Written evidence from the Bingham Centre for the Rule of Law  
(CTS0065)

Introduction

1. The Bingham Centre for the Rule of Law (‘the Bingham Centre’) welcomes this opportunity to submit evidence to the Justice Committee (‘the Committee’) on effects and potential effects of the £1 billion HMCTS reform programme (‘the Programme’) on access to justice, and on management of the reform process.

2. The Bingham Centre is a constituent part of the British Institute of International and Comparative Law (‘BIICL’) and was launched in 2010 to honour the work and career of Lord Bingham of Cornhill. The Bingham Centre is dedicated to the study, promotion and proactive advancement of the Rule of Law worldwide. BIICL is a registered charity and leading independent research centre founded in 1958 by a group of legal practitioners and academics under the leadership of Lord Denning. BIICL is a unique research institution, unaffiliated to any university, which has become a world-leading authority on international and comparative law.

3. This submission has been written by Dr Jack Simson Caird (Senior Research Fellow in Parliaments and the Rule of Law, Bingham Centre for the Rule of Law), Michael Abiodun Olatokun (Research Fellow in Citizenship and the Rule of Law, Bingham Centre for the Rule of Law), Ellis Paterson (Researcher, Bingham Centre for the Rule of Law) and Gemma McNeil-Walsh (Researcher and Assistant to the Director of the British Institute of International and Comparative Law).

Summary

4. The Centre’s view is that the Programme is fundamentally re-designing the justice system of England and Wales and this is of paramount constitutional significance. The institutional silo in which the Programme has so far operated, and the agile development process upon which the Programme has been designed, have served to disaggregate the Programme from the broader constitutional context in which it operates. This raises two concerns: first, that there is a democratic deficit in which the constitutional significance of these reforms are not being properly debated and scrutinised; and second, that the long-term impact of these reforms on access to justice (and more broadly, the Rule of Law) has been insufficiently engaged with.

5. We structure our submission around these two concerns: part A considers the reforms from a constitutional perspective and engages with Q3 and Q4 of the Committee’s terms of reference; part B considers the reforms from a Rule of Law perspective and
engages with Q1 and Q2 of the terms of reference. In so doing, we make eight recommendations for the Committee’s consideration and which are consolidated below for ease of reference:

Consolidated list of recommendations

- We recommend that the Committee examines the institutional framework in which the Programme operates and identifies mechanisms by which to improve support, communication and collaboration across all governmental departments, including between HMCTS and the Ministry of Justice (paragraph 11).

- We recommend that the Government brings forward legislation to enable the overall effect of the Programme to be democratically scrutinised and debated (paragraph 13).

- We recommend that the Committee considers how to enhance scrutiny of the digital ‘end product’ of the justice system (paragraph 14).

- We recommend that the Programme increases openness and transparency by making available early-stage ‘draft’ versions of digital system designs in order to increase evaluation opportunities and mitigate clarity, intelligibility and predictability concerns (paragraph 20).

- We recommend that the Committee considers the DCMS Committee’s recommendation that digital literacy be a specific branch of the current educational framework (paragraph 22).

- We recommend that more data is collected and made openly available so that the access to justice implications and digital uptake patterns can be better evaluated and understood (paragraph 26).

- The Government should develop a non-binding charter of principles on the Rule of Law and technology to guide and inform the development of digital reform of the justice system (paragraph 27).

- We recommend that more ‘friction’ be incorporated into the digital justice system so that decision-making processes are accessible to a wide range of users with differing levels of legal capability (paragraph 29).

PART A: COURT REFORM AND THE CONSTITUTION
6. There are two key issues relating to the constitutional context of the Programme that we wish to highlight in this evidence. First, it appears that the way that the Programme is being delivered, through an iterative reform process led by an executive agency, Her Majesty’s Court and Tribunal Service, is obscuring its potential long-term constitutional implications. Second, the Programme is not underpinned by legislation and has received limited scrutiny in Parliament and therefore suffers from an accountability and democratic deficit.

The constitutional implications of the Programme and the role of HMCTS

7. The Government and the Judiciary have not hidden the transformative ambitions of the Programme. In terms of the Programme’s constitutional effect the central message has been that the Rule of Law (and in particular, access to justice) and the independence of the judiciary will either be maintained or enhanced.¹ This approach is justifiable in relation to the individual components of the Programme, which are primarily technical in nature (for example e-filing and online case management). However, when considered together, the overall long-term effect of these changes will be to transform the way in which an individual interacts with the justice system.

8. This transformative effect should trigger a duty of intellectual leadership to consider, design and explain the potential constitutional implications. For example, will the Programme ultimately result in a shift from an adversarial to a more inquisitorial justice system? What measures, technological solutions and safeguards are needed to enable or enhance the constitutional function of the (online) courts? If individuals experience the justice system through digital means, how will the justice system ensure that the judiciary is distinguished from other forms of public services delivered by digital means? These are questions which highlight the need for an overall Rule of Law vision. The Programme’s lack of a long-term overarching vision for the justice system was highlighted by the Public Accounts Committee in their 2018 report, ‘Transforming courts and tribunals’.²

9. These concerns can be evidenced by way of a basic illustration. We note that in order to issue an online claim (whether that be for a small money claim, an online divorce, or a social security appeal) the user must set up an online account. In its current format, the ‘create an account’ requirement is situated on a ‘gov.uk’ webpage: the online account sits under the ‘gov.uk’ banner and its design is so similar to other government services that it is barely indistinguishable from, say, uploading a tax

return. From a constitutional perspective, does this online site of justice sufficiently reflect the courts as being of distinct constitutional status, home to an independent judiciary? From a user’s perspective, how does this impact their perception of the justice system – and most importantly, their trust in it?

10. We consider that one of the reasons the long-term constitutional effect of the Programme is yet to be identified or considered is its limited institutional scope. The body responsible for delivering the Programme is Her Majesty’s Court and Tribunal Service (‘HMCTS’), the executive agency sponsored by the Ministry of Justice and responsible for the administration of the courts and tribunals. The Programme is by far the biggest project that HMCTS has undertaken since it was created in 2011 and is therefore a major test of the HMCTS governance structure. In our view, the limited institutional structure in which the Programme operates raises three areas of concern:

a. The effect of the Programme on the overall justice system is so significant that it cannot only be situated in the context of the ‘administration’ of courts and tribunals; it must be situated in the context of the wider justice system.

b. The control that HMCTS exercises over the Programme is fostering a siloed approach to reform, which sends a message that the Programme is a narrow and technical-focused process of reform. This discourages engagement with the broader-long term constitutional implications.

c. In their 2016 Review, the Boston Consulting Group identified that: ‘the greatest risk to the overall success of the reform programme relates to the structures and cultures that surround the programme, in particular the working relationship between MoJ and HMCTS’. The BCG report referred to an organisational culture characterised by a lack of cooperation, trust and clarity around specific roles and responsibilities. It is imperative to the success of the Programme that HMCTS and the Ministry of Justice have an effective, collaborative working relationship.

11. To that end, we recommend that the Committee pays attention to the institutional framework in which the Programme operates and identifies mechanisms by which to improve cross-department support, communication and collaboration in Government, including between HMCTS and the Ministry of Justice.

A democratic deficit?

12. The absence of a legislative basis for the reforms, and the concurrent limited parliamentary scrutiny for the Programme, has Rule of Law consequences. One of the
constitutional functions of the primary law-making procedure is to ensure that changes to the law are made transparently and so they can be subject to public debate. Legislative scrutiny in Parliament provides an opportunity for democratically-elected representatives to scrutinise changes and propose amendments. This can require the Government to justify, defend and explain the changes proposed. The abandonment of the Prison and Courts Bill in 2017 has limited the scope of opportunity to democratically legitimate the Programme and provide an opportunity for broader public scrutiny and debate. This delay has increased uncertainty over the scope and timetable of the Programme.4

13. It is imperative that MPs are given the opportunity to scrutinise a Bill that provides a framework to underpin reform to the justice system, and enables MPs to consider the justice system in the round. **We recommend that the Government brings forward legislation to enable the overall effect of the Programme to be democratically scrutinised and debated.**

14. Existing forms of scrutiny are unlikely to give MPs or the public a sense of how the justice system will work in an era of ‘digital by default’.5 To ensure transparency and accountability of the justice system, parliamentarians and the public should be able to scrutinise the digital interface as well as the law which underpins it. **In acknowledging the limits of legislative scrutiny when it comes to reforms delivered by digital means, the Committee should consider how to enhance scrutiny of the digital ‘end product’ of the justice system.**

PART B: THE RULE OF LAW, THE EFFECT OF COURT REFORM ON THE JUSTICE SYSTEM, AND CITIZENSHIP

15. The Rule of Law is the foundation of a fair and just society and a guarantee of responsible government.6 Advancing the Rule of Law has been central to the Programme from the outset. In his 2018 lecture, the Senior President of Tribunals stated that the original aim of the court modernisation programme was: ‘to give the administration of justice a new operating model with a sustainable and affordable infrastructure that delivers better services at lower cost in order to safeguard the Rule of Law by improving access to justice’.7

16. The Rule of Law is a fundamental constitutional principle, which can be broken down into a concrete set of principles that can be identified and applied as standards. We see

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7 Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, Transforming Our Justice System: Joint Vision Statement (September 2016)
no reason to doubt the Government’s overall commitment to the Rule of Law, but in our view the Programme has not engaged sufficiently with concrete Rule of Law principles. Here we refer to two components of the Rule of Law which are particularly relevant to our analysis of the Programme:

a. The Rule of Law requires **equal access to justice**; and
b. The Rule of Law requires that the law is **intelligible, clear and predictable**.

### Equal access, intelligibility, clarity and predictability

17. **Equal access to justice** is a key principle of the Rule of Law. In our view, equal access to justice not only means equal access to the system but equal access in use of the system. The newly constructed ‘isolated’ site of justice will require users to not only navigate the online system from a technical perspective (an issue of ‘digital literacy’) but to make substantive decisions that could have significant bearing on the legal process (an issue of ‘legal capability’).  

18. Decisions that users of the digital system will need to make include, for example: if and when to make an offer to settle (in Small Money Claims); if and when to try mediation (in the Online Divorce process); or how to present an explanation of facts and circumstances that will amount to a ‘statement of case’ (in appealing a social security benefit).

19. The ability to make such decisions is predicated on the Programme being designed in such a way as to make the law clear, intelligible and predictable – a fundamental principle of the Rule of Law. We are concerned that insufficient attention has been paid to the process by which the legal process has been simplified and redesigned for the purposes of the online system. For example, a user proceeds through an online form on a step-by-basis (unlike with a paper form, where you can see the form in its entirety). This raises concerns as to the **predictability** of the law: i.e. you might have to make a selection on decision (a) without knowing what decisions you might be asked to make subsequently at (b). In making a claim via the online Small Money Claims service, the ‘offer to settle’ page does not appear to not make clear that such an offer would be ‘without prejudice’ and very limited information is provided as to the factors surrounding the offer (such as the strength of the claim or cost implications). This raises concerns as to the **intelligibility** of the law.

20. **We therefore recommend that the Programme increases openness and transparency by making available early-stage ‘draft’ versions of digital system**

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designs in order to increase evaluation opportunities and mitigate clarity, intelligibility and predictability concerns.

21. The ability to make such decisions is also predicated on the assumption that users will have sufficient levels of digital literacy and legal capability. This raises equal access to the law concerns. In their Final Report on disinformation and ‘fake news’, the House of Commons’ Digital, Culture, Media and Sport Committee (‘the DCMS Committee’) recommended that digital literacy be a fourth pillar of education, alongside reading, writing and maths. In their Final Report on disinformation and ‘fake news’, the House of Commons’ Digital, Culture, Media and Sport Committee (‘the DCMS Committee’) recommended that digital literacy be a fourth pillar of education, alongside reading, writing and maths.

22. In the spirit of adopting a collaborative, cross-departmental approach (see paragraph 11, page 5) and in light of moving towards an increasingly digital justice system, we recommend that the Committee considers the DCMS Committee’s recommendation that digital literacy be a specific branch of the current educational framework, to ensure users have the requisite skills, knowledge and confidence to use the digital justice system.

A citizenship perspective

23. We recognise that the existing justice system is characterised by significant access to justice barriers and that better use of technology in the justice system may well assist with addressing some of these barriers. However, we are concerned that the changes envisioned by the Programme will move the site of justice from a predominantly social practice to a more isolated space, placing a greater onus and decision-making responsibility on the user of the system. In designing a more user-dependent justice system, it follows that there should be a more proactive duty to strengthen legal capability in the United Kingdom.

24. The proactive duty to strengthen legal capability engages a wider citizenship perspective and fosters a broader understanding of how and why individuals make certain choices on their engagement with the legal system. We are concerned that the Programme has made the relatively simplistic assumption that a digital justice system will be preferred by citizens (and therefore ‘accessed’ more) purely because it is ‘digital’.

25. It is important to recognise the distinction between ‘digital uptake’ and ‘access.’ Available data on court users who have used the reformed services so far (i.e. those who have chosen to ‘uptake’ the digital service) cannot be conflated with the system’s uptake and access. The data shows that while some users have chosen to use the digital service, others have not. It is therefore important to consider the reasons behind this decision and how these can be addressed to ensure equal access to justice.

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necessarily being more accessible. Further, the Programme’s approach to ‘digital uptake’ is itself problematic. BCG identified that the digital uptake rates assumed by the Programme were optimistic: in part because rapid growth and high steady-stages for digital uptake tend to be seen in ‘relatively simple’ government services or in those services which reach ‘predominantly professional and professionally-assisted users’.10

26. To this end, we recommend that more data is collected and made openly available so that access to justice implications and digital uptake patterns can be better evaluated and understood.

Principles on the Rule of Law and technology

27. The Programme provides an opportunity to define a set of principles at the outset that can serve to shape the long-term transformation of the justice system. In order to effect such a vision, the Government should seek to develop a set of normative principles on the Rule of Law and technology that can be used to guide the design of technological solutions such as those in the digital justice system. The Legal Education Foundation’s research and recommendations on access to justice highlights the value of constructing a concrete definition of access to justice that can serve as a tool for evaluating and guiding specific reform proposals.11 We therefore recommend that the Government take the opportunity presented by the Programme to develop a non-binding charter of principles on the Rule of Law and technology that can guide and inform the development of digital reform of the justice system.

28. Emerging regulatory and ethical principles in various online contexts could provide the basis for such principles. The Committee could, for example, draw upon the ten principles recommended by the House of Lords’ Select Committee on Communications in their 2019 report, ‘Regulating in a digital world’.12

29. A further principle which would be of value in this context is ‘friction’. In the digital context, friction refers anything that slows down a process or function.13 Embedding

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friction as a value inherent in the Programme would serve to ensure that court users in the digital justice system are given adequate time to think about, *inter alia*, the information that they are inputting into the system; the costs and benefits of options available to them; and the consequences of their decision-making. For example, the online service to appeal a social security benefit has a tool by which to save and review a draft (this is an example of friction being *positively* used in the system); whereas, a page which reads ‘Are you sure?’ in the same online service is an example of *insufficient* friction. *We recommend that more ‘friction’ be incorporated into the digital justice system so that decision-making processes are accessible to a wider range of users and cater to users with differing levels of legal capability.*

30. Such a charter on the Rule of Law and technology could also contain open justice principles. The digital transformation of the justice system represents an opportunity to set new expectations for the accessibility of the law online. In a common law system, it is vital that everyone within the jurisdiction has access to both legislation and judgments. In a new era of digital justice, it is arguable that all judicial decisions should be made available as open data by default.

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