Written evidence from Dr Joe Tomlinson (CTS0092)

REVIEW OF KEY LITERATURE

Introduction
1. This literature review provides an overview of the key, recent pieces of literature pertaining to the issues raised by the Justice Committee’s Court and Tribunal Reforms Inquiry. My aim in this document is to provide a summary of key issues discussed in published research and to identify relevant empirical studies. For the sake of clarity and ease of use, the structure of this review follows the Committee’s terms of reference (‘ToRs’).

2. Four preliminary points about the scope of the material identified and relied upon here must be noted at the outset:

   a. The ToRs are wide and there is a vast amount of literature on some sub-areas alone, e.g. family justice, criminal justice, and civil justice. The review has therefore been selective, with the purposes of the Inquiry in mind;

   b. Much of the relevant literature available is ‘grey’ literature and not peer-reviewed publications. Much relevant material is also international. My aim here has been to include a mix which, in my view, provides a balanced grounding for the issues raised by the ToRs;

   c. The literature review revealed a dearth of concrete empirical evidence of the performance of online dispute resolution (‘ODR’) and related technologies (such as video-link hearings). Much of the published discussion is therefore best characterised as sophisticated speculation and analysis but without an empirical evidence base. My emphasis here has been on relevant empirical studies; and

   d. The research referred to in this review adopted various methodologies. I have not included full details of the methods for the sake of concision. In an environment when evidence is so limited, all evidence can be useful. Some studies are, however, more robust and extensive than others.

ToR 1

1. What will be the likely effects of the reforms, both implemented and proposed, on access to justice in relation to:
   a. civil justice?
   b. family justice?
   c. criminal justice?
d. administrative justice, particularly as delivered by the tribunals system?
e. those who are digitally excluded or require support to use digital services?

Recent major empirical studies in justice and user experience

3. Much of the relevant literature on civil, criminal, and family justice is focused on the impact of recent reforms to the justice system. In particular, it focuses on the effects of funding reductions and restrictions on legal aid. Much of the research has increasingly focused on ‘user’—largely meaning citizen—experiences of justice processes. This has involved more focus on ‘paths’ that individuals and groups follow to secure justice. A particularly prominent strand of research in this area has been the experience of litigants in person (‘LIPs’).

4. For example, in civil justice, the leading work remains Genn’s *Paths to Justice: What People Do and Think About Going to Law*, which was published in 1999.\(^1\) This influential text argues that effective policy-making in the administration of justice requires a solid understanding of public behaviour and provides survey evidence on how people experience problems for which there might be a legal solution and how they set about solving them. The civil justice system has changed dramatically since 1999, but the framing of this research provides the context for much of the research undertaken in recent years, across the entire justice system.

5. One recent example is the study undertaken by Barlow, Hunter, Smithson, and Ewing, on *Mapping Paths to Family Justice*.\(^2\) The aim of this research was to study the awareness and experience of different types of family dispute resolution in England and Wales by conducting a (quantitative) nationally representative study of 2974 respondents using a structured questionnaire. This was supplemented by qualitative research interviews and recordings of processes to gain further insights into party and practitioner perspectives. This work led to a huge data set. Key conclusions included that:

   a. Parties need to be emotionally and practically ready to engage in dispute resolution;

   b. Parties are increasingly turning to online assistance following separation but they reported feeling overwhelmed by the volume of information available online and frustrated by the lack of guidance on how to choose the best options for their situation.

   c. Many found that information was difficult to access and had problems in assessing the credibility of the resources accessed; and

   d. There needs to be better, more consistent screening into and out of appropriate

---

dispute resolution processes.

6. Another example of research of this kind are the projects on LIPs led by McKeever. One recent empirical study focuses on LIPs involved in proceedings relating to Divorce, Ancillary Relief, Family Homes and Domestic Violence, Family Proceedings, Bankruptcy and Civil Bills. The aims of the study were: to understand how LIPs participate in their case proceedings; to evaluate the impact of LIPs on the Northern Ireland court system; to assess the human rights implications of acting without a lawyer; and to evaluate the impact of providing advice to LIPs, both on their participation and on the court. Using qualitative and quantitative data gathered from LIPs, the Northern Ireland Courts and Tribunals Service (NICTS) and court actors (judges, solicitors, barristers, McKenzie Friends and Court Children’s Officers), the study provides a holistic view of how LIPs experience the court system and have an impact upon it. The data set generated included 214 transcribed interviews, 139 completed questionnaires, 275 typed court room observations, five years of management information data from NICTS, and 49 typed clinic session records. The key findings depict a situation where LIPs are at a disadvantage for several reasons, not simply by not having legal representation. Such reasons included that they are not fully accepted as legitimate court users, do not have access to the information to support their efforts to self-represent, have little understanding of law and procedure, and are emotionally involved in their proceedings. Key conclusions highlighted in the research include that:

a. There will be cases when representation is necessary, such as when the case is too complex or the litigant’s capacity to self-represent is insufficient;

b. Equality of arms for LIPs must be protected alongside effective participation;

c. The ability to influence proceedings requires an understanding of what is expected, being given opportunities to be heard, being prepared, being present, and being emotionally supported;

d. Alongside the participatory aspects of self-representation lie the layperson’s sense of fair and just legal procedures as experienced during the legal proceedings, which are as important as their sense of a just outcome;

e. Representation was preferable for most people, but for those who cannot afford it or prefer to self-represent, their right to access a court obligates the State to ensure the disadvantage of self-representation does not result in unlawful discrimination. The disadvantage is unlikely to be fully removed but it can be managed to a level at which fair trial guarantees are intact;

f. The acceptance of the right of litigants to self-represent legitimises their place in the court system but does not dictate that they must be turned into lawyers to pursue their cases;

g. A change in the orientation of the court service is required which places the needs of all court users on a more equal footing; and

h. Attitudinal change compels subsequent changes to some administrative procedures, the development of LIP-oriented sources of support and information, specific judicial techniques and professional legal education.

7. In the context of administrative justice, there has been little research on user experience and the UK Administrative Justice Institute, in its 2017 Research Roadmap, argued that there is an urgent need for this research to be developed. There has, however, been some work. For instance, in 2006, Genn, Lever, Gray, and Balmer published a study exploring how users experience tribunals. This was a study of access, expectations, experiences and outcomes of tribunal hearings from the perspective of tribunal users in three tribunals (the Appeals Service, Criminal Injuries Compensation Appeals Panel, and Special Educational Needs and Disability Tribunal). The study was designed specifically to compare the experiences of White, Black, and Minority Ethnic users in order to establish not only how users perceive and are treated within tribunals, but whether Black and Minority Ethnic users experience any direct or indirect disadvantage in accessing and using tribunal services.

8. The method of the study included: focus group discussions with 115 members of the general public; face-to-face interviews with 529 users in tribunal waiting rooms; observation of 391 of those users during their tribunal hearing assessing the enabling skills of tribunal judiciary and users’ ability to participate in hearings; face-to-face interviews with 374 of those users after their hearing and before their decision, focusing on reactions to the hearing and perceptions of the fairness of the process; face-to-face interviews with 295 of those users after receiving their decision, exploring users’ understanding of the reasons for tribunal’s decision and views on the fairness of the outcome; a statistical modelling exercise using 3,058 tribunal decisions from the three tribunals to identify factors associated with success or lack of success at hearings, including case type, ethnic group, representation, pre-hearing advice and the presence of an observer at the hearing; and telephone interviews with 63 tribunal judiciary, exploring approaches to delivering fair hearings, any challenges presented by users from different ethnic or cultural backgrounds, and views on the value of diversity training. This research offered a vital insight into the functioning of administrative justice from the perspective of citizens.

---

4 UK Administrative Justice Institute, Research Roadmap (2017)
5 H. Genn, B. Lever, L. Gray, N. Balmer, Tribunals for diverse users (Department for Constitutional Affairs, 2006).
a. Discussion groups with Black, South Asian and White members of the public revealed generally weak levels of understanding about avenues of redress for administrative grievances and limited awareness of tribunals;

b. There was little consistent variation between ethnic groups in attitudes to seeking redress or expectations of tribunal proceedings, but language and cultural barriers, coupled with poor information about systems of redress, were seen as critical obstacles in accessing tribunals.

c. Public awareness of advice sources was variable. Reported experiences of difficulty in accessing free advice services demonstrated the continuing need to improve the availability of information and advice about seeking redress and for more information to be produced in community languages;

d. Those who take the step of challenging administrative decisions tend to be the most determined and confident, or those who are successful in obtaining advice and support;

e. There was evidence of reluctance to become involved in legal proceedings because of anticipated expense and complexity;

f. The dominance of criminal justice in the public imagination of courts and tribunals deters people from seeking redress;

g. There is a considerable job to be done in educating the public about the difference between the criminal courts and those parts of the legal system where rights or entitlements can be made effective;

h. Discussions revealed nagging apprehensions among Black and Minority Ethnic groups about their likely treatment within the legal system;

i. A waiting room survey of tribunal users revealed that, across all ethnic groups, the principal motivation for appealing to tribunals was a sense of unfairness;

j. Few users had known about the possibility of seeking redress from their general knowledge and in most cases information about the possibility of appealing to the tribunal had come from the initial decision letter sent by the Department or Authority;

k. Users’ expectations of proceedings were relatively vague, with an unacceptably high proportion of users not knowing what to expect. Some anticipated a judge and jury, others a friendly and informal chat;
The practice of sending a video to users prior to their hearing appears to have been effective in framing users’ expectations.

About half of the users interviewed at hearings were attending without representation, generally because it had not occurred to them to seek representation, or because they had tried and been unable to obtain representation;

Observations of tribunal hearings revealed generally high levels of professionalism among tribunal judiciary, with most being able to combine authority with approachability;

Tribunals used a wide range of techniques to enable users to participate effectively in hearings and to convey that they were listening to, and taking seriously, the user’s case;

Although, with the assistance of tribunals, most users were able to present their cases reasonably well, observation of users during hearings revealed deep and fundamental differences in language, literacy, culture, education, confidence and fluency, which traverse ethnic boundaries. These differences significantly affect users’ ability to present their case;

In some circumstances, an advocate is not only helpful to the user and to the tribunal, but may be crucial to procedural and substantive fairness;

Most users made generally positive assessments of treatment during hearings and of their own ability to participate. Where dissatisfaction occurred, it tended to result from tribunals communicating the impression that they had already made up their mind or that they were not listening attentively to the user. This underlines the significance that users attach to feeling that they have been heard, that their arguments have been taken seriously and weighed by the tribunal;

Despite users’ generally positive assessments of hearings, about one in five, when prompted, raised concerns about perceived unfairness or lack of respect during the hearing;

Tribunal judiciary generally displayed high levels of sensitivity to diversity issues and mostly felt that enabling Minority Ethnic users to participate in hearings was an aspect of ensuring fairness that applied to all users. Significant concerns were raised, however, about the involvement of interpreters in hearings, who were of variable quality and tended to prolong hearings, creating pressure on the tribunal;
u. Representation was generally felt to be of value to all users and particularly so for Minority Ethnic users; and

v. The overall results contain strong messages about preparing users for hearings, paying attention to those features of proceedings that contribute to perceptions of fairness, of the need to equip the judiciary with the necessary skills to enable unrepresented parties to present their cases, and of the limits to this enabling role.

9. Beyond research on user experiences, there have been various important mapping projects, particularly in respect of administrative justice, which seeks to identify how key systems are working. For instance, Nason undertook a mapping project in Wales, which she is currently developing further. Key initial findings and conclusions were:

a. There is a lack of understanding about administrative justice across the UK;

b. In Wales, this lack of awareness includes a limited appreciation (among professionals as well as the wider public) of which aspects of the administrative justice system are devolved and which are not;

c. The administrative justice ‘system’ in Wales has developed in an *ad hoc* manner in response to the evolving devolution settlement and immediate demands of public administration;

d. In designing a future system of administrative justice for Wales consideration needs to be given to standards of first-instance decision-making within public bodies, the business case for making decisions that affect citizens right first time, and developing redress mechanisms that can best provide feedback to improve public body performance;

e. There is insufficient standardised and publicly available data about aspects of administrative justice in Wales, particularly including complaints and internal reviews within public bodies, and quantitative and qualitative data about ‘Welsh’ claims across a range of devolved and non-devolved tribunals;

f. We know very little about user experiences of the administrative justice system and what barriers people face in accessing it. A future priority is to collect and interpret such data;

g. It should be user experiences which inform the development of an improved administrative justice system; and

---

6 *e.g.* M. Anderson, A. McIlroy, and M. McAleer, *Mapping the Administrative Justice Landscape in Northern Ireland* (2014).

h. It is increasingly difficult to fit redress providers (such as ombudsmen, commissioners and some tribunals) within the traditional legislative, executive and judicial account of the state; define the roles and responsibilities of particular institutions.

10. Similar observations were made in a 2017 paper about administrative justice at the central government level by Thomas and Tomlinson. This research was based on direct engagement with key actors in the administrative justice system, including judges, civil servants, and civil society. It considered three key themes: improving initial decisions; administrative review; and the future of tribunals. The key conclusion was that, in each of these areas, some aspects of administrative justice work well, but austerity has presented acute challenges in ensuring the fair and just treatment of people through: restrictions upon legal aid; the withdrawal of some appeal rights; and the expansion of administrative review. Consequently, they suggest the administrative justice system is moving away from a ‘legal’ model of administrative justice to the ‘bureaucratic rationality’ model, which focuses upon accurate and efficient implementation. However, rather than accurate and efficient implementation of policy, there is often poor decision-making made by junior officials with insufficient quality controls. They suggest digitising tribunals may have potential benefits in terms of increased accessibility. Nonetheless, the prospects for administrative justice are weak at present.

11. It is an almost universal theme of recent empirical literature that there is concern about the experience of users of justice systems. This concern is particularly acute in view of recent reforms and in respect of vulnerable users and litigants in person. However, given the stage of the reforms, we do not have a similar research base for how users interact with online processes or reformed service provision. Yet the research of the kind presented here does provide the context for the implementation of the reforms.

**Digital exclusion**

12. In respect of the possibility of digital exclusion resulting from the reforms, there is more research available on digital exclusion from services generally than from the justice system specifically.

13. The major study of digital exclusion from justice in the UK was undertaken by JUSTICE, which used a high-level working group from across different sectors and worked directly with HMCTS, to formulate conclusions and recommendations. These include that:

   a. There is a risk that technology might exacerbate existing barriers to justice;

---


b. With more investment in digital inclusion, creative thinking, and inclusive design and technology, there is an opportunity to realise the full potential of the online court and to improve access to justice for many people;

c. Achieving this will depend on a continuing programme of learning from users’ experience and understanding and responding to users’ needs;

d. People can be digitally disadvantaged in many ways – including through an inability to access the internet or digital devices, lack of basic digital skills, or problems with confidence and motivation;

e. HMCTS should conduct more research (including qualitative research) about how people behave in an online environment and on choices between various Assisted Digital channels;

f. HMCTS should collect and make available the widest range of data possible to support research by external experts;

g. Assisted Digital services should be tested in regions where internet access is still limited and support services may be difficult to access;

h. Specific attention should be paid to solutions for highly excluded groups, like homeless people and detainees;

i. Greater investment should be made in ‘trusted faces’ in ‘trusted places,’ i.e. services already providing digital support and internet access;

j. HMCTS should design the Online Court, and other online justice services, with an independent ‘look and feel’ to reflect the constitutional independence of the courts;

k. HMCTS should maximise the benefits of the ‘multi-channel’ approach, e.g. helping people move with ease between digital access, phone assistance, face-to-face assistance and paper;

l. Online justice services should cater for the most affordable and ubiquitous mode of digital interaction – that is mobile technology; and

m. HMCTS should conduct end-to-end pilots of online justice services, learning from hearing and enforcement stages what is required at earlier stages.

14. In respect of digital exclusion more generally, there are multiple studies which can provide helpful evidence in the context of the reforms. For instance, Age UK undertook a study, focusing on exclusion of the elderly, in 2015 which concluded:10
a. Moving public services online without adequate support is making it harder for some who do not use the internet to access services, could deter people from seeking the support they need, and can increase dependency;

b. Some groups are at particular risk. Three out of ten people aged 65 to 74 and two-thirds of those aged 75 and over are not online;

c. In order to ensure that those who do not use the internet are not disadvantaged by digital transformation, there needs to be three complementary approaches: greater support to increase digital inclusion, user-friendly technology and design, and appropriate alternative access for people who are not online.;

d. Design needs to start from a strong understanding of older people’s attitudes and experiences;

e. The speed of change requires renewed efforts to help people get online, and stay online, with adequate and sustainable funding. Building on good practice, initiatives need to find ways to engage people’s interest, provide tailored training, ensure there is follow up support, and address concerns about security and costs; and

f. The Government should be clearer about the savings that moving services online will bring and how much of these will be reinvested in alternative ways to access services and support to help those who are digitally excluded.

15. In 2016, the Citizens Advice undertook a study on digital capability and the needs of their clients. In February 2016, they surveyed 3,000 clients accessing face-to-face advice at 39 Citizens Advice services in each region of England and Wales. Every client was asked to complete the survey but only a portion did. The research findings included that:

a. Face-to-face clients are twice as likely to lack basic digital skills as people in the UK. Only 54% of these clients said they could complete a digital task in key skill areas, well below the 77% national benchmark;

b. Face-to-face clients are more likely to lack access to the internet. A small number of clients reported they could access the internet through friends, family or public places, but 1 in 5 reported they have no internet access at all;

c. Internet access and digital skills are interrelated. People who lack internet

---

11 Citizens Advice Bureau, Digital capability: understanding the digital needs of face-to-face clients of Citizens Advice (2016).
access were much less likely to have basic digital skills. People who have less opportunity to develop digital skills if they’re unable to get online to learn; and

d. Clients aged 65+ were less likely than clients generally to have access to the internet, either in their home or using a smartphone.

16. The general view in the research is that online services can both increase inclusion and exclusion. The real challenge is determining who is negatively affected and creating effective services and counterbalances to combat exclusion. There is some evidence on these questions but not a great deal.

ToR 2

2. What are the effects on access to justice of court and tribunal centre closures, including the likely impact of closures that have not yet been implemented; and of reductions in HMCTS staffing under the reform programme? For users, how far can online processes and video hearings be a sufficient substitute for access to court and tribunal buildings?

Court closures

17. Despite the scale of the proposed closures of courts and hearing centres, there has been remarkably little research and evidence generated. This is true of both the government and the research community. The government’s modelling was based on internal budgetary data and previous DfT statistics. The House of Commons Library undertook an analysis explaining the development of the policy in 2016.12

18. In one brief academic analysis court closures by Hand,13 it was argued that:

a. Closing courts which have not been used for significant periods of time could well be a sensible measure;

b. There is a worrying vagueness both in the Impact Assessment and in the ‘commitment’ to provide alternative ways to access court services;

c. The fact that there will be, for example, at least one District Council with no courts within their boundary is glossed over;

d. No attention is paid to the civic importance of courts, or being able to see the courts in action;

e. County towns without County Courts may be a sign of the future. This may be

---

12 J. Simson Caird, Court and tribunal closures (CBP 7347, 21 March 2016).
mitigated, in some ways at least, by the alternative measures which could bring justice closer to the people; and

f. The proposals will affect legal professionals and the wider public and present a real threat to access to justice. It is inevitable that some courts will close but there is a very real risk of judicial deserts.

19. As Hand identifies, the introduction of digital processes of various kinds is, at least from one perspective, an offset for the policy on court closures. The government’s stated aim is to use digital technology not only to offset court closures but to improve access to justice.

20. A larger study was recently published by Adisa.¹⁴ This focused on Suffolk, where two of three magistrates courts have been closed. Suffolk’s Public Sector Leaders commissioned the University of Suffolk in March 2017 to investigate the impact of the court closures on those most affected, particularly on those having to travel long distances. The impact assessment was conducted between March 2017 and May 2017 and the research period ran to November 2017, to allow additional time to include court data from the HMCTS. The study used a combination of qualitative and quantitative methods and verified quantitative local court data drawn locally and centrally from the HMCTS. The researcher also conducted interviews and focus groups with key stakeholders who represent the interests of various court users. These stakeholders worked within the criminal justice system and were selected using purposive sampling. The researcher also undertook court observations and spent about 20 hours at Ipswich Magistrates’ Court over the course of four weeks. Conversations with stakeholders revealed that people viewed the case allocation of Lowestoft cases to Great Yarmouth Magistrates’ Court favourably, due to the proximity of Lowestoft and Great Yarmouth. Therefore, the researcher focused the research primarily on the other closure in the region (Bury St Edmonds). The key findings were:

a. The court closure at Bury St Edmonds is aggravating issues already present in the system. These issues, brought on by court reforms in relation to Legal Aid, and the furtherance of the digitalisation agenda across criminal justice system agencies are to an extent contributing to non-appearances, low morale of criminal defence professionals, inefficiencies in court procedures, and disengagement from the judicial system;

b. There are far greater generalised time costs for court users residing further away from Ipswich;

c. There is a need for greater clarity regarding the alternative provision proposals to improve accessibility. An alternative provision plan needs to take into

consideration the diverse needs of court users in Suffolk, as there are no ‘one-size-fits-all’ solutions;

d. The layout of the remaining court building has made it challenging to meet the needs of all court users, particularly criminal justice professionals. The only lift in the building is located in the public side, which has implications for witnesses with mobility challenges. No modifications have been undertaken to the court facilities at Ipswich Magistrates’ Court to meet the needs of all court users in Suffolk. Conversations with court staff revealed that no modifications were required as a consequence of the court closure so none has been undertaken, although routine maintenance work has been carried out;

e. The court closures have led to a loss of informal ‘human’ relationships between the court and the defence advocates working on behalf of their clients. Prior to the closures, defence advocates felt able to better advocate for their clients because they had a closer working relationship with their local court officials who were just a few metres away;

f. The court closures are weakening access to ‘local justice knowledge’ due to the Magistrates not being able to sit in their local courts. Data provided by the courts suggests that the closures have not affected the number of sitting magistrates adversely, but the IMC confirmed that they lost some magistrates from West Suffolk when the courts closed but recruited over 10 magistrates based in and around Suffolk;

g. While non-appearances have been a persistent issue in the courts even before the closures, the research examined the courts’ “failure to appear” warrants data by defendant’s location before and after the closure to identify any changes in the warrants data. Quantitative data from the courts revealed that preceding the closures, warrants issued for defendants based in the area of the closed court were only 2.7%, but post-closure for the same area, warrants issued were 12.8%. The report therefore highlights that geographical accessibility of a court is likely to matter in the context of the closures;

h. The average numbers of days from charge to first listing before closures was 34 days (October 2015–March 2016) and 42 days after the closures October 2016–March 2017). First listing to completion data revealed that the process at Ipswich Magistrates’ Court took an average of 25 days pre-closure and 24 days post-closure, suggesting that the closures have not affected processing times. For either way and indictable cases, the court data revealed that processing times from offence to completion more than doubled in the post-closure period, compared to the pre-closure period; and

i. Trial performance data from HMCTS suggests a slight improvement in
efficiency at Ipswich Magistrates’ Court following the court closures.

**Online and remote proceedings**

21. In contrast to the position on court closures, there is a vast amount of literature concerning the role of technology in justice process, from a wide range of jurisdictions. A helpful overview of different ways in which technology has been used for ODR was produced by Sela.

22. **Much of the ODR literature theorises the potential impact of technology in justice processes.** Some of it advocates strongly for the introduction of technology. Susskind has been a leading advocate. For instance, his recent book, *Tomorrow’s Lawyers*, promotes a vision of the future, in which he sees technology as a way to solve major concerns within the legal profession, such as diminishing public funding, and explores alternative roles for future lawyers. Susskind has been a central inspiration to the ongoing reforms. Similarly, the work of the British Columbia Civil Resolution Tribunal—a successful online court—has been widely influential. Salter, who also chairs the tribunals, argues that ODR can improve justice but that the transformational potential of ODR will only be realised when it is fully integrated with public justice processes. This work is rooted in her learning from the development of the Civil Resolution Tribunal.

23. **Other research has been questioning the evidence base for technology in the justice system,** rather than taking a staunch line. For instance, Thomas and Tomlinson highlight the lack of evidence base around the reforms to the social security tribunal. In a report, with the UK Administrative Justice Institute and the Public Law Project, they also set out a series of questions in relation to reforms to tribunals where there appears to be a need for further evidence. Similarly, Genn has suggested there is a lack of evidence on key issues in the reform programme, especially relating to the use of online procedures. She argued that in order ‘to begin to answer these and other questions that could demonstrate the success of the change programme in relation to one of its key justifications, we need data, and in my view we have an important opportunity to put

---

20 H. Genn, ‘Online Courts and the Future of Justice’ (Birkenhead Lecture, Gray’s Inn, 2017)
ourselves in a better position than we have ever had in the civil justice sphere.’

24. In terms of empirical research, the best empirical evidence base is available vis-à-vis video-link/remote hearings. There have been multiple studies in this area, from different jurisdictions. A particular focus area has been remote sentencing hearings.

25. One Australian paper, on remote sentencing hearings, from Wallace, Roach Anleu, and Mack reported findings from two projects.21 First, investigations undertaken nationally over the past decade by the Magistrates Research Project and Judicial Research Project into several dimensions of judicial work. Second, research undertaken as part of a three-year empirical research project that investigated the use of AV links in Australian court proceedings. They raised the following points:

a. The sentencing process provides an important opportunity for direct engagement between a judicial officer and a defendant. Sentencing represents loss of freedom for the defendant, even if the sentence is non-custodial. Conviction and sentence can result in status degradation and continuing stigmatisation and disadvantage. Court proceedings can symbolise collective consciousness and be important sites for the affirmation or articulation of social norms and emotional expression;

b. Legal process has long relied on distinctive visible symbols and ceremony associated with the court building, the courtroom and the judicial officer. The gravitas, ritual, decorum and seriousness of proceedings are experienced directly by those physically present in the courtroom. Reliance on AV links alters the representation of the judicial officer as the embodiment of law, and so may weaken these distinctive symbolic and cultural dimensions. Communication with the court becomes like any other communication that relies on Skype or AV;

c. Interview participants in both projects identify issues regarding use of AV links in court, including de-humanising participants, a negative effect on remote communities, inappropriate behaviour from defendants, and strain on court staff and judicial officers;

d. Such problems can limit the capacity of the judicial officer to effectively communicate and engage with the remote participant. While these concerns may not be specific to sentencing, the distinctive nature and purposes of communication in sentencing means that problems with AV use have special significance when an offender is being sentenced;

e. Themes of the de-humanising effects of technology, the importance of judicial performance as a human process and the value of physical presence as part of the court experience for judicial officers and court users emerged. However, courts can also be intimidating or alienating for those who are unfamiliar or who lack authority or professional status in the court process;

f. Concerns about increasing use of technology are also associated with a desire to achieve procedural justice and ensure that parties in the court feel that they are being treated with respect;

g. Many judicial officers took the view that sentencing by AV link detracts from the ability to achieve the necessary level of interaction or engagement, and for the defendant to understand the sentence;

h. Any loss of engagement when court proceedings are conducted using AV links may be felt most by those who are already the most disadvantaged participants in the criminal justice system;

i. Replacing in-person regional court services with AV links, and the use of ‘remote’ magistrates, may result in a loss of engagement with local communities and have an adverse effect on the communities;

j. One of the unintended consequences of reduced levels of engagement where court proceedings are conducted by AV is that the behaviour of participants may be incongruent with the expectations of decorum and ceremony that apply in a courtroom. A participant appearing by AV link may be unable to understand how they present to the courtroom and, as a result, present inappropriately. Factors include the inability to make eye contact with courtroom participants, or to orientate one’s body to them;

k. A number of interview participants described less formal or inappropriate behaviour by defendants appearing on the AV link;

l. Despite its potential for assisting the management of workloads, increasing use of AV links may impact on the workloads of judicial officers and court staff in negative ways; and

m. Some judicial officers are reluctant to use the technology, but improvements in the quality of the AV technology available in the courts can overcome resistance among judicial officers, especially as recently appointed judicial officers are more accepting of the technology.

26. In respect of England and Wales, **Transform Justice** undertook an analysis of remote
The analysis draws on international academic research and additional qualitative data obtained via: a survey which was circulated via twitter and e-bulletins of organisations such as the Criminal Bar Association and CILEx; eight in-depth telephone interviews with some of the survey respondents; and a roundtable discussion with a range of participants, including lawyers, magistrates, academics, HMCTS, an intermediary and liaison and diversion practitioners. This research, which was critical of remote video hearings, suggested that:

a. The only true fans of video hearings for defendants appear to be a minority of senior judges, of lawyers and of police and crime commissioners. They feel that virtual justice saves time and money. Many prisoners also like video hearings for practical reasons—they avoid disruption, long hours travelling and the risk of having to move prison.

b. Most lawyers have always been opposed to virtual justice on principle and for practical reasons. They worry that their clients cannot communicate their best evidence on a video screen, and thus that justice outcomes may be prejudiced;

c. Lawyers report numerous technical problems which cause delay to them and their clients;

d. The hidden story of virtual justice is of the harm the disconnect does to the relationship between lawyer and client;

e. The rigid timetable of remote hearings leads to ‘stopwatch’ justice, in which lawyers try to beat the clock to get instructions from their clients, many of whom have challenges understanding the basics of the criminal justice process;

f. The defendants who appear on video are all, to a lesser or greater extent, vulnerable. They appear alone, save for a custody officer, isolated from the court, their lawyer, court staff and family, with their ability to communicate hampered by poor technology;

g. Defendants often appear disengaged or frustrated;

h. Virtual justice renders people vulnerable by providing no adjustment for those with mental disabilities. In some specific circumstances the ability to give evidence on video may be beneficial to those who have mental health issues, particularly social anxiety, but practitioners felt that virtual justice mostly exacerbated existing difficulties in assessing disability and vulnerability and in facilitating the participation of disabled people;

i. Those with English as a second language and unrepresented defendants were also felt to be at a significant disadvantage;

j. Video justice does defendants a disservice – it facilitates and encourages inappropriate or disengaged behaviour, the impact of which the defendant cannot see, and deprives defendants of the choice to appear on video or not;

k. Defendants are often said to prefer the convenience of the prison video link, but they are also deprived of the information they would need to take an informed view;

l. The ‘unanswerable question’ is whether virtual justice does make any difference to justice outcomes. We have no developed research in England and Wales which assesses the impact on court decisions. With no data collection since video hearings were launched on the number and type of defendant who appears on video, the system is working in the dark; and

m. There is not a clear picture of the impact of virtual justice in respect for justice itself. Confidence in the justice system is already fragile and this report suggests that defendants are ‘disconnected’ from the court process and from their lawyers through appearing on video. This could undermine confidence in the justice system itself.

27. In a U.S. study, Eagly undertook empirical research on remote immigration adjudication. Comparing the outcomes of televideo and in-person cases in federal immigration courts, the study revealed an ‘outcome paradox’: detained televideo litigants were more likely than detained in-person litigants to be deported, but judges did not deny respondents’ claims in televideo cases at higher rates. Instead, the inferior results were associated with the fact that detained litigants assigned to televideo courtrooms exhibited depressed engagement with the adversarial process. They were less likely to retain counsel, apply to remain lawfully in the United States, or seek an immigration benefit known as voluntary departure.

28. A 2017 Australian project by Tait, McKimmie, Sarre, Jones, McDonald, and Gelb looks at the idea of a distributed court (i.e. where participants are in different locations). The approach drew upon expertise in law, psychology, and sociology. The project involved multiple field experiments using a distributed court. The key conclusions were:

a. Technology makes trials easier to see and hear. Technology does affect the way jurors perceive audibility and visibility—they consider trials using video
technology as better in terms of being able to see and hear than those in which the participants are in the courtroom;

b. If court technology configuration is designed appropriately there is no reason to suppose that it will be harder for jurors to see and hear the evidence using video technology;

c. This was, however, an experiment in which experts collaborated to get the technology working to a high standard—and with actors playing the roles of court participants. Whether similar circumstances are always possible under usual conditions would need to be tested;

d. Technology does not affect perceptions of the environment, but defendant location does. The environment was seen as more positive for the accused when he or she was seated alongside his lawyer. Technology had little or no effect on how the environment was perceived. This suggests that jurors judge whether the environment is intimidating and isolating, or comforting and welcoming based largely on social criteria. Any changes proposed to use of technology should therefore carefully pay attention to the changes it enables in the social environment, such as the opportunities for clients to consult their lawyers, or lawyers to confer;

e. The defendant’s location in the courtroom affects verdict and perceptions of the evidence. Defendants were most likely to be considered guilty when they were in the dock in a courtroom, and least likely when sitting with their lawyer in the distributed court setting. The prosecution’s case was also seen to be stronger when the accused was in the dock, and weakest in the distributed condition. Sitting alongside one’s lawyer made the accused appear more honest, although for most other measures, including credibility, there was no significant difference between conditions;

f. Technology does not undermine the presumption of innocence, but defendant location does. There is no evidence that the distributed condition undermines the presumption of innocence;

g. Technology affects perceptions of prosecutors and defence lawyers in different ways. Prosecutors were considered more credible and stronger when they were physically present in the courtroom. When they appeared on a screen their credibility diminished. The perceived strength of defence lawyers was less affected by whether they appeared on a screen or in person, and, if anything, their credibility was enhanced by appearing remotely; and

h. Technology does not make trials seem less ‘real.’
29. An experimental U.S. study by *Sela* in 2016 compared how subjective procedural justice experiences in an ODR process differed when using text-based or video-based asynchronous communication with a judge. The experiment was conducted at Stanford University using a design that was tailored to preserve internal and external validity for participating students. Subjects were told that the Stanford Office of Judicial Affairs was considering using a new online platform—Online Early Resolution Program—to handle cases of students charged with violations of the University Honor Code. Participants were asked to play the role of a student resolving a case on the Online Early Resolution Program in order to test the system and provide feedback. The study was conducted as an online study at Stanford University, completed by eighty-four native English-speaking students, seventy-two undergraduate and twelve graduate students, who participated to receive credit for their degrees. The key finding was that there were greater levels of perceived procedural justice in an asynchronous process design in which users sent textual messages to the judge and receive video messages from the judge compared to the other tested designs. This suggests that ODR systems that rely exclusively on text-based communication could improve the procedural justice experiences of their self-represented users by incorporating a video communication component on the part of the judge.

30. The government has also been conducting some research on the use of online and remote adjudication. Much of this has been since the reform programme started. One example is *Terry, Johnson, and Thompson*, which presented a study on outcomes in a ‘Virtual Court’. In the Virtual Court pilot, a defendant would appear in a magistrates’ court for their first hearing by means of a secure video link while remaining physically located in the police station where they were charged. Defence representation was either provided at the police station or in court. Other courtroom practitioners remained located in court. New electronic systems facilitated hearing bookings and the confidential transfer of case files. The pilot ran from May 2009 for 12 months in two magistrates’ courts in London and North Kent, covering 15 police stations in London and one in North Kent. The objectives of this evaluation were: to assess the extent to which the Virtual Court pilot delivered financial benefits (and disbenefits), including its impact on Legal Aid costs and defence solicitor business models; to assess the extent to which Virtual Courts reduced the time between a defendant being charged and his/her first hearing, to assess whether the Virtual Court process was no less fair than a traditional court; and to identify any unintended consequences arising as a result of the pilot. Evidence was gathered through semi-structured interviews with criminal justice practitioners, observations in police stations and magistrates’ courts, a survey of victims, and detailed analysis of criminal justice data. The pilot’s performance is measured against a comparator area, namely the whole of London excluding those courts and police stations that were directly affected by the pilot. The findings included:

---


26 Some work was also done earlier, see *e.g.* M. Mason and A.H. Sherr, *Evaluation of the Small Claims Online Dispute Resolution Pilot* (2008).

a. Overall, the Virtual Court pilot added cost to the delivery of criminal justice in the London pilot area, compared to the traditional court process. Some cost savings were however made by Virtual Courts, including reduced prisoner transportation costs resulting from defendants remanded in police custody not having to be taken to court for their first hearing;

b. The rate of defendants failing to appear at court for their first hearing was 1% in Virtual Courts, compared to 5% in the comparator area. This resulted in a saving for the police, who had fewer defendants to track down when a warrant was issued for their attendance at court, plus additional savings for courts and prisons. Enabling custody cases to be heard on the day of charge resulted in savings on overnight police cell costs;

c. The savings made by the pilot were exceeded by the additional costs generated by the Virtual Court process, including the high set-up and running costs for the Virtual Court technology;

d. Virtual Court activity placed an additional resource burden on police Custody Officers, case file handlers and, most significantly, Designated Detention Officers, who were charged with overseeing Virtual Court hearings in custody suites;

e. The pilot was successful in significantly reducing the average time from charge to first hearing, in particular through the use of electronic file sharing and the removal of the need for defendants to travel to court. The biggest time benefits occurred when charge and hearing took place on the same day, a situation that was relatively rare in traditional court cases, but which accounted for the majority of cases in the pilot (57% of cases in the pilot took place on the same day, compared to 12% in the comparator area);

f. The average number of hearings per case was slightly higher in the pilot compared to the comparator area (2.3 and 2.2 hearings per case respectively; and slightly higher still during extended hours (2.4)). This was reflected in a higher rate of adjournments. This appears to have been caused by a number of factors, including the inability to set trial dates during extended hours (when other courts were closed), and the lack of flexibility in the fixed hearing slot system to put cases back, for example to hear a Probation Service report on the same day. A higher number of hearings, although modest, is likely to increase the overall time and costs to complete those cases that are affected;

g. The separation made it harder for defence and CPS advocates to communicate before and during hearings;

h. The time pressures resulting from the court running fixed 15-minute slots were
judged by some magistrates and District Judges as risking delivering ‘hasty justice,’ or a perception of such;

i. The fixed time slots were not thought suitable for more complex cases;

j. Some magistrates and District Judges thought that the court had more difficulty in imposing its authority ‘remotely,’ and perceived that defendants took the process less seriously than they would if they appeared in person; and

k. The rate of guilty pleas and custodial sentences were higher in the pilot than in traditional courts.

31. A second study, by Rossner and McCurdy in 2018, reported on a process evaluation of the user experience of the HMCTS video hearings pilot for party-to-state hearings. The case study focused on the First-tier Tribunal (Tax Chamber). The pilot used an early technical product to test the concept of video hearings. The research draws: on interviews with video hearing users, including appellants, their representatives, and HMRC representatives; observations of video hearings and traditional in-person hearings; and interviews with judges. The research was only small-scale and exploratory. It was recommended that the video hearings pilot is expanded, data collection on the process continues, and data on outcomes is collected. Key conclusions included that:

a. Once screened for technological and substantive issues, only a small number of cases were deemed suitable for a video hearing. Much of the screening was due to the limitation of this first iteration of the technical product, which required specific browser and hardware specifications, among other criteria;

b. In those cases that were deemed suitable for video hearings, appellants and representatives were satisfied with the administrative support they received at the pre-hearing stage;

c. Most cases that proceeded to a video hearing were completed successfully;

d. The video hearings administration team played an important role in the hearings. They resolved any problems with user technology prior to the hearing, helped prepare users so they were ‘camera ready,’ and acted as a quick response team on the day to deal with any problems. Users reported satisfaction with this process, though there are issues around how HMCTS will be able to maintain this level of support;

e. Users found it easy to access the hearing and Judges did a good job of making

introductions and setting the tone for the hearing;

f. The majority of video hearings experienced technology difficulties, which were quickly dealt with by the users themselves or by the video hearings team at HMCTS. Technology difficulties included issues around Wi-Fi, audibility, visibility of parties on the screen or access to documents;

g. In many cases, the hearing had to be paused and restarted, which usually solved the problem;

h. Some technology problems could not be resolved (usually due to poor Wi-Fi connections), resulting in a technology failing and the hearing being abandoned;

i. While users took a pragmatic approach to technology issues, there are still hurdles to be overcome to ensure that the technology is robust and usable;

j. In interviews, appellants and representatives reported that their video hearing was suitably formal and approximated being in a court;

k. Some Judges and HMRC representatives expressed a concern that some appellants appeared to act in a less formal manner during their video hearings than they would have had they appeared in court;

l. Members of Judiciary reported that the training provided was useful and that the technology was easy to use. Data from observations and interviews suggest that the Judges were effective in managing proceedings; and

m. A key difference with video hearings is that turn-taking conventions needed to be more explicitly signposted.

32. Overall, there is a growing evidence base on remote proceedings in different setting. Some of the findings are inconsistent but other themes—such as technology difficulties and parties being less engaged when remote from a hearing—are consistent.

ToR 3

3. Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication, with:
   a. Judicial office holders at all levels of seniority?
   b. The legal professions and the advice sector?
   c. Other relevant stakeholders?
33. There is very academic little literature relevant to this ToR. This is, from one perspective, unusual because the reforms are the most major stress test to date of the new ‘judicial leadership’ model and HMCTS governance arrangements. The most relevant recent research here does not speak to the particular context of the reforms.

34. **One of the main issues in the research and commentary around the reforms has been the lack of transparency and clarity around the reforms.** For instance, *Genn*, a leading authority of access to justice, offered at the conclusion her 2017 Birkenhead Lecture: ‘simply a plea for the future of the programme. We have an opportunity to modernise and reshape our public dispute resolution process to provide greater access for those who feel excluded from the public justice system and greater ease of use for those who are currently struggling without representation. But we need clarity and co-ordination over objectives … Communication is always essential in any change programme and there is a need for this to be better accomplished. The profession, advice agencies and universities need to prepare for operating to maximum effect in a substantially online environment. The increasingly online environment will transform the role and experience of our judiciary and their performance and training will need to adapt to meet that challenge.’

Many other have made similar observations about communication and transparency.

35. HMCTS are also using new ‘agile’ design techniques, pioneered in the UK by the Government Digital Service. This involves testing with user groups to iteratively design processes. *Tomlinson* has produced an analysis of this process, drawing on literature from a range of contexts but also suggesting further empirical research is necessary. The analysis is in the particular context of tribunals and administrative justice. He raises the following points about the use of agile design processes in the reform programme:

a. They can lower the risk of large-scale disasters. Building systems piece by piece can mean that problems can be more easily located and fixed than in one large system. It also avoids the moment where there is one ‘big-bang’ roll-out of a new process;

b. Agile may also more easily facilitate feedback to allow for improvement beyond the initial design phase;

c. Agile methods can give users of the system a greater voice in the design process. At the same time, agile processes can also allow the actual voices of

---

30 There are some general contributions on the issues, see *e.g.* G. Gee, R. Hazell, K. Malleson, and P. O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (CUP, 2015).
users to be heard, rather than assumptions being made about what users want or how they experience processes;

d. Agile processes seek to foster a greater emphasis on evidence-based policy-making. With the growth of digital processes, there is also the possibility of capturing more detailed data on administrative justice processes. Agile processes may allow the most to be made of ‘big data’ through directly incorporating searching for all available evidence into the process;

e. Agile methods focus on specific parts of the system as ‘components.’ Due to this, there remains a need for changes to be assessed in the wider systems in which they exist, as well as end-to-end testing of the overall processes that are built;

f. This method can make it difficult for external stakeholders, including external researchers, experts and those affected by changes, to engage with the design process;

g. Agile processes also put emphasis on what users want and care must be taken not to too willingly emphasise values often preferred by users—such as convenience—over traditional concerns such as procedural fairness;

h. The financial costs of user research and testing may prove a further limitation. To do effective agile design, research teams are required. The reliance on engaging with users could also present problems in some contexts. For instance, tracking down users of the justice system willing to spend time talking with government about their experiences with government may pose problems. The issues around the practical implementation, financial and otherwise, of the agile method may ultimately lead to user research and testing only being conducted on a small scale. This could undermine how representative, and therefore reliable, the outcomes of agile processes are;

i. Agile testing is not public and focuses on narrow topics. It cannot therefore be seen as a proxy for deliberative, public debate or even traditional forms of public consultation;

j. The relationship between traditional forms of public consultation and agile testing presents various tensions; and

k. Agile methods are typically deployed within broadly pre-established policy objectives, meaning the results of the process, no matter how well-managed the method is, will also be limited. The highest aim can only be that agile methods have features that allow for the development of the best process
4. Have the Ministry of Justice and HMCTS taken sufficient steps to evaluate the impact of reforms implemented so far, including those introduced as pilots; and have they made sufficient commitment to evaluation in future?

36. There is a lively discussion around the evaluation of justice processes, and specifically access to justice dimensions, in the literature. Some of that work, e.g. Lucy, attempts to define or interrogate relevant concepts, such as access to justice.34 There is also a growing literature on methods of measuring access to justice, and related concepts such as perceived procedural justice. In 2009, the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems produced an authoritative handbook on this issue.35 Similar work has been undertaken by others, such as the Centre for Court Innovation.36 There has also been the production of global metrics, such as the produced by the World Justice Project.37

37. Recent work by academics has also sought to develop reliable and useful measures of justice. For instance, Shestowsky has examined how litigants evaluate legal procedures in the U.S.38 Based on the analysis of a field study in multiple courts, the research concluded that litigants evaluated the characteristics in terms of control, i.e. whether the characteristics granted relative control to the litigants themselves or to third parties (e.g. mediators, judges). Although the litigants indicated a desire to be present for the resolution process, they preferred third-party control to litigant control. They also wanted third parties to control the process more than the outcome. Gender, age group, and case-type significantly predicted attraction to third-party control, whereas attraction to litigant control was predicted by whether litigants had a pre-existing relationship with each other, how much they valued a future relationship with the opposing party, party type, the type of opposing party, and court location. Implications for legal policy and lawyering are discussed. Similar work efforts are taking place in the UK, led by academics such as Pascoe and Balmer.39

38. What data HMCTS plans to collect from the new online processes has been unclear and

---

the site of an ongoing debate. The Legal Education Foundation seconded an expert to work with HMCTS on this issue. Collecting and making such data available would likely be a huge step towards allowing proper long-term evaluation of the reform project.