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# The Digitalisation of Tribunals: What we know and what we need to know

Robert Thomas and Joe Tomlinson



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# Executive summary

## What is the purpose of this report?

Tribunals are a major part of the administrative justice system. The Government has begun to introduce digital procedures in tribunals but the full details of the changes remain to be seen. This report—commissioned by the UK Administrative Justice Institute—outlines ‘what we know and what we need to know’ about the digitalisation of tribunals. It takes the first steps towards establishing a research agenda for online tribunals and identifies a range of key research issues and questions.

## Overview of this report

This report covers four distinct areas:

- What is the context for the introduction of online tribunals?;
- What do we know about what online tribunal procedures will look like?;
- What are the key issues and questions going forward?; and
- How do developments in the UK fit within wider international developments?

In relation to the first question, this report outlines four important contexts for the advent of online tribunals: reforms to administrative justice and changes to tribunals; advances in e-government; developments in online dispute resolution; and the development of the *Transforming Our Justice System* proposals. In relation to the second question, this report sketches out the types of online procedure that are either being introduced or that are likely to be introduced. The third part of the report provides a survey of the kind of issues which are likely to arise, both during the reform process and more generally. This section also highlights some key research questions. As regards the fourth question, this report provides a brief overview of developments internationally.

The report concludes that, going forward, it is crucial that research on online tribunals is pursued. To this end, it is suggested that it is important to develop a multidisciplinary research agenda which sets out, in detail, what sort of work would be useful in supporting and assessing the design and implementation of online tribunals. Finally, it suggests there is space for international dialogue on important common issues in this area.

## **Who produced this report?**

The report is co-authored by Professor Robert Thomas (Professor of Public Law, University of Manchester) and Dr Joe Tomlinson (Lecturer in Public Law, University of Sheffield, and Research Director, Public Law Project). It is based on developing research concerning online tribunals. The first part of the report is drawn partly from a previous piece of work: J Tomlinson, *A Primer on the Digitisation of Administrative Tribunals* (2017). Sarah McCloskey (University of Sheffield) provided helpful research assistance on parts of the report.

This report has been produced with funding from and the support of the UK Administrative Justice Institute, itself funded by the Nuffield Foundation. Professor Maurice Sunkin QC (Hon) and Margaret Doyle from the UK Administrative Justice Institute provided helpful comments on draft versions of the report. The report is the result of collaboration with the Public Law Project, which is developing research and practical initiatives around online tribunals as part of its Research 2020 strategy. Sara Lomri and Matt Ahluwalia from PLP provided particularly helpful comments, from which this report has benefitted greatly.

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# Introduction

There is a global movement toward digital justice.<sup>1</sup> In the UK, the Ministry of Justice (MoJ) and HM Courts and Tribunals Service (HMCTS) are implementing a wide-ranging court reform and digitalisation programme across the justice system.<sup>2</sup> The digitalisation of administrative tribunals is a key part of that agenda.<sup>3</sup> In global terms, the reforms being carried out by HMCTS are pioneering and are on an unprecedented scale. While there is clear ambition on display, much of the detail of how the new system will work are still being worked out.<sup>4</sup>

The digitalisation work on tribunals will be initially developed and piloted in the Social Security Tribunal, as well as the tax tribunal, and work has already begun in that respect.<sup>5</sup> The aim here is to resolve social security appeals through a variety of methods—including ‘continuous on-line hearings.’ A key idea is that greater use of digital technology will bring the judge and the parties together at a much earlier stage to resolve cases in the most appropriate way, whether via a hearing or through an online exchange and decision.<sup>6</sup> The overall aim is to devise a flexible system which initially retains the confidence of all parties and the judiciary, then moves on to becoming the accepted standard for resolving disputes, while at the same time being significantly more efficient in terms of time and resources. From October 2017, immigration tribunals are pilot-testing virtual hearings for case management purposes and for electronic evidence exchange.<sup>7</sup>

This report—commissioned by the UK Administrative Justice Institute—outlines ‘what we know and what we need to know’ about the digitalisation of tribunals. It seeks to identify broad areas where research may be important in the coming years and lays the groundwork for devising more detailed research proposals.

This report covers four distinct questions:

- what is the context for the introduction of online tribunals?
- what do we know about what online tribunal procedures will look like?
- what are the key issues going forward?
- how do developments in the UK fit within wider international developments?

In relation to the first question, this report outlines four important contexts for the advent of online tribunals: reforms to administrative justice and changes to tribunals; advances in e-government; developments in online dispute resolution; and the development of the *Transforming Our Justice System* proposals. In relation to the second question, this report sketches out the types of online

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<sup>1</sup> E. Katsh and O. Rabinovich-Einy, *Digital Justice* (Oxford, 2017); B. Barton and S. Bibas, *Rebooting Justice* (Encounter Books, 2017).

<sup>2</sup> This reform agenda is discussed below. See generally: J. Rozenberg, *The Online Court: Will IT Work?* (2017).

<sup>3</sup> Ministry of Justice, *Transforming Our Justice System* (2016), p.15. Our focus here excludes party-to-party tribunals, such as the Employment Tribunal—the focus is solely on claims concerning administrative decisions.

<sup>4</sup> M. Adler and J. Gulland, ‘Online Dispute Resolution and Administrative Justice’ (UK *Administrative Justice Institute Researching Users’ Perspectives Conference*, 2017).

<sup>5</sup> Ministry of Justice, *Transforming Our Justice System* (2016), p.15.

<sup>6</sup> J. Aitken, President of the First-tier Tribunal (Social Entitlement Chamber) in *Senior President of Tribunals’ Annual Report* (2017), p.38.

<sup>7</sup> *Ibid.*, p.15; F. Rutherford, ‘How remote working will give users and courts greater flexibility’ (*Inside HMCTS*, 10 August 2017).

procedure that have, thus far, been discussed as part of the reforms. The third part of the report provides a survey of the kind of issues which are likely to arise, both during the reform process and more generally. As regards the fourth question, this report provides a brief overview of international developments in other jurisdictions.

## **Why is research on online tribunals important?**

In a recent speech, the Senior President of Tribunals explained that, during a period of quick and enormous change, reform of the justice system is required to enable the judiciary to secure the effective administration of justice. However, the Senior President noted that, unlike previous reforms, future reforms can no longer be predicated on the views of a single judge formed on the basis of anecdote or impression: ‘reform must be based on proper research; robust and tested.’<sup>8</sup> The Senior President concluded: ‘if we are to secure open justice, all questions must be capable of being asked and examined. But examined properly. The judiciary must therefore support, promote, and commission research. Just as the unexamined life is one not worth living; the unexamined and unresearched reform may not be worth taking.’<sup>9</sup>

Accordingly, research will be a fundamental component of the wide-ranging reform programme. It will be essential to undertake empirical research to investigate how reforms to tribunals work in practice, whether there are intended or unintended effects, and also to consider the range of design techniques and options appropriate in any particular context. Research will be able to promote better understanding, better learning, better design, and continuous improvement. It can analyse and validate the implementation of reforms by providing robust and timely insight into how they are operating and what, if any, changes are needed to enhance the system. Research can also provide clear feedback which can be used by policymakers.

It is important to note that the recently established Administrative Justice Council will have an important role in identifying and supporting research into the administrative justice system, and particularly online tribunals. The UK Administrative Justice Institute’s recent Research Roadmap also highlighted the importance of research in this area.<sup>10</sup>

## **Research funding and access**

In this report, we suggest several possible avenues for research. Almost all of the suggested research areas will involve collecting and analysing new empirical data concerning the operation of digital procedures and the views and experiences of people concerned. Such research will require funding. Traditionally, there are two principal funders of research in this area: the Economic and Social Research Council and the Nuffield Foundation. Both of these bodies have previously funded research into tribunals and administrative justice. At the same time, it is important that government takes some responsibility in this respect. The MoJ, as a principal beneficiary of research, should itself consider funding further external research into online tribunals. The MoJ also has the key role of

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<sup>8</sup> Sir Ernest Ryder, Senior President of Tribunals, ‘Securing Open Justice’ (1 February 2018).

<sup>9</sup> Ibid.

<sup>10</sup> UK Administrative Justice Institute, *Research Roadmap* (2018).

granting or restricting access for research. To undertake empirical research into tribunals, it is frequently necessary to have access in order to collect data. It is important that the MoJ remains open to research, while protecting individuals. It is also essential that researchers work together with members of the judiciary.

# What is the context for the advent of online tribunals?

The digitalisation of tribunals can be understood as occurring within four related though discrete contexts:

- reforms to administrative justice and changes to tribunals;
- advances in e-government;
- developments in online dispute resolution (ODR); and
- the development of the *Transforming Our Justice System* proposals.

In this part of the report, we introduce each of these contexts to show the backdrop against which the current reforms to tribunals are occurring.

## Reforms to administrative justice and changes to tribunals

Administrative justice concerns both the making of administrative decisions and the systems for challenging such decisions. The administrative justice system is complex and fragmented and comprised of various specific systems that divide along ‘vertical’ policy/functions lines, such as: immigration, social security, tax, criminal injuries compensation, and many more. There are also ‘horizontal’ cross-cutting different redress mechanisms, including: complaint and ombuds procedures; internal administrative review processes; tribunal appeals; and judicial review.

The administrative justice landscape is constantly changing. There have been multiple major reforms since 2010: the restriction of legal aid;<sup>11</sup> the withdrawal of some tribunal appeal rights;<sup>12</sup> attempts to restrict judicial review; and expansion of internal review systems (either as a replacement for tribunals<sup>13</sup> or as an additional pre-appeal stage).<sup>14</sup> The effects of these changes can be understood by reference to the models of administrative justice, as developed by Mashaw and Adler (see table 1).<sup>15</sup> Before the financial crash of 2008, the system-wide movement seemed to be towards emphasising the legal model. This was seen in, *e.g.*, the increasing judicialisation of tribunals and the Human Rights Act 1998.<sup>16</sup> Since 2010, it could be said that the pendulum has swung away back towards the bureaucratic rationality model.<sup>17</sup> This is evident in, *e.g.*, the withdrawal of appeal rights and expansion of internal review. The models of administrative justice rely on ideal types.<sup>18</sup> The

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<sup>11</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>12</sup> Immigration Act 2014.

<sup>13</sup> Immigration Act 2014.

<sup>14</sup> Welfare Reform Act 2012, s 102; The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations SI 2013/381.

<sup>15</sup> J. Mashaw, *Bureaucratic Justice* (Yale University Press, 1983); M. Adler, ‘A Socio-legal Approach to Administrative Justice’ (2003) 25(4) *Law & Policy* 323.

<sup>16</sup> G. Drewry, ‘The Judicialisation of ‘Administrative’ Tribunals in the UK: From Hewart to Leggatt’ (2009) 28 *Transylvanian Review of Administrative Sciences* 45.

<sup>17</sup> R. Thomas and J. Tomlinson, ‘Mapping current issues in administrative justice: austerity and the ‘more bureaucratic rationality’ approach’ (2017) 39(3) *Journal of Social Welfare and Family Law* 380, p.396-397.

<sup>18</sup> M. Weber, ‘Objectivity in Social Science and Social Policy’ in E.A. Shils and H.A. Finch (ed. and trans.), *The Methodology of the Social Sciences* (Free Press, 1904/1949), p. 90. J. Mashaw, *Bureaucratic Justice* (Yale University Press, 1983).

promise of the bureaucratic rationality model is accurate and efficient policy implementation.<sup>19</sup> The reality is often some distance from the ideal: much of the available evidence concerning the practical operation of newly-established bureaucratic-rationality-based systems (such as the DWP's mandatory reconsideration system) reveals, among other problems, concerns about accuracy.<sup>20</sup>

**Table 1: Models of administrative justice**

Model	Mode of Decision Making	Legitimizing Goal	Mode of Accountability	Mode of Redress
<b>Bureaucratic Rationality</b>	Applying rules	Accuracy	Hierarchical	Administrative review
<b>Professional</b>	Applying knowledge	Public service	Interpersonal	Second opinion or complaint to a professional body
<b>Legal</b>	Asserting rights	Legality	Independent	Appeal to a court or tribunal (public law)
<b>Managerial</b>	Managerial autonomy	Improved performance	Performance indicators and audit	None, except adverse publicity or complaints that result in sanctions
<b>Consumerist</b>	Consumer participation	Consumer satisfaction	Consumer charters	"Voice" and/or compensation through consumer charters
<b>Market</b>	Matching supply and demand	Economic efficiency	Competition	Citizen "exit" and/or court action

Within the administrative justice context, there is also the particular context of tribunals that must be considered. Tribunals have changed significantly over the course of their history.<sup>21</sup> For a long time, however, tribunals have offered a relatively cheap, quick, and accessible alternative to the courts as a venue for challenging administrative decisions. Tribunals have also provided a more effective route of challenge than the courts, offering a full reconsideration of the administrative decision instead of a bare legality review. The tribunals caseload far outsizes that of the ordinary courts.

<sup>19</sup> Ibid.

<sup>20</sup> Social Security Advisory Committee, *Decision Making and Mandatory Reconsideration* (2016); Independent Chief Inspector of Borders and Immigration, *An Inspection of the Administrative Review Processes Introduced Following the Immigration Act 2014* (2016); R. Thomas and J. Tomlinson, 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) *Journal of Social Welfare and Family Law* 380, p.396–397.

<sup>21</sup> C. Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge University Press, 2006); R.E. Wraith and P.G. Hutchesson, *Administrative Tribunals* (Allen & Unwin, 1974); M. Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 *Modern Law Review* 958; N. Wikeley, 'Future Directions for Tribunals: a United Kingdom Perspective' in R. Creyke (ed.), *Tribunals in the Common Law World* (Federation Press, 2008); R. Thomas, 'Current Developments in UK Tribunals: Challenges for Administrative Justice' in S. Nason (ed.), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, 2017).

While tribunals are one of the ‘core institutions of administrative justice and will remain so... they are also changing.’<sup>22</sup> Various developments have affected tribunals in recent years (including legal aid restrictions, the abolition of the Administrative Justice and Tribunals Council, the marginalisation of tribunals following the introduction of internal review mechanisms, and the erosion and abolition of appeal rights), and the effect of these changes, taken together, is that ‘a new model of tribunals is gradually coming into being.’<sup>23</sup> Table 2 outlines the main features of the ‘old’ and ‘new’ models. These models provide a good overview of the changing tribunals landscape—a landscape that digitalisation forms just one aspect of.

**Table 2: Old and new models of tribunals**

Old model tribunals	New model tribunals
Dispute resolution	Dispute avoidance and containment – as well as dispute resolution
Initial decisions appealed directly to tribunals	Internal review increasingly inserted either before or instead of going to a tribunal
„Paper-based systems for assembling a case- file	Greater use of ICT and online systems for processing appeals
Oral and paper appeals	Oral, paper, and online appeals
„Some legal aid available	Legal aid extremely limited
High caseloads for social security and immigration tribunals	Reduced caseloads
The higher courts oversee ‘inferior’ tribunals	The higher courts recognise the expertise of the Upper Tribunal, a superior court of record
„Tribunals subject to judicial review by the Administrative Court	Some categories of judicial reviews transferred to the Upper Tribunal
Little or no effort by government to learn from tribunal decisions	Right first time: departments taking responsibility to analyse tribunal feedback

## Advances in e-government

A second context in which the digitalisation of tribunals must be understood is advances in e-government and the rise of digital government units (GDUs). The public sector is often perceived as a disaster zone for IT projects, with much talk of over-expensive, under-used services.<sup>24</sup> This was a problem in many jurisdictions, even if there were some less disastrous government efforts (for instance, Canada was an early pack-leader in e-government).<sup>25</sup> As for the UK, it has been described

<sup>22</sup> R. Thomas, ‘Current Developments in UK Tribunals: Challenges for Administrative Justice’ in S. Nason (ed.), *Administrative Justice in Wales and Comparative Perspectives* (University of Wales Press, 2017).

<sup>23</sup> Ibid.

<sup>24</sup> P. Dunleavy, H. Margetts, S. Bastow, and J. Tinkler, *Digital Era Governance: IT Corporations, the State, and e-Government* (OUP, 2008).

<sup>25</sup> J. Roy, *E-government in Canada: transformation for the digital age* (University of Ottawa Press, 2006).

in such terms as ‘ground zero for IT management failures’<sup>26</sup> and ‘a world leader in ineffective IT schemes for government.’<sup>27</sup> Problems took a variety of forms, including spiralling costs, delays, and straightforward system failures. The reasons for these problems were multi-layered and complex.<sup>28</sup>

Failure is not, however, the present tone of UK government IT operations. In the context of widespread condemnation of IT projects, growing expense (£16 million annually as of 2009), and a global financial crisis, and various reports,<sup>29</sup> the response was to create the Government Digital Service (GDS). Introduced in 2011 as ‘Alphagov’, GDS started work on rebuilding Directgov. GDS then developed into a unit of the Cabinet Office, with a mandate across the whole of government concerning: digital strategy; services; hiring; and procurement. It was headed by a group of digital experts taken both with and without civil service experience. Within a very short period of time, GDS was widely seen as the global leader. It topped the United Nations’ e-government rankings.<sup>30</sup> It also co-founded the ‘D5’—a group of the five most digitally advanced governments in the world. GDS is seen as the first of a new breed of e-government organisation which have now spread across the world: GDUs.<sup>31</sup> The key changes in style are set out in Table 3.<sup>32</sup> The digitalisation of tribunals—and the wider reform process—presents a new, major challenge for this new style of digital government.

**Table 3: Changing approaches to IT and government**

Traditional Approaches to Government IT	Current Digital Government Orthodoxy
Waterfall design, the long release cycle	Agile, iterative design
Government-centric (focused on adhering to internal government standards, processes and needs)	User-centric (focused on identifying user needs, and tailoring government standards and processes around these needs)
Limited reliance on data in decision making and design	Heavy reliance on data-driven decision making and design
Managing legacy contracts with a small number of big IT providers	Building in house and procuring with a competitive, pluralistic marketplace
Favours proprietary solutions	Favours open source solutions
Siloed (‘one use’, department/initiative specific project development and IT management)	Horizontal, platform models (‘multiple use’, whole of government project development and IT management)

<sup>26</sup> A. Clarke, ‘Digital Government Units: Origins, Orthodoxy and Critical Considerations for Public Management Theory and Practice’ (2017).

<sup>27</sup> P. Dunleavy, H. Margetts, S. Bastow, and J. Tinkler, *Digital Era Governance: IT Corporations, the State, and e-Government* (OUP, 2008), p 70

<sup>28</sup> A. Clarke, ‘Digital Government Units: Origins, Orthodoxy and Critical Considerations for Public Management Theory and Practice’ (2017).

<sup>29</sup> House of Commons Public Administration Select Committee, *Government and IT – ‘a recipe for ripoffs’: Time For A New Approach* (2010-12 HC 715-I). M. Lane-Fox, *Directgov 2010 and Beyond: Revolution not Evolution* (2010).

<sup>30</sup> Department of Economic and Social Affairs, *UN E-Government Survey 2016* (2016).

<sup>31</sup> Similar set-ups have emerged in the US, Canada, and Australia.

<sup>32</sup> This table is taken from A. Clarke, above n 28.

Risk-averse, process-first, hierarchical organizational culture	.Hacker, delivery-first, 'flatter' organizational culture
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## Developments in online dispute resolution

The third key context is the wider development of ODR. Expanding from a niche corner of legal scholarship,<sup>33</sup> ODR is now a mainstream topic in law.<sup>34</sup> Broadly speaking, ODR has often been seen as attractive because of its promise of lower costs and increased convenience. Companies and governments are now developing ODR systems rapidly. ODR has recently been described as 'one of the principal forces redefining the traditional practice of law.'<sup>35</sup>

Early ODR systems were made for small-stakes, high-volume, standardised, commercial transactions. Good examples are *Smartsettle* and *Cybersettle*. These are 'blind-bidding' systems. In these systems, parties submit offers for settlement to the system and do not reveal the offers to each other. The computer then attempts to split the difference, within stipulated parameters. More sophisticated ODR models developed quickly. *Square Trade* is a good example of the next generation of ODR. It offered a system for resolving delivery, warranty, billing, and misrepresentation disputes between low-level actors in online, commercial transactions. It worked by a user filing a claim by choosing from menus, filling in a few text boxes, and ranking outcomes from a range of choices. The software would exchange documents and see if an automatic solution was possible. If it was not possible, an online mediator would be activated, emailing both sides to seek compromise.

*eBay* launched a more advanced system, to resolve disputes on its site. It relied on a mediator model. A dispute was started by a user clicking a link and filling out a complaint form. The mediator would then take over the process, emailing both sides to request participation in the mediation process. If users agreed, they would be able to give their account of the dispute via email. The mediator would then: identify the issues in dispute; create a synopsis of the problem; set out what needed to be determined; seek views on the issues; and ask parties to agree a resolution. If no agreement was reached, the process would be stopped.

*Modria*, taking a lead from the *eBay* system, tried to go one step further. They sought a system that could resolve a range of more high-value, complicated disputes, as well as more simple claims. This system worked on a 'fairness engine.' This 'engine' was constituted of processes that: gathered information; identified the key issues in dispute; made suggestions for settlement; and directed parties to mediation or arbitration. Some other recent attempts are much more sophisticated.

In the public sector context, online methods have been used for some time by the Traffic Penalty Tribunal.<sup>36</sup> With that system, all the parties can consider the evidence put online and comment upon

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<sup>33</sup> Early work includes E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Wiley & Sons, 2001); R.C. Bordone, 'Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal' (1998) 3 *Harvard Negotiation Law Review* 175.

<sup>34</sup> e.g. R. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (3<sup>rd</sup> edn, OUP, 2017).

<sup>35</sup> R. Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab?' (2017) 18 *Cardozo Journal of Conflict Resolution* 717.

<sup>36</sup> C. Sheppard and J. Raine, 'Parking Adjudications: The Impact of New Technology' in M. Harris and M. Partington (eds.) *Administrative Justice in the 21st Century* (Hart, 1999); R. Thomas and J. Tomlinson,

it. The online messaging system enables adjudicators to adopt an online inquisitorial approach. Some cases can be resolved very quickly—within days or even hours or minutes. There is also a facility to assist people who are not able to access the online process.

## The development of the *Transforming Our Justice System* proposals

The fourth important context for the digitalisation of tribunals is the wider programme of court reform and modernisation as announced in *Transforming Our Justice System*.<sup>37</sup> This is a huge reform programme. The ambition is that by 2022 most civil disputes in England and Wales will be resolved through an online court. This is pioneering on a global level. There are three main elements to the general reform agenda: digitalisation and the use of IT for all procedures and hearings; simplification of processes and procedures; and modernisation of court estate.<sup>38</sup> The Senior President of Tribunals, Sir Ernest Ryder, stated the aim 'is, quite simply, to strengthen the rule of law.'<sup>39</sup> It has also been claimed that the reforms will enhance access to justice and allow disputes to be resolved effectively, speedily and, justly.<sup>40</sup>

The HMCTS reform programme started in March 2014 when Chris Grayling, then Lord Chancellor, announced a one-off investment of up to £75m per annum over five years from 2015. The figure grew until, in November 2015, there was to be a £700 million investment. The figure then became, a short while later, £738m over five years.<sup>41</sup> HMCTS and the Treasury agreed, in late 2016, a seven-year project from 2016 with a £1bn+ budget. These plans were approved by each of Chris Grayling's successors (Michael Gove, Elizabeth Truss, David Lidington, and David Gauke).<sup>42</sup>

Austerity is the both backdrop to and part of the motivation for the reforms. As Sir Ernest Ryder explained in March 2016, austerity 'provides the spur to rethink our approach from first principles... [to] look at our systems, our procedures, our courts and tribunals, and ask whether they are the best they can be, and if not how they can be improved.'<sup>43</sup>

In September 2016, the MoJ published *Transforming our Justice System*. A consultation paper sought views on, among other things, 'assisted digital'—how to help those who may not have access to or capability with online systems.<sup>44</sup> In its response, the Government promised support will be provided:

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'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) *Journal of Social Welfare and Family Law* 380, p.394.

<sup>37</sup> Ministry of Justice, *Transforming Our Justice System* (2016), p.15.

<sup>38</sup> *The Lord Chief Justice's Report 2016* (2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/11/lcj-report-2016-final-web.pdf>>.

<sup>39</sup> Sir E. Ryder, *Speech to the Bar Conference* (2016).

<sup>40</sup> e.g. Sir E. Ryder and Lord Thomas, 'Memorandum: Prisons and Courts Bill 2017' (2017) <<https://publications.parliament.uk/pa/cm201617/cmpublic/PrisonsCourts/memo/PCB19.pdf>>.

<sup>41</sup> See *The Lord Chief Justice's Report 2015* (2016) <[https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj\\_report\\_2015-final.pdf](https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf)>.

<sup>42</sup> The swift change was due to upheaval caused by the Brexit referendum, a change on Prime Minister, and a general election.

<sup>43</sup> Sir E. Ryder, 'The Modernisation of Access to Justice in Times of Austerity' (2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf>>.

<sup>44</sup> Ministry of Justice, *Transforming our justice system: summary of reforms and consultation* (2016) <[https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting\\_documents/consultationpaper.pdf](https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf)>.

‘we will ensure that our assisted digital support takes into account the needs of those who are elderly or have disabilities, those with poor literacy or English skills, and those who lack access to technology because of cost or geography.’<sup>45</sup>

The direction for the reforms is being set by the MoJ and the judiciary working together. This is, largely, only possible because of the changes enacted by the Constitutional Reform Act 2005.<sup>46</sup> Senior judges now have powerful leadership roles.<sup>47</sup> Judges also exert influence via the HMCTS board.

On an operational level, HMCTS officials manage the reforms. HMCTS was created in 2011, and is an executive agency of the MoJ. It operates on the basis of a partnership between the Lord Chancellor and the Lord Chief Justice. In 2016, HMCTS had approximately 17,000 staff (though cuts are expected). The staff includes designers, IT experts, and user-experience researchers. The design process is an ‘agile’ one, in the style of the new e-government orthodoxy outlined above. Different parts of the reforms are designed and prototyped separately. The reforms are being delivered through a wide variety of projects. Joshua Rozenberg has helpfully attempted to collate and summarise these project, which is represented in Table 4.<sup>48</sup>

**Table 4: Overview of the HMCTS ‘transformation’ programme**

Feature of reform	Outline
<b>The online court</b>	A new, more investigative, court designed to be used by non-lawyers.
<b>The CJS (criminal justice system) Common Platform programme</b>	In partnership with the Crown Prosecution Service, HMCTS is working to develop a unified case management system based on a digital case-file. It will replace the existing HMCTS and CPS case management systems with a single system providing access to all the information needed to deal with individual cases. The Common Platform programme preceded HMCTS reform and was initially funded separately. It’s the fourth attempt since the early 1990s to improve the flow of information between police, prosecutors and the courts.
<b>The Crown Court Digital Case System (DCS)</b>	This allows all professionals involved in a criminal case to share documents online and read whatever material they are entitled to see. Judges can use it annotate evidence and write judgments — although they are not allowed to view areas that are restricted to prosecution or defence teams. The system is now available in all Crown Courts and can be accessed from any location on any device. By June 2016, six million pages of evidence had been stored on the DCS. When it is fully implemented, there will be no paper files (although special provision may be needed for unrepresented parties and jurors).

<sup>45</sup> Ministry of Justice, *Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals : Government response* (2017) <<https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/results/transforming-our-justice-system-government-response.pdf>>.

<sup>46</sup> See generally, G. Gee, R. Hazell, K. Malleon, and P. O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge, 2015).

<sup>47</sup> Lord Thomas, ‘The Paradox Judicial Independence’ (2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf>>, where it is stated that the ‘judiciary – and particularly those with leadership roles – are required themselves to undertake the types of reform effort that had previously been initiated by the Executive’.

<sup>48</sup> J. Rozenberg, *The Online Court: Will IT Work?* (2017).

<b>The Criminal Justice System Efficiency Programme</b>	Set up by the Ministry of Justice during the coalition government of 2010-15. This led to the DCS and also preceded HMCTS reform. However, the National Audit Office reported in March 2016 that the criminal justice system was not delivering value for money and there were 'many areas where improvements must be made'.
<b>The Better Case Management initiative</b>	The Better Case Management (BCM) initiative. This gave effect to Sir Brian Leveson's <i>Review of Efficiency in Criminal Proceedings</i> published in January 2015. BCM's aims include robust case management, fewer hearings, maximum engagement from every part of the criminal justice system and efficient compliance with the rules. Launched in October 2015, it introduced a uniform national Early Guilty Plea scheme and Crown Court Disclosure in document-heavy cases. BCM builds on Transforming Summary Justice, a joint criminal justice system initiative which was aimed at simplifying the process for dealing with cases in the magistrates' courts. These reforms were introduced by Lord Justice Gross when he served as senior presiding judge from the beginning of 2013 to the end of 2015.
<b>Video links</b>	Improved video links from courts to police stations, prisons and other locations at which vulnerable witnesses may give evidence. These 3G/4G mobile links were introduced as part of the CJEP and avoid the need for witnesses to attend court. They are available from non-court buildings and now from vehicles that can be parked at locations convenient for witnesses.
<b>Wi-Fi</b>	Professional Court User Wi-Fi for authorised users, including lawyers. One password covers all courts.
<b>ClickShare</b>	The ClickShare dongle, which allows advocates to display evidence stored on, or accessible from, their laptop computers on large television screens installed in courts. Until that was introduced, video recordings were often found to be incompatible with the hardware and displays available in court.
<b>The online make-a-plea service</b>	This is now available for people charged with traffic offences. Users must have an internet-enabled device — such as a computer or smart phone — but a call centre is available to help users complete the online forms. Welsh-speakers are assisted by staff in Caernarfon. The system is linked to drivers' licensing records at the DVLA. There have been more than 46,000 plea submissions since June 2015.
<b>The eJudiciary service</b>	An email and document management system that provides information and advice direct to decision-makers in the courtroom. Judges and magistrates can access this service from any device — unlike DOM1, the antiquated system it replaced, which ran only on court-issued computers and could take as long as 20 minutes to boot up. The eJudiciary system was developed by John Tanzer, a circuit judge who retired in 2016. He worked with Andrew Wright of HMCTS and two specialists from Microsoft, whose software the system uses. Senior judges said it was 'successfully transforming the ability of the judiciary to carry out research and legal work online'.
<b>eLIS</b>	The courts' electronic library and information service. This provides judges and others with access to legal databases and other library services.
<b>The CE File electronic filing and diary system</b>	Introduced at the end of 2015 in all courts in the Rolls Building. Limited public access to this was provided from computer terminals in the court lobby. Like eJudiciary, this pre-dated HMCTS reform.
<b>Assisted Digital</b>	Designed to help court users who are 'challenged in the use of online services'.

<b>The Help with Fees online service</b>	Enabling court users to apply online for reductions in court fees. This service became fully operational in July 2016.
<b>Data Store</b>	In the magistrates' courts. This allows automated receipt of case files from the CPS and improved archiving.
<b>The Civil Money Claims project</b>	Covers the online court and the digitisation of the other civil courts. Pilots began in 2017.
<b>The RCJ project</b>	To update IT systems in the Royal Courts of Justice in London and the nearby Rolls Building.
<b>The Divorce project</b>	A project under which more than 99% of divorces will be granted online by a 'suitably trained and legally qualified professional judge'. This was launched in January 2017 when the East Midlands regional divorce centre began requiring divorce petitions to be completed online.
<b>The Probate project</b>	To allow the personal representatives of a person who has died to deal with the deceased's property. Like the Divorce project, this will need to develop ways of authenticating documents such as birth certificates and marriage certificates submitted online. This too was launched in 2017.
<b>The jury summoning service</b>	When completed, this will allow people summoned for jury service to respond directly, confirming their availability or asking to be excused.
<b>An online tribunals service</b>	<i>As discussed in this report.</i>

# Online tribunal procedures

What will online tribunals look like and how will they operate? There is no single defined digital procedure. Instead, the advent of online tribunals should be understood as the adoption of a range of fluid and developing processes that vary in the degree to which new digital methods are blended together with current procedures for handling appeals. In this part of the report we consider the traditional model of tribunal appeals and how online procedures may differ. Table 5 provides an overview of the discussion

**Table 5: Traditional and online tribunal procedures**

Type of tribunal procedure	Key features	Used by	Advantages	Disadvantages
<b>Traditional model of tribunal procedure</b>	Paper appeal file assembled Oral hearing in a physical court room with the parties – either inquisitorial or adversarial, with or without representation Or appeal decided on the papers	Almost all tribunals, e.g., immigration, tax, and social security tribunals	Traditional model enables parties to meet at a hearing for face-to-face interaction User has a human experience of the justice process and the majesty of the law	Limited or no communication between the parties before the hearing Hearing is first and only opportunity for parties to exchange views and engage with tribunal Public body and users may disengage Length of time taken delays justice
<b>Lodging appeals online</b>	User lodges appeal online and uploads documents Replicates paper process with online process	Tax, immigration, and planning appeals	'Save and return' functionality allows users to revisit and submit further information Validation of applications means less likely to be rejected as incomplete	Risk of digital exclusion for some users, but this can be mitigated if appeals can be lodged on paper or users receive digital assistance
<b>'Track your appeal' online</b>	Text notifications inform appellant of the progress of her appeal 'Push' and 'pull' text messages remind appellant to submit evidence and notify of appeal hearing Appellant also given supporting information on hearing format and how to submit evidence	Being piloted by social security tribunals	Enhanced user understanding of and engagement in the appeal process	Risk of digital exclusion for some users

<p><b>Video link hearings for non-factual matters/issues of law for hearings, e.g. error of law hearings</b></p>	<p>Still paper-based case-file Video link used as substitute for physical in-person communication Parties use video link at one tribunal centre to connect with another tribunal centre</p> <p>Parties use video link from any appropriate location</p>	<p>Used for over a decade by immigration tribunals for bail hearings and the Upper Tribunal for error of law hearings.</p> <p>Being piloted in immigration tribunal case management review hearings</p>	<p>Reduced travelling costs for parties, e.g. no longer necessary to transport immigration detainee to tribunal centre Convenience to the parties</p>	<p>Video link technology can be unreliable May reduce the appellant's participation, engagement with, and understanding of the tribunal process</p>
<p><b>Video link hearings for factual matters, e.g. credibility</b></p>	<p>Video link as substitute for physical in-person communication</p>	<p>To be used in out of country immigration appeals</p>	<p>Reduces parties travelling costs Convenience to the parties</p>	<p>Oral hearing seen as gold standard for evaluating appellant's evidence through demeanour; non-verbal cues harder to pick up on over video link Tribunal may have reduced control over remote proceedings Potential for misuse of the judicial process</p>
<p><b>Continuous online hearings</b></p>	<p>Electronic evidence exchange: evidence uploaded online for instant sharing between the parties Online interaction and communication between the parties, with scope to divert to physical hearing if required Judge adopts online inquisitorial/problem-solving approach</p>	<p>Pioneered successfully by the Traffic Penalty Tribunal</p> <p>Being piloted by the social security tribunal</p>	<p>Contested issues can be clarified and narrowed down Judge case-manages from the outset Much quicker handling and resolution of appeals Greater engagement of the public body can reduce time taken</p>	<p>Risk of digital exclusion for some users but users can receive digital assistance</p>

## The traditional model of tribunal procedure

The 'traditional model' of tribunal procedure is based upon the following features: paper-based files; paper-based communications with and between the parties; physical oral hearings in a tribunal courtroom; and written decisions. This is a court-based model and has long been held out as the ideal way of hearing appeals. Having all the parties physically present in the same physical hearing room

gives the tribunal good opportunity to hear and evaluate the appellant's oral evidence, to consider documentary evidence, and to maintain an informed dialogue with the parties (and representatives) as to how the case should be decided. The tribunal appellant or user has a human and face-to-face experience of the justice process. The tribunal will either immediately issue a short, written decision or reserve its decision.

This model is widely used, with variations, across almost all tribunals. Consider social security appeals. In 2016/17, just under 230,000 social security appeals were received in addition to some 104,000 outstanding appeals.<sup>49</sup> Around 90 per cent of appellants opt for an oral hearing. The tribunal has long worked on the basis of a fully paper-based system. Hearings are informal and inquisitorial, and most appellants are unrepresented. The non-attendance of presenting officers has been a long-running issue. Similarly, most immigration appeals take the form of oral hearings, though they tend to be adversarial and a much higher proportion of appellants are represented. Whereas some appeals (*e.g.* social security appeals) proceed directly to a substantive hearing, other types of appeals (some immigration appeals) are preceded by a case management review hearing to ensure that the appeal is ready to proceed.

The traditional model of tribunals is well-established and the norm. There are widely recognised advantages of this model. It is tried and tested. It ensures good levels of fairness between the parties. At the same time, there are limitations in this model. First, it operates on the basis that one size fits all. Variations on the basic design are very limited. Second, the model can be highly inefficient and time-consuming. There is typically limited or no communication between the parties before the hearing. The physical hearing will usually be the first and only opportunity for the parties to exchange views and engage with the tribunal. The hearing is also the stage at which many of the details of the case become apparent. Third, given the volume of cases and the need to list oral hearings, appeals can take some time to be heard and decided. In 2017, social security appeals took, on average, 20 weeks to be decided and immigration appeals took 51 weeks.<sup>50</sup> This means that many weeks of 'downtime' pass in which nothing is happening to an appeal other than delay. All appellants have a direct interest in receiving a timely decision on their legal rights and entitlements. Delay can also increase stress and anxiety for appellants. Fourth, the demand on the courts and tribunals service to file and move around an enormous number of paper files by itself generates complications. Lost and mislaid court documents have been a key issue in complaints against HMCTS.<sup>51</sup> Such issues can have a profound impact upon those affected and the dispensation of justice.

Overall, the traditional approach of tribunals represents an analogue model operating in a digital age: slow, costly, rigid, top-down, and not user-friendly. Accordingly, policymakers have increasingly sought alternative digital methods to make tribunals more accessible, efficient, proportionate, and flexible. Next, we outline the range of digital processes currently being considered and implemented in different parts of the tribunal process, the possible reasons for their adoption, and some possible concerns.

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<sup>49</sup> Ministry of Justice, *Tribunals and Gender Recognition Statistics Quarterly, April to June 2017* (2017), tables S2 and S4. Social security appeals are heard by the First-tier Tribunal (Social Entitlement Chamber).

<sup>50</sup> Ministry of Justice, *Tribunals and Gender Recognition Statistics Quarterly, April to June 2017* (2017), table T3.

<sup>51</sup> Parliamentary and Health Service Ombudsman, *Complaints about UK government departments and agencies, and some UK public organisations 2015-16* (2016), p.17.

## Online processes in the initial stages of appeals

Replacing the initial stages of appeals with online processes can increase the practical accessibility of tribunals. For instance, people can now lodge tax and immigration appeals online rather than on paper. This increases accessibility and convenience for users and reduces cost. It also enables appeals to be 'validated' more quickly, meaning that they are less likely to be rejected as incomplete.<sup>52</sup> Online submission can also be used to enable fully online casefiles to be developed.

Enabling people to track their appeals online allows them to be better informed of the progress of their appeal. A major issue for many appellants is not knowing at what stage they are in the tribunal process. Research undertaken by HMCTS has found that 'the most prominent pain point is a lack of understanding about the appeals process and where users are within it. Weeks can go by without any sort of update. Users disengage, miss deadlines or don't turn up to their hearings. This can lead to adjournments and further delays.'<sup>53</sup> This can clearly have negative consequences for both appellants and the tribunal system. Online tracking of appeals remedies this problem. The parties are automatically notified through online, SMS, and email messages of the progress of an appeal. 'Push' and 'pull' messages can, through accessible language, notify the appellant when and how to submit evidence and when a hearing has been booked. With online links, these messages also give supporting information on the hearing format. An appellant can be confident that her appeal has been received and is receiving immediate attention. Appellants can also have a better idea of how long the appeal will take and be informed of what is happening, and what will happen next.

## Video link hearings

Video link hearings have been used for some time already. Immigration tribunal bail hearings and error of law hearings by the Upper Tribunal (Immigration and Asylum Chamber) have been conducted through video link to reduce the travel costs.<sup>54</sup> In error of law hearings, the parties in a regional tribunal centre appear through video link before the Upper Tribunal judges sitting in London. The Asylum Support Tribunal, which is based in central London, has also used video link in hearing by asylum claimants dispersed to Glasgow and Belfast. Using video link in such cases is relatively uncontroversial because the proceedings typically take the form of a dialogue or conversation between representatives and the judge, with the appellant making little, if any, active contribution. There have, though, been concerns that video link can reduce appellants' understanding and participation in the process.

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<sup>52</sup> Validation requires that appeals comply with certain procedural requirements to be recognised as a valid appeal. For instance, that the particular type of initial decision is appealable and that the appeal was lodged in time. Moving such processes online means that appeals are less likely to be rejected as incomplete.

<sup>53</sup> R. Marchant, 'Sometimes it makes sense to start in the middle' (3 February 2017) <<https://insidehmcts.blog.gov.uk/2017/02/03/sometimes-it-makes-sense-to-start-in-the-middle/>>.

<sup>54</sup> See *Upper Tribunal Immigration and Asylum Chamber Guidance 2013 No 2: Video link hearings*. Error of law hearings last for around an hour. Representatives and presenting officers based outside of the south east of England would otherwise incur time and travelling costs. In bail hearings, a video link between the detention centre and the tribunal reduces travel costs.

Whether video link should be used when the appellant makes a direct contribution to the proceedings—for instance, by giving oral evidence and being cross-examined—is more controversial. Other jurisdictions, such as the US and Canada, have made increasing use of video link for live evidence.<sup>55</sup> By contrast, there has been some unease in the UK in this respect. The President of the Upper Tribunal (Immigration and Asylum Chamber), McCloskey J, has stated: ‘I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal.’<sup>56</sup> In *Kiarie and Byndloss*, Lord Wilson noted that ‘[t]here 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.’<sup>57</sup> By contrast, Lord Carnwath stated that he saw ‘no reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad, so long as the necessary facilities and resources are available.’<sup>58</sup>

Concern often arises from the widely held assumption that the best method for assessing direct oral evidence is to have an oral hearing in a courtroom.<sup>59</sup> This is so for the following reasons. First, other means of providing oral evidence may risk unfairness for appellants or reduce the ability of the other parties to test such evidence. Second, the judicial task of collecting and evaluating facts—especially the credibility of a witness—will often, if not usually, also depend not just upon the appellant’s oral evidence, but also upon non-verbal forms of communication, such as the way in which the evidence has been presented.<sup>60</sup> For instance, according to the Upper Tribunal (Immigration and Asylum Chamber), ‘detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor’ in immigration cases.<sup>61</sup> A physical hearing enables the tribunal to make a close assessment of the appellant’s oral evidence by taking into account body language and non-verbal forms of communication. Third, giving live evidence at a hearing is subject to a degree of formality and supervision by the tribunal. The tribunal can control the procedure to ensure that there is no misuse of the judicial process—aspects that will either be absent or reduced when video link is used.

The judicial approach to date has been to view departures from the physical hearing model as likely to reduce the quality of the evidence and the ability of the judge to assess it. Applications by the parties to call oral evidence by video or other electronic link therefore need to be justified. Further, the use of video link requires regulation and ought not to be regarded as routine.<sup>62</sup> Video link evidence is permissible, but it is a matter for judicial decision to be taken on an individual basis having regard

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<sup>55</sup> See M. Federman, ‘On the Media Effects of Immigration and Refugee Board Hearings via Videoconference’ (2006) 19 *Journal of Refugee Studies* 433; I.V. Eagly, ‘Remote Adjudication in Immigration’ (2015) 109 *Northwestern University Law Review* 933.

<sup>56</sup> *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) [90]. On the use of video link in the criminal justice system, see Penelope Gibbs, *Defendants on video – conveyor belt justice or a revolution in access?* (Transform Justice, 2017).

<sup>57</sup> *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, [67].

<sup>58</sup> *Ibid* [103].

<sup>59</sup> *Secretary of State for the Home Department v Nare* (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC), [17].

<sup>60</sup> Objections could, of course, be made to the assumptions which underlie this view.

<sup>61</sup> *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) [90].

<sup>62</sup> *Secretary of State for the Home Department v Nare* (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC), [17].

to various practical considerations identified in the Civil Procedures Rules and by the Upper Tribunal.<sup>63</sup> A leading case is *Kiarie and Byndloss*, in which the Supreme Court held that accepted that video link could be sufficient for an effective appeal, provided that the opportunity to give evidence in that way was realistically available. The court concluded that the financial and logistical barriers to giving video link evidence in out of country immigration appeals were almost insurmountable.<sup>64</sup> This case provides important guidance on the accessibility of video link and a starting point for consideration of video link in procedural fairness terms.

## Continuous online hearings

‘Continuous online hearings’ involve using online methods to bring the judge and the parties together at a much earlier stage to case-manage and resolve the dispute in the most appropriate and efficient way, whether through online dialogue and decision or a physical hearing.

Continuous online hearings have been pioneered by the Traffic Penalty Tribunal.<sup>65</sup> Appeals are commenced online. Uploaded evidence is instantly available to the parties to be reviewed and commented upon. The judge case-manages from the outset and engages with the parties online to clarify disputed issues. The parties can comment online. The judge can then proceed to decide the case online.

The Traffic Penalty Tribunal has found that online messaging has considerable advantages in terms of narrowing down the issues and enabling a focused exchange. Online messaging can also significantly lower the costs, delays, and constraints that come with physical hearings. A key feature is that the ‘hearing’ is not a single physical event in the traditional sense. Instead, the online hearing is a continuous iterative process that takes place over a number of stages which enables the judge and the parties to refine and explore the issues.

The First-tier Tribunal (Social Entitlement Chamber) is to pilot continuous online hearings and immigration tribunals are pilot-testing virtual hearings for case management purposes and for electronic evidence exchange.<sup>66</sup> It is likely that social security appeals will, over time, make extensive use of continuous online hearings. The overall aim is to devise a flexible online system which initially retains the confidence of all parties and the judiciary, then moves on to becoming the accepted standard for resolving disputes while at the same time being significantly more efficient in terms of time and physical resources.

In broad terms, the process is likely to work as follows in the social security context. The appellant’s case, the initial decision, and mandatory reconsideration notice would be uploaded to a designated and private part of an online portal or dashboard. The online dialogue between the parties would be

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<sup>63</sup> Civil Procedure Rules, Practice Direction 32, Annex 3; *Secretary of State for the Home Department v Nare* (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC), [21].

<sup>64</sup> *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42, [70]–[74] (Lord Wilson).

<sup>65</sup> The Traffic Penalty Tribunal also uses telephone hearings and, to a lesser degree, traditional physical hearings.

<sup>66</sup> Ministry of Justice, *Transforming Our Justice System* (2016), p.15; *Senior President of Tribunals’ Annual Report* (2017), p.15 and p.38; F. Rutherford, ‘How remote working will give users and courts greater flexibility’ (*Inside HMCTS*, 10 August 2017).

led by the judge who would case-manage the appeal, make requests of the parties, and investigate and clarify the issues in the appeal. The parties would then be notified by text of any updates to the case such as updated evidence and messaging. If the appellant wanted an oral hearing, then this could be arranged. However, in many social security cases such a hearing may not be necessary.

In common with the traditional approach in social security appeals, the judge would take an inquisitorial and problem-solving approach. However, the online process would enable the judge to take this approach much more quickly. In many straightforward or uncontested cases, there would not be the need for a physical hearing and the decision would be produced online and be instantly available to the parties. At the decision-making stage, non-legal tribunal members, such as medical and disability members, would be brought in to examine the evidence and contribute to the online process. A check by another tribunal judge would provide quality assurance control. This process could have several advantages. Unlike oral hearings, all of the discussion between the parties would be recorded online. There could be enhanced accessibility, speed, convenience, and flexibility. Without the need for a physical hearing, the issues can be examined and clarified online quickly without the delays and costs of physical hearings. Online appeals could be closed within a week or so compared with the current timescale of 20 weeks for a physical hearing, a significant improvement in the timeliness of appeals. Another potential gain is that the process could be easier for appellants to negotiate. Some people find the current appeals process, its length, and the prospect of presenting their own case before a tribunal to be very stressful.<sup>67</sup> Indeed, for some people, this anxiety may contribute to claimants' ill health or prompt them either not to appeal or not to attend their appeal. Continuous hearings could work to reduce this anxiety. Introducing the judge at an earlier stage to engage with the appellant at a much earlier stage to bring out all relevant information can improve appellants' trust and confidence in the process.

## Online tribunal procedures and the law

Despite the Government using the existing legislative framework for tribunals as a basis for the reforms, a range of legal issues—broadly defined—may arise with online tribunals. One issue is how the judiciary will see new online procedures if they are challenged by way of judicial review. The UK Supreme Court recently handed down a widely-reported judgment in *R (on the application of UNISON) v Lord Chancellor*.<sup>68</sup> In the case, the UKSC found that fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals and the employment appeal tribunal were unlawful because of their effects on access to justice.<sup>69</sup> There was much discussion of the constitutional right to access to justice afterwards. This judgment, and other recent judgements, are broadly demonstrative of a willingness on the part of the judiciary to review important aspects of justice-system design.<sup>70</sup> This raises the question of what role the judiciary may play in overseeing, in their judicial capacity, the implementation of online tribunals.

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<sup>67</sup> P. Grey, *The Second Independent Review of the Personal Independence Payment Assessment* (London, DWP, 2017), p.29.

<sup>68</sup> [2017] UKSC 51.

<sup>69</sup> For discussion, see: A. Adams and J. Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80(3) *Modern Law Review* 412.

<sup>70</sup> See, e.g., *R(CJ) and SG v Secretary of State for Work and Pensions* [2017] UKUT 324 (AAC); *Coventry v Lawrence* (No. 3) [2015] UKSC 50.

In the recent Upper Tribunal (IAC) case of *SM and Qadir (ETS – Evidence – Burden of Proof)*, it was said, in relation to out of country tribunal appeals in the immigration context, that:

We are conscious that some future appeals may be of the “out of country” species. It is our understanding that neither the First-tier Tribunal nor this tribunal has experience of an out of country appeal of this kind, whether through the medium of video link or Skype or otherwise. The question of whether mechanisms of this kind are satisfactory and, in particular, the legal question of whether they provide an appellant with a fair hearing will depend upon the particular context and circumstances of the individual case. This, predictably, is an issue which may require future judicial determination.<sup>71</sup>

This was then followed up in *R (on the application of Mohibullah) v Secretary of State for the Home Department (TOEIC – ETS – judicial review principles)*, where it was said, on the same topic, that:

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.<sup>72</sup>

In both of these judgments, we can see clear concern about the deployment of new technologies in the justice system. The key question here is: how much is the design of justice systems the province of government and how much is it the province of the courts? In an analysis of the use of videoconferencing in the Canadian justice system, Sossin and Yetnikoff suggested that how ‘the courts resolve these challenges may represent the next frontier of administrative law.’<sup>73</sup>

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<sup>71</sup> [2016] UKUT 229 (IAC) [104].

<sup>72</sup> [2016] UKUT 561 (IAC) [90].

<sup>73</sup> L. Sossin and Z. Yetnikoff, ‘I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources’ (2007) 25(2) *Windsor Yearbook of Access to Justice* 247.

# Future research on tribunals digitalisation

In this part of the report, we identify key areas where research will be required in respect of online tribunals. We also highlight some key questions that will need to be investigated. We acknowledge that this is an initial and incomplete survey. Furthermore, new research questions will arise as the digital reforms are implemented. Nonetheless, we seek to provide a starting point in this discussion.

## Access to justice

Much of the HMCTS digitalisation agenda is centred upon improving access to justice.<sup>74</sup> This is often linked to familiar notions of the attractions of ODR, *i.e.* that digital systems can create lower-cost and more convenient solutions for users. The intended reforms may well enhance access to justice but there are also risks here. One such risk is ‘digital exclusion’—the concern that by putting services online we may exclude as much as a fifth of the population from them. Of people in the UK who use government digital services, it is estimated that 30% can do so unaided and a further 52% can manage to do so with some help.<sup>75</sup> The remaining 18% are ‘digitally excluded.’

### Key research questions:

- How will digitisation affect access to justice?
- How effective are assisted digital procedures?
- To what extent will digitalisation enhance access to justice? If so, then how?

In February 2017, the MoJ published its general approach to ‘assisted digital’ services. It promised support for people who have trouble with using technology. It stated ‘we will ensure that our assisted digital support takes into account the needs of those who are elderly or have disabilities, those with poor literacy or English skills, and those who lack access to technology because of cost or geography.’<sup>76</sup> The MoJ said it would work with independent suppliers to provide a network of accessible, quality-assured assistance: ‘[t]elephone and webchat services will also be available and clearly signposted for those who already have access to IT but require extra support, and paper channels will be maintained for those who need them.’<sup>77</sup> How assisted digital works in practice will be of great importance going forwards.

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<sup>74</sup> *e.g.* Sir E. Ryder and Lord Thomas, ‘Memorandum: Prisons and Courts Bill 2017’ (2017) <<https://publications.parliament.uk/pa/cm201617/cmpublic/PrisonsCourts/memo/PCB19.pdf>>.

<sup>75</sup> J. Rozenberg, *The Online Court: Will IT Work?* (2017). See also L. Altmann, *Digital Exclusion & Assisted Digital Research* (HMRC, 2015) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/457800/Digital\\_Exclusion\\_and\\_Assisted\\_Digital\\_research\\_publication\\_report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/457800/Digital_Exclusion_and_Assisted_Digital_research_publication_report.pdf)>.

<sup>76</sup> Ministry of Justice, *Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals: Government response* (2017) <<https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/results/transforming-our-justice-system-government-response.pdf>>.

<sup>77</sup> *Ibid.*

There are also multifaceted socio-economic issues, including access to the internet.<sup>78</sup> Some people cannot afford internet access.<sup>79</sup> Some of those people may have access at a library or some other place, but their access—in terms of time and convenience—is likely to be less than those who have their own at-home connection. Beyond this, connection quality and coverage varies drastically across the UK.<sup>80</sup> These sorts of difficulties raise a range of possible issues in the context of online tribunals.

**Key research questions:**

- What, if any, internet inequalities have significant effects on online tribunals?
- What solutions can be used to address these inequalities?

## Online procedures

There are sure to be questions around fair procedures in online tribunals.<sup>81</sup> Online tribunals, we expect, will come with a new procedural code.<sup>82</sup> Online processes, whether they come with a new procedural code or not, promise huge changes in tribunals. This raises a host of questions. One prominent example, discussed earlier in this report, is the possible use of video technology in evidence-gathering. How much weight ought to be given to such evidence is a controversial question. There are also a range of questions about how these developments may be seen through the prism of the common law principles of procedural fairness.

**Key research question:**

- To what extent will online procedures enable people to meaningfully participate in the tribunal process? What are the limits to online procedures?
- How can online procedures reflect the principles of procedural fairness? How will any tensions between online tribunal procedures and the principles of procedural fairness be resolved?

There is also the issue of determining which cases are handled under online procedures. Are there some types of cases that would not be appropriate for ODR? If so, which types of cases? And how would those cases be identified – through a blanket policy or on a case by case basis? To what extent will the choice rest with individuals, the public body being challenged or the tribunal? What approach will be taken when cases raises issues of the appellant’s credibility? (It is often assumed that it is preferable to assess credibility if the appellant appears in person.) There is a fine balance to be struck here. Too cautious of an approach means attempts at digitalisation will leave us with only a very

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<sup>78</sup> For a very helpful discussion of such issues, see: R. Smith, *Digital Delivery of Legal Services to People on Low Incomes* (2014) (see also subsequent follow-up reports and updates).

<sup>79</sup> In 2015, of the 14% of households in Great Britain with no internet access, some explained this on the basis of equipment costs being too high (14%) and access costs being too high (12%), see: ONS, ‘Statistical bulletin: Internet Access – Households and Individuals (2015)’ <<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2015-08-06>>.

<sup>80</sup> See e.g. British Infrastructure Group, *Broadband: A new study into broadband investment and the role of BT and Openreach* (2016).

<sup>81</sup> In legal terms, it is important to keep in mind the common law principles of procedural fairness and Article 6, ECHR.

<sup>82</sup> Ministry of Justice, *Transforming Our Justice System* (2016), p. 6.

expensive case management system. Too liberal of an approach will lead to unsuitable cases being determined through online procedures.

More broadly, there may be challenges *vis-à-vis* translating traditional values of administrative justice to the digital sphere.<sup>83</sup> Such values include transparency, fairness, participation *etc.*<sup>84</sup> A key question will be how these values—along with traditional values of public law, such as judicial independence, open justice *etc.*—can be effectively respected into the digital sphere? This also raises a major dilemma of modern administration: the role of the private sector. The expanding role of the private sector has been a key feature of the debate around public administration and law in the last 30 years. What the role of the private sector will be in the online tribunals system—both in terms of design and operation—is an important question.

## Users

A key issue will be how users engage with online tribunals. From one point of view, ‘users’ includes those people who take their case to a tribunal. This approach stems from the Leggatt report which stated that tribunals exist for users and not the other way round.<sup>85</sup> The sentiment remains entirely valid. However, there is no reason why the term ‘users’ should be limited solely to appellants. From a wider perspective, a ‘user’ includes any person or organisation that interacts with a tribunal. From this perspective, the users of tribunals include: claimants/appellants; advisors and representatives; the government departments and public bodies whose decisions are being appealed against; other witnesses, including expert witnesses; tribunal judges and non-legal members; tribunal admin staff; and members of the public observing tribunal proceedings. Nonetheless, the views of claimants and appellants will be of particular importance given that the purpose of tribunals is to provide a quick and efficient means of appealing against administrative decisions.

It will be important to undertake research into the range of users to understand their views and experiences of online tribunals. Such research could take the form of large-scale surveys, questionnaires, and interviews. There is also scope for research into the behaviours of users and whether or not the use of online procedures affects their behaviours and understandings of tribunals.

### Key research questions:

- What are the views and experiences of people using video link hearings and continuous online hearings?
- How will online processes influence the behaviours and understandings of users?

Furthermore, it will be important to undertake research into different types of users and different types of tribunals. People who appear before tribunals are a very diverse collection of persons ranging from companies to vulnerable unaccompanied asylum-seeking children, as well as represented and unrepresented litigants. The types of issues that tribunals deal with also vary enormously. It is therefore important that research considers the need to take account of such diversity.

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<sup>83</sup> For discussion, see: M. Partington, ‘Restructuring administrative justice? The redress of citizens’ grievances’ (1999) 53 *Current Legal Problems* 173.

<sup>84</sup> *Ibid.*

<sup>85</sup> A. Leggatt, *Tribunals for Users - One System, One Service* (Department for Constitutional Affairs, 2001).

There is much discussion about online tribunals being designed for users in the interests of lower costs, simplicity, and convenience. At the same time, there is a 'human element' that must be considered in the context of online tribunals. It has been suggested that the 'the courtroom is imbued with the broad scope of human emotion and experience. Technology must not replace that.'<sup>86</sup> The 'human' experience element of online processes will likely prove to be a major discussion point as online tribunals develop. It will be important to investigate how people engage with the online tribunals system. For instance, a US study found that appellants appearing before immigration courts through video link engage less in the adjudicative process than those with in-person hearings.<sup>87</sup> It is important for research to investigate this issue in UK tribunals.

#### **Key research questions:**

- How do lawyers integrate into a system designed, at least for the most part, for lay users?
- Will representation affect outcomes in online tribunals?
- How does the experience and effects of representation in online tribunals differ from conventional tribunals?
- To what extent do online procedures facilitate the hearing and determination of appeals?
- How will online procedures impact upon the judicial role?

There is also the issue of understanding the role of lawyers and other representatives in online tribunals. Much of the discussion about online tribunals appears to be operating on the premise that users will not need and will not have lawyers (or other representation). There are questions therefore around what role lawyers and representatives can play, and how procedures and their outcomes differ without them.

## **Online procedures and substantive decision-making**

In theory, tribunals decide each case on its own individual merits. Accordingly, the procedure by which appeals are heard should exert little, if any, influence on the outcome of decisions. However, in practice, it is widely recognised that the procedures both condition and shape the outcomes of tribunal decisions. Well-represented appellants are more likely than unrepresented appellants to have their appeals allowed.<sup>88</sup> Appellants experience higher success rates at oral hearings compared with paper appeals. These trends apply across a range of tribunals. Similar questions arise concerning the degree to which online procedures may similarly influence the outcome of tribunal decisions. At present, we lack the data needed to answer such questions, but it will be possible to investigate such questions as online procedures are rolled-out.

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<sup>86</sup> *Letter to The Daily Telegraph* (16 August 2017).

<sup>87</sup> I. V. Eagly, 'Remote Adjudication in Immigration' (2015) 109 *Northwestern University Law Review* 933, 960.

<sup>88</sup> H. Genn and Y. Genn, *Effectiveness of Representation in Tribunals* (Lord Chancellor's Department, 1989).

**Key research questions:**

- How might online procedures influence and shape tribunal decisions?
- Will the use of continuous online hearings and video-link affect tribunal decisions compared with traditional oral hearings?
- How will the use of online processes compare between types of appeal, different tribunals, and different types of users?
- How will the use of video-link compare with online continuous hearings?
- Are there trends in decision outcomes between different online procedures and different types of tribunal users?

These will be important issues for researchers to investigate both within particular tribunals and across the tribunals system as a whole. It will also be important to investigate the use of different types of online procedure too. Such research could inform the further development and use of online tribunals.

## Technology, data, and security

Digital systems collect massive amounts of data. They can do this consciously through, *e.g.*, asking for specific information on a form. But digital systems also create data through their operation (often in the form of meta data). The prospect of digitalising a tribunals system historically reliant on paper raises questions in relation to data collection and protection. From a research perspective, there is a potential bounty here too: the collection of mass data that is easily searchable opens clear gateways for new research, at a much faster rate and at lower cost.

**Key research questions:**

- What data ought to be actively collected through online systems?
- Who should have access to the data collected through online systems?
- How will private data collected through online systems be secured?
- If private companies have a role in the running of online systems, how will their rights relate to the data?

Linked to questions about data, digital systems are open to many security threats. The 2017 WannaCry ransomware attack on the NHS demonstrated this.<sup>89</sup> That attack may have been an extreme example but system-security is an important challenge. Security is also not necessarily a background issue which administrative justice researchers can take for granted: procedures may have to be designed in a certain way for security reasons, and this may have consequences for, *e.g.*, accessibility concerns. Understanding security justifications is thus important in assessing the new system in an informed way. Many citizens also have security concerns about online systems. This may have an effect on user-behaviour, which administrative justice researchers certainly have a stake in understanding.

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<sup>89</sup> 'Cyber-attack: Europol says it was unprecedented in scale' (13 May 2017, *BBC*).

There is also the challenge of ensuring systems are kept up to date. Technology ages quickly.<sup>90</sup> There is a lot of money on the table for digitalisation at present. Updating, or renewing, technology also requires investment. Each iteration of the Apple iPhone, for instance, requires an extensive research and development programme. Tribunals are not iPhones but the underlying principle that technology needs constant renewal applies the same in both contexts. How are online tribunal systems going to be updated in the longer term? The details of any strategy in this respect—and the level of funding underpinning it—will be important details.

## Online tribunals and the wider administrative justice system

The effects of the digitalisation of tribunals on the wider administrative justice landscape must be considered. As noted earlier in this report, administrative justice is both a fragmented and integrated landscape. It is comprised of a range of different systems (*e.g.* internal review, tribunals, judicial review) and different policy areas (*e.g.* benefits, immigration, tax *etc.*). Changes to one part of the wider landscape can have implications to another part. The introduction of online tribunals will prompt a variety of questions in this respect.

### Key research questions:

- Will online tribunals potentially blur the lines between tribunals and other systems, such as internal review?
- Will tribunals digitalisation make other systems appear redundant?
- How can feedback loops (to initial decision-makers) be improved with digitalisation reforms?

There is plenty of room for creative improvements here too. For instance, the idea that government should learn from their mistakes is widely-discussed in the administrative justice literature.<sup>91</sup> The prospect of digitalisation presents the opportunity to build in better feedback loops that consume less time, effort, and money—as well as ultimately improving the quality of initial decisions.

## Efficiency

Efficiency is a key driver in the HMCTS-led reforms. Technology-based reforms tend to be based on the idea of frontloading investment and gaining long-term savings. That seems to be the case with the *Transforming Our Justice System* reforms too. At the same time, systems often work in unpredictable ways and contain hidden costs. If the value of efficiency is to be key driver, we must understand what efficiencies are actually generated.

### Key research question:

- What efficiencies do online tribunals create?
- Are they false efficiencies that exist with online procedures?

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<sup>90</sup> Famously expressed in G. Moore, 'Cramming More Components onto Integrated Circuits' (April 19, 1965) *Electronics* 114.

<sup>91</sup> See generally: R. Thomas, 'Administrative Justice, Better Decisions, and Organisational Learning' [2015] *Public Law* 111.

There is also a need to understand false efficiencies. Sir Ernest Ryder, in March 2016, explained that Money Claims Online ‘has been in operation since 2001 and has over 180,000 users annually. But once the ‘submit’ button is pressed by the user or their representative, a civil servant at the other end has to print the e-form, and make up a paper file. From that point on, we are back to square one: almost back to the Dickensian model of justice via the quill pen.’<sup>92</sup> There are two major ‘risks’ in this respect. First, that the online system makes appealing decisions so easy that there is an upsurge in cases. Second, that the use of online systems will not be as broad as is predicted as there will be two systems—online and traditional—which inefficiently co-exist.

## **Non-HMCTS, devolved tribunals, and the Upper Tribunal**

HMCTS is responsible for many tribunal jurisdictions, but not all of them. Various tribunals stand outside of the unified tribunal structure introduced by the Tribunals, Courts and Enforcement Act 2007. Such tribunals typically hear appeals from decisions of local authorities and include, for instance, Valuation Tribunals, school admission and exclusion appeal panels, and the Traffic Penalty Tribunal. There are also other bodies that are not formally designated as tribunals, but nonetheless perform a judicial function. The Parole Board is a good example.

### **Key research questions:**

- Will digitalisation be adopted by non-HMCTS tribunal, devolved tribunals, and the Upper Tribunal?
- Should digitalisation be pursued by these tribunals?

As noted above, the Traffic Penalty Tribunal has been a leading tribunal in adopting digital methods, but there is little sign that the digitalisation agenda has had any impact on other non-HMCTS tribunals—other than the ability to submit some appeals online. This is unsurprising given the division of responsibility for tribunals across different parts of central and local government. On the other hand, all of the arguments for digitalisation apply with equal force for such tribunals. There is also a need to consider consistency of approach amongst different tribunals from the perspective of users. From this point of view, the technicality of governmental responsibility for tribunals is of little significance.

A similar question arises in relation to devolved tribunals. There is a complex picture as to the jurisdiction of particular tribunals. Some tribunals, such as the immigration tribunal, have a UK-wide jurisdiction. By contrast, the social security tribunal jurisdiction covers Great Britain, but not Northern Ireland. Other tribunals are England and Wales and some are England-only. In Scotland, the Tribunals (Scotland) Act 2014 created a new, simplified statutory framework for tribunals in Scotland, bringing existing jurisdictions together and providing a structure for new ones. The Act created two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland.

An important question also arises in relation to the Upper Tribunal, which has an error of law jurisdiction. Will it adopt online processes?

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<sup>92</sup> Sir E. Ryder, ‘The Modernisation of Access to Justice in Times of Austerity’ (2016) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf>>.

# International developments

While the UK's justice digitalisation reforms are on a scale never seen before, many of the issues around online tribunals being grappled with in the UK are being grappled with elsewhere. Though there are naturally differences in systems of administrative law, there remains space for a meaningful international conversation around these developments. Thus, this section explores, briefly, the most pertinent existing international reference point: the BC Civil Resolution Tribunal (CRT). The CRT is the first online tribunal in Canada, and the first of its type in the world.<sup>93</sup>

## The Civil Resolution Tribunal

Created to meet the objective of eliminating the barriers inherent in a legal system made by and for lawyers, the CRT came into being in 2016 as a product of the Civil Resolution Tribunal Act 2012.<sup>94</sup> While grounded in a traditional statutory authority, its aims are otherwise devoted to modernising dispute resolution through divergence from the strict adherence to traditional processes. The approach of the CRT is to place users—and their 'needs, interests, and limitations'—at the centre of the process.<sup>95</sup> Consequently, satisfactory, accessible, and proportionate resolutions become the priority and processes allow for greater adaptability to the particular context of the case. These principles underpin the CRT's development, including its affinity for technology and alternative methods of dispute resolution.

The CRT itself has 4 main stages: self-help; negotiation; facilitation; and adjudication. It complements each of these with interactive resources that can be accessed remotely at a convenient time online. Paper or telephone-based services are also provided for those who prefer or require. The Solution Explorer—a free online tool that provides guidance on possible resolutions before a user even starts a claim—comprises the first stage. Where this is ineffective, notice of the claim is served. At this point, the parties are afforded some time to negotiate with guidance and minimal intervention. Failing this, the process proceeds to the facilitation phase, in which an expert facilitator can employ various communication channels (*e.g.* email, phone, or the CRT platform itself) to help the parties reach an agreement. If this still cannot be achieved, a tribunal member makes a binding decision. This final step of adjudication is truly regarded as a last resort.

The CRT can appear to have several advantages that its traditional counterparts lack. For example, it maintains engagement with the parties throughout the process, increasing the opportunities for resolution and augmenting support to improve accessibility. Further, it accommodates an increasingly online society without neglecting the segments unwilling or unable to participate in this revolution.

Equally, however, a new host of challenges are visible in respect of the CRT. First, an overarching issue is that there is only limited research available on the CRT's operation and much of the valuable

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<sup>93</sup> S. Salter and D. Thompson, 'Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal' (2017) 3 *McGill Journal of Dispute Resolution* 114.

<sup>94</sup> *Civil Resolution Tribunal Act*, RSBC 2012, c C-25 (4<sup>th</sup> Sess).

<sup>95</sup> S. Salter and D. Thompson, 'Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal' (2017) 3 *McGill Journal of Dispute Resolution* 114, p. 136.

writing has been produced by those involved with the CRT.<sup>96</sup> Second, the CRT requires persistent innovation and improvement, and this requires a long-term commitment. Third, the ‘idealization of the adversarial trial process’ and reverence for procedure more generally threatens resistance to the CRT’s malleable procedures and attempts at persistent innovation.<sup>97</sup> The CRT has feedback mechanisms that provide for continuous feedback and resultant improvement.<sup>98</sup> This complements a trial-and-error process compliance in private commercial ventures but more counter-intuitive to legal and governmental ones, which aim to command public confidence by averting error altogether. To the extent that public sectors operations have less freedom to fail, public schemes are subject to limitations that their private counterparts have thrived without. The CRT’s use of technology is, however, its biggest challenge; specifically, the balancing of efficiency and convenience against the value of human presence and nuances of human involvement.

## **International dialogue**

This report has looked closely at one example, but many countries are beginning to integrate technology into their administrative justice processes. The CRT highlights the possibility of international dialogue on common issues relating to the advent of online tribunals, and the digitalisation of administrative justice systems more generally. Maintaining such an international dialogue will be beneficial and it will be important to undertake comparative research where possible and valuable.

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<sup>96</sup> *e.g.* S. Salter, ‘Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal’ (2017) 34 *Windsor Yearbook of Access to Justice* 112, p. 114, where it is stated that the ‘discussion of the CRT in this article is based primarily on my experience as the tribunal’s chair. While I have endeavoured to examine objectively some of the CRT’s challenges and criticisms, my perspective is necessarily shaped by my ongoing involvement in the project.’

<sup>97</sup> *Ibid.*, p. 126.

<sup>98</sup> *Ibid.*, p. 122.

## Conclusion

Digitalisation represents a major reform of tribunals. A full assessment of these reforms can only be made when we are much further down the road. With this in mind, this report has sought to outline ‘what we know and what we need to know’ about the digitalisation of tribunals at this stage. In doing so, it sought to identify broad areas in which research will be important in the future and laid the groundwork for more detailed research proposals in this area. Specifically, it has addressed four distinct questions: what is the context for the introduction of online tribunals?; what do we know about what online tribunal procedures will look like?; what are the key issues going forward?; and how do developments in the UK fit within wider international developments?

In view of the survey we have conducted in response to these questions, it is clear that it is important that research is undertaken on online tribunals. In particular, there is space for the production of a multidisciplinary research agenda which sets out, in detail, what sort of work would be useful in supporting and assessing the design and implementation of online tribunals. Ensuring that research keeps pace with quickly-unfolding developments and their implications presents an immense challenge, but this is a major issue—with potentially huge social and economic effects—worthy of detailed inquiry.

It is also important that a research agenda for online tribunals is distinct from research concerning online courts generally—in administrative justice, the fundamental question of the relationship between the state and the citizen is in play. There are particular concerns in this context that may not be—and often have not been—touched upon by general research on online dispute resolution. There is a range of research methods which can be deployed to produce a reliable evidence base. Many administrative justice researchers are well-equipped to tackle complex methodological issues but tackling technology-connected issues may present a relatively new challenge. There is scope for innovative multidisciplinary work in this respect.

Finally, there is an opportunity for international dialogue on important common issues in this sphere. The digitalisation of administrative justice systems is a growing global trend and future research in this area will be enhanced by international dialogue.



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