

# Written Evidence to the Justice Committee on the Modernisation of Her Majesty's Courts and Tribunals Service

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## **EXECUTIVE SUMMARY**

- Support for litigants who cannot afford private legal representation has been reduced to unsustainable levels. This threatens to undermine the HMCTS reform programme, even if it is successfully implemented;
- The public interest and user experiences should guide the design of digital justice systems;
- Expected savings generated by the reforms must be treated as a benefit of the reforms and not as an objective that drives the design of the reform programme;
- Financial implications on the wider justice system and other governmental services must be fully accounted, including direct and indirect costs, to prevent the risk of false economies;
- Engagement, communication, and collaboration with external stakeholders should not be limited due to pressures of delivering the reforms according to fixed deadlines;
- Individual projects and the reform programme as a whole must be empirically reviewed, assessed, and evaluated by internal and external examiners;
- Securing access to justice for all requires more extensive civil justice reforms beyond the current modernisation programme, particularly reforms to expand the availability and use of representative procedures, including test cases, representative proceedings, and class actions.

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# WRITTEN EVIDENCE TO THE JUSTICE COMMITTEE ON THE MODERNISATION OF HER MAJESTY’S COURTS AND TRIBUNALS SERVICE

## I. INTRODUCTION

The Bonavero Institute of Human Rights is an institute in the Faculty of Law at the University of Oxford. As part of its research programme, the Bonavero Institute of Human Rights supports scholarship and collaborates with stakeholders across a range of access to justice issues. On 16 November 2018, the Bonavero Institute of Human Rights hosted a collaborative event on the modernisation programme, *Measuring the Impact of Court Reform on Access to Justice*, with the support of the Economic and Social Research Council and the Legal Education Foundation.

## II. COMMENTS

1. It is important to begin this submission by recognising the background to the reform programme of severe cuts to the legal aid system. Notably, the Legal Aid, Sentencing and Punishment of Offenders Act (‘LASPO’) 2012 has had detrimental impacts on access to justice and the wider justice system, including the exclusion of large numbers of people from free or subsidised legal advice, creating legal advice deserts, limiting the availability of legal aid for those who are still eligible, and significantly increasing the numbers of litigants in person. The Ministry of Justice’s 2019 Post-Implementation Review of LASPO corroborates these adverse impacts. It is by now undeniable that the level of public subsidy has been restricted to such levels that many people are denied access to justice, including vulnerable persons as the successful challenges to the Lord Chancellor’s Exceptional Case Funding Guidelines have demonstrated. The resultant clustering and escalation of justiciable problems into health, employment, social, and financial problems places increased burdens on other public services and their respective budgets (re: ‘knock-on’ effects). While it is clear that we are currently in a fiscally challenging environment, we raise concerns about the fairness and efficacy of severe cuts that have not only led to injustices in individual cases, but have also had serious adverse implications for the budgets of other governmental services. The unsustainable level of support for litigants threatens to undermine the HMCTS reform programme. Irrespective of the success of the design and implementation of the

reform programme, many litigants will still need some legal assistance to effectively navigate digital or physical justice systems. Although governments have (rightly) borne the brunt of criticism for reducing legal aid, we also affirm that it is legitimate to expect the profession, who make considerable profits from England's world class legal services market, to do more to support access to justice for those who cannot afford private legal representation.

2. The HMCTS modernisation programme is a bold transformation of the justice institutions of England and Wales. No system to date has undertaken reforms of such ambitious scale, scope, and complexity in the world. We are supportive of the important aims of modernising the justice system, improving efficiency, enhancing user experience, and promoting access to justice specifically for litigants, who often unrepresented, face challenges accessing physical courts and tribunals and navigating an often bewildering array of paper forms and notices to get their cases ready for a hearing. If implemented successfully, the reforms hold out the realistic prospect of reducing the time and cost needed to resolve cases justly in accordance with the overriding objective. As an executive agency of the Ministry of Justice, HMCTS is bringing the courts and tribunal systems into the twenty-first century by utilising technological advances to ensure that the justice system is more accessible, just, and proportionate. It is thus pivotal that the extent to which these objectives are fulfilled should be empirically substantiated.
3. At a projected cost of £1.2 billion, the economic and efficiency benefits of the reform programme are expected to include a £265 million reduction in annual spending, 5000 fewer staff, and the processing of 2.4 million cases per year outside physical courtrooms (National Audit Office 2018). It is entirely appropriate that the expected efficiencies produced by the move to digital justice systems are factored into the reform programme. However we believe that the expected savings of the reforms must be treated as a benefit of the reforms and not as an objective that drives the design of the reform programme. If the reforms do work as intended they will produce considerable savings – for both the taxpayer and private users – but justice reform is an area where there is a real risk of false economies where costs can be shifted between different parts of the legal system or between different government services. Accordingly, it is important that the financial implications on the wider justice system are more adequately addressed moving forward. This includes greater accounting for both direct and indirect costs, such as the need to purchase new and compatible technology by other organisations in the former category, and delays caused by staff shortages and building closures in the latter category. Such direct and indirect costs should be fully addressed and quantified, where possible, to provide projections and reflections of the true costs and benefits of the reform programme to the justice system as a whole.

4. It follows from the above that the interests of the public and user experiences should guide the design of systems. Increasing efficiency should not come at the expense of undermining the integrity of the justice system and ensuring fair and equal accessibility. Sir Ernest Ryder, Senior President of Tribunals, has noted the modernisation programme should ensure the delivery of ‘an administration programme that is patently fair, that protects the judiciary’s independence and provides equality of access that is open to scrutiny by a diverse public with whom we must engage and communicate if we are to meet their needs and retain their understanding, trust and respect.’ It is important to uphold the principles of transparency and engagement underlying this call for a public and open process in order to maximise the access to justice benefits of the modernisation programme with a view to user needs.
5. The scale, scope, and complexity of the modernisation programme has contributed to an extension of its original timescale from 4 years to 6 years. Despite the revised timescale, the reforms are currently not on schedule, creating pressure for an increased pace of delivery in the remaining period. While a sense of urgency is welcome given most observers accept there is presently an access to justice crisis, working to fixed deadlines also carries risks. Engagement, communication, and collaboration with external stakeholders should not be limited as a result of any anticipated time constraints. Meaningful and collaborative consultation and evaluation with stakeholders, including legal professionals, academics, and charities, cannot be formal and perfunctory, but should rather be iterative and undertaken in a manner conducive and open to substantive input in influencing changes. This can be a time-intensive process. Adequate measures and planning should be undertaken to ensure that such meaningful collaboration constitutes an integral part of the reform process moving forward.
6. While it is important to utilise technological advances in the pursuit of a more accessible, just, and proportionate justice system, such uses should be empirically tested by both internal and external examiners. Modernisation of this scale and scope without impact assessments on users has serious implications for access to justice. This includes concerns over digital exclusion and digital assistance services, linguistic and literacy barriers, unequal outcomes and cognitive biases involved in video hearings, absence of sufficient legal advice leading to uninformed and inappropriate user decision-making, and other such problems. The HMCTS response in 2019 to the Public Accounts Committee 2018 Report - Recommendation 4 to previously raised concerns of this nature, outlining proposed internal testing and trialing of individual projects, is promising in character. These activities should be open and transparent to external stakeholders for independent review, assessment, and evaluation. As such, these critical activities should not be

unduly limited due to time constraints and the pressures associated with delivering the reforms according to the revised timescale. The potential uneven impacts of the reforms on users indicates that assessments and evaluations with a view towards those with protected characteristics under the Equalities Act 2010 is undertaken to ensure fairness and equality. In addition to individual project reviews, assessments, and evaluations, the modernisation programme as a whole should be subject to empirical analyses using appropriate methods.

7. Finally, the Committee should be conscious of the fact that although the reforms are ambitious in seeking to transform the way litigation is conducted, we believe the goal of promoting greater access to justice – and hence equal treatment under law for all and not just those presently using the system – requires reconsideration of the *scope* of litigation as well. In particular we believe the English legal system needs to re-examine the limited availability of and use of representative procedures, including test cases, representative proceedings, and class actions, as a more efficient and fairer method of dealing with common legal problems. At present, courts and tribunals are frequently called on to decide these questions on multiple occasions (creating waste and a risk of unequal outcomes) or the problems are never presented to court because it would be irrational to litigate them on an individual basis (creating an obvious justice deficit). We acknowledge these issues are currently outside the scope of the HMCTS reform programme, but they are integral to the objectives of those reforms. In this regard we note the landmark decision of the Supreme Court in *R (Unison) v Lord Chancellor* [2017] UKSC 51 declaring that rules which make litigation unaffordable or render litigation irrational because it can only be pursued at disproportionate cost, breach the common law right of access to justice. Lord Justice Briggs’ (now Lord Briggs) *Civil Court Structure Review* report, which sparked the current HMCTS reform programme, recognised that the system was failing badly virtually all litigants in “low value” disputes. While successful implementation of the HMCTS reform programme will go some way to ameliorating this failure, securing the right of access to justice for all will require more extensive reforms to the civil justice system.