NOTE OF
ADVICE TO LEGAL EDUCATION FOUNDATION

1. I have been asked to advise the Legal Education Foundation ("TLEF") about the digital reform programme ("the Programme") within Her Majesty's Courts and Tribunals Service ("HMCTS"). I have advised in writing (on 1st February 2018) and at a meeting in Chambers (on 29th March 2018). I have been asked to provide a Note summarising my views.

2. TLEF is keen that data collection should be built into the Programme from the outset, rather than being carried out only as part of subsequent formal evaluation and monitoring. The sort of data that TLEF has in mind would include: equalities data about the operation of online court processes; data about the points at which individuals exit the system; and data about the outcomes secured through online processes. I am told that various apparent barriers to data collection have been identified by HMCTS officials, including: the Government Digital Service Standard ("GDSS"); and the General Data Protection Regulation 2016 ("GDPR").

3. In relation to the **GDSS**, I do not understand on what basis this is said to be an obstacle. There are 18 principles that are central to GDSS; none of them seems to me to rule out the data collection that TLEF is advocating. Indeed, principle 15 advocates the collection of performance data, thereby acknowledging the value of taking account of data collection when designing a system.

4. Even if there is some conflict between the GDSS and the data collection advocated by TLEF, I do not think those responsible for the Programme can properly treat this as determinative. GDSS has no specific legal basis; it is a policy framework for Government websites operating under the gov.uk umbrella. A policy framework of this kind should not operate as a fetter on the discretion of those who design and implement the Programme.

5. The Ministry of Justice ("MOJ") has policy responsibility for the Programme. In designing and implementing the Programme, the MOJ (and any other relevant

Government department or other public body) are subject to the public sector equality duty ("PSED") under section 149 of the Equality Act 2010. This requires public authorities, in the exercise of their functions, to have "due regard" to various matters, including the need to eliminate unlawful discrimination and to advance equality of opportunity between persons who do and do not share a "protected characteristic". The protected characteristics are set out in section 4 of the Equality Act 2010: they include matters such as age, disability, race, and sex. "Public authorities" for this purpose are specified in Schedule 19 to the Equality Act 2010, and include Ministers of the Crown and Government Departments.

6. The PSED does not apply to the exercise of a judicial function, or to the exercise of a function that is exercised on behalf of or on the instructions of a person exercising a judicial function: see paragraph 3 of Schedule 18 to the Equality Act 2010. However, the Programme is about the overall design of the court system, rather than to the performance of judicial functions. In my view the PSED would apply both to the MOJ and to any other relevant Government Department when exercising their functions in relation to the Programme.

7. If the GDSS is regarded as precluding particular forms of data collection at the outset, then there is a serious risk that there will be a failure to comply with the PSED. By analogy, the MOJ could not rely on a building management policy as an absolute bar to making particular modifications to Court buildings in order to accommodate the needs of disabled Court users: proper consideration would need to be given as to what modifications (if any) should be made, and any relevant policy about building management would be relevant but not determinative.

8. More generally, the MOJ is obliged (on general public law principles) to have regard to relevant considerations when designing and implementing the Programme, and this includes considerations about the impact of the Programme on the rule of law. For the importance of the rule of law in relation to the MOJ's work, see generally sections 1 and 17 of the Constitutional Reform Act 2005.

9. I do not suggest that there is a specific positive legal obligation on the MOJ to engage in the kind of data collection advocated by TLEF. But it seems to me that there is an obligation (by reference both to the PSED and to general public law principles) to give

proper consideration as to whether it should engage in such data collection. To rely on the GDSS as an absolute bar to the relevant data collection creates a significant risk that MOJ (and other Departments) will: unlawfully fetter their discretion, and fail to have regard to relevant considerations, in designing and implementing the Programme; and act in breach of the PSED.

10. As far as the **GDPR** is concerned, this will come into effect on 25th May 2018. A Data Protection Bill ("the DP Bill") currently before Parliament will make provision for how the GDPR will operate in the UK. For present purposes I make the (realistic) assumption that the DP Bill will come into force on or before 25th May 2018, in substantially the form of the most recent version (dated 23rd March 2018, and available here: https://services.parliament.uk/bills/2017-19/dataprotection.html). The DP Bill will repeal the Data Protection Act 1998.

11. The GDPR and the DP Bill do not seem to me to preclude data collection of the type advocated by TLEF.

12. The GDPR requires that the processing of personal data must satisfy one of the conditions in Article 6 of the GDPR; and that the processing of "special category" data (as defined by Article 9) must satisfy one of the conditions in Article 9. The DP Bill includes detailed provisions about how Article 9 will work in the UK. Much of the data that TLEF would wish to see collected and analysed in connection with the online Court reforms, would be special category data falling within Article 9.

13. The GDPR and the DP Bill– read together – provide a number of bases on which the collection and analysis of this kind of data could be justified.

- In relation to Article 6, the obvious relevant condition for HMCTS and/or the MOJ to rely upon in collecting and analysing the data, is Article 6(1)(e): the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller. By clause 8 of the Data Protection Bill, Article 6(1)(e) includes the processing of data that is necessary for the administration of justice or the exercise of statutory functions. The relevant

data collection and analysis would in my view be capable of falling within both of these categories.

- The bases for processing special category data, as set out in GDPR Article 9, should be read in conjunction with Schedule 1 to the DP Bill (see clause 10 of the Bill). Schedule 1 makes provision for a number of bases on which special category data may be processed.

- Schedule 1 paragraph 4 enables special category data to be processed for research purposes, in the public interest.

- Schedule 1 paragraphs 6 and 7 enable special category data to be processed: for the exercise of a statutory function where this is in the substantial public interest (paragraph 6), or for the administration of justice (paragraph 7).

- Schedule 1 paragraph 8 enables particular types of special category data to be processed for identifying or keeping under review the existence or absence of equality of opportunity or treatment between specified groups.

14. One difficulty may be that the Programme is being implemented within the umbrella of the gov.uk family of websites, to which the GDSS is applicable. Neither gov.uk nor the GDSS were designed to accommodate an online court system. I also have a wider concern about the use of the gov.uk brand in connection with the Programme. The courts and tribunals are independent of the executive, and are required to rule on disputes between the citizen and the state. If the Court system is accessed via gov.uk, this risks giving the impression that the Courts are part of the executive branch of government rather than independent of it. A comparable, non-digital problem arose in the days when some magistrates courts were known as "police courts", suggesting that the court was an emanation of the police rather than being impartial as between prosecution and defence.

15. Generally, the Programme is of great importance. It has the potential radically to change the way in which citizens interact with the Court system: it intends to move the focus from interaction in the physical world to online interaction. There is considerable potential for this to have a different impact as between different groups, with an adverse effect on those who are unable or unwilling to use online services, or who face particular difficulties (e.g. related to physical disability) in doing so. There are also wider questions about how the perceived fairness and legitimacy of the Court system will be affected by the Programme. All of these are important questions, requiring careful consideration: and without a proper evidence-base, the discussion is likely to be driven by untested assumptions. For instance, the reform programme may be attractive to some as a money-saving measure, enabling the number of Court buildings to be reduced. Or reactions for or against the Policy may reflect more general views (whether favourable or unfavourable) about computerisation and online technology.

16. My comments are not intended either to support or to criticise the Programme. Rather, they are intended to point out the importance of monitoring and testing its practical effects. Proper data collection is an essential starting-point in this task. It would be most regrettable if this were blocked by misunderstandings about the legal position.

TIMOTHY PITT-PAYNE QC

11KBW

18th April 2018