

Mishcon de Reya LLP – written evidence (CIC0023)

House of Lords Constitution Committee

Inquiry into the Constitutional Implications of COVID-19

INTRODUCTION

1. Mishcon de Reya LLP makes this submission on the impact of the changes to the operation of the civil justice system to the courts' contribution to climate change and air pollution.
2. The Constitution Committee's inquiry's stated aim is to explore the impact of the pandemic, and the Government's response to it, in relation to the ability of Parliament to function effectively and hold the Government to account, the operation of the courts, and the use and scrutiny of emergency powers. It notes particularly significant constitutional implications, as well as health, social and economic ones, including in the operation of the courts.
3. The Constitution Committee's call is for evidence on the workings of the courts and tribunals in response to the pandemic and what the future of the justice system might look like as a result.
4. At Appendix 1, we enclose our submission (the "**MdR CJC Submission**") on this subject to the Civil Justice Council's Rapid Consultation on the impact of COVID-19 measures on the civil justice system (the "**CJC Consultation**") and the CJC's report (the "**CJC Consultation Report**"¹). The CJC Consultation Report identified seven urgent priorities for evaluation, including:
5. ***D7 Priorities for evaluation: The impact of remote hearings on carbon emissions***
6. *The impact of remote hearings on carbon emissions should be studied, particularly in relation to large international commercial disputes where parties are currently required to travel internationally to attend in-person hearings.*
7. The impact of these measures on the courts' contribution to climate change and air pollution are matters of significant constitutional, health, social and economic implication. Accordingly, we make the below brief submission to ensure the issue is brought to the attention of the Constitution Committee.
8. In our submission, the civil justice system should look like, and be, the paradigm of an institution aligned with the Paris Agreement target to limit global warming to well-below 2°C above pre-industrial levels and pursue efforts to limit warming to 1.5°C, as well as minimising air pollution.

CONTEXT

9. As set out in our MdR CJC Submission, COVID-19 is the largest international crisis the world has faced since the Second World War. The Director General of the UN, in his Earth Day speech, called for focus in the response to COVID-19 to address an "*even deeper emergency – the planet's unfolding environmental crisis.*"
10. On 27 June 2019, the UK became the first major economy in the world to pass laws to end its contribution to global warming by 2050. The target requires the UK to bring all greenhouse gas emissions to net zero by 2050.
11. Currently, the UK's civil justice system is a source of considerable greenhouse gas emissions. These are both direct – emitted by the courts – and indirect – those

¹ <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>

which court users are compelled to incur during the litigation process. The MDR CJC Submission details a number of these. This includes travel to and from the Courts (including international travel) and the reliance on paper bundling.

12. During the UK's lockdown period, courts and court users alike demonstrated an incredible adaptability in adjusting to remote hearings and electronic bundling. Whilst remote hearings will not be appropriate in every case (in particular any hearing involving cross-examination is likely to be more effective in person), the short-term changes necessitated by the COVID-19 crisis may have a significant positive impact in reducing greenhouse gas emissions and air pollution if made permanent.

THE CONSULTATION'S REPORT

13. The CJC Report identified the "*important role that the widespread adoption of remote hearings could play in reducing carbon emission*".²
14. In its conclusion, the Rapid Review identified seven Priorities for Evaluation. One of these Priorities was to consider the impact of remote hearings on carbon emissions, particularly "*in relation to large international commercial disputes where parties are currently required to travel internationally to attend in-person hearings*."³
15. At the House of Lords Select Committee on the Constitution on 10 June 2020, Dr Natalie Byrom (the lead author of the CJC Report) described the "*transformative*" effect technology and remote hearings could have, including that "*it could have positive impacts on carbon emissions, for example, if fewer people were travelling to court to participate in what are essentially procedural hearings*."⁴ There is also a public health issue to consider given the harmful effects produced by high levels of air pollution.
16. Since the CJC Report was published, we have started scoping an evaluation process, and have contacted the authors of the Report and the Customer Director of HM Courts & Tribunals Services.

AIR POLLUTION IMPACT

17. Since we made our Submission, a number of organisations have carried out research demonstrating the general and radical impact lockdown measures have had on carbon emissions and levels of air pollution.
18. As identified in our Submission, the traditional approach to court hearings requires frequent travel to and from the Courts for parties, firms, barristers and witnesses, not to mention court staff. Much of this travel is necessarily by vehicle and by definition to and from the courts' steps. The air pollution generated by this travel poses two significant threats: to the environment and to public health.
19. During lockdown, the reduction in vehicular travel produced a demonstrable and significant impact on pollution levels:
 - According to one study, nitrogen dioxide levels fell by 37% in central London during the evening rush hour (5-8pm) as compared to pre-lockdown levels;⁵
 - Another study reported that nitrogen dioxide levels fell by 43% across urban areas of the UK as compared to the levels recorded in the previous five years.⁶

² Paragraph 8.4, CJC Rapid Review

³ Paragraph 9.21, CJC Rapid Review

⁴ <https://committees.parliament.uk/oralevidence/501/html/>

⁵ <https://www.breathelondon.org/new-breathe-london-data-covid-19-confinement-measures-reduce-london-air-pollution/>

20. Whilst we have not yet identified a study looking specifically at the pollution levels attributable to the reduction in travel by court users, it is encouraging to note that significant positive change in levels of air pollutants occurred almost simultaneously with the reduction in traffic.
21. However, as lockdown restrictions have eased pollution levels are reported to have rebounded.⁷ This indicates the narrowing of window of opportunity to capitalise on change imposed by COVID-19 to make lasting difference. It also demonstrates the fundamental need for systemic change in the organisations that drive vehicular travel, if local air pollution and emissions are to be reduced.

AREAS FOR ENQUIRY AND NEXT STEPS

22. Following publication of the CJC Report and identification of the Priorities for Evaluation, we have identified a number of lines of enquiry we think it would be worth exploring in order to further analyse the carbon impact of the courts. We envisage this including data collection and analysis regarding travel by court users and the volume of paper unnecessarily printed each year.
23. We would welcome a systemic review of civil and criminal justice systems in order to identify practical measures to address this important issue. We would also welcome the opportunity to contribute to this review.
24. We note that the Constitution Committee's inquiry has two strands, including Parliament, as well as the courts. While this submission is restricted to the impact of the pandemic and the government's response to it on the courts, we note that many of the points raised here and in the MdR CJC Submission are likely to be relevant to Parliament.

Mishcon de Reya

20 August 2020

Appendix 1

Rapid Consultation: Mishcon de reya llp's submission on the IMPACT OF CURRENT MEASURES UNDER COVID-19 TO THE civil justice system'S CONTRIBUTION TO CLIMATE CHANGE AND THE uk's commitment to nET-ZERO emissions.

⁶ <https://www.ncas.ac.uk/en/18-news/3069-pollution-down-by-40-in-cities-during-covid-19-lockdown>

⁷ Centre for Research on Energy and Clean Air report, Hubert Thieriot, Lauri Myllyvirta

INTRODUCTION

25. Mishcon de Reya LLP makes this submission on the impact of the changes to the operation of the civil justice system to the Court's contribution to climate change and air pollution. This submission is made in response to the Rapid Consultation on the impact of COVID-19 measures on the civil justice system (the Consultation).
26. The independent Civil Justice Council (CJC) commissioned review's stated aim is to:
 - provide an overview of the operation of current measures and offer practical recommendations to inform the ongoing response to COVID-19; and to
 - provide useful ground work for any future wider review of the use of remote hearings, identifying areas where further evidence may be needed.
27. Sir Terence Etherton, The Master of the Rolls, has explained: "The evidence collected by this review will be invaluable in shaping the way forward for the civil justice system, both immediately and in the longer term."

CONTEXT

28. COVID-19 is the largest international crisis the world has faced since the Second World War. The Director General of the UN, in his Earth Day speech, called for focus in the response to COVID-19 to address an "*even deeper emergency – the planet's unfolding environmental crisis.*"
29. On 27 June 2019, the UK became the first major economy in the world to pass laws to end its contribution to global warming by 2050. The target requires the UK to bring all greenhouse gas emissions to net zero by 2050, compared with the previous target of at least 80% reduction from 1990 levels.
30. The UK's national target derives from the global framework designed to limit global warming to well below 2°C and pursuing efforts to limit it to 1.5°C, set out in the 2015 Paris Agreement. Announcing the new law, Energy and Clean Growth Minister Chris Skidmore said: "*[w]e're pioneering the way for other countries to follow in our footsteps driving prosperity by seizing the economic opportunities of becoming a greener economy.*"
31. The Greening Government Commitments 2016 to 2020 policy paper states that the government will reduce greenhouse gas emissions by at least 43% from a 2009 to 2010 baseline (in line with individual departmental targets). The Ministry of Justice (MOJ)'s stated ambition is to achieve and if possible exceed a 38% carbon reduction by 2019–20.⁸
32. From a preliminary review, it appears there is significant scope for the administration of civil justice in England and Wales to play a part in the reducing the contribution to climate change. The measures adopted by the Court system during the COVID-19 crisis – and in particular the prevalence of remote hearings – have brought into focus some of the opportunities for lasting change to reduce carbon emissions. Where these emissions result from avoidable vehicle emissions in towns and cities in particular, the contribution to air pollution could also be reduced.
33. The courts of England and Wales play a leadership role in civil justice systems internationally. By ensuring the civil justice system's contribution to climate change is measured and monitored, and that any steps to improve it contribute expressly to the achievement of the UK's zero emissions target, it will play an

⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/692523/carbon-energy-reduction-strategy.pdf

important role in the contribution that the administration of justice can make to tackle climate change.

34. We understand that Embedding Sustainable Development is a shared responsibility within the MOJ; and that the Chief Operating Officer acts as MOJ's Sustainability Champion and chairs the Senior Sustainability Board, responsible for developing and overseeing the implementation of the MOJ's sustainability strategy and supporting policy, standards, rules and guidance.

STRUCTURE

35. For the sake of adopting a standardised approach, we have set out our submissions, inspired by the three "scopes" identified by the Greenhouse Gas Protocol Corporate Standard.⁹ In these submissions we consider:
- Scope 1 – Direct emissions from sources that are owned or controlled by the Courts, for example, emissions from combustion in owned or controlled boilers, furnaces, vehicles, etc.
 - Scope 2 – Emissions from the generation of purchased electricity consumed by the Courts.
 - Scope 3 – Emissions made as a consequence of the activities of the courts, occurring from sources not owned or controlled by the courts. For the purposes of these submissions, we have included here the emissions of litigants and their representatives, arising from their engagement with the Courts.
36. Although we identify Scopes 1 and 2, as a law firm engaged in running litigation for clients, our submissions mainly focus on Scope 3.
37. These submissions are not intended to be comprehensive in terms of the scope of emissions, or their size. They are meant to highlight some of the key opportunities for improvement, which have been highlighted by the current measures. We refer to case studies and data collected by this Firm.

HEARINGS

38. In making these submissions, we are not advocating a 100% remote hearing environment. There are many, many advantages of litigants being in the same room. Human interaction has an important role to play in administration of justice. For example, we do not accept that cross examination can always fairly be done remotely. There are particular needs in specialist courts which mean that hearings "*could not be conducted fairly or properly*" without a physical presence in a courtroom, such as those identified in the judgment of Sir Andrew McFarlane in *P (A Child: Remote Hearing)*, Re [2020] EWFC 32. There are the thousands of human interactions – from the judge to the Court, between opposing teams of lawyers, between litigants etc that cannot be replicated in a virtual environment.
39. In our view, the civil justice system should include decarbonisation, climate and air quality considerations at the heart of this consultation. While we consider that the ability for remote hearings has an important role to play in this, in our view, the ideal would be climate neutral in person hearings as the norm – at least for trial and substantive applications.

SCOPES 1 AND 2:

The requirement for Real Estate

⁹ https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf

40. The Ministry of Justice has the second largest estate in government. The current measures, including the use of remote hearings, raises the question as to the extent to which the civil justice system needs and will continue to need its existing network of buildings to act as the physical arena for the administration of justice.
41. *Real estate is a significant contributor to climate change.* The real estate sector is identified as the greatest consumer of global energy, consuming over 40% of global energy annually.¹⁰ 20% of global greenhouse gases emissions are identified as originating from buildings.¹¹ The Court estate comprises buildings of varying ages and levels of energy efficiency.
42. *Remote hearings create the possibility of reducing the amount of real estate required.* Whilst it may be difficult to imagine the Court system entirely devoid of buildings, the past several weeks have demonstrated unprecedented adaptability on the part of the Court and court users to allow hearings – including trials – to take place remotely. If remote hearings remain prevalent after the current COVID-19 crisis subsides, this could lead to savings of court space; as well as a reduction in the need for other built environment required for and ancillary to the administration of justice, including offices, waiting and consultation rooms and washrooms. Whilst recognising that physical buildings will continue to have a central role to play in access to justice, the flexibility offered by technology should mean that significant efficiencies could be realised – building on the reported low utilisation rates of some real estate pre-COVID-19. A reduction in the Court estate could not only have cost efficiencies, but could have a significant impact on the justice system's carbon footprint.
43. *Retention of the most efficient space.* A reduction in the court's real estate would also allow for prioritisation and investment in the most energy efficient and lowest emitting property.

ENERGY

44. Information technology systems are, of course, not emissions free. Some are very energy intensive. A detailed review would be needed to determine the cost/benefit for emissions and climate impact of permanently adopting these technologies in lieu of the use of physical real estate and paper. However, it seems evident to us that the permanent and extensive adoption of information technology under the current measures presents a significant opportunity to reduce the Courts' emissions from the generation of purchased and consumed electricity.

SCOPE 3: INDIRECT EMISSIONS – PARTIES AND PAPERS

45. The current measures highlight the very large level indirect emissions arising from the civil justice system. These are emissions that litigants and their representatives are obliged by the civil justice system to create. They can be characterised as the direct climate cost incurred by a party to litigation.
46. In these submissions, we highlight in particular two areas by way of example.

Travel to and from Courts

¹⁰ http://www3.weforum.org/docs/GAC16/CRE_Sustainability.pdf

¹¹ http://www3.weforum.org/docs/GAC16/CRE_Sustainability.pdf

47. The reliance on physical hearings necessarily involves significant travel to and from Court. The cumulative effect of short but frequent taxi journeys on carbon emissions and on air pollution is significant.
48. London's air pollution levels, especially those of Nitrogen Dioxide, are reported to have decreased by more than a third during lockdown.
49. The London offices of the top 40 litigation firms¹² are an average of 1.27 miles from the Rolls Building. Even that short journey takes a significant toll on emissions, particularly when taken by taxi as it so often is because of the necessity for voluminous paper bundles. That short journey by taxi equates to 515g of CO₂ emissions each way – *ie: in excess of 1kg CO₂ for every return journey.*¹³
50. This figure is important when one considers the number of such journeys that every single claim in the Rolls Building alone requires (even accounting for those who walk, use public transport, or share taxis):
- For each party;
 - For each instructed firm;
 - For each instructed barrister (including clerks); and
 - For each hearing.
51. In one high value fraud case this Firm has been involved in over the past two and a half years, there have been over seven separate hearings, each occasion requiring travel to Court, often by taxi because of the voluminous bundles required. With three different sets of solicitors involved, those hearings equate to a minimum of 21 return journeys – before factoring in Counsel, Counsel's clerks, witnesses, clients and multiple-day hearings.
52. By way of further example, R (on the application of Miller) v the Prime Minister [2019] UKSC 41, whilst atypical in many ways, demonstrates the scale on which small journeys add up. Whilst the Mishcon team walked and used public transport as much as possible, it is estimated that numerous short taxi journeys added up to c. 20km – producing an estimated 5.11kg CO₂ emissions. That is without taking into account travel by other parties, not to mention significant press and public attendance, and additional police and security presence at the Supreme Court.
53. The lockdown imposed by COVID-19 has necessitated an unprecedented degree of adaptability, and this has had the positive impact of limiting emissions attributable to Court visits. Of 12 remote hearings Mishcon de Reya has been involved with over the last six weeks, it is estimated that 115 attendees participated in hearings remotely, who would otherwise have travelled to Court.¹⁴ A significant proportion of the travel avoided would have been local travel – i.e. the relatively short distance between the solicitor's London office and the High Court. As suggested above, even that local travel has a significant carbon footprint.¹⁵ However, some hearings would have involved travel to Courts elsewhere in England and court users travelling from even further afield.
54. Although COVID-19 has precipitated the prevalence of video or telephone hearings, this is not the first time such facilities have been used to conduct justice. The CPR has long acknowledged the value of video conferencing to avoid unnecessary international travel for overseas witnesses, acknowledging that "its use for the taking of evidence from overseas witnesses will, in particular, be likely to achieve a material saving of costs".¹⁶ As well as saving cost and time, there is

¹² As according to Chambers and Partners:

<https://chambers.com/guide/uk?publicationTypeId=1&practiceAreaId=717&subsectionTypeId=1&locationId=1814>

¹³ See London Transport CO₂ emissions excel documents. Private Transport, Taxi, 1.27 mile journey <https://tfl.gov.uk/corporate/transparency/freedom-of-information/foi-request-detail?referenceId=FOI-0880-1819>

¹⁴ Attendees includes instructing solicitors on both sides, Counsel, parties and witnesses.

¹⁵ On the basis that the distance from MdR offices to Rolls Building is 1.2km, and an estimate 3-4 people per taxi, that equates to 9.69kg of CO₂ saved

a significant carbon saving in avoiding plane travel. Aviation travel accounts for 2% of global human-induced CO₂ emissions.¹⁷ In the fraud case referenced at 6.3.5, the Claimants intended to call two witnesses who would have travelled to the UK to give evidence. According to the calculator from the UN's civil aviation body, the International Civil Aviation Organization (ICAO), a premium-class return flight from London to New York emits approximately 1.34 metric tonnes of CO₂ per passenger.¹⁸

55. As the CPR acknowledges, there is no reason why savings should just be limited to overseas parties and witnesses – savings could also be made by use of video-conferencing "for taking domestic evidence."¹⁹ The use of video conferencing facilities can also be useful for parties who are not providing witness evidence but nevertheless wish to follow a trial or interim hearing.
56. Encouragingly, complex trials have taken place remotely during lockdown. But the case is even stronger for interim hearings to take place remotely. The CPR indicates that "interim applications, case management conferences and pre-trial reviews with a time estimate of no more than one hour" should be conducted by telephone, unless the Court orders otherwise.²⁰ In reality, however, the Court does frequently order otherwise or turns an application on the papers into an in-person hearing.
57. Avoiding unnecessary travel to Court clearly has a beneficial impact in reducing the carbon emissions attributable to car, train and aviation travel. But there are further indirect benefits. Minimising the waiting time at Court minimises the impact of Court facilities and a reliance on takeaway food and coffee (almost invariably involving single-use plastics and disposable coffee cups). The listing of multiple applications simultaneously at physical hearings also increases the risk of applications going part-heard, requiring further travel to Court on another occasion.

Bundling

58. The reliance on paper bundles throughout the litigation process has a number of detrimental effects to the environment. Lockdown has demonstrated that civil justice can continue successfully whilst relying on significantly less paper than usual.
59. The first area of impact is trips to Court to physically lodge papers. The CE-filing system has assisted in reducing paper filings in the High Court. Nevertheless, most cases still involve physical filings. Where a firm is further away from the Court in question, the impact is necessarily higher and the filing often facilitated by courier.
60. The second very tangible area is the volume of paper printed. In one high value fraud case this firm recently acted on, the trial bundle alone exceeded 10,000 pages. Only two copies were printed as it was available electronically via the Opus II system – nevertheless, those two copies generated the equivalent of 2,880 kg of CO₂-e (energy and paper) emissions.²¹
61. This contrasts with the data from remote hearings during lockdown. Of the remote hearings this firm has been involved with, it is estimated that over 21,800 pages were not printed that would in the normal course of events have been printed – this equates to 3,139.2kg of CO₂-e emissions or 981 kg of paper.

¹⁶ CPR Practice Direction 32, Annex 3.2

¹⁷ <https://www.atag.org/facts-figures.html>

¹⁸ <https://www.icao.int/environmental-protection/Carbonoffset/Pages/default.aspx>

¹⁹ CPR Practice Direction 32, Annex 3

²⁰ CPR Practice Direction 32A

²¹ Based on an HP Laserjet – 1,000 pages of A4 printing approximately equal to 144kg energy and paper (CO₂-e) emissions; See HP Carbon Footprint Calculator for Printing <http://h30248.www3.hp.com/cfc/index.html#comprehensive>

According to the US charity Conservatree, 1 ton of office paper (equivalent to 981kg) requires the felling of 24 trees.²²

62. By allowing the filing and service of electronic bundles, this also serves to increase efficiency. A typo or pagination error is far simpler to correct electronically without involving the carbon, cost or time implications of re-printing lots of paper.
63. In taking further steps to see paper bundling as the exception rather than the rule, this could have further positive effects. For example, this could increase the flexibility as to Court staff working remotely, in turn reducing emissions attributable to travel to court and use of building space.

A NEW DAWN?

64. We consider it important that the Courts – and other court users from lawyers to witnesses – recognise their role in contributing to the climate emergency response. COVID-19 has required a level of adaptability many would have previously never believed possible; climate change requires the same adaptability. Whilst recognising that change will likely depend on technology – which in turn requires energy – the current measures demonstrate that immediate reductions can be made in reducing real estate, transport and paper related emissions.
65. This submission is not intended to comprise a comprehensive analysis or roadmap for the courts. We hope we have drawn the Consultation's attention to some of the key factors at play between the Court system and carbon emissions. We encourage the Court to appoint a committee to oversee a systemic and participatory review on reducing emissions in the civil justice system, interfacing with the Ministry of Justice's Estates' Directorate's Carbon and Energy Reduction Strategy and other existing initiatives. We would welcome the opportunity to contribute to such a review.
66. We believe that this review of the measures adopted to address the COVID-19 pandemic presents the civil justice system with a unique opportunity to play a leading role in addressing climate change and meeting the government's commitment to zero-carbon emissions by 2050.

15 May 2020

²² <http://conservatree.org/learn/EnviroIssues/TreeStats.shtml>

