Justice Committee

Oral evidence: Court and tribunal reforms, HC 1886

Tuesday 11 June 2019

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Watch the meeting

Members present: Robert Neill (Chair); Bambos Charalambous; David Hanson; John Howell; Gavin Newlands; Victoria Prentis; Ellie Reeves; Ms Marie Rimmer; Andy Slaughter.

Questions 101 – 179

Witnesses

I: Frances Judd QC, Chair, Family Law Bar Association; Jo Edwards, Chair, Resolution’s Family Law Reform Group; and Dr Jenny Birchall, Women’s Aid.

II: Sara Lomri, Deputy Legal Director, Public Law Project; Ken Butler, Welfare Rights and Policy Adviser, Disability Rights UK; and Wendy Rainbow, Legal Team Manager, Independent Provider of Special Education Advice.
Examination of witnesses

Witnesses: Frances Judd, Jo Edwards and Dr Jenny Birchall.

Chair: Good morning, everyone. Thank you very much for coming to give evidence to us. This is the first of two panels for our inquiry into court and justice reform. Before we start and I ask our witnesses to introduce themselves, in every session we have to go through a formal procedure of declaring our interests. I am a non-practising barrister and a consultant to a law firm.

Victoria Prentis: I am a non-practising barrister, married to a judge.

Ellie Reeves: I am a non-practising barrister.

Andy Slaughter: I am a non-practising barrister as well.

John Howell: I have become an associate of the Chartered Institute of Arbitrators.

Q101 Chair: Can we ask our panel of witnesses to introduce yourselves? Thank you very much in advance for the written evidence that various of you and your organisations have submitted. For the record, can you say who you are and which organisation you are involved with? We can then get into the questions.

Jo Edwards: My name is Jo Edwards. I am here on behalf of Resolution, the national family lawyers’ organisation. I am also a practising family lawyer and mediator.

Frances Judd: My name is Frances Judd. I am the chairman of the Family Law Bar Association. I have been a practising barrister in family law for 30 years.

Dr Birchall: I am Jenny Birchall. I am from Women’s Aid. I am an academic by background.

Q102 Chair: To begin with, I would like all of you to give me an overview, your impression of the reform programme, as far as family proceedings are concerned. Different areas seem to have different potential impacts from these reforms. In terms of access to justice, which is one of our principal concerns, is this moving in the right direction? What are the pluses and the downsides so far? What safeguards or changes would you want to see?

Jo Edwards: As Resolution has said before, we are very supportive of the reforms in broad terms. However, we have particular concerns about the impacts on access to justice. Speaking first about the positives, there is one very particular positive. We have been very supportive of the move to online applications, and particularly, in the family sphere, online divorce petitions. As far as we can tell thus far, that has been a success. We hope that it will continue to be rolled out, so that it becomes an end-to-end process for litigants in person and so that solicitors can start to
use the service as well. That is not to say that we are without concerns about that aspect, but, generally, the move to online applications is a positive thing.

However, we have very fundamental concerns that stem primarily from the coming together of a whole host of factors in the family sphere. The legal aid cuts, which, as everybody knows, took effect in 2013, have had a disproportionate impact on family clients. Lots of people are struggling with access to justice. We have seen huge swathes of court closures, in the past three or four years in particular. What we are seeing, therefore, are people who are no longer eligible for public funding for legal advice. Historically, they regarded their local court as their first port of call for information, to help them with forms and knowing which way to go, but in a lot of instances they are no longer able to do that.

We are seeing a huge increase in the volume of applications in family cases. When I spoke about this approximately a year ago, in the two years since the reforms started, there had been a 20% increase in the number of public law applications, a 17% increase in the number of private law children applications and an 11% increase in the number of financial applications. Over the past year, broadly that has increased by a further 3%.

We are also seeing huge shortages of judges on the ground. We ran a survey of our members, some of which we shared with you in our written evidence. There are very many instances of people who experience huge delay in their hearings being listed. Unfortunately, far too often they turn up at court and find that no judge is available.

Q103 Chair: Is this happening on the day?

Jo Edwards: It is happening either on the day or the day before. You will not want me to go through today the dozens and dozens of examples that I have from our members, from our survey. We had 276 responses to the survey we ran in the spring. The vast majority talk of those cases. The impact on clients is profound. Of course, those are people who are represented, so that does not even speak about the huge swathes who are not represented. Very often, those who are represented have saved all that they possibly can for a particular hearing, to instruct a solicitor or a barrister. They are told at the 11th hour, “We are really sorry, but there is no judge available,” and they cannot afford to do that again. We have a lot of examples of people who then have to represent themselves, because that is happening to them.

I am sorry if I am painting a really bleak picture, but in family cases our clients and wider litigants have been disproportionately affected by the legal aid cuts and have been significantly affected by the court closures. Because there has been a huge increase in the number of applications, the number of judges is not enough. As I hope to go on to say later, we do not think that having video hearings is the answer in family cases.
HMCTS itself has acknowledged that online hearings will be appropriate in less than 10% of family cases.

Where does that leave people? Where can they turn? I dare say that there are a lot of people who do not have a voice, because they are not represented by Resolution’s survey of its members. They are not represented at all. There are very serious concerns about access to justice.

Q104 Chair: Perhaps you could share some of those incidents. The business of cases being adjourned late in the day, both in family law and in criminal and civil jurisdictions, is something I and other members of the Committee have raised in the House. More evidence of that would be interesting.

Frances Judd: We agree with what Jo Edwards has just told you. We are also supportive of the modernisation programme in that we hope that it will bring increased access to justice for litigants and will streamline certain processes. We also think that it will be useful to be able to do some administrative hearings by video link. We already use video link for some hearings, and some telephone hearings. Obviously, in the family context, they have to be limited, because the courts need to see people, and people need to be there to give instructions to their solicitors and barristers.

We are concerned about access to justice because of court closures and the state of some of the court buildings. The difficulty is that the court closures probably preceded a lot of the modernisation programme, so we have felt their effects in advance of having the effect of the advantages that we hope will be brought by modernisation. We have heard from our members of difficulties for clients travelling to court. A lot of the people involved in both public law proceedings and private law proceedings are vulnerable individuals and have a number of difficult caring responsibilities, so long distances to court are hard for them, in the context of hearings that are very emotional. People need to be able to get to court in as calm a state as is reasonably possible, without the difficulty of three different changes of public transport. We are very concerned about that.

We have heard from our members that the closures of some of the more peripheral courts geographically have led to greater pressure on the larger court centres; therefore, even when there are enough judges, there are not enough courtrooms. One member told me yesterday that, in one particular court, it was very difficult to get listings because of the shortage of courtrooms.

Q105 Victoria Prentis: Which one was that?

Frances Judd: That was in Oxford.

Victoria Prentis: I thought it might be.
Frances Judd: That individual felt that, if you looked at the statistics, they would say that the courts were busy for only 70% or 80% of the time, but that does not necessarily give a good picture, because people go in and out of court to discuss things.

We have heard of difficulties in cases being listed. Because of the problem of people turning up to court and not being able to get on, some courts have tried to develop a situation where you have a listing, on a warned list, over a week, but that causes great difficulty, because barristers cannot make themselves available to represent people.

Chair: It is a common practice in crime, but I have not come across it in family.

Frances Judd: It is a common practice in crime.

Chair: There are different considerations.

Frances Judd: There are different considerations. It would be wrong to say that it is happening across the board in family, but it is happening in some cases and causing difficulty. Those are the sorts of difficulties we are encountering. I do not want to take too much time, but there is also a problem with the state of some court buildings.

Chair: We are certainly going to develop that more. Mr Slaughter, did you want to come in on that point? I will then come on to Dr Birchall.

Andy Slaughter: You have got straight into the issue of the relationship between the reforms and legal aid cuts. When there was the wholesale reduction in legal aid for private family work, it was sold principally on the idea that there would be alternative dispute resolution methods and that it would be done through mediation. Has that worked at all? In the relationship between court closures, other shortages and the cuts in legal aid, is part of the problem that hearings take longer? As an MP, I have certainly experienced what you said in relation to people saving up and going to court lawyered up, and the case simply being stood out. That matters in crime in many ways, but you will probably have your lawyer there next time as well. In this case, you will not.

Chair: Yes. You are precisely right.

Andy Slaughter: That seems to me to be a serious problem, and not one that is getting much attention.

Jo Edwards: It is a hugely significant problem. I will answer directly your question about the legal impacts and the intention that more and more people would go to mediation. As I said, I am a mediator and I am hugely supportive of mediation. The problem is that the vast majority of referrals to mediation come from solicitors. Unless there is an element of signposting and funded legal advice at the outset, there is not going to be mediation.
The family court judges recognise that and are doing all they possibly can to divert more cases to mediation, but without proper funding and tailored advice right at the outset, more and more people are just going to court on their own, without representation. The stats from HMCTS, which I read again yesterday, consistently say that the cases where parties are not represented take less time. That is simply not borne out by our experience. Those cases take longer and longer. A couple of our retired High Court judges wrote to *The Times* only a couple of weeks ago to highlight the issue from their perspective and how impossible it is, because those cases take multiple hearings. For judges trying to have an even playing field for parties, it is really difficult.

All around, people are not being signposted. Either they are going to court and taking up bundles of court time or, worse still, they do not know where to turn, and are not accessing time with their children or are not pursuing financial remedies, so again there are other costs to the state.

**Q109** Chair: The idea is that somehow you actually save time by having people unrepresented. Frances, do members of the Family Law Bar Association ever come across that?

**Frances Judd:** No. Rather worryingly, there are occasions when people who are not represented do not put their case at all. That is as much a worry as those who—

**Q110** Chair: It might tick up in the stats, but it is not justice.

**Frances Judd:** That is right. It is not justice. On the whole, people trying to represent themselves, which is very difficult for them, in a very emotional situation, leads to a proliferation in court time.

**Q111** Chair: I understand that. Jenny, what is your experience of this from the research you have done?

**Dr Birchall:** Women’s Aid also welcomes the overarching principles of the reforms, particularly around improving access to justice. Our main concern is that the reforms are looking quite far ahead into the future and do not focus on the urgent changes that we would like to see now—the things that affect survivors of domestic abuse today in the family courts. We have concerns around safety in building design, travel and transport to the courts, virtual hearings, video links and listing systems.

Our concerns stem from the fact that survivors tell us that, when they go to court, they are often left feeling revictimised and retraumatised by the experience. Criminal courts have special measures in place that, hopefully, survivors can access, but in the family courts we find that it is often difficult to access special measures. We did some recent research with Queen Mary University that found that 61% of survivors had not had access to special measures in the family courts.
We have also heard from survivors of domestic abuse who have a disability. For example, one woman told us that she had to wait seven hours before she could use the bathroom, because the bathroom in the court that she was using was not accessible. Those are our concerns around the things that affect survivors of domestic abuse now.

Q112 Chair: Would more video hearings actually help in those cases? Could they avoid some of that stress and distress?

Dr Birchall: From our point of view, video hearings and online processes may be beneficial to some of the people we work with, but they have to be an option, not an obligation. They have to be designed to be safe and robust as well.

Chair: We will probably pick that up later.

Q113 Victoria Prentis: My questions are on court closures. I guessed that you were likely to be talking about Oxford, because I represent the constituency of Banbury. We have had court closures in Banbury and Bicester. I have tried to make the point many times that the net result of court closures would be unbearable pressure in Oxford. Would you mind telling me a bit more about what you have heard about what is happening in Oxford at the moment? Is the problem a shortage of judges or a shortage of courtrooms?

Frances Judd: It is a shortage of courtrooms. I have been told more recently that such judicial shortages as there were seem to have been ameliorated. I have heard, anecdotally at least, that the situation as far as judges are concerned is not the issue at the moment. The issue is courtroom space.

Q114 Victoria Prentis: That is very helpful.

As part of the recent consultation, the Department came up with a new benchmark for acceptable travelling times. This was certainly a surprise to me, and I have been very involved all the way through in making representations about court closures. They suggested that it was acceptable for someone to leave home at 7.30 in the morning and to return home by 7.30 at night, by public transport if necessary. Have you had any thoughts about whether that is truly acceptable for the majority of users of the family courts?

Jo Edwards: For users of the family courts, I would say categorically that it is not, as you will be unsurprised to hear. I have made the point already that, for lots of them, cost is a huge issue. The cost of the journey is important. The complexity of the journey is important. We act for and work with some of the most vulnerable in society, who have issues that are of particular importance to them. If they have childcare responsibilities and school runs to do, it is not practical.

We have mentioned already the state of court listings. In the courts I work in, typically there will be a block listing at 10 am and a block listing
at 2 pm. If you are in a 10 am listing, there is an expectation that you are at court by 9 am, so that you can have negotiation, discussion and conciliation. I am not sure quite how that is going to work with a 7.30 to 7.30 test. There is also the spectre of the flexible operating hours pilot, which the witnesses a couple of weeks ago spoke about. I do not know how that is going to dovetail with a 7.30 to 7.30 test.

For Resolution, a more appropriate test in family is the nature of the hearing that is being looked at. If it is just a one-hour hearing, it seems wholly disproportionate to suggest that a 7.30 to 7.30 test is appropriate. It should be about a maximum time of journey, which is what we had a little while ago, and about the cost and complexity of journey.

Q115 **Victoria Prentis:** When we all replied to the consultation, I certainly did so on the basis that it was about time of journey. Is that how you prepared your reply?

*Jo Edwards:* Absolutely.

Q116 **Victoria Prentis:** You used the word “vulnerable”. Could you spell out for us what the typical user is like?

*Jo Edwards:* It is fair to say that we work with quite diverse individuals, but we work with a lot of people who are of extremely limited, straitened means, who may have educational difficulties, who may be disabled, and who struggle for various reasons to get to court. One of the members responding to our survey talked about her experience of working in Eastbourne, where the court has closed. She has clients who need to get to Brighton or Hastings, which are now the nearest courts. She said that in a lot of cases they struggle to do so. We had so many of those instances, from all around the country. It is partly financial constraints and partly other constraints that particularly affect the clients we work with.

Q117 **Victoria Prentis:** Dr Birchall, do you have anything to add?

*Dr Birchall:* As regards how it may affect vulnerable people, many of the survivors of domestic abuse we work with have had to flee from the local area where they lived, so they have gone far from families and friends who might have been able to look after children while they had a day from 7.30 am to 7.30 at night. For them, it would be virtually impossible to find childcare for that 12-hour period. We totally agree that that benchmark would be very difficult.

Q118 **Victoria Prentis:** For the record, could you remind us whether it is possible to take children to court?

*Frances Judd:* It is very difficult and stressful. You see people who have had to bring their children to court. It is really not—

Q119 **Victoria Prentis:** It is miserable.

*Frances Judd:* It is not suitable for the children, either.
**Victoria Prentis:** No.

**Frances Judd:** I want to echo what has been said. A lot of the work of the family courts is in public law proceedings, where the state is intervening in the lives of families. That is normally because the families are not coping very well, so they are not the families who are best placed to get to court easily, in good time, and to manage all of that. We do not want to add that to the stresses.

Q120 **Victoria Prentis:** Something I bang on about a lot is a possible mobile court system, whereby the family court could come to Banbury, for example. Is that something you think is worth scoping?

**Jo Edwards:** Definitely. I will not overegg this one, but an experience that we had is with the closure of the Chichester combined court at the end of last year. You may know about all this already. There were three long, hard years of engagement on the part of one of our local members, Edward Cooke, who challenged the decision in 2016 to close the Chichester combined court. He did not think that the case for closure had been made on utilisation levels and the profound impact that it was going to have on local people, in terms of the distances they would have to travel.

There is now provision in Chichester, at a facility called East Pallant House, which, I understand, is a local council building. As things stand—it is still subject to quite extensive scrutiny, because it has not panned out quite as had been promised—there is one sitting day a week in Chichester. The intention had been that it would be for some civil cases and low-risk family work, particularly on the low-risk family work side, in cases where one of the parties was disabled and might struggle to travel the distance to Worthing, Brighton or other courts further away. Unfortunately, the experience so far in 2019 is that very few family cases have been listed in Chichester. Requests have been made of HMCTS and the MOJ about what listing criteria are being applied, and I think a Freedom of Information Act request has now been put in around that.

In principle, we think that is a good solution, because it is a local hub. Provided that it has the same gravitas as a court, that it is secure, that the judges can be made available and that the IT infrastructure is there, it can be a hub of information and justice for people on the ground, particularly in rural areas, where there are huge swathes of distance between courts and there is real difficulty with travelling.

Q121 **Chair:** Are there any other observations on that point?

**Frances Judd:** We agree with that. Last October, I was involved in a case when the video link broke down in court. We moved to a nearby set of chambers and held a court there. There are issues, such as security, to think about, although not in that case.

**Chair:** Sure, it depends on the individual case.
Q122 **Ellie Reeves:** We have talked about the impact of court closures on court users. I am interested in understanding a bit more about how court closures have affected the work of your members. Do you have any examples of how they have affected your members?

**Jo Edwards:** As members responded to the survey I spoke of, they focused, rightly, more on the impact on clients. Generally, members are having to travel longer distances; 49% of those who responded said they had been impacted by their local court being closed. They now have further to travel.

As I mentioned, they have concerns about the impact in terms of cost for clients. If clients want their solicitor to travel to what is now the nearest court, and solicitors are charging by the hour to do that, it will cost clients more. In quite a few instances, difficult decisions have been made about instructing a barrister who is closer to the local court. That may not be what the client would want, because they are used to working with their solicitor day to day. That has been a particular issue.

There are practical difficulties. As things become digitised, we will move away from those, but, far too often, one turns up at court and finds that a bundle that was sent has not been married up with the appropriate judge, and a judge has not read anything. When the court was closer, solicitors could send somebody with a physical hard copy of something and ensure that it got married up with the right file. There are those practical issues as well.

Fundamentally, the concern about distance is the impact on clients, both in terms of cost—those who simply cannot afford to travel the distances—and in terms of the stress we have spoken of. I am a commuter. I know that if I have a bad commute one morning it impacts on my day. If somebody is going to court and is really worried about what lies ahead, and then they have a challenging journey to get there, it makes it all the more difficult.

Q123 **Ellie Reeves:** Is there anything from the Family Law Bar Association?

**Frances Judd:** For the Family Law Bar Association, the impact on counsel relates more to the listing problems—the fact that they are going to court, waiting all day and not getting on. That has an impact on them.

Through the family Bar, I have also heard about the impact on solicitors and clients. For example, I was told in relation to the court closure in Tunbridge Wells that a lot of solicitors based in Tunbridge Wells who used to represent a number of women applying for domestic abuse injunctions would just go around to the local court to apply for an injunction. Now that the court is gone, they have to travel an awful lot farther. That may be helped by video-link hearings. As I understand it, domestic abuse without notice hearings are likely to be piloted first for fully video hearings.

Q124 **Ellie Reeves:** Thinking about how courts are staffed, we know that there
have been reductions in the number of court staff. What effect do you think that has had on access to justice?

Jo Edwards: It has had an extremely significant impact, at two levels. We have talked about judicial shortages already. The judicial shortages are critical in the family sphere. As I have said already, that means wasted legal costs on a particular day. It means that additional legal costs are incurred, because a further hearing is needed. Sometimes a satellite hearing might be needed, because a particular issue cannot wait until a hearing five months hence. It means difficulties in terms of contact not taking place because a hearing has not happened. There is emotional strain on litigants. Clients may have travelled from overseas. All those sorts of things are very profound.

In our survey, we had a lot of examples from our members of other financial detriment to clients as a result of judicial shortages. To give an obvious example, members are now waiting an inordinate amount of time for financial consent orders in divorces to be approved. You might say, “What does that matter?”, but if the housing market has shifted in the meantime, or a mortgage offer has been lost or a pension sharing order cannot be implemented until you have the order back, it can have direct financial impacts. The judicial staffing crisis is very serious.

Obviously, there are administrative impacts of not having enough court staff. I know that the direction of travel is to reduce very significantly—further still—the number of court staff, but it is also about not having the physical counters at court that used to be there. For those who cannot afford legal advice and are not eligible for legal aid, that used to be their point of contact. It is not there any more. Many counters have gone completely. Others are by appointment only. If you try to get an appointment, you might have to wait days, if not weeks. You can try to telephone one of the regional divorce centres, but everybody acknowledges that they have not been a success. Our members’ experience—I know this from my trainee when I make her phone the divorce centre—is that you will be 100th in the queue, waiting to speak to somebody.

All of those cuts have a very direct impact. I make the point again that I am talking about our members and their clients. I cannot possibly speak about all the litigants who are not represented or who just give up.

Q125 Ellie Reeves: What is Women’s Aid’s perspective on the staff cuts?

Dr Birchall: From our perspective, the staff cuts are very concerning. Court staff are vital in organising special measures, so we feel that it will restrict access to justice if there are fewer staff. Survivors of domestic abuse tell us that they sometimes feel intimidated when they are in the family court estate, so they rely on staff members being there to put special measures in place.
It is interesting that the Government recently awarded £900,000 to organisations that are going to support survivors of domestic abuse in the family courts. That seems to me to be at odds with, at the same time, there being fewer staff and less face-to-face contact with staff available in the courts to support people when they need it.

Q126 **Ellie Reeves:** What about the Family Law Bar Association?

**Frances Judd:** Some court staff are real unsung heroes. They are not paid a huge amount, but a lot of them are extremely good. There is nothing like seeing a friendly face at court if you are nervous and anxious and do not know what to do. It is vital that those staff are not cut back.

Q127 **Chair:** You cannot view this as a transactional exercise, can you? It is not like buying a postage stamp or something. You have to have the interaction with people.

**Frances Judd:** Yes, and so many of them do that.

Q128 **John Howell:** You have all expressed support for the modernisation programme, to various extents. There are a number of specific examples I want to raise with you. First, assuming that the technology actually works, to what extent is it a real contribution to access to justice?

**Frances Judd:** I think it is. It makes good sense to be able to make applications online and to have the processes in all fields fully digitised, as long as care is taken to make sure that those who are not able to access the process easily can do so and that paper still works for some people. It should streamline processes and make them easier for both the courts and practitioners. There is a good case to be made for some administrative hearings to be dealt with remotely—we already do that—as long as they are contained to specific cases where you do not need human contact. There will not be that many of them, but even 10% is quite significant.

**Jo Edwards:** Dealing with the two strands and looking first at online applications, we are hugely supportive of the online divorce application process that is being rolled out. We sought input from our members in our survey as to their experience of working with clients who had used the online process. At the moment, it is available only to litigants in person, not for solicitors, to use.

It is fair to say that it was quite mixed; people had positive and less positive experiences. Some people said that the very reason they went to a solicitor was that they could not make head nor tail of the online application form, and that there was not enough signposting and guidance. I am sure those sorts of things can be looked at and tweaked. There was also huge confusion about the fact that getting a divorce online does not mean you are getting your finances resolved. It is absolutely crucial that people are made aware of that. Lots of people said that they were not able to access any of the assisted digital support that has been mentioned by HMCTS. That support was not available to them.
There is scope for online applications being rolled out further. I know that the lodging of financial consent orders online is being rolled out, or is being looked at, at the moment, and that other applications are being brought online, but there needs to be an appropriate level of signposting to legal advice, coupled with—dare I say it—funding for that initial legal advice.

On video hearings, which is the other aspect of the question, I have already made the point that there is very limited scope in family cases for video hearings to be the answer. That is why we are particularly concerned. There are two sources for that. The first is that HMCTS itself acknowledges that point. It has acknowledged that fewer than 10% of family cases will be appropriate for video hearings. I was re-reading a summary by Sir Andrew McFarlane, President of the Family Division, sent to judges earlier this year of the judicial ways of working consultation and the responses to it. It said it was “felt that fully video hearings will not normally be appropriate for contested cases”—in family—“involving the giving of oral evidence, multi-party cases, cases concerning litigants in person”—81% of family cases now have at least one litigant in person—“and/or cases concerning children.” That does not leave very many cases that can be dealt with by video hearings.

There is a pilot in Birmingham and Manchester at the moment for what is called first appointment, a directions hearing in financial cases on divorce. Even those, if they are contested or there is at least one litigant in person, will not be appropriate. Unfortunately, I do not think that in family, unlike other areas of the justice system, a move to online video hearings is going to be the answer.

**Frances Judd:** I agree. It is a very limited number of hearings in family cases, but for those very limited hearings it will be useful.

**Q129 John Howell:** Dr Birchall, do you want to add to that?

**Dr Birchall:** In terms of online applications, I agree with the importance of signposting support. That is vital. I also agree that video hearings should be only in cases where it is appropriate. Sometimes women tell us that they are terrified to go into the physical space of a family court. For some survivors, video hearings, where appropriate, may help them, but we stress that anyone should be able to choose whether that is appropriate for them, with the help of their legal guidance. We would not want it to be an obligation or the norm, but something that is available as a type of special measure if it is deemed appropriate.

**Q130 John Howell:** There are two examples I want to raise with you. The first is divorce, where there is enormous support, particularly from the senior judiciary, to continue this and see it come through. Do you share that enthusiasm? The second example is domestic abuse. I think this must fall into the area covered by your concerns about how sensitive material can be used either on video or put online. Do you want to comment on those two situations?
**Jo Edwards:** On those two specific examples, with divorce, we share the enthusiasm for the project and we feel it simply needs some tweaking. Most divorce cases go through undefended, so it should be perfectly possible to do all of that on paper. Only about 2% are ever defended. One of the concerns Resolution members have expressed, and one of the things they have seen, is what if a person runs into difficulty using the online system? A common example is that the respondent never engages. How are they signposted as to what they need to do then, which would be to apply for an order for deemed service? We would know to do that, but they would not. We need to think about the signposting around that.

On domestic abuse-type cases, I absolutely agree. There has been a successful pilot on ex parte domestic abuse applications. It was hugely successful because victims of domestic abuse were not forced to go along to court to make those applications. We know already that family courts at present do not really lend themselves to that; they are not set up appropriately for domestic abuse victims. Those become more difficult when applications are contested and there is a return hearing at which evidence might be taken. Those are the sorts of hearings at which ideally a judge, at his or her discretion, would want to hear evidence, to see the whites of people’s eyes before making a decision. For anything beyond the initial stage, it is quite difficult to anticipate those hearings continuing online.

**Frances Judd:** I agree and, as I understand it, that is also the view of the judiciary at the moment. It will be very interesting to see what happens in relation to without notice hearings, and what observations judges and practitioners have on how they are working.

**Chair:** When you are making a finding of fact, I suppose the sense is that sometimes you have to look at whom you believe, and body language and things that cannot be picked up by video are important.

**Frances Judd:** You do, although a number of people give evidence via video link in court anyway, but they are present in the court building, which is different.

**Q132 Chair:** Exactly. There is a difference.

**Dr Birchall:** I stress that survivors do not all have the same experiences, and they have different views when they speak to us. Some tell us that they would prefer to be on video link; others say, “I want to be there in the room. Why can’t my ex-husband be on the video link? How come he can be there and I have to be somewhere else?” People have different situations and circumstances and they want to be able to put forward their choice. A video link or online process should never be a substitution for specialist support and legal representation. We have concerns about how litigants in person are able to navigate the system.

**Q133 David Hanson:** I want to turn to transparency and consultation. We have had some evidence given to us that the process is a bit opaque and
people are not quite sure what is happening. We have also seen evidence, including some from Resolution, about consultation. What is your assessment of, first, transparency and, secondly, the quality of the consultation to date?

**Jo Edwards:** I acknowledge that it has improved. I gave evidence almost exactly a year ago to the Committee on Public Accounts. One of the things we complained about was inadequate consultation at that stage and/or a feeling that lip service was being paid to any input we made, and that meetings were being arranged at very short notice with no prospect of any of our members being able to attend. Since that evidence, things have moved on for the good.

**Q134 David Hanson:** There was a figure of 83% from Resolution.

**Jo Edwards:** I was going to distinguish between national and local level. At national level, we have been invited to a couple of meetings with Susan Acland-Hood, the chief executive of HMCTS. We have noticed more reform updates coming out, so more information is being distilled, but there are two criticisms, two points, to make.

No. 1 is the one you picked up, which is that 83% of members in our survey said they do not feel engaged at local level. That is something we have picked up with HMCTS repeatedly. We have said that we would like there to be a two-way conversation on these issues on the ground, and for them to go out to our members and understand what the issues are and let them feed back to HMCTS as well. It is not happening at the moment; it is something we have encouraged.

The second wider point, which I made a year ago, is that I do not understand the ultimate direction of travel. It would be quite helpful to have a road map to understand where the court closures are going to end and what all of this means for our members. At points, it has felt like piecemeal consultation, almost death by a thousand cuts, without us understanding where it will all end. It would be quite helpful to know what the plan is.

**Q135 David Hanson:** That is quite a damning criticism, isn’t it?

**Jo Edwards:** It would be helpful, if we are asked to feed into consultations, to know the ultimate direction of travel. It would also—dare I say it—be helpful to stop and take stock at this stage of the impact so far on access to justice of the huge swathes of court closures that have happened in a very short space of time.

**Frances Judd:** We were invited to some professional engagement group meetings, but the difficulty for the Bar was that quite a lot of them were at short notice and in the middle of the day. Barristers have to go out and earn their living, and giving up a day’s work is a day’s pay, so it was difficult for our members to get to some of the consultation meetings.
We have not always understood the direction of travel. I think we understand it a little bit better now, and the most important thing is to make sure that the consultation and evaluation for the future is properly put in place. As far as the modernisation programme is concerned, there are some known unknowns and some unknown unknowns, and we need to make sure that we fully appreciate the effects on litigants and access to justice of what happens in the future.

Dr Birchall: We have been members of HMCTS’s Change Victim and Witness Engagement Group for the last couple of years. We welcome the engagement and communication we have had. We find it difficult to tell how much impact our engagement has had in that process. Our main input has been that, as well as improving user experience, we want to improve safety for people using court buildings at the moment. We have not seen much evidence of that being taken on board, although we welcomed being involved in the discussions.

Q136 David Hanson: Given that, can anybody point to a change that has been made by HMCTS as a result of anything you have said?

Jo Edwards: I flag again the Chichester experience. The Chichester victory, if I can call it that, was the result of lots of engagement over time with the MOJ and HMCTS, so the fact that there is proper provision now, albeit needing some tweaking, is a success. I have been asked before whether I know of similar successes. The short answer is that I do not, but that is one tangible thing that is a positive that has come out of engagement.

Frances Judd: Reading all the documentation and the latest response to the consultation document, I hope there is acceptance that only a very limited number of family hearings will be suitable to be conducted by video. There seems to be acceptance of that. We’ll see.

Q137 Chair: Do you get systematic feedback from the consultation meetings you go to? Do they say, “Thank you very much for your consultation. Here’s what we have decided to do, and why”?

Frances Judd: Not really.

Q138 David Hanson: MPs have a broad consultation every five years and that focuses our minds quite considerably.

We are halfway through the progress of the scheme to date, and I have some questions on evaluation. This is linked to what the Chair has just said. Are you aware of any changes they are making in view of what you have said? Do you feel that there will be an evaluation of where we are today to look at the next stage of development, and do you think that HMCTS has the capacity to examine the experiences to date and evaluate them sufficiently?

Jo Edwards: I hope so. I will be cautiously optimistic that there is proper evaluation of the access to justice impacts. I hope I do not sound too
critical when I say that at points it has felt as though the emphasis was on efficiency and saving pennies, which we totally understand have to be focuses, but it has been without sufficient focus on access to justice. If I had my way, I would elevate access to justice above the other two planks, the other two principles that underpin the work they are doing. I hope they will take the opportunity to stop and take stock of the court closures that have taken place and try to evaluate what the impact has been. I have no idea how they would do it.

Q139 **David Hanson:** Do they have a baseline for that?

**Jo Edwards:** I do not know. Resolution has been doing surveys quite regularly, almost driving our members mad. The reason we have been doing them regularly is so that we have something of an evidential baseline that we can put to HMCTS. We shared at our most recent meeting with Susan Acland-Hood in March the top-line results of the survey to which I have spoken today. Whatever we can do to take the temperature on the ground, and engage with what our members and their clients are experiencing, we hope is helpful. What we cannot know, and do not know, is the impact on those who are not accessing justice simply because they do not know where to turn. How one gauges that I just do not know.

**Frances Judd:** The judiciary are heavily engaged in the modernisation programme now in terms of digitisation and video hearings. They are very concerned about access to justice, so that is a powerful protection. I do not think they are as closely involved in court closures, but they are very much involved and that is a very important point.

Q140 **Andy Slaughter:** We are getting to the nub of the issue now. We have been going through this process for nearly 10 years, with LASPO. The major court closure programme began in 2010. We have had the LASPO review, which is a separate subject. From what you are saying, the mood appears to be better now. You are saying there is more willingness to listen and to be consensual. I remember that at hearings similar to this—at pre-legislative hearings on LASPO—there was a lot of hostility from parliamentarians towards the professions, believing they were sinecures and needed to be cut down to size.

It is all very well saying that you have a better relationship, that you are trying to pick out the positives and you want it paused, but what would you like to see changed in terms of what is happening now? You have expressed serious concerns about access to justice and people’s voices not being heard. These are very serious matters. What is the single change, or the one or two changes, that you would like to happen?

**Jo Edwards:** The problem is that one cannot focus in isolation. I have been at pains to say that one cannot focus in isolation on the court reform programme and say that is what is causing the problem. It is a whole number of factors coming together, as I outlined at the start. There is a huge increase in the number of applications being brought in
the family court. Clearly, more needs to be done to encourage people to go to mediation, not to go to court at all, so we have to think about that. That in turn links with legal advice and the funding of early legal advice and diverting people, so that goes into legal aid-type questions.

Then we have coming into play the court closures and their impact, and the fact that people who do not have legal advice and representation can increasingly no longer access court staff and local courts for justice help, so it is difficult to sit here today and say that there is one single thing that can be done. I certainly echo what Frances said in many respects, and two in particular. In the main, the court staff we have are working jolly hard in difficult circumstances. Those are assets we should definitely capitalise on and work with. The judiciary increasingly recognise the issues. For example, at the moment, the President of the Family Division is looking at how more private law children cases can be diverted from court. Things like that all help. Clearly, some of it is about the court reform programme; some of it is much wider than that.

**Frances Judd:** It is about funding of early advice for people involved in family disputes. We have seen the effect of taking that away. If people have early advice, hopefully, it will divert them from court processes. That is what we have to fix on in private law cases. Public law cases are more difficult. It is not so much about modernisation, but if we tackle that it will help with everything.

**Q141 Chair:** That is the No. 1 ask.

**Frances Judd:** I would say so.

**Chair:** Thank you very much for your very clear evidence, which has been very helpful to us, and for your time in coming along. I appreciate that it is in the middle of the day. We are very grateful to you for taking the trouble.

**Examination of witnesses**

Witnesses: Sara Lomri, Ken Butler and Wendy Rainbow.

**Q142 Chair:** Good morning, everyone. Thank you very much for coming to help us with your evidence. We have had some written submissions from you. Perhaps you would introduce yourselves for the record, and then we can get into the questions.

**Sara Lomri:** I am Sara Lomri. I am a solicitor and deputy legal director at the Public Law Project. We work on behalf of marginalised and disadvantaged people to increase access to public law remedies.

**Wendy Rainbow:** My name is Wendy Rainbow. I am from IPSEA, which stands for the Independent Provider of Special Education Advice, and I am a legal team manager with them.
Ken Butler: My name is Ken Butler. I am a welfare rights and policy adviser at Disability Rights UK.

Chair: We are particularly interested in the impact of some of the reforms and changes to the tribunal system. The sense is to try to give a more informal means of challenging and dealing with what are sometimes errors in decisions made by public bodies and in the enforcement of rights of the kind we have just been talking about.

Sir Ernest Ryder, Senior President of Tribunals, made the observation that he thought the system had grown up piecemeal, and he was critical in some respects of the way it had grown up. He thought that modernisation could give an opportunity for improving and enhancing access to justice. He viewed that as an opportunity that the modernisation system could afford. Are we achieving that? If not, why not?

Ken Butler: The use of digital technology could in some cases enhance access. The problem is whether it will replace opportunity for access. For example, the closure programme for the estate is quite large and is supposed to finish by 2023. It is predicated on dealing with fewer cases in the millions, so it is difficult to see how that could be achieved without increased digitisation and in a lot of cases replacing face-to-face appeal hearings.

Chair: What has the estate closure impact been like in the tribunals? We have heard about it from other jurisdictions. How significant has it been?

Ken Butler: Since 2010, the statistics show that the estate has been reduced by 50%, and that has probably contributed to the lengthy delays in getting an oral hearing, which might take up to 12 months.

Chair: What sort of case would be waiting about 12 months for an oral hearing?

Ken Butler: Eight in 10 cases—80%—dealt with by social security tribunals involve appeals about employment support allowance or personal independence payment. In terms of types of user, by far the greatest number are those who are disabled and have long-term health conditions.

Chair: That is very helpful. Wendy, what is your take?

Wendy Rainbow: From the SEND tribunal perspective, we have seen a massive increase in appeals over the last three years, which has co-ordinated with some of the closures. We have a few hearing centres. The tribunals have still done quite well. We are about four to six months from lodging an appeal to getting a hearing. Part of the problem is that the appeals are against local authority decisions that we say are poorly made. We accept that efficiencies need to be made to get cases heard quicker, but we are very concerned that they do not create extra barriers for those applying and do not resolve the issue in terms of the success rate of appellants in the face of poor decision making.
Sara Lomri: I echo what the other witnesses have said. Some of that goes to describe the current system, which is problematic. There are long waiting times, particularly for people who have significant problems. We are talking about waiting times for hearings before a social security tribunal and longer waiting times in the first-tier immigration appeals tribunal. Obviously, there are massive impacts on people’s lives while they are waiting for decisions on ability to work and issues that fundamentally interfere with their basic human rights.

You opened with the comment of Sir Ernest Ryder about a piecemeal programme. In the same speech, he said that the absence of time to get it right increases the chances of getting it wrong. One of my organisation’s real concerns is the pace of change and ongoing lack of concern about how much evaluation is going on of the overall impact on access to justice.

Chair: We are going to get into that very shortly. Obviously, delays are unfair but also inefficient. What to your mind drives the reforms in practice? Is it an efficiency-driven thing, or is there a real attempt to make the system fairer?

Sara Lomri: We are encouraged that in the future consultation response they seem to have listened to the responses and the place that has rightfully been given to access to justice. That is encouraging, but it is seriously discouraging that access to justice did not feature in the principles in the consultation paper. It is great that it does now, but we have questions about how we know what is happening, if the impact on access to justice is not measured. That is a serious oversight in the consultation response.

Wendy Rainbow: From the SEND tribunal perspective, we are a specialist chamber and I am not sure we know yet what is coming down the line, other than that something is, but, from the experience of the tribunal user groups where we have discussed resources, there are issues. They are not focused necessarily on ensuring fairness; they are about managing finite resources in a new scenario.

Ken Butler: Access to justice has to be seen not just in the narrow sense that you have a right to appeal and challenge the decision. It has to be access to justice in terms of opportunity and outcome. For example, in terms of outcomes, disabled people who appeal a PIP or ESA decision are successful in over 70% of cases and the appeal is upheld; 90% of hearings are face-to-face oral hearings.

You might say that the system could run quicker in terms of dealing with cases and getting them out of the way, but one of the things that needs to be monitored is the outcome. Without the system being tested and evaluated to see whether or not it “works”, to try to proceed on the basis that you can have so many court and tribunal closures predicated on having fewer cases to deal with at those offices does not seem to make any sense and is not at all just.
Andy Slaughter: Do you discern any general policy, as far as the Government are concerned, on their attitude to tribunals? If you went back a decade or more, you would see that tribunals were promoted as perhaps a cheaper and more specialised way of doing things. You would have less representation and more intervention by tribunal chairs; you would have a more expert body, if you like. To a certain extent, that has continued with proposals for a housing court, or something like that, but if at the same time you are now getting the same degree of retrenchment in the resources available to tribunals, as we have heard before, a 70% success rate is quite a shocking figure. Clearly, they are playing an essential role. What do you discern as the future for the tribunals you are engaged with?

Ken Butler: One of the dangers is that, in terms of law, social security is seen as just benefits, whereas it is one of the most complicated areas of law and is becoming increasingly complicated. There is a need for greater advice and representation despite the appeal success rate. What that belies is that, unfortunately, not enough disabled people appeal and go through the tribunal process. Digitisation risks turning the process into a simplified one: “Thank you very much. Can we just ask you a few more questions online? Thank you very much; here’s our decision,” which is the complete opposite of seeing a face at an oral hearing.

Wendy Rainbow: I very much echo that in terms of parents’ experience of SEND tribunals. The area of law is immensely complicated for parents who are usually unrepresented trying to navigate the legal basis of their claim as well as the tribunal procedure. The tribunal procedure can get hijacked by local authorities in representation; we have cases where parents are up against QCs in what should be a fairly informal process, notwithstanding the fact that it deals with complicated issues. It can be overwhelming, and, as Mr Butler said, I am not sure that digitisation will necessarily help.

Sara Lomri: No is the answer; there does not seem to be a very clear and distinct policy difference between tribunals and courts. What we can see is that there seems to be a push towards tribunals becoming more and more inquisitorial. We question that. Another question we have about the way tribunals are being developed is on the role of representatives. There are questions about what space there is online for representatives in those processes. That leads to questions about the difference between legal representation, legal advice and assistance, and digital advice and assistance.

Andy Slaughter: What would you like to see? In so far as you think the system is not working, or is getting progressively worse, what changes would you like? Would you like to see a more explicitly inquisitorial role, or more representation?

Sara Lomri: The tribunal systems are complicated; they are integrated with other systems, or not, and we would like each tribunal to be
developed, taking into consideration all the people who use it, on evidence-based policy.

Chair: There seems to be agreement on that.

Q150 Victoria Prentis: Turning to the nitty-gritty parts of access to justice, what is your view of the Government’s new line on travel times, which appears to be that 7.30 in the morning until 7.30 in the evening is a reasonable time to spend accessing court?

Ken Butler: It is absurd in social security appeal tribunals, and quite probably indirectly discriminatory against most social security tribunal users.

Q151 Victoria Prentis: Do you want to tell us why?

Ken Butler: Even the DWP says to its assessment providers—the companies that make the assessments—that, when a disabled person is invited to a face-to-face assessment, the maximum travel time should be 90 minutes, for obvious reasons. In a lot of cases that might still be—

Victoria Prentis: Insurmountable.

Ken Butler: It may be that they could travel later in the day. When they get an early morning appointment, they have to try to get it rearranged so they can go later in the day. If because of a physical or mental disability you cannot access a tribunal venue, you are cut off from justice. You can appeal, but you are cut off. The longer the journey time and the more complicated the journey, the more arduous it will be. There will be more connections. It may be less straightforward because you need to make sure that the connections you make involve accessible means of transport. I am not sure how they arrived at that. I think it is a reflection of not looking at exactly who is using the tribunal system in social security appeal tribunals.

Wendy Rainbow: At the moment, the SEND tribunal tries to list hearings within two hours of parents’ travel, and any extension of that would cause massive issues for them. By the nature of the appeal, all of them have childcare problems; some of them have children with serious health issues and complex health needs. It would disproportionately affect them if they were expected to do that.

Q152 Victoria Prentis: Were you surprised by it?

Wendy Rainbow: Yes. It dribbled down, didn’t it? We have not yet had any indication from the tribunal user group about when it is coming in or when it will take effect. It may not, hopefully. I do not know what the tribunal venue stuff is like, but at the latest tribunal user group meeting they were saying that, due to lack of judicial availability and venues, 40 hearings a week were being stood down, which is a massive number.

Q153 Victoria Prentis: Forty of your hearings.
**Wendy Rainbow:** Forty SEND hearings a week were stood down in March on the basis of lack of judicial time and then venue. Very often, SEND tribunal users get one hearing listed and that will be vacated, usually at short notice when they have put in place all of their childcare issues and arrangements.

Q154 **Victoria Prentis:** Do you have a sense of whether that is mainly lack of judges or lack of court space?

**Wendy Rainbow:** Both is the indication. They have recruited some more judges, which will potentially ease that capacity. Registrars and caseworkers are trying to do more of the administrative stuff, but, while local authorities are still making bad decisions at the bottom, pressure builds up through the system and it is not easily resolved.

**Sara Lomri:** We were certainly surprised by the jump. The last thing we had in our mind was the 2016 promise by Mr Vara, who talked about travelling to court within an hour by car. This is a significant jump. I absolutely echo what others have said. It is worth thinking about how often individuals have to use tribunals. For example, a recipient of ESA who is getting 18-month reviews may well go to the tribunal every year. That is a significant amount of resource. The burden on individuals who are making claims is an important measure of whether or not access to justice is being provided in terms of both cost and time.

Q155 **Victoria Prentis:** Ken looks as though he has something else to say.

**Ken Butler:** I forgot something. The distance in the case of, say, a face-to-face medical assessment for PIP, is 90 minutes. That is quite clear in a way, but you are talking about a blanket 7.30 in the morning until 7.30 at night. The tribunal attendance might be an hour or so, and you could allow, say, an hour for getting to the hearing early and other things, so we are talking about two hours. If you are talking about a 12-hour round trip, potentially only two hours of that is spent at the tribunal, so that is a five-hour journey there and a five-hour journey back, which in a lot of cases people will simply not be able to do.

**Wendy Rainbow:** Our hearings potentially go over one day, so either you have an added journey or you have to make overnight arrangements.

Q156 **Ellie Reeves:** Do you have concerns about the impact on access to justice of reducing staffing levels at tribunal centres or other hearing venues used by tribunals?

**Ken Butler:** If your intention and your aim is to close so many venues, inevitably you will probably have fewer staff, so the two go together. You will not move the staff from one building so that they are all grouped together, so I would have concerns. Closing so many offices means that inevitably we have come to the suggestion of a 12-hour journey time for tribunals. That inevitably leads to reductions in the number of staff.
Unless and until the IT system is fully tested and evaluated, on both how it works and its outcomes, to proceed on the basis of closing so many offices by 2023 seems absurd. Lots of people go to a tribunal only once; although, unfortunately, more do so once or twice nowadays, perhaps because of poor decision making by the DWP. When they go to a hearing, they will not know how things work and where things are, so to have staff available to reassure them, direct them and answer their questions is valuable.

**Wendy Rainbow:** It is also important because most appellants are unrepresented. They are entering a very strange building and trying to negotiate that as well as having the stress of the hearing that day. Certainly, in a SEND tribunal ushers play a very important part. We would not want to see them reduced in number in terms of assisting the parties and making them feel at ease in the hearing.

**Sara Lomri:** Our reading is not that the proposal necessarily means there will be fewer staff because courts are being closed. Our understanding is that there is a proposal for fewer staff in the courts that are kept, but I may have misunderstood that. We have questions about courts being run at overcapacity and delivering poor quality service and access to justice, and about the impact that has on confidence in the court system generally. Our experience from social security tribunals is that the court staff do an incredible job of taking further evidence on the day, putting in place special arrangements for reasonable adjustments and arranging interpreters. As mentioned at the beginning, we have concerns about the delays in getting cases listed and that being linked to lack of court staff.

**Q157 Ellie Reeves:** You have seen proposals for tribunal judges delegating case supervision to authorised officers—for example, tribunal staff. What is your view on tribunal judges delegating case management duties?

**Sara Lomri:** At the moment, the proposal is somewhat opaque, so it is very difficult to comment finally on it. Judges perform important roles; it is important to the rule of law that they are independent and it is important that they are properly trained. I suppose there is no principled basis against running a more efficient case management system, for example. The delegation of decisions will depend on the nature of those decisions.

The Courts and Tribunals (Online Procedure) Bill, currently going through Parliament, has quite a lot of detail on how online courts will be run, and that is going to be decided by the committee set up under that legislation. We have some questions about how the committee and the rules will be developed; questions about the lack of piloting of the system; concerns about the Henry VIII powers given to the Lord Chancellor; and questions about the lack of reference to open justice in that system.

**Q158 Ellie Reeves:** Are there any other comments about delegating case
supervision?

**Wendy Rainbow:** We have seen some practical benefits in terms of capacity in the system. Our view is that, if it can be managed appropriately—we accept that not all administrative decisions on how cases progress necessarily need to be made by judges—and it ends up with cases being heard quicker, there might be some benefit in delegating some of those powers. Where we have seen it so far, it has not been an issue and we have not seen any concerns, but they were fairly low-level casework progression decisions.

**Ken Butler:** It probably depends on the type of decision. They may be decisions about whether or not somebody should be granted a postponement. To delegate to someone who is not a judge such decisions without the individual having the opportunity of saying, “I have had my request for a postponement refused, but I would like you to reconsider it,” or, “You have told me my hearing will be by video, but I don’t want a video hearing and this is why,” could prove difficult if there is no right of review.

**Chair:** It has been suggested in the Committee of the Courts and Tribunals (Online Procedure) Bill in the House of Lords that regulations laid in the matter should require the concurrence of the Lord Chief Justice with the Lord Chancellor, as a safeguard from the judiciary’s point of view as to what is appropriate to delegate. Might that go towards answering your concerns?

**Sara Lomri:** Yes, because the current proposal is to consult but they do not need to agree.

**Chair:** It would strengthen it to some extent. That is very helpful.

**Gavin Newlands:** We have touched on this already, but could you flesh out in a little more detail in what circumstances you would support the extension of video hearings at tribunals?

**Ken Butler:** There has been very limited evaluation of it. There has been a recent evaluation, I think by the LSE, of a few tax appeal tribunals. Even there, a couple of judges said, “We think this can be used, but only in a situation where there is no alternative, for example when someone cannot, for whatever reason, physically get to a tribunal office.”

My concern is that until now people have been asked to make a decision between a paper hearing and an oral face-to-face hearing. In effect, it is their decision and their choice is respected, but with video hearings that will not be the case. The judiciary will decide whether or not someone should have a video hearing. Obviously, the person can make representations as to why they do not want such a hearing, but in the end it is not their decision. They have the opportunity to appeal, but they do not necessarily have the opportunity to have their case heard fairly. It boils down to a human rights issue in terms of the right to a fair trial.
We have the situation where ESA appeals are upheld in over 70% of cases. Often, in those cases there is conflicting evidence between the medical report of the DWP and the person’s GP. The tribunal has to weigh up what decision to make. It does that by getting face-to-face evidence from the disabled person. That is the best way to make a judgment.

It is doubtful, and certainly unproven, whether that can be regularly replaced by a video hearing. I went to a meeting a couple of days ago where it seemed that at the video hearing the appellant saw themselves on the screen on one side—in effect, they were talking to themselves and seeing that—and the appeal tribunal on the other. In a lot of cases, that will mean that the appellant may not be in a good position to give the evidence they could give in a better setting, and the tribunal may not be able to evaluate what kind of evidence it is given, weigh the veracity of it and test it, which is what a face-to-face hearing does quite well.

**Wendy Rainbow:** We have issues potentially with the very short trial about the nature of the hearings that were videoed. They were very short and not complicated, and nobody attending had any vulnerabilities, which does not translate at all to the kinds of cases that come before the SEND tribunal.

**Q161 Chair:** Not one size fits all.

**Sara Lomri:** What Mr Butler says is absolutely right about reliance on the evidence of claimants face to face. It plays an important role in the inquisitorial nature of tribunals. In the tax tribunal pilot, there is no role in that model for open justice, and we have serious concerns about that. As was said, those users had no accessibility challenges, and there are questions about how that could be rolled out.

Video hearings or remote access hearings may be great for promoting access to justice, but there is no evidence about what accessing justice in that way does to outcomes. There is a bit of evaluation of what attending a job interview remotely does to your job prospects, but for the UK there is nothing about the outcomes of hearings. We currently have bail hearings in criminal proceedings, but we do not have any assessment of what it does to outcomes, and that is absolutely vital in ensuring that access to justice is promoted and preserved.

**Ken Butler:** In 2016, the then Minister for Disabled People, answering a question in Parliament, said that, in 75% of cases, appeals were upheld at social security tribunal on the basis of new documentary or oral evidence. If we break that down, 66% of the 75% were based on oral evidence given by the appellant. That shows how important oral evidence is in helping a tribunal to make a decision. I echo the view that there are doubts, at least, as to whether that could be done adequately by video.

**Q162 Gavin Newlands:** Clearly, there will be claimants who benefit from the process of online dispute resolution and those who are disadvantaged—perhaps the digitally excluded, for example. Could you give us a bit more
detail on who may be disadvantaged, explain what the disadvantages may be and offer the Committee any remedies for those issues?

**Ken Butler:** One of the suggestions is to have continuous online resolution. Whereas with PIP and ESA appeals the panel is made up of a judge and a doctor, or a judge, a doctor and a disabled person, with continuous online resolution it would be a judge, who would then run the case. If the judge felt that it would be of benefit to involve a doctor or a disabled person in the panel at some stage, that would happen.

One of the things that seem to be happening—for me, anyway, when I look at it—is that things are working to the advantage of, for want of a neutral word, efficiency for the judiciary, at the expense of the appellants. Clearly, it is better for the tribunals service just to have one judge running the case. The judge decides, “It’s been 20 minutes. I’ve got enough now. Thank you very much. We’ll start again.” The appellant has no control over how many interruptions there are. As was said before, how does a representative take part in a process of continuous online resolution?

**Wendy Rainbow:** An element of that is understanding the implications of the action you are taking. The online stuff is very immediate. You might be better taking stock, rather than yielding to the temptation to make a decision that you come to regret.

**Gavin Newlands:** Are there any particular groups who may be disadvantaged?

**Wendy Rainbow:** Yes. We have parents who have special needs conducting appeals on behalf of their children, who also have special needs. I am not quite sure that I understand how the issue of how savvy they are with the tech is going to be evaluated as part of the appeal process. It will be a massive concern if everyone is just filtered through the online system automatically, without proper evaluation of how they cope with it.

**Sara Lomri:** We have certainly had clients for whom online resolution would be brilliant. They have significant impairments, and IT absolutely makes things accessible. Equally, we have clients who have impairments who are digitally excluded, for various reasons, or who are so poor that they cannot afford any data on their telephone. There is a real spread. I agree absolutely with what Ken and Wendy said.

At the HMCTS roadshow earlier this year, there was a set of slides about how the PIP appeals might look. We have some questions that have arisen from that. It is a bit of a technical point, but, in the preliminary view of that system, there seems to be no clarity about how the points are awarded, which dictates whether you get a PIP and whether you get the standard or the enhanced rate.

There seems to be no breakdown of the points awarded in the preliminary view, so there is a basic public law issue about getting a decision and
getting reasons for the decision. There is no space in that system, as presented to us, for representatives, and there is lack of clarity about the role of representatives. There is nothing in the system, as presented to us, about appeal rights, about the next stage. It is not clear how much weight the panel for a live hearing would have to give for a preliminary review.

Q164 **Gavin Newlands:** To support the process, HMCTS has the assisted digital programme. There has been some mixed feedback on that. Citizens Advice certainly has some issues with it. Could you give your own feedback on how the system has been operating?

**Sara Lomri:** We have had no clients who have gone to the system and no contact with anybody who has.

Q165 **Gavin Newlands:** Could it help them?

**Sara Lomri:** We have not had an opportunity to see how the system actually works. There is a certain level of opacity that is hard to understand. When you last heard oral evidence on this, the Law Society told you about the poor uptake of assisted digital provided by the Good Things Foundation. We are seriously concerned about the interface between advice and assistance and digital help. There are lots of parallels with, and lots that can be learned from, the way the settled status scheme is being run currently. From having spoken in detail to frontline organisations helping people with impairments or significant challenges to obtain settled status, we know that there are serious concerns about the fact that they are meant to be giving digital support but often feel that they are straying into complex legal advice issues.

**Ken Butler:** Again, it sounds good, but it is very optimistic. You need to look at the reality for the users of the tribunal system. Recently, Citizens Advice did a survey that showed that 46% of users of the CAB service lacked digital capability. Only 40% actually had internet access. For 11% of those, it was not via a PC or laptop, but via a smartphone.

When I first heard the term “digital by default”, I thought it must mean that it has to be done digitally. In fact, technically it means that it is possible to do it digitally. What concerns me is that there is going to be a push to do away with paper systems. It is really, really, really, really difficult—and a few more “reallys”—to claim universal credit by telephone. You are pushed into claiming online and offered support to do so, even though that support may not be enough to make your claim successful. If someone does not have the capability or the hardware to participate online, and you then make a paper service very difficult or withdraw it, they are, in effect, excluded from access to justice.

Q166 **Ms Marie Rimmer:** We have just heard the bells for prayers. Do those people need prayers when they go online to apply? They certainly do.

Back in May 2018, the National Audit Office produced a report that found that the level of engagement of the Courts and Tribunals Service reform
programme was affected by limited transparency and that HMCTS did not yet have effective arrangements to measure and report on progress and communicate it clearly to stakeholders. From the point of view of the advice sector, has HMCTS taken a sufficiently transparent approach in developing the tribunal reform programme so far?

**Ken Butler:** It reminds me of the DWP and things like introducing PIP. What happened was that the Chancellor at the time said, “Disability benefit expenditure is going to be reduced by 20%.” After that, the personal independence payment was named and developed, but in the context of being a benefit that was expected to reduce expenditure by 20% and, obviously, reduce entitlement. The danger is that, again, this feels to me a bit like a rollercoaster.

For example, the aim is to have major office closure by 2023, with reductions in staffing levels. How is that going to be achieved? Clearly, the idea is to replace offices with digital methods, but without those digital methods having been properly tested and evaluated. If it was done from the position of saying, “Let’s test these over quite a long period of time, to make sure that they are embedded to a certain extent. What is the result? What are the actual outcomes?”, that would be one thing, but how on earth will it be possible? Unless they reduce the number of hearings face to face, they will not be able to cope with the number of office closures and the number of staff reductions. You are kind of involved and consulted around the edges. You are not really consulted about the actual aim and whether it is realistic or whether it should be the aim. You are consulted by being told, “This is what we are going to do. Can you help us to do it?”

**Wendy Rainbow:** That is very true for SEND tribunals. I attended a November 2018 public event for HMCTS, when they were launching stuff about the SSCS. I said, “That’s great. I understand that, but what information have you got about the SEND tribunal?” They said, “Nothing at the moment, but what is here will roll down to the specialist tribunals.” I said, “Great. How do I get involved in that?” They said, “Don’t worry yourself about that at moment.” There does not seem to be any discussion about whether it is going to be relevant to the SEND tribunal. The issue is what bits they can save money on, I presume, when exploring how it applies to the SEND tribunal. That is concerning for us, as it might not be applicable at all.

**Sara Lomri:** I definitely echo what I heard Jo and Frances say in your last session about the lack of road map or overview, and what Ken said about the decision being made and then some consultation going on about how it plays out.

One of the asks of my organisation, Public Law Project, is evidence-based policy development. While we are encouraged by what is written in the “Fit for the future” consultation response, we note that some quite significant assumptions are made there about how to deliver access to justice. You will have seen the report of Professor Chalkley, which
questioned some of those assumptions. HMCTS certainly has been engaging, but there seems to be a significant difference between engaging and consulting. When consulting, it is not clear how much we are being listened to. Those are our broad concerns around consultation.

Q167 **Ms Marie Rimmer:** What about the general public? Do you think there has been a transparent approach towards the general public?

**Ken Butler:** I would not have thought so. If you stopped anybody in the street and asked them if they had heard about this, most people would not know about it. I am not even sure that people who are current users of the tribunal have had their opinions asked for. For example, if someone has had their face-to-face appeal hearing for PIP, does anybody ask them afterwards, “What do you think of this? This is what we are thinking of doing, and this is what our aim is in actual fact. Do you think it would have worked for you as well or better if it had been held on video link? What do you think about the journey you had here today? Would you be able to travel much further than you did today?” That is the kind of thing, involving people who are actually using the tribunal system.

**Wendy Rainbow:** We are not aware of it. I have not come across anybody who is aware of what is being proposed.

**Sara Lomri:** The proposal to engage with past users is a good idea. Generally, it is difficult to engage with the public on ideas about the rule of law and conceptual ideas about access to justice. The idea of working with groups of past users of courts and tribunals is a good one.

Q168 **Ms Marie Rimmer:** That takes me to the next question. Has your organisation been consulted about the aspects of the reform programme that will affect access to justice in the tribunal system?

**Wendy Rainbow:** No.

Q169 **Chair:** Has anybody been consulted?

**Ken Butler:** I have been to quality engagement group meetings. The problem is that, again, it is about developing something where the aim is in place and saying, “This is what we are going to do. What do you think about it?” It is that kind of thing. There is a lack of rigorous testing of the outcomes.

Q170 **Chair:** It is purely handed down to you from above.

**Ms Marie Rimmer:** Yes.

**Ken Butler:** Yes. I am not saying that views are not asked for, but if I express concerns about the whole nature of video hearings or say, “People should be given a choice. If they want a video hearing, for whatever reason, it is good that they have a choice. That’s access. But if they don’t want a video hearing but want a face-to-face hearing, they should have that choice. That is access to justice,” the response is, “Oh
no. They can say they don’t want it, but they don’t have the final say. We have the final say.” That is what is concerning.

Sara Lomri: We have been attending the same group as Mr Butler. On consultation, we have been saying for a long time that there needs to be research, evaluation and data gathering on an ongoing basis. The consultation response does not necessarily reflect that or make any promises to do that, as we read it. Therefore, we have a question about how much we are being listened to.

Q171 Andy Slaughter: Given what you have said about the complexity of the law and, in some senses, procedure at tribunal, and the high rate of success on appeal, do you know any research that was done pre-modernisation into how that might put people off? In other words, what percentage of people who would or could benefit from the system are put off simply by that process? Is there any ongoing research into or monitoring of how the changes will affect that?

Ken Butler: The DWP did some research among people who had had their mandatory reconsideration of PIP refused. A lot of people said, “I am just too nervous. I can’t face going to an appeal,” or, “I’m not physically up to coping with it.” The problem is that, from the tribunals service point of view, the hearings seem to work—they certainly work for appellants in terms of the outcome—but the service does not seem to have asked, “How could we make them work better to encourage more people to appeal?”

You could say that even if we take it as read that disabled people will not have any difficulty taking part in an online process—which, of course, hopefully, we have tried to indicate they will—it will not have the same justice outcome. I do not think that it will, anyway. It might be a single judge, instead of a medical panel with a disability member. It will only look at evidence. It will probably not ask as many questions as in a face-to-face hearing. I can see the attraction of digital, especially for people who have all the IT coming out of their ears, who can use it and who have the dream of a paperless future. In practical terms, you can widen access to justice via digital, but are you going to get the outcome?

Sara Lomri: Some years ago, Dame Hazel Genn did work on measuring unmet legal need. Only a very small percentage of people ever go to see a lawyer or seek resolution of their problems. Other than that, I am not aware of any research measuring when people are using the courts now, even under our current system. In relation to judicial review, we know that last year there was a drop of 14% in the number of claims issued—not in the immigration tribunal, but in the admin court. We do not know why that is. There were questions about whether people were so fatigued and so worn down that they were not bringing claims or making complaints, or whether they were focusing on other, more pressing, problems. We do not know, and there does not seem to be a commitment to investigate the issue.
**Wendy Rainbow:** We are aware anecdotally of families accepting unlawful decisions because they do not understand the process of appeal. It relates to Mr Butler’s point about how you get people who at the moment accept decisions that are wrong into the tribunal environment, to get the decisions set aside. I do not know of any data or stats on that.

Q172 **Ms Marie Rimmer:** Can I touch on special needs? Have you come across any particular problems for people with autism as regards the appropriateness of the buildings where tribunals are held?

**Wendy Rainbow:** The tribunal is very aware of that. The paper forms, which you can complete online, encourage you to be up front about any disabilities or access issues. We had a specific example recently, where a hearing was at the Royal Courts of Justice. The family had a very poorly child. They had to get a car park space, and he needed continual care. That was not appropriate. Although the tribunal does what it can to accommodate everybody’s needs, at times it is not possible.

Q173 **Chair:** You have talked about when consultation has or has not worked satisfactorily. Do you have any sense of how these reforms will be evaluated as they go forward, or any thoughts about how they should be evaluated?

**Wendy Rainbow:** As regards how they should be evaluated, we have a national trial in the SEND tribunal at the moment involving the recommendations for extended tribunal powers in relation to health and social care. There is a national steering group that involves stakeholders, and of which our chief exec is a member, evaluating that trial. Something like that would be useful. It should certainly involve the users—the people who are applying, the general public—rather than just the professionals.

Q174 **Chair:** I see—to get beyond the usual suspects. Does anybody else have any thoughts about that?

**Ken Butler:** One of the main things will be evaluating outcomes. It comes down to not just having all that challenge, but having that challenge dealt with justly and being given every opportunity to put your case and have it independently considered.

**Sara Lomri:** We would certainly want to see sustained commitment to evaluation, as well as to data sharing. We understand that the online processes will generate lots and lots of data. It is not clear at the moment how much of that is going to be considered and analysed. We would like a commitment to sharing it, so that other researchers and academics can assess the impact on access to justice.

When it comes to ongoing evaluation, we would certainly like a commitment to measuring the impact of the reforms on access to justice. It is absolutely about the outcomes—the detail of what having video hearings does for outcomes, and so on. What does having PIP decided in this way, with some of the detail of the decision not broken down or its not being clear that there are appeal rights, do for outcomes? It should
also look at burden. That is what the case of Unison in the Supreme Court looked at. What is the burden on the claimant? That is absolutely key to working out whether there is access to justice.

Q175 **Chair:** A lot has been made of the creation of the Administrative Justice Council. What role do you see that playing in all of this? Should it be involved? Does it or does it not have a role?

**Ken Butler:** I think it should. I have to confess that I have recently become a member of the council, but I have only been to one meeting. I think it should have an overseeing role. Democratic is the wrong word, but I am not sure how democratic the meetings are in terms of forming a collective view on something. From the meeting I went to, I think it is possible very openly to express a view and to have that view listened to, but I am not yet sure from experience how far the council itself is representative or is willing or able to take a contrary view.

Q176 **Chair:** Do you have a sense of what its purpose is going to be?

**Ken Butler:** Yes, but again, through lack of experience, I am not sure how that aim is going to be put into effect.

Q177 **Chair:** What do you see as the aim?

**Ken Butler:** To have an overseeing role, basically.

Q178 **Chair:** As you said, you are not sure yet how that will work.

**Ken Butler:** Yes.

**Sara Lomri:** One of our team sits on the council. In theory, a well-constituted council could play a good role in the evaluation of online processes. I do not see why, in theory, it would not or should not. Obviously, it has to be well resourced and transparent. Please, remember data sharing.

Q179 **Chair:** It comes back to data sharing.

**Sara Lomri:** Yes.

**Chair:** Thank you all very much for your evidence. It has been helpful to us. Thank you for taking the time to come and talk to us. The session is concluded.