can be made, and hopefully reform will enable us to do them… We are probably 20 or 30 years behind in terms of modernisation of the court system" (Jo King).

Chapter 16 The Jury

16-015 Is the law Working as Intended?
In July 2018, as part of their courts reform programme, the Ministry of Justice launched their "Juror Digital" system, which enables people summoned for jury service to reply online, instead of just on paper. The Ministry claims it to be a success, as a pilot study with 12,000 people resulted in 19 per cent responding in seven days, compared with just one per cent under the paper-only system.

16-029 The impact of social media
On March 5th, the Attorney General published a *Response to Call for Evidence on the Impact of Social Media of the Administration of Justice*. It concluded that social media did not currently pose a threat but the Government has launched a new webpage on contempt of court and the judicial office is working on new guidelines.

Chapter 17 Legal Aid

17-019 Pro bono work
Pro Bono Connect links barristers chambers and solicitors' firms offering free legal services so that they can collaborate in litigation.

17-020 Enhancing access to justice: alternatives to legal aid
Since the 1970s or before, various bodies have contemplated the promotion of "before the event insurance". This means insurance which a claimant has taken out prior to bringing a claim, for example, legal expenses as part of their house or car insurance. For the latest on this, including its role in enhancing access to justice and its relationship with legal aid, see *The Law and Practicalities of Before-the-Event Insurance: an information study*, by the Civil Justice Council, November 2017.

17-026 Law Centres and Other Advisors Are Still Vulnerable
In November 2018, Suffolk Law Centre protested at the proposed withdrawal by Suffolk County Council of a £400,000 grant for Citizens' Advice. In 2018, the South West London Law Centres revealed that they had almost had to close again in 2017, despite the fact that they had helped over 8,000 people, received 60,000 calls and their website received over a million hits. They cover a huge population area: Wandsworth, Merton, Croydon, Kingston-upon-Thames, Richmond-upon-Thames and Sutton.

17-033 Part 6 Where are we now?
In July 2018, the Parliamentary Joint Committee on Human Rights published *Enforcing Human Rights Tenth Report of Session 2017–19*, here. Chapter 3 is tellingly called "The damaging effects of legal aid reforms". They were critical of the means tests, which the Ministry of Justice had admitted in 2015 had resulted in 25 per cent of the population being eligible for free or contributory civil legal aid, compared with 70 per cent in Scotland. They pointed out that the number of cases being funded for initial legal help had levelled out to *one third* of pre-2012 levels, starkly illustrated in the graph on p. 12 of their report. They were especially critical of the meanness in administering the Exceptional Cases Fund. When the LASPO (Legal Aid, Sentencing and Punishment of Offenders) Act 2012 was passing as a Bill through Parliament, the Government had projected that 5-7000 cases per year would be funded but under a thousand benefited in 2017. The forms were far too complex to complete without a lawyer and lawyers were not paid for completing them, which took about four hours. The Committee shared the concerns of many other bodies about the "severe impact on legal aid professionals, damaging morale and undermining the legal profession's ability to undertake legal aid work, leading to consequent grave concerns for access to justice, the rule of law and enforcement of human rights in the UK". (para. 83).

17-032 Legal Aid Fees
In July 2018, the House of Commons Justice Committee published *Criminal Legal Aid Twelfth Report of Session 2017–19*, prompted by the concerns raised in their review of the disclosure of evidence system. It considered criminal legal aid fees and the decline in criminal justice spending. They concluded that poor remuneration hampered defence lawyers' ability to properly review unused prosecution material. They regretted that both solicitors and barristers were in dispute with the Ministry of Justice and warned that both defence solicitors' firms and the defence bar were so fragile that rights to legal advice and representation were at risk. They recommended the establishment of an independent comprehensive review of legal aid, plus an annual review of advocates' fees.

In November 2018, after consultation, the Minister of Justice announced that an extra £23 million would be spent on the Advocates' Graduated Fee Scheme, "The money will be specifically targeted at junior advocates to support continued investment in the profession." (press release, 24 November). Nevertheless, 193 barristers wrote an open letter to the chairperson of the Criminal Bar Association in December, threatening further action in 2019 if there were not a "significant increase in funding across the board", in both prosecution and defence.

LASPO Post-Implementation Review
In July 2018, the House of Commons House of Lords Joint Committee on Human Rights published *Enforcing Human Rights Tenth Report of Session 2017–19.* Chapter 3 had the title, "The Damaging Effects of Legal Aid Reforms". The publication of the latest Review, due in 2018, was delayed until 2019 but has been published this spring (below). In its December 2018 submission, the Civil Justice Council reminded the Government that access to justice was a constitutional right.

17-039 Who's missing out on LA now?

The bereaved
In July 2018, the Government consulted on legal aid for representation at inquests, amid widespread media coverage of examples of bereaved people who had been denied LA at inquests and inquiries. In December, the Bar Council responded that a suggested "independent public advocate" would be inadequate because they would be better labelled "independent advisor". Survivors of disasters and the bereaved still needed independent representation. See further the report of the Joint Committee on Human Rights.

Parents and children
In four items in December 2018, the *Guardian* alleged that its investigation had shown that there had been an 80 per cent drop in the number of people receiving LA since 2012 and parents were abandoning their attempts to maintain contact with children.

The disabled and immigrants; those applying for judicial review: see the Joint Committee on Human Rights report, above.

As for judicial review, Julia Salasky, who founded the Crowdjustice website, said crowdfunding should not be seen as an alternative to legal aid. Five cases funded by

Crowdjustice had gone to the UK Supreme court. On crowdfunding public interest cases, see further Joe Tomlinson, "Crowdfunding public interest judicial reviews: a risky new resource and the case for a practical ethics" [2019] Public Law 166 (*Westlaw*).

Others
The Bar Council and Open Democracy have published videos depicting real-life examples of people who had lost out on LA in the above examples plus early legal advice, disability benefits and the Windrush immigrants and their families.

17-039 Increasing demands on charity
The LawWorks 2018 Report, said that, of 229 clinics, 76% reported an increase in demand for advice and 52% saw more clients in crisis.

17-039 Evaluating the 2012 Cuts
After a one-year consultation with over 130 organisations, the Ministry of Justice published the Post-Implementation Review of Part 1 of LASPO (the Legal Aid, Sentencing and Punishment of Offenders Act 2012), on February 7, 2019. At long last they have acknowledged some of the damaging effect of the cuts, which charities, judges and Parliament have been warning them of since before 2012 so they also published a *Legal Support Action Plan*. Main points, from the summary:

- "With the availability of legal aid limited in various areas of law, the volumes of publicly funded cases dropped, and expenditure has fallen. In 2017-18, the scope changes saw legal aid spending fall by approximately £90m in civil cases and £160m in family cases, compared to £105m and £130m estimated in the impact assessments that accompanied the Act."
- "In social welfare law matters, the volumes of legal aid have declined more than anticipated in the original IA (impact assessment), in all of the respective areas…this trend could be due to a lack of awareness of the availability of legal aid, the clustering of problems, or other external factors."
- Feedback said early intervention was paramount in solving problems and saving public money. Where people have clusters of problems, current provision could often solve some of their problems but not others. "Stakeholders suggested Government should consider embedding legal advice in other services; 'location based legal services', noting that 'one stop shops' can be very effective, user friendly, and would support those with clustered problems".
- As for people representing themselves, "stakeholders" thought the system did not cater for them. A variety of help options should be available, as online advice was insufficient.
- There were advice deserts in immigration and housing, as solicitors had abandoned legal aid work. "It was noted that advice deserts are more likely to occur in rural areas with people no longer seeking advice because following LASPO they either do not know where to go, or because it is too far to travel."
- "Aside from the comments raised concerning the specific eligibility reforms, the overwhelming view expressed by those engaged was that LASPO should have fundamentally changed the means testing scheme to align with the cost of current living standards."
- "Total expenditure on civil legal aid work has reduced by 25% since 2012-13 and, as a consequence, the number of providers doing legally aided civil work has fallen by

32% overall (varying between the differing areas of civil law). The average income per civil legal aid provider has increased by 11%."

The Act came into force in 2013 but the Government has been unforgivably slow in responding to criticisms of the destructive effects of the Act that were predicted in 2010, by judges, lawyers and charities, including some glaring false economies. I am not summarising the Action Plan, because it contains nothing new and can do nothing to reassure critics. The Ministry also published a Review of legal aid for inquests.

Further reading

S. Hynes, "Birthday wishes" (2019) 169 N.L.J. (7827), 7 (February). (On the 70th anniversary of civil legal aid).

J. Roberts and G. Bindman, "Frozen out of justice" (2019) 169 N.L.J. (7828), 9-10.