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### The Nightingale Court Experiment: Lessons for Access to Justice in a Post-Pandemic World

Natasha Naidu

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Résumé de l'article

La mesure dans laquelle les tribunaux Nightingale ont favorisé l'accès à la justice en Angleterre et au pays de Galles pendant la pandémie de COVID-19 n'a pas encore été analysée dans la doctrine. Les tribunaux Nightingale sont des tribunaux temporaires établis dans des immeubles convertis comme des hôtels de ville, des hôtels et des théâtres, afin de faciliter la tenue de procès et d'audiences dans le respect de la distanciation sociale. Je me penche sur ce sujet en posant la question suivante : jusqu'à quel point les tribunaux Nightingale ont-ils atténué les problèmes d'accès à la justice pendant la pandémie et quelles sont les leçons à tirer de leur expérience pour l'accès à la justice à l'avenir et dans l'ensemble des juridictions? J'explique d'abord qu'à mon avis, malgré leur coût et leur complexité, les tribunaux Nightingale ont permis de freiner l'accroissement des délais pendant la pandémie. J'explore ensuite les leçons à tirer de leur fonctionnement pour ce qui est de l'accès à la justice dans l'ensemble des juridictions et dans un monde postpandémique. Je considère les tribunaux Nightingale comme une expérience sur le plan de la structure juridique, de la justice informelle, de l'adaptation et de la résilience. J'affirme en conclusion que ces tribunaux ont maintenu et préservé l'accès au système judiciaire pendant une période de crise et ont amélioré de ce fait la solidité du système.

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## The Nightingale Court Experiment: Lessons for Access to Justice in a Post-Pandemic World

Natasha Naidu\*

*The literature is yet to consider the contribution of Nightingale Courts to access to justice in England and Wales during the COVID-19 pandemic. Nightingale Courts are courts that have been set up in repurposed buildings, such as town halls, hotels, and theatres, to facilitate socially distanced trials and hearings. I fill this gap by asking: to what extent have Nightingale Courts addressed access to justice concerns during the pandemic, and what lessons do Nightingale Courts hold for access to justice across jurisdictions and in the future? I argue that though costly and complex, Nightingale Courts have helped to prevent a further worsening of delay during the pandemic. Then, I explore the lessons of the Nightingale Court experiment for access to justice across jurisdictions and in a post-pandemic world. I consider Nightingale Courts as an experiment for legal architecture, informal justice, and adaptation and resilience. I conclude that Nightingale Courts have maintained and preserved access to the legal system during a time of crisis and thereby contributed to the resilience of the system.*

*La mesure dans laquelle les tribunaux Nightingale ont favorisé l'accès à la justice en Angleterre et au pays de Galles pendant la pandémie de COVID-19 n'a pas encore été analysée dans la doctrine. Les tribunaux Nightingale sont des tribunaux temporaires établis dans des immeubles convertis comme des hôtels de ville, des hôtels et des théâtres, afin de faciliter la tenue de procès et d'audiences dans le respect de la distanciation sociale. Je me penche sur ce sujet en posant la question suivante : jusqu'à quel point les tribunaux Nightingale ont-ils atténué les problèmes d'accès à la justice pendant la pandémie et quelles sont les leçons à tirer de leur expérience pour l'accès à la justice à l'avenir et dans l'ensemble des juridictions? J'explique d'abord qu'à mon avis, malgré leur coût et leur complexité, les tribunaux Nightingale ont permis de freiner l'accroissement des délais pendant la pandémie. J'explore ensuite les leçons à tirer de leur fonctionnement pour ce qui est de l'accès à la justice dans l'ensemble des juridictions et dans un monde postpandémique. Je considère les tribunaux Nightingale comme une expérience sur le plan de la structure juridique, de la justice informelle, de l'adaptation et de la résilience. J'affirme en conclusion que ces tribunaux ont maintenu et préservé l'accès au système judiciaire pendant une période de crise et ont amélioré de ce fait la solidité du système.*

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\* Research Associate, UNSW Law & Justice; LLM (Hons I) (Cantab); BA (Distinction) / LLB (Hons I) (UNSW). She gratefully acknowledges the Lionel Murphy Foundation for supporting her LLM studies at the University of Cambridge, and Gonville & Caius College for supporting her to present an earlier version of this article at the Socio-Legal Studies Association Conference in 2022. This article was written as part of the Public Law Seminar at the University of Cambridge and she is grateful for the feedback received there. She thanks the two anonymous reviewers for their thoughtful comments and the editorial board of the Windsor Yearbook of Access to Justice. All mistakes remain her own.

## I. INTRODUCTION

The COVID-19 pandemic has been a moment of disruption for court systems worldwide, as courts have made rapid adaptations to meet the demands of the health crisis.<sup>1</sup> Particularly within the context of the initial lockdowns,<sup>2</sup> the first variants of concern,<sup>3</sup> and the rush to develop vaccines,<sup>4</sup> these adaptations have been fast-paced and creative.<sup>5</sup> Courts worldwide have expanded their online and remote hearing capabilities,<sup>6</sup> facilitated hearings on the papers,<sup>7</sup> and reconfigured timetables to account for delay.<sup>8</sup>

In England and Wales, the pandemic has led to a range of adaptations, including increasing remote hearing capacity<sup>9</sup> and closing court estate not suitable for social distancing.<sup>10</sup> Continual adjustments were made as the pandemic stretched throughout 2021, including extended sitting hours,<sup>11</sup> increasing the powers of magistrates,<sup>12</sup> and the introduction of Nightingale Courts.<sup>13</sup> Nightingale Courts are courts that have been set up in repurposed buildings, such as town halls, hotels, and theatres, through Ministry of Justice partnerships with the private sector during the pandemic.<sup>14</sup> Nightingale Courts have been set up to provide socially distanced spaces to hear matters not suitable to be heard online.<sup>15</sup> Nightingale Courts have utilised venues that could not be used for their original purposes during the lockdowns.<sup>16</sup>

<sup>1</sup> See e.g. Tania Sourdin, Bin Li & Donna Marie McNamara, “Court Innovations and Access to Justice in Times of Crisis” (2020) 9:4 Health Policy & Technology 447.

<sup>2</sup> Prime Minister’s Office & Boris Johnson MP, “Prime Minister’s Statement on Coronavirus (COVID-19): 23 March 2020” (23 March 2020), online: <[www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020](http://www.gov.uk/government/speeches/pm-address-to-the-nation-on-coronavirus-23-march-2020)>.

<sup>3</sup> Public Health England, “Confirmed Cases of COVID-19 Variants Identified in UK” (23 December 2020), online: <[www.gov.uk/government/news/confirmed-cases-of-covid-19-variants-identified-in-uk](http://www.gov.uk/government/news/confirmed-cases-of-covid-19-variants-identified-in-uk)>.

<sup>4</sup> World Health Organisation, *COVID-19 Vaccine Tracker and Landscape* (26 April 2022), online: <[www.who.int/publications/m/item/draft-landscape-of-covid-19-candidate-vaccines](http://www.who.int/publications/m/item/draft-landscape-of-covid-19-candidate-vaccines)>.

<sup>5</sup> See generally Sourdin, Li & McNamara, *supra* note 1.

<sup>6</sup> Lawtech UK, “News” (21 April 2022), online: Remote Courts Worldwide <<https://remotecourts.org/>>.

<sup>7</sup> Judicial College of Victoria, “Coronavirus and the Courts” (3 March 2022), online: <[www.judicialcollege.vic.edu.au/resources/coronavirus-and-courts](http://www.judicialcollege.vic.edu.au/resources/coronavirus-and-courts)>.

<sup>8</sup> *Ibid.*

<sup>9</sup> UK, Select Committee on the Constitution, *COVID-19 and The Courts* (HL 2019-21, 275-I) 15.

<sup>10</sup> *Ibid* at 15.

<sup>11</sup> UK, Ministry of Justice, HM Courts & Tribunals Services & Dominic Raab MP, “Magistrates’ Courts Given More Power to Tackle Backlog” (18 January 2022), online: <[www.gov.uk/government/news/magistrates-courts-given-more-power-to-tackle-backlog](http://www.gov.uk/government/news/magistrates-courts-given-more-power-to-tackle-backlog)>.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> Lorna Cameron, “The Nightingale COVID-19 Response”, *Counsel* (5 October 2021), online: <[www.counselmagazine.co.uk/articles/the-nightingale-covid-19-response](http://www.counselmagazine.co.uk/articles/the-nightingale-covid-19-response)>.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

The contribution of Nightingale Courts to access to justice has been asserted, questioned, challenged, and defended by various stakeholders including the Ministry of Justice,<sup>17</sup> media,<sup>18</sup> non-government organisations,<sup>19</sup> parliamentarians,<sup>20</sup> and parliamentary committees.<sup>21</sup> In particular, in early-2021 the House of Commons Justice Committee held an inquiry into court capacity in order to consider how the adaptations made to court proceedings during the pandemic have impacted court capacity.<sup>22</sup> Specifically, the Justice Committee considered whether the adaptations made to court proceedings increased access to justice during the pandemic and whether these adaptations held potential to act as long-term solutions to reducing delay in bringing cases to trial.<sup>23</sup> In the course of oral evidence, members of the Justice Committee asked about the impact of Nightingale Courts on access to justice both during the pandemic and into the future.<sup>24</sup> Those giving evidence before the Justice Committee lamented the lack of available data to adequately assess Nightingale Courts.<sup>25</sup> Nightingale Courts are also yet to be discussed in the academic literature.

In this article, I seek to fill these gaps by asking: to what extent have Nightingale Courts addressed access to justice concerns during the COVID-19 pandemic, and what lessons do Nightingale Courts hold for access to justice across jurisdictions in the future? After identifying the relevant concerns of the access to justice literature, I detail the development, aims, characteristics and future of Nightingale Courts. Next, I analyse the extent to which Nightingale Courts have addressed relevant access to justice concerns during the COVID-19 pandemic, considering their contribution to reducing cost, delay and complexity, and improving the experience of the litigant.

Finally, I consider three kinds of experiments posed by Nightingale Courts and the lessons these experiments may hold for access to justice in different countries and for a post-pandemic world. These are an experiment in legal architecture, an experiment in informal justice, and an experiment in adaptation and resilience of a legal system during times of crisis. I conclude that adaptations to legal proceedings that contribute to preserving and maintaining access to a legal system during a time of crisis contribute to the resilience of the legal system. Nightingale Courts have contributed to maintaining access to the legal system in England and Wales during the COVID-19 pandemic.

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<sup>17</sup> UK, Ministry of Justice, HMCTS & Robert Buckland QC, “Nine More Nightingale Courtrooms to be Delivered” (14 December 2020), online: <[www.gov.uk/government/news/nine-more-nightingale-courtrooms-to-be-delivered](http://www.gov.uk/government/news/nine-more-nightingale-courtrooms-to-be-delivered)> [HMCTS & Buckland, “Nine More Courtrooms”].

<sup>18</sup> Jonathan Ames & George Greenwood, “How Much have Nightingale Courts Cost the Taxpayer? £17 Million”, *The Times* (17 October 2021), online: <[www.thetimes.co.uk/article/how-much-have-nightingale-courts-cost-the-taxpayer-17-million-7pjq32fl](http://www.thetimes.co.uk/article/how-much-have-nightingale-courts-cost-the-taxpayer-17-million-7pjq32fl)>.

<sup>19</sup> Danny Shaw, “Clearing Backlogs in the Courts: Are There Enough Lawyers, Judges and Court Staff to do it?”, *Crest* (24 September 2021), online: <[www.crestadvisory.com/post/clearing-backlogs-in-the-courts-are-there-enough-lawyers-judges-and-court-staff-to-do-it](http://www.crestadvisory.com/post/clearing-backlogs-in-the-courts-are-there-enough-lawyers-judges-and-court-staff-to-do-it)>.

<sup>20</sup> UK, HC Deb (3 December 2020), vol 685, col 472. Cf HC Deb (22 September 2020), vol 680, col 784.

<sup>21</sup> Select Committee on the Constitution, *supra* note 9.

<sup>22</sup> UK, Justice Committee, *Court Capacity: Inquiry* (House of Commons, 2020), online: <<https://committees.parliament.uk/work/481/court-capacity/>>.

<sup>23</sup> UK, Justice Committee, “Call for Evidence: Court Capacity” (House of Commons, 2020), online: <<https://committees.parliament.uk/work/481/court-capacity/>>.

<sup>24</sup> UK, Justice Committee, *Oral Evidence: Court Capacity* (HC 284, 26 January 2021) Q131-6.

<sup>25</sup> *Ibid* at Q136.

## II. ACCESS TO JUSTICE CONCERNS

What were the relevant access to justice concerns that Nightingale Courts may have addressed? The key concerns of access to justice have been extensively debated, especially within the pages of this journal. At its core, the literature on access to justice supposes that there are barriers in place between legal systems and those who need or want to access legal systems.<sup>26</sup> The literature concerns itself with how those barriers can be removed.<sup>27</sup> Key concerns that are prevalent across the access to justice literature, and relevant to the assessment of Nightingale Courts, include; reducing cost, reducing delay, reducing complexity, and improving the experience of the litigant. A survey of these concerns follows.

### A. Reducing Cost

The first key concern of the access to justice literature is reducing cost. Primarily, the literature has examined how the reduction of fees and legal costs can reduce barriers to accessing legal services. For example, the literature has considered how fee structure influences litigation and litigation outcomes. Paul Fenn and Neil Rickman have scrutinised whether a proportionality assessment in the determination of costs reduces variability of costs<sup>28</sup> and Steven Garber et al have questioned the effect of noneconomic damages caps and attorney fee limits in medical negligence cases.<sup>29</sup> Similarly, David Capper has argued for the merits of conditional fee agreements and contingency legal aid funds,<sup>30</sup> and Tamara Goriely has assessed whether salaried public defenders are more cost-effective than private practitioners.<sup>31</sup> While the literature on reducing cost is primarily concerned with cost to the individual seeking to access legal services, the literature has also been attentive to the cost to the government and therefore society at large. For example, debate has ensued as to the promise of legal expense insurance in shifting from provision of legal services through public legal aid to private insurance.<sup>32</sup> Cost has also been articulated as a key concern of access to justice reform in England and Wales, following negative findings about cost

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<sup>26</sup> See e.g. Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Bloomsbury, 1999) 67; Mauro Cappelletti & Bryant Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 Buffalo L Rev 181; Roderick A Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor YB Access Just 287 at 292; Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 LSR 95 at 125 (Figure 3).

<sup>27</sup> *Ibid.*

<sup>28</sup> Paul Fenn & Neil Rickman, "Fixing Lawyers' Fees Ex Ante: A Case Study in Policy and Empirical Legal Studies" (2011) 8 J Empirical Legal Stud 533 at 552.

<sup>29</sup> Steven Garber et al, "Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?" (2009) 6 J Empirical Legal Stud 637 at 637.

<sup>30</sup> David Capper, "The Contingency Legal Aid Fund: A Third Way to Finance Personal Injury Litigation" (2003) 30 JL & Soc'y 66 at 82.

<sup>31</sup> Tamara Goriely, "Evaluating the Scottish Public Defense Solicitors' Office" (2003) 30 JL & Soc'y 84 at 84.

<sup>32</sup> Matthias Kilian, "Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience" (2003) 30 JL & Soc'y 31; Francis Regan, "The Swedish Legal Services Policy Remix: The Shift from Public Legal Aid to Private Legal Expense Insurance" (2003) 30 JL & Soc'y 49; Ben C J van Velthoven & Carolien M Klein Haarhuis, "Legal Aid and Legal Expenses Insurance, Complements or Substitutes - The Case of the Netherlands" (2011) 8 J Empirical Legal Stud 587 at 587.

in the 1997 report by Lord Woolf<sup>33</sup> and 2009 report of Lord Jackson.<sup>34</sup> Discussion about reducing cost in legal proceedings is thus a key concern of the access to justice literature.

## B. Reducing Delay

After cost, delay has been characterised as the next major barrier to accessing legal systems.<sup>35</sup> Roscoe Pound emphasised the impact of delay, together with cost and complexity, in his 1906 paper on the causes of dissatisfaction with the administration of justice.<sup>36</sup> Lord Woolf also concluded that the legal system was too slow in bringing cases to an end in his 1997 Report.<sup>37</sup> The Woolf Report led to reforms in England and Wales that sought to simplify legal proceedings, make them cheaper, and reduce delay.<sup>38</sup>

In relation to delay and access to justice, Richard Moorhead and Pascoe Pleasance have considered the capacity of delay to defeat the value of justice in popular politics and debate, arguing that the intangibility and contestability of values such as justice make these values easily challenged in comparison to the issues presented by delay in the legal system.<sup>39</sup> Tania Sourdin and John Zeleznikow have examined the role of technology in supporting the justice system to continue delivering outcomes without increasing delay.<sup>40</sup> Sourdin, Bin Li and Donna Maria McNamara have suggested that the notion of access to justice refers to a right to be tried without undue delay.<sup>41</sup> The literature has also considered specific consequences of delay. In criminal proceedings, Shima Baradaran Baughman has examined the impact of delay for those held on remand<sup>42</sup> and Chantal Chevroulet et al have scrutinised the influence of delay on witness memory.<sup>43</sup> The access to justice literature is thus strongly concerned with delay.

## C. Reducing Complexity

Complexity has also been characterised as a major barrier in accessing legal systems.<sup>44</sup> In addition to concluding that the legal system was too slow in bringing cases to a conclusion, Lord Woolf also found that the system remained “incomprehensible” to litigants.<sup>45</sup> Marc Galanter has identified that complexity

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<sup>33</sup> UK, Lord Woolf, *Access to Justice* (Final Report, April 1997), online: <<https://webarchive.nationalarchives.gov.uk/ukgwa/20090117133209/http://www.dca.gov.uk/civil/final/contents.htm>>.

<sup>34</sup> UK, Lord Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) online: <[www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf)>.

<sup>35</sup> Wayne Martin, “Access to Justice” (2014) 16 U Notre Dame Austl L Rev 1, 2.

<sup>36</sup> Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice” (1906) 29 Annual Report of the American Bar Association 395, 397.

<sup>37</sup> Lord Woolf, *supra* note 33 at [2].

<sup>38</sup> UK, Lord Jackson, *Review of Civil Litigation Costs* (Preliminary Report, May 2009), online: <[judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf](http://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf)> at 1.

<sup>39</sup> Richard Moorhead & Pascoe Pleasance, “Access to Justice after Universalism: Introduction” (2003) 30 JL & Soc’y 1 at 3.

<sup>40</sup> Tania Sourdin & John Zeleznikow, “Courts, Mediation and COVID-19” (2020) Austl Business L Rev (forthcoming), online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3595910](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595910)> 1.

<sup>41</sup> Sourdin, Li & McNamara, *supra* note 1 at 448.

<sup>42</sup> Shima Baradaran Baughman, “Costs of Pretrial Detention” (2017) 97 Boston U L Rev 1 at 1.

<sup>43</sup> Chantal Chevroulet et al, “The Impact of Recall Timing on the Preservation of Eyewitness Memory” (2022) 29:3 Psychiatry, Psychology, & Law 471 at 471.

<sup>44</sup> Martin, *supra* note 35 at 2.

<sup>45</sup> Lord Woolf, *supra* note 33 at [2].

in legal proceedings, along with the need for high inputs of legal services and cost barriers, make challenging legal rules for one-time litigants difficult.<sup>46</sup> Further, William Lucy has argued that complexity in legal proceedings makes access to legal expertise necessary, constructing another barrier in access to justice.<sup>47</sup> Finally, Anthony Niblett and Albert H Yoon have analysed backlog in small claims courts, arguing that increasing the jurisdictional limits in small claims courts has led to an increased complexity in cases and therefore a longer delay.<sup>48</sup> The complexity of legal proceedings is a concern of the access to justice literature.

#### D. The Experience of the Litigant

Finally, the access to justice literature has been strongly concerned with the experience of litigants. Three aspects are relevant: the equal treatment of litigants, meeting the legal needs of litigants, and litigant empowerment and participation. First, as to the equal treatment of litigants, the literature has emphasised that ensuring access to justice for all often necessitates the differential treatment of marginalised groups. Eric Schultheis has argued for an integrated access to justice model that adequately accounts for the social, geographic, and organisational determinants of access to civil legal aid services.<sup>49</sup> Jane Bailey et al have considered whether technology can aid in achieving an “expansive vision” of access to justice for all.<sup>50</sup> Niblett and Yoon have found that increasing the jurisdictional limit of a small claims court can create congestion and crowd out litigants with less resources.<sup>51</sup>

Secondly, the literature has been concerned with meeting the legal needs of litigants, deriving from Hazel Genn’s 1999 study on paths to justice.<sup>52</sup> At least 28 similar national surveys across 15 jurisdictions of the public’s experience of justiciable problems have been conducted since.<sup>53</sup> Marisol Smith et al have built on the paths to justice studies to document the incidence of legal problem clusters, being the tendency of justiciable problems to occur together.<sup>54</sup> Some criticisms have emerged: Pascoe Pleasance, Nigel Balmer and Rebecca Sandefur have identified the potential for bias as a consequence of methodological variations to Genn’s study<sup>55</sup> and Lucy has questioned whether unmet legal needs are necessarily a problem.<sup>56</sup>

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<sup>46</sup> Galanter, *supra* note 26 at 136.

<sup>47</sup> William Lucy, “The Normative Standing of Access to Justice: An Argument from Non-Domination” (2016) 33 Windsor YB Access Just 231 at 236.

<sup>48</sup> Anthony Niblett & Albert H Yoon, “Unintended Consequences: The Regressive Effects of Increased Access to Courts” (2017) 14 J Empirical Legal Stud 5 at 27-8.

<sup>49</sup> Eric W Schultheis, “The Social, Geographic, and Organizational Determinants of Access to Civil Legal Aid Services: An Argument for an Integrated Access to Justice Model” (2014) 11 J Empirical Legal Stud 541 at 542-3.

<sup>50</sup> Jane Bailey, Jacquelyn Burkell & Graham Reynolds, “Access to Justice for All: Towards an “Expansive Vision” of Justice and Technology” (2013) 31 Windsor YB Access Just 181 at 182-4.

<sup>51</sup> Niblett & Yoon, *supra* note 48 at 5.

<sup>52</sup> Genn, *supra* note 26.

<sup>53</sup> Pascoe Pleasance, Nigel J Balmer & Rebecca L Sandefur, “Apples and Oranges: An International Comparison of the Public’s Experience of Justiciable Problems and the Methodological Issues Affecting Comparative Study” (2016) 13 J Empirical Legal Stud 50 at 88-9.

<sup>54</sup> Marisol Smith et al, “Bridging the Empirical Gap: New Insights into the Experience of Multiple Legal Problems and Advice Seeking” (2013) 10 J Empirical Legal Stud 146 at 147.

<sup>55</sup> Pleasance, Balmer & Sandefur, *supra* note 53 at 50.

<sup>56</sup> Lucy, *supra* note 47 at 233-4.

Thirdly, the literature has also been concerned with empowering litigants,<sup>57</sup> increasing the legal confidence of litigants,<sup>58</sup> and improving participation in legal proceedings.<sup>59</sup> The notion of participation has been suggested as leading to positive change in the context of alternative dispute resolution<sup>60</sup> and tribunals,<sup>61</sup> and could be extended to courts. Aylet Sela and Limor Gabay-Egozi have developed a judicial procedural involvement metric for measuring a judge's role in civil litigation and settlement, and the implications for judicial procedural involvement for access to justice.<sup>62</sup> Pleasance and Balmer have developed a general legal confidence scale, implementing the Rasch measurement model in the study of access to justice.<sup>63</sup> Jeff Giddings and Michael Robertson have highlighted the potential for legal empowerment rhetoric to be misused in justifying self-help legal aid programs.<sup>64</sup> The access to justice literature is concerned with the experience of the litigant.

### III. NIGHTINGALE COURTS

Having detailed the four relevant access to justice concerns, it is next necessary to sketch a picture of Nightingale Courts. Nightingale Courts have yet to be discussed in the literature. Little is known about the origin, aims, characteristics, and future plans of Nightingale Courts. It is therefore necessary to fill this gap before scrutinising Nightingale Courts.

#### A. Development of Nightingale Courts

The first cases of COVID-19 were confirmed in England and Wales in January 2020.<sup>65</sup> On 17 March 2020, as new cases COVID-19 continued to emerge, the Lord Chief Justice announced that no new trials listed for longer than three days would start in the Crown Court.<sup>66</sup> Cases expected to last longer than three days and scheduled to be heard before the end of April 2020 were adjourned.<sup>67</sup> On 23 March 2020, the Prime Minister announced a national lockdown.<sup>68</sup> On the same day, the Lord Chief Justice announced that

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<sup>57</sup> Jeff Giddings & Michael Robertson, "Large-Scale Map or the A-Z - The Place of Self-Help Services in Legal Aid" (2003) 30 *JL & Soc'y* 102 at 102-5.

<sup>58</sup> Pascoe Pleasance & Nigel J Balmer, "Development of General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies" (2019) 16 *J Empirical Legal Stud* 143 at 169-70.

<sup>59</sup> Grainne McKeever, "A Ladder of Legal Participation for Tribunal Users" (2013) *PL* 575 at 575-77.

<sup>60</sup> Jane Williams et al, "Participation as a Framework for Analysing Consumers' Experiences of Alternative Dispute Resolution (ADR)" (2020) 47 *JL & Soc'y* 271 at 271.

<sup>61</sup> McKeever, *supra* note 59 at 575.

<sup>62</sup> Aylet Sela & Limor Gabay-Egozi, "Judicial Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice" (2020) 47 *JL & Soc'y* 468 at 468.

<sup>63</sup> Pleasance & Balmer, *supra* note 58 at 143.

<sup>64</sup> Giddings & Robertson, *supra* note 57 at 102.

<sup>65</sup> UK, Department of Health and Social Care, "CMO Confirms Cases of Coronavirus in England" (31 January 2020), online: <[www.gov.uk/government/news/cmo-confirms-cases-of-coronavirus-in-england](http://www.gov.uk/government/news/cmo-confirms-cases-of-coronavirus-in-england)>.

<sup>66</sup> UK, Courts and Tribunals Judiciary, "Coronavirus (COVID-19): Jury Trials, Message from the Lord Chief Justice" (17 March 2020), online: <[www.judiciary.uk/announcements/coronavirus-jury-trials-message-from-the-lord-chief-justice/](http://www.judiciary.uk/announcements/coronavirus-jury-trials-message-from-the-lord-chief-justice/)>.

<sup>67</sup> *Ibid.*

<sup>68</sup> Prime Minister's Office & Boris Johnson MP, *supra* note 2.



no new jury trials would start.<sup>69</sup> Two days later, the *Coronavirus Act 2020* was enacted, enabling the wider use of technology in courts and tribunals.<sup>70</sup> On 27 March 2020, HM Courts and Tribunals Services [HMCTS] announced that the work of courts and tribunals would be consolidated into a smaller number of buildings and that 157 priority court and tribunal buildings would remain open for essential in-person hearings.<sup>71</sup> This amounted to 42% of the total 370 courts and tribunals across England and Wales.<sup>72</sup> On 18 May 2020, a limited number of jury trials resumed.<sup>73</sup>

The Nightingale Court proposal emerged in the context of the COVID-19 pandemic. At the onset of the pandemic in March 2020, HMCTS prioritised closing physical courts that did not meet social distancing requirements and increasing the use of digital technology to facilitate hearings.<sup>74</sup> Judicial Working Groups instigated by Lord Justice Edis were also set up to consider judicial responses.<sup>75</sup> One working group, comprised of Judge Kearl, Richard Wright QC, Daniel Bonich (a solicitor), and Lorna Cameron (an academic), produced the Nightingale Court Report in May 2020 which proposed a strategy of “temporary courts utilising suitable host buildings”.<sup>76</sup>

On 1 July 2020, HMCTS published an overview of its response to the COVID-19 pandemic in which it identified using other buildings as courts as a “building block to recovery”.<sup>77</sup> The overview stated that HMCTS had been identifying additional venues to use as courts since June and intended to begin operating courts in these buildings from August.<sup>78</sup> On 19 July 2020, HMCTS, the Ministry of Justice and the Lord Chancellor announced that 10 Nightingale Courts were to begin operating.<sup>79</sup> Nightingale Courts take their name from Nightingale Hospitals, said to evoke a “wartime ‘can do’ spirit to maintaining the rule of law at a time of crisis”.<sup>80</sup>

<sup>69</sup> UK, Courts and Tribunals Judiciary, “Review of Court Arrangements due to COVID-19, Message from the Lord Chief Justice” (23 March 2020), online: <[www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/](http://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/)>.

<sup>70</sup> *Coronavirus Act 2020*, (UK), ss 53–57.

<sup>71</sup> Select Committee on the Constitution, *supra* note 9 at 15.

<sup>72</sup> *Ibid* at 15.

<sup>73</sup> UK, Courts and Tribunals Judiciary, “Jury Trials to Resume This Month” (11 May 2020), online: <[www.judiciary.uk/announcements/jury-trials-to-resume-this-month/](http://www.judiciary.uk/announcements/jury-trials-to-resume-this-month/)>.

<sup>74</sup> See e.g. Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: A Rapid Consultation* (May 2020), online: <[www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo\\_remote\\_hearings\\_20200507-2-.pdf](http://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf)>.

<sup>75</sup> Cameron, *supra* note 14. See also Courts and Tribunals Judiciary, “Introducing Screen Solutions at Leeds Crown Court” (11 September 2020), online: <[www.judiciary.uk/announcements/introducing-screen-solutions-at-leeds-crown-court/](http://www.judiciary.uk/announcements/introducing-screen-solutions-at-leeds-crown-court/)>.

<sup>76</sup> Cameron, *supra* note 14.

<sup>77</sup> HM Courts and Tribunals Services, “COVID-19: Overview of HMCTS Response” (July 2020), online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/896779/HMCTS368\\_recovery\\_-\\_COVID-19\\_Overview\\_of\\_HMCTS\\_response\\_A4L\\_v3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/896779/HMCTS368_recovery_-_COVID-19_Overview_of_HMCTS_response_A4L_v3.pdf)> 4.

<sup>78</sup> *Ibid* at 5.

<sup>79</sup> HM Courts and Tribunals Services, Ministry of Justice & Robert Buckland QC MP, “10 ‘Nightingale Courts’ Unveiled” (19 July 2020), online: <[www.gov.uk/government/news/10-nightingale-courts-unveiled](http://www.gov.uk/government/news/10-nightingale-courts-unveiled)>.

<sup>80</sup> Cameron, *supra* note 14.

## B. Aim of Nightingale Courts

The aim of Nightingale Courts was to provide additional physical courtrooms and facilities during the COVID-19 pandemic.<sup>81</sup> The need for extra courtrooms arose out of the closure of more than half of the court estate which could not accommodate social distancing requirements at the beginning of the pandemic.<sup>82</sup> HMCTS pursued the strategy of using alternative venues to provide additional courtrooms in addition to maximising the use of existing court estate in compliance with social distancing requirements and continuing the use of technology to support remote or video hearings.<sup>83</sup> In particular, Nightingale Courts were set up to facilitate socially distanced trials and hearings of matters which could not take place online.<sup>84</sup> The suitability of any particular matter to proceed online was a judicial decision.<sup>85</sup> Yet, particular types of proceedings never transitioned online. In particular, while a trial for online jury trials took place, jury trials were never conducted online during the pandemic.<sup>86</sup>

## C. Characteristics of Nightingale Courts

The operation of Nightingale Courts has been dynamic throughout the changing circumstances of COVID-19. HMCTS has operated a list online of additional courtrooms set up to support the justice system during COVID-19 which has been frequently edited and updated during the evolving pandemic.<sup>87</sup> In order to ascertain the characteristics of Nightingale Courts, I examined each of the 53 updates to the HMCTS webpage between August 2020 and January 2022 using an internet archive tool.<sup>88</sup> I then compared the information against a list of some Nightingale Courts kept by the Law Society of England and Wales<sup>89</sup> and evidence given by HMCTS to the Judicial Committee Inquiry into Court Capacity.<sup>90</sup> This qualitative content analysis has allowed me to present an original overview of the characteristics of Nightingale Courts.<sup>91</sup> A summary is as follows.

<sup>81</sup> HM Courts and Tribunals Services, “COVID-19 Update on the HMCTS Response for Criminal Courts in England and Wales” (September 2020), online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/915493/HMCTS401\\_recovery\\_overview\\_for\\_crime\\_WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915493/HMCTS401_recovery_overview_for_crime_WEB.pdf)> [HMCTS, “Update on Criminal Courts”] 8.

<sup>82</sup> Select Committee on the Constitution, *supra* note 9 at 15.

<sup>83</sup> HMCTS, “Update on Criminal Courts”, *supra* note 81 at 6-8.

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

<sup>85</sup> Robert Buckland QC MP, “Government Response to the House of Lords Select Committee on the Constitution 22<sup>nd</sup> Report of Session 2019-21: COVID-19 and the Courts” (28 May 2021) at [35].

<sup>86</sup> Linda Mulcahy, Emma Rowden & Wendy Teeder, *Exploring the Case for Virtual Jury Trials during the COVID-19 Crisis: An Evaluation of a Pilot Study Conducted by JUSTICE* (April 2020), online: <<https://files.justice.org.uk/wp-content/uploads/2020/04/06165956/Mulcahy-Rowden-Virtual-trials-final.pdf>>.

<sup>87</sup> HM Courts and Tribunals Services, “Temporary Nightingale Courts and Extra Court Capacity” (3 August 2020), online: <[www.gov.uk/guidance/courts-and-tribunals-additional-capacity-during-coronavirus-outbreak-nightingale-courts](http://www.gov.uk/guidance/courts-and-tribunals-additional-capacity-during-coronavirus-outbreak-nightingale-courts)> [HMCTS, “Temporary Nightingale Courts”].

<sup>88</sup> Internet Archive, *Wayback Machine* online: <[https://web.archive.org/web/\\*/https://www.gov.uk/guidance/courts-and-tribunals-additional-capacity-during-coronavirus-outbreak-nightingale-courts](https://web.archive.org/web/*/https://www.gov.uk/guidance/courts-and-tribunals-additional-capacity-during-coronavirus-outbreak-nightingale-courts)>.

<sup>89</sup> Law Society of England and Wales, “Nightingale Court Status Interactive Map” (10 November 2021), online: <<https://www.lawsociety.org.uk/campaigns/court-reform/tools/nightingale-courts-status-interactive-map>>.

<sup>90</sup> HM Courts and Tribunals Services, “Written Evidence from HM Courts and Tribunals Service” (Justice Committee Inquiry into Court Capacity, 24 March 2021) [HMCTS, “Written Evidence”] 3-5.

<sup>91</sup> Lisa Webley, “Qualitative Approaches to Empirical Legal Research” in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford: OUP, 2010) 927 at 941-3.

## 1. Venues

A total of 37 Nightingale Courts operated during the COVID-19 pandemic. In January 2022, 23 Nightingale Courts were still open. Nightingale Courts have been hosted in a range of different venues, across privately-owned venues and government properties. The most common venue used to host a Nightingale Court was a hotel (10). Two Nightingale Courts each have been hosted in Jurys Inns, Hilton Hotels and Mercure Hotels. Halls such as town halls or concert halls were the next most common venue (7), followed by former or current courts (6). Former or current courts entailed either re-opening a previously closed court or repurposing a current court, e.g., Cloth Hall Court, for use by another court, e.g., Leeds Combined Court.

Conference centres (4) and offices (4) were another commonly used site. The Ministry of Justice itself allowed its offices to be used as a Nightingale venue, as did the Bristol Law Society. More unique venues included the use of theatres (2), a library, university, stadium, football club, and a cathedral. Many of these venues could not serve their usual functions under the then-existing lockdown laws in England and Wales. The Lowry Theatre in Salford was among the first Nightingale Courts to open and was widely discussed in media<sup>92</sup> and by the judiciary<sup>93</sup> as a successful example of the Nightingale Court experiment. The Birmingham Repertory Theatre, on the other hand, was criticised for its decision to host a Nightingale Court and has since apologised for doing so.<sup>94</sup>

## 2. Location

At least one Nightingale Court has operated in each region of England and Wales. The most common locations were in the North West (10), West Midlands (6), and London (5). The regions of East Midlands, East of England, and Wales have, at some point, had one Nightingale Court each. In order to ascertain whether an operational requirement for a Nightingale Court existed, HMCTS looked at the current number of non-custodial cases in the region; the number of cases suitable for hearing within a Nightingale Court; the estimated number of days the cases would take; the number of jury trial courtrooms already in the region; and the additional rooms required to hear the outstanding cases.<sup>95</sup> The balanced spread of Nightingale Courts across regions was also a relevant consideration, with local media praising Nightingale venues opening within their area<sup>96</sup> and members of parliament calling for Nightingale Courts to open within their constituency.<sup>97</sup>

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<sup>92</sup> See e.g. Helen Pidd, “Courtroom Drama: Salford’s Lowry Theatre to become Nightingale Court”, *The Guardian* (23 September 2020), online: <[www.theguardian.com/law/2020/sep/23/courtroom-drama-salfords-lowry-theatre-to-become-nightingale-court](http://www.theguardian.com/law/2020/sep/23/courtroom-drama-salfords-lowry-theatre-to-become-nightingale-court)>.

<sup>93</sup> UK, Courts and Tribunals Judiciary, “The Nightingale Court at The Lowry Theatre” (30 October 2020), online: <[www.judiciary.uk/announcements/the-nightingale-court-at-the-lowry-theatre/](http://www.judiciary.uk/announcements/the-nightingale-court-at-the-lowry-theatre/)> [Courts and Tribunals Judiciary, “The Lowry Theatre”].

<sup>94</sup> Jessica Murray, “‘We Need a Sanctuary’: New Art-House Seeks Justice for Birmingham’s Creatives”, *The Guardian* (3 June 2021), online: <[www.theguardian.com/stage/2021/jun/03/yard-birmingham-rep-theatre](http://www.theguardian.com/stage/2021/jun/03/yard-birmingham-rep-theatre)>.

<sup>95</sup> HMCTS, “Written Evidence”, *supra* note 90.

<sup>96</sup> See e.g. Mark Dowling, “New Nightingale Court to Open at Chester City Centre Hotel”, *Chester Standard* (11 June 2021), online: <[www.chesterstandard.co.uk/news/chester/19367372.new-nightingale-court-open-chester-city-centre-hotel/](http://www.chesterstandard.co.uk/news/chester/19367372.new-nightingale-court-open-chester-city-centre-hotel/)>.

<sup>97</sup> UK, HC Deb (16 March 2021), vol 691, cols 157-8.

### 3. Length of Operation

The majority of Nightingale Courts (21) have operated for a length of between four and 11 months before closing. Most of the remaining Nightingale Courts (12) have operated for a length of between 12 and 17 months. The longest-running Nightingale Court was at Prospero House in London and had been operating for 17 months as of January 2022. Two Nightingale Courts have operated for less than three months, with the Hertfordshire Development Centre closing after 14 days.

Commonly, Nightingale Courts have closed after a length of six or 12 months which reflects the duration of the contract held with individual venues.<sup>98</sup> At least seven Nightingale Courts have closed because the venue licensing agreement ended and was not renewed.<sup>99</sup> This is likely because a number of Nightingale Court venues sought to return to their original use as lockdown restrictions ended.<sup>100</sup> For example, both Nightingale Courts held in theatres closed in July and August 2021, likely with a view to using their spaces to host performances again.<sup>101</sup>

### 4. Courtrooms

The majority of Nightingale venues housed two courtrooms (22). Six Nightingale venues contained one courtroom each. The Salford Lowry Theatre, now closed, was the largest Nightingale Court, with five courtrooms available. The number of courtrooms in each Nightingale venue has been a subject of criticism, with *The Times* criticising the cost of operating the Nightingale Court at Peterborough Cathedral only housing one courtroom.<sup>102</sup> Further, the size of the courtrooms and how many people can enter the courtrooms has been a subject of contention, when the parents of a young victim in criminal proceedings were told that there was not enough space in the Nightingale Court itself for them to attend the trial.<sup>103</sup>

### 5. Types of Courts

Nightingale Courts hosted a range of County Courts, Family Courts, Crown Courts, Magistrates' Courts, Combined Courts, Justice Centres, and Tribunals. Most commonly, Nightingale venues hosted Crown Courts (23). The next most common types of courts were Combined Courts (7) and County Courts (6). The majority of Nightingale venues hosted one court each. Yet, six Nightingale venues hosted two different courts and three Nightingale venues hosted three different courts. The types of courts hosted in one Nightingale venue tended to be grouped by location or by type of court. The Salford Lowry Theatre hosted three types of Manchester courts: the Manchester Crown Court, the Manchester Employment Tribunal and the Manchester Immigration Tribunal. The Ministry of Justice Offices hosted Family Courts from two locations: the East London Family Court and the West London Family Court.

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<sup>98</sup> HMCTS, "Temporary Nightingale Courts", *supra* note 87.

<sup>99</sup> *Ibid* at 'Amendment Notes'.

<sup>100</sup> Jennifer Brown & Esme Kirk-Wade, *Coronavirus: A History of 'Lockdown Laws' in England* (London: House of Commons Library, 22 December 2021) 16.

<sup>101</sup> *Ibid*.

<sup>102</sup> Ames & Greenwood, *supra* note 18.

<sup>103</sup> Rajeev Syal, "Nightingale Court Tells Parents of Victim of Alleged Rape There is No Room for Them at Trial", *The Guardian* (13 February 2022), online: <[www.theguardian.com/uk-news/2022/feb/13/nightingale-court-tells-parents-of-victim-of-alleged-there-is-no-room-for-them-at-trial](http://www.theguardian.com/uk-news/2022/feb/13/nightingale-court-tells-parents-of-victim-of-alleged-there-is-no-room-for-them-at-trial)>.

The mixing of different types of courts may be a challenge for Nightingale venues. The requirements for courtroom layout and design differs between different types of courts.<sup>104</sup> A dock for the accused and box for the jury is required in Crown Courts,<sup>105</sup> whereas small mediation rooms are required in Family Courts.<sup>106</sup> Given that most Nightingale venues only house one or two courtrooms, authors of the Nightingale Court Report have suggested that a high degree of cooperation and oversight would be needed to effectively list and manage the use of these courtrooms between courts from different locations and for different purposes.<sup>107</sup> When the House of Commons Justice Committee visited a Nightingale Court, staff members confirmed that “a robust approach to listing and a proactive approach to communication” was enabling the use of these venues.<sup>108</sup>

## 6. Types of Matters

The most common type of matter dealt with at Nightingale venues was crime (26). This was due to Nightingale venues mostly hosting Crown Courts. Eleven Nightingale Courts dealt with civil matters, nine with family matters and five with tribunal matters. Of the Nightingale Courts that dealt with criminal matters, 17 were listed as able to host jury trials. The Nightingale Courts established in the second half of 2020 were more likely to host a range of civil, family, tribunal, and criminal matters. In comparison, the 11 Nightingale Courts that had been established since 15 March 2021 had been exclusively used to host criminal matters. All but one were listed as able to hear jury trials. This was likely in response to criticisms that emerged in Parliament about the serious delay for jury trials.<sup>109</sup>

## 7. Cost

The total cost of the 23 Nightingale Courts that were operating as at 31 January 2022 was £34,661,000.<sup>110</sup> This figure included running costs such as venue hire, security, cleaning and IT hardware. It did not include the cost of staff, nor judicial or court costs. The figure also did not include the cost of a further 14 Nightingale Courts that closed before January 2022. The average per sitting day cost of Nightingale Courts in March 2020 was £5,485.<sup>111</sup> This can be compared with a pre-pandemic estimate by the Law Society of the average per sitting day at £2,692.<sup>112</sup>

Nightingale Courts operating in conferences centres were the most expensive. Of the 23 Nightingale Court venues open in January 2022, the most expensive was the Nightingale Court at Prospero House, a conference centre in London, which had cost £6,813,000 and provided three courtrooms since August

<sup>104</sup> HM Courts and Tribunals Services, *Court and Tribunal Design Guide* (v 1.1, 10 May 2019) 131-81.

<sup>105</sup> *Ibid* at 145.

<sup>106</sup> *Ibid* at 139.

<sup>107</sup> *Ibid*.

<sup>108</sup> Justice Committee, *Court Capacity: Sixth Report of Session 2021-22* (House of Commons, 20 April 2022) 24 at [60] [Justice Committee, “Court Capacity 2022”].

<sup>109</sup> UK, HC Deb (20 January 2021), vol 687, cols 981-2.

<sup>110</sup> UK, House of Commons, ‘Courts: Coronavirus – Questions for Ministry of Justice’ (UIN 120753, tabled on 8 February 2022), online: <<https://questions-statements.parliament.uk/written-questions/detail/2022-02-08/120753>> [House of Commons, “Courts: Coronavirus”].

<sup>111</sup> Ames & Greenwood, *supra* note 18.

<sup>112</sup> *Ibid*.

2020.<sup>113</sup> The next most expensive were the Nightingale Courts at the Barbican, a conference centre in London, which had cost £2,822,000 to provide two courtrooms since March 2021, and the Maple House, a conference centre in Birmingham, which had cost £2,751,000 to provide four courtrooms since March 2021.<sup>114</sup> The Nightingale Courts hosted in hotels were next in expense, costing at least £850,000 and up to £2,255,000.<sup>115</sup>

In comparison, the Nightingale Courts operating in previously-closed courthouses were the least expensive. The least expensive Nightingale Court operating in January 2022 was a previously-closed courthouse in Fleetwood, costing £376,000 to provide two courtrooms since August 2020.<sup>116</sup> Nightingale Courts operating in previously-closed courthouses cost between £370,000 and £810,000.<sup>117</sup>

#### D. Future of Nightingale Courts

As at January 2022, 23 Nightingale Courts comprising a total of 50 courtrooms were still operating. In March 2022, the Ministry of Justice announced that 11 of those Nightingale Courts would close within two weeks.<sup>118</sup> The Ministry of Justice also announced that the remaining 12 Nightingale Courts comprising 30 courtrooms would remain open for a further year, until March 2023.<sup>119</sup> The Ministry of Justice explained that the Nightingale Courts that were closing were no longer needed because HMCTS has reopened existing courtrooms in those areas as social distancing measures have eased. The Ministry of Justice has said that the Nightingale Courts that will continue to operate into 2023 are helping to drive court recovery and reduce delay.

### IV. NIGHTINGALE COURTS AND ACCESS TO JUSTICE CONCERNS: A PRELIMINARY ANALYSIS

In this section, I conduct a preliminary analysis of the extent to which Nightingale Courts have addressed access to justice concerns during the COVID-19 pandemic. I do so by considering the contribution of Nightingale Courts to delay, cost, complexity, and the treatment of the litigant. Then, I explore the implications of my findings.

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<sup>113</sup> House of Commons, “Courts: Coronavirus”, *supra* note 110.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> UK, Ministry of Justice, HM Courts and Tribunals Services & James Cartlidge MP, “Nightingale Courts Extended to Support Justice Recovery” (3 March 2022), online: <[www.gov.uk/government/news/nightingale-courts-extended-to-support-justice-recovery#:~:text=Today's%20\(3%20March%202022\)%20announcement,Court%20sitting%20time%20each%20year](http://www.gov.uk/government/news/nightingale-courts-extended-to-support-justice-recovery#:~:text=Today's%20(3%20March%202022)%20announcement,Court%20sitting%20time%20each%20year)>. See also Dulcie Lee, “Covid: Half of Nightingale Courts to Close Within Weeks” *BBC News* (3 March 2022), online: <<https://www.bbc.co.uk/news/uk-60596769>>.

<sup>119</sup> Ministry of Justice, HMCTS & James Cartlidge MP, *supra* note 118.

### A. Delay

Have Nightingale Courts contributed to reducing delay during the COVID-19 pandemic? It is first necessary to sketch the state of delay in the justice system before assessing the contribution of Nightingale Courts to delay during the pandemic.

At the onset of the pandemic, HMCTS initially closed 213 of its 370 courts and tribunals across England and Wales, amounting to 58% of the court estate.<sup>120</sup> The court closures had an uneven impact across the different types of courts and tribunals.<sup>121</sup> Remote hearings worked well in the High Court, Court of Appeal and the Supreme Court, with the High Court continuing more than 80% of its normal work throughout.<sup>122</sup> A large number of civil proceedings were able to transition to online hearings.<sup>123</sup> The lower courts and criminal courts experienced more difficulty and an increase in delay. The number of cases processed between the end of March 2020 and late February 2021 in the Crown Court amounted to 75% of pre-COVID levels.<sup>124</sup> In the Magistrates' Courts the figure was 55%.<sup>125</sup> The total criminal backlog at the end of February 2021 exceeded 530,000, representing a 100,000 case increase since the start of the pandemic.<sup>126</sup>

According to HMCTS, the number of cases waiting to be heard in the Crown Court increased from 39,000 in early March 2020 to 59,000 in February 2021.<sup>127</sup> Another analysis by the Institute for Government and the Chartered Institute of Public Finance and Accountancy estimated the backlog to be closer to 70,000 cases in November 2020.<sup>128</sup> This report emphasised the increase in outstanding jury trials, as the Crown Court had reduced delay by focusing on disposing of preliminary matters, procedural matters, and sentencing hearings.<sup>129</sup> Significant delay in the Crown Court ensued, with trials in March 2021 being listed for 2023.<sup>130</sup>

Nightingale Courts contributed to alleviating delay by providing additional physical courtrooms to conduct hearings for matters that were not suitable to be heard online. Thirty-seven Nightingale Courts have operated to date, providing 74 extra courtrooms throughout the COVID-19 pandemic.<sup>131</sup> These numbers need to be viewed in the context of the closure of courthouses not suitable for social distancing

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<sup>120</sup> Select Committee on the Constitution, *supra* note 9 at 15.

<sup>121</sup> *Ibid* at 19.

<sup>122</sup> *Ibid* at [44].

<sup>123</sup> HM Courts and Tribunals Services, "COVID-19: Overview of HMCTS Recovery for Civil and Family Courts and Tribunals" (November 2020), online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/932496/HMCTS\\_CFT\\_Recovery\\_Plan\\_v2b.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932496/HMCTS_CFT_Recovery_Plan_v2b.pdf)> 3.

<sup>124</sup> Select Committee on the Constitution, *supra* note 9 at [129].

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid*.

<sup>127</sup> HM Courts and Tribunals Services, "HMCTS Weekly Management Information during Coronavirus: March 2020 to February 2021" (11 March 2021), online: <[www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-2020-to-february-2021](http://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-2020-to-february-2021)> [HMCTS, "Weekly Management Information"].

<sup>128</sup> Nick Davies et al, *Performance Tracker 2020: How Public Services Have Coped with Coronavirus* (London: The Institute for Government and The Chartered Institute for Public Finance and Accountancy, 2020) at 71.

<sup>129</sup> *Ibid* 71.

<sup>130</sup> Select Committee on the Constitution, *supra* note 9 at [134].

<sup>131</sup> HMCTS, "Temporary Nightingale Courts", *supra* note 87.

at the onset of the pandemic. Figures, however, are unavailable as to how long these unsuitable courthouses were closed for or when they began to reopen.

Nightingale Courts have played some role in preventing a further worsening of delay during the pandemic by providing 74 extra courtrooms that would not otherwise be available for trials and hearings that could not take place online. Yet, the number of courthouses made available (37) is not sufficient to meet the number of courthouses closed at the beginning of the pandemic (213). Further, there was an overall increase in the number of cases waiting to be heard during the onset of the pandemic including when Nightingale Courts were introduced.<sup>132</sup> To this extent, it is not possible to say that Nightingale Courts have contributed to reducing delay during the pandemic. Nightingale Courts have not improved the number of available courthouses or courtrooms in which to hear matters during the pandemic. However, Nightingale Courts have contributed to maintaining some physical spaces in which to hear matters during the pandemic. To this extent, Nightingale Courts have prevented a further worsening of delay during the pandemic.

However, the number of courtrooms made available by Nightingale Courts may not be a sufficient marker by which to assess the contribution of Nightingale Courts to delay. This is because the figures on the number of courtrooms made available during the pandemic do not tell us enough about what was happening inside those courtrooms. The available figures do not tell us the rate at which the courtrooms were being utilised, the number of sitting days Nightingale Courts have facilitated, or the number of cases disposed of using Nightingale Courts. In particular, the number of courtrooms available does not necessarily indicate that those courtrooms were adequately equipped to hear cases.<sup>133</sup> Concerns have been expressed for the lack of court staff, judges, and barristers available to facilitate hearings in Nightingale courtrooms.<sup>134</sup>

A more accurate marker of the role of Nightingale Courts in reducing delay may be the rate at which Nightingale Courts have been utilised.<sup>135</sup> HMCTS has not always provided information on the rate at which Nightingale Courts are being utilised.<sup>136</sup> In the early period of Nightingale Courts opening, HMCTS providing statistics which ranged from 70% utilisation of the Nightingale Court at the Ministry of Justice Offices to 100% utilisation of the Nightingale Court at the Telford County Court.<sup>137</sup> However, more recent studies have been less optimistic. The Nightingale Court at Bristol Law Society hosted just 12 sitting days over the six months it was open between October 2020 and March 2021.<sup>138</sup> The Nightingale Court at East Pallant House sat for 35 days, despite being open for 223 days between July 2020 and February 2021.<sup>139</sup> The Nightingale Court at St. George's Hall sat for 59 days over the six months it was open between

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<sup>132</sup> HMCTS, "Weekly Management Information", *supra* note 127; Davies et al, *supra* note 128.

<sup>133</sup> Shaw, *supra* note 19.

<sup>134</sup> *Ibid*; Law Society of England and Wales, "Sustained Investment Needed in Threadbare Criminal Justice System" (27 July 2021), online: <<https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/sustained-investment-needed-in-threadbare-criminal-justice-system>>.

<sup>135</sup> Select Committee on the Constitution, *supra* note 9 at [188]-[193].

<sup>136</sup> UK, Justice Committee, *Oral Evidence: Court Capacity* (HC 284, 12 January 2021) Q124-137.

<sup>137</sup> UK, House of Commons, "Courts: Cost – Question for Ministry of Justice" (UN 86141, tabled on 7 September 2020), online: <<https://questions-statements.parliament.uk/written-questions/detail/2020-09-07/86141>>.

<sup>138</sup> Ames & Greenwood, *supra* note 18.

<sup>139</sup> *Ibid*.



October 2020 and March 2021.<sup>140</sup> The rate of utilisation could provide a more accurate picture of the contribution of Nightingale Courts to delay during the pandemic. On the available information, Nightingale Courts have contributed to preventing a further worsening of delay during the pandemic, without having improved delay.

## B. Cost

Have Nightingale Courts contributed to reducing cost during the COVID-19 pandemic? Here, the concern is with the cost to the Government and therefore society at large as opposed to the individual litigant.

The justice system in England and Wales pre-pandemic was characterised by austerity policies pursued by the Government.<sup>141</sup> In 2019/20, the Government reduced funding for the justice system by 21% from the level of funding provided in 2011.<sup>142</sup> This corresponded with a reduction in legal aid funding: from 2010/11 to 2015/16 annual legal aid spending fell at a rate of 10% per year, and by 2019/20, it was 37% less compared to 2010/11.<sup>143</sup> Governments have targeted court estate and HMCTS staff to limit spending.<sup>144</sup> Over the nine years between 2010 and 2019, the Government closed more than one third of County Courts and half of all Magistrates' Courts in England and Wales.<sup>145</sup> In addition, between 2013 and 2019, HMCTS reduced the number of its employees by 17%.<sup>146</sup>

In 2013, the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* abolished legal aid for many civil disputes including family, employment and welfare benefits matters.<sup>147</sup> The consequence of the *Act* has been an increase in the number of cases in which one or both parties are unrepresented, with the proportion of cases where both parties had legal representation in family law cases almost halving between 2013 and 2020.<sup>148</sup> Increased numbers of court proceedings with litigants in person have created additional work for judges and court staff as hearings take longer and more hearings take place that could have been resolved with legal advice.<sup>149</sup>

In March 2014, the Ministry of Justice announced a reform program for HMCTS which was aimed at simplifying court procedures and moving many hearings online in order to reduce demand for court buildings.<sup>150</sup> The Ministry of Justice aimed to reduce the number of cases held in physical courtrooms by

<sup>140</sup> *Ibid.*

<sup>141</sup> Tom Cornford et al, "Introduction" in Ellie Palmer et al, eds, *Access to Justice: Beyond Policies and Politics of Austerity* (Oxford: Hart Publishing, 2016) 1.

<sup>142</sup> Select Committee on the Constitution, *supra* note 9 at [9].

<sup>143</sup> *Ibid* at [16].

<sup>144</sup> *Ibid* at [15].

<sup>145</sup> UK, House of Commons Library, *Court Closures and Access to Justice* (Number CDP-0156, 18 June 2019) 4.

<sup>146</sup> Select Committee on the Constitution, *supra* note 9 at [15] fn 10.

<sup>147</sup> *Ibid* at [17]. See also Ana Speed, "Just-ish? An Analysis of Routes to Justice in Family Law Disputes in England and Wales" (2020) 52:3 J Leg Pluralism Unofficial Law 276, 279-80.

<sup>148</sup> UK, Ministry of Justice, "Family Court Statistics Quarterly: July to September 2020" (18 December 2020), online: <[www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020/family-court-statistics-quarterly-july-to-september-2020](http://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020/family-court-statistics-quarterly-july-to-september-2020)>.

<sup>149</sup> UK, Ministry of Justice, "Joint Letter from Lord Chief Justice of England and Wales, Senior President of Tribunals and Lord Chancellor and Secretary of State for Justice" (28 March 2014), online: <[www.judiciary.uk/wp-content/uploads/2014/03/joint-letter-to-judges-and-staff-hmcts-reform.pdf](http://www.judiciary.uk/wp-content/uploads/2014/03/joint-letter-to-judges-and-staff-hmcts-reform.pdf)>. See also Speed, *supra* note 152 at 283.

<sup>150</sup> Select Committee on the Constitution, *supra* note 9 at [21].

2.4 million cases a year, reducing annual spending by £265 million and employing 5,000 fewer staff.<sup>151</sup> Yet, delays to the program meant that a number of planned improvements to the courts' digital systems had not been implemented before the onset of the pandemic.<sup>152</sup>

Nightingale Courts have cost at least £34.5 million as at January 2022.<sup>153</sup> The cost of individual Nightingale Courts has been as little as £376,000 and as much as £6,813,000.<sup>154</sup> The discrepancy between these costs can be attributed to the different types of venues, where Nightingale Courts in conferences centres were the most expensive and Nightingale Courts in previously-closed courthouses were the least expensive. But such figures alone do not tell us enough. Instead, it is helpful to compare the cost of Nightingale Courts to what Nightingale Courts have been able to achieve during the pandemic. One way of assessing cost in comparison to what Nightingale Courts have been able to achieve is to compare the cost per sitting day. Here, one sitting day in a Nightingale Court has been estimated to cost on average £5,485 which is more than twice that of one sitting day in a non-Nightingale Court pre-pandemic at about £2,692.<sup>155</sup>

However, the cost of Nightingale Courts has been widely divergent depending on the venue type used. As at March 2021, the Nightingale Court at Bristol Law Society had cost £140,000 and facilitated just 12 sitting days.<sup>156</sup> On this calculation, the cost of sitting at the Bristol Law Society Nightingale Court has been £11,667 a day. The Nightingale Court at East Pallant House sat for 35 days, despite being open for 223 days between July 2020 and February 2021 at a total cost of £64,810.<sup>157</sup> On this calculation, the cost of sitting at the East Pallant House Nightingale Court has been £1,852 a day. It is not clear whether these figures include the cost of operating the Nightingale Court or merely venue hire.

What should we make of the cost of Nightingale Courts in the wider context of funding for the justice system? On the one hand, the impact of the COVID-19 pandemic on the justice system in England and Wales must be viewed within the context of austerity policies which resulted in significant defunding of the justice system pre-pandemic.<sup>158</sup> As Godfrey, Richardson and Walklate have argued, it is important to understand this context, as one solution to the current delay in the justice system may be to backfill austerity measures.<sup>159</sup> Such backfill could only be achieved through a sustained period of significant financial investment.<sup>160</sup> The cost of austerity in England and Wales is important to consider because it indicates that reducing delay in the justice system will necessarily be at a significantly high cost.

On the other hand, the question of whether Nightingale Courts are an appropriate investment in the context of the financial investment needed for the justice system remains. This question is particularly pertinent in light of some major themes that have emerged: that Nightingale Courts no longer need to facilitate socially distanced trials; and that Nightingale Courts have not operated at full capacity due to a

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<sup>151</sup> *Ibid* at [22].

<sup>152</sup> *Ibid* at [23].

<sup>153</sup> House of Commons, "Courts: Coronavirus", *supra* note 110.

<sup>154</sup> *Ibid*.

<sup>155</sup> Ames & Greenwood, *supra* note 18.

<sup>156</sup> *Ibid*.

<sup>157</sup> *Ibid*.

<sup>158</sup> Barry Godfrey, Jane C Richardson & Sandra Walklate, "The Crisis in the Courts: Before and Beyond Covid" (2022) 64:2 Br J Criminol 1036.

<sup>159</sup> *Ibid*.

<sup>160</sup> *Ibid*.

lack of staff and infrastructure. Instead, the funding could be more meaningfully invested in reopening court estate earmarked for sale, and in hiring enough staff and judges to ensure that the reopened courtrooms can be effectively operated.<sup>161</sup> Nightingale Courts have not contributed to reducing cost during the COVID-19 pandemic because of the high costs involved in facilitating relatively few sitting days.

### C. Complexity

Have Nightingale Courts contributed to reducing the complexity of legal proceedings during the pandemic? While it would be relevant to consider the complexity for both court users and court staff, relevant information is only available as to the complexity Nightingale Courts have added for court staff, including the judiciary. The Courts and Tribunals Judiciary and HMCTS have documented the added complexity of Nightingale Courts for the judiciary and court staff.

As to the Courts and Tribunals Judiciary, Judge Potter of the Manchester Crown Court,<sup>162</sup> Judge Walters of the Swansea Crown Court<sup>163</sup> and Judge Kearn of the Leeds Crown Court<sup>164</sup> have each recounted the logistical challenges and complexities associated with implementing Nightingale Courts. Among these complexities were ensuring the health safety of court users,<sup>165</sup> the distraction caused by the novelty of the buildings,<sup>166</sup> the implementation of security measures,<sup>167</sup> and the marshalling of the jury in and out of the court space.<sup>168</sup> As to case law, in considering a claim for judicial review for applications to extend custody time limits during the pandemic, Lord Burnett of Maldon CJ and Lord Justice Holroyde considered the implementation of Nightingale Courts a “timely and careful step”.<sup>169</sup>

In addition, HMCTS has outlined the numerous factors that were accounted for in selecting and establishing Nightingale Courts. First, in deciding where to establish Nightingale Courts, HMCTS considered: the number of non-custodial cases in the region; the number of those cases suitable for hearing in a Nightingale Court; the estimated days the cases would take; the number of jury trial courtrooms already operating in the region; the number of additional rooms required; and the proximity of staff, judges and legal practitioners.<sup>170</sup> Secondly, in determining the suitability of venues in those locations, HMCTS considered: the venue’s suitability for the type of work intended; the ability to hold hearings safely and securely; the cost and time of necessary alterations to the venue; the cost of hire and operation; the length of the available lease; whether the venue offered full and sole access for the full term of the license period; and whether the venue was owned by Government or the private sector.<sup>171</sup> The selection of Nightingale Court locations and venues was a complicated process.

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<sup>161</sup> *Ibid.*

<sup>162</sup> Courts and Tribunals Judiciary, “The Lowry Theatre”, *supra* note 93.

<sup>163</sup> UK, Courts and Tribunals Judiciary, “Swansea’s Nightingale Court” (25 September 2020), online: <<https://www.judiciary.uk/announcements/swanseas-nightingale-court/>> [Courts and Tribunals Judiciary, “Swansea”].

<sup>164</sup> UK, Courts and Tribunals Judiciary, “Introducing Screen Solutions at Leeds Crown Court” (11 September 2020), online: <[www.judiciary.uk/announcements/introducing-screen-solutions-at-leeds-crown-court/](https://www.judiciary.uk/announcements/introducing-screen-solutions-at-leeds-crown-court/)> [Courts and Tribunals Judiciary, “Leeds”].

<sup>165</sup> Courts and Tribunals Judiciary, “The Lowry Theatre”, *supra* note 93.

<sup>166</sup> *Ibid.*

<sup>167</sup> Courts and Tribunals Judiciary, “Swansea”, *supra* note 163.

<sup>168</sup> Courts and Tribunals Judiciary, “Leeds”, *supra* note 164.

<sup>169</sup> *DPP v Crown Court at Woolwich* [2021] ACD 20, [37].

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

Considering the complications that Nightingale Courts have added to the legal process for the judiciary and court staff, Nightingale Courts cannot be said to have contributed to reducing complexity of proceedings during the pandemic. Though the potential added complexity for litigants is unknown, the complexity for the judiciary and court staff has been documented.

#### D. Experience of the Litigant

Finally, have Nightingale Courts improved the experiences of litigants during the pandemic? On one hand, anecdotal evidence has recounted the benefits of Nightingale Courts for the experience of the litigant. Judge Walters of the Swansea Crown Court has recounted the fast, smooth, and secure jury trials that have taken place at the Nightingale Court at the Swansea Civic Centre.<sup>172</sup> Further, no challenges to do with the venue were reported from the high-profile criminal trial of Lady Lavinia Nourse which took place at the Peterborough Cathedral Nightingale Court.<sup>173</sup>

On the other hand, similarly anecdotal evidence has highlighted challenges associated with the experience of the litigant in a Nightingale Court. Reflecting on the Nightingale Court at the Lowry Theatre, Judge Potter expressed concerns that court users would be distracted by the novelty of the building being a theatre and called it an “unusual environment”.<sup>174</sup> *The Guardian* has also reported on the parents of a young victim in criminal proceedings being told that there would be no space to accommodate them within the Nightingale Court in which the trial would be heard.<sup>175</sup> The mother of the victim condemned “the complete lack of empathy for victims” displayed by the inability to accommodate the parents in the Nightingale Court.<sup>176</sup> Further research involving surveys and interviews would assist in gaining a more robust view of the experience of litigants in Nightingale Courts.

#### E. Preliminary Conclusion

Nightingale Courts were a quickly designed initiative to respond to an unpredictable pandemic. Nightingale Courts have been an expensive adaptation to the legal system which has resulted in additional complexity for court staff and the judiciary. Yet, though expensive and complex, Nightingale Courts have contributed to preventing a further worsening of delay by providing socially distanced courtrooms in which to hear matters not suitable to be heard online. Without Nightingale Courts, matters which could not be heard online, and could not be heard in the available courtrooms, would not have been heard at all. While Nightingale Courts have not been able to hear all the matters for which there was demand, and have done so at a high cost and additional complexity, Nightingale Courts have at least been able to hear some of those matters. To this extent, Nightingale Courts have contributed to maintaining access to justice during the COVID-19 pandemic, without having increased access to justice.

There are two main implications of this analysis: Nightingale Courts have achieved their primary aim, but an ongoing role of Nightingale Courts in addressing access to justice concerns going forward is limited. The relevance of this analysis is two-fold: it answers the question posed by the Justice Committee

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<sup>172</sup> Courts and Tribunals Judiciary, “Swansea”, *supra* note 163.

<sup>173</sup> BBC News, “Lady Lavinia Nourse: Accuser of Ex-Judge’s Widow ‘Carried Shame’” *BBC News* (12 May 2021), online: <[www.bbc.co.uk/news/uk-england-suffolk-57088389](http://www.bbc.co.uk/news/uk-england-suffolk-57088389)>.

<sup>174</sup> Courts and Tribunals Judiciary, “The Lowry Theatre”, *supra* note 93.

<sup>175</sup> Syal, *supra* note 103.

<sup>176</sup> *Ibid.*

as well as other stakeholders, and calls into question the soundness of the Government's decision to keep Nightingale Courts open into 2023.

First, the analysis shows that Nightingale Courts have achieved their primary aims and objectives. Nightingale Courts were set up to provide additional physical courtrooms and facilities during the COVID-19 pandemic.<sup>177</sup> A total of 37 Nightingale Courts have operated throughout the pandemic, providing 74 additional courtrooms.<sup>178</sup> To this extent, Nightingale Courts have achieved their primary aims and objectives. Additional factors, such as the cost that it took to set up these extra 74 courtrooms or the low rates at which Nightingale Courts may have been utilised, limits the extent to which Nightingale Courts can be said to have effectively achieved the original aims. Yet, the analysis identifies that Nightingale Courts have achieved the aims with which they were set up to achieve. This provides support for stakeholders such as the Ministry of Justice<sup>179</sup> and parliamentarians<sup>180</sup> who have asserted and defended the contribution of Nightingale Courts throughout the pandemic.

As to the soundness of the Government's decision to keep Nightingale Courts open into 2023, the analysis suggests that an ongoing role of Nightingale Courts in increasing access to justice is limited. This is because Nightingale Courts helped to reduce a further worsening of delay during the pandemic by providing socially distanced spaces to conduct trials and hearings. Yet, social distancing regulations ended in July 2021,<sup>181</sup> and all COVID-19 restrictions were removed in February 2022.<sup>182</sup> Considering this change in circumstances, and despite the Justice Committee's suggestion that Nightingale Courts could remain active to enable permanent courthouses to undergo essential maintenance,<sup>183</sup> there are likely cheaper and less complex ways in which to support the capacity of the justice system, reduce delay, and thereby increase access to justice. These strategies could include reopening court estate that has been earmarked for sale but not yet sold off through court reform policies. This, in turn, supports stakeholders in the media<sup>184</sup> and non-government organisations<sup>185</sup> who have questioned and challenged the ongoing role of Nightingale Courts.

The implications of this analysis speak directly to the question posed by the Justice Committee: have adaptations made to court proceedings increased access to justice during the pandemic, and do they hold potential to act as long-term solutions to reducing delay?<sup>186</sup> On the information available, Nightingale Courts have contributed to maintaining access to justice during the pandemic, but cost and complexity limits the potential for Nightingale Courts to act as a long-term solution to reducing delay. Finally, the implications of the analysis call into question the soundness of the Government's decision to keep 12

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<sup>177</sup> HMCTS, "Update for Criminal Courts", *supra* note 81.

<sup>178</sup> HMCTS, "Temporary Nightingale Courts", *supra* note 87.

<sup>179</sup> HMCTS & Buckland, "Nine More Courtrooms", *supra* note 17.

<sup>180</sup> House of Commons, *supra* note 20.

<sup>181</sup> UK, Cabinet Office, "Moving to Step 4 of the Roadmap" (27 August 2021), online: <[www.gov.uk/government/publications/covid-19-response-summer-2021-roadmap/moving-to-step-4-of-the-roadmap](http://www.gov.uk/government/publications/covid-19-response-summer-2021-roadmap/moving-to-step-4-of-the-roadmap)>.

<sup>182</sup> UK, Prime Minister's Office, "Prime Minister Sets Out Plan for Living with COVID" (21 February 2022), online: <[www.gov.uk/government/news/prime-minister-sets-out-plan-for-living-with-covid#:~:text=The%20Prime%20Minister%20has%20today,requirement%20to%20self%20isolate%20ends.>](http://www.gov.uk/government/news/prime-minister-sets-out-plan-for-living-with-covid#:~:text=The%20Prime%20Minister%20has%20today,requirement%20to%20self%20isolate%20ends.>)>.

<sup>183</sup> Justice Committee, "Court Capacity 2022", *supra* note 108 at 8 [15].

<sup>184</sup> Ames & Greenwood, *supra* note 18.

<sup>185</sup> Shaw, *supra* note 19.

<sup>186</sup> Justice Committee, *supra* note 23.

Nightingale Courts open until at least March 2023. Given that social distancing regulations and COVID-19 restrictions have ended, it is difficult to see how the continued operation of Nightingale Courts in a post-pandemic world will contribute to reducing delay or increasing access to justice.

## V. LESSONS FROM THE NIGHTINGALE COURT EXPERIENCE FOR ACCESS TO JUSTICE IN A POST-PANDEMIC WORLD

What is the relevance of the Nightingale Court experiment for access to justice in a post-pandemic world? What lessons do Nightingale Courts hold for access to justice across jurisdictions and in different countries? Nightingale Courts were hastily designed in the context of an unforeseen health crisis and were therefore unlikely to have been designed with the future in mind. Despite this, the Nightingale Court experiment may still hold lessons for access to justice across contexts and in a post-pandemic world. Here, I reflect on three different kinds of experiments that the Nightingale Court proposal enlivened and draw out potential lessons for access to justice in a post-pandemic world. These are an experiment in legal architecture, an experiment in informal justice, and an experiment in adaptation and resilience of a legal system during times of crisis.

### A. An Experiment in Legal Architecture

Nightingale Courts are courts operating in alternative physical spaces and buildings. These spaces have included a cathedral, a university, a library, and a theatre. What happens when a courthouse is reconstructed in an alternative physical building? While the prospect of setting up courts in alternative buildings had been contemplated in England and Wales pre-pandemic,<sup>187</sup> Nightingale Courts are the first initiative of this kind. Through setting up a series of courthouses in alternative physical locations, Nightingale Courts have become an inadvertent experiment in legal architecture.

The Nightingale Court experiment raises numerous questions about the relationship between legal processes and the architecture of the building in which they take place. On one hand, it is possible that Nightingale Courts raise more concerns for legal architecture than they remedy. This is because the modern courthouse is strongly associated with the ideology that it is a place of justice, due process, and dignity.<sup>188</sup> Other buildings are not. For example, how has the use of the Salford Lowry Theatre increased the litigant's perception of the courthouse as a place of drama and theatrics? What does the use of the Peterborough Cathedral say for the separation between church and state? How about the implications of the use of Ministry of Justice offices for the separation of powers? It is possible that this inadvertent experiment in legal architecture has been to the detriment of the ideology of the courthouse as a place of justice.

On the other hand, it is possible that the Nightingale Court experiment holds potential for facilitating legal proceedings in spaces that are devoid of dynamics of power and exclusion found in the modern courthouse. For example, Linda Mulcahy has illustrated that court spaces are fundamental to the exercise of state power by allocating people in space and coding their reciprocal relationships.<sup>189</sup> According to

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<sup>187</sup> Linda Mulcahy & Emma Rowden, *The Democratic Courthouse: A Modern History of Design, Due Process and Dignity* (Oxford: Routledge, 2020) at 466.

<sup>188</sup> *Ibid.*

<sup>189</sup> Linda Mulcahy, "Architects of Justice: The Politics of Courtroom Design" (2007) 16 Soc Leg Stud 384 at 385.

Mulcahy, the materiality of the courthouse, including the segmentation of the courtroom, placement of the dock, and allocation of space to the public, is a deliberate constitution of power and exclusion in which central players to court proceedings are privileged at the expense of others.<sup>190</sup>

To the extent that the process of conducting legal proceedings in different buildings has disrupted dynamics of power that persist in the modern courtroom, I argue that this may have positive implications for the experience of the litigant. The experience of the legal process may be less intimidating, more dignifying, and more accessible for the litigant. This in turn holds potential for using alternative spaces to increase access to justice. The use of non-courtroom buildings to improve the experience of the litigant and thereby increase access to justice is one potential lesson that the Nightingale Court experiment offers across contexts and for a post-pandemic world.

### **B. An Experiment in Informal Justice**

Next, Nightingale Courts have been an inadvertent experiment in informal justice. Informal justice advocates were driven by a desire to use a range of alternative, informal, and simpler processes for handling conflicts and disputes.<sup>191</sup> Nightingale Courts themselves cannot be considered informal justice mechanisms because they do not possess characteristics such as being decentralised from the formal legal system, unofficial, or use non-professionals.<sup>192</sup> Yet, it is possible that Nightingale Courts have inadvertently achieved some of the goals of the informal justice movement through being located in local areas or reducing formality in proceedings held outside a courthouse. In this way, Nightingale Courts have been an experiment in the informalisation of the legal system.

First, by being situated in local areas, it is possible that Nightingale Courts hold lessons for the localisation of justice. Informal justice advocates sought to localise legal proceedings through adaptations such as Neighbourhood Justice Centres<sup>193</sup> which were used to resolve disputes through mutually acceptable and voluntary agreements between parties who knew each other.<sup>194</sup> Neighbourhood Justice Centres were thought to reduce community alienation from the courts and thereby expand access to justice through increased participation.<sup>195</sup> Nightingale Courts may have helped reduce community alienation from the court system by establishing Nightingale Courts in local areas. At least one Nightingale Court has been established in each region of England and Wales.<sup>196</sup> Parliamentarians<sup>197</sup> and local media<sup>198</sup> have

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<sup>190</sup> Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Oxford: Routledge, 2010) at 173.

<sup>191</sup> J M FitzGerald, "Thinking about Law and Its Alternatives: Abel et al. and the Debate Over Informal Justice" (1984) 9 *Am B Found Res J* 637 at 637.

<sup>192</sup> Richard L Abel, "Introduction" in Richard L Abel, ed, *The Politics of Informal Justice: Vol II Comparative Studies* (New York: New York Academic Press, 1981) 2.

<sup>193</sup> See Richard Hofrichter, "Neighbourhood Justice and the Social Control Problems of American Capitalism: A Perspective" in Richard L Abel, ed, *The Politics of Informal Justice: Vol I The American Experience* (New York: New York Academic Press, 1982) 207 at 207-10.

<sup>194</sup> *Ibid* at 209.

<sup>195</sup> Christine B Harrington, "Delegalization Reform Movements: A Historical Analysis" in Richard L Abel, ed, *The Politics of Informal Justice: Vol I The American Experience* (New York: New York Academic Press, 1982) 35 at 62.

<sup>196</sup> HMCTS, "Temporary Nightingale Courts", *supra* note 87.

<sup>197</sup> UK, HC Deb (20 January 2021), vol 687, cols 981-2.

<sup>198</sup> See e.g. Dowling, *supra* note 96.

celebrated the implementation of Nightingale Courts in their areas. Nightingale Courts have served as a reminder of the symbolic and practical importance of local justice in increasing access to justice.<sup>199</sup>

Secondly, by using non-court spaces to hold trials and hearings, Nightingale Courts may have furthered the cause of the informal justice movement to make the process of attending court less formal and thereby increase participation.<sup>200</sup> It is possible that the use of non-court spaces has removed the structures and formalities associated with the modern courthouse. This could especially benefit the litigant in person by removing intimidating aspects of the process, thereby improving the ability to participate.<sup>201</sup> It could also benefit litigants who find the formalities of the courthouse a barrier to participation, such as litigants with disabilities, from low socio-economic backgrounds, or who are culturally and linguistically diverse.<sup>202</sup> Nightingale Courts may hold lessons for using non-courtroom spaces as an informal alternative when this would remove barriers to participation.

### C. An Experiment in Adaptation and Resilience

Finally, Nightingale Courts have been a forced experiment of adaptation and resilience of legal systems in times of crisis. The demands of the COVID-19 pandemic that the legal system was required to adapt to, such as social distancing requirements, were specific to the particularities of the health crisis. To the extent that Nightingale Courts were set up to provide courtrooms large enough to cater to social distancing requirements, they are unlikely to be required to perform this particular function again. However, the COVID-19 pandemic was a form of crisis. Legal systems around the world will be required to respond adequately to different forms of crises that will likely emerge in the following decades. Future pandemics and epidemics, war, and the effects of climate change are some possible examples.

In order to adequately respond to future crises, legal systems must remain adaptive and responsive.<sup>203</sup> A resilient legal system is one that maintains consistency in its overall behavioural structure despite continuous change in both internal and external conditions.<sup>204</sup> A legal system is adaptive when it has an ability to respond and change to evolving circumstances while maintaining the fundamental attributes of the system.<sup>205</sup> Nightingale Courts have been an experiment in both aspects of adaptation and resilience. The ultimate success of this experiment in adaptation and resilience will hinge on evaluating, reflecting on, and drawing further lessons from the experiment. It will also depend on making structural changes to relieve the pressure on adaptations in the face of future crises. This will include structural changes to funding of the legal system.

The experiment in adaptation and resilience brings to the fore the importance of *preserving* and *maintaining* access to a legal system during crisis. This is a different focus to that of *increasing* access to legal systems, which has been central to the access to justice literature. Viewed in this way, it is possible to see that the existence of Nightingale Courts alone in the context of an unpredictable pandemic was a

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<sup>199</sup> UK, HC Deb (20 June 2019), vol 662, col 414.

<sup>200</sup> Harrington, *supra* note 195 at 62.

<sup>201</sup> See generally Mckeever, *supra* note 59.

<sup>202</sup> See Abenaa Owusu-Bempah, "Understanding the Barriers to Defendant Participation in Criminal Proceedings in England and Wales" (2020) 40 Leg Stud 609 at 618.

<sup>203</sup> JB Ruhl, "General Design Principles for Resilience and Adaptive Capacity in Legal Systems – With Applications to Climate Change Adaptations" (2011) 89 NC L Rev 1373 at 1373.

<sup>204</sup> *Ibid* at 1379.

<sup>205</sup> *Ibid* at 1388.



form of adaptation and resilience of the legal system in England and Wales. The Nightingale Court experiment invites consideration of how legal systems around the world are prepared to maintain access to legal processes during times of crisis.

## VI. CONCLUSION

This article began with a question: to what extent have Nightingale Courts addressed access to justice concerns during the COVID-19 pandemic, and what lessons do Nightingale Courts hold for access to justice across contexts and in the future? Though costly and complex, Nightingale Courts have contributed to preventing a further worsening of delay during the pandemic. Nightingale Courts can be said to have contributed to maintaining, though not increasing, access to justice during the pandemic. While Nightingale Courts have achieved their original aims and objectives, an ongoing role for Nightingale Courts in increasing access to justice post-pandemic is limited. These findings have provided a direct response to the question asked by the Justice Committee,<sup>206</sup> and provided support for stakeholders who have defended the role of Nightingale Courts during the pandemic,<sup>207</sup> as well as those who have questioned the ongoing relevance of Nightingale Courts post-pandemic.<sup>208</sup>

Although an ongoing role for Nightingale Courts going forward is limited, the enduring relevance of Nightingale Courts is in the lessons that they hold for access to justice across jurisdictions and in a post-pandemic world. First, the Nightingale Court experiment in legal architecture invites us to consider whether reconstructing the courtroom in an alternative physical space holds potential to improve the litigant's experience, thereby increasing access to justice. Secondly, the Nightingale Court experiment in informal justice provokes consideration of whether the goals of the informal justice movement have been inadvertently met by Nightingale Courts and can be carried forward. Finally, the Nightingale Court experiment in adaptation and resilience enlivens the importance of adaptations to legal systems that maintain and preserve access to legal systems in times of crisis.

Throughout this article I have analysed the ways in which Nightingale Courts have contributed to the key concerns of the access to justice literature such as cost, delay, complexity, and the litigant experience. I have concluded that Nightingale Courts can be said to have contributed to maintaining access to justice during the pandemic. Yet, the lessons posed by the Nightingale Court experiment encourage us to think wider, to issues such as adaptation and resilience. Perhaps, then, the real take away for Nightingale Courts is not their contribution to cost, delay, and complexity, but that they existed at all, and maintained access to the legal system, throughout the COVID-19 pandemic. By maintaining and preserving access during the pandemic, Nightingale Courts have contributed to the resilience of the legal system. Despite their challenges and inefficiencies, the existence of Nightingale Courts throughout the pandemic alone is cause for careful optimism in the face of future crises.

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<sup>206</sup> Justice Committee, *supra* note 24.

<sup>207</sup> HMCTS & Buckland, "Nine More Courtrooms", *supra* note 17; House of Commons, *supra* note 20.

<sup>208</sup> Ames & Greenwood, *supra* note 18; Shaw, *supra* note 19.