

WORKSHOP BRIEFING PAPER: MEASURING SUCCESS IN ONLINE COURTS: AN EMPIRICAL CHALLENGE¹

1.1 Aims of the workshop

This workshop brings together leading experts from England and Wales, the USA, Canada, Israel and Australia to explore current issues in the way in which success in Online Courts is understood, with a particular focus on developing thinking in relation to how we measure the impact of Online Courts on access to justice. By the end of the workshop, participants will have contributed to a set of draft recommendations detailing:

- i.) The factors that should be included in any evaluation of the extent to which online courts have improved or maintained access to justice and the fairness of the justice system
- ii.) The data that should be collected and the methods that might be used to undertake these evaluations

These draft recommendations will be made publicly available in order to stimulate debate and comment, and to inform the development and evaluation of Online Court projects as they progress.

1.2 Introduction

Public Justice Systems around the world are embracing the potential of Online Dispute Resolution (“ODR”) to provide cost effective and timely solutions to justiciable problems. In the UK, USA, British Columbia, Australia and Europe ODR is being deployed in a variety of different legal jurisdictions with there is considerable variation in the complexity of the substantive law underlying each individual initiative. Public Justice System ODR projects currently in operation include ODR for traffic penalties, welfare benefits, low value civil money claims, housing, debt, employment and even family law. In England and Wales and the USA justice system officials are embracing the potential of Online Courts, a particular form of Public Justice System ODR project, as an alternative to the traditional courts. In response to these developments, in May 2018, UCL Faculty of Laws, The Nuffield Foundation and The Legal Education Foundation jointly convened a symposium entitled: “The Future of Justice: Harnessing the Power of Empirical Research” to explore the implications of the expansion of

¹ Citation: Byrom, N. (2018) “*Measuring Success in Online Courts: An Empirical Challenge*” October, 2018. The author is grateful to Professor Dame Hazel Genn for her extremely helpful comments on an earlier draft of this paper.

public justice system ODR for litigants, legal professionals, policy makers and the public². Discussion at the conference focused on two key questions, firstly, how do we understand the impact of public justice system ODR on access to justice and fundamental constitutional principles, such as open justice and secondly, what data do we need to collect in order to facilitate evaluation? At the symposium it was agreed that as the number of Online Court projects expands, there is an urgent need to establish common metrics for understanding the extent to which Online Courts are successful, in order to identify models of best practice and ensure that new systems deliver on their promise to enhance access to justice. This workshop is intended to catalyse efforts to develop these metrics.

1.3 Online Courts and Access to Justice: Understanding reform in England and Wales

Whilst the expansion of the use of Online Dispute Resolution in public justice systems may be considered a truly international phenomenon, the programme of court reform currently underway in England and Wales arguably constitutes one of the most ambitious and comprehensive examples of the introduction of ODR at scale³. The £1billion programme of reform announced in a joint vision statement⁴ published by the Lord Chancellor, Lord Chief Justice and the Senior President of Tribunals in 2016 aims to develop a modernised justice system where cases will increasingly be dealt with online. In whole areas of the justice system, such as divorce and civil money claims, physical and remote hearings will be reserved: “*only for those cases that cannot be otherwise resolved*”⁵ (Vos, 2018:2). The stated ambition of these reforms is to create: “*a courts and tribunal system that is just, and proportionate and accessible to everyone*”⁶. Whilst the reform programme is being delivered by Her Majesty’s Courts and Tribunals Service⁷ with the budget and business case approved by the Executive, the settlement achieved through the enactment of the Constitutional Reform Act 2005 has resulted in the judiciary adopting a crucial leadership role in relation to the reforms. Lord Thomas, the then Lord Chief Justice, speaking in

² A report of proceedings of the symposium is available here:

<https://research.thelegaleducationfoundation.org/research-learning/funded-research/conference-report-the-future-of-justice-harnessing-the-power-of-empirical-research>

³ Noted legal commentator Joshua Rozenberg QC has produced an excellent and comprehensive review of progress to date, available to access free of charge at: <https://long-reads.thelegaleducationfoundation.org/>

⁴ Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, (2016) *Transforming our Justice System: Joint Vision Statement*, September 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf

⁵ Vos, G. (2018) *The Foundation for Science and Technology: Debate on how the adoption of new technology can be accelerated to improve the efficiency of the justice system* 20 June 2018, pp2 available online at: <https://www.judiciary.uk/wp-content/uploads/2018/06/speech-chc-the-foundation-for-science-and-technology.pdf>

⁶ Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, (2016) *Transforming our Justice System: Joint Vision Statement*, September 2016, pp4. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf

⁷ An executive agency of the Ministry of Justice accountable to both the Ministry of Justice and the Judiciary⁷,

2015 stated that: *“the overhaul of the machinery of justice now to be delivered would never have occurred without the judiciary assuming its new role of leadership.”*⁸ In keeping with their prominent role in instigating and overseeing the reform programme, the senior judiciary have proposed six criteria⁹ according to which the projects developed will be: *“tested, and if successful, implemented”* (Ryder, 2018:2). These criteria are as follows:

1. *Ensure justice is accessible to those who need it ie to improve access to justice;*
2. *Design systems around the people who use them;*
3. *Create a system that is financially viable using a more cost effective infrastructure ie better IT, new working practices and decent estate;*
4. *Eliminate the most common causes of delay,*
5. *Retain our national and international standing as a world-class provider of legal services and in the delivery of justice, and*
6. *Maintain the constitutional independence of the judiciary.* (Ryder, 2018:2).

Given their status as standards against which the success or otherwise of reform projects will be assessed, it follows that these principles should properly be considered empirical questions. However, to date, little detail has been provided regarding the precise ways in which these principles will be operationalised and the thresholds against which a given project will be judged successful. The abandonment of legislation to support these changes the Prison and Courts Bill in April 2017¹⁰, and the decision to divide the provisions contained in this Bill (thirty eight clauses and thirteen schedules) between different pieces of legislation, in a move commentators have argued constitutes a “legislative drip-feed” (Rozenberg, 2018:12) has limited the opportunities for public scrutiny and democratic deliberation of the reform programme in the round. In this context, it is vital that the metrics and thresholds being applied to assess different elements of the reform programme are transparent, theoretically sound and empirically falsifiable. As Davis et al. writing on the value of legal and justice system indicators have observed: “the transparency of indicator-based decisions will be illusory unless the process of determining scores on indicators is also transparent” (Davis, 2014:48). In addition, in response to a recommendation made by the Public Accounts Committee that has been accepted by the Government, HMCTS have agreed to: *“...write to the Committee by January 2019, setting out how it will identify and evaluate the impact of changes on peoples access to, and the fairness of, the justice system, particularly in relation to those who*

⁸ Thomas, J. (2015) “Check Against Delivery” Speech delivered at: “Judicial Leadership: Conference on the Paradox of Judicial Independence” UCL Constitution Unit, 22nd June 2015 pp.13 available at: <https://www.judiciary.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf>

⁹ See Ryder, E. (2018) “What’s happening in justice? A View from England and Wales” 14 May 2018 pp2, <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-ryder-spt-ucl-may-2018.pdf>

¹⁰ As a consequence of the calling of a general election

*are vulnerable.*¹¹ As such, it is intended that the recommendations of this workshop will assist in both:

- i.) developing the frameworks and approaches used to measure whether the introduction of Online Courts has increased or maintained access to justice; and
- ii.) assisting in the design of approaches to evaluating the impact of changes on the fairness of the justice system, particularly in relation to those who are vulnerable.

1.4 What do we mean by “Online Courts”?

Throughout this briefing paper the term: “Online Court” is used to refer to “full integration” Online Dispute Resolution projects. The Joint Committee on Technology defines full integration projects as those projects where: “ODR is integrated seamlessly into the courts processes and includes phases for notification of availability of ODR, problem self-diagnosis, negotiation, potential court review, adjudication and recording of final settlements” (JTC Bulletin, 2017:10). The Civil Money Claims project currently underway in England and Wales is an example of an Online Court. Internationally, public justice systems are experimenting with what Sela (2018) has referred to as “Instrumental Online Dispute Resolution” (2018: 100). Sela defines Instrumental Online Dispute Resolution systems as: “a virtual space for convening the dispute resolution process: a specialized communication platform that enables conducting the process online. Typically, instrumental ODR systems provide generic process orientation and help parties collect and deliver information in a manner constructive to the dispute resolution process: planning, interaction, and decision-making remain in control of the human parties who use them. Instrumental ODR platforms require, therefore, a human third-party to operate them and communicate with the disputants. More advanced software tools can be used in the process, but they have no decisive role or autonomy.” (Sela, 2018:100). The Civil Resolution Tribunal in British Columbia is an example of Instrumental ODR. Instrumental ODR platforms are distinguished by Sela from Principal ODR platforms where artificial intelligence powered platforms take a proactive role in the resolution of the dispute and: “can relieve disputants of many of the dependencies on the limited and expensive supply of expert human third parties” (Sela, 2018:100). The extent to which the development of Instrumental ODR platforms foreshadows the introduction of Principal ODR platforms remains to be seen, although nothing of this kind is currently contemplated in the reform programme underway in England and Wales.

¹¹ HM Treasury (2018) “Treasury Minutes: Government response to the Committee of Public Accounts on the Forty Third to the Fifty Eighth reports from Session 2017-19” October 2018, CM9702 pp49

1.5 Access to Justice and Online Courts- What measures are currently used?

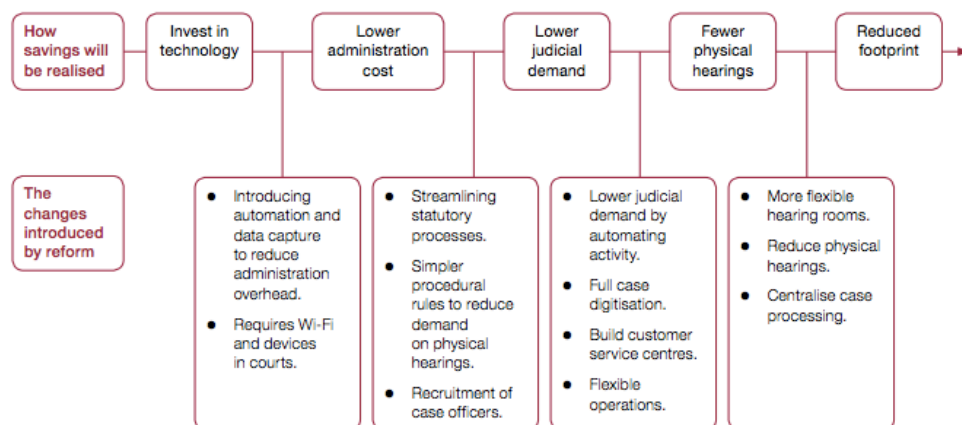
A review of the literature on Online Courts reveals that the metrics most commonly used to demonstrate the success of Online Courts in terms of improving access to justice are: (i.) reduction in cost (to the administrators of the system and to litigants) on the basis that the cost of the justice system impedes access (ii.) reduction in the need for hearings, on the basis that hearings are a major cause of both cost and delay (iii.) increased rates of settlement, where settlement is considered synonymous with justice (iv.) reduced time to resolution, (v.) increased case volume and litigant engagement and (vi.) improved perceptions of procedural fairness and user satisfaction. The following discussion reviews the way in which these measures have been used to demonstrate the success of online courts in terms of increasing access to justice.

1.5.1 Reduction in costs

One of the most commonly cited metrics of success against which Online Courts are measured is their ability to reduce the cost of both the administration of justice and the costs incurred by litigants. A review of the impact of ODR technology on dispute resolution in the UK published by Thomson Reuters in 2016 argued that the introduction of online courts was key to driving costs savings in courts services (Thomson Reuters, 2016:9) In recent decades in England and Wales, concerns have been raised about the cost of civil justice (to individual litigants and the state), leading some academic commentators to state that the civil justice system is in crisis (Zuckerman, 1999). The desire to reduce the cost of the justice system was a driving factor behind the government's decision to invest in the reform programme currently underway in England and Wales (NAO, 2018:5), and part of the impetus behind the first Online Court established by the architects of the reform programme- the Civil Money Claims project. A report published by the National Audit Office in 2018 set out the process through which it is hoped cost savings will be realized over a period of six years (see Figure 1 below, taken from NAO, 2018:18).

The sequence of expected benefits as the reforms to the justice system are introduced

The savings will be delivered incrementally as the elements of reform are implemented



Source: HM Courts & Tribunals Service six-year delivery plan

As can be seen in Figure 1 above, the reduction of physical hearings (through the introduction of Online Courts, such as the Civil Money Claims Project), and diversion from formal hearings to an online facilitation stage (in the context of the Civil Money Claims Project, the without prejudice negotiation and settlement platform¹²) is a key mechanism through which these savings are intended to be realised. As such, one measure of success that will be used in evaluating the Online Court will be the extent to which the new Civil Money Claims Project delivers cost savings for those in charge of the administration of justice. The fees for litigants to issue proceedings online are slightly cheaper than those charged for initiating claims by post, but held at the same rate as those fees currently charged for initiating proceedings online via the Money Claims OnLine system- as such, it is not obvious that any reduction in costs will be passed on to litigants. In the context of the Civil Resolution Tribunal, British Columbia (“CRT”), the Civil Resolution Tribunal Act 2012 states that the mandate of the CRT is to provide: “accessible, speedy, economical, informal and flexible dispute resolution services for small claims and condominium property disputes. In contrast to the experience of England and Wales, the focus was not on reducing the costs of the administration of justice, but reducing costs to litigants. One of the ways in which it was felt that the CRT might reduce costs for litigants was by removing the need for legal representation and the CRT was designed with this aim in mind. Writing about issues in access to justice in the Canadian context, and the way in which the CRT addresses them, the Chair of the CRT Shannon Salter states that: “In 2015, the average two-day civil trial in Canada cost an average of \$31,330 in legal fees. Meanwhile, the average Canadian family earned a median after-tax income of \$53,500 in 2013. Not surprisingly, 90% of parties in British Columbia’s Small Claims Court are self represented” (Salter, 2017:118-119). The statute that established the Civil Resolution Tribunal, the Civil Resolution Tribunal Act 2012 contains a

¹² <https://insidehmcts.blog.gov.uk/2017/10/19/transforming-civil-justice-latest-developments-from-civil-money-claims-testing/> See also Susan Acland-Hood’s reform update.

provision (section 20) which states that: “unless otherwise provided under this Act, the parties are to represent themselves in a tribunal proceeding”. This provision addresses both concerns regarding equality of arms, and facilitates the goal of reducing the cost of engaging with the justice system for litigants, therefore improving access to justice.

1.5.2 Reduction in the need for hearings

A further measure of success used to evaluate online courts is the extent to which the court reduces the need for hearings, by encouraging individuals to resolve their problem earlier. As hearings are implicated in driving both cost and delay in the justice system, the reduction in hearings is seen as a proxy for improved access to justice. The findings of a review of the impact of online dispute resolution in the UK argued that well designed technology assisted court pathways would enable: “...swifter resolution of disputes at a low level” (Thomson Reuters, 2016:21). The proposals for an “Online Solutions Court” contained in a report authored by Lord Justice Briggs as part of his Civil Courts Structure Review (2016) were inspired by the recommendations of an earlier report prepared by Professor Richard Susskind for the Civil Justice Council (Susskind, 2015). Susskind’s report argued for an end-to-end system consisting of three stages, (i.) online evaluation, whereby an expert system helps users to diagnose issues and understand their options, (ii.) online facilitation, which supports individuals to mediate and settle their claims and (iii.) online adjudication, where an online platform enables asynchronous resolution and binding decisions in respect of cases (Susskind, 2015:19-20). In Susskind’s view a principle guiding the development of Her Majesty’s Online Court should be that judges are involved only as: “a last resort” (Susskind, 2016:8). In the interim report that proposed the “Online Solutions Court” Lord Justice Briggs argued that a substantial advantage of the new process would be that it: “opens up opportunities for conciliation of claims, whether...by mediation or early neutral evaluation well in advance of trial.” (Briggs, 2015:77). As such, a key feature of the proposal was to encourage the termination of claims prior to a hearing. In British Columbia, the CRT is even more explicit in endorsing resolution prior to a hearing as a metric of success: the chair of the CRT Shannon Salter is quoted as stating that: “Not ending up in CRT is success” (Salter, 2017 cited in JTC, 2017:17) and the tribunal regularly publishes data to demonstrate the low proportion of cases that result in an adjudication and published decision¹³. In an article on the CRT published in 2017, Salter and Thompson state that: “A foundational design principle of the CRT process is to create opportunities for early resolution” (Salter and Thompson, 2017:129). The Joint Technology Committee established by the National Centre for State Courts, the Conference of State Court Administrators and the National Association for

¹³ For example, this tweet published on the 14 August 2018 which stated: Did you know the [#CRT](#) has resolved 4,046 disputes as of July 31, 2018? We focus on collaborative dispute resolution, so only about 6% of small claims & 23% of strata disputes require adjudication and result in a published decision. Read our decisions here: <https://decisions.civilresolutionbc.ca/crt/en/nav.do>
<https://twitter.com/CivResTribunal/status/1029420362537172993>

Court Management has argued that: “Quantifying the number of problems identified and resolved before they become cases is a better measure of success than the number of cases that complete an Online Dispute Resolution process” (JTC, 2017:17).

1.5.3 Rates of settlement

Related to the adoption of “reduction in the number of hearings” as a metric of success is the use of the rate of settlement as an indicator of the efficaciousness of online courts. The ability of a given online court to promote access to settlement or redress is often used to make claims regarding its ability to promote “access to justice”. In much of the literature on Online Courts and Online Dispute Resolution more widely, access to redress or settlement is used interchangeably with access to justice. Writing on the effect of online technologies on dispute resolution design in 2017, Ayelet Sela argues that: “*A key issue...is whether ODR systems are (or should be) designed to provide justice or redress...The dominance of the “efficiency paradigm” in law and technology initiatives and the fact that to date, most ODR systems were designed by private service providers (most commonly commercial companies) seem to have tilted the pendulum towards a concept of redress...reaching an acceptable solution to a dispute, without necessarily ensuring or promoting justice in a wider sense*” (Sela, 2017:681). In the USA, The Joint Technology Committee’s resource bulletin on ODR for Courts states that: “measures of the effectiveness of ODR on legal outcomes include time to disposition, cost per case to both litigants and courts and settlement rates”(JTC:2017:18). The Civil Resolution Tribunal (unsurprisingly, given it’s title) is highly focused on promoting resolution, and publishes statistics on “completed disputes” via the tribunal’s Twitter account¹⁴ as evidence of the success of the project. The report of the Civil Justice Council of England and Wales (Susskind, 2015) that proposed the introduction of an online court for low value civil claims anticipated the creation of a system whereby cases would be brought to: “speedy, fair conclusions” (Susskind, 2015:20) by facilitators, rather than judges. In Susskind’s view, these decisions would not be binding, but were likely to be accepted in the majority of cases. The same report cited approvingly the model of adjudicators working in the Financial Ombudsman Service who: “dispose of 90% of the Service’s workload, so that only 10% of cases reach the ombudsmen” (Susskind, 2015:20). In a 2016 report published by the Hague Institute for Innovation of Law, the authors argued that the potential for Online Dispute Resolution to deliver 100% access to justice was reliant on courts promoting: “problem-solving and settlement instead of the classical approach of deciding on claims and defences through an adversarial debate” (HiiL, 2016:2). As such, rates of settlement are likely to remain an indicator of success in the context of Online Courts.

1.5.4 Time to resolution

¹⁴ <https://twitter.com/CivResTribunal/status/1029420362537172993>

A further metric used to assess the success of Online Courts is reduction in the time taken to resolve a particular case. As academics such as Legg (2016) have observed: “Much of ODR’s popularity in Europe and elsewhere stems from its speed and low cost. (Legg, 2016:14). In the US context, the Joint Technology Committee cites reduced time to disposition as a key measure of success (JTC, 2017:18) and recounts approvingly the experience of an ODR pilot in Washtenaw County Michigan 14A District Court, which saw: “the number of days to case closure drop by 65%” (JTC, 2017:18). In reporting on progress made in respect of the civil money claims project currently underway in England and Wales, the Lord Chief Justice states: “A claim was lodged online at 14:02 and had been paid by 16:00. That is the sort of service we should be providing to the public” (HMCTS, 2018:12). The assumption that speed of resolution is an intrinsic good in the context of Online Courts has been relatively unchallenged, as such, reductions in the time from deposition to resolution is likely to remain an indicator of success and access to justice in this context.

1.5.5 Case volume and litigant engagement

In demonstrating their success current online court projects cite figures regarding case volume and engagement. One of the key arguments cited for the adoption of public justice system ODR is the promise the Online Courts will be better equipped to deal with disputes at scale, on the basis that ODR has been applied successfully to high volume disputes in e-commerce (Katsh and Rule, 2016:332). The Joint Committee on Technology, whilst favouring an opt-out rather than opt-in model for court based ODR (JTC, 2017:30) with limited options for users to opt-out suggests that increase in case volumes may be a proxy for success (JTC, 2017:19). The Civil Resolution Tribunal reports on the number of cases dealt with as evidence of the success of the model. Further, many proponents of Online Courts argue that Online Courts have the potential to increase engagement and reduce default judgements, although the data on this is mixed (the CRT in May reported a 60% default rate in civil claims¹⁵). The Chief Executive of HMCTS Susan Acland-Hood, reporting on progress made in respect of the Online Civil Money Claims project stated that: “evidence gathered suggests that the online system has improved access to justice, with engagement from defendants being higher than that in the traditional civil money claims service” (HMCTS, 2018:12) though no further detail has been provided. As such, case volume and litigant engagement are likely to remain proxies for improved access to justice in the context of Online Courts.

1.5.6 Measures of procedural justice and user-satisfaction

In work on online dispute resolution to date, the academic literature has emphasized the need to explore the implications of public justice system adoption of online dispute resolution for

¹⁵ Interview with Darin Thompson and Richard Rogers

perceptions of procedural justice (Sela, 2017, Katsh & Rabinovich Einy, 2017:164). Promoting perceptions of procedural justice amongst litigants and other participants in the justice system has been viewed as important, as successive studies have indicated that: “people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair” (Tyler, 2000:117). In addition, perceptions of procedural justice have been found to be linked to public trust and confidence in legal authorities and institutions, including courts (Tyler, 2001:216). As such, the provision of procedural justice has been positioned as intimately connected to the maintenance of the Rule of Law (Tyler, 2001). The literature on procedural justice is extensive, dating back to 1975, and it is beyond the scope of this article to review it in detail. However, in summary, it is widely accepted that four factors are critical to the way individuals evaluate procedural fairness: “whether there are opportunities to participate (voice); whether the authorities are neutral; the degree to which people trust the motives of the authorities; and whether people are treated with dignity and respect during the process” (Tyler, 2000:117 see also Tyler, Casper, Fisher, 1989). Validated instruments have been produced to assess these dimensions of procedural justice, and tested in a wide range of settings including experimental and survey work (MacCoun, 2005:171). The Center for Court Innovation in the USA has developed a range of tools for evaluating procedural fairness in court settings, including both subjective and objective measures (Gold La Gratta and Jensen, 2015). In studying ODR systems more generally, academics including Sela (2018) have used experimental settings to explore the impact of different ODR systems on perceptions of procedural justice. In this study Sela captured data on four dimensions of procedural justice, which she defined as: “process control (control over the opportunity to present evidence), decision control (control over the final outcome), interactional justice (the decision maker’s treatment of a person with politeness, dignity and respect) and informational justice (the availability of information and explanations about the process and its justification)” (Sela, 2018:106). However, to date, only a limited number of studies have explored the experiences of disputants in ODR settings, and an even smaller number in public justice system based ODR projects (see Mason & Sherr, 2008; Bollen & Euwema, 2012; and Gramatikov and Klaming, 2012, cited in Sela 2018:122). To the extent that the concepts of procedural justice have been employed in evaluating Online Courts, these have tended to be expressed as measures of “user satisfaction” or “procedural satisfaction”. The Joint Technology Committee Resource Bulletin on ODR for Courts states that: “Valid measures of procedural satisfaction can include whether individuals felt they were treated respectfully, felt heard, understood the instructions and implications of the process, believed the process was fair and impartial, and whether the technology worked well” (JTC, 2017:18). In developing the Civil Resolution Tribunal model, user surveys were deployed to explore questions such as whether the technology was easy to use, whether it worked well and whether the information provided was accurate (Salter, 2017:124). In England and Wales, the Civil Money Claims Project has also used

user surveys to measure the efficacy of the project to date. Reporting on progress in respect of the project, the Chief Executive of Her Majesty's Courts and Tribunal Service Susan Acland-Hood stated that: "Over 80% of users including claimants and defendants have told us that the service was very good and easy to use" (HMCTS, 2018:12).

1.6 Access to Justice and Online Courts: gaps in what is measured?

The preceding discussion reviewed the existing literature on Online Courts and explored the measures that are currently used to assess the success or otherwise of these projects. The indicators identified are important measures of success, and the cultural shift towards empiricism and data driven decision-making that the adoption of Online Courts can facilitate is driving interest in these projects from researchers worldwide. However, (and unsurprisingly, given the nascent state of the field) the literature on current practice reveals gaps in the way in which those measures selected are currently being deployed and opportunities for developing consistent and commensurate approaches to measurement of these concepts. On reviewing the literature on measuring the impact of Online Courts on Access to Justice, a number of gaps emerge:

1.6.1 Paucity of information on the impact of litigant demographic characteristics on engagement with and perceptions of Online Courts.

Despite calls for the inclusion of demographic data in evaluations of Online Courts by proponents of these projects (see Katsh and Rule, 2016:342, JTC, 2017:35), the literature reveals a paucity of information on the interaction between demographic characteristics and both engagement with and perceptions of procedural justice and user satisfaction in the context of Online Courts. The Online Court projects currently in operation, such as the Civil Resolution Tribunal and the Civil Money Claims Project, do not routinely collect data on the demographic characteristics of users for the purposes of monitoring and evaluation. In failing to analyse the data collected on user satisfaction/procedural justice with reference to demographic characteristics, valuable insights into the most effective means of promoting procedural justice and engagement in the context of Online Courts may be missed, with consequences for the ongoing trust in and legitimacy of these projects.

Whilst the procedural justice literature has emphasized the universality of the role of perceptions of procedural justice in driving attitudes towards the legal system¹⁶, recent research has highlighted demographic differences in the factors that lead individuals to consider a process procedurally just or fair. In the literature on the features of procedurally just processes, "voice" defined as: "the opportunity for people to express what is important to them" (Welsh, 2017:733

¹⁶ See Zimmerman and Tyler (2010:484): "people generally react to their experience [of the courts] on terms of procedural justice whatever their background, suggesting that focusing on procedural justice is a very good way to build trust and encourage compliance irrespective of who is using the courts"

citing Zimmerman and Tyler, 2010) has consistently emerged as a key factor in driving perceptions of procedural justice (Tyler 1997, Welsh, 2017: 733). This research seemingly indicates that for Online Courts to be judged “procedurally just”, they should privilege providing opportunities for people to present their views on the dispute (Welsh, 2017:735). However, a set of studies published by Brockner et al. (2001) found that cultural background mediated the impact of voice on perceptions of procedural justice, through comparing attitudes to “voice” in the US and Germany with attitudes to voice in The People’s Republic of China, Mexico and Hong Kong. In this research, Brockner et al. confirmed their hypothesis that individuals in cultures where there is a high level of “power distance” (cultures where high levels of inequality among persons in different positions of formal power are legitimized, in the case of the study, The Peoples Republic of China, Mexico and Hong Kong (Brockner et al. 2001:302)) were less likely to believe that they should have voice and therefore less likely to equate the ability to exercise voice with procedural justice. Research published by Tyler (2001) conducted within the US found ethnic group differences in the ways in which people define a fair procedure, with White and African Americans emphasizing “trust” and “treatment with respect” in contrast to individuals of Hispanic background who focused on the adjudicator demonstrating evidence of neutrality (Tyler, 2001:231). Evidence that cultural and ethnic group differences impact on the features of processes that lead individuals to judge a system to be procedurally fair mitigate in favour of gathering demographic data in the context of designing and evaluating Online Courts, in order that perceptions of procedural justice can be maximized.

1.6.2 Online Courts and the ability to deliver decisions in accordance with the substantive law

The fundamental constitutional role of the public court system is to enforce substantive law (Assy, 2017:71 citing Bentham, 1843:6). The ability of courts to enforce the substantive law is the means through which public justice systems uphold the rule of law and provide access to justice. As such, when public justice systems adopt ODR to deliver their functions, a key metric according to which their success should be assessed is whether or not the ODR process supports the enforcement of the substantive law. Surprisingly however, to date, little research has been published exploring the impact of Online Courts on substantive outcomes, or benchmarking the outcomes secured through Online Courts against those delivered by existing proceedings. There are a number of powerful normative and pragmatic arguments for measuring success in Online Courts according to whether or not they can be demonstrated to facilitate the correct application of the substantive law. Normative justifications for including an assessment of the extent to which Online Courts promote the correct application of the substantive law in any evaluation of their success may include that: i.) that the constitutional function of the courts is to enforce the substantive law, ii.) that capturing data on whether Online Courts are delivering judgments in accordance with substantive law is vital to guard against exploitation of litigants and iii.) that

capturing and publishing this data in conjunction with data on cost and speed is essential to guide democratic deliberation as to the merits and demerits of this new method of delivering justice.

1.6.2.1 The constitutional function of Courts is to enforce the substantive law

The constitutional legitimacy of Courts is inextricably linked to their ability to demonstrate the correct application of the substantive law to the facts of individual cases (Assy, 2017; Twining, 1993:384 citing Bentham). In English law, as in other common law jurisdictions, access to a court for the determination of disputes has been understood to be fundamental to the maintenance of the rule of law. There is an established constitutional right of access to the courts, not as an end in itself, but in order that disputes can be determined in accordance with the rights prescribed by the legislature (Bogg, 2018:509). This right can be traced back to the Magna Carta (Ford, 2017) and has found expression in the writings of jurists including Jeremy Bentham, Sir Edmund Coke and Sir William Blackstone. Lord Diplock's statement in *Bremer v South India Shipping Corporation Ltd (1981) AC 909, 917* is an often-cited articulation of this argument- "*Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access.*" This approach has been confirmed in human rights case law under Article 6 of the European Convention on Human Rights. Assy, writing on proposals to introduce an Online Court in England and Wales in 2017, asserted that: "The basic constitutional function of a court is to enforce the substantive law" (Assy, 2017:71). The veracity of this statement was affirmed by the UK Supreme Court in the decision handed down in the case of *R(on the application of UNISON) [2017] UKSC 51*. Lord Reed, in a powerful judgment that attracted the concurrence of his seven fellow justices, stated that:

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

If it is accepted that the constitutional function of courts is to give effect the rights prescribed by parliament, it follows that any evaluation of the success of Online Courts must entail a consideration as to whether Online Courts are supporting the correct application of the substantive law to the facts of individual cases. Various academics concerned with trends in the adoption of ODR by public justice systems have highlighted the need to evaluate the success of these projects in terms of their ability to support the vindication of rights (see Schmitz, 2016; Sela, 2017:681), however, methodologies for approaching this challenge are yet to be developed.

1.6.2.2 Evaluation of Online Courts in terms of their ability to support the application of substantive law is necessary in order to avoid exploitation of litigants

As discussed above, proponents of Online Dispute Resolution in the context of the public justice have emphasized the importance of maximizing subjective measures of procedural justice in assessing the success of Online Courts. As discussed above, there are both pragmatic and principled arguments for the emphasis afforded to assessments of procedural justice. Pragmatic arguments include that individuals who perceive a process as procedurally fair are more likely to regard the adjudicator as legitimate and comply with the outcomes of cases (Zimmerman and Tyler 2010:484). On a principled basis, as political scientist Austin Sarat has observed: “it would be strange, indeed, to call a legal system democratic if its procedures and operations were greatly at odds with the values, preferences or desires of citizens over a long period of time” (Tyler, 1997:871-2 citing Sarat). However, even the most strident advocates for the importance of procedural justice acknowledge that privileging measures of procedural justice above others can create the potential for exploitation and that as such, monitoring the outcomes of procedures in terms of their ability to promote the correct application of the law is essential.

Those who have low levels of legal knowledge, are disadvantaged or are involved in disputes of subjective importance are most at risk of exploitation if the sole focus of evaluation is based on subjective indicators of procedural justice. The link between low levels of legal knowledge and tendency to accept as fair outcomes that are not is particularly concerning in the context of England and Wales. In this jurisdiction, successive population level surveys have identified low levels of legal knowledge and understanding across the population as a whole (see Pleasence & Balmer, 2015 and Franklyn et al. 2017:21) and particularly amongst the young and those who are affected by physical, mental or stress related health problems (Pleasence et al. 2015:xiii). Compounding this, widespread cuts to public funding for legal advice and representation have impacted detrimentally on the availability of individuals to access the legal support they need. The lack of availability of independent legal advice in England and Wales has been held to impact disproportionately on disadvantaged groups (see Anthony and Crilly, 2015:91 and Amnesty, 2016:4). Those who are disadvantaged are least likely to possess legal knowledge and the more likely to experience multiple justiciable problems (Pleasence et al. 2015).

Successive research has identified that when individuals: “lack a clear metric for assessing the fairness of a dispute’s outcome (which is common in legal disputes) they use their assessment of the process as a mental shortcut for evaluating the outcome” (Shestowsky, 2016:8 citing Kees van den Bos (2001). Perceptions of a particular procedure as fair can distract individuals from evaluating the justice of the outcome, and lead to individuals accepting as fair outcomes that are not (see Tyler (1997) citing Greenberg (1990) and Tyler and McGraw (1986). Research has

indicated that individuals who are disadvantaged are particularly likely to focus on procedural justice indicators as a heuristic for outcome fairness in evaluating court processes (Scheingold:1974 cited in Tyler, 1997:896) and that as such are particularly vulnerable to exploitation. For this reason Wissler, (1995) cautioned against the use of subjective procedural fairness perceptions to evaluate a procedure's performance, stating that: "...procedures that seem fair may not be fair by more objective standards (e.g., Lind & Tyler 1988; Kressel & Pruitt 1989). For instance, litigants may express satisfaction with a process that gives them the opportunity to tell their story, even if it does not produce just outcomes (O'Barr & Conley 1985)" (Wissler, 1995:352). Later research has concluded that this tendency to rely on perceptions of procedural justice as a proxy for the trustworthiness of the process increases when the case is one in which the stakes are high. In a recent study, Grootelaar and Van Den Bos (2018) concluded that: "...because litigants in high stakes cases are dealing with outcomes which are difficult to interpret, they rely on procedural justice information" (Grootelaar & Van Den Bos 2018:261). It follows that individuals who are disadvantaged due to status characteristics or the subjective importance of their case will be more likely to accept as legitimate processes that are procedurally just, regardless of whether these processes deliver substantively just outcomes. Worryingly, these individuals are also those for whom substantively unjust decisions are likely to have the greatest impact.

In addition, the nature of Online Court projects, which tend to emphasise reductions in procedural complexity, reduced formality (current model include allowing litigants to join hearings remotely from a variety of locations) and offer the potential to develop to incorporate technology that adapts to individual preferences may exacerbate, rather than diminish these issues. The literature on alternative dispute resolution models may prove instructive here, revealing as it does that: "the apparent informality of alternative processes can replicate existing power disparities" (Reynolds, 2014:250). Research conducted by Eagly (2015) into the impact of the introduction of remote hearings in immigration detention settings impacted negatively on the level of litigant engagement in the process- litigants perceived the process as less legitimate and therefore did not take full advantage of the legal safeguards available to them. Sela (2018) has warned that the move to Online Courts creates the potential to tailor processes to meet subjective perceptions of procedural justice regardless of their normative fairness, stating that:

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

The combination of these factors may be seen to mitigate in favour of including measures of substantive justice in the evaluation of Online Courts.

1.6.2.3 Capturing and publishing data on the substantive justice of outcomes delivered by Online Courts is necessary to guide democratic deliberation

In jurisdictions around the world, including the USA, Canada, Australia and England and Wales, concerns have been raised regarding the cost, speed and accessibility of the justice system. In recent decades in England and Wales, consternation has focused on both the cost of civil justice (to individual litigants and the state), and delays in the system, leading some academic commentators to argue that the civil justice system is “in crisis” (Zuckerman, 1999). Online Courts have been proffered as a solution to this crisis, with proponents arguing that the introduction of online courts can reduce cost, and improve the capacity of the system to process cases at scale, therefore improving access to justice. Writing in 2017, Assy argues that: “exorbitant litigation cost is a chronic feature of English courts, hindering them in their function” (Assy, 2017:72). Both Assy (2017) and Zuckerman (1994) have argued that: “the sanctification of correct judgements” (Assy, 2017:70) has led to the downgrading of cost and timeliness as dimensions of justice. Assy in particular has argued that any evaluation of Online Courts necessitates a paradigm shift in the way justice is defined: “so that cost and timeliness are treated as components of justice, parts of its very definition” rather than external hazards (Assy, 2017:70). If it is the case that the design of justice system processes entails a necessary trade-off between cost, speed and rectitude of decision, who should decide where the balance is struck? And once the threshold is decided, what are the mechanisms required to ensure that the balance is held? The answer to these questions must lie in democratic deliberation and scrutiny. Zuckerman, citing Dworkin states that: “we are entitled to expect procedures which strive to provide a reasonable measure of protection of rights, commensurable with the general resources that the community has, and relative to the other public facilities that the community needs to provide.” (Zuckerman, 1999:8). This was the route pursued by proponents of the Civil Resolution Tribunal in British Columbia, who introduced legislation to support the creation of this new method of resolving a subset of justiciable civil law problems. In discussing the development of the Civil Resolution Tribunal as a paradigmatic example of a user-designed justice system, Salter and Thompson (2017) state that: “*A balance must be struck between the needs of justice and the needs of the public. In the context of our current justice system, it may be more accurate to say there must be a rebalancing between justice and justice system users. There is no bright line between what does and does not strike the right balance*” (Salter and Thompson, 2017:124). In the context of England and Wales, no such legislation has proved forthcoming- the Civil Money Claims project, an example of an

Online Court is being delivered by Her Majesty's Courts and Tribunals Service¹⁷ with the budget and business case approved by the Executive and the judiciary adopting a crucial leadership role. In this context, collecting and publishing data on the ability of Online Courts to enforce the substantive law is vital to promote informed deliberation that supports a consensus as to the degree and nature of the compromise to be struck. The results of this deliberation may prove surprising. Research in the USA has revealed that “in contrast to what is often believed, public confidence in the police and courts is not primarily linked to judgments about cost, delay, and performance.” (Tyler, 2001:216). Further to this, studies have revealed that perceptions regarding the legalistic nature of court processes may have a role to play in promoting diffuse support for Courts: research published by Baird (2001) revealed that the perception that judicial procedures should be legalistic leads to support for courts. This chimes with research on litigant preferences in the context of mediation which demonstrates that litigants tend to prefer formality and adjudicative processes over non-adjudicative processes (Shestowksy, 2016:832). Nevertheless, discussion should be informed by evidence regarding the level of substantive justice Online Courts are able to deliver, and the failure to gather this evidence is troubling.

1.7 Access to Justice and Online Courts: Gaps in how success is measured

Reviewing the literature on *how* Online Courts are evaluated reveals gaps in the methodological approaches used to assess the success of these projects. For example, there is a lack of impact or randomized controlled studies that explore the impact of the move to Online Courts on outcomes for litigants, cost of cases, or time to settlement. The majority of evaluations conducted in this space are process or formative evaluations (as is typical of studies in the legal field more generally- please see Greiner (2016)). The existence of multiple channels whilst Online Courts are developed arguably creates unprecedented opportunities for the application of these approaches.

Further to this, the assessments of perceptions of procedural fairness undertaken in the context of Online Courts tend to be derived from the subjective self-assessments of litigants. Arguably, there is a gap in relation to the adoption of objective measures for assessing procedural fairness in this context (for example of a toolkit of objective and subjective measures of procedural fairness in physical court processes see Gold La Gratta and Jensen, 2015). Research has indicated that litigants thresholds for identifying an unjust process are extremely high; and that litigants will reject a procedure only: “when there is overwhelming social or factual support for the supposition that the procedure is corrupt” (Welsh, 2017:738, Lind and Tyler, 1988:180). As such it may be considered important that objective assessments of new procedures are conducted

¹⁷ An executive agency of the Ministry of Justice accountable to both the Ministry of Justice and the Judiciary¹⁷,

(see for example the model assessment process proposed by the Center for Court Innovation), and that additional data is used to assess the success or otherwise of Online Courts.

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