

Exploring eCourt innovations in New South Wales civil courts

By Philippa Ryan and Maxine Evers

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Some New South Wales civil courts have recently introduced electronic filing and online pre-trial appearances. These innovations have different consequences for different users of the civil justice system. Whatever the ostensible benefit, any change to the way our justice system works must enable the purpose for which it exists: access to justice. For practitioners and self-represented litigants who would otherwise travel long distances to attend court, the time and costs savings could be significant. Of course, this intended outcome depends upon the reliability and usability of the technology, as well as the competence of the users. However, for those without these skills or those who do not have access to computers and/or the Internet, this change could impede access to justice. It is too early to evaluate the success of this project, but lessons can be drawn from other jurisdictions. This paper will explore potential advantages and disadvantages of these changes for self-represented litigants and legal professionals. It will conclude that as technology is disrupting all aspects of our social and commercial arrangements, it is logical that our courts will need to keep up.

Introduction

In September 2015, the New South Wales civil courts launched some innovative online functionality to its services. In the Supreme, District and Local Courts, solicitors and self-represented parties can now complete, file and access forms online. While many court forms have been available via the courts' website for more than a decade, being able to file and then access court documents electronically is new. In addition to this online registry service, parties represented by solicitors can also opt into an online court. The online court is a new digital service that removes the need to and associated costs of appearing in court in person to deal with preliminary and

interlocutory matters. It gives solicitors the option to “appear” in most pre-trial directions and call-overs via a secure portal that allows solicitors and registrars to manage cases and process preliminary orders without having to enter the courtroom.

If this trial is successful, it is hoped that by moving preliminary court work and interlocutory appearances to an online platform, parties and their representatives will be saved the time and expense of having to attend the court in person.¹ A by-benefit of this aim will be a reduction in the number of hardcopies of documents produced during the preparation for trial.

The use of technology in court processes raises significant questions for both users and the legal profession. Will online filing and appearances improve access to justice or inhibit it? Will all users of the justice system be sufficiently competent with technology to be able use the new system or will it be another intimidating barrier to justice? Is this move intended to benefit the users of the justice system or just reduce the burden on the public purse? The work usually done by solicitors and junior barristers will be lost, denying budding advocates the opportunity to hone their nascent skills. When will junior solicitors and new barristers have an opportunity to practise their advocacy skills? In the case of new barristers, how will they earn much-needed income in their first two years at the Bar?

Access to justice is an important issue - in Australia, as much as any other justice system. Increasingly, technology has the potential to facilitate access to justice, particularly in terms of improving efficiency and reducing costs. Whether technology can be regarded as improving access to justice comes down to two propositions: it must work; and it must be readily understood by its users.

This paper will explore some of the issues raised by the move of New South Wales courts to online filing and pre-trial appearances. In particular, it will explore the particular steps in civil procedure that will be conducted online, who will be able to use these systems and whether they improve or inhibit access to justice.

This paper is divided into four parts. First, it will provide an overview of how new technology services are being used in civil courts. Second, it will explore whether this

¹ New South Wales Supreme, District and Local Courts Online Registry. Retrieved 10 December 2015, from <https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt>.

technology is improving or inhibiting access to justice for users of the civil justice system. Part three will examine the impact that the automation of filing and pre-trial processes will have on solicitors and other legal professionals, in particular new barristers and solicitors' agents. Part four will provide an overview of the lessons from three other jurisdictions that have already trialed the transition of court process to online platforms and consider whether those lessons might inform the experience in New South Wales.

As with so many innovations in the public sector, this paper will conclude by highlighting the potential advantages and disadvantages of the New South Wales eCourt trial. The potential costs include the development and implementation of new technology and the effectiveness of that new technology to enable access to the systems it is intended to facilitate. The benefits are the reduction in costs to the public purse and a more streamlined way for the public and professionals to interact with the court and its processes.

I The Role of Technology in the Justice System

The two main aspects of court work being automated by the New South Wales courts are filing and pre-trial processes. It is not possible at this early stage to provide an evaluation of the success of this project. However, it is possible to explore what the New South Wales courts hope to achieve and how this might impact the registry staff, legal professionals and their clients.

Court perspective

While positioned within a legal system and a profession that are often viewed as conservative and constrained by tradition, Australian courts have demonstrated an advanced strategy as early enablers of technology. Since the 1990s, innovative changes have impacted on court processes and systems, resulting in a different user experience. The Federal Court of Australia, in 1995, was the first court to introduce a video conferencing system and a process of electronic filing.² Subsequent initiatives

² Former Chief Justice of the Federal Court, the Honourable Michael Black suggests that the Federal Court of Australia was the first court in the world to introduce a video conferencing system. The Hon

by Australian courts have included electronic filing, electronic discovery, digital scanning of files and publication of decisions on Court websites.³ These initiatives were introduced as part of the increasing focus of courts on case management.

The development of further innovative systems and processes was enabled by the growing sophistication, and the widespread availability, of technology. This complemented the continued government strategy for courts and judicial officers to administer caseloads effectively and efficiently. The role of technology in the management of caseloads, both general and individual cases, was reinforced by Practice Notes, guiding the profession in its navigation of a 'brave new world' of e-litigation.⁴ Progressive changes in court processes and systems continue to be gradually implemented with a significant achievement being that of an online court.

New South Wales was the first state jurisdiction to establish an Online Court. The Supreme, District and Local Courts have all developed Online Courts, allowing for networked discussions between judicial and administrative court staff and legal practitioners.⁵ This mode of access to the court is not available to parties, self-represented litigants and non-parties.⁶ The first major pilot of the Online Court targeted local court criminal matters.

The pilot was introduced, in 2011, at the NSW Downing Centre for online processes in criminal proceedings for matters such as service of briefs, continuance or consent variances to bail and the setting of timetables.⁷ Disputed issues and hearings continued to be determined in the courtroom. At the conclusion of the 23 month trial, the Department of Attorney-General and Justice determined that, due to the low

Chief Justice Michael E J Black, 'The Federal Court of Australia: The First 30 Years – A Survey of the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017 – 1052 at 1049.

³ In 2008 the Supreme Court of New South Wales introduced a Practice Note 'Use of Technology' to provide for electronic discovery.

⁴ See, for example, the Federal Court's Practice Note CMG *Electronic Technology in Litigation, Default Document Management Protocol* (where discovery involves between 200 and 5,000 documents) and *Advance Management Document Protocol* (where discovery involves in excess of 5,000 documents). Also, Supreme Court Practice Note Gen 12 *Supreme Court – online court Protocol*.

⁵ NSW Government Justice, Courts and Tribunal Services NSW. Online Services at http://www.courts.justice.nsw.gov.au/Pages/cats/catscorporate_online_services/onlinecourt.aspx. Retrieved on 25 November 2015.

⁶ Supreme Court Practice Note Gen 12 *Supreme Court – online court Protocol*.

⁷ Local Court of New South Wales, Annual Review 2011, p 19.

number of participants and ‘limitations that constrained the useability of the system in a court context’⁸, the Online Court be discontinued.⁹ A positive outcome of the evaluation was its approval by more than 80% of the practitioners who accessed the Online Court.¹⁰ Although, from the court’s perspective, volume of use and allocation of time are significant resource factors when managing large numbers of cases and parties. A small participant rate can simply be disregarded when compared with large numbers of cases, parties and legal representatives.

The requirement for effective resource allocation is paramount, given that the Local Court aims to resolve 90% of civil cases within six months of commencement, with the remaining 10% within 12 months.¹¹ These targets are set within a comprehensive case management system. One component of the system is the extension of technology to include electronic bench books¹², bail applications by audio-visual or audio links¹³ and evidence from protected or vulnerable witnesses using CCTV.¹⁴ Another is the dispensing of parties’ attendances for applications for a change of venue¹⁵ and the granting of leave to issue a subpoena in the Small Claims Division.¹⁶

In 2015, the Downing Centre introduced a second pilot Online Court, this time in its civil jurisdiction. The pilot referred to as the Justice Online Project involves an Online Registry and Online Court. The main benefits of the e-registry are for the profession with the removal of travel time to the registry, the availability to file outside of business hours and the speedier return of sealed documents.¹⁷ The pilot also includes an education program for the profession, including several You-tube videos.¹⁸

⁸ Local Court of New South Wales, Annual Review 2012, p 20.

⁹ Ibid. p 14.

¹⁰ Ibid. These practitioners stated that they would use the Online Court again.

¹¹ See Practice Note Civ. 1 pursuant to Civil Procedure Act 2005 (NSW), s 15 and Local Court Act 2007 (NSW), s 27.

¹² Local Court of New South Wales, Annual Review 2013, p 3.

¹³ Local Court of New South Wales n 7, p 26.

¹⁴ Local Court of New South Wales n 6, p 39, 40.

¹⁵ See Practice Note Civ. 1, 10.6.

¹⁶ See Practice Note Civ. 1, 26.5.

¹⁷ For example, sealed documents are available from the online registry in fifteen minutes compared with the over-the-counter filing and return of between 5 to 8 days. Presentation to the authors of the Online Court by Court staff on 17 November 2015.

¹⁸ <https://www.youtube.com/channel/UChDtIPYulcNhpByUI4LN6LQ>. Retrieved on 25 November 2015.

The main function of the Online Court is the management of civil cases up to the Review stage.¹⁹ All parties must be legal represented and opt in to the online process. Lawyers communicate with the register and each other by email. Directions must be made by consent. The avoidance of court appearances results in an early hearing date.²⁰

The Online Court's objective is to reduce practitioners' and court staff's time in filing documents and seeking orders. An additional incentive for parties and their lawyers to file documents in the online registry is a waiver of the 28 day waiting time from the filing of the defence to the first call-over.

The pilot has been designed as a trial for the Supreme, District and other local courts in NSW. Evaluation of the pilot will be critical in determining the prospects for its continuation and expansion. It is important that an evaluation includes, not only the effect on Court resources, but also the impact on access to justice. What is the capacity of the Online Court to embrace self-represented users? Will the less billable time incurred by lawyers using the online registry and court result in lower fees for clients? Two objectives that need to be included in the evaluation are the reliability and useability of the technology for unrepresented parties and the response of the profession to the time and costs savings.

User experience

Users of civil justice system processes and procedures fall into three categories: self-represented litigants, solicitors and barristers. Most litigants (whether self-represented or who have retained a solicitor) aim to keep the cost of legal processes to a minimum. Litigants who have retained lawyers face having to pay court costs and legal fees. Every step undertaken by a lawyer incurs for their client the cost of the court process (for example, filing fees) and fees payable for their lawyer's time. These fees include the time spent travelling to and from court, the cost of that travel, and waiting time in court. Meanwhile, self-represented litigants save significant legal

¹⁹ The review date is 4 weeks before the hearing for the purpose of ensuring the matter is ready for hearing and that all directions have been complied with. See Practice Note Civ. 1, 15.

²⁰ For example, a call-over appearance could take a practitioner 6 hours, with travelling and waiting time. Online Court Orders can be made in 6 minutes. Presentation to the authors of the Online Court by Court staff on 17 November 2015.

expense by not retaining a lawyer to act on their behalf, but their need for guidance as to how to prosecute or defend a claim imposes a significant burden on the registry staff. The automation of pre-trial processes should significantly reduce both lawyers' fees and the amount of interaction between self-represented litigants and registry staff.

Australian courts have been steadily adopting more and more technology over the past 20 years. These developments have included the availability of free searchable online legislation and judgments via AustLII;²¹ the online tracking of all matters filed in each jurisdiction; and the provision to the bench of soft copies of submissions and transcript. In larger disputes, courts have managed paperless trials, where scanned copies of all documents are displayed in court on screens and parties can appear by teleconference or video link.

The main factor determining the success and confidence with which these innovations have been adopted has been the reliability and speed of processing systems and internet connection. Recent improvements in wireless capability and portable laptop computers, tablets and handheld devices means that court room landscape has changed forever: needing fewer bookshelves and more power outlets.

A key step in the progression from paper-only courts to online filing is the New South Wales civil justice systems has been the commencement of the *Civil Procedure Act* in 2005 and the attendant *Uniform Civil Procedure Rules*.²² The commencement of the CPA also heralded the advent of streamlined forms across the Local, District and Supreme Courts.²³

Since 2005, all civil (and many criminal and specialist tribunal) court forms have been available as soft templates via the courts' websites (in Word or PDF format).²⁴ The forms contain detailed instructions and guidance for users as to how to complete the form. Some of the forms are interactive and include drop-down menus so that certain keywords and fixed elements in the forms are selected from a list of possible

²¹ The Australian Legal Information Institute: <http://www.austlii.edu.au>

²² *Civil Procedure Act 2005* (NSW) and *Uniform Civil Procedure Rules 2005* (NSW).

²³ There are some specialist civil jurisdictions that continue to maintain their own forms, but the Local, District and Supreme Courts manage a significant proportion of all proceedings filed in New South Wales.

²⁴ See for example, <https://onlineregistry.lawlink.nsw.gov.au/content/help/forms-list>

options. This reduces the risk of operator error. The completion of an online form or preparation of a Word document before saving it in PDF format is therefore something most practitioners and many non-lawyers would by now be familiar with. Online filing takes this process just two steps further – instead of just printing the document, the user will need to upload it to a website and then submit it. For most experienced legal practitioners, it will not be a significant disruption for them to learn how to complete these further two steps; and any new users will likely be familiar with the sorts of online commands driving the courts’ website.²⁵

Modern technology has reached a point where processing systems have become fast and reliable; and it so pervasive in day-to-day communications and transactions that users can expect the look and feel of any new system to have familiar functions and universal symbols. Because of the way most of us use technology to create documents and interact with each other, the idea that court documents would be filed online or that a court appearance might happen by email, instead of in person, seems more incremental than disruptive. This is the good news.

However, there are two issues for discussion that deserve attention. This first issue is whether the increasing use of technology will improve access to justice or simply leave further behind the users who are already disenfranchised by their inability to keep up with technology. The second issue concerns junior lawyers and para-professionals whose traditional training ground has included filing court documents and appearing before registrars in pre-trial motions and directions. Not only have young lawyers cut their teeth appearing in directions and on motions, but for new barristers and solicitors’ agents this has been a reliable source of income. These issues will be discussed further in the next two sections of this article.

Having established that the increasing use of technology in the civil justice system is inevitable and likely to be easily accessed by new and experienced legal practitioners alike, we turn to a discussion of how technology will impact on access to justice, particularly for self-represented litigants.

²⁵ Law students follow these steps when submitting essays to originality checkers in law school. Many law schools are introducing on-line marking systems, which also require that students upload a soft copy of their essays to an online portal.

II Access to Justice Issues arising from Online Registries and eCourts

Access to justice is a term positioned in discussions concerning government funded legal aid, community legal centres and litigation funding. It refers to the availability and accessibility of legal information and advice to the community. In the context of the local court's civil jurisdiction, access to justice for litigants and potential litigants is to the provision of information, advice and assistance. The NSW civil court's core objective of achieving the 'just, quick and cheap resolution of the real issues'²⁶ highlights the desire to facilitate access to justice for litigants in civil disputes. The significance of this objective is evidenced by its extension to parties²⁷ and legal representatives,²⁸ requiring them to assist the Court in achieving this outcome.

Recent research concludes that technology is an enabler in providing greater access to justice through its ability to connect people with legal needs to legal assistance, information and advice. The 2012 Review of the Delivery of Legal Assistance Services to NSW, whilst acknowledging that not all community members have access to technology, recommended that 'publicly funded legal assistance services should investigate ways in which technology may be used to deliver services more efficiently and effectively'.²⁹ Examples of the application of technology to provide legal information and assistance include case studies, guides and virtual legal advice clinics.³⁰ Interestingly, the Review does not address the role of courts in serving the legal needs of the community. This may be because the court system is not regarded as a part of the wider legal assistance services.³¹ However, this omission questions the role of the court in facilitating access to its services, including dispute resolution and trials. The Review identified uses of technology to expand the delivery of services, many of which are transferable to an online court. These services include e-access for

²⁶ *Civil Procedure Act 2005* (NSW), s 56(1).

²⁷ *Civil Procedure Act 2005* (NSW), s 56 (3).

²⁸ *Civil Procedure Act 2005* (NSW), s 56 (4)(a).

²⁹ Recommendation 9. NSW Government, Attorney General & Justice, Review of the Delivery of Legal Assistance Services to NSW, (June 2012), p 42.

³⁰ NSW Government, Attorney General & Justice, n 9, p 41.

³¹ The legal services referred to include LawAccess, LawAssist, LawPrompt, Legal Aid NSW, the Aboriginal Legal Service and Far West Community Legal Centre. NSW Government, Attorney General & Justice, n 29, p 41.

remote communities, availability outside of business hours, interactive processes and virtual appearances.³²

In 2014, recommendations as to the use of technology to facilitate access to courts were detailed in the Productivity Commission's Access to Justice Report. These included the:

1. Extension of use of online technologies and telephone conferences for procedural and uncontested issues,³³
2. Consideration of a 'presumption' for use of online technologies and telephone conferences;³⁴ and
3. Investigation of better interactions between courts and users, including self-represented litigants.³⁵

The NSW Online Court's objective to make the justice system 'faster, easier and more accessible for the community'³⁶ is aligned with the Commission's Recommendations.

Further evaluative research is needed to determine the usefulness of online courts for the community. If the systems and processes that support these courts have been developed for the sole use of the court staff, the judiciary and the profession, their user-friendly capacity may not extend to lay persons who seek access to the court for their individual matter.

The value of the online court may be in the additional resources opened up as a consequence of increased efficiency. Meanwhile, the time and costs savings may result in greater available for registry staff and duty and community solicitors to assist lay persons seeking information, advice and representation.

³² NSW Government, Attorney General & Justice, n 29, p 42.

³³ Productivity Commission, Access to Justice Arrangements, report No 72 (September 2014), p 59.

³⁴ Productivity Commission, n 33, p 59.

³⁵ Productivity Commission, n 33, p 60.

³⁶ Reference to comment of NSW Attorney-General, Gabrielle Upton, 'First 'online court' for civil cases to be trialed in NSW' Lawyers Weekly, October 2015, 16.

III The Impact of Automation on Practitioners and Para-professionals

As pre-trial processes become more automated, opportunities for junior lawyers to appear in court will decline. There may be costs savings for clients and the public purse, but the loss to the profession is significant. If junior solicitors and barristers are not needed in court, there will be little opportunity for them to develop their advocacy skills.

It is not just the automation of court processes that is impacting junior and para-legal professionals. The automation of many process-driven tasks required for the preparation of a matter for trial means that law students and law graduates are missing out on vital opportunities to gain meaningful work experience and gainful employment. Tasks that would traditionally fall to junior civil practitioners include indexing discovered documents, preparing briefs for counsel, drafting court documents, attending call-overs before registrars and moving the court on interlocutory applications before masters or associate justices. All of these processes are moving online.

Service organisations across all disciplines have long-recognised the benefits of delegating to junior or para-professionals work that does not require experience or expertise.³⁷ This is certainly true of law firms. Indeed, in recent years, sophisticated clients have learned to scrutinise the bills from their lawyers and they will complain if they detect ‘over-servicing’ by their lawyers. Over-servicing arises when lawyers spend an unreasonably long time working on a particular task or when a task that could have been done by someone quite junior is completed by and charged to a senior lawyer.

Of interest to this paper is the impact of eCourts on solicitors, new barristers and agents. The impact of the eCourt trial on solicitors, new barristers and agents is different for each; and so each will be discussed here in turn.

³⁷ R Susskind and D Susskind, *The Future of the Professions* (Oxford University Press, 2015) at 124.

Solicitors

The following advice of magistrate Hugh Dillon is a reminder to many newly-admitted solicitors of the reputational importance of competent advocacy skills.

*They find it easier to listen to and respect the arguments of an advocate who appears to have his or her case under control than those of somebody who is thrashing around in panicky disorganisation.*³⁸

A respectable advocacy practice is achieved through the development of appearance work. A new advocate commences a career in advocacy with by-consent mentions before the registrar and graduates to hearings set down for several days with multiple parties.

With criminal matters first being heard in the local court and the majority of litigants with a civil dispute coming within the jurisdictional limit of the local court, many solicitor advocates therefore begin their litigation careers here. General and small to mid-sized firms with a civil litigation practice have caseloads of diverse local court matters, including debt recovery, property damage and insurance claims. City practitioners, particularly those located in close proximity to the Downing Centre; suburban solicitors, especially those in a local court precinct and regional and rural lawyers share a common purpose, that of providing legal services to plaintiffs and defendants in the local courts. Many of these lawyers offer an essential service as agents with their agency work providing a regular source of income.

With the replacement of articles with practical legal training programs, local court advocacy serves as a training ground for newly admitted solicitors, some of whom had never entered a court. This ‘training ground’ model allowed newly admitted solicitors to embark on their careers as advocates developed by a period of regular mentions, call-overs and directions hearings.

Removal of this preliminary work may result in a skills gap for solicitors with career intentions as advocates and a financial loss for agents. This unintended consequence

³⁸ Hugh Dillon *Staying afloat and navigating homeward: Practical tips from the Bench on Advocacy in the Local Court* (2005) Paper delivered at the Criminal Law and Advocacy Conference, Sydney, 12 August 2005, 1. Retrieved on 25 November 2015 from http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Local%20Court%20Advocacy.pdf.

is beyond the scope of the Online Court's evaluation. It is, however, an issue that deserves consideration by legal educators and professional associations as well as the courts. One possibility is an advocacy mentoring program through professional associations. This could be a 'flipped' program to the Law Society of New South Wales' Technology Mentoring program piloted in 2013. This program was designed to connect 'tech-savvy' lawyers with non-technical lawyers to exchange skills in technology, including online and social media, for other skills based on knowledge and experience.³⁹ Another is the offer of more advocacy subjects in academic and practical legal training courses, or as part of professional development, to enable students or newly-admitted lawyers to learn, practise and receive feedback on the skills, knowledge and ethics of advocacy.

With court appearances on the wane, the role of solicitors in civil matters is changing. The ability to communicate succinctly and effectively in writing is going to become an advocacy skill for the future. The increasing use of written correspondence, submissions and evidence has been a feature of common law jurisdictions for decades. Most civil cases begin with pleadings, affidavits and requests for particulars and documents filed and served in writing. So the extension of this convention to online filing and emailed appearances is arguably an incremental step toward a more remote management of the pre-trial stages in civil litigation, particularly for solicitors who could not possibly practise law in the modern world without access to the internet and a reasonable level of competence with technology.

This "remoteness" of online filing and appearances does not mean that the system is any less centralised. The court continues to play a key role in making orders and directions about how the matter is to proceed to trial. Under the new eCourt regime, these steps will happen without having to bring the parties or their representatives before the court. The greatest saving is achieved by those who were previously most disadvantaged – the practitioners who are located farthest from the court.

Whereas solicitors will appreciate some of these direct benefits to their clients, they may perceive a loss of authenticity in the way that the parties are represented. Many a

³⁹ Further information on the Technology Mentoring Program is available at <https://www.lawsociety.com.au/ForSolicitors/professionalsupport/supportingyou/Mentoring/TechnologyMentoring/733300>. Retrieved on 11 November 2015.

court of appeal has remarked that the trial judge truly had the best measure of the evidence and the demeanour of the parties.⁴⁰ This is also true of the conduct of the parties during preparation for trial. Registrars and Associate Justices need to observe the parties and their representatives, in order to make a meaningful assessment of costs orders and otherwise control the litigation. While the parties are conducting their appearances on line, there will be less time spent in court engaging in robust debate about the conduct of the proceedings. Some judicial officers will welcome this aspect of the eCourts, but it may be frustrating for practitioners who feel that they need to be heard in real time.

New barristers

For almost two centuries, barristers in New South Wales have cut their teeth on appearing before registrars in pre-trial directions and interlocutory applications. Solicitors will brief junior barristers to appear on their behalf if getting to court is too expensive or if the solicitor does not have time to attend. If these pre-trial processes go online, there will be no need to brief new barristers to appear. This not only robs the junior of valuable low-risk advocacy experience, but it is also a loss of paid work. A barrister's practice is similar to a small business. New barristers often earn little or no income in the first three to six months of practice. The New South Wales Bar Association warns that,

*Even if a new barrister is lucky enough to obtain work and send out fee notices, payment might not arrive for some time. Readers will need sufficient capital so that they can gain experience in court with his or her tutor, undertake devilling (researching) and observing proceedings in court without payment.*⁴¹

The Bar Association does not contemplate in its advice that a new barrister can expect to be on their feet in court during these early months at the Bar. The advocacy work that new barristers could expect in their early years at the Bar was traditionally found

⁴⁰ See for example, *Fox v Percy* [2003] HCA 22; 214 CLR 118; 197 ALR 201; 77 ALJR 989 at [30] per Gleeson CJ, Gummow and Kirby JJ; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 (24 December 2002) at [184]; and *Nominal Defendant v Clancy* [2007] NSWCA 349 at [64].

⁴¹ 'Coming to the Bar: cost of setting up a practice' - New South Wales Bar Association website retrieved on 11 November 2015 from <http://www.nswbar.asn.au/coming-to-the-bar>.

in directions and motions before registrars and masters (now known in some States as associate justices). These appearances in the interlocutory stages of preparation for trial have long been the training ground for young advocates, particularly in the Local and District Courts. Now that some of the courts are moving these processes online, there will be even less work for the junior barrister to do.

The availability of advocacy work for junior barristers has also suffered in recent years under pressure from the requirement that civil practitioners attempt to resolve disputes before resorting to fully-contested litigation.⁴² Alternative Dispute Resolution (ADR) has become a significant part a barrister's practice.⁴³ This is a relatively new development as, traditionally, any advocacy in ADR processes was ably undertaken by the solicitor with carriage of the matter. Indeed, many solicitors (and their clients) abjure retaining counsel until the last possible moment, as a way to save legal fees. With more than 90% of all civil matters settling before trial,⁴⁴ it seems to makes sense to brief counsel as late as possible in the preparation process.

Agents

On any given day, there is a small army of experienced agents appearing in Courts all over New South Wales on behalf of clients and their solicitors who are unable to attend. Agents traditionally have practising certificates and will attend registries to file documents and appear in non-contentious pre-trial proceedings. With the advent of online registries and eCourts, this work will all but disappear. This will be a direct saving to the parties who would have paid for the agent's appearance. But the agents will be left without a valuable source of income. This sort of adjustment is becoming the norm in a world increasingly disrupted by new technology.

⁴² For example, Rule 7.2 of the *NSW Solicitors' Rules* and Rule 36 of the *NSW Barristers' Rules* require that the legal practitioner must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case that are reasonably available to the client.

⁴³ The Hon Justice Susan Kiefel, *Practice at the Bar – what has changed and what remains the same* (2012) Paper delivered to Bar Association of Queensland Annual Conference, 2012.

⁴⁴ In 2013, more than 50% of civil cases in the Supreme Court settled at the court-referred mediation. Many more settled before trial. The registry does not collect settlement data for mediations conducted by private mediators. Source: Supreme Court of New South Wales provisional statistics as at 24 January 2014, retrieved 16 November 2015, from [http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/e154dd079de60d044a2565fa0012aa89/192ee598ebf29c6cca257c6e0010f070/\\$FILE/AR_2013_prov_stats.pdf](http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/e154dd079de60d044a2565fa0012aa89/192ee598ebf29c6cca257c6e0010f070/$FILE/AR_2013_prov_stats.pdf).

IV Lessons from other jurisdictions

A number of jurisdictions around the world have automated some of their court processes and services. Three are worth exploring (Ontario, New Hampshire and Western Australia), as they have published preliminary evaluations of these projects. Importantly, any projects evaluated more than 10 years ago should be read in light of the recent significant improvements to internet speed and availability and increased processing power of all desk top and mobile or hand-held devices. Many of these frustrations experienced at the turn of this century have become almost negligible.

Ontario

The Integrated Justice Project (IJP) was launched in 1996 and was intended to allow government service organisations online access to electronic records about victims, witnesses and offenders in the Ontario criminal justice system. It caused so many delays and was so expensive that it was scrapped in 2002.⁴⁵ Perhaps if this project was trialed today with the advent of reliable wireless technology, it would have a greater chance of success. But for now it stands as a cautionary tale.

According to Lupo and Bailey, the IJP case study highlights two key principles that must be applied when automating case and document management: simplicity in design and careful management of the process of designing and implementing technological change.⁴⁶ They also note that the sheer scale and complexity of the project made it a huge undertaking.⁴⁷

This project was very different to the online registry being trialed in New South Wales. It was a case management system intended to make information about participants in the criminal justice system more readily available to other users of that system. There may be a way to do this using technology, but clearly the approach or technology adopted in this instance did not achieve that aim. It may be that it was too ambitious.

⁴⁵ G Lupo and J Bailey, 'Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples' (2014) 3 *Laws* 353-387 at 368.

⁴⁶ G Lupo and J Bailey, 'Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples' (2014) 3 *Laws* 353-387 at 368.

⁴⁷ G Lupo and J Bailey, 'Designing and Implementing e-Justice Systems: Some Lessons Learned from EU and Canadian Examples' (2014) 3 *Laws* 353-387 at 369.

New Hampshire

New Hampshire's e-Court Project was the result of a 2011 recommendation from the New Hampshire Judicial Branch Innovation Commission that state courts should transition from a paper-based to a digitised document processing system. The Commission hoped that this transition would "reduce operational costs, streamline business process flow and improve customer service in the court system".⁴⁸

The New Hampshire Court began the roll out of its system in the small claims division. Small claims are the most common civil actions in New Hampshire (14,000 per annum). The Court Registry requires that all claims must be filed electronically. Those without access to computers can use the computers in the Court House lobby.⁴⁹ The main problem facing the New Hampshire eCourts project has been government funding. This continues to be a concern moving forward. According to Boral et al, the New Hampshire project could have benefited from the lessons of other similar endeavours in other States (including New Jersey), where the scale of the project was limited at first and then slowly increased, only where legislative funding was available and would continue to be made available in the future.⁵⁰

Legislative support is essential for the delivery of public services. If innovation results in real savings to the public purse, then the upfront cost of development and implementation may be justifiable. Of course, this has to be weighed against the results for users.

The New South Wales Online Registry and eCourt project is being rolled out in stages. These distinct steps will allow for assessment of the success of each stage before expansion, allowing for teething while users familiarise themselves with new systems.

⁴⁸ AB Boral, JD Koenig, ZD Markovich, ME Plecha, KE Schultz, 'E-Court Transition in New Hampshire: an Analysis of Short- and Long-Term Implications' (2014) *PRS Policy Brief* 1314-13, Presented to the NH Commission on Innovation, Efficiency and Transparency at 1.

⁴⁹ AB Boral, JD Koenig, ZD Markovich, ME Plecha, KE Schultz, 'E-Court Transition in New Hampshire: an Analysis of Short- and Long-Term Implications' (2014) *PRS Policy Brief* 1314-13, Presented to the NH Commission on Innovation, Efficiency and Transparency at 1.

⁵⁰ AB Boral, JD Koenig, ZD Markovich, ME Plecha, KE Schultz, 'E-Court Transition in New Hampshire: an Analysis of Short- and Long-Term Implications' (2014) *PRS Policy Brief* 1314-13, Presented to the NH Commission on Innovation, Efficiency and Transparency at 8.

Western Australia

In 2014, the Attorney General of the State of Western Australia announced the commencement of an eCourt trial for criminal proceedings before magistrates in that State. The Perth Magistrates Court was set to be the first to operate entirely from electronic records, as part of a new plan to make Western Australia's justice system paper-free. The State Government invested \$10 million in a trial that included the electronic recording of all criminal trial information (including prosecutions and bail applications), which had previously been manually recorded on a paper prosecution notice.⁵¹

It seems a significant driver for the Western Australian project is to save storage space. This has long been a challenge in courts all over the world. Over the past ten years, the Supreme Court of New South Wales has required all exhibits to be returned to the parties at the end of a trial. This is a space-saving policy. If every paper document held in the storage facilities of Australia's Federal Circuit Court were stacked in one pile, it would stand 24 kilometres high.⁵² The Western Australian Magistrates Court aim is to become a paperless court and to reduce its environmental footprint.

By digitising the court documents and keeping electronic records of the proceedings, it is easier for a matter to prepare for e-Trial. For more than twenty years, courts in Australia have been running trials with scanned documents projected onto screens and parties able to search for electronic versions of discovered and filed documents. Phil Hocking, chief information officer of the Federal Court, recently told the Australian Financial Review, "We've reached the point now where it is certainly possible for us to create a fully electronic court file."⁵³ As Leeke notes, the profession is still a little way off being a paperless, but practitioners should prepare for increased utilisation of

⁵¹ Paperless e-Courts a step closer in WA (2014) retrieved on 8 December 2015, from <https://www.mediastatements.wa.gov.au/Pages/Barnett/2014/11/Paperless-e-courts-a-step-closer-in-WA.aspx>.

⁵² T Learoyd, 'Preparing for a Paperless Courtroom' (2015) *Lawyers Weekly*, retrieved on 8 December 2015 from <http://www.lawyersweekly.com.au/sponsored-features/17462-prepare-for-a-paperless-courtroom>.

⁵³ A Boxsell, 'How Technology will save time in Federal Courts' (6 December 2013) *Australian Financial Review*, Retrieved on 15 December 2015, from <http://www.afr.com/technology/enterprise-it/how-technology-will-save-time-in-federal-courts-20131205-iyyny>.

electronic options in litigation.⁵⁴ It seems only natural that the New South Wales justice system should embrace the technology being used in the private sector to achieve efficiencies and environmental aims expected by the public. The New South Wales Civil Courts Online Registry and eCourt are a logical progression in that endeavour.

Conclusion

This paper has explored a number of issues that arise from the automation of court processes. Not only has the New South Wales online registry come at the right time, but its development and implementation seems to have focused on how the users will interact with the technology, rather than what the technology can do for its client. This approach distinguishes it from other attempts to automate court services. Any innovation in the public sector requires legislative support to receive funding. The New South Wales project has so far been supported and funded with a view to savings in the long term. Any cost benefit analysis of the project must extend to valuing more than just the public purse; it must value access to justice.

This analysis has sought to identify the aims of this innovation and then assess potential advantages and disadvantages.

The potential advantages include:

- Greater access to justice for those who live in remote areas;
- Reduction in the costs usually incurred when travelling to and attending court;
- Seamless preparation for eTrials;
- Reduction in the use of paper and therefore a reduced environmental footprint;
- Reduction in the cost of storage space (for courts and practitioners); and
- More time made available for registry staff to be able to assist self-represented litigants.

⁵⁴ S Leeke, Australian eTrials and Paperless Courts (1 April 2014) retrieved on 15 December 2015 from <http://insight.thomsonreuters.com.au/australian-e-trials-paperless-courts/>.

The potential disadvantages could be:

- Reduced access to justice for those who do not have access to or do not understand the online registry and eCourt technology;
- Fewer opportunities for junior professionals and agents to experience the low-stakes advocacy usually associated with pre-trial directions and applications;
- Less transparent presence of the parties before the Court making it hard for registrars and associate justices to assess the conduct of the parties and therefore make meaningful costs orders or otherwise control the litigation; and
- Wasted expense by the public in the hope of achieving long-term savings that do not eventuate.

The New South Wales online registry is being trialed at a time in the evolution of modern technology, when users of new platforms and applications no longer need manuals or instruction to figure out how it works. In other words, technology itself is becoming more user-friendly. The fast emerging universal look and feel of symbols and buttons means that it is possible to make new technology speak to users in the same language as other technologies being used every day. This is critical in achieving simplicity and ready use. If new technology is simple to use, then it will be readily absorbed. Good technology should be almost invisible to the user.⁵⁵ If the New South Wales online registry and eCourt achieves universal accessibility, this will be a positive step towards achieving better access to justice.

Some jurisdictions have accepted that “the savings are in the spendings”.⁵⁶ As a result many courts in Australia and elsewhere in the world are making the transition from paper-based information management to digital files. In order to evaluate whether or not the New South Wales Civil Courts project has been successful, it will be necessary to review it after some months have passed. For now, the authors will watch its gradual expansion with interest.

⁵⁵ B O'Donnell, 'The Best New Tech is Invisible' (4 June 2015) *USA Today* retrieved from <http://www.usatoday.com/story/tech/columnist/2015/06/04/the-best-new-tech-is-invisible-smartphones-internet-of-things-nest/28471075/>. Retrieved on 22 November 2015.

⁵⁶ S Leeke, 'Australian eTrials and Paperless Courts' (1 April 2014) retrieved on 15 December 2015 from <http://insight.thomsonreuters.com.au/australian-e-trials-paperless-courts/>.