Written evidence from Transform Justice (CTS0022)

Overview

This evidence, submitted by Transform Justice to the Justice Committee’s inquiry into the access to justice implications for court reform, outlines the following concerns:

- That the main driver for the court reform programme is cost-saving through increased efficiency, with access to justice as a secondary concern or overlooked;
- That court closures are impeding access to justice;
- That the digital court reform programme will have significant implications for open justice and that HMCTS has yet to clarify how these implications will be addressed;
- That the digital court reform programme is untransparent and has been subject to very little public consultation and parliamentary scrutiny;
- That the introduction of the digital court reform programme was informed by scant research and evaluation, with limited evidence gathered since.

The reform programme has also sought to replace paper with digital files, which endeavour Transform Justice supports.

The inception of the project

The digital court reform programme was conceived quickly, and the policy-making process is difficult to discern since there are no public documents about it. The first public announcement of the programme was in March 2014. This committed £375 million over five years to increasing efficiency in courts through digital processes. Savings were to be achieved by digitising paper processes and by replacing physical court hearings with virtual and online hearings. Neither court closures nor access to justice were mentioned. Two senior judges were asked to explore issues - efficiency in criminal proceedings (Sir Brian Leveson) and the structure of Civil Courts (Lord Briggs) – which would affect and be affected by the reform programme. Neither were asked to explore ways of improving access to justice. Both reviews recommended that traditional court processes, whereby parties meet for a hearing in a physical court, could be replaced by technologically driven processes such as online and virtual hearings.

Access to justice

The court reform programme appears to have been driven by a need to save money in the courts system. Chris Grayling said in 2014 that the programme “will be used to deliver more efficient and effective courts and tribunals administration for all users and deliver significant savings”. The Lord Chancellor offered some benefits for court users – potential reduction in delays and an upgrade of facilities for victims and witnesses – but the main driver was efficiency.

Though the programme has more recently been justified on the basis of increasing access to justice, the evidence for it doing so is thin, while there are strong indications that replacing physical courts with digital processes may increase barriers to plaintiffs, defendants and the public accessing and effectively participating in the justice system.

The potential conflict between greater efficiency and access to justice was reflected in a report by the Boston Consulting Group (BCG) for the Ministry of Justice. This report, which
was presented to the government in 2016 but never published, suggested that: “Reforms are framed around efficiency and proportionality…It is not obvious that [the reforms] are focused on creating broader social benefits such as lowering recidivism, addressing the underlying causes of criminality or disputes or improving witness and victim experience (apart from more efficient interaction with the system)…the reform plans will nonetheless significantly impact the way in which users access justice and the quality of justice they receive…given that driving efficiency gains was the focal point for the programme design…the plans may look different if improvement to justice outcomes were the overriding objective. An efficiency focussed approach may for instance place emphasis on a very aggressive shift of cases to the new online channels whereas a policy driven approach [might] take a different view of the right balance between the use of physical hearings and remote channels”.

After the BCG report was delivered, the narrative around court reform changed. The “Transforming our Justice System” statement (September 2016) promised “a courts and tribunal system that is just, and proportionate and accessible to everyone”. However, the contemporaneous programme of activities suggested that cost-saving remained the overriding driver. In 2016 and 2017 no research was commissioned on the barriers to accessing justice experienced by plaintiffs, witnesses and defendants, or on the outcomes of video hearings, and no baseline data was gathered to enable the impact of the reform programme to be measured. And HMCTS pressed ahead with the design of new services.

The example of video hearings suggests that digital justice may increase convenience while threatening rights to effective participation and fair trial. Since 2000 defendants have been forced or encouraged to appear on video from prisons or police stations for every kind of criminal hearing apart from trials. Many defendants in prison prefer to appear on video since they thus avoid lengthy, uncomfortable journeys to court. But there is good evidence from qualitative research conducted by Transform Justice (and others) that video hearings impair the relationship between lawyer and client, and the ability of the defendant to communicate, i.e. to effectively participate. A 2010 evaluation by the Ministry of Justice of virtual courts also suggested that appearing on video affects justice outcomes significantly – those appearing by video from the police station at their first appearance were more likely to plead guilty and more likely to get a higher prison sentence. Defendants on video were also less likely to be legally represented than defendants who appeared in person in court. The difference in outcomes may have been related to the low level of representation or to appearing on video, or both. But the evaluation findings were never followed up.

The government is proposing to increase considerably the proportion of video-linked hearings in criminal courts and to extend video hearings into other jurisdictions. They also want to hold virtual hearings, where no-one will be in the court and all parties will be on separate video screens in their office/home/police station/prison. This will undoubtedly reduce travel times for court users and practitioners, but all those who have already been involved in video hearings have considerable concerns about the impact of increased use of video on access to justice and fair trial. Appearing at one remove impairs the ability of defendants/plaintiffs/witnesses and practitioners to communicate and read body language. Appearing remotely also seems to increase the stress of defendants, thus prompting them to be aggressive, which is detrimental to the outcome of their hearing. Giving evidence on video may decrease the stress of witnesses, but we still don’t know whether juries and judges
respond more negatively to witness evidence given via video – the only research available is a process evaluation, which does not measure impact, and two studies of simulated trials. An Australian simulated trial study has been cited by HMCTS as showing that defendants on video do not suffer prejudice, but the circumstances were very different to those in our courts. The simulated trial was held in a court-room which had been totally redesigned for video hearings, the video equipment was state-of-the-art and the best outcomes for defendants were only achieved when their lawyer was sitting next to them in prison. In England and Wales, the lawyer is nearly always in the court while their client is on video.

The other aspect of virtual hearings that concerns practitioners and experts is the potential prejudicial impact on those with protected characteristics, particularly mental health and neurological conditions, learning difficulties and autism. There is no research on how the virtual/online experiences of those with protected characteristics differs from those without, nor what reasonable adjustments are currently put in place (if any) or which might be most appropriate.

HMCTS has responded to concerns about access to justice for disabled people by consulting on and setting up an assisted digital service. This offers telephone and face-to-face support (not legal advice) to such court users. However, users need to engage with the legal process or already be online before they are directed to this support, and face-to-face support can only be accessed via online/telephone engagement. Only 14 people have used the face-to-face assisted digital service since it was launched in March 2018.

**Court closures**

It is not clear what impact the court reform programme will have on court closures. In January 2018 the government published consultations on the closure of eight courts and on the strategy for future court closures. The response to the latter has not yet been published.

The Fit for the Future strategy consultation document suggested that many courts were under-utilised and many more would become redundant due to court processes going online/virtual. However, this “trade-off” was not made explicit and information about court usage currently and HMCTS’ modelling of future usage was not published. Many lawyers attribute the main cause of court under-utilisation to a shortage of judges rather than a shortage of cases to hear.

Up to now, court closures have been justified on financial grounds, with court users assumed to be able and willing to travel further to go to court. As recently as 2010, the HMCTS suggested that all courts should be within a one-hour public transport journey for all users. HMCTS estimates that currently 7% of Crown Court users and 5% of magistrates’ court users are more than two hours by public transport from their nearest court. In their new strategy, HMCTS suggest that users should be able to get to and from court within the day, and imply that a journey of two and a half hours each way would be acceptable. These are long journeys for a visit to court (particularly for those with disabilities) and, furthermore, court users have suggested HMCTS underestimates travel times for those living outside town centres.

**Open Justice**

The digital court reform programme has never clearly articulated how the principles of open justice will be addressed when physical courts are replaced by online and virtual processes.
A principle of the justice system is that justice should be seen to be done. Currently this is addressed through opening up physical court hearings to public and media scrutiny. Nearly all criminal courts and tribunals in England and Wales are open to the public, as are most civil hearings and a few family hearings. The public cannot take any pictures or record any part of court hearings, but they can watch and take notes. Supreme Court hearings are all available to watch online, as are many Court of Appeal hearings. And the media has privileged access to some “closed” courts.

The government and the judiciary have always given assurances that the principles of open justice will be maintained throughout the reform programme but there are no published plans as to how that will be achieved. Already the principles of open justice have been severely compromised in the introduction of the single justice procedure. The passage of such cases is completely closed to the public, since pleas are entered online/on paper and defendants are sentenced on the papers in a closed court. Two other scenarios pose particular challenges in the future:

- **Online court processes** such as social security appeals and the online criminal court. Details of the cases listed and the results may be available online but if the public cannot access the court process itself (who is saying/writing what to whom?) justice will not be seen to be done in real time and the process of decision-making will not be accessible.

- **Virtual hearings.** There will be no-one in the courtroom in this scenario. It is not clear how the public or witnesses will be able to witness such a hearing but government and judicial documents suggest that criminal hearings will be available to watch live in a video booth within the courthouse. People will have to go to their local court, however far away this is, in order to watch criminal court hearings on a screen. In contrast, the judiciary seems to suggest that tribunal hearings will be recorded and available for anyone to watch online. This proposal has been greeted with anxiety by lawyers who feel that making court hearings (which air much personal information) freely available may have a “chilling” effect on those contemplating going to law.

No formal consultation or research has been done on this issue whether with the public, with lawyers or with plaintiffs, defendants or witnesses.

**Transparency**

HMCTS has become better at communicating about the court reform programme but most aspects remain in a black box. No detailed plan, budget or timetable has ever been published. The National Audit Office [2018 report](#) is still the best evidence of the financial modelling of the programme, and of its proposed activities. The most recent [HMCTS response to the Public Accounts Committee](#) outlines progress against 23 indicators, but we believe this is the first time these indicators have been published. Plans for the next six months are outlined, but there is no detail of these plans or of the programme beyond this point.

The opacity of the programme is particularly evident in relation to the budget. The NAO report indicates how the budget grew over time to £1.2 billion and how the timetable was extended (thus reducing annual “steady state” benefits). But few of these developments were announced at the time. HMCTS will have spent £546m by the end of 2019 on the programme, but it is not clear who has been paid for what. [Spreadsheets of payments](#) indicate
that considerable sums are being spent on consultants (including £30 million to PWC for support in change management), but there is no public document bringing together details of all the main contracts.

HMCTS publishes a newsletter and a blog, but key information about the programme is still unknown. For instance Transform Justice has asked for information via FOIA about the online single justice procedure. Some of this is apparently available but the request was refused since responding would exceed the FOIA cost limit (£600). Also, it is impossible for an ordinary person to test any of the current online digital processes to check what information appears on each webpage. So digital products have been launched which can only be accessed by defendants/plaintiffs.

Consultation

The digital court reform programme has been subject to very little public consultation and parliamentary scrutiny.

Aspects of the criminal reform programme were promoted in a white paper in September 2016 and the public were consulted. But this consultation touched only a tiny proportion of the changes involved in digital court reforms. No public consultation has been undertaken on the huge digital changes in tribunals, civil and potentially family justice. It is not clear why so little public consultation has been done, but the imperative to spend Treasury funds to a very tight timetable may have been a barrier.

HMCTS has replaced formal open consultation with informal consultation with stakeholder groups. Each workstream has invited specific stakeholders to meetings to discuss the reform programme and get feedback. Our critique of this approach is that it is untransparent and unaccountable, and excludes many stakeholders. It is not clear what criteria have been used for inviting stakeholders to engage, what information they have been given, what the terms of reference of the engagement have been, nor the status and value of stakeholder responses. There is no record of this stakeholder engagement, nor have the documents available to stakeholder groups been published. There is anecdotal evidence that stakeholders who have attended these groups have been very critical of the reforms proposals, but no stakeholder response has ever been put in the public domain by HMCTS. HMCTS has held roadshow events exclusively for lawyers and other targeted stakeholders (including parliament). Again feedback received has never been published.

Parliament was given a brief opportunity to appraise the changes involved in the digital court reform programme through scrutiny of the Prisons and Courts Bill. The Bill committee was beginning to take evidence, and was subjecting proposals to considerable challenge, when the Bill was abandoned due to the 2017 election. A new Courts Bill was promised in the Queens Speech but the digital court aspects of the bill (the introduction of an online criminal court, and digital services to enable businesses to recover debt more easily) have not yet been tabled. It may be that the government has decided that most aspects of reform programme no longer need parliamentary scrutiny since all measures can instead be enacted through guidance and secondary legislation – criminal and civil procedure rules and practice directions. We recommend the committee analyse recent changes to these rules in the light of the digital court reform programme.
While there has been no public consultation or parliamentary scrutiny of most aspects of the reform programme, judges themselves have been extensively consulted. In spring 2018 a consultation on the implementation of the reform programme was circulated to all judges and magistrates. The judiciary has never published a report detailing the responses received but they have briefly summarised them and responded. Unfortunately it is too late to engage with fundamental criticisms of the programme, which some judges seem to have wanted to do, but some adjustments appear to have been made as a response to judicial concerns.

The court closure programme has been subject to public consultation, but it is questionable to what extent public opposition is taken into account in making decisions. Every court closure in the last fifteen years has been opposed by the majority of respondents, but only a tiny minority of closures have been stayed.

**Research and evaluation**

The digital court reform programme has suffered from a lack of research and evaluation at every stage. No research appears to have been done to shape the original bids for funding from the Treasury and no research (bar some statistical analysis) commissioned to support the Leveson and Briggs reviews. Lord Leveson wrote in his introduction that “there has been no time or little opportunity for evidence gathering”. Also “there is no quantitative analysis of the effect of the changes which are proposed. Within the constraints of the Review, it has not been possible to calculate how much will be saved by any participant in the criminal justice system by any single change, or combination of changes, to the way in which criminal cases are conducted”. No major research or evidence gathering has been published since by the government.

The best published research on the effect of video hearings on the criminal justice system was commissioned by the government in 2010. This outcome evaluation of a pilot for virtual hearings from police stations to courts concluded that virtual courts as piloted were more expensive, may have driven more guilty pleas and longer sentences, and impeded the communication between lawyer and client. The economists who did the research modelled a scenario whereby virtual courts might lead to a small saving over ten years, but this relied on hearing six cases per hour, and excluded any impact on sentences.

No research has been done on the use of video links between prison and courts since 2000 and no data has been gathered on the usage of video links either for witnesses or defendants. Apart from the 2010 study, the MoJ has only published process evaluations on the use of video in courts. These only determine whether a programme has been implemented as intended, not the impact or outcomes of that programme. The recent evaluation of the video tax tribunal pilot was a process evaluation and small scale – only two plaintiffs who had taken part were interviewed.

HMCTS has undertaken extensive “user research”. This type of research is designed to help service designers refine their product design. It does not meet any of the guidelines essential for academic research and does not conform to the protocol on the publication of government social research. Neither the specification for the HMCTS user research, nor the results have been published. Transform Justice obtained one example via an FOI request. The researchers did not interview defendants nor ask interviewees about outcomes. The risk of relying on user
research for all new digital court reform services is that the focus is on whether the service works technically, rather than on whether the new service enhances access to justice.

HMCTS in response to requests from the PAC have recently published their plans for evaluating the whole court reform programme. The principal questions are: has reform altered outcomes (fairness e.g. case/ hearing outcomes, sentencing and financial awards)?; has reform changed the ability of users to pursue a case effectively (access to justice e.g. ability and speed at which court users can access and pursue a case)?; has reform had an effect on costs including those incurred by those who use courts and tribunals (e.g. travel costs, costs of time wasted)? These are important questions but it also will be important to explore the effect of court reform on effective participation, on open justice and on trust in the justice system. A proper impact and outcome evaluation requires baseline data and research. Unfortunately in many cases HMCTS has already launched new digital services (divorce and probate online, single justice procedure plea online) or closed courts before gathering that data.

The documents mentioned in this submission are linked in this article.