

Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice

Report and recommendations arising from two expert workshops

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1 EXECUTIVE SUMMARY

- 1.1 The Court System in England and Wales is undergoing a period of unprecedented change. In 2016, Her Majesty's Courts and Tribunal Service established a portfolio of change programmes¹ which intend to introduce new technology, modernise the justice system and reduce costs. Cost reductions are expected to be realised through a combination of reducing staff, reducing the number of cases held in physical court rooms and reducing the court estate, as well as generating efficiency savings through reforming administrative processes. In addition to introducing cost savings, the stated aim of the reform programme is to produce a justice system that: "works better for all involved, uses court time more proportionately and makes processes more accessible to users" (NAO, 2018:1).
- 1.2 The HMCTS Reform Programme aims to reduce demand on courts by moving activity out of courtrooms, expanding the use of video technology, introducing online end-to-end processes, promoting the use of online negotiation, mediation and settlement and developing new asynchronous processes (such as Continuous Online Resolution) for use in areas of administrative justice (starting with appeals made in respect of a subset of welfare benefits cases in the Social Security and Child Support Tribunal). The programme consists of individual "service projects" for example, the Civil Money Claims Online project, which is creating a new service for initiating and resolving low value civil money claims online and cross cutting projects, such as court closures (estates) and video hearings.
- 1.3 Those involved in the design and delivery of the reform programme have made explicit commitments to ensure that the programme: "*improves or maintains access to justice*" and results in a court system that is: "just, proportionate and accessible". The judiciary have adopted a crucial leadership role in respect of the reform programme, and in keeping with this role, have proposed six criteria according to which the projects developed will be: "*tested, and if successful, implemented*" (Senior President of Tribunals, 2019:9), the first of which is: "*1. Ensure justice is accessible to those who need it ie to improve or maintain access to justice.*" In addition in summer 2018, HMCTS agreed to "*...write to the (Public Accounts) Committee by January 2019, setting out how it will identify and evaluate the impact of changes on peoples access to, and the fairness of, the justice system, particularly in relation to those who are vulnerable.*" (HM Treasury, 2018:49). The Ministry of Justice led response, published in February 2019, confirmed the

¹ The National Audit Office, who reported on HMCTS's progress in May 2018, described the change portfolio as consisting of three related programmes which consist of many individual projects. The three programmes are: (1.) The HMCTS Reform Programme which is modernising processes and systems to reduce demand on courts by moving activity out of courtrooms. For example, it will introduce online services and digital case files and expand the use of video technology in hearings. (2) The Common Platform Programme which is developing shared processes and a digital criminal justice case management system to share information between HMCTS, the Crown Prosecution Service and the police. It is jointly managed by these organisations. (3) The Transforming Compliance and Enforcement Programme (TCEP) which is upgrading systems in HMCTS's National Compliance and Enforcement Service, used to enforce court orders such as penalties and compensation. (NAO, 2018:1)

intention to evaluate the impact of the reform programme within these terms and stated that scoping for this evaluation would be finalised in Spring 2019.

- 1.4 HMCTS have publicly committed to: “using insights from external research and academia to validate and challenge our approach”(HMCTS, 2018b:15). To assist in this, The Legal Education Foundation, together with UCL Laws and academics at the University of Oxford, brought together 38 national and international experts in online dispute resolution, public law, civil procedure, access to justice research, court administration and evaluation to produce a set of recommendations to inform the development of a robust evaluation framework.
- 1.5 The paper is structured as follows. Sections 2-4 below set out the background to the current reform programme and the workshops before outlining the scope of the recommendations set out in this paper.
- 1.6 Section 5 presents the definition of “vulnerability” recommended by stakeholders, which is drawn from the extant law, procedural rules and practice directions, augmented by research on digitally excluded populations. Section 6 recommends that any evaluation relating to the fairness of the justice system should encompass an assessment of the impact of reform on those individuals with protected characteristics under the Equality Act 2010.
- 1.7 Section 7 presents an irreducible minimum definition of “access to justice” derived from case law, which is capable of acting as an empirical standard for the purposes of evaluation. The components of this irreducible minimum standard are:
 - i. Access to the formal legal system;
 - ii. Access to an effective hearing
 - iii. Access to a decision in accordance with substantive law
 - iv. Access to remedy

These components are interrelated, mutually supportive and non-divisible (for example, an observable increase in individuals accessing the formal legal system, of itself, is insufficient to justify assertions that access to justice has improved under reform). It is recommended that any evaluation of reform must examine the impact of the programme on each of these four components to arrive at a determination regarding the impact of the programme on access to justice. Assessments of the impact of reform on access to justice must be based on a holistic evaluation that explores the progression of a full range of cases and individuals through the system from claim to outcome.

The Sections 8-11 set out the justification for each of the components and recommends approaches to measurement. Section 12 summarises the recommendations contained within the paper.

2 **BACKGROUND**

- 2.1 In England and Wales, a £1bn programme of reform (“the reform programme”) aims to develop a modernised justice system where cases will increasingly be dealt with online. In whole areas of the justice system, such as divorce and civil money claims, physical and remote hearings will be reserved: “*only for those cases that cannot be otherwise resolved*” (Nos, 2018:2). The stated ambition of these reforms is to create: “*a courts and tribunal system that is just, and proportionate and accessible to everyone*” (Lord Chancellor et al. 2016:4). By March 2023 Her Majesty’s Courts and Tribunal Service expects to: “employ 5,000 fewer full time equivalent staff, reduce the number of cases held in physical courtrooms by 2.4 million per year and reduce annual spending by £265 million.” (NAO, 2018:5). Savings will be achieved through lower administrative and judicial staff costs, fewer physical hearings and a reduced estate, with new hearing centres replacing court buildings.
- 2.2 Whilst the reform programme is being delivered by Her Majesty’s Courts and Tribunals Service² with the budget and business case approved by the Executive, the settlement achieved through the enactment of the Constitutional Reform Act 2005 has resulted in the judiciary adopting a crucial leadership role in relation to the reforms. Lord Thomas, the then Lord Chief Justice, speaking in 2015 stated that: “*the overhaul of the machinery of justice now to be delivered would never have occurred without the judiciary assuming its new role of leadership*” (Thomas, 2015:13). In keeping with their prominent role in instigating and overseeing the reform programme, the senior judiciary have proposed six criteria according to which the projects developed will be: “*tested, and if successful, implemented*” (Ryder, 2018:2), the first of which is: “*1. Ensure justice is accessible to those who need it ie to improve or maintain access to justice;*”
- 2.3 In addition, in the summer of 2018, the Public Accounts Committee, a body tasked with “holding the government and its civil servants to account for the delivery of public services” conducted a review of progress made in respect of the reform programme. One of their recommendations, which HMCTS have agreed to is: to: “*...write to the Committee by January 2019, setting out how it will identify and evaluate the impact of changes on peoples access to, and the fairness of, the justice system, particularly in relation to those who are vulnerable.*”(HM Treasury, 2018:49). Official HMCTS publications have also referenced an internal commitment to capturing data that will enable HMCTS to: “*...change and improve [services] regularly in the future...make(ing) our changes future-proof by designing for further improvement*” (HMCTS, 2018:21).
- 2.4 With these commitments in mind, The Legal Education Foundation conducted a review of existing measures used to demonstrate the success or otherwise of public justice system

² An executive agency of the Ministry of Justice accountable to both the Ministry of Justice and the Judiciary

Online Dispute Resolution projects on access to justice (Byrom, 2018), to understand what could be learned from international best practice. The review revealed an emphasis on indicators such as: (i.) reductions in cost (both to the court system and individual litigants); (ii) reduction in time to resolution; (iii.) reduced need for hearings (as hearings are associated with greater cost and increased time to resolution) (iv.) increased rates of settlement; (v.) increased case volume and litigant engagement; and (v.) subjective measures of procedural justice and user satisfaction. Whilst these measures are important, they do not clearly map to the existing definitions of “access to justice” set out in case law, or the measures used to assess access to justice in empirical research in physical settings.

2.5 In order to address the gaps in the existing approaches to measurement, The Legal Education Foundation in partnership with Professor Dame Hazel Genn (University College London) and Professor Abigail Adams and Professor Jeremias Prassl (University of Oxford), convened workshops with expert stakeholders including officials from HMCTS and the Ministry of Justice to recommend:

- (i.) The way in which an evaluation that robustly captures the impact of the reform programme on both access to the justice system and the fairness of the justice, particularly in relation to those who are vulnerable, should be approached.
- (ii.) The data that should be recorded through reform to facilitate continuous improvement in the interests of maintaining or improving access to justice.

3 ABOUT THE WORKSHOPS

3.1 The workshops were attended by 38 expert stakeholders drawn from around the world. Participation was on an invitation only basis, with attendees selected for their experience and expertise in Public Justice System Online Dispute Resolution, Access to Justice, Public Law, Equality and Diversity monitoring and the evaluation of complex programmes. Academics, practitioners, policy professionals, court administrators NGO’s and the judiciary were all represented. A list of those who attended the workshops is available at Appendix A.

3.2 As noted above, the reform programme currently underway is unprecedented in scale and progressing at speed. An update published by HMCTS in November 2018 stated that there are over fifty projects underway across all jurisdictions (crime, civil, family and tribunals) (HMCTS, 2018:5), including 26 cross-cutting projects. Given the scale and complexity of the programme, the workshops focused on developing overarching principles for evaluation and data collection, with a focus on recommending the definition of “access to justice” and “vulnerable persons” that should be used in any evaluation of

the reform programme and specifying the implications of the adoption of these definitions for data capture.

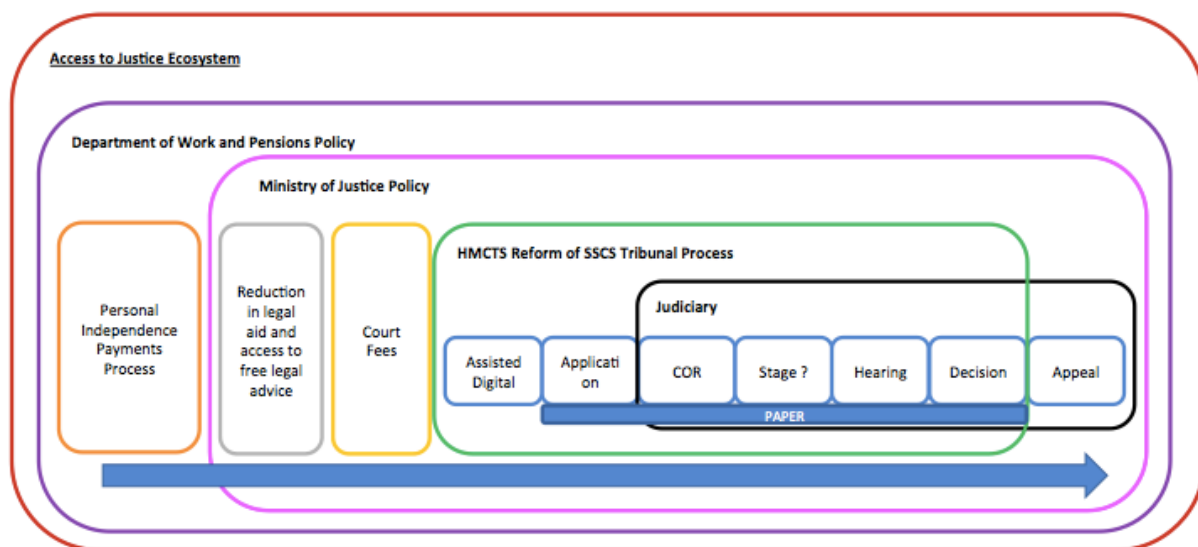
4 SCOPE OF THE RECOMMENDATIONS

- 4.1 The reform programme is being conducted in the context of a justice landscape that has seen significant changes in recent years. It is indisputable that there are numerous factors beyond the scope of reform that impact on the overall accessibility of the justice system—factors that range from the introduction court fees, reductions in the availability of public funding for legal advice and assistance and the low levels of public understanding of law and legal rights. However, the current reform programme is fundamentally altering the processes through which justice is delivered, and as such, it is incumbent on reform leaders to demonstrate (or create the data that enables others to demonstrate) that new systems do not impede access to justice by creating barriers to bringing a claim or design processes that place users at an unacceptable risk of being “processed unfairly”³
- 4.2 Disaggregating the impact of the reform programme (or the individual projects that comprise it) from other external factors is complex but necessary task. Figure 1 below illustrates this complexity, through attempting to describe the ecosystem of factors that impact on access to justice beyond the scope of the reform programme, using the example of Social Security Claims Tribunal Appeals⁴ project as an example. The recommendations in this paper focus on the part of the “Justice Ecosystem” that is within the remit of the HMCTS reform programme (shown in green in Figure 4.1 below).

³ (Children's Rights Alliance for England v Secretary of State for Justice [2013] EWCA Civ 34; [2013] H.R.L.R. 17).

⁴ Complete logic models/official descriptions of projects, even those at the “public beta stage” of testing, are currently unavailable. As such, the figures contained within this document are based on best available knowledge regarding the processes designed, and should be viewed as illustrative, rather than definitive.

Figure 4-1: Illustrative example of the access to justice ecosystem



4.3 The Public Accounts Committee recommendation, agreed to by HMCTS, underlined the importance of considering the impact of reform on: “*access to, and the fairness of, the justice system, particularly in relation to those who are vulnerable*”. As stated above, on 5 February 2019, the Ministry of Justice published their response to the Public Accounts Committee which set out, at a high level, the issues to be considered in the scoping of the evaluation of the reform programme⁵. This response identified the need to construct a definition of “vulnerability” for the purposes of evaluation. Workshop attendees and consultees pointed to a range of materials that might be used to construct a definition of “vulnerability” - these are discussed below at section five.

5 DEFINING VULNERABILITY

5.1 Workshop participants recommended that the definition of “vulnerability” adopted as part of the overarching evaluation of the reform programme should be based on the factors set out in existing substantive and procedural law and practice directions. These are summarised below at 5.2-5.7.

5.2 Whether or not an individual is considered “vulnerable” is dependent on both inherent and situational characteristics (Dunn, 2008:18). As such, vulnerability is neither wholly

⁵ See Ministry of Justice: “Evaluating our reforms: Response to PAC Recommendation 4, January 2019” available online at: <https://www.gov.uk/government/news/moj-response-to-public-accounts-committee-transforming-courts-and-tribunals> (accessed 7 February 2019)

contextually dependent, nor entirely reducible to a list of intrinsic attributes. The Lord Chancellors Department, consulting on proposals for the criteria to be taken into account when making decisions on behalf of mentally incapacitated adults, defined a vulnerable adult as: “...someone over the age of 18 who is or may be in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of him/herself or unable to protect him/herself against significant harm or exploitation”

- 5.3 Case law which concerns circumstances where the High Court is compelled to exercise its inherent jurisdiction to intervene in the life of an adult deemed to lack mental capacity⁶ in contexts which lie beyond the scope of the Mental Capacity Act 2005 (for example, testamentary capacity, capacity to marry and capacity to enter into a contract) has developed this conception of the “vulnerable adult”. In *Re SA*, Munby J. stated that, in the context of invoking the inherent jurisdiction, he would treat as a vulnerable adult:

“...someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness, or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation”

- 5.4 Accordingly, whilst intrinsic or inherent characteristics may provide an indicator as to whether or not someone is to be considered vulnerable, contextual or situational factors, such as whether an individual: “...is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors”⁷ may also be taken into account. The relationship between inherent and situational vulnerability is such that whilst inherent vulnerability may increase the likelihood of an individual being subject to situational vulnerability, the two factors can be said to exist independently. Research conducted by the Mason et al. (2009) for the Ministry of Justice which specifically addressed the experience of vulnerable groups within the justice system, subordinated inherent characteristics, focussing instead on a situational or social model of vulnerability, whereby vulnerability was understood as a creation of social structures and processes rather than inherent to the individual.
- 5.5 In the context of the administration of justice, a range of practice directions and guidance made in respect of family, criminal and administrative law have further emphasised the contextual nature of vulnerability in the justice system context, linking “vulnerability” to those factors that might undermine the ability of an individual to give effective evidence. For example, in the context of the Immigration and Asylum Tribunal, a Practice Direction “First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses” was

⁶ For example, *Re S (Adult Patient), (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam), *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867 20

⁷ *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867, pp 79 per Munby J. 23

issued on 30 October 2008 which sets out the circumstances under which a child, vulnerable adult or sensitive witness may give evidence. Whilst the definition of “vulnerable adult” is drawn from legislation (the Safeguarding Vulnerable Groups Act 2006, s59⁸), the definition of “sensitive witness” adopted is as follows: *“an adult witness where the quality of the evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with giving evidence in the case?”* The Practice Direction was augmented by joint Presidential Guidance Note No 2 of 2010 (“the 2010 Guidance”) which states that factors to be taken into account when determining vulnerability are: *“mental health problems, social or learning difficulties, religious beliefs and practices, sexual orientation, ethnic social and cultural background, domestic and employment circumstances and physical disability or impairment that may affect the giving of evidence?”* (per para 2). In a recent case heard before the Court of Appeal⁹ it was stated that: *“The directions and guidance contained within them are to be followed... Failure to follow them will most likely be a material error of law”*¹⁰

- 5.6 Further to this, The Advocate’s Gateway resources, often cited as an example of best practice guidance for professionals working with vulnerable clients and witnesses, identifies the following risk factors that might bring a person within the definition of ‘vulnerable’: these are: being a child; lack of fluency in the English language; illiteracy; learning disabilities; hearing impairments; speech (or language) impairments; mental health conditions or impairments whilst noting that: *“Any one single definition of vulnerability based on age, incapacity, impairment or medical condition may not reflect the nature of vulnerability that a particular individual may face at different times and in different environments. Advocates should be alert to risk factors which may indicate that the witness or defendant is vulnerable and, if identified, expert advice should be sought.”* (ATC The Advocates Gateway, 2017:5).
- 5.7 As described above, the existing definitions of vulnerability adopted in the context of the justice system capture both inherent and situational characteristics, with emphasis afforded to those factors that inhibit participation in legal processes. The stated aim of the reform programme is to change the nature of many legal processes, moving from physical to online end-to-end systems. As such the definition of “vulnerability” adopted should reflect the factors that are likely to render an individual with a meritorious claim less able

⁸ s59 Safeguarding Vulnerable Groups Act defines a vulnerable adult as follows: (1) A person is a vulnerable adult if he has attained the age of 18 and (a) he is in residential accommodation, (b) he is in sheltered housing, (c) he receives domiciliary care, (d) he receives any form of health care, (e) he is detained in lawful custody, (f) he is by virtue of an order of a court under supervision by a person exercising functions for the purposes of Part 1 of the Criminal Justice and Court Services Act 2000 (c. 43), (g) he receives a welfare service of a prescribed description, (h) he receives any service or participates in any activity provided specifically for persons who fall within subsection (9), (i) payments are made to him (or to another on his behalf) in pursuance of arrangements under section 57 of the Health and Social Care Act 2001 (c. 15), or (j) he requires assistance in the conduct of his own affairs. Some individuals are vulnerable because of what has happened to them eg they are victims of trafficking or have sustained serious harm or torture or are suffering from PTSD.

⁹ AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA CIV 1123

¹⁰ AM (Afghanistan) per para 30

participate in an online justice system. In April 2018, the all-party law reform group Justice published a report which stated that over 11 million adults in the UK lack basic digital skills such as being able to complete online forms and relocate websites (Justice (2018), cited in Adams, Byrom and Prassl, 2018:14). The same report identified the following groups who are most at risk of digital exclusion: older adults, those who are disabled, those who are based in rural areas with low broadband coverage and lack of access to physical services where they can access internet enabled devices, those in care homes, those who are detained, those who are homeless, those on low incomes and young people who are both on low incomes and left school before the age of sixteen (Justice, 2018: 25-46).

6 **MONITORING FAIRNESS**

6.1 The Public Sector Equality Duty, set out under the Equality Act 2010 149(1) states that:

“A public authority must, in the exercise of its functions, have due regard to the need to-

- (a.) eliminate discrimination, harassment, victimization and any other conduct that is prohibited by or under this Act;*
- (b.) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and*
- (c.) foster good relations between persons who share a relevant protected characteristic and persons who do not share it”*

The protected characteristics identified at Equality Act 2010 s4 are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

6.2 In addition to the above, the Equalities Act 2010 requires that public bodies, when making decisions of a strategic nature regarding the exercise of their functions: *“have due regard to: the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage”* Equality Act 2010 1(1).

6.3 As such, the evaluation of the reform programme should address the impact of reform on access to and the fairness of the justice system with particular reference to persons who share protected characteristics under the *Equality Act 2010*.

6.4 Generating robust data on the fairness of court processes in relation to individuals with protected characteristics is also crucial to build support for the Rule of Law. Research in England and Wales indicates that trust in the justice system varies according to demographic group. The Lammy Review into the treatment of and outcomes for Black, Asian and Minority Ethnic individuals in the Criminal Justice System cited findings from the 2015 Crime Survey for England and Wales which stated that: “51% of people from

BAME backgrounds born in England and Wales who were surveyed believe that “the criminal justice system discriminates against particular groups and individuals” and implicated lack of information and transparency regarding decision making processes as part of the problem, stating that: “decisions must be fair, but must also be seen to be fair, if we are to build respect for the Rule of Law” (Lammy, 2017:6). This recommendation underscores the need for new processes to be rigorously evaluated and the findings widely circulated. The Lammy Review also repeatedly called for the collection and publication of better data on the operation of all aspects of the criminal justice system, to identify and address disproportionality on racial grounds and to improve trust in the justice system (Lammy, 2017:7).

- 6.5 Appendix B below summarises the 13 data-points that should be collected in relation to individual users of the justice system in order to identify vulnerability and assess the impact of reform on fairness.

7 DEFINING “ACCESS TO JUSTICE”- AN IRREDUCIBLE MINIMUM CAPABLE OF OPERATING AS AN EMPIRICAL STANDARD

7.1 The concept of “Access to Justice” has been described as being “inherently ambiguous” (KA v London Borough of Croydon [2017] EWHC 1723 (Admin)) and difficult to define. However, workshop attendees highlighted that a review of the existing case law in England and Wales reveals the elements of an irreducible minimum definition of access to justice that is capable of operating as an empirical standard.

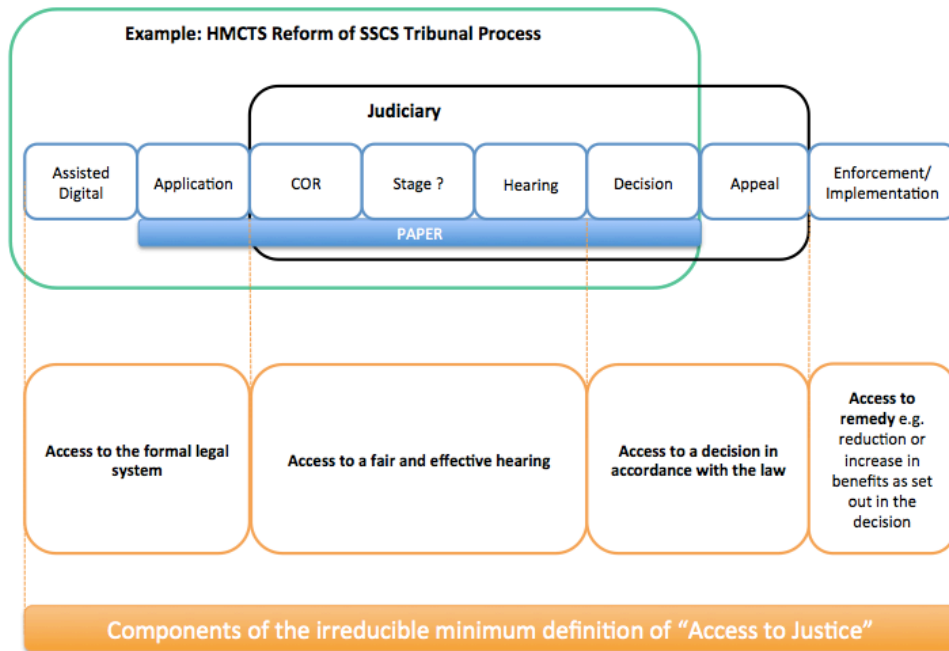
7.2 The components of this irreducible minimum standard are:

- i. Access to the formal legal system;
- ii. Access to an effective hearing
- iii. Access to a decision in accordance with substantive law
- iv. Access to remedy

These components are interrelated, mutually supportive and non-divisible (for example, an observable increase in individuals accessing the formal legal system, of itself, is insufficient to justify assertions that access to justice has improved under reform). Any evaluation of reform must examine the impact of the programme on each of these four components to arrive at a determination regarding the impact of reform on access to justice. Assessments of the impact of reform on access to justice must be based on a holistic evaluation that explores the progression of a full range of cases and individuals through the system from claim to outcome.

7.3 Figure 7.1 below shows how these components map to an example of a project currently underway as part of the reform programme- an end-to-end online process for resolving appeals against decisions made by the Department of Work and Pensions in respect of Personal Injury Payments. Whilst the specifics of this project are yet to be finalised, the diagram illustrates how the components of the irreducible minimum standard might map to an individual project.

Figure 7-1: Illustrative example: Mapping the components of the irreducible minimum definition to an individual project



7.4 Access to remedy has repeatedly been identified as an important component of access to justice- a desire to provide people with a speedy remedy to their justiciable problems has driven the growth in interest in public justice system ODR internationally. Whether or not enforcement is within the scope of the irreducible minimum definition for the purposes of evaluation of individual reform projects depends on the rules governing the particular jurisdiction- the SSCS tribunal, unlike the courts, has no legal powers to enforce its decisions. In the context of the Online Civil Money Claims project, the efficacy of enforcement mechanisms is within scope, and so the extent to which the system developed promotes access to remedy should be included within the evaluation of this project.

7.5 The following discussion details the justification for the four components identified as comprising the irreducible minimum definition of "Access to Justice" and recommends approaches to measuring them. In calculating an aggregate measure of the impact of the reform programme on Access to Justice, the individual components should not be weighted equally. Adams and Prassl (2018) in their forthcoming paper: "Access to Justice, Systemic Unfairness and Futility: A Framework" present a model for calculating the extent to which a system as a whole gives rise to an unacceptable risk of access to justice violations based on the case law on systemic unfairness and orthodox micro-economic theory. One implication of their approach is that the impact of reform on the likelihood that meritorious claims will be vindicated is the key metric under consideration. Further,

this metric should be considered for the ‘full run’ of cases in the tribunal system, including those made by vulnerable individuals who may have difficulties launching and effectively presenting their case.

8 COMPONENT 1: ACCESS TO THE FORMAL LEGAL SYSTEM

- 8.1 Access to the formal legal process for the determination of disputes and vindication of rights has long been held to be a critical component of the common law definition of access to justice. Lord Diplock’s statement in *Bremer v South India Shipping Corporation Ltd (1981) AC 909, 917* is an often-cited articulation of this argument:

“Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access.”

- 8.2 Recent case law has affirmed the principle that access to formal legal processes must be “practical and effective” as opposed to “theoretical and illusory” *R (Gudaniviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor [2014] EWCA Civ 1622; [2015] 1 W.L.R. 2247 [46]* and that the state has a duty not to place obstacles in the way of access to justice *Children’s Rights Alliance for England v Secretary of State for Justice [2013] EWCA Civ 34, [2013] HRLR 17 [38]*.
- 8.3 As Adams and Prassl (2018) have argued, citing *R(Unison) v Lord Chancellor [2017] UKSC 51 [96]* this requires (amongst other things) that: “application processes are not so complex that users of the system cannot effectively use them.”(Adams, Byrom, Prassl, 2018). In determining whether a system poses an inherent risk to access to justice, the case law establishes that the test to be applied is whether: “looking at the full run of cases...that go through the system, the other forms of assistance relied on by the Lord Chancellor are adequate and available” to ensure effective participation (*R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor [2017] EWCA Civ 244 [51]*) and “whether the safeguards relied on are sufficient to render the system fair and just” (*R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber) [27]*). Answering this question requires: “a detailed examination of the support that is available in in practice” (*R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor [2017] EWCA Civ 244 [52]*).
- 8.4 In the case of the reform programme, the practical support and safeguards put in place to ensure that access is not impeded are (i.) the assisted digital programme, which is designed to help those who are ‘digitally excluded’ or lack digital skills to engage with new processes and (ii.) the continued existence of a paper channel. The National Audit Office reported in May 2018 that HMCTS has assumed that: “at least 70% of users will move to online

services within five years” (NAO:2018:14). Experience from other government departments, such as HMRC, indicates that this target may be over-optimistic. Workshop participants raised concerns that if conversion rates were not realised, this might create demand for the paper channel that HMCTS would not be resourced to manage, which could lead to barriers to accessing the formal legal system. As such, any evaluation of the impact of the reform programme on access to justice must examine the operation of both assisted digital and the paper channel, and the experience of individuals who use them.

- 8.5 Recent case law (*R(Unison) v Lord Chancellor [2017] UKSC 51[96]*) has established the principle that changes to the justice system should be assessed according to their likely impact on behaviour in the real world (Bogg, 2018: 513). Justice (2018:42) has highlighted the importance of monitoring the impact of the court reform programme on motivation and confidence to access the justice system. Workshop participants raised concerns that local court closures might impact on individual’s perceptions regarding the accessibility of the justice system, and in doing so impact on claimant behaviour¹¹. Pleasence and Balmer (2018a) have published standardised inventories designed to measure confidence in the civil justice system that could be deployed to assess changes over time (Pleasence and Balmer, 2018a). As such, workshop attendees considered that an element of survey work to explore the impact of reform on attitudes to the justice system could be helpful in generating insights into the impact of the programme on the ability and willingness to initiate claims.
- 8.6 Workshop participants welcomed the proposals from HMCTS to incorporate measures of “cost” and “effort” into the performance framework for the reformed system. Previous research (Adams and Prassl, 2017; Pleasence and Balmer, 2015) has explored the link between the cost of access to the justice system (court fees and perceptions regarding the cost of legal advice and representation respectively) on willingness and ability to initiate claims. Whilst researchers have identified a lack of robust evidence to quantify and identify: “correlates of negative perceptions of different aspects of the civil justice system” (Pleasence and Balmer, 2018b:259) perceptions related to the effort of bringing a claim are likely to impact on attitudes to accessing the justice system. Workshop participants strongly recommended that any evaluation of the reform programme should explore the impact of reform on the effort involved in initiating and resolving a claim on individuals from different backgrounds, with particular emphasis on monitoring the impact on those who are vulnerable. For example, it is possible that digitising processes and moving them online reduces the effort expended by claimant companies, whilst increasing the burdens

placed on vulnerable defendants in civil money claims. Attendees recommended that the approach to measuring “effort” be made available at the earliest possible opportunity.

- 8.7 Workshop attendees also raised the point that digitisation of processes has an *ex ante* ambiguous effect on the ability of individuals to initiate claims. Digitisation may make it easier for certain types of claimant to initiate claims, whilst deterring others. Reducing barriers to accessing legal processes may alter the types of cases that individuals pursue through the justice system. As such, changes in the characteristics of claimants initiating cases and the types of cases being initiated should be monitored.

9 COMPONENT 2: ACCESS TO A FAIR AND EFFECTIVE HEARING:

- 9.1 Workshop participants identified the concept of: “a fair and effective hearing” as a crucial component of any definition of access to justice. The fairness of a hearing can and should be assessed via both subjective and objective measures. The established literature on procedural justice provides validated measures that can be used to assess individual’s subjective assessments of the fairness of new processes- these should replace “user satisfaction” surveys. Objective measures of procedural justice should also be deployed to assess the impact of the reform programme on the fairness and efficacy of hearings, these can include, information on litigant or defendant engagement (with the process and with other sources of advice and help), the impact on communication between legal representatives and clients (in the context of remote or virtual hearings), the impact of new processes on the nature and volume of evidence provided and information on the duration of the process. An effective hearing requires both that individuals are able to present the information necessary to enable a decision maker to make a determination based on applying the law to the facts of the case and that the decision maker is able to comprehend this information. As such, any evaluation of new processes intended to replace the function of physical hearings, such as Continuous Online Resolution or virtual hearings, should look at the impact of changes in mode on judicial attitudes, behaviour and decision-making.
- 9.2 The existing case law on access to justice gives primacy to the notion of an individual being able to put his or her case effectively. In 2015, the Court of Appeal held that the Government’s Detained Fast Track system, which implemented fast track limit rules for appealing Home Office Asylum decisions for those held in Immigration Removal Centres was unlawful, on the basis that the short time limits contained in the Fast Track Rules rendered the system: “structurally unfair and unjust” (*R(Detention Action) v First Tier Tribunal and others* [2015] EWCA Civ 840 para 45). In a paper prepared for the second workshop, Adams and Prassl (2018) stated that:

“It has been recognised that oral hearings might be required “when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted” (R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor [2017] EWCA Civ 244 (41)). When the issues involved in a case are too factually or legally complex for an individual to present their case effectively the courts have recognised a requirement for representation and legal aid (see for example, R(Medical Justice) v Secretary of State for the Home Department [2011] EWCA Civ 1710). Note that an inquisitorial process does not necessarily negate this requirement”

Subjective measures of procedural fairness

- 9.3 The emphasis in the case law on effective participation reflects the criterion identified in the academic literature that are commonly cited as determining perceptions of procedural fairness. Demonstrating procedural fairness has been held to be important for a number of reasons, firstly, because successive studies have indicated that: “people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair” (Tyler, 2000:117). In addition, perceptions of procedural justice have been found to be linked to public trust and confidence in legal authorities and institutions, including courts (Tyler, 2001:216). As such, the provision of procedural justice has been positioned as intimately connected to the maintenance of the Rule of Law (Tyler, 2001).
- 9.4 The literature on procedural justice is extensive, dating back to 1975, however, in summary, it is widely accepted that four factors are critical to the way individuals evaluate procedural fairness: “whether there are opportunities to participate (voice); whether the authorities are neutral; the degree to which people trust the motives of the authorities; and whether people are treated with dignity and respect during the process” (Tyler, 2000:117 see also Tyler, Casper, Fisher, 1989). Validated instruments have been produced to assess these dimensions of procedural justice, and tested in a wide range of settings including experimental and survey work (MacCoun, 2005:171).
- 9.5 In studying ODR systems more generally, academics including Sela (2018) have used experimental settings to explore the impact of different ODR systems on perceptions of procedural justice. In this study Sela captured data on four dimensions of procedural justice, which she defined as: “process control (control over the opportunity to present evidence), decision control (control over the final outcome), interactional justice (the decision maker’s treatment of a person with politeness, dignity and respect) and informational justice (the availability of information and explanations about the process and its justification” (Sela, 2018:106). However, to date, only a limited number of studies

have explored the experiences of disputants in ODR settings, and an even smaller number in public justice system based ODR projects (see Mason & Sherr, 2008; Bollen & Euwema, 2012; and Gramatikov and Klaming, 2012, cited in Sela 2018:122).

- 9.6 To the extent that the concepts of procedural justice have been employed in evaluating Online Courts, these have tended to be expressed as measures of “user satisfaction” or “procedural satisfaction”. The Joint Technology Committee Resource Bulletin on ODR for Courts states that: “Valid measures of procedural satisfaction can include whether individuals felt they were treated respectfully, felt heard, understood the instructions and implications of the process, believed the process was fair and impartial, and whether the technology worked well” (JTC, 2017:18). In developing the Civil Resolution Tribunal model, user surveys were deployed to explore questions such as whether the technology was easy to use, whether it worked well and whether the information provided was accurate (Salter, 2017:124). In England and Wales, the Civil Money Claims Project has also used user surveys to measure the efficacy of the project to date. Reporting on progress in respect of the project, the Chief Executive of Her Majesty’s Courts and Tribunal Service Susan Acland-Hood stated that: “Over 80% of users including claimants and defendants have told us that the service was very good and easy to use” (HMCTS, 2018a:12). To date the questions used to assess user satisfaction have not been made publicly available, making it difficult to assess the extent to which the user satisfaction surveys deployed map to existing validated approaches for measuring procedural justice. Workshop participants strongly recommended that existing validated tools be used to monitor subjective perceptions of procedural fairness as part of any evaluation of new online services (for an example of these validated tools see Sela (2016) at Appendix C below).

Objective measures of procedural fairness

- 9.7 Workshop participants expressed the importance of including objective measures of procedural justice in any evaluation of new processes such as Continuous Online Resolution or virtual hearings, particularly where they are likely to involve vulnerable individuals. Those who have low levels of legal knowledge, are disadvantaged or are involved in disputes of subjective importance are most at risk of exploitation if the sole focus of evaluation is based on subjective indicators of procedural justice. The Center for Court Innovation in the USA has developed a range of tools for evaluating procedural fairness in court settings, including both subjective and objective measures (Gold La Gratta and Jensen, 2015) recognising that those individuals who lack legal knowledge, advice and support are unlikely to be well placed to assess the legality a given process or procedure. Workshop attendees emphasized the importance of building in opportunities

for third parties to read or watch ODR interactions as they took place as part of any evaluation.

- 9.8 Successive research has identified that when individuals: “lack a clear metric for assessing the fairness of a dispute’s outcome (which is common in legal disputes) they use their assessment of the process as a mental shortcut for evaluating the outcome” (Shestowsky, 2016:8 citing Kees van den Bos (2001). Perceptions of a particular procedure as fair can distract individuals from evaluating the justice of the outcome, and lead to individuals accepting as fair outcomes that are not (see Tyler (1997) citing Greenberg (1990) and Tyler and McGraw (1986). Research has indicated that individuals who are disadvantaged are particularly likely to focus on procedural justice indicators as a heuristic for outcome fairness in evaluating court processes (Scheingold:1974 cited in Tyler, 1997:896) and that as such are particularly vulnerable to exploitation. For this reason Wissler, (1995) cautioned against the use of subjective procedural fairness perceptions to evaluate a procedure’s performance, stating that: “...procedures that seem fair may not be fair by more objective standards (e.g., Lind & Tyler 1988; Kressel & Pruitt 1989). For instance, litigants may express satisfaction with a process that gives them the opportunity to tell their story, even if it does not produce just outcomes (O’Barr & Conley 1985)” (Wissler, 1995:352). Later research has concluded that this tendency to rely on perceptions of procedural justice as a proxy for the trustworthiness of the process increases when the case is one in which the stakes are high. In a recent study, Grootelaar and Van Den Bos (2018) concluded that: “...because litigants in high stakes cases are dealing with outcomes which are difficult to interpret, they rely on procedural justice information” (Grootelaar & Van Den Bos 2018:261). It follows that individuals who are disadvantaged due to status characteristics or the subjective importance of their case will be more likely to accept as legitimate processes that they perceive as procedurally just, regardless of whether these processes comply with the law. This strengthens the case for external oversight and scrutiny.
- 9.9 In addition, the nature of ODR projects, which tend to emphasise reductions in procedural complexity, reduced formality (current model include allowing litigants to join hearings remotely from a variety of locations) and offer the potential to develop to incorporate technology that adapts to individual preferences may exacerbate, rather than diminish these issues. The literature on alternative dispute resolution models reveals that: “the apparent informality of alternative processes can replicate existing power disparities” (Reynolds, 2014:250). Sela (2018) has warned that the move to Online Courts creates the potential to tailor processes to meet subjective perceptions of procedural justice regardless of their normative fairness, stating that:

“Principal ODR processes involve an inherent risk for embedded bias and tradeoffs between objective and subjective procedural justice. Powered by big-data and modeling capabilities, principal ODR systems can tailor the process and outcome to what a particular disputant is likely to subjectively perceive as fair, regardless of objective standards. While such deferential treatment has the potential to maximize subjective procedural justice experiences, it may disadvantage less savvy disputants and it is at odds with fundamental values of equal and consistent treatment.” (Sela, 2017:193-194)

Workshop participants with expertise in the design and evaluation of ODR systems emphasised that small changes in the design architecture of systems (e.g. altering the position of different boxes or questions) could radically impact on the behaviour of individuals in unintended ways, and as such, comprehensive evaluation of the processes designed on behaviour should be undertaken.

- 9.10 Workshop attendees recommended that any evaluation of reform projects should explore the impact of new processes on litigant engagement, both with processes and potential external sources of support. Participants recommended the use of management information or platform data to capture proxies for engagement with online or virtual processes, such as the dates and time of party interactions, the duration of time spent by party on each interaction with the ODR platform. Volume and quality of evidence provided could also be used as a proxy for engagement.
- 9.11 Workshop participants strongly recommended that data be captured on rates of representation between online and physical processes. Research conducted by Eagly (2015) into the impact of the introduction of remote hearings in immigration detention settings in the USA demonstrated that remote hearings impacted negatively on the level of litigant engagement in the process- litigants perceived the process as less legitimate and therefore did not take full advantage of the legal safeguards available to them. Research published by the Ministry of Justice in 2010 into a pilot “Virtual Court” process that allowed defendants charged with an offence to appear in the Magistrates Court for their first hearing via a secure video link identified that: “the rate of defence representation was lower in Virtual Courts compared to the expectations of the pilot in the original model and the comparator area” (Terry, 2010:vi). Disparities in patterns in engagement between physical and online processes should be monitored.

Understanding triage

- 9.12 As stated above, the common law in England and Wales recognises that an oral hearing may be required: “when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted” R (*Howard League for Penal Reform and The Prisoner’s Advice Service*) v Lord Chancellor [2017] EWCA Civ 244 (41). Publications relating to reform have emphasised

that online processes, such as the new Online Civil Money Claims service and Continuous Online Resolution in Personal Independence Payment Appeals are primarily intended to target “relatively simple” disputes.

- 9.13 In light of this, we heard from workshop participants who were concerned that HMCTS reflect on lessons from the experience of the Detained Fast Track (DFT) process. The DFT was: “designed to accelerate timescales for claims that were considered suitable for a quick decision” however in practice triage procedures were inadequate and vulnerable people with complex cases were regularly detained (IVAR, 2017:2). This had serious consequences for individuals- wrongly entering the process had a significant impact on a person’s chances of successfully claiming asylum- one study stated that in many years, the Home Office refused 99% of asylum claims that were placed on the Detained Fast Track (Detention Action, 2011:12).
- 9.14 Workshop participants called for the need to better understand the triage process adopted for identifying “relatively simple” cases and argued that evaluation of the reform programme should address the extent to which processes are effective in distributing cases to the most appropriate track or process. Workshop attendees highlighted that moving to online processes should in theory make triaging more transparent, as JJ Prescott, one of the architects of Matterhorn, an Online Case Resolution platform developed in the USA has written:

An important component of a sophisticated OCR system will be an advanced decision rules management interface for courts. In essence, this interface would allow judges, prosecutors, and other decision makers to categorize and sort cases based on key facts about the law, the case, or the litigant. Using this aspect of the system, individual judges and prosecutors will be able to create, map, and view the heuristics they use to make decisions about cases—first, in deciding whether the case or case type can be resolved online, and second, in deciding how to resolve the case online. Actively or passively, implicitly or explicitly, decision makers will identify the necessary and/or sufficient facts for particular outcomes, as well as the weight to be given to particular kinds of evidence, and so on. They will make this determination either ex ante or by how they decide cases in practice. This interface has the potential to improve the OCR system over time. (Bulinski and Prescott, 2016:213)

- 9.15 Whilst triage processes are being designed and tested, workshop participants called for safeguards to be put in place to protect those who are vulnerable, for example, in the case of Continuous Online Resolution for Personal Independence Payment Appeals, workshop attendees strongly argued that decisions arising from the Continuous Online Resolution process should only be binding if they are in favour of the appellant. Workshop attendees

also praised examples from the USA, where Online Dispute Resolution platforms such as Matterhorn have built-in safeguards to protect vulnerable individuals in money claims, for example, making it impossible for litigants to mediate if they have a defence to a claim.

Understanding the impact of mode on decision making

- 9.16 An effective hearing requires both individuals presenting evidence to be able to make their case and the decision maker to be able to hear it. As such, any evaluation of the impact of reform on access to justice must consider the effect of changing the mode of presentation of evidence on judicial perceptions of evidence. In *R (on the application of Kiarie) (Appellant) v Secretary of State for the Home Department (Respondent)* *R (on the application of Byndloss) (Appellant) v Secretary of State for the Home Department (Respondent)* [2017] UKSC 42 [67], Lord Wilson, giving the lead judgment stated:

There is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as satisfactory as live evidence given in person from the witness box. The recent decision of the Upper Tribunal (McCloskey Page 24 P and UTJ Rintoul) in R (Mobibullah) v Secretary of State for the Home Department [2016] UKUT 561 (IAC) concerned a claim for judicial review of the Home Secretary's decision to curtail a student's leave to remain in the UK on the grounds that he had obtained it by deception. The Upper Tribunal quashed the decision but, in a footnote, suggested that the facility for a statutory appeal would have been preferable to the mechanism of judicial review and that it would be preferable for any statutory appeal to be able to be brought from within the UK. It said: "(90) Experience has demonstrated that in such cases detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor. So too is close quarters assessment of how the proceedings are being conducted - for example, unscheduled requests for the production of further documents, the response thereto, the conduct of all present in the courtroom, the taking of further instructions in the heat of battle and related matters. These examples could be multiplied. I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal. It is not clear whether the aforementioned essential judicial exercises could be conducted satisfactorily in an out of country appeal. Furthermore, there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process."

- 9.17 Research published by the Ministry of Justice in 2010 into a pilot "Virtual Court" process (described above at 9.11) found that: "some magistrates and District Judges thought that the court had more difficulty in imposing its authority remotely and perceived that defendants took the process less seriously than they would if they appeared in person"

(Terry, 2010:vi). The veracity of these perceptions is untested, however, if the mode of hearing (rather than any other factor) affects the way in which Judges assess the credibility of defendants, this could have serious consequences for the fairness of the justice system. As such, further research is needed to understand how changes in the mode of hearing impact on decisions reached by judges. .

10 **COMPONENT 3: ACCESS TO A DETERMINATION**

- 10.1 It has been well established that the constitutional function of courts is to apply the substantive law to the facts of the case. This is particularly important in a common law jurisdiction, where in order to develop the substantive law, cases must be determined by the courts. As such, workshop attendees were keen to ensure that any evaluation of the impact of reform programme on access to justice captured the impact of reform on the types of cases that are being decided before the Courts.
- 10.2 The constitutional legitimacy of Courts is inextricably linked to their ability to demonstrate the correct application of the substantive law to the facts of individual cases (Assy, 2017; Twining, 1993:384 citing Bentham). In English law, as in other common law jurisdictions, access to a court for the determination of disputes has been understood to be fundamental to the maintenance of the Rule of Law. There is an established constitutional right of access to the courts, not as an end in itself, but in order that disputes can be determined in accordance with the rights prescribed by the legislature (Bogg, 2018:509). This right can be traced back to the Magna Carta (Ford, 2017) and has found expression in the writings of jurists including Jeremy Bentham, Sir Edmund Coke and Sir William Blackstone. This approach has been confirmed in human rights case law under Article 6 of the European Convention on Human Rights. Assy, writing on proposals to introduce an Online Court in England and Wales in 2017, asserted that: “The basic constitutional function of a court is to enforce the substantive law” (Assy, 2017:71). The veracity of this statement was affirmed by the UK Supreme Court in the decision handed down in the case of *R(on the application of UNISON) [2017] UKSC 51*. Lord Reed, in a powerful judgment that attracted the concurrence of his seven fellow justices, stated that:

“Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by parliament and the common law created by the courts themselves are applied and enforced.” (Lord Reed, per para 68).

If it is accepted that the constitutional function of courts is to give effect the rights prescribed by parliament, it follows that any evaluation of the Reform Programme should

explore the impact of changes on the cases being brought before and determined by the Courts.

- 10.3 As stated above, the business case for the reform programme is expected to be achieved through the creation of: “new online systems for mediation and resolution so that citizens can resolve more disputes outside the courtroom” (NAO:2018:4). This emphasis on ADR and settlement is not a new phenomenon. However, workshop participants expressed concerns that the reform programme as currently constituted represented a wholesale endorsement of the proposition that the function of the justice system in certain areas is to promote resolution rather than vindicate rights. The importance of understanding and evaluating the impact of reform on both the types of cases that reach judicial determination, and the individuals who bring them, in order to understand whether the reform programme replicates existing trends, or creates new ones was therefore emphasised.

11 COMPONENT 4: ACCESS TO REMEDY

- 11.1 As discussed above at 8.5, assessments of the impact of changes to the justice system on access to justice must take account of “behaviour in the real world” (Bogg, 2018: 513). In *R(Unison) v Lord Chancellor [2017] UKSC 51* [96] it was established that access to justice can be violated if changes to the system render it “futile or irrational to bring a claim”. Data on the enforcement of judgements can form part of an individual calculation as to the rationality of initiating a claim. Bogg (2018) writing on the judgment reached in *Unison* states that:

“Even where claimants were seeking to vindicate statutory rights with higher monetary awards, the difficulties in predicting a successful outcome, compounded by the shocking figures on non-enforcement of ET awards, meant that enforcement was likely ‘irrational or futile’ in many of these cases too. This undermined the public good represented by the effective general enforcement of statutory employment rights. (Bogg, 2018)

- 11.2 As such, workshop attendees recommended that data should be captured on enforcement rates, and time from decision to enforcement as part of any evaluation of the impact of the reform programme on access to justice.

12 SUMMARY OF RECOMMENDATIONS FOR EVALUATION

Overarching recommendations: Stakeholder engagement and harnessing external expertise in developing an evaluation approach.

- 12.1 External engagement in the development of a detailed evaluation plan for both the reform programme as a whole and the individual projects that comprise it has, to date, been hampered by the lack of availability of logic models and intended outcomes for individual service projects (such as Civil Money Claims Online service). We have heard from HMCTS (in their November 2018 response to the Public Accounts Committee¹²) that the organisation is: “using insights from external research and academia to validate and challenge our approach”(HMCTS, 2018b:15). However, without specific, authoritative information regarding the nature of service projects, it is difficult for external researchers and academics to fulfill this role, and moreover, to assist in identifying the data and approaches necessary to conduct a robust evaluation. As such **workshop attendees strongly recommended that for each individual service (for example Civil Money Claims Online) HMCTS should publish the underpinning logic models and intended outcomes for individuals at each stage of the process. These logic models should be made available at step two of the seven step project cycle adopted by HMCTS (HMCTS 2018b:18).**
- 12.2 Stakeholders have heard from HMCTS that cross-cutting projects such as court closures (“estates”) and fully video hearings will cut across multiple service projects, however, stakeholders have not seen estimates of the percentage of individuals/cases within each service likely to be impacted by these cross-cutting changes. **Workshop participants recommended that HMCTS set out these estimates at the earliest possible opportunity in order to: (i.) guide the design of the evaluation and (ii.) assist the legal advice and legal services sector in preparing for the impact of reform.**

Vulnerability and Fairness

- 12.3 Workshop participants recommended that the definition of “vulnerability” adopted as part of the overarching evaluation of the reform programme should be based on the factors set out in existing substantive and procedural law (summarised at Appendix B below).
- 12.4 **In order to monitor the impact of reform both on access to justice for those who are vulnerable and on the fairness of the justice system, workshop participants recommended that HMCTS commit to embedding the collection of the thirteen data-points relating to vulnerability into each service at the earliest possible**

¹² See: “HMCTS External Stakeholder Approach” (29 November 2018) available online at: <https://www.gov.uk/government/publications/engaging-with-our-external-stakeholders-our-approach-and-plans>

opportunity in the user journey. This is necessary to monitor patterns in attrition at different stages and the relationship between vulnerability and different types of outcome (e.g. settlement, withdrawal from the system).

- 12.5 Workshop participants stated that it is imperative that the evaluation of the reform programme should address the impact of reform on access to and the fairness of the justice system with particular reference to persons who share protected characteristics under the *Equality Act 2010*.
- 12.6 Workshop participants recommended that HMCTS consider the **benefits and risks of introducing unique identifiers for individual users of the justice system**. Unique identifiers at the user, rather than case level would facilitate the development of a detailed understanding of the way in which court users progress through the system, where and when they exit the system, and the outcomes they secure when they do so. This would support HMCTS to deliver a better service to users of reformed systems. If appropriately anonymised, this data could also be of use to researchers and wider stakeholders (including policy-makers). Experts in privacy law and data ethics should be consulted to advise on the benefits and drawbacks of this approach and ensure that this data is captured, stored and utilised in a manner that respects the Rule of Law.

Defining Access to Justice

- 12.7 Workshop attendees highlighted the existence of an **irreducible minimum standard of access to justice** under English law and argued that this standard should be adopted as the basis for any evaluation of the reform programme. The components of the irreducible minimum standard are as follows:
- i. Access to the formal legal system;
 - ii. Access to an effective hearing
 - iii. Access to a decision in accordance with substantive law
 - iv. Access to remedy
- 12.8 These components are interrelated, mutually supportive and non-divisible (for example, an observable increase in individuals accessing the formal legal system, of itself, is insufficient to justify assertions that access to justice has improved under reform). **Any evaluation of reform must examine the impact of the programme on each of these four components to arrive at a determination regarding the impact of reform on access to justice.**
- 12.9 Assessments of the impact of reform on access to justice must be based on a holistic evaluation that explores the progression of a full range of cases and individuals through

the system from claim initiation to outcome (e.g. settlement, withdrawal, judicial determination etc.).

- 12.10 Workshop attendees recommended approaches that should be taken to measuring each component of the irreducible minimum definition of access to justice- these are summarised below.

Measuring Component 1: Access to the formal legal system

- 12.11 In determining whether a system poses an inherent risk to access to justice, the case law establishes that the test to be applied is whether: “looking at the full run of cases...that go through the system, the other forms of assistance relied on by the Lord Chancellor are adequate and available” to ensure effective participation (*R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor [2017] EWCA Civ 244 [51]*) and “whether the safeguards relied on are sufficient to render the system fair and just” (*R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber) [27]*). Answering this question requires: “a detailed examination of the support that is available in in practice” (*R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor [2017] EWCA Civ 244 [52]*)
- 12.12 In the case of the reform programme, the practical support and safeguards put in place to ensure that access is not impeded are (i.) the assisted digital programme, which is designed to help those who are ‘digitally excluded’ or lack digital skills to engage with new processes and (ii.) the continued existence of a paper channel. The National Audit Office reported in May 2018 that HMCTS has assumed that: “at least 70% of users will move to online services within five years” (NAO, 2018:14). Based on the experience of other government departments, workshop participants felt that these estimates may be overly optimistic and raised concerns that, if these conversion rates were not secured, the paper and assisted digital routes may not be adequately resourced to cope with demand. **Workshop attendees argued that any evaluation of the impact of the reform programme on access to justice must examine both the operation of assisted digital and the paper channel, and the experience of individuals who use them.**
- 12.13 Recent case law (*R(Unison) v Lord Chancellor [2017] UKSC 51[96]*) has established the principle that changes to the justice system should be assessed according to their likely impact on behaviour in the real world (Bogg, 2018: 513). Justice (2018:42) has highlighted the importance of monitoring the impact of the court reform programme on motivation and confidence to access the justice system. **As such, workshop attendees considered that an element of survey work to explore the impact of reform on attitudes to the justice system could be helpful in generating insights into the impact of the**

programme on the ability and willingness to initiate claims. Pleasence and Balmer (2018a) have published standardised inventories designed to measure confidence in the civil justice system that could be deployed to assess changes over time.

- 12.14 Workshop participants welcomed the proposals from HMCTS to incorporate measures of “cost” and “effort” into the performance framework for the reformed system. Previous research (Adams and Prassl, 2017; Pleasence and Balmer, 2015) has explored the link between the cost of access to the justice system (court fees and perceptions regarding the cost of legal advice and representation respectively) on willingness and ability to initiate claims. Workshop participants strongly recommended that any evaluation of the reform programme should explore the impact of reform on the effort involved in initiating and resolving a claim on different types of service user, with particular emphasis on monitoring the impact on those who are vulnerable. For example, in the context of Civil Money Claims, it is possible that digitising processes and moving them online reduces the effort expended by claimant companies, whilst increasing the effort burdens placed on vulnerable defendants. **Attendees recommended that the definition of and approach to measuring “effort” adopted by HMCTS be made available at the earliest possible opportunity.**
- 12.15 Workshop attendees also raised the point that digitisation of processes has an *ex ante* ambiguous effect on the ability of individuals to initiate claims. Digitisation may make it easier for certain types of claimant to initiate claims, whilst deterring others. Reducing barriers to accessing legal processes may alter the types of cases that individuals pursue through the justice system. **In light of this, workshop participants strongly recommended that changes in the characteristics of claimants initiating cases and the types of cases being initiated should be monitored, in order to understand the impact of reform on access to justice.**

Measuring Component 2: Access to a fair and effective hearing

- 12.16 Workshop participants identified the concept of: “a fair and effective hearing” as a crucial component of any definition of access to justice, noting that the existing case law on access to justice gives primacy to the notion of an individual being able to put his or her case effectively. Discussion at the workshops focussed on four issues: (i.) subjective measures of fairness and efficacy, (ii.) objective measures of fairness and efficacy, (iii.) the imperative to monitor the impact and accuracy of triage procedures within new services and (iv.) the need to understand the impact of change of “mode of hearing” on judicial decision making, in order to ensure that physical and online hearings deliver equality of fairness and efficacy.

Subjective measures of fairness and efficacy

12.17 In relation to measuring subjective fairness and efficacy: workshop participants expressed concern that to date, HMCTS has relied on “user satisfaction” surveys as a proxy for measuring the efficacy of new services rather than established measures of procedural fairness. For example, in reporting on progress in respect of the Civil Money Claims Online service, the Chief Executive of Her Majesty’s Courts and Tribunal Service Susan Acland-Hood stated that: “Over 80% of users including claimants and defendants have told us that the service was very good” (HMCTS, 2018:12). To date the questions used to assess user satisfaction have not been made publicly available, making it difficult to assess the extent to which the user satisfaction surveys deployed map to existing validated approaches for measuring procedural justice. **Workshop participants strongly recommended that existing validated tools be used to monitor subjective perceptions of procedural fairness as part of any evaluation of new online services** (for an example of these validated tools see Sela (2016) at Appendix C).

Objective measures of fairness and efficacy

12.18 Further to this, it was strongly recommended that data from validated subjective measures of procedural justice be combined with data from **objective** indicators of procedural justice as part of any evaluation of the impact of reform on the fairness and efficacy of hearings. Workshop participants emphasised the importance of including objective measures of procedural justice in any evaluation of new processes such as Continuous Online Resolution or virtual hearings, particularly where they are likely to involve vulnerable individuals. **Participants noted that those who have low levels of legal knowledge, are disadvantaged or are involved in disputes of subjective importance are most at risk of exploitation if the sole focus of evaluation is based on subjective indicators of procedural justice.** The Center for Court Innovation in the USA has developed a range of tools for evaluating procedural fairness in court settings, including both subjective and objective measures (Gold La Gratta and Jensen, 2015) recognising that those individuals who lack legal knowledge, advice and support are unlikely to be well placed to assess the legality a given process or procedure. **Accordingly, workshop participants emphasized the importance of building in opportunities for third parties to read or watch ODR interactions as they took place as part of any evaluation in order to monitor the efficacy and fairness of new services.**

12.19 The ex-ante ambiguous impact of the move to online processes on user behaviour underscores the need to incorporate measures of objective fairness into any evaluation of reform. Workshop participants with expertise in the design and evaluation of ODR systems emphasised that small changes in the design architecture of systems (e.g. altering

the position of different boxes or questions) could radically impact on the behaviour of individuals in unintended ways. **Given the lack of extant evidence exploring the impact of design architecture on user behaviour in the context of justice system processes, any evaluation of the impact of reform must entail comprehensive and ongoing evaluation of the impact of design architecture on user behaviour.**

- 12.20 In addition, workshop attendees raised concerns that changes in mode might impact on user engagement with legal processes. Workshop attendees recommended that any evaluation of reform projects should explore the impact of new processes on litigant engagement. **Participants recommended the use of management information or platform data to capture proxies for engagement with online or virtual processes, such as the dates and time of party interactions, the duration of time spent by party on each interaction with the ODR platform. It was also suggested that data relating to the volume and quality of evidence provided could be used as an indicator of engagement.**
- 12.21 Workshop participants strongly recommended that data be captured on rates of representation between online and physical processes. Research conducted by Eagly (2015) into the impact of the introduction of remote hearings in immigration detention settings in the USA demonstrated that remote hearings impacted negatively on the level of litigant engagement in the process- litigants perceived the process as less legitimate and therefore did not take full advantage of the legal safeguards available to them. Research published by the Ministry of Justice in 2010 into a pilot “Virtual Court” process that allowed defendants charged with an offence to appear in the Magistrates Court for their first hearing via a secure video link identified that: “the rate of defence representation was lower in Virtual Courts compared to the expectations of the pilot in the original model and the comparator area” (Terry, 2010:vi). The Lammy Review (2017) highlighted the impact of engagement with defence representation on outcomes for individuals. **Participants recommended that discrepancies in patterns in engagement between physical and online processes should be monitored in order to ensure that parity of fairness is maintained.**

Understanding triage

- 12.22 Workshop participants stated that the common law in England and Wales recognises that an oral hearing may be required: “when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted” R (*Howard League for Penal Reform and The Prisoner’s Advice Service*) v *Lord Chancellor* [2017] EWCA Civ 244 (41). Publications relating to reform have emphasised that online processes, such as the new Online Civil Money Claims service and

Continuous Online Resolution in Personal Independence Payment Appeals are primarily intended to target “relatively simple” disputes.

12.23 Given these objectives, workshop participants were concerned that HMCTS reflect on lessons from the experience of the Detained Fast Track (DFT) process. The DFT was: “designed to accelerate timescales for claims that were considered suitable for a quick decision” however in practice triage procedures were inadequate and vulnerable people with complex cases were regularly detained (IVAR, 2017:2). This had serious consequences for individuals- wrongly entering the process had a significant impact on a person’s chances of successfully claiming asylum- one study stated that in many years, the Home Office refused 99% of asylum claims that were placed on the Detained Fast Track (Detention Action, 2011:12).

12.24 **Given this context, workshop participants called for increased transparency around the triage process adopted for identifying “relatively simple” cases and publication of the evidence base for deriving the triage process. Participants strongly recommended that evaluation of the reform programme should address the extent to which processes are effective in distributing cases to the most appropriate track or process.**

12.25 Whilst triage processes are being designed and tested, workshop participants called for safeguards to be put in place to protect those who are vulnerable, for example, in the case of Continuous Online Resolution for Personal Independence Payment Appeals, workshop attendees strongly argued that decisions arising from the Continuous Online Resolution process should only be binding if they are in favour of the appellant. Workshop attendees also praised examples from the USA, where Online Dispute Resolution platforms such as Matterhorn have built-in safeguards to protect vulnerable individuals in money claims, for example, making it impossible for litigants to mediate if they have a defence to a claim.

Understanding the impact of mode of hearing on decision making

12.26 An effective hearing requires both that individuals are able to present the information necessary to enable a decision maker to make a determination based on applying the law to the facts of the case and that the decision maker is able to comprehend this information.

12.27 **Workshop participants therefore recommended that any evaluation of new processes intended to replace the function of physical hearings, such as Continuous Online Resolution or virtual hearings, should look at the impact of changes in mode on judicial attitudes, behaviour and decision-making in order to**

ensure that changing the mode of hearing does not impact on the way in which evidence is heard and understood.

Measuring Component 3: Access to a determination

12.28 Workshop participants affirmed that the constitutional function of courts is to apply the substantive law to the facts of the case. This is particularly important in a common law jurisdiction, where in order to develop the substantive law, cases must be determined by the courts.

12.29 Workshop participants noted that the business case for the reform programme is expected to be achieved through the creation of: “new online systems for mediation and resolution so that citizens can resolve more disputes outside the courtroom” (NAO:2018:4). This emphasis on ADR and settlement is not a new phenomenon. **However, participants expressed concerns that the reform programme as currently constituted represented a wholesale endorsement of the proposition that the function of the justice system in certain areas is to promote resolution rather than vindicate rights. Accordingly, workshop participants strongly recommended that any evaluation of the impact of reform programme on access to justice must capture the impact of reform on the types of cases that are being decided before the Courts and the individuals who bring them in order to understand whether the impact of the reform programme is to replicate existing trends or create new ones.**

Measuring Component 4: Access to remedy

12.30 Workshop participants emphasised that assessments of the impact of changes to the justice system on access to justice must take account of “behaviour in the real world” (Bogg, 2018: 513). In *R(Unison) v Lord Chancellor [2017] UKSC 51* [96] it was established that access to justice can be violated if changes to the system render it “futile or irrational to bring a claim”. Data on the enforcement of judgements can form part of an individual calculation as to the rationality of initiating a claim. **In light of this, workshop participants recommended that data should be captured on enforcement rates, and time from decision to enforcement as part of any evaluation of the impact of the reform programme on access to justice.**

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APPENDIX A: LIST OF WORKSHOP ATTENDEES

Name			Organisation
Prof.	Abi	Adams	New College, University of Oxford
Ms.	Julie	Bishop	Law Centres Network
Lord Justice	Peter	Coulson	Deputy Head of Civil Justice, England and Wales
Dr.	Naomi	Creutzfeld	University of Westminster
Ms.	Renee	Danser	Access to Justice Lab, Harvard Law School
Prof.	Noam	Ebner	Creighton University Graduate School
Prof.	Cristie	Ford	University of British Columbia
Prof. Dame	Hazel	Genn	UCL Centre for Access to Justice, UCL Faculty of Laws
Mr.	Richard	Goodman	HMCTS
Ms.	Swee Leng	Harris	The Legal Education Foundation and Bingham Centre for the Rule of Law
Prof.	Andrew	Higgins	Mansfield College, University of Oxford
Ms.	Rhiannon	Hollis	Justice Select Committee
Mr.	Murray	Hunt	Bingham Centre for the Rule of Law
Prof.	Peter	John	Kings College London
Ms.	Charlotte	Kilroy	Doughty Street Chambers
Ms.	Sidonie	Kingsmill	HMCTS
Ms.	Sara	Lomri	Public Law Project
Prof.	Helen	Margetts	The Alan Turing Institute and The Oxford Internet Institute
Mr.	Richard	Miller	The Law Society
Dr	Michael	Molavi	The Bonavero Institute of Human Rights, Oxford
Prof.	Helen	Mountfield	Matrix Chambers and Mansfield College Oxford
Prof.	Kate	O'Regan	The Bonavero Institute of Human Rights, University of Oxford
Mr.	James	Palmer	HMCTS
Ms.	Rose	Pennells	HMCTS
Ms.	Alison	Pickup	Public Law Project
Mr.	Timothy	Pitt-Payne QC	11 Kings Bench Walk
Prof.	Jeremias	Prassl	Magdalene College, Oxford
Mr.	Michael	Reed	Free Representation Unit
Prof.	Judith	Resnik	Arthur Liman Professor of Law, Yale Law School
Ms.	Erika	Rickard	The Pew Charitable Trusts
Ms.	Rachel	Robinson	Equality and Human Rights Commission
Mr.	Richard	Rogers	The Civil Resolution Tribunal, British Columbia
Dr.	Meredith	Rossner	The London School of Economics
Sir	Ernest	Ryder	Senior President of Tribunals
Dr.	Ayelet	Sela	Bar-Ilan University, Israel
Mr.	David	Slayton	Joint Technology Committee, National Centre for State Courts
Ms.	Lauren	Small	Ministry of Justice
Mr.	Giles	Stephenson	Ministry of Justice
Dr	Joe	Tomlinson	Kings College London and The Public Law Project
Ms.	Haile	Warner	Ministry of Justice
Prof.	Patricia	White	University of Miami School of Law
Prof.	John	Zelevnikow	Victoria University Business School

14 APPENDIX B – VULNERABILITY AND FAIRNESS DATAPOINTS

Individual attributes to be captured		Vulnerability	Digital Exclusion	Equality Act 2010
1	Age			
2	Disability ¹³			
3	Employment status/Income			
4	English as a foreign language			
5	Gender reassignment			
6	Highest level of education (proxy for literacy)			
7	Postcode (Permanent address, to identify whether in a care home, homeless, in an area of low internet coverage etc.)			
8	Pregnancy and maternity			
9	Race			
10	Religion or belief			
11	Sex			
12	Sexual orientation			
13	Fear or distress connected with the case e.g. domestic violence/abuse, in detention, survivor of trafficking/trauma.			

¹³ This should include detailed information on the nature of the disability, as different conditions are likely to impact on vulnerability in different ways.

APPENDIX C: SUBJECTIVE MEASURES OF PROCEDURAL FAIRNESS¹⁴

Concept	Dimension	Indicator
Procedural Justice	Process Fairness	Agree/Disagree: Process was fair
		To what degree: Process was neutral
		To what degree: Process was fair
	Voice/Participation	Agree/Disagree: Able to express views
		Agree/Disagree: Allowed to present one's side of story
	Process Control	Agree/Disagree: My views were considered in the process
		To what degree: I had control over the process
	Decision Control	Agree/Disagree: My needs were considered in the outcome
		To what degree: Information I provided was considered in the outcome: None—A lot
	Bias Suppression	Agree/Disagree: Treatment was influenced by my race, sex, age, nationality or other characteristics
Accuracy	Information collected was: Accurate— Inaccurate	
Interactional Justice	Judicial Officer Attentiveness	JO was: Attentive—Not attentive
		Agree/Disagree: JO was attentive to my views
	Judicial Officer Respectfulness	JO was: Respectful—Disrespectful
		Agree/Disagree: JO treated me with respect
	Judicial Officer Trustworthiness	Agree/Disagree: JO was trustworthy
		JO was: Untrustworthy—Trustworthy
Informational Justice	Explanation of Process	JO explained process: Not at all—Fully
	Neutral Clarity	JO was: Clear- Confusing

¹⁴ Sela, A. (2016) "Streamlining Justice: How Online Courts Can Resolve The Challenges of Pro Se Litigation" *Cornell Journal of Law and Public Policy* Vol. 26:331 pp 367

