1. I have worked in law and technology since the early 1980s. I am President of the Society for Computers and Law, Chair of the Advisory Board of the Oxford Internet Institute, and, since 1998, I have been Technology Adviser to the Lord Chief Justice of England and Wales. I write here, however, in a personal capacity.

2. This submission relates to one aspect of the reforms – the introduction of “online courts” for the resolution of low value civil cases. I should declare two interests. I was Chair of the advisory group on online dispute resolution for the Civil Justice Council (CJC) that, in February 2015, first proposed the idea of online courts for England and Wales. And I am currently completing a book on the subject, *Online Courts and the Future of Justice*, which is to be published by Oxford University Press later this year. In summary, I am a strong advocate of online courts.

**An introduction to online courts**

3. The motivation behind the introduction of online courts to our justice system is clear – our current system for resolving low-value civil disputes (for current purposes, say, under £10,000) is too slow, too costly, and is unintelligible to self-represented litigants. To the internet generation and many others, the civil justice process seems antiquated. The net result is that most citizens are denied access to justice on a scale that is intolerable. Online courts, in my view, are our most promising solution to this access to justice problem.

4. I draw a basic distinction between physical courts, virtual courts, and online courts. Physical courts are the bricks-and-mortar hearing rooms with which we are all familiar. Virtual courts are hearings in which one or more participants appear by video link. In contrast, in online courts, human judges determine cases but neither in a physical courtroom nor in a virtual hearing. Instead, evidence and arguments are submitted through an online platform. Judges then deliver their decisions not in open court but again via the online service. The proceedings are not conducted in one sitting by video, audio, or real-time chat. There is no hearing, virtual or otherwise.
The process is *asynchronous*. Members should be particularly clear about the difference between online courts and virtual hearings, because these terms are often and wrongly used interchangeably.

5. While it is helpful, for the purposes of analysis and discussion, to draw the distinction between physical courts, virtual courts, and online courts, the reality is that court services of the future will be delivered as blend of some or all of these. It will become common practice, in the course of civil case management, to disaggregate disputes into their component parts and to allocate each part to the most appropriate (efficient and just) process. In this way, in one case, part of the work might be undertaken online, some of it in a traditional courtroom, and yet other tasks in a virtual hearing room.

6. Another aspect of online courts envisaged by the Reforms is that our courts will be able to deliver more than judicial decisions, providing tools in due course to help court users understand relevant law and the options available to them, to guide users in completing court forms, and help them to formulate their arguments and assemble their evidence. They can also offer various forms of non-judicial settlement such as negotiation and early neutral evaluation, not as an alternative to the public court system but as part of it.

7. Two major benefits should flow from the introduction of online courts – *an increase in access to justice (a more affordable and user-friendly service) and substantial savings in costs, both for individual litigants as well for the court system*. This is not science fiction. Online dispute resolution is widely used in the private sector and online courts are being deployed in other jurisdictions, including Canada, USA, Australia, Ukraine, and China.

8. It is not suggested that online courts are suitable for all cases. More work needs to be undertaken to identify the characteristics of cases that make them suitable for online disposal. I do know from discussions with District Court judges that many feel they could properly dispose of significant numbers of their cases on the papers alone, supported perhaps by telephone conferencing or, in due course, by video conferencing. My view is that the value of a dispute is clearly an important factor in
identifying a case as suitable for online disposal, but this is by no means the only factor. Other important aspects are the complexity of the law and of the fact patterns, the volumes of documents, the sensitivity of the issues, the types of legal problem at issue, and the efficiency of the current processes.

9. One specific challenge is worth highlighting – for online courts to work effectively and genuinely increase access to justice, they will need to be governed by a new, simplified set of civil procedure rules. If the new system is to be accessible and intelligible, it cannot rest on the current and very large body of rules. I do worry that the necessary legislation has not yet been passed to set up a new rule-drafting body for online processes.

Objections and responses

10. The level of debate so far on online courts has largely been disappointing. In the first place, there has been confusion over what is actually proposed. For instance, some lobbyists and lawyers who, vocally, seem to reject online courts for minor civil matters in fact have in mind virtual hearings for serious criminal trials. This is unhelpful.

11. One set of concerns relate to digital exclusion. However, the critical rhetoric here does not align with empirical research. According to the Office of National Statistics, 90% of adults in the UK in 2018 were recent internet users. 1 If we also take ‘proxy users’ into account (grandfather is not an internet user but his grandchildren can help), the percentage of excluded adults falls well below 5%. 2 I am satisfied that HMCTS’s provision for this small but important minority, under the heading of ‘digitally assisted’, is sufficient to ensure all citizens have access. It is interesting, in passing, to compare the above figures with the statistics relating to physical disability. In the UK, around 19% of working adults have a limiting long-term illness, impairment, or disability, 3 for many of whom an online court would surely be more convenient and less traumatic than attending a physical court.

---

1 https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2018
2 On proxy users and levels of internet usage, see Dutton, W. and Blank, G., Cultures of the Internet: The Internet in Britain, Oxford Internet Study 2013 (Oxford: Oxford Internet Institute, 2013).
12. Another important set of concerns relate to justice. Can justice really be administered acceptably when parties do not congregate together? The main topic of debate here has been ‘open justice’. Critics argue that online courts will not be public forums and so we will lose an indispensable aspect of our justice system – transparency. Advocates argue the reverse. They claim that online courts will be more transparent.

13. Notice that this debate over transparency differs from the claim that all argument before civil judges must be oral argument. This latter assertion is immediately falsified by the existence of paper determinations in our current system, and by the fact that there are countless civil proceedings around the world that proceed without oral argument. The discussion here (see paragraph 8 above) should focus on distinguishing those categories of case which can reliably handled without oral argument and those that cannot. The transparency argument is also different from claims such as, ‘justice requires participants to look one another in the eye, as an irreducibly human endeavour’. This argument has no constitutional or philosophical basis. It is largely an appeal to emotion and tradition, but it does have considerable force. However, if judges can deliver fair decisions on the papers alone, does justice really require, for example, that all small money claims or disputes between shopkeepers and their customers must nonetheless require parties to congregate in a physical space.

14. Returning to the question of transparency, it is of course vital that the work of our courts and the conduct of individual cases are open to scrutiny. The processes, procedures, and operations of our courts should be made publicly available, as should data about their volumes, the subject matter of actions, and the value, timing and results of their cases. Court lists should be published, and we should also be able to determine the cost of our court services to the public purse. In particular cases, transparency requires that there should be publicly accessible information about the processes and procedures involved, the nature and content of the dispute, the identities of the parties, some kind of record of proceedings, some insight into the decision-making process of the judge, some details about case management decisions,

---

3 https://www.scope.org.uk/media/disability-facts-figures
and the determination itself. Justice, in this way, can be seen to be done. But in a
digital society, with widespread access to the internet, almost all of this information is
surely more likely to be examined online than through visits to physical hearings.
Indeed, realistically, some of this information can only be provided online.

15. What do we lose if some low-value civil cases are not resolved by judges in public
hearings and instead are resolved by judges on an online basis? So long as many
significant civil cases are still conducted publicly, I do not see that the justice system
as a whole is thereby rendered less public. There will still be countless opportunities
to see the system in action. As for individual cases, parties may feel they will lose the
chance to be publicly vindicated and for their opponents to be publicly denounced.
They might lose their day in court. Surely, however, it is the purpose of the civil
courts to resolve the disputes of all who have justiciable claims and not to offer a
forum for public expiation to a privileged few.

16. Looking at the question of transparency more philosophically or in terms of social
policy, we might in any event ask whether ‘open justice’ is in some way an overriding
principle. We can say immediately that it is not because, for example, in cases
involving national security or involving vulnerable witnesses, it is not unusual to hold
hearings or parts of them in camera. Moreover, in my forthcoming book, Online
Courts and the Future of Justice, I suggest that when we speak of justice in the
context of our courts, we might have one or more of seven different conceptions of
justice in mind, only one of which is ‘open justice’. And these various conceptions of
justice can pull in different directions. For example, in the context of a low value civil
claim, it is often contrary to ‘proportionate justice’ to have parties take time off work
to appear in court and pay lawyers much more than the amount at issue. Because
many people cannot afford lawyers and court fees, we also have a pervasive problem
of ‘distributive justice’ – legal and court services are social goods that are unevenly
distributed across society and are available, generally, only to those of considerable
means. Open justice (physical courts) often therefore gives rises to breaches of
proportionate and distributive justice, and it is not self-evident that open justice (in the
limited sense of physical hearing) should always prevail. It is not self-evident that
when a plumber has a modest money claim against a customer, or a tenant is requiring
a landlord to fix the lock on the back door, that judges must only consider these issues in open court.

17. In relation to all objections to online courts, what surely matters above all else is that the decisions of our courts are fair (substantive justice), that the processes are fair (procedural justice) and that participants feel that they are so. If online courts deliver substantive and procedural justice, I cannot find any countervailing principle of justice that insists we should always favour our traditional system which is accessible to very few and too often disproportionate when it is invoked.

Concluding remarks

18. I am concerned that very few critics of online courts (including judges) have seen them demonstrated or heard directly from people who have used them in earnest. There is a danger that policy thinking is being driven by assumption and instinct rather than evidence and experience. I would happily introduce (by video conference) members of the Justice Committee to, for example, the team in British Columbia whose Civil Resolution Tribunal is widely acclaimed and fully operational. I am anxious that the Committee’s views are informed by best practice. Equally, HMCTS are increasingly and openly demonstrating their developments around the country.

19. It is significant that there are no systematic, credible alternative proposals for tackling the access to justice problem. Many lawyers and activists, who are understandably angry about cuts in public spending on legal aid, seem to suggest that the simple answer to inaccessible courts is to set that tap running again, for the state to pay for the legal work of many more people. But greater funding cannot be the definitive solution because this will often be to fund an inefficient, antiquated court system. If our current system is disproportionately expensive, we should want a better system regardless of who is paying.

20. More generally, critics should be cautious about comparing online courts with some ideal and yet simply unaffordable conventional court service. As Voltaire would no doubt have counselled, “the best is the enemy of the proportionate”. The comparison that should be made is with what we actually have today – a system that is too
expensive, takes too long, is not understandable to the non-lawyer, and so excludes many potential litigants with credible claims. We have to find a way of widening access and reducing unmet legal need at a cost that makes sense relative to the value of any given case. In online courts, I believe we have found such a way. After almost 40 years of work on court technology, I believe we are on the brink of a breakthrough in helping people understand and enforce their legal entitlements.

21. Nonetheless, the opposition to online courts (and indeed to virtual courts) is strong. Judges and lawyers rightly extoll the virtues of oral hearings, but with little acknowledgement that this mode of hearing is simply not scalable. It is unaffordable and disproportionate for many low value claims. It is a Rolls Royce system for the very few, while everyone else is left to walk.

22. Most advocates of online courts agree, of course, there must be safeguards in place to protect the interests of litigants. Two of these should always be borne in mind. The first is that it should be open to case officers and to judges to allocate cases to traditional hearings when they consider it appropriate to do so. Second, it must be possible to appeal from an online court to a traditional court.

23. Critics are right to be concerned about the poor track record of public sector technology projects. However, this is an argument for developing systems well rather than not at all. The current leaders at HMCTS who are responsible for the delivery of the reform programme are, in my view, impressive individuals who are putting their hearts and souls into the initiative. Technology projects are hard and rarely go without hitch. The officials must of course be accountable for difficulties that arise but, at the same time, they deserve more support from outside HMCTS than they currently receive.

24. Recent technology problems in the court system highlight the need to move beyond the current out-of-date administrative systems, beyond also the difficult transitional phase when old and new systems are working together, to an era when there is a full new suite of systems and more coherent governance in place. Regarding timing, I welcome the recent news that the reform project is being extended. I have for long
argued that the original time scales were too ambitious, driven by the idiosyncrasies of public sector spending rather than realism about the scale of the programme.

25. The idea of online courts has rapidly gained traction across the world over the past few years. In December 2018, at the First International Forum on Online Courts, held in London, 300 delegates attended from 26 countries. Reports from various countries confirm that online courts are no longer the hope of a few dozen experts, judges, and lawyers in England and Wales. They are taking shape as a global vision of how we might dramatically increase access to justice. Once comfortable with the potential and the limitations of online courts, my hope is that the Justice Committee can support wider efforts for England and Wales to lead the way internationally, being recognised in the 21st century, as in previous centuries, as a leading forum for dispute resolution.

26. I would be very pleased to clarify any points that arise from this note or appear before the Justice Committee in person. I would also welcome the opportunity to talk through the strengths and weaknesses of online courts. In truth, the issues are too complex to cover in a short submission. Online courts are, in my view, the most significant changes to our court system in more than a century and deserve in-depth discussion.

March 2019