Written evidence from the Bar Council (CTS0058)

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the House of Commons Justice Committee’s inquiry on Court and Tribunal Reforms.

2. The Bar Council is the governing body and the approved regulator for all barristers in England and Wales. It represents over 16,000 barristers in self-employed and employed practice.

3. The Bar Council naturally takes an interest in Her Majesty’s Courts and Tribunals Services’ (HMCTS) Reform Programme. The future of both court procedure and the use, condition, and availability of our physical courts will have a significant impact not only on our members’ working lives, but also on their clients’ ability to enforce or protect their rights, and hence on the rule of law itself. For this reason, we have previously responded to the Public Accounts Committee’s call for evidence on HMCTS’ progress, and also contributed to the National Audit Office’s (NAO) published and forthcoming reports.

4. As we have indicated on all of these occasions, the Bar does not oppose reform of the courts nor greater use of technology in principle. Practitioners in fact welcome practical change that benefits them and their clients alike, such as the removal of unnecessary hearings and the move away from an unwieldy and inefficient paper-based system in the civil courts in particular. We do, however, consider it a vital part of our role to ensure that reforms of this nature are undertaken for the right reasons, with the right evidence, and do not have consequences that are contrary to the interests of justice.

5. For this reason, the Bar Council accepted an invitation from HMCTS in 2016 to act as a key stakeholder, regularly feeding the Bar’s perspective and expert knowledge into individual projects that form part of the programme. According to the terms of our agreement, this participation does not imply endorsement of the various parts of the programme nor any specific proposal or decision. Rather, it shows the Bar’s commitment to work positively with HMCTS in ensuring that the reform programme meets the needs of all court users.

6. The Bar Council welcomes the decision of the Justice Committee to scrutinise the implications of the reform programme at this stage. We confine our submissions below to those areas of the inquiry’s Terms of Reference which concern the overall impact on our members, their clients, and the justice system as a whole, and would direct the Committee to the work of the Specialist Bar Associations on the more jurisdictionally specific issues set out in Question 1.

Q.2 What are the effects on access to justice of court and tribunal centre closures, including the likely impact of closures that have not yet been implemented; and of reductions in HMCTS staffing under the reform programme? For users, how far can online processes and video hearings be a sufficient substitute for access to court and tribunal buildings?

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1 Public Accounts Committee [2018], Transforming Courts and Tribunals inquiry; details here, and Bar Council submission here.
2 National Audit Office [2018], Early progress in transforming courts and tribunals, available here.
7. The Bar Council has joined with other stakeholders in expressing the view that court closures may have a negative impact on court users, especially where decisions are driven more by cost than a thorough understanding of users’ needs. We made this point in our response to the Government’s “Fit for the future: transforming the court and tribunal estate” consultation, to which no response has been published to date almost a year later.³

“Whilst we can readily accept that consolidating facilities in larger more modern premises may be advantageous, in particular from a cost perspective, we consider that there are limits to the extent to which the density and distribution of court buildings can be reduced without adversely affecting court users and compromising the civic function of locally administered justice. In particular we do not think the case has been made for an overall reduction in the size of the court estate; that is to say we would not wish to see HMCTS sell off two courts and replace them with one which is half the size and less well-equipped to handle the volume of hearings currently scheduled.”⁴

8. We also noted the need for pre- and post-hearing conferences to be taken into account, both when calculating how early and late court users are likely to have to travel to the nearest court, and when considering the suitability of replacing physical court hearings with online alternatives.

9. A further concern that the Bar Council has raised, again with no response to date, is the move to accommodate more of the administrative functions of a court into the new Courts and Tribunals Service Centres. Given that some of these functions will be delegated judicial functions, proper judicial supervision will be crucial if the quality of justice is not to suffer. No details are currently available as to how this will be ensured.

10. The Bar Council’s position on online processes and video hearings is that we have reservations about the “digital by default” ethos of the reform programme, despite our willingness to embrace technology where there are clear benefits. We share the concerns raised by the NAO that this can lead to an overly narrow focus on outputs without proper consideration of “the system-wide consequences”.⁵

11. On video hearings, our main concern is the lack of evidence we have seen about the impact of this expansion on “justice outcomes” such as witness credibility, clarity of communication and the preservation of the necessary formality: issues which ought to be highly material to judicial decisions as to how and when video should be used. We also want more clarity about when and how this project will be expanded to other jurisdictions.

12. This project also has clear ramifications for open justice; a vital enabler of individual users’ access to justice. HMCTS’s current intention is that terminals will be set up in court buildings which will allow members of the public to watch court hearings - including video hearings - that are taking place elsewhere. There are also plans to make “results” of cases more accessible to the public. This throws up many questions about where these terminals will be situated when space is so limited already, about how capacity will be managed when there is high demand from the public to view a particular case, how judges will continue to

³ Ministry of Justice [2018], Fit for the future: transforming the court and tribunal estate, available here.
⁵ National Audit Office [2018], Early progress in transforming courts and tribunals, available here.
manage attendance at hearings by those who should not be present (such as witnesses and those subject to non-molestation or restraining orders), about the increasingly difficult question of information security, and even about the future of the Rehabilitation of Offenders Act 1974 in a world where a conviction may live permanently online.

13. In addition to video hearings, the Bar Council has objections to some specific digitisation projects where we feel that the impact on the court users has not been sufficiently considered. An observation that we have made on multiple occasions is that, in some circumstances, a wholesale move to digitisation of legal processes may strip key stages in criminal or civil litigation of their formality, and encourage users to do what is easy, rather than what is in their best interests or the interests of justice. The Committee will, of course, appreciate that this is particularly worrying in the current atmosphere of reduced access to legal advice. A prominent example to date has been the scheme to allow defendants in criminal prosecutions the option to indicate their plea online before formal arraignment takes place. Our view has always been that this may be an example of unintended consequences, in that unrepresented defendants may choose to indicate a guilty plea online because: 1) they do not realise, without the benefit of advice, that they do in fact have a legitimate defence; 2) because they have not had the opportunity to think about the consequences; or 3) simply because an online process feels remote and unreal compared to a preliminary hearing in a courtroom. It seems highly plausible that many defendants may then take a different decision at a later stage, hence exacerbating the very problem that HMCTS is seeking to address.

14. Our most up-to-date understanding is that there are no current plans to include unrepresented defendants in this scheme, and that the most likely focus at least as a first step is simply a digitised version of the procedure already in place under section 12 of the Magistrates Court Act 1980, whereby defendants indicate a guilty plea in writing in summary only cases, which, in any case, does not become binding until the court decides to convict. The Bar Council is aware, however, that once a digital process exists, there is little to stop its use from being expanded subsequently, so we believe that continuing scrutiny of this scheme is essential.

15. Another example, from the civil courts, is the Civil Money Claims service which currently allows users to issue, defend and settle money claims worth less than £10,000 online, making resolutions in simple cases more accessible to unrepresented litigants than the current paper-based process. It also signposts users to mediation options as an alternative way to deal with the dispute, which the Bar Council welcomes. However, the intention is that this service will soon include complex and higher-value cases. In addition, plans are already under way to allow a claim started online to lead directly to a hearing (where settlement is not possible). The Bar has questioned what safeguards will be in place to prevent unrepresented litigants from issuing weak claims - potentially with no financial limit - and insisting they go to court, simply because it will in future be much easier to do so. This would of course risk making the new system less efficient instead of more so, as well as being potentially very damaging for the parties. The Bar Council has argued that users must be signposted to legal advice at the outset, although there has not yet been a clear commitment from HMCTS to do this.
Q.3 Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication, with:

b. The legal professions and the advice sector?

16. It is no secret that early consultation and communication with legal professionals over even those aspects of reform that were most likely to affect them left much to be desired. Anger over plans to pilot Flexible Operating Hours (or split shifts) in the courts reached such heights that it was widely reported in the press. There has, however, been significant improvement in the structures and practices developed by HMCTS to ensure that the Bar Council - and through us, our members - are kept informed of key milestones and relevant emerging issues as the various projects roll out. There are now very good working relationships in place between our representatives and key HMCTS staff, from the most senior levels to the teams delivering specific projects, thanks in large part to the work of the coordinating Legal Professional Relations team. We also acknowledge the efforts made to communicate with legal professionals directly, in the form of the regular newsletter, the series of “roadshow” events, and the commendably proactive approach taken by the HMCTS Chief Executive when questions are raised via social media, and in twice attending our flagship Annual Bar and Young Bar Conference.

17. A further positive development since the Public Accounts Committee inquiry is the move to ensure central coordination of requests to the Bar Council for volunteer barristers to participate in user research exercises, so that an overwhelming volume of requests are not received from multiple projects at the same time. This apparently minor and common-sense adjustment in fact makes a considerable difference to an organisation of our size.

18. Nevertheless, some of the challenges that we have previously highlighted, flowing both from the vast scale and the distinctive governance structures of this programme, remain. The most significant of these, which the Bar Council does not believe that either HMCTS or Parliament itself has yet fully grasped, flows from HMCTS’ unique constitutional position as an agency in which the executive and the judiciary together manage a public service. There is at times a tension between the judiciary’s natural caution about entering public debate, and the very real need to seek and be responsive to outside views when making decisions about how to spend and save public money.

19. There have been, and continue to be, occasions when the close involvement of the judiciary in certain key projects has limited the availability of information about plans and opportunities for meaningful engagement. The Bar Council previously raised this concern in relation to the proposal to expand the range of judicial functions that can be delegated to authorised court staff, a version of which has now passed into law in the form of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018. From an early stage, the Bar Council had called for the legislation to include a right of reconsideration of any decision made by an authorised staff member; we considered this to be a vital safeguard to the quality and independence of judicial decision-making, and necessary to maintain public confidence in the justice system. Our representatives made this point repeatedly in our regular stakeholder meetings during the two years between the initial proposal to the publication of the Bill but they were invariably told that these were decisions for the judiciary to take and that, as a result, HMCTS was not able to engage in a substantive discussion with us.

20. When the Bill was published in May 2018, without any prior public consultation, the Bar Council took the view that it should liaise directly with Parliamentarians in order to raise the
issue. When our arguments and the amendments that we drafted commanded some support from peers, and the Shadow Attorney General indicated that she might be minded to move the amendments in due course, the Bill team approached us directly to discuss our concerns. A government amendment requiring the Rules Committees to consider attaching a right of reconsideration to any delegated power, and to give their reasons to the Lord Chancellor if they chose not to do so, was duly passed. Although the Bar Council was pleased with this outcome, it is nevertheless surely the case that a more substantive discussion with us, and other key stakeholders, at an earlier stage may have been more helpful and less time-consuming for all parties.

21. This concern also arises in relation to other questions that the Bar Council regards as essential to understanding the future of the justice system, and which it has been raising over the last two years, such as on the question of open justice, where, as indicated above, there are obvious questions to which few answers have so far been made available.

22. Other barriers to engagement do exist but are more practical in nature. For example, where working groups are not primarily made up of legal professionals, such as the Evaluation Advisory Group (EAG) that will oversee the pilots of Flexible Operating Hours in the civil and family courts, there is still a strong tendency to schedule meetings during court hours. In addition, the number of projects taking place simultaneously means that those of our members who have indicated a willingness to give their input to the programme often find they are asked to be involved in several projects at the same time. As these are all led by different teams and are each at different development stages, this can lead to busy practitioners being repeatedly asked the same, often very basic questions about the work of barristers. In both of the above examples, however, we believe that HMCTS is aware of the problem and is being as flexible as can realistically be expected in finding a solution, such as in agreeing to an additional number of representatives to the EAG to increase the likelihood that at least one will be able to attend each meeting, and in taking more proactive steps to ensure in advance that staff understand what barristers do.

Q.4 Have the Ministry of Justice and HMCTS taken sufficient steps to evaluate the impact of reforms implemented so far, including those introduced as pilots; and have they made sufficient commitment to evaluation in future?

23. Since few of the projects in which the Bar Council is most involved have launched at this stage, our main observation at this point is that comparatively little in the way of evaluation findings is currently shared with stakeholders. This is no doubt in part due to the highly iterative methodology used, which would be considerably slowed by constantly having to share results with external stakeholders. However the provision of more information, specifically about the feedback given by legal professionals (even if only available at the launch stage of a project) would have been helpful to practitioners who had responded to the Bar Council’s requests for assistance from the profession to take part in the evaluation.

24. In addition, as mentioned in our response to question 3b) above, we have a particular concern about video hearings and the lack of any clear plan to research the impact on “justice outcomes”, which we consider is an indispensable prior step before further legislation to expand and normalise the use of video hearings is contemplated.

25. Finally, we should note that, while we welcome having been asked to sit on the Flexible Operating Hours EAG, these pilots have not yet started and discussion of the evaluation
criteria is continuing, so it is too early to form a view as to whether this form of evaluation will meet the needs of legal professionals, court users, or indeed HMCTS itself.

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