Written evidence from the Free Representation Unit (CTS0080)

Executive summary

- We acknowledge the welcome investment being made in the court and tribunal system and the fact that the reforms have the potential to increase access to justice for some court and tribunal users.
- We believe that increasing access to justice must clearly become the overriding objective of the reforms and that must be measured in a meaningful way.
- We are concerned that vulnerable and excluded users may be further excluded from access to justice if they are forced to use digital services inappropriately or without appropriate support.
- We recommend that engagement and consultation about the underlying principles of transformation and implementation is made more meaningful.
- We recommend that the Ministry of Justice adopts the recommendations of the Legal Education Foundation report “Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice”

Introduction

1. The Free Representation Unit (FRU) provides free legal representation, to those who cannot afford it, in social security, employment and criminal injuries compensation appeal tribunals. Each year we represent between 500 – 800 clients and train up to 1000 mainly law students in the relevant law and practice. We operate across Great Britain but mainly in the south east and east midlands of England. We are submitting evidence as we have considerable experience of supporting vulnerable litigants in person in court and tribunal proceedings. We understand the need for modernisation of the court and tribunal system and welcome the financial investment. However, we have concerns about how some of the reforms are being implemented and how they will impact on our clients who are often vulnerable and socially excluded.

Inquiry terms of reference response

2. What will be the likely effects of the reforms, both implemented and proposed, on access to justice in relation to:
   
   d. administrative justice, particularly as delivered by the tribunals system?
   
   e. those who are digitally excluded or require support to use digital services?

We will respond to these aspects together. Our comments are primarily based on the reform of social security tribunals as that service project has commenced and there is more clarity on proposed reforms than for the employment tribunal.

3. Access to justice can be difficult to define but we will adopt the definition contained in the Legal Education Foundation report “Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice”;

   i. Access to the formal legal system;
   
   ii. Access to an effective hearing
iii. Access to a decision in accordance with substantive law

iv. Access to remedy

The reforms are most likely to impact on the first 2 elements.

4. At the moment, it isn’t possible to know the likely effects of the reforms, because there is insufficient knowledge about precisely how they will work, what support will be offered to users and to what extent users will be required to use digital channels that may not be suitable for them.

5. Access to the formal legal system was limited before the reforms. This was due to the lack of accessible information and support from HMCTS, the lack of affordable legal advice or inadequate access to advice agencies or inaccessible court buildings. Reformed services can address some of these factors but won’t address access to legal or other advice.

6. The reforms have the potential to increase access to the formal legal system and an effective hearing for some users, but either fail to increase access or actively reduce access for others. Increasing access to justice must become the most important aim for the reforms, not relying on increasing the number of people making applications or using a service as the sole measure. The success of the reforms will depend on how they are implemented and HMCTS needs to increase its genuine engagement with users or their representatives to design services rather than just receive information about what has been decided. We aren’t yet reassured that the drive to save money in the long-term won’t force users to use inappropriate services, or that the reformed services will work effectively. There must be structural commitment and enablement for accessibility for all, including those who want to or need to continue to use paper and face to face channels. It will not be enough to rely on the judiciary to identify exceptions or where digital approaches have failed.

7. HMCTS is making arrangements to provide assisted digital services. However, its assumptions about digital take-up, with assisted digital provision are ambitious. It must not repeat the mistakes made by, for example the DWP, which deals with similarly vulnerable and excluded people as HMCTS.

8. 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? – FRU made a submission to the HMCTS 2018 consultation ‘Fit for the future: transforming the Court and Tribunal Estate’. Our submission raised concerns about the planning, justification and consultation approach to court and tribunal centre closures. We concluded that it was precipitous to close centres before assumptions had been tested about the take up of digital services or the extent to which members of the public become a party to court or tribunal proceedings. We are concerned that access to physical justice spaces has been removed before the alternatives are in place or established as providing effective access to justice. All too often the justification for
closing court centres is under-use. At the same time there are extensive delays in listing tribunal hearings and outstanding caseloads are rising. In the latest statistics available\(^1\) social security cases disposed of had decreased by 7% on the previous year and there were almost 122,000 cases outstanding, up 12% on the previous year. The mean age of cases had risen by 6 weeks to 29 weeks. FRU represents people who have waited for up to a year for their appeal to be heard, for example in December a FRU volunteer wrote “won all points on appeal for Employment Support Allowance (24 points after 0 previously) …client had waited more than a year for her appeal hearing”. Similarly, for employment tribunal cases the same statistics showed that single cases outstanding cases rose by 77% and multiple cases outstanding rose by 30%. FRU is currently (March 2019) representing in a case where the hearing has been adjourned until July 2020. In these circumstances it is unacceptable for a radical reduction in the estate to continue before the alternatives are in place and shown to be working.

9. We note with concern that nearly 12 months later no response to the vitally important ‘Fit for the Future’ consultation has been published.

10. For users, how far can online processes and video hearings be a sufficient substitute for access to court and tribunal buildings? - How far online and video hearings can be a sufficient substitute will have subjective and objective elements. Many tribunal users find formal hearings intimidating, having no prior experience of what they will be like and being concerned about how they will be treated. In addition, travelling to a distant hearing centre can also be problematic, particularly for sick or disabled people. For those reasons, if the user experience of online or video hearings can be maximised in the future (which is not a given) then subjectively they could be a sufficient substitute and could actually be an improvement for many people. However, what is missing is sufficient research on justice outcomes from the use of these alternative ways of access to justice. This could mean that users could be driven by the incentive of ease of access to use online or video processes, without the ability to judge whether that could have an impact on the outcome of their case. We have extensive experience of representing clients in Personal Independence Payment and Employment Support Allowance appeals. The national success rate for these appeals is very high (currently 72%), and a key factor is often the ability of the tribunal members to see the appellant in the flesh and to make their own assessment of the medical issues and the degree of functionality. It is not clear how this would be affected using online or video hearings. It will be crucial that the use of online or video processes does not become a stated or de facto default position, that appellants have real choice as to venue and process, and that there are safeguards if the use of such tools can be said to have affected the outcome of a hearing.

11. Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication, with:

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\(^1\) Tribunals and Gender Recognition Statistics Quarterly, July to September 2018 (Provisional) Ministry of Justice 13 December 2018.
b. **The legal professions and the advice sector?** – Communication has increased during the course of the HMCTS transformation program so that there are now regular newsletters and announcements about overall progress and the development of particular service projects. We have attended the two public events held in 2017 and 2018 at Petty France. These days usefully enabled a degree of contact between a wide range of stakeholders and HMCTS staff. They also provided a snapshot of progress on a wide range of service and overarching projects. However, there were many sessions, running for relatively short periods and a feeling that the programmes were over-ambitious. The days were also subject to some technical issues and delays. These initiatives are necessary but not sufficient. Compared to the wide breadth and depth of transformation planned, information is still very limited. Information provision is also different to consultation and the genuine ability to feed in insight and challenge based on our experience of working with our clients. At the macro-level there was insufficient engagement with stakeholders about the vision for the justice system and how it should be achieved, before the transformation delivery was instigated. The ‘transforming the Court and Tribunal Estate’ consultation opened up some fundamental questions about the digitisation strategy. The fact that 12 months has elapsed without any formal response to the questions raised whilst the pace of reform is maintained is concerning and illustrates the problem of the ineffectiveness of consultation.

12. FRU is one of the foremost providers of free representation in employment and social security tribunals. However, we do not yet have sufficient information about the reforms to enable us to plan for how and when we need to adapt our systems and working practices.

13. **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?** – We are not aware of all of the steps HMCTS has taken to evaluate the impact of existing reforms. We are aware, for example of the process evaluation of the user experience of the HMCTS video hearings pilot in the First-tier Tribunal (Tax Chamber). This research is, in HMCTS’s own words “small scale and exploratory”. User-research process evaluation is useful but limited and must be scaled up considerably to have meaning even in its own terms. HMCTS does need to know how it feels to be a system user, but it would be possible for a user to feel very positively about their experience, but not realise that their access to justice had been compromised.

14. We applaud HMCTS for seconding in Dr Natalie Byrom, Director of Research and Learning at The Legal Education Foundation (TLEF), as an independent expert advisor on open data and academic engagement for 3 months. That is a welcome indication of transparency and a willingness to broaden its approach from being user-research centred to genuine academic evaluation of justice transformation. We believe that evaluation of the planned reforms must primarily focus on the impact on the impact on access to justice rather than on efficiency or even user experience. We support the recommendations of the Legal Education Foundation report “Developing
the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice” and hope that the Ministry of Justice will adopt them in full.