**Written evidence submitted by the Criminal Law Committee of Birmingham Law Society**

The Criminal Law Committee consists of members drawn from throughout Birmingham and surrounding areas. Its co-opted members include representatives of the judiciary and the Legal Aid Agency, as well as HMCTS staff, probation officers, prosecutors and others.

The Committee liaises with prisons, police and the courts about issues affecting all of our members. It also responds to consultations, and lobbies on behalf of both members and clients.

**What will be the likely effects of the reforms, both implemented and proposed, on access to justice in relation to:
    a. civil justice?
    b. family justice?
    c. criminal justice?
    d. administrative justice, particularly as delivered by the tribunals system?
    e. those who are digitally excluded or require support to use digital services?**

The Criminal Law Committee of Birmingham Law Society responds to items c) and e) above. We recognise and embrace the potential to streamline the Criminal Justice System (CJS) with the implementation of digital systems, where that innovation improves access to justice. We welcome the implementation of the Digital Case System in Crown Court Proceedings and await the introduction of the Common Platform (now expected to be delivered in 2020) which it is hoped will provide an accessible system from the point of charge to resolution of the case for all affected parties. However, we express below our criticisms and reservations regarding some of the consequences of the reform program.

The reduction in the number of court buildings has undoubtedly increased travel and associated cost for parties in proceedings before the Magistrates’ Courts. The impact disproportionately affects those in lower socio economic groups. Closure of courts has impacted on the local nature of dispensing justice within the affected community. Disincentives to the attendance of defendants or witnesses interfere with the rule of law.

There is little doubt that court closures have greatly reduced the ability of courts to deal with work in a reasonably prompt manner.  It is now normal to face the following issues:

* Non CPS matters in the Magistrates’ Courts listed in lists of seventy or more cases, to be completed within three hours.  There is no prospect of the court making substantive progress with any of those matters.  The cost to the prosecuting authority and the (usually privately funded) client of these adjournments is enormous, and far outweighs the savings to the courts. For example, a client might pay private fees for a plea in mitigation, only to have to fund further hearings due to the case being adjourned.  Complaints to the courts about the situation receive the response ‘listing is a judicial decision, and so there is no right of compensation’;
* Road Traffic Act offence trials listed in very busy courts, where they are given ‘low priority’ and are regularly adjourned again costing the defendant and parties;
* It is common place for Crown Courts to be unable to accommodate trials within six to nine months of the first hearing. Trials are perpetually taken out of ‘warned lists’ and put back for three to six months.  In the meantime, defendants and witnesses’ lives are on hold.

At the same time, the quality of the court staff continues to deteriorate.  It is virtually impossible to obtain a sensible response from the current administrative staff.  The resources of parties are expended in resolving court administrative errors, and explaining what needs to be done to correct them.  This cost is passed to the client, or the taxpayer.

What is needed is a thorough review of the way courts operate.  It may well be that centralisation of some tasks is sensible, but on the whole it leads to a deterioration in the quality of decisions.  The courts have become slaves to targets with regard to sitting hours, the number of effective trials and the number of hearings a case takes to completion.  There needs to be scope for sensible decisions about listing practises to be taken locally.

In the West Midlands cuts to police funding and the rationalisation of custody suites has resulted in unintended consequences. Waiting times for those detained pending investigation have soared such that a period of 17 hours in custody for investigation of minor offences is common. The contact between custody officers and investigators has become disjointed. The restriction of the use of bail has simply been replaced by suspects waiting months “released under investigation” to know the outcome of the process. Whilst they may not be subject to requirement to attend to answer bail or their liberty restricted by conditions they are as subject to the stress caused by lack of resolution as under the former system where suspects spent protracted periods awaiting decisions on bail.

We share the concerns expressed to the Justice Committee by The Law Society and Transform Justice in relation to the potential for proposed changes to undermine the quality of justice and impact on the breadth of access to justice in England and Wales. We will amplify our key concerns below.

The apparent pressure on courts to resist adjournment of cases has led to a rich vein of case law. Litigants in person report being given the impression that defence of minor proceedings is considered an inconvenience. We are not satisfied that the summary courts adequately cater for litigants in person. The position has been exacerbated by the relative paucity of disclosure in the initial stages of the summary case. Abbreviated disclosure commonly consists of a case summary written by the investigator, not an impartial observer of the case, and contain inaccuracies. It is common place to find the defendant’s account in response to allegations of offences against the person summarised to an acceptance of contact having been made, without apparent understanding that their response raises private defence. This is a common example reported by prosecutors and defence practitioners. We are concerned that enlargement of the online entry of plea and sentencing will fail to identify such errors and lead to unjust outcomes.

Although we welcome digital initiatives some recent examples continue to produce as many problems as they solve. Commonly the issues arise from the need of secure access by interested parties and protection of the sensitive data retained. The Egress system for provision of video footage and large file transfer from the prosecution to defence has not been a complete success. There continue to be issues with access to material and delay in posting of relevant material. Similarly access to digital audio files containing suspect interviews is provided in a haphazard manner. It has been necessary to make representations to ensure that file access when sent identifies the relevant case rather than the sending of a generic link.

There is room to improve the communication afforded by use of the Digital Case System (DCS) implemented for Crown Court cases. The notification system is poorly designed and whilst the defence can request items are sent to the prosecution via the site that facility does not stretch to other parties. As a consequence there is a need for duplication in electronic transmission of secure information by e-mail as well as posting to the case file. There is room for improving the efficiency of communication between parties utilising DCS.

Whilst there are clear benefits to the digital change program introduced it has had unintended consequences for practitioners. Many of the changes and proposed changes have caused significant increase in the costs incurred by firms of Solicitors and individual barristers due to required investment in technology.

**What are the effects on access to justice of court and tribunal centre closures, including the likely impact of closures that have not yet been implemented; and of reductions in HMCTS staffing under the reform programme? For users, how far can online processes and video hearings be a sufficient substitute for access to court and tribunal buildings?**

We refer to our reply above regarding the no doubt unintended consequences of court and police station closures. The inequalities arising disproportionately impact on court users in rural areas.

The defence community has embraced the introduction of the Digital Case System. The service of disclosure digitally has undoubtedly overcome previous issues with regard to the stage of service in contested cases. However, there is not a level playing field for firms, with many unable to invest in significant improvements to internal IT and processes due to the stagnant funding position. There is the clear potential for the Common Platform to similarly streamline summary proceedings.

We are concerned by the proposed roll out of the presently limited process for online entry of plea and imposition of penalty. The current process, which may be suitable for the lowest level offending, subject to the Single Justice Procedure is not fit for use in more complex or serious cases. We share concern that online processes are not utilised by all in society. Defendants have no access to publicly funded legal advice and are at risk of entering pleas of convenience resulting in injustice. There remains a community of disabled, disadvantaged and non-IT literate defendants who are excluded from access to these systems. We are not satisfied that HMCTS has prepared for a satisfactory system to enable online “conversation” with litigants in person utilising an online process, as would take place in court. In our experience expediency outweighs the interests of justice when defendants appear as litigants in person and we have witnessed advice from Justices Legal Advisers in which pressure was put on defendants to make progress with cases when they were clearly lacking in understanding, to plead guilty when defences had not been identified.

There is risk that the public, used to online transactions for household purposes, will feel an expectation to respond via online services. In instances where the ramifications are only later understood cost savings will be lost in the appeal process, or to greater detriment inappropriate convictions will stand. Litigants in person often do not understand the complexities of the law, the consequences of conviction, how to argue for alternative resolution of cases, identify statutory and common law defences nor do they understand the statutory framework of the sentencing guidelines and mitigating features. HMCTS has provided no detail of how the proposed online “conversation” with litigants in person will be conducted. In view of our reservations regarding the extent to which litigants in person are cared for in live proceedings we have no faith that online processes will prove more robust.

The use of live video link technology has assisted witnesses to give evidence with a level of protection from having sight of other parties. There are benefits to the quality of evidence as envisaged by the legislation providing for “special measures” to be utilised by the courts. However there are also disadvantages. Practitioners report that witnesses can often appear distant from the court process and that their evidence can appear depersonalised. This is particularly concerning in cases involving emotive offending, such as sexual offending or in cases involving children. Although witnesses broadly support the measures we are keen for there to be research into the effectiveness of the use of live video links and impact on the acquittal/conviction rate. We are not aware that any specific study has been undertaken. This may be an area in which the Justice Commission could commission or encourage research to ensure that there is better understanding of the jury’s perception of the cogency of evidence delivered by video link.

West Midlands Police and HMCTS undertook a pilot in which officers were to give evidence remote by live video link from police stations. The aim was to cut court waiting time, enable officers to continue with other duties and yet give evidence. In one infamous instance the misgivings of the defence were realised when via the live link officers could be heard coaching a police officer witness who had not yet given evidence. It was apparent that the remote location of the officers meant that policing their contact with one another was outside the control of the CPS.

The use of live video link facilities provides efficiency to the courts and Prison service but it does not serve defendants well. Prisons by necessity must limit the availability of video conferencing and the open time in which they can link to the court. Such hearings are commonly listed at the outset of long lists of cases pending sentence, plea and case management or other interlocutory stages. Courts and by extension all parties are therefore confined to limited time frames. The key area which is squeezed is the time allotted to consultation with the defendant.

Live video link facilities are a poor substitute for face to face contact with defendants, particularly where they are affected by disability, poor mental health, drug/alcohol dependency, youth or involvement in complex cases. There is no facility to share documents or to give other than a verbal update on the stage of disclosure. A proportion of defendants object to being denied the option of direct contact with their lawyer. Video link production at the PTPH stage may comprise the first meeting of the defendant with their instructed advocate. It can prove difficult to build a rapport and inspire confidence in the defendant by live video link.

The booths provided at the court and prison are often not sound proofed giving rise to concerns about confidentiality. That in turn may cause defendants to be loathed to discuss sensitive cases. Some courts (including Birmingham Crown Court) endeavour to facilitate longer conference time frames but by necessity those are limited in any court session. One of the greatest difficulties arises from there being no facility to have a further conference with the defendant following the hearing. Experience indicates that defendants (whether in person or produced by live link) may understand a limited amount of what is discussed at court. The Judiciary and Advocates often use language impenetrable to the defendant, despite best intentions, due to the need to conduct robustly case managed but brief hearings.

As a consequence we raise our concern that the desire to improve efficiency can result in limited opportunities to discuss the case. This may impact on the likelihood of the defendant entering a guilty plea where initial indications suggest a strong prosecution case. Where defendants lose credit as a consequence justice is ill served. Conversely practitioners report instances where defendants, frustrated with the process, have entered what appear to be equivocal pleas or pleas of convenience. The Advocate is unable to obtain signature to a draft basis of plea or endorsement to the brief when such instances arise.

Dr Jessica Jacobson (Director of the Institute of Criminal Policy Research, Birkbeck, University of London) has undertaken a study of the live video link process and the apparent disengagement of defendants. It is key to avoid the use of systems which create a video conveyor belt of defendants. We understand that in a 2010 study commissioned by the Ministry of Justice a higher level of unrepresented defendants were found among those produced by video link than in person. One cause is no doubt that Advocates appearing to represent defendants produced by video link are not able to obtain the necessary signature to the client declaration required to submit an application for a Representation Order (legal aid).

Defendant’s report frustration at being silenced if they interrupt the process, the court having the means to mute the microphone at the defendant’s location such that they are not heard at court. Although the facility exists for the defendant to consult in private with their Advocate using a telephone located at the back of the court room a confidential conversation can only be achieved by clearing the court. Judges and other parties in proceedings are understandably loathed to allow interruption during often overwhelming court lists. Further difficulty arises where the defendant’s first language is not English, with interpreters ordered to be present at court and interpreting remote from the subject of the conversation.

The defendant experience suggests that too often they feel like silent spectators observing the process when paradoxically they should be at the centre of that process. There are barriers to engagement including the complexity of language, formality and ritual of the court, perceived camaraderie of the Advocates and vulnerabilities of the defendant which limit comprehension. There remains grave risk that defendants produced by live video link exhibit at best passive acceptance without real comprehension of the decisions they are making. Although defendants often express the wish not to be produced at court we are concerned that reflects passive acceptance on their part, a desire to avoid the unpleasant trip in a cell van, rather than to better engaged with their case. Dr Jacobson identified that defendants may take proceedings less seriously, which can impact on their behaviour and consequent judicial decision making.

A Recorder attending the recent conference on technology in the CJS held at Keele University cited his training from fellow Judges that he should never imprison a defendant he could not look in the eye. Whilst anecdotal the increasing use in sentencing defendants by live video link has the potential to impact on the sentence passed by the court. There is a risk that it has less impact for the judiciary to imprison a person from whom they are remote.

There is an argument that enabling more profound engagement with the criminal process is as desirable as making savings through IT led efficiency drives. Dr Jacobson has raised the lack of research in this area. We encourage the Justice Committee to consider the need for better evaluation of the impact of the proposed changes to the CJS.

One of the concerning consequences of utilisation of live video links is the normalisation of the approach to communication. In a case pending trial a Judge at Birmingham Crown Court recently ruled that the defendant could appear throughout the trial by video link. That decision was made in the context of his having been diagnosed with a health condition highly contagious and which would place court users at risk. The court did not instruct an assessment of his ability to cope with the rigours of appearing on live link or consider the broader consequences with regard to how the jury might perceive his health. Defence reports have identified the defendant to be, in the view of a leading consultant in the field, unfit to stand trial in the sense of his ability to concentrate, follow proceedings and provide ongoing instructions. This being a measure of his wellness as opposed to the usual measure of his psychiatric fitness. The use of live video link facilities for a patient undergoing inpatient treatment, suffering from a life threatening illness were no doubt not what Parliament had in mind when implementing primary and secondary legislation to allow for live video links to the court. It may appear to the Justice Committee astonishing that in a live case the defence would find the necessity to argue that such an approach was contrary to the right of the defendant to have a fair trial enshrined in article 6 by the Human Rights Act.

We draw to your attention the recent practice direction issued by the Recorder of Birmingham which relates to the use by Counsel of video link facilities to conduct hearing remote to the court. It would appear that Counsel have made use of the facility to link to the court to overcome the expense of travel and limitations of funding. The court has limited resources in terms of time for links and means to facilitate these requests. As a consequence they are now only permitted in extremis as priority must be given to prison to court links.

The broader availability of facilities to link to prisoners could assist Solicitors and Barristers involved in cases. However, many are put off by the poor facilities available to courts, which are not appropriately sound proofed. It is not possible to link to all prisons using the available booths as some prisons do not facilitate live video link communication either through lack of staff or lack of link facilities. HMP Wormwood Scrubs facilitates live video link by Probation Officers but not the defence community.

**Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication, with:
    a.   Judicial office holders at all levels of seniority?
    b.   The legal professions and the advice sector?
    c.   Other relevant stakeholders?**

We are not able to comment in relation to groups a) and c) above. Legal professionals report that they have not felt consulted but have been presented with the changes announced in the paper “Transforming Our Justice System” (2015) authored by the Lord Chancellor, Lord Chief Justice and Chair of the Tribunals

It remains a concern that significant changes to the CJS have not been debated on the floor of the House of Commons but implemented by secondary legislation not submitted to public scrutiny. The Prisons and Courts Bill 2017 lacked parliamentary scrutiny due to lack of time and was mothballed due to the General Election. The rule of law requires significant change to legislation should be made through primary legislation, properly debated, not through judicial amendments to the Criminal Procedure Rules or via the Practice Directions issued by the judiciary.

**Have the Ministry of Justice and HMCTS taken sufficient steps to evaluate the impact of reforms implemented so far, including those introduced as pilots; and have they made sufficient commitment to evaluation in future?**

The Justice Committee’s earlier report indicated that HMCTS and the Ministry had not taken sufficient steps. The recommendations to report in further detail by January 2019 are noted.

Multi agency discussion of the issues has been stymied by the death of Criminal Justice Boards and Area Delivery Groups in many areas of England and Wales. Court User Groups have disappeared in many summary courts, though have been retained in Crown Courts. In some areas the criminal law committee meetings of Local Law Societies remain the last bastion of multi-agency meetings to which the defence have access. We are concerned by the practice in some areas to invite the Legal Aid Agency to represent the interests of defence practitioners, which in our view is not an appropriate role for the Agency.

It is telling that the Criminal Justice System Integration Board empanelled by HMCTS seeks the views of Police, HM Prison and Probation Services, CPS and Legal Aid Agency but not representative groups for Solicitors and the Bar. An example of the commonplace failure to consult with the defence as an integral part of the criminal justice system. It is common for practitioners to learn of local “protocols” existing between HMCTS and the CPS implemented with consultation with the defence. Meetings are arranged to seek “defence buy in” once central decisions have been made in their absence.

Practitioners have suffered a lengthy period in which their responses to consultation issues by the Ministry of Justice, Legal Aid Agency, Solicitors Regulation Authority and other regulatory bodies appears to have been ignored. Practitioners coined the phrase “Nonsultation” indicating their perception of the heed paid to their input. There is an appearance of consultations issued with very limited time frames and in which representations of Local Law Societies rather than being accepted as representative of the membership are counted as single responses (in which context Birmingham Law Society represents the interests of over 5000 members).

We share the concern of the Public Accounts Committee expressed in its publication “Transforming courts and tribunals” dated 16 July 2018 that there is a lack of clarity regarding how the Ministry of Justice has set its priorities for expenditure. The Law Society has advised of the impending crisis facing the criminal justice system as a result of the ageing demographic of duty solicitors. Practitioners have warned of the impact of cuts to legal aid in terms of scope and fees for decades. Those warnings have gone unheeded by Government such that there is now a crisis in recruitment evidenced by the paucity of young entrants to positions within the criminal justice system. The interest of students in the criminal justice system is not matched by applications or qualification of young solicitors, barristers and paralegals in the sector. The Law Society warns of a shortage of duty solicitors in three to five years in many areas of the country. Even in the main metropolitan areas the lack of young solicitors entering the field is marked, such as in Birmingham where 42% of duty solicitors are aged over 50. The situation is considerably more pronounced in rural areas of the country which are also disproportionately affected by other measures arising from the transformation program. The £1.2bn package of reforms intended to save £256m per year constitutes a significant investment of the Ministry’s budget at the expense of other areas which are in dire need of funding.

The view of practitioners is that the prison system, police, Crown Prosecution Service, Probation Service are under resourced with resulting impact on the effectiveness as well as the efficiency of the criminal justice system. Those inefficiencies impact hardest on an already stretched defence community which is penalised by waste elsewhere in the system, over which it has no control yet seemingly always criticised for delay when seeking to balance the requirements of a just legal system. There is urgent need to review the funding of solicitors and barristers acting for defendants to resolve the crisis in recruitment and ensure parity of arms within the criminal justice system.

The looming crisis in succession adds to a broader concern regarding the impact on the future diversity of the profession. The vision of the authors of “Transforming Our Justice System” (2015) was that the “*judiciary and profession should be drawn from the widest possible pool of talent which includes women, those from the BAME community and those from a socially disadvantaged background*.” That aim was indicated as central to upholding public confidence in the system and judiciary. The current parlous state of investment undermines that vision and ambition, particularly in terms of entry to the profession for those from socially disadvantaged backgrounds and the BAME community.

In conclusion our view is that there is considerable work to be done to improve the process of consultation with the community we represent.