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1. This submission addresses a central theme underpinning questions 1, 2, and 4 of the Committee’s inquiry: how can we measure the impact of the government’s reform agenda on access to justice in an empirically and constitutionally robust way?

2. As Associate Professors in the Oxford Department of Economics and Faculty of Law, respectively, we have worked on questions of public law and economics for several years, including research on the impact of employment tribunal fees which was drawn upon in Supreme Court litigation (*Unison*) in 2017.¹ Since January 2019, our research in this field has been part of the Next Generation Services programme, funded by UK Research and Innovation through the Industrial Strategy Challenge Fund.²

Summary

3. The evaluation agenda should be conceived of as a long-term programme into which resources should be invested in addition to those assigned to the reform process itself. An adequate impact evaluation will require the commissioning of empirical research as well as the implementation of surveys and randomized evaluation to assess how digitalization is affecting access to justice and the operation of the courts and tribunals service. We would recommend that ‘baseline’ measures be published in 2020, with further reporting every 2 to 3 years until 2030.

4. Evaluation of the reform agenda on access to justice must consider the outcomes that individuals are able to achieve within the justice system. This requires more than just the tracking of changes in overall case volume, cost, and subjective user ratings of the system; success rates, withdrawal rates, and the nature of remedies awarded must be analysed.

5. Further, access to justice requires that areas in which the consequences of an individual being unable to enforce their rights are severe should be sequenced at an advanced stage, i.e. only once the risk of futility factors have been thoroughly evaluated and minimized.

6. The impact of moving to an online system has an *ex-ante* ambiguous impact on improving access to justice. While the digitally capable should find it easier to launch claims, and less costly in terms of time and travel when they do so, the same conclusion does not necessarily hold for the vulnerable and digitally excluded. Information on the demographic characteristics of system users, and their experiences in the non-digital

² Grant No ES/ S010424/1. We gratefully acknowledge discussions with Dr Natalie Byrom of the Legal Education Foundation and our colleague Professor John Armour.
channel, must therefore be collected in order to understand whether the justice system is accessible for the ‘full run’ of litigants.

7. As it is difficult to assess whether any given outcome is ‘just’, evaluation should focus on how reform changes the distribution of outcomes achieved and, if there is any effect, which types of users are affected. This will likely require a combination of commissioned surveys to form adequate baseline and on-going data on users to form a comparable yardstick across time, as well as the use of randomised evaluation in the piloting of new programmes.

8. Given the scale of the reform programme and the ‘agile’ approach to design and roll-out, evaluation should be conceived of at two levels. First, at the ‘micro’ level, undertaken as part of the iterative design and testing of individual components of the reform agenda, claimant outcomes and not just time and cost must be evaluated. Furthermore, the ‘micro’ agile design and testing process must be properly documented and transparently communicated to external stakeholders. Which design iterations are trialled, the population of claimants that are drawn upon in this iterative trial process, and the precise evaluation metrics, must be properly documented to facilitate future learning and permit evaluation of this stage of design.

9. At the ‘macro’ level, an evaluation of the system as a whole and the interactions of individual design choices on claimant outcomes must be commissioned. This will likely be a long-term undertaking, the dates of reporting for which should be set in advance. Elements of the longer term evaluation strategy will likely have to rely on survey and administrative data such that the approach is sufficiently flexible to take account of changes as the programme develops, but also provide yardstick across time. In our opinion, baseline measures should be published in 2020 and evaluation metrics should be reported on a biannual basis for at least 10 years.

Measuring “Access to Justice”

10. Byrom provides a comprehensive overview of the metrics most commonly used to evaluate the success of Online Courts in terms of access to justice. Key elements include: (i) reductions in cost (both administrative and those faced by litigants); (ii) reduction in time to resolution; (iii) reduced need for hearings (as hearings are associated with greater cost and time for litigants); (iv) increased rates of settlement; (v) increased case volume and litigant engagement; (v) subjective measures of procedural justice and user-satisfaction.3

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3 Natalie Byrom ‘Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice’ (Legal Education Foundation 2019).
11. As documented in an extensive literature on Access to Justice, these metrics are undoubtedly important in aiding a broad, interdisciplinary understanding of the factors at stake. Upon closer inspection, however, there appears to be little connection between existing approaches and the key factors to be considered within the context of English law and the UK’s broader constitutional arrangements. This submission sets out to bridge this gap, drawing on a series of recent decisions and economic theory to frame a wider discussion of the appropriate review standard for measuring changes in access to justice: in this analysis, the risk, and cost, of futility become key metrics in understanding Access to Justice.

**Access to Justice and Futility**

12. In discussing the constitutional principle of access to justice in *Unison*, Lord Reed held that ‘[i]t is not only when fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it futile or irrational to bring a claim.’

4 Viewed through this lens, access to justice becomes a concrete review standard in line with orthodox micro-economic theory, and thus in principle subject to empirical assessment.

13. On this basis, we suggest that whether a system gives rise to an unacceptable risk of access to justice violations depends on the interaction of two factors:

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\text{Access to Justice Risk} = \text{Risk of Futility} \times \text{Cost of Futility}
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14. Assessing the risk and cost of futility in turn requires a consideration of individual and system level incentives. With respect to the risk of futility, one must consider both individual incentives to launch meritorious claims and system level incentives to ensure their vindication. Futility has important consequences when it results in high cost for an individual, but also when a large proportion of claims in a system are affected, leading to concerns about lack of deterrence and precedent.

15. We now look at each of these elements in more detail.

**Individual Incentives to Launch Claims**

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4 *R (Unison) v Lord Chancellor* [2017] UKSC 51, [96] (our emphasis).
16. Attempts to vindicate one’s rights will be futile if: a) a litigant is unable to launch a claim; b) it is not in a litigant’s rational interests to launch a claim. Together, these factors determine the probability of launching a meritorious claim.

**Ability**

17. Access to formal legal processes must be ‘practical and effective’ as opposed to ‘theoretical and illusory’.⁵ There must be a route through which an individual is able to vindicate their rights. This requires, for example, that application processes are not so complex that users of the system cannot effectively use them,⁶ and that court fees are structured such that litigants can realistically afford them.⁷ While the courts consider the full range of mechanisms open to individuals for vindicating their rights (see, for example, *Howard League*⁸), in some of the jurisdictions covered by the reform programme, there are no alternative routes beyond the official channel (e.g. mediation) for pursuing a claim.⁹

18. For the digitally confident, online processes have the potential to reduce barriers to accessing the justice system. Yet, over 11 million adults in the UK lack basic digital skills such as being able to complete online forms and re-locate websites.¹⁰ As the Legal Education Foundation has argued, it ‘certainly cannot be assumed that effective access [to justice] equates with access to the internet.’¹¹

19. Online systems must be sufficiently flexible to support those who cannot effectively use digital services and potentially to channel some users into alternative resolution routes. HMCTS’ Assisted Digital service has been developed to ensure that sufficient support is in place to accompany online services and to provide applicants with a range of options to suit their needs and digital capabilities. However, no large-scale evaluation plan has been published for the effectiveness of this service.¹² Furthermore, even if offline services remain open in principle, it is unclear if access will remain effective with closures of physical courts and tribunals.

**Incentives**

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⁵ *R (Gudanaviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWCA Civ 1622, [2015] 1 W.L.R. 2247 [46].
⁶ Ibid. See also *R (S) v Director of Legal Aid Casework* [2016] EWCA Civ 464; [2016] 1 WLR 4733.
⁷ *R (Unison) v Lord Chancellor* [2017] UKSC 51, [96].
⁸ *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92 [41].
⁹ Furthermore, one needs to be mindful of how changes to formal dispute resolution system affects incentives to engage with other channels. For example, high employment tribunal fees also undermined settlement rates; see Adams and Prassl, ‘Vexatious Claims: Challenging the Case for Employment Tribunal Fees’ *Modern Law Review* (2017).
¹¹ *Justice Digital Exclusion Report, 1.18.*
¹² The impact assessment only states that “extensive piloting” will be carried out: https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/assisteddigitaliaandeia.pdf
20. In *Unison*, it was recognized that even if a claimant is theoretically able to launch a claim, access to justice is still violated if it is nonetheless irrational to do so, notably because the expected payoffs would be negative.\(^\text{13}\)

21. Moving online, for those able to navigate the system, should bring advantages in this respect. The potential for greater flexibility over when and how litigants can access the system, and the potential of digital service to lower cost and time for users, should improve the expected payoff calculation for enforcing one’s rights. For those unable to access the digital channel, however, attention must be paid to the quality of the service that they are provided with and the costs and time incurred in attempts to vindicate their rights.

**Implications for Evaluation Metrics**

22. The impact of moving to an online system has an *ex-ante* ambiguous impact on the likelihood of certain groups’ launching claims. While the digitally capable should find it easier to launch claims, and less costly in terms of time and travel when they do so, the same conclusion does not necessarily hold for the vulnerable and digitally excluded. Therefore, changes in overall caseload are not sufficient for assessing whether all groups are able to access the system effectively. Information on the characteristics of users of the systems, and their experiences in the non-digital channel, must be collected in order to understand whether the justice system is accessible for the “full run” of litigants.

**System Incentives & Vindication of Meritorious Claims**

23. Once a meritorious claim is launched, it may still be a futile exercise if there is a significant risk that it will not be vindicated. The case law points to the importance of being able to put one’s case effectively as a key aspect of reducing futility in this sense.\(^\text{14}\) It has been recognized that oral hearings might be required ‘when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted’.\(^\text{15}\) When the issues involved in a case are too factually or legally complex for an individual to present their case effectively, the courts have recognized a requirement for representation and legal aid.\(^\text{16}\) Note that an inquisitorial process does not necessarily negate this requirement.\(^\text{17}\)

**Implications for Evaluation Metrics**

\(^{13}\) *R (Unison) v Lord Chancellor* [2017] UKSC 51, [96].

\(^{14}\) Many cases have been concerned with time limits denying litigants a fair opportunity to put the case. For example: *R (Detention Action) v First Tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341; *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710.

\(^{15}\) *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92 [41].

\(^{16}\) See, for example, *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710

\(^{17}\) *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92, [61]-[92].
24. This aspect of futility requires an evaluation of litigants’ ability to participate effectively in online processes and of the impact of digital channels on substantive outcomes. We would like to explore how this element of futility might be measured using objective criteria. As surveyed by Byrom, there are reasons to caution against a reliance on subjective measures of procedural fairness and a claimant’s own perception of the fairness of a given outcome. She notes that the “link between low levels of legal knowledge and a tendency to accept as fair outcomes that are not is particularly concerning in the context of England and Wales.”

The Cost of Futility

25. A risk of futility is inherent in all complex dispute resolution mechanisms: ‘no system can be risk free.’ Translated into the present framework, this means that we must look not only at the risk that a meritorious claim will not be vindicated, but also the consequences of such a failure: the cost of futility.

26. In understanding the broad range of factors which influence the consequences, or cost, of futility, it is again useful to structure our analysis into individual and system-level considerations. The cost of futility for the individual, first, will often be relatively straightforward to assess, whether in material and monetary terms, or threats to liberty and life more generally: in asylum cases, for example, the courts have recognised that ‘the consequences … of mistakes in the process are potentially disastrous. That is why … justice and fairness should not be sacrificed on the altar of speed and efficiency.’ The range of factors to be taken into account, however, is not limited thus: the Lord Chancellor’s LASPO guidance provides further examples of situations where the cost of futility may be particularly high, including ‘issues of life, liberty, health and bodily integrity, welfare of children or vulnerable adults, protection from violence or abuse, or physical safety’.

Consequences for the Reform Programme

27. The Cost of Futility will vary across the many jurisdictions affected by the reform agenda: ‘horizontal’ civil money claims between commercial parties are fundamentally different from ‘vertical’ claims against the state, including notably benefit (PIP) appeals and immigration (asylum) decisions. The sequencing and piloting of aspects of the reform agenda should be highly sensitive to the consequences of futility: this is directly

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18 Byrom (n 1).
19 Refugee Legal Centre (n ) [7].
20 Detention Action CA (n ) [49]. In coining the phrase in Refugee Legal Centre CA (n ) [8], Sedley LJ drew on the matrix of considerations set out in Paul Craig, Administrative Law (5th ed, Sweet & Maxwell 2003) ch 13.
relevant, for example, in the context of the roll-out of continuous online resolution for PIP appeals.

28. Areas in which the consequences of futility for individuals are especially severe should be sequenced at an advanced stage, i.e. only once the risk of futility factors have been thoroughly evaluated and minimized.

**Evaluation of the Reform Programme**

29. As noted above, changes in raw case volumes are insufficient to determine whether effective access to justice has increased for all groups: it is crucial to determine whether an increase in claims from more digitally confident groups might mask a fall in the propensity of more vulnerable groups to bring claims? More information is required on the characteristics of individuals bringing claims and the outcomes they are able to achieve within the system to answer this question. The legal needs literature has identified key characteristics that correlate with vulnerability in the justice system and should inform what information is collected as part of the case management system.

30. A key difficulty lies in establishing whether any given outcome achieved within the system is ‘just’. A feasible aim, on the other hand, is to assess whether the reform process changes the outcomes that are achieved within the system and, if so, for which groups of individuals.

31. Baseline data on the operation of the courts and tribunals system is scarce. Thus, in order to establish the impact of reform on users at least one of two routes could be pursued: first, the collection of baseline and ‘endline’ survey data in key jurisdictions (see, for example, the *Survey of Employment Tribunal Applications*, for an example of government commissioned surveys on the operation of the tribunals); second, the use of randomized evaluation in the piloting process.

32. *Randomised Control Trials* are increasingly used in social science research to evaluate the impact of reforms. The key idea is to randomly allocate claimants between “control” and “treatment” groups. Outcomes across these groups can then be compared to determine how the treatment influences outcomes and user experience. They are often held up as a “gold standard” and, properly designed, results from such trials are considered to give a credible and robust measure of the impact of a programme.

33. For example, in the context of continuous online resolution (COR) in PIP appeals, after DWP have responded to a benefit appeal (submitted online), cases could be randomly allocated to different groups. A control group would have a physical hearing booked in, in the usual manner. A treatment group would be allocated to have their case determined
through COR. There are a number of outcomes that could then be evaluated without the collection of additional data including: success rates; withdrawal rates; time to decision. Relevant demographic data to consider alongside outcomes could perhaps be scraped from the information uploaded by individuals or it could be gained by short exit surveys when an individual submits their appeal. Short follow-up surveys by text message, phone or email could give further information about how individuals perceived the process, their acceptance of the outcome, and the cost to them of pursuing their appeal. The relationship between the information uploaded and outcomes could also be analysed.

34. Given the ‘Common Components Approach’ to agile system design adopted by HMCTS, evaluation should be conceived of at both the micro and macro-levels. HMCTS note that reform projects are developed in “small blocks” to allow teams to “test, iterate and prove [their] technology without a ‘big bang’”. The methodology used for testing and the characteristics of users participating in the testing process is not publicly available but should be made accessible to improve stakeholder trust in the process. Small-scale randomized evaluations could be built into this iterative process in which not only time and cost, but also user experience and outcomes should be analysed.

35. At the ‘macro’ level, the working of the system as a whole, and not just the operation of individual sub-components, must be evaluated. Thus, changes in the demographic composition of users and the final outcomes that groups achieve at the end of their engagement with the justice system must be tracked and reported for each jurisdiction.

36. We recommend that baseline surveys, especially on jurisdictions sequenced early in the reform timetable, are commissioned to facilitate the publishing of baseline metrics in 2020. We recommend that these ‘macro’ results are then published on a regular basis, every two years for example, to form a comparable yardstick across time according to which the programme can be evaluated and areas for improvement identified.

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22 This information could also be used when allocating cases to treatment and control groups.
23 https://www.gov.uk/government/publications/7-lenses-of-transformation/the-7-lenses-of-transformation