Written evidence from Professor Richard Susskind OBE

1. This note is my response to an invitation to prepare a 'short written submission' in lieu of oral evidence to the Justice Committee in relation to its inquiry into court capacity. Specifically, I was asked to respond to three questions, as laid out below. Although I am President of the Society for Computers and Law and, since 1998, have been Technology Adviser to the Lord Chief Justice, I write here in a personal capacity.

2. The first question is as follows: 'How successful and ambitious has the use of technology been during the pandemic to address court capacity challenges?'

3. In the broadest of terms, relative to other jurisdictions, I believe the court system of England and Wales has responded very well to the Covid crisis. It is clear from Remote Courts Worldwide (RCW - www.remotecourts.org), where we now have around 150 countries represented, that in a small number of weeks, judges, officials and lawyers around the country adapted as swiftly and effectively as their equivalents in any other justice system. There were, of course, teething problems and technical challenges, but the transition to video hearings in England and Wales certainly came about more smoothly than most judges and lawyers would have predicted in February 2020. In a sense, the use of video hearings (and to some extent, but less successfully, audio hearings) has been like a great unscheduled pilot of the use of technology 'to address court capacity challenges' – in so far as capacity in this context means the capacity of physical court rooms and related resources.

4. We can see clearly from RCW that, for certain types of cases, a satisfactory level of court service can be achieved, more speedily and at lower cost, without assembling in court buildings. This is said to be so for many interim, procedural, and interlocutory hearings; routine family matters; small money claims; minor criminal offences; administrative tribunal hearings; and civil appeals. On the other hand, it is clear that for other types of cases – for example, relating to serious crime or sensitive family work – traditional hearings are preferable.

5. However, much more work needs to be done, in my view, to determine what types of cases or issues are best suited to what types of disposal, whether in person, by audio or video, or even on the papers alone. To make this determination reliably, we need to capture more data about cases that have been concluded remotely and make that data available to researchers who can evaluate what has been achieved and what has not. In turn, this evaluation can form the basis of evidence-based policymaking about the future of our courts.

6. Has the use of technology in our courts during the Covid crisis been ambitious? In terms of the scale and speed of change – undoubtedly. However, dropping traditional hearings into Zoom or CVP (Cloud Video Platform) is not of itself a technological revolution. It is no more than the widespread use of videoconferencing in the courts, a possibility that we can trace to the 1980s. There has been a remarkable uptake in the circumstances but of itself the use of video-conferencing does not overcome some fundamental obstacles that self-represented court users face, such as the unaffordability of taking legal action and the unintelligibility of our rules of procedure. In using video, we are still at the foothills of change. Much more radical shifts are required if we are to overcome the challenges of court capacity – see Section 9.

7. The second question is: 'What immediate and longer-term opportunities has the pandemic presented in terms of using technology to address court capacity challenges, and how should these opportunities be seized?'

8. The main opportunity provided by the pandemic derives from a notable shift in attitude. The widespread and generally successful use of video hearings has opened the minds of many judges, lawyers, and policymakers to the possibility of settling at least some disputes in different ways. Many minds indeed have been changed – some fierce opponents of remote alternatives to physical courts have become ardent advocates. The topic of technological change has moved from the edge to the centre of the desks of senior judges and lawyers. When I last appeared before the Justice Committee, there was modest appetite for technological change, not least, it seemed to me, because there was insufficient evidence of the benefits. For tragic reasons, our world has moved on. The conversation has changed. The evidence is now coming in

(if patchily). The question now is not ‘whether we can use technology?’ but ‘to what extent is this possible and desirable?’.

9. If we are to increase access to justice and manage the strain on our court services more effectively, we must both embrace video technology where it has proven to work well but we must also move beyond it to other techniques. One of the most promising solutions is the use of ODR (online dispute resolution) as a kind of ‘front-end’ to our court service, as envisaged in my book, *Online Courts and the Future of Justice* (OUP, 2019), and in work undertaken recently by LawtechUK (https://technation.io/lawtechuk/). Another promising technique, again laid out in my book, is that of asynchronous hearings. Fully operational in the Civil Resolution Tribunal in British Columbia, the idea here is that judges handle cases not in physical or video hearings; nor by hearing oral evidence. Instead, parties submit their evidence and arguments to the judge in electronic form; thereafter, there is some debate and discussion, again online, not unlike an exchange of emails; and the judge delivers a binding decision in the same form. In this way, the court proceedings become asynchronous rather than synchronous (the judge and parties do not need to be available at the same time to participate). I commend this as a powerful way of handling high volumes of low value disputes.

10. There are many keys to seizing the opportunity for the introduction of technology. For the Justice Committee, I think two are particularly important. The first is that if technology projects are to succeed, they should be driven through by leaders and not left to others to progress. Without the unstinting support of our top judges, politicians, lawyers, and officials, we will fail to make the most of technology in our courts. In this context, the support of the Justice Committee itself is important – your enthusiasm and backing could make a great difference. The second key is having a clear vision of what reform and technological change will actually look like. Having reviewed countless court technology projects around the world, I conclude that many falter because of a lack of clarity – technological jargon does not help, nor does opaque project management. It should be clear where a project is heading and progress should be visible to all interested parties, including the Justice Committee.

11. The third question is: ‘What needs to be done as part of the court recovery scheme to future-proof the courts?’

12. I am unsure what is meant by the 'court recovery scheme'. But in my view, it is helpful to think in three time scales. First, from now until we are free from lockdown restrictions, the priority should be to keep our court systems running as effectively as possible and, where needed, to use technology tactically and often on an adaptable *ad hoc* basis. Second, after lockdown restrictions are lifted, we will be faced with the challenge of keeping the court system running while tackling the backlog that has arisen over the past year, and reviewing and, where appropriate, revising the court reform programme in light of lessons learned during Covid. In particular, we should identify and industrialise what has gone well, technologically speaking, over the past year. Third, in the long run, as new and emerging technologies become available, we must expect many further changes to the way we deliver court services. There is no finishing line. In my view, the reform programme represents the start and not the end of the process of bringing our courts into the 21st century.

13. From a technology point of view, it is not possible to 'future-proof' our courts. Our machines and systems are becoming increasingly capable and there will no doubt be developments and breakthroughs in years to come of which we have but a bare glimpse today. It is very hard to plan for as-yet-uninvented systems. Developments in artificial intelligence and virtual reality, for example, may seem science fictional today but I have little doubt they will form integral parts of our court systems by the closing years of this decade. That said, on a practical level, we should certainly want (i) any new systems to be scalable, that is, easily capable of being expanded, upgraded, or made available to large bodies of users; (ii) any new systems to be easily capable of integration with other relevant systems – for instance, of the legal profession and of other parts of the justice system; and (iii) never to be unduly reliant on any technology providers, whether external or internal.

14. Finally, in terms of the spirit of our future work, if we follow most other professions and industries, we will use technology not just to automate but to innovate as well. So far, most (but not all) of our reforms have been directed at *automating* our past practices and processes. In years to come, we will seek instead to use technology in *innovating* - enabling us to work and deliver service in ways that previously were not possible. In this way, we will improve access to justice, and so deliver speedier, less costly, more convenient, and more available court service.

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