



Access to Justice Impacts of Court and Tribunal Reforms
(Commons Justice Committee inquiry)
Written evidence submitted by The Transparency Project

This is the response of The Transparency Project, a registered charity (no. 1161471) whose objects include the advancement of public legal education and the promotion of the sound administration of justice, particularly in relation to family law. It explains and discusses family law and family courts in England & Wales, and signposts useful resources to help people understand the system and the law better. For further information see its website, <http://www.transparencyproject.org.uk/>.

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Our response is numbered in accordance with the questions set out in the Justice Committee's Terms of Reference, as follows.

1. What will be the likely effects of the reforms, both implemented and proposed, on access to justice in relation to:

a. civil justice?

(i) Access to justice includes access to legal information

Access to justice includes access to information and understanding about the justice system. It means not only that justice remains open and transparent, but also that people, including members of the public, academic researchers, and the media (who are also, but not exclusively, the eyes and ears of the public) are able to scrutinise and follow judicial proceedings, and have access to ancillary materials such as documents referred to in court, pleadings, written submissions and court orders.

Lack of information about the legal system has been exacerbated by the decline in public interest journalism, particularly at the local level, including

the coverage of the courts, as documented most recently in the Cairncross Review (February 2019).¹

The Reform programme offers huge opportunities to increase transparency and understanding, but it is not clear that these are being sufficiently considered or – crucially – consulted upon widely enough. To date, there has been no public consultation exercise, of which we are aware, that has specifically considered legal and practical questions of access, observation and publicity of proceedings. Previous HMCTS consultation exercises did not contain questions explicitly addressing open justice and transparency (and related privacy, data protection and rehabilitation concerns). We understand that operational and policy teams at HMCTS and the MOJ are considering the question of open justice but thus far their consultation has been with small ‘stakeholder’ groups and not publicly advertised. We have been willing participants in meetings (where permitted to attend) and would be happy to engage further, but suggest that full public consultation is also required. We are also concerned that an HMCTS open justice working group² that advised on guidance published in October 2018 was restricted to members of the media when there are wider interests that should be represented in the development of future guidance and policy (we understand other groups may be formed in future and we hope to participate in this activity).

An open and imaginative approach is called for. A functioning justice system must be observable by third parties – not only by members of the press, but ordinary members of the public, and other professionals such as those working for NGOs or in research. It is much more than just a question of providing via modern technology a rough equivalence for the traditional concept of attending court in person to watch and learn. The online court merits online transparency, rather than an attempt to replicate online the experience of attending a traditional offline hearing.

But the solutions so far canvassed in nearly three years of development, such as the idea of a viewing booth in a court building dedicated to displaying real-time (streamed, but not recorded) virtual hearings conducted online, appear to be limited and lacking in imagination with insufficient attention given to the likely ‘human impact’. Moreover, there are examples of more imaginative and useful solutions, both in our own and in other jurisdictions which could be investigated and harnessed here.

For example, the UK Supreme Court offers video streaming, video catchup, and long term archiving of hearings, as well as making available court

¹ <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism>

² <https://www.gov.uk/government/news/new-media-guidance-issued-to-all-court-staff>

documents, press summaries etc. The Court of Appeal, both Criminal Division and more recently the Civil Division, have experimented with live streaming, the latter apparently being allowed to remain on the court's YouTube channel as a catch-up recording.

Access to court documents in civil claims could be provided for media and public access via the CE-file platform, currently being piloted: it remains to be seen whether this will be made accessible in a way that promotes open justice, or merely monetised to help fund the system, leaving only major news organisations able to afford the necessary access. A comparison with the American PACER platform suggests that its charging model, though far from free, even to the public, is more supportive of transparency than CE-file.

An initiative by the solicitor General in July 2017 (A Vision for Legal Education) to boost public legal education by setting up a panel of mainly non-profit public interest and advice organisations does not seem to have produced any results, apart from a further vision statement to coincide with Justice Week in October 2018.

We encourage a more ambitious programme of reform for the provision of public materials and facilitating the observation of court processes. While we urge a transparent and open approach, we also suggest that the implications – legal, ethical and practical – need to be carefully considered and subject to full public and parliamentary consideration. A nuanced approach that permits different levels of access to courts data, depending on its type, may be required.

(ii) Access increased for simple claims, decreased for more complex ones

Simple disputes, involving quantifiable money claims, will be easier for most litigants to navigate online. However, more complex disputes involving oral witness and expert evidence, which need to be heard in a live environment, will be more difficult to resolve quickly and cost effectively if there are fewer courts available and longer distances to travel in order to find them.

In this respect, the closure of many local courts has made justice *less* accessible, not simply because the courts available to litigants are further away, but because the lack of travel infrastructure in rural areas, e.g. bus services, has not been remedied, and there are environmental deficits arising from an increased reliance on road use, private car transport, as well as the cost implications for court users. Public transport over longer distances, even when available, may require changing trains or from train to bus or taxi. These issues are multiplied where hearings involve a larger number of participants, so it is not just the judge and counsel and the clients who all have to travel

further, possibly incurring accommodation costs, but also the witnesses and families of litigants in some cases.

There is not a 'zero sum' basis on which closing courts and replacing some court hearings with online hearings while requiring others to be conducted at greater distance, cost and inconvenience, can somehow achieve a balancing out of cost and convenience when measured against what went before.

b. family justice?

Lack of early advice reduces potential of developments

While online divorce applications and the possibility of online financial dispute resolution may simplify some family justice processes in less complex cases, the lack of early or ancillary advice (for which legal aid is not available) limits the beneficial effect that those developments otherwise might have had. If the reforms could include pre-litigation advice and the provision of advice in association with online processes, the improvement to access to justice would be more substantial.

At the same time, the closure of many local courts has the effect of reducing access to justice, particularly in more complex cases, those involving children and local authorities, for which legal aid continues to be available, but which require attendance in physical court rooms for substantive decision making, although case management and preliminary hearing may benefit from video linked or online (or telephone) hearings.

The initial pilot of the C100 form for section 8 Children Act 1989 (Child Arrangements Order) applications,³ which was aimed at litigants in person, suggests that limited work has been done or is underway in respect of how litigants may understand and interact with an online application process as compared to a paper process. By this we mean, do litigants understand who will see the data submitted, how it will be used, and the potential legal consequences and practical ramifications of the submission of inaccurate information? For example, do people appreciate they are signing a statement of truth that carries consequences? Do they realise their ex-partner may see the information submitted or that a failure to disclose abuse in the online application may be raised later in the court process as evidence of inconsistency? It appears from our enquiries that no data protection impact

³Gov.uk, We're trialling a new online service to apply to court about child arrangements, https://apply-to-court-about-child-arrangements.service.justice.gov.uk/?utm_source=formfinder (See also, Pink Tape blog, This is your pilot speaking...brace for impact, <http://www.pinktape.co.uk/rants/this-is-your-pilot-speaking-brace-for-impact/>)

analysis was conducted prior to the rollout of this online pilot. The initial iterations of the process contained quite inappropriate questions and potentially harvested more data than was necessary for the purposes of the application, or would be required through the paper process (though improvements have been made since). Whilst we welcome the appropriate use of well-designed online processes, we are concerned that in matters of family justice, in particular, litigants are often in person, have multiple vulnerabilities including literacy, cognitive and linguistic limitations – and many have no access to a device upon which to complete online forms.

c. criminal justice?

Systematic and comprehensive criminal listings and results have not been published online by the courts previously,⁴ so if the proposal is to publish these on court websites and to the open web, this is a matter on which there should be further public and parliamentary consultation. An impact assessment (MoJ022/2016, 15/09/2016) suggests that this was planned for summary only, non-imprisonable offences but as noted above there has been no formal consultation on such plans.⁵

Legal professionals and justice charities (such as those representing ex-offenders), as well as media organisations should be consulted on such plans. It might be appropriate, for example, to make such data available via a restricted database for a limited period of time, rather than automatically publishing to the open web.

Consideration should be given to the introduction of safeguards, limits or access filters to prevent a possible conflict between publication of information about criminal convictions and the Rehabilitation of Offenders Act 1974. We would also welcome consideration of any data protection issues, both under EU GDPR and the Data Protection Act 2018. Again, we have not seen any specific consultation or discussion of these issues during the reform process, or following the introduction of new legislation on data protection.

d. administrative justice, particularly as delivered by the tribunals system?

⁴ Some Crown Court listings have been made available online by private services such as Courtserve. Magistrates' Court listings, as far as we are aware, have never been systematically published online, nor results for the criminal courts.

⁵ https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/onlineconvictioniaandeia.pdf, p.5 para 23. Also see: <http://www.transparencyproject.org.uk/access-to-information-should-not-be-an-after-thought-in-plans-for-transforming-our-justice-system/>.

We have no specific comment to make although some of the issues we raise above about the importance of consultation on the implications of changes to access, observation and publicity of proceedings apply to tribunals as well as the criminal and civil courts.

e. those who are digitally excluded or require support to use digital services?

Providing more digital resources could be of great benefit to people with disabilities that prevent them from attending and observing court. In this way, greater digital access could improve access to court materials for some people. However, if the sole method of access is via digital means, there is a risk that some people of limited digital means will be unable to attend court as a public observer or access materials to which they are entitled. The different methods described should not be available only to direct participants in court cases, but also public users of the courts who wish to observe hearings, or access documents.

It is essential that measures are put in place for public access to public court proceedings that are conducted via virtual means, such as video, telephone and online services.

For the avoidance of doubt we consider that open justice requires either physical or digital access to public proceedings without prior or special arrangement – i.e. any courts access system should allow members of the public (including the media) to attend or view public proceedings without pre-booking places. On our current understanding, it appears that the proposals will lead to significant numbers of proceedings being conducted in effect in private, where these are currently conducted in public. We urge the Ministry of Justice and Judiciary to provide more detail on their specific plans for physical and digital access to virtual proceedings and open these plans to further consultation.

We note that the Reform programme is working with the Good Things Foundation to support those who might otherwise be digitally excluded, as HMCTS's fourth response to the Public Accounts Committee's report demonstrated.⁶

What is not clear is whether this assistance is confined to court users (i.e. litigants, perhaps witnesses, jurors etc) or also includes those attending, researching or reporting court proceedings.

⁶ See: <https://www.gov.uk/government/news/moj-response-to-public-accounts-committee-transforming-courts-and-tribunals>.

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 inevitably reduce access to justice if they result in users having to travel further and at greater cost and inconvenience to reach a suitable court (see above). This is a cost both to litigants and to the public purse as professionals also have to travel further (to an extent, in light of the limitations of legal aid, this additional cost is borne by legal professionals as it cannot be fully recuperated). Increased travel times, particularly where combined with flexible operating hours are likely to further impact on the diversity of the legal profession, in particular the bar, as those with childcare responsibilities (predominantly women) will be disproportionately affected.

Court users are not the only persons whose access to a court is affected by court closures. Members of the public, and others who might attend court hearings in open court, will also be subject to the same obstacles and impediments. Open justice and transparency require that courts should be open and accessible to the public and other groups, such as the media, academic researchers, public interest organisations et al.

In family matters, particularly those involving domestic abuse allegations, there are particular difficulties arising from the closure of courts in areas where there are limited public transport routes to and from the court, and where both parties may have no means of travelling to or from court without sharing a bus or train or waiting on the same platform / stop. This is a security risk in some cases, and one that will be exacerbated to the extent that flexible working pilots may be extended to times when public transport is less frequent and after dark. Such practical matters are a significant barrier to physically accessing justice as they are a real impediment to litigants getting to hearings, safely or at all. Those with caring responsibilities will also find later sitting hours or longer travel times to and from court make it difficult to attend due to limitations on available childcare.

Online processes and video hearings may be a suitable substitute for litigants, witnesses and lawyers, they may even be more convenient in many cases, avoiding the need for travel or unsocial hours, but unless those who would otherwise attend court in the public gallery or the press bench are given equivalent access to the processes, there will be a detriment to open justice and transparency. In addition, open court hearings are readily understandable according to traditional concepts of adversarial justice, however imperfect their representation in the media might be. The transition to new processes

which take place online or via virtual hearings may be confusing and hard to follow even if access of a sort is provided.

We do not think that a significant proportion of family hearings are likely to be suitable for or productively conducted via video link, even if it were practically possible. Given that a significant proportion of litigants involved in family proceedings will be acting in person and will have care responsibilities it should not be assumed that they have somewhere private and quiet from which to attend a video linked hearing. In family cases most hearings require the attendance of both advocate and lay client and there is a very significant practical disadvantage to them being in different geographical locations as private advice cannot be given nor instructions taken. We are unclear whether the intention is that the legal professions will be expected to make their offices available for advocate and client to attend from, but there would be significant economic ramifications.

As a general point we think that there is a pressing need for enhanced public legal education and raised awareness of justice matters generally, but in particular, in family law and family courts. We are alive to the fact that physical hearings are not regularly attended by journalists or the public in significant numbers (and in family cases restrictions mean that the public are usually not permitted to attend), but are concerned that a wholesale move from physical hearings to video hearings would make it even more difficult for journalists or legal bloggers to access hearings and report to the public at large. We can see that the use of video hearings might represent an opportunity to achieve greater public awareness of court process and law because video footage would be capable of distribution and repurposing / repackaging – but we have seen no detailed proposals in this regard nor are we confident based on the current resource limitations in the justice system that such opportunities will be explored let alone fully developed. Rather, we worry that justice traditionally conducted in public and open court will increasingly move behind (virtual) closed doors. In family justice we know that the perception of secrecy is hugely corrosive of public trust and confidence in the justice system.

The Child Arrangements Tool

(<https://helpwithchildarrangements.service.justice.gov.uk/>) referred to in the Ministry of Justice's recently published Action Plan 'Legal Support: The Way Ahead, An action plan to deliver better support to people experiencing legal problems' is poorly constructed, of limited utility and fails to utilize or signpost to the wealth of existing high quality material available. It is not comparable to individualized legal advice.

We note that whilst the network of Personal Support Units, housed in court buildings (currently 24 across the country) provides welcome but ultimately limited support (not advice) to litigants in person, many of whom are involved in family disputes for which no legal aid is available, that support is unlikely to be accessible where hearings take place online.

Particularly in private law children disputes where parties are more often than not unrepresented and without legal advice, a physical hearing represents an opportunity to build rapport and broker agreement, to reassure vulnerable litigants and to properly understand their vulnerabilities and needs (for example whether they are comprehending what is being said) and to signpost litigants to resources to assist them by handing out leaflets or web addresses. All these soft but important parts of a court hearing are lost when communicating remotely.

There is probably a marginally greater risk that proceedings will be inappropriately recorded and disseminated if litigants in person are expected to conduct hearings online, because of the technical ease with which a live stream can be recorded. Although there are comparatively rare examples of hearings visible on YouTube, the need to conceal a recording device when passing through security and clear signage probably minimizes such conduct. We query whether s9 Contempt of Court Act 1981, which prohibits the making of audio recordings in court or s41 Criminal Justice Act 1925, which prohibits the making of images of parties or witnesses whilst in court would be effective (without amendment) in prohibiting such conduct. This is of particular importance in family proceedings or any other proceedings which are held in private to protect the vulnerable (in children proceedings s12 Administration of Justice Act 1960 and s97 Children Act 1989 would still bite regardless of whether the hearing was online or not).

Conversely, a relaxation of rules regarding digital audio recording might have potential to permit some reduction in workload, cost and delay associated with obtaining transcripts of proceedings or judgments, although of course there would still remain a need for an authorized recording to be made and retained by the court in case of discrepancy or dispute.

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?**

The public, whose ability to watch, read about and be informed about the justice system, have not been consulted as widely as they should have been.

The mainstream media appear to have been consulted (e.g. via the working group mentioned above). While this is an important constituency, which are understood as the “eyes and ears of the public”, they do not represent all interests in open justice. For example, the media – understandably – are concerned with access to newsworthy information and only selectively report court proceedings. We suggest that the interests in open justice are much broader and therefore require wider consultation. It appears that others such as legal bloggers, academics, NGO representatives or independent journalists have not been fully represented in this process.

Open justice and transparency require not only that the public have access to attend and watch legal proceedings, but also that they have access to information about such proceedings.

For the purpose of consultation, media representatives should not be confined to traditional print and broadcast media, though these are important. The scope should include legal bloggers, for example, such as those the subject of the pilot established by Family Procedure Rules Practice Direction 36J, which runs from 1 October 2018 until 30 June 2019. This enables three categories of person to attend private family hearings on the same basis as accredited media representatives currently can under the FPR, namely:

- Practising lawyers
- Non practising lawyers working for a Higher Education Institution
- Non practising lawyers working for a registered educational charity whose details have been placed on a list with the President’s office. The Transparency Project is such a charity.

Academic researchers and commentators should also be consulted, since they have a legitimate interest in watching, researching, and analysing the administration of justice.

Most of the events that have been organised by HMCTS have involved stakeholders such as legal professionals and court staff, and to some degree litigants; and in some cases, public interest or public legal education groups have been represented, and legal commentators or media representatives. But we have seen no indication that ordinary members of the public have been invited or attended.

Pilots must have involved genuine users, but it is not clear to what extent their views have been sought before developing products to meet their needs, or whether they have simply been brought in afterwards to trial new products and provide feedback.

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?

It is clear from its response to the Public Accounts Committee's fourth recommendation in its report, *Transforming courts and tribunals*, 56th Report of Session 2017 to 2019, that HMCTS is aware of the need to identify and evaluate the impact of the reforms, both at the individual project level and at an overarching level. However, the response indicates that mechanisms of evaluation are still being developed and that early evaluation has been hampered by an absence of reliable baseline data measuring pre-reform performance, from which to compare the effect of the changes.

However the evaluation is conducted, it needs to include the same range of subjects as the consultation discussed above: in other words, it needs to take account of the impact of the reforms not just on court users such as litigants, victims, witnesses, professionals and the judiciary, but also the general public, family members, the media, academics, students, and anyone else who might use or visit a traditional court to attend or report on what is happening there.

By way of example, in the current Video Hearing Pilot Scheme running at Birmingham Civil and Family Justice Centre and Manchester Civil Justice Centre, under Civil Procedure Rules Practice Direction 51V⁷ and in an earlier pilot involving tax appeals, while the hearing with remote parties was hosted by a judge in a physical courtroom, it is not clear from the published material whether the cases are listed as in open court or, if they are, how the media and public might be able to find out about them. The evaluation commissioned by

⁷ <https://www.lawsociety.org.uk/news/stories/video-hearings-pilot-to-begin/>



the Ministry of Justice following the earlier tax hearings⁸ did not consider the impact on the public or media or anyone other than the litigants and professionals. An earlier Virtual Remand Hearings User Research Report⁹ likewise considered impact on various kinds of user, but not the public or other observers. This kind of oversight or lack of scope needs to be correct for future impact evaluations.

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⁸ , Implementing Video hearing (Party to state): A process evaluation, by Dr Meredith Rossner and Ms Martha McCurdy (LSE)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740275/Implementing_Video_Hearings_web_.pdf

⁹ Made available to Transform Justice via FOI request:
<http://www.transformjustice.org.uk/wp-content/uploads/2019/01/FOI-User-Research-Virtual-Bail-and-Remand-Hearings-1-1.pdf>