About the author

1. I have been a magistrate since 2002 and have held a number of leadership posts within the magistracy including chair of the National Bench Chairmen’s Forum/National Leadership Magistrate from 2016 to 2018. Since January 2016 I have been closely involved in the Reform project and co-chair the Magistrates’ Engagement Group. My current role is Magistrates’ Reform Lead. I am writing this submission in a personal capacity and will focus on the impacts of reform on criminal justice in the magistrates’ courts.

Key points

1. Reform of the criminal justice system is long overdue. In 2015 the Leveson Review\(^1\) identified that ‘Common Platform’, a comprehensive online case management system used by all criminal justice agencies to provide single source case information, was critical to improving the efficiency of the criminal courts. It is of concern that development of Common Platform is still not at an advanced stage, particularly given its central role in achieving realisable efficiencies without which other initiatives are unlikely to be effective. The scope and funding of common platform appears to be limited, whilst much time and money is spent on more ‘innovative’ schemes that are unproven.

**Recommendation:** HMCTS should prioritise the development of common platform as the key component of an efficient system for the administration of justice.

2. Open justice is essential in maintaining public confidence in the administration of justice by ensuring accountability, facilitating public censure, educating the public and deterring crime by demonstrating the ability of the criminal justice system to deal with offenders. There is little evidence that MoJ or HMCTS have any credible plans to preserve meaningful open justice principles, despite being 3 years into the 6-year reform programme.

**Recommendation:** MoJ and HMCTS should prioritise preserving open justice in the criminal courts before committing to removing hearings from physical courtrooms and further centralising listings.

3. The reform programme is relying heavily on much greater use of video-links and fully-video hearings in the magistrates’ courts to reduce the need for physical courtrooms and facilitate further court closures. HMCTS has not undertaken any independent research to show that these hearings are safe and there is no detriment to justice outcomes, for example by introducing unconscious bias or ‘dehumanising’ defendants.

**Recommendation:** Independent research should be undertaken into whether there are adverse impacts on defendants appearing by way of video link in remand hearings as a matter of urgency and before HMCTS commits to further extension of video remand hearings.

\(^1\) Review of Efficiency in Criminal Proceedings by the Rt Hon Sir Brian Leveson, President of the Queen’s Bench Division, 2015
What will be the likely effects of the reform, both implemented and proposed, on access to justice in relation to criminal justice?

5. ‘Access to justice’ covers a number of very important issues and should not just be thought of as enabling court users to participate in hearings. Whilst the oft-quoted aphorism “Not only must Justice be done; it must also be seen to be done”\(^2\), originally related to the impartiality and recusal of judges, it encapsulates the overarching need for justice (and I would argue especially criminal justice, where the might of the state is being bought against an individual) to be open and transparent. In order for the public to have confidence in those entrusted to wield the power of the state, it must be able to observe it in action.

6. A fundamental aim of reform is to remove many magistrates’ court hearings from the courtroom to online, telephone conferencing or fully-video hearings, thus removing the ability of the public and press to observe first-hand what is being done. Many of the anticipated savings in administration and the court estate are based on this move away from physical hearings. It is therefore of deep concern that the issue of open justice – how to give the public access to these out-of-courtroom decisions – appears to be a low priority for HMCTS. Already there are large numbers of low seriousness prosecutions going through the single justice procedure with limited transparency.

7. It has been suggested that access to video (and presumably telephone) hearings can be provided by way of screens in court buildings. It is not clear how this would be supervised, or whether the public would be able to access any hearing from any hearing centre.

8. The complexity of open justice is exacerbated by likely changes to listing practices. In order to maximise the use of the court estate, court lists are already being combined across local justice areas. For example, all remand hearings for East Sussex and Brighton are heard at Brighton magistrates’ court. A family, or victim, of a defendant arrested in Rye would have to travel to Brighton (a distance of 50 miles) to observe the hearing. Efficiencies gained by listing ‘virtual’ cases in the next available hearing centre on a regional or even national basis, makes it much more difficult for the press and public to gain access and gives rise to obvious questions: how would anyone know where a particular case would be listed in time to be able to dial in from another part of the country? If cases were only accessible at the court building in which it is being heard, does this mean family members or interested members of the press/public would have to travel to another part of the region/country? How could they do this for short-notice hearings such as remand hearings? There is little evidence that HMCTS have made any progress in answering these questions, despite so much of the reform programme being based on ‘virtual’ hearings, amalgamating court lists and closing court buildings.

9. It is also of concern that HMCTS do not appear to recognise the need for proper public access to physical hearings. The latest version of the Courts and Tribunal Design guide – on which future court refurbishment and construction will be based – allows a maximum of nine public seats for Crown Court hearing rooms. Given the seriousness of cases that will be heard in these court rooms: murder, serious sexual assault and so on, possibly with multiple defendants, it should be clear that many more than nine public seats will be needed, not least to allow the families of victims and defendants to be given adequate separation. Is this indicative of the low priority HMCTS places on public access to justice?

\(^2\) R v Sussex Justices, ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233)
10. Equally our justice system does not appear to be highly valued by the general public. In part no doubt, because, unlike the health service, most people do not expect to need it. The more isolated our justice system becomes, the harder it will be for people to understand what takes place, potentially undermining the rule of law. Lack of transparency is also likely to reduce the number of highly qualified people interested in working in justice, to the detriment of us all.

11. The second aspect of access to justice, the ability of court users to participate in court processes, is also important. Between 2010 and 2018 162 of 323 magistrates’ courts closed (50%), leaving significant populations with travel distances of more than 20 miles to their nearest magistrates’ court.3

12. There is little available data on the impact of the closures so far, as HMCTS has poor management information processes in place. The question that should be asked is whether the increasing remoteness of courts has an impact on the willingness of victims and witnesses to support court proceedings. The criminal justice system is highly complex and affected by numerous factors including changing to policing. It is therefore not possible to simply look at workload statistics and draw meaningful conclusions. Future policy should not be decided on anecdotal evidence.

13. Reform proposes that concerns around ability to participate can be overcome by the use of video links, either by way of ‘video-enabled’ ie in a physical courtroom with one or more participants appearing by video-link, or by fully-video hearings not in a courtroom. The use of video is further explored in paragraphs 19 to 27 below.

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 hearings?

14. Closing courts on the assumption that court users will engage digitally may leave large parts of England and Wales with no accessible court. HMCTS have previously said that they will not close courts until the replacement systems have been proven to work, but given that so much of the funding for reform is derived from the sale of court buildings, and the enormous backlog of essential maintenance that the court estate needs in order for it to be fit for purpose and safe to work in, it is very difficult to see how there will be anything other than significant court closures irrespective of whether the replacement systems work, with magistrates’ courts being most likely to be affected.

15. Under reform many administrative functions are being removed from court buildings to be dealt with in centralised service centres. At present court users and the public are very poorly served: reductions in staffing levels that have already taken place have resulted in the almost universal closure of public counters in court buildings and telephones are frequently left unanswered. It is therefore hoped that combining functions into service centres will show an improvement in the service court users and the public receive, although this will be entirely dependent on a fully functioning common platform system allowing case enquiries to be dealt

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with centrally, underlining the importance of the core system being properly funded and developed as a matter of urgency.

16. Courts, however, cannot function without any staff. The split between court-based and service centre-based staff is not yet known, but it is essential that sufficient staff remain in courts for them to be secure, and to deal with the day to day issues that arise, including assisting unrepresented and digitally-excluded court users, and to provide adequate contingency for system issues, such as the unavailability of Wi-Fi.

Online processes

17. There have been some notable successes in introducing online processes, such as those for divorce and online plea, which are to be welcomed. Many processes are made much more accessible when they are available at any time of the day online. However, not everyone is able to use online. It is therefore essential that parallel paper-based systems are incorporated into reform programmes, but there is little evidence of this, with the focus being exclusively on digital channels. For example, litigants in person need to be able to submit evidence, receive court papers and request/respond to enquiries in non-digital environments. This may require equipment (printers in court) and amendments to processes, but these are not integrated in the new ways of working being proposed.

18. There may be unintended consequences of increasing access to court processes via online channels by stimulating demand that cannot be accommodated. For example, the online divorce application system has been hailed a success, but average time from petition to decree nisi from July to September 2018 was 31 weeks and to decree absolute 56 weeks, (the highest figures recorded according to an article in The Telegraph⁴) and an increase in 7 weeks compared to the equivalent quarter in 2017⁵. HMCTS must look at the whole process when evaluating success and efficiency, not isolated parts.

Increased use of video

19. Reform anticipates a significant increase in the use of video-links in magistrates’ courts. Although HMCTS have said that less than a tenth of magistrates’ court hearings will be fully video in the future⁶, I have been unable to establish on what basis this figure has been calculated, and there has been no indication of the extent to which hearings are expected to be video-enabled (ie with one or more parties not physically present). It is however, understood that the majority of fully video hearings in the magistrates’ court will be remand hearings.

20. Remand hearings are some of the most complex in the criminal justice system, occurring at short notice with little time to prepare (a defendant remanded in custody by the police must be produced before the next available court) and often within a day or so of the offence having been committed. It is equally important for both the defendant and the criminal justice system that there is the fullest engagement possible between the parties. Decisions at this stage will determine if the (as yet unconvicted) defendant will lose their liberty and also dictate the time and resources needed to progress the case to a conclusion.

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⁴ Warring couples pay to ‘go private’ for swift divorce. The Daily Telegraph, 2nd March 2019.
⁶ ‘Realising the potential for video hearings’, blog by Kevin Sadler, Deputy Chief Executive of HMCTS, published 30th July 2018
21. In order to be effective, they require a range of agencies to come together: police, CPS, defence advocates, HMCTS, judiciary, liaison and diversion services, probation, drug intervention teams, and interpreters being some of the most common. These different parties must be able to communicate outside of the courtroom at short notice and in a fluid way so that problems can be resolved at the earliest opportunity. The remand hearing is one of the most demanding on the judiciary: early guilty pleas will be sought where appropriate and bail determined. Where there is a not guilty plea the court will set the agenda for trial: there are no interim hearings in the magistrates’ courts. Denial of bail can have enormous impact on defendants – loss of housing, loss of employment and alienation from family - with the potential for being remanded in custody for many months awaiting trial. It is increasingly common for defendants to be unrepresented at these hearings.

22. Where defendants are represented it is very difficult, especially for those who have not been remanded before, for solicitors to take full instructions in any way other than face-to-face. Defendants often do not trust ‘the system’. The situation is raw and may require them to discuss sensitive personal information such as mental health issues or difficulties with substance misuse that they may have difficulty accepting. Many defendants have complex, chaotic lives, or the offences may be of a sexual nature, and the solicitor has to build trust in a very short space of time.

23. It is therefore essential that defendants can understand and effectively participate in the initial remand hearing. Experience of existing video link hearings shows that defendants are often distracted and appear to pay less attention. Defendants in criminal proceedings are often suffering from mental or physical illness, disorder or disability, be substance-dependent, have literacy or language difficulties and be vulnerable. There is a risk that such defendants, many of whom may also not be represented, either because they do not understand the importance of legal representation or because they do not meet the requirements of legal aid, are disadvantaged by appearing over video-link. It is disappointing that HMCTS has not commissioned independent research to evaluate the current use of video-links in remand hearing to establish if they are fair with no adverse effect on judicial outcomes before making video remand hearings a central part of reform. We know that it is infinitely easier to pull a trigger and blast your enemy away in the virtual world than it is in real life: to what extent might behaviours in a video court mimic those in a video game?

24. HMCTS and the judiciary agree that the decision on whether a hearing should be held by video will be one for the judge/magistrates hearing the case. Whilst the lower volumes of cases in the Crown Court make this practicable, in the magistrates’ courts there is real concern that benches will be presented with a fait accompli, either due to the impact of listing policies, or because of the proposed increase in legal advisers’ powers, or simply due to benches having to take the least-worst course of action. For example, it is agreed that youths should not appear over video for remand hearings. However, a number of instances have occurred where a youth in police custody has not initially been produced to the court in person. When the bench has asked for the person to be produced to court no transport is available for them to appear the same day, leaving the bench with the unenviable task of deciding if the youth either remains in police custody for an extra night, or dealing with them over the video link. In theory this is a judicial decision, but in practice any decision has been nullified by the failure to anticipate the need to produce to the court and the lack of suitable transport facilities.
25. Video-links have been used for a number of years in the criminal courts to enable vulnerable and intimidated witnesses to give evidence. However, where video has been used for these purposes, it has been to secure testimony from witnesses who otherwise may have been unwilling to support a prosecution. Concerns about a possible reduction in the credibility of their evidence are reduced because it is better to have evidence given over video than no evidence at all. It is a big step to say that it is therefore safe for all evidence can be given by video. There are anecdotal reports that some defendants prefer appearing by way of video link as it is harder for them to be held to account, for example.

26. It should go without saying that if video links are to be used the equipment must be fit for purpose, be properly set up and maintained and users should be appropriately trained in its use. However, much of the equipment in current use is of a low standard. Video and audio quality can be poor and camera/screen angles not conducive to effective communication.

27. Although HMCTS have publicly stated on a number of occasions that all trials will be heard in a physical court room, they nevertheless propose that trials arising from the single justice procedure (including traffic prosecutions, TV licencing, DVLA and fare evasion) could take place as fully video trials. There is no HMCTS workstream evaluating this, despite this being a major departure from current court practice requiring primary legislation. Whilst these cases may be of relatively low seriousness in terms of the wider spectrum of criminal activity, for defendants they can still be extremely important: a conviction can have grave consequences for employability, and even travel options. If these offences are deemed of such low consequence that the normal standards of a criminal trial should not apply, the more logical route is to decriminalise the offences, not introduce a two-tier standard for trials. The impacts of fully video trials should be examined before any legislation is proposed, not afterwards.

Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication, with judicial office holders, the legal professions and advice section and other relevant stakeholders?

28. Given the centrality to reform of court closures, it is very disappointing that the consultation response to ‘Fit for the future: transforming the court and tribunal estate’, which closed in March 2018 has still not been published. This consultation set out the proposed future strategy and approach to court and tribunal estate reform and the response is long overdue.

29. Consultation with magistrates has almost exclusively been done by Judicial Office, rather than by HMCTS. The senior judiciary and others have put considerable time and effort into informing judicial office holders about reform and consulting them, but this is hampered by the agile nature of the reform programme and the lack of any easily articulated vision of the end state. Reform is seen as a collection of 52 jurisdiction specific and cross-jurisdictional projects, but the greatest impacts will be felt, not by the introduction of new technology, but by the changes to ways of working that the technology allows, such as the centralisation of work. This is likely to have many impacts, including potentially magistrates being limited to certain types of work, such as trials, deskill them unless they are prepared to travel huge distances to remote hearing centres.

30. The crime design model is still a work in progress, half-way through reform. It is therefore of concern that projects have been underway for some time, and at great cost, without a clear plan for the criminal jurisdiction.
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?

31. No. HMCTS has very little management information available, partly due to the fragmented way in which it has been developed in the past and because it is using outdated legacy systems. There appears to be little understanding of where value is added, for example the case management functions that District Judges (Magistrates’ Courts) and magistrates do for not guilty first hearings, which risks replacing vital functions with online systems that cannot replicate the judicial involvement we currently have leading to box-ticking exercises. The lack of management information means that it is very difficult to measure the impact of reform in a meaningful way and hampers robust evaluation.

32. There are key areas where reform proposes to innovate without clearly understanding the likely impact of that innovation and no attempt appears to have been made to undertake any research to understand the impact of proposals. This particularly applies to the use of video-links beyond their current use for vulnerable and intimidated witnesses, fully video trials and open justice. It would have been logical to examine the implications of innovative ways of working before committing significant time and expense developing those projects, but this has not been done. There is a significant risk that projects with adverse unintended consequences will be continued with, due to the cost and reputational risk to the MoJ/HMCTS of abandoning them at a late stage.

33. HMCTS are assuming a high level of digital engagement which may be unachievable, particularly in the criminal jurisdiction given the particular characteristics of those appearing in the courts. It is essential that access to traditional channels are maintained and adequately resourced, and any impacts of failing to meet expected digital engagement levels evaluated.

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