

Response of the Equality and Human Rights Commission to the consultation: Fit for the future: transforming the court and tribunal estate

Title:	Fit for the future: transforming the court and tribunal estate
Source of consultation:	HM Courts & Tribunals Service
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About the Equality and Human Rights Commission

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited at UN level as an ‘A status’ National Human Rights Institution, in recognition of its independence, powers and performance.

Summary

2. The Commission welcomes the opportunity to respond to this consultation on the strategy for the courts and tribunals estate, including the approach to court closures, improvements to court buildings, and the modernisation of some court administration. We note the consultation also indicates other changes to the courts as part of the modernisation programme, including virtual hearings, online pleading, and online courts, on which we have also provided analysis in our response.
3. The courts modernisation programme and the specific changes proposed in the consultation exist against a backdrop of recent reforms to the justice system, particularly cuts to legal aid, that challenge access to justice. It is important to consider changes to the justice system in the round to ensure the fundamental right of access to justice is not compromised. The courts have established that access to justice must be a practical reality; as such, as the recent Supreme Court judgment in *Unison v the Lord Chancellor* emphasised, in the assessment of a policy’s impact on access to justice, it is important to focus on its impact on behaviour in the real world rather than in theory.¹ The Commission’s strategic plan for the 2018/19 financial year includes priorities to improve access to justice for individuals who have experienced discrimination or breaches of their human rights, and to improve protection of the rights of people with mental health conditions and/or learning disabilities in the criminal justice system.

¹ *R (Unison) v Lord Chancellor* [2017], UKSC 51.

4. We recognise that modernising the courts may provide a number of opportunities to improve access to justice, for example by improving accessibility for disabled court users. Our key concerns about the proposals, in relation to both the closure of existing courts and the introduction of digital justice alternatives, are:
 - the lack of comprehensive evidence and impact assessment to underpin decision-making and ensure the courts modernisation programme does not disproportionately disadvantage people with protected characteristics, in particular disability, age, pregnancy and maternity, and sex;
 - the closure of courts on the basis of increased use in the future of digital processes, which will necessarily exclude people with certain protected characteristics who have lower levels of digital literacy, before the impact of digital processes has been thoroughly assessed; and
 - the potentially detrimental implications of virtual processes (including virtual hearings and online court processes) on access to justice and fair trial rights.
5. In light of our concerns, and the requirement for HM Courts & Tribunals Service (HMCTS) to comply with the public sector equality duty, we recommend that HMCTS:
 - does not proceed with any court closures until it has collected the evidence about court users necessary to conduct a meaningful equality impact assessment, and has conducted that assessment;
 - conducts a thorough assessment of the digital literacy of court users in order to determine the nature and content of the support required to ensure access to justice in the context of increased digitisation; and
 - establishes a clear evidence base setting out the impacts of virtual processes (including virtual hearings and online court processes) and the equality and human rights issues that need to be addressed before any new measures are introduced or existing pilots are extended.
6. We recognise the work undertaken by the Ministry of Justice and HMCTS to prepare the consultation and equality impact assessment, and we would like to emphasise our willingness to meet to discuss our concerns and recommendations with officials in further detail.

The relevant legal framework

7. Article 6 of the European Convention on Human Rights (ECHR) sets out the right to a fair trial in both civil and criminal proceedings. Read with Article 6, Article 14 of the ECHR guarantees freedom from discrimination in relation to the right to a fair trial. Most rights in the ECHR, including the right to a fair trial, have been given domestic effect by the Human Rights Act 1998 (HRA). Section 6(1) of the HRA provides that public authorities must not act incompatibly with the incorporated rights.
8. Article 6(1) ECHR sets out the right of effective access to civil and criminal courts and tribunals. The European Court of Human Rights has established that litigants should have a 'clear, practical and effective opportunity' to go to court.²
9. Articles 6(2) and (3) ECHR guarantee specific minimum rights for those charged with criminal offences. These include the rights to be informed in a language which they understand, and in detail, of the nature and cause of the accusations against them; and to have adequate time and facilities for the preparation of a defence and to examine witnesses against them.
10. As well as complying with the UK's obligations under the ECHR, the proposals should also reflect other international human rights obligations. Of particular relevance is the UN Convention on the Rights of People with Disabilities (UNCRPD) and the Convention on the Elimination of all forms of Discrimination against Women (UNCEDAW). Also relevant are the Convention on the Elimination of all forms of Racial Discrimination (UNCERD) and the International Covenant on Civil and Political Rights (ICCPR), which includes the protection of fair trial rights.
11. Article 4 of UNCRPD requires State Parties to promote the full realisation of disabled people's rights, including by adopting all appropriate legislative, administrative and other measures. Under Article 13, State Parties must ensure effective access to justice for persons with disabilities on an equal basis with others, to facilitate their effective role as participants in all legal proceedings. Under Article 9, State Parties must take appropriate measures to ensure access for disabled people,

² *De Geouffre de la Pradelle v France* [1992]

on an equal basis to others, to the physical environment, transport, and information and communications.

12. Article 2 of UNCEDAW requires State Parties to take all appropriate measures to eliminate discrimination against women. Article 15 provides that women and men must have equality before the law and benefit from equal protection of the law. The CEDAW Committee has identified accessibility as one of the six essential components necessary to ensure access to justice. It has explained that accessibility requires that all justice systems be secure, affordable and physically accessible to women, and be adapted and appropriate to the needs of women, including those who face intersecting or compounded forms of discrimination.³
13. Article 5 of UNCERD requires State Parties to guarantee the right of everyone to equality before the law, without distinction on the basis of race, colour, or ethnic origin, including the right to equal treatment before a court or tribunal. The ICCPR provides that everyone shall be equal before the courts and tribunals, and in criminal cases, be entitled to a fair and public hearing by a competent, independent and impartial tribunal.
14. It is unlawful under the Equality Act 2010 for both the Ministry of Justice (MOJ) and its executive agency HM Courts and Tribunals Service (HMCTS) to discriminate in providing services or exercising public functions on the basis of the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, or sexual orientation. Discrimination can take a number of forms, including direct and indirect discrimination, discrimination arising from disability, and a failure to make reasonable adjustments. The duty to make reasonable adjustments is anticipatory, which means that organisations must think in advance and on an ongoing basis about the requirements of disabled people and the adjustments that may have to be made for them.
15. In exercising their functions, the MOJ and HMCTS are also required under the public sector equality duty (PSED) to have due regard to the need to: eliminate unlawful discrimination, advance equality of opportunity (including having regard to the need to remove or minimise

³ UN Committee on the Elimination of all forms of Discrimination Against Women (2015), [General Recommendations](#), see recommendation 33 on women's access to justice.

disadvantages) and foster good relations.⁴ This requires assessing the impact of any new service or change to existing services on users who share protected characteristics, and taking this into account when developing proposals and after they have been implemented, through monitoring and evaluation. The Commission publishes technical guidance on the PSED, which provides practical approaches to complying with the duty.⁵

16. The Commission responds to the Government's proposed changes with this legal framework in mind.

Travel to court (Q1 & Q3)

17. The consultation proposes to assess future court closures against a benchmark that nearly all users should be able to attend a court or tribunal on time and return within a day, by public transport if necessary. The separate consultations for the eight proposed court closures include analysis of the impact on travel, based on information about the general population in the absence of data about court users and their characteristics. The consultation identifies that disabled people and women with the protected characteristic of pregnancy and maternity are more likely to be adversely affected by court closures, because of the difficulties they would face in having to travel further distances to attend hearings.
18. We encourage HMCTS to assess whether there are other groups who may be put at a disadvantage as a result of court closures. These may include older people and those with caring responsibilities. Carers are more likely to be women, and there is a relationship between caring, age and disability: a fifth of people aged 50-64 are carers, and almost two-thirds of older carers (aged 60-94) themselves have long-term health problems or a disability.⁶ People living in rural areas may also be disproportionately affected because they are less likely to have access to public transport. According to the National Travel Survey, fewer than half (49%) of people living in the most rural areas had access to a

⁴ *Equality Act 2010*, s.149.

⁵ EHRC (2014), [Technical guidance on the Public Sector Equality Duty: England](#).

⁶ Carers Trust, [Key facts about carers and the people they care for](#). The Carers Trust estimates that 58% of carers are women, across the UK.

regular bus service.⁷ We are also particularly concerned that the impact of the closure of Youth Courts on children and young people is not specifically referenced in the consultation document and does not appear to have been considered.

19. Changes to the courts and tribunals estate should take account of the need to provide facilities and services that ensure equal access to justice, so that everyone can participate fully in the justice system without discrimination. We are concerned that the assessment of the impact of the proposed closures is not sufficient to establish that certain protected groups will not be disadvantaged, and we recommend that no court closures take place until the relevant evidence is available and a comprehensive impact assessment is carried out.
20. We do not believe that HMCTS can effectively assess the impact of the proposed closures on those with protected characteristics based on information about the general population that is unlikely to be reflective of the court user cohort. For example, disabled people are more likely to be victims of crime and may therefore be disproportionately represented among court users.⁸ We encourage HMCTS to take steps to establish the extent to which protected groups may be overrepresented among court and tribunal users in its consideration of any court closures, before proceeding with the proposals set out in the current consultation and any future aspects of the courts modernisation programme. We note that the results of a feasibility study published by the MOJ in 2015 suggested a court user survey may be possible for civil court claimants.⁹ We would welcome further steps by HMCTS to identify how a regular court user survey could be developed and implemented.
21. There is also insufficient evidence to understand how the changes may impact differently on those with some protected characteristics compared to the rest of the population. For example, the impacts may be both more likely to affect disabled people and likely to affect disabled people more significantly. As such, consideration should be given to whether the same journeys for disabled people are not only longer but

⁷ See Rural England (2017), [The state of rural services 2016 report](#). Note that the figure relates to 2012 data.

⁸ According to the 2018 Crime Survey of England and Wales (January 2018), 14.8% of disabled people reported having been a victim of crime compared to 13.7% of non-disabled people. See [Crime in England & Wales, year ending March 2017: Annual trend and demographic tables](#).

⁹ Ministry of Justice (2015), [Civil Court User Survey 2014 to 2015: Findings from a postal survey of individual claimants and profiling of business claimants](#).

also more complex, and potentially impossible if facilities are not accessible. The Commission's 2017 report on 'Being disabled in Britain' highlighted the often very limited access disabled people have to transport.¹⁰ The UN Committee on the Rights of Persons with Disabilities has expressed concern about whether there are sufficient obligatory standards included in domestic legislation to ensure equal access to transport for disabled people, in line with Article 9 of UNCRPD.¹¹ In addition, the knock-on impacts for some groups may extend beyond travel duration, for example women who are mothers may need to arrange and pay for additional childcare as a result of needing to travel a longer distance to attend a court or tribunal. The evidence to assess these impacts might include engagement with court user groups, and data about transport use and requirements disaggregated by protected characteristic.

22. To ensure that travel times are reasonable and do not inhibit access to justice we recommend that HMCTS commit to a clear maximum limit for travel time, which reflects the 'real world' travel time for disabled users, taking account of the potential difficulties we refer to above. We are concerned that the proposed benchmark that most users should be able to travel to court within a day and by public transport is too broad to ensure fairness: it is not explicit what proportion of users is implied by 'most', or what length or complexity of journey would be considered reasonable. For example, the data provided in the consultation shows that with the current estate, without further closures, 21% per cent of people could not travel to a tribunal within two hours by public transport.¹² The consultation on the closure of Northallerton Magistrates' Court indicates that residents of Richmond, Yorkshire would be expected to make a roundtrip by public transport of between 4 hours 40 minutes and over 7 hours, depending on which court they were attending.¹³ That length of journey is very likely to be prohibitive for some users, and to cause additional stress in attending court, which is already an inherently stressful experience.
23. The consultation states that disproportionate impacts would be mitigated by later start times in court and reasonable adjustments. Further detail

¹⁰ EHRC (2017), [Being disabled in Britain: a journey less equal](#).

¹¹ UNCRPD (2017), [Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland](#).

¹² MOJ and HMCTS (2018), [Fit for the future: transforming the court and tribunal estate](#), p23.

¹³ MOJ and HMCTS (2018), [Northallerton Magistrates' Court: proposal on its future](#), p13.

about these measures and how they will be implemented is required before any court closures take place, in order to establish whether they are sufficient to ensure protected groups are not unlawfully disadvantaged.

24. The proposed court closures are underpinned by an assumption that digital access will largely replace the need for most people to attend court in person in future, mitigating (in theory) the concerns about travel to court. While we recognise the benefits this may bring, we are cautious about any planned closures that depend on increased use of digital justice without clear proposals for these changes. We are particularly concerned about the need for an assessment of the impact of these proposals on people with certain protected characteristics and on access to justice more generally, which are not the subject of this or the 2016 consultation, ‘Transforming our justice system’.¹⁴ We set out our concerns on this point in full at paragraphs 47-54.

Supplementary court and tribunal provision (Q2)

25. The consultation proposes, as a principle of the estates strategy, to make supplementary court and tribunal provision available in other locations, such as community centres and town halls.
26. In principle, we support the use of supplementary court and tribunal provision and recognise its potential to increase access to justice, including for some disabled people and others for whom longer travel may be difficult or prohibitive. We also recognise the benefits of more locally-delivered justice. The Lammy Review has recommended that the criminal justice system should be more rooted in local communities, including through holding hearings in local neighbourhoods and using non-traditional buildings such as libraries or community centres.¹⁵
27. We note the concerns raised by the Chair of the Justice Committee among others, about the security risks associated with the use of alternative court and tribunal provision.¹⁶ This does, however, provide a timely opportunity to consider, through a human rights lens, existing assumptions about court layout, including the requirement for a secure

¹⁴ MOJ and HMCTS (2016), [Transforming our justice system: consultation](#).

¹⁵ The Lammy Review (2017), [Lammy Review: final report](#).

¹⁶ [Letter from Bob Neill, MP](#), Chair of the Justice Committee, to Lucy Frazer, QC MP, Ministry of Justice, dated 27 February, on Ministry of Justice consultation: Fit for the future.

dock. We discuss this point in relation to the proposed design principles at paragraph 33 of our response.

28. Decisions about which sites are appropriate to use as courts must consider accessibility for disabled users as a priority, particularly if the use of these sites is intended to reduce the time disabled people would otherwise have to travel to attend court. Accessibility should be considered broadly, including provision such as hearing loops as well as access to premises. As described above, HMCTS should ensure it has sufficient data about court users and their needs to identify whether protected groups may be overrepresented, and establish that their specific requirements can be met – noting that the duty to provide reasonable adjustments is anticipatory and should not be made on a case-by-case basis. HMCTS should also make other relevant considerations in the use of supplementary court provision in terms of access to justice, such as whether separate entrances are available for claimants and defendants in the case of vulnerable witnesses, and whether the facilities provide for defendants to have private conversations with their lawyers.

Court and tribunal capacity and design (Q4 & 5)

29. The consultation proposes to make decisions about rationalising the courts estate using a principle that hearing room requirements can be accommodated and capacity is sufficient to meet the expected workload. The consultation also proposes a series of principles for the design of court buildings: that facilities are appropriate, effective, accessible, flexible, and sustainable to resource and maintain. Related to this, the consultation discusses implementing technology to support digital justice alternatives, such as virtual hearings.
30. We welcome the proposal to establish a clear set of design principles to ensure court and tribunal buildings are fit-for-purpose. The adoption of universal design principles could further support HMCTS to ensure court buildings are fully accessible to all. The principle of accessibility should explicitly include access for disabled users to court and tribunal buildings, and to all spaces within them including hearing rooms and waiting rooms. Accessibility should also encompass ensuring that hearing rooms can readily accommodate any reasonable adjustments that are needed to remove barriers to full participation in hearings. Decisions about court and hearing room capacity should take accessibility into account.

31. The use of reasonable adjustments is necessary to ensure access to justice and full participation for all parties to and participants in proceedings. This includes reasonable adjustments for physical impairments and for mental health conditions and learning difficulties. The UN Committee on the Rights of Persons with Disabilities has recommended that to give effect to the obligations of article 13 of UNCRPD the Government should design and implement a decision-making framework focusing on respecting the will and preferences of persons with disabilities in court proceedings, particularly those with intellectual and/or psychosocial disabilities.¹⁷
32. We encourage HMCTS to explore other opportunities through improved design and more modern court management systems to promote access to justice for disabled people. This could include ensuring that the listing process is designed so that information about reasonable adjustments is available to those responsible for ensuring adjustments are in place at every stage of the proceedings.
33. As we noted at paragraph 27, the modernisation of the courts may allow for the reconsideration of some features of court buildings and procedures in terms of their accessibility and the extent to which they promote access to justice. For example, in light of evidence of the potentially prejudicial effects on the enjoyment of fair trial rights and the presumption of innocence, JUSTICE has suggested that docks should not be used for the vast majority of defendants in criminal proceedings.¹⁸

Court systems and assisted digital (Q6)

34. The consultation proposes changes to courts staff and systems, specifically: improvements in front of house staffing, on-site digital support staff, telephone and web chat services to support case progression, and 'assisted digital' provision for those who need support to access digital services. The consultation also proposes to introduce digital tools for the scheduling and listing of cases.
35. The rate of digital exclusion may be higher among court users, if there is overrepresentation of certain characteristics that indicate digital exclusion. For example, according to the National Institute for Health

¹⁷ UNCRPD (October 2017), [Concluding observations](#).

¹⁸ Justice (2015), [In the dock: reassessing the use of the dock in criminal trials](#).

and Care Excellence (NICE), 39% of people detained in police custody have some form of mental health condition and/or learning difficulty, compared to around 20% in the general population.¹⁹ Comprehensive data on the characteristics of those in both the criminal and civil justice systems is needed to make an assessment of the rate of digital exclusion among court users, and the range of support that would be needed.

36. According to the 2017 Basic Digital Skills report, 21% of the adult population in the UK are classified as not having basic digital skills, which include the ability to use a search engine to look for information, find a previously visited website, send messages over email, solve a problem with a digital service using online help, and complete online forms.²⁰ Lower digital skill was more prevalent among older people: only 49% of people aged 65 and over had basic digital skills, and this group were less likely to have a computer or laptop at home. There is also a correlation between disability and digital exclusion: in 2017, the Office of National Statistics found 22% of disabled adults had never used the internet.²¹
37. Lower digital skill and lower access to PCs and laptops at home is more prevalent among socio-economically disadvantaged groups. In 2017, 88% of ABC1s had basic digital skills compared to 69% of C2DEs. Digital skills were also lower among those who were unemployed compared to those in employment.²² Further, there are discrepancies between men and women, with 75% of women having digital skills compared to 84% of men. There are also regional differences in digital access, with people living in Wales registering the lowest levels of basic digital skills (62%).
38. We appreciate the steps that HMCTS has taken, as referred to in the consultation document, to identify and address the potentially discriminatory impacts of digitising court services through the provision

¹⁹ National Institute for Health and Care Excellence (2017), [Mental health of adults in contact with the criminal justice system](#). NICE have recommended that research is undertaken on the prevalence of mental health problems for those in the contact with the criminal justice system.

²⁰ Lloyds Bank and the Tech Partnership (2017), [Basic digital skills UK report 2017](#). The figure of 21% refers to the proportion of the population that does not have all five of the assessed digital skills, which are managing information, communicating, transacting, problem solving and creating (which includes completing online forms).

²¹ Office for National Statistics (2017), [Internet users in the UK: 2017](#).

²² Lloyds Bank and the Tech Partnership (2017), Basic digital skills report.

of ‘assisted digital’ services. We also welcome the commitment to research and test assisted digital provision with a range of user groups and to use the findings to inform service design.

39. At this stage, however, we remain unclear as to whether the proposed measures for digital inclusion will adequately overcome barriers for all those who might otherwise be excluded from accessing justice. The effectiveness of these measures will depend on how individual needs are identified and met. Further reasonable adjustments may need to be developed to facilitate effective participation by some digital justice users. We would welcome further detail about how assisted digital provision will secure equal access to justice, and the results of HMCTS’ initial work in the area, including evaluation of the partnership with the Good Things Foundation to provide face-to-face digital assistance.
40. In response to the previous consultation in 2017, ‘Transforming our justice system’,²³ the Commission emphasised that the focus of the courts modernisation programme must be on ensuring equal access to justice, rather than on only ensuring equal digital access.²⁴ A starting assumption that the courts must be accessed digitally - even where there is recognition of the need to make digital courts more accessible – will not necessarily ensure equal access to justice for all. It is crucial that alternatives to digital access, including paper processes and in-person hearings, remain available where digital processes are not appropriate and would not ensure access to justice. These alternatives should ensure access to justice on an equal basis with other users.

Impact assessment and future changes (Q7, 8 & 9)

41. The consultation sets out the intention to use an evaluation matrix to make decisions about court and tribunal closures, which would be published with future consultations. We would welcome the opportunity to comment on the proposed factors that will be included. In our consideration, access to justice is a fundamental principle, and cannot simply be one factor that is weighed against others. The consultation also states that instead of a single large consultation in future, the MOJ and HMCTS will consult on specific sites or groups of sites individually, as part of a rolling programme.

²³ MOJ and HMCTS (2017), [Transforming our justice system: consultation](#).

²⁴ EHRC (2017), [Response to the Ministry of Justice consultation on Transforming our justice system](#).

42. As we have explained above, court closures - and the plans for a digitised court system as an alternative - have potentially indirectly discriminatory effects. We therefore agree that the approach to rationalising the estate should be ‘incremental’, with ongoing monitoring of whether the changes are inhibiting access to justice and/or having a disproportionate impact on those with protected characteristics. We welcome the commitment to publish the findings of an independent review of the evidence base for court closures, including whether it takes account of the right information and uses the right tools to assess impacts. We would welcome clarity about how the findings of the independent review will inform decisions about the closures that are proposed at this stage. As we have stated above, we do not believe any closures should take place before there is a robust assessment based on the characteristics of the court user cohort and, on the basis of that data, effective strategies in place to prevent disproportionate impacts.
43. Adequate and accurate equality evidence, properly analysed, is at the root of effective compliance with the general duty under the PSED. We do not believe that the impact assessment for the consultation adequately analyses the potential impacts of the courts modernisation proposals on protected groups. There is no equality impact assessment for the overarching consultation, and the assessments for each of the proposed court closures is limited to the impact on travel time, which is not based on data about court users. It is difficult, on this basis, to see how HMCTS can conclude that the potential impact is proportionate, and that the “closure of the proposed court will impact a small number of users and the savings and efficiency achieved as a result...will contribute to a better service overall for users.” The number of affected users is not in itself an indication of the scale of the impacts or the extent to which some users are affected: even if the number of people affected by a particular decision may be small, the seriousness or extent of discrimination might be great. The weight given to the aims of the duty is not necessarily less when the number of people affected is small.²⁵
44. We recognise the consultation includes some steps such as later start times for hearings and reasonable adjustments to mitigate likely disproportionate impacts. Again, without a detailed analysis of the impacts and sufficiently detailed proposals for mitigation, it is difficult to

²⁵ See EHRC (2014), Technical guidance on the Public Sector Equality Duty, para 5.45.

assess whether these measures will be sufficient to meet a range of individual needs in relation to access to justice.

45. To address the issues we have highlighted, we recommend that HMCTS carry out a thorough equality impact assessment, and that this is completed before decisions are taken about any court closures. The Commission's technical guidance on the PSED²⁶ provides examples of how bodies subject to the PSED should consider what evidence is needed:

- A body subject to the PSED should consider whether it has sufficient evidence to give proper consideration to the potential impact on people with protected characteristics, including whether it has sufficient understanding of the particular disadvantages and different needs of people who share particular protected characteristics.
- It is not acceptable for a body to say that it does not have the evidence to meet the general duty under the PSED: it will need to decide where there are gaps in its evidence base and how to address them. This could include collecting new sources of data, engaging with people with certain protected characteristics, or using external sources of information. Hard statistical data is not required in every instance.

46. We are concerned that a programme of local consultations may not allow for full public consultation on the wider modernisation programme, and that the cumulative effect of rationalising the estate, for example on disabled people's access to courts, will not be tested. We note that the consultation states that in reviewing the current courts estate, HMCTS "do[es] not assume future benefits of modernisation", but there is a clear underlying assumption that reliance on physical courts will be reduced through modernisation. Detailed proposals for these changes are not the subject of this or the previous consultation, although some initiatives are already in place or in development, such as the online court for lower value money claims and virtual hearings for some remand cases.

²⁶ EHRC (2014), Technical guidance on the Public Sector Equality Duty.

Increased use of virtual and online court services

47. The increased use of virtual justice underpins the strategy for the courts and tribunals estate, and the consultation states as its starting point that only what has to be done at a physical venue will be done there in the future. We note references to a number of measures to modernise the justice system, including virtual hearings as well as online pleading and online courts.
48. We are not opposed to these measures in principle, and we recognise the potential for digitisation to improve access to justice. Our key concern is the lack of robust and comprehensive evidence on which these proposals may be developed and implemented. We also set out below specific considerations and important principles in relation to ensuring access to justice.

Virtual hearings

49. There is some evidence to suggest that digitisation can have negative impacts in the criminal justice system. A study by Transform Justice on video hearings showed that they reduced defendants' understanding of the process and excluded family and supporters for both defendants and witnesses. It highlighted in particular the damaging impact on the relationship between lawyers and defendants, many of whom find it challenging to understand the basics of the criminal justice process.²⁷ Prior to this, a 2010 evaluation of the virtual courts pilots commissioned by the MOJ identified that the rates of guilty pleas and custodial sentences were higher for defendants appearing over video, and rates of representation were lower. We note the report recommended further exploration of the impact on judicial processes and outcomes, but we are not aware of any further evaluations.²⁸ The impact of virtual hearings may be particularly detrimental for people with mental health conditions and/or learning disabilities, or for those whose first language is not English.

²⁷ Transform Justice (2017), [Defendants on video – conveyor belt justice or a revolution in access?](#)

²⁸ Ministry of Justice (2010), [Virtual courts pilot: outcome evaluation report](#).

Online court services

50. In addition to our concerns about the use of video or virtual hearings, we also emphasise that the suitability of any type of case for online processes and particularly the introduction of online plea processes must be considered carefully. The fair and effective administration of justice is essential in all cases, and in criminal cases, even for straightforward or ‘routine’ offences, the consequences of conviction for an individual can be serious - for example in terms of their current and future employment. It is imperative that those who are unable to engage digitally or who require assistance or reasonable adjustments are not disadvantaged by using other routes, for example, by reduced penalties being offered only for defendants who plead guilty online.
51. It must be considered whether online court processes ensure the fundamental right to a fair trial, in relation to a defendant’s ability to understand the proceedings, including the consequences of pleading guilty, and effectively present their case. As with virtual hearings, the risks associated with online court services (and particularly online pleas), are particularly pronounced for people with mental health conditions and/or learning difficulties, or whose first language is not English.
52. Related to this, the proposed increase in reliance on online court services raises concern about both the potential for people to engage in legal processes without seeking legal advice, and for the potential reduced role of the judiciary. Judges play an important role in identifying and addressing any avoidable imbalance in the situation of the prosecutors and the defendant, such as learning disabilities and/or mental health issues on the part of the defendant. Judges also have a role to determine any mitigating circumstances that should be taken into consideration at sentencing.
53. Online processes have implications in addition for open justice and for public confidence in the system. Open justice has been described as a fundamental principle of the common law,²⁹ and it is a general principle of our constitutional law that justice is administered by the courts in public, so that it is open to public scrutiny.³⁰

²⁹ Times Newspapers Ltd, Re [2016] EWCA Crim 887

³⁰ BBC, Re [2014] UKSC 25

54. In light of the above, we recommend that HMCTS establish a clear evidence base setting out the impacts of virtual justice and the issues that need to be addressed, before new measures are introduced or existing pilots are extended. We would also welcome clarity about plans to evaluate these pilots and to publish their findings.