Written evidence from Rhona Friedman, Sue James and Simon Mullings (CTS0085)

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Preamble to Submissions

Our submission is based on collective experience of decades of court representation and recent evidence gathering including an expert panel meeting convened by Transform Justice and Justice Alliance. We welcome the scrutiny that the Justice Committee is bringing to HM Courts and Tribunals Service Reform Programme.

Any justice system needs to ensure fair and equal access to justice for all which can only be achieved by holding the state to account whilst protecting those who are vulnerable to the misuse of state power. Court staff and those who advise, represent and prosecute in our courts must be supported and encouraged by Ministers and senior civil servants who should facilitate rather than obstruct. Those who oversee the courts system must value social justice.

Justice must be local, transparent and consistent, a court decision in Truro must be imbued with the same logic and application of the law as a court decision in Truro. Legal aid is the key to a fair and lawful justice system and the rule of law in this country depends on both the restoration of early legal help to those seeking to enact their rights and a reversal to the systematic impoverishment of the legal aid system.

As of this year 40% will have been cut from the justice budget since 2013. By 2023 the cut in budget will rise to 51%. The result of these years of austerity justice is a degraded and dysfunctional system of which no one can be proud. The answer to systemic malaise is not merely to digitise our way out of deliberate underfunding. Everyone who works in the justice system welcomes timesaving technology, but we fear these reforms look to design out lawyers and dehumanise law by removing face-to-face advice and introducing virtual “resolutions” as a means to enforcing rights and enabling prosecutions. We think this is a misstep which will blight the justice system for decades. The Reform Programme is driven by an imperative to cut costs and sold on a Panglossian vision of what lawyer-less tech can actually achieve without any interrogation of the potential damage to legitimacy that may result.

The Court Reform programme is marked by recklessness and lack of foresight. Boston Consulting Group warned the Ministry of Justice in 2016 that two thirds of tech projects “fail (18%) or are either functionally incomplete or not on time/budget (43%)”. This project has already seen key components axed (the CPS case management system with no replacement to the unwieldy, temperamental secure email platform CJSM) and is now estimated to be completed 4 years later than anticipated in 2014. The budget has mushroomed from £375 m in 2014 to north of £1bn in 2019. How far north is hard to establish, and we hope that the Justice Committee has

more luck than we did in arriving at a precise figure. It is noteworthy that eyewatering sums have been paid to private sector consultants including £30 m to Price Waterhouse Cooper. However, the Boston Consulting Group noted that the project planners had not created any contingency fund to cope with budget overruns and delays although they “would typically expect to see 15-35% of resource costs in a programme of this nature.” As with much of this project it is unknown whether this budgetary oversight has been corrected.

In relation to the court reform programme we believe that there has been:

- Insufficient debate about what lawyer-less law means for us all
- Insufficient parliamentary scrutiny which is why the Justice Committee Inquiry is so welcome and timely
- Insufficient research on digital exclusion, and adverse outcomes for those whose cases are determined virtually
- Insufficient evaluation of the changes which have been implemented so far
- An overarching obsession with pushing justice online because we can, not because we should

**In response to the committee’s call for evidence:**

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

Many will raise serious concerns with you about the effect of court closures on the poor, the elderly and the vulnerable who may have travelled miles to a poorly maintained court building only to experience the daily failures of newly introduced technology on the court service. We hope you hear from the front-line court staff whose working lives are now plagued with crisis management duties because of daily system glitches.

With regard to the likely effects on the access to justice we must reconfigure the question. HMCTS and the Ministry of Justice should have commissioned research and evaluated the likely effect of their reforms before designing them and rolling them out. This abdication of responsibility has meant that stakeholders can only engage with the reform programme in a piecemeal, predictive way and can only provide feedback from the ‘coal-face’ after reforms have already been rolled out.

The whole project is redolent of the way former MOJ Permanent Secretary Ursula Brennan

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2 [https://www.lawgazette.co.uk/law/moj-chief-admits-cuts-rushed-through-without-research/5045500.article](https://www.lawgazette.co.uk/law/moj-chief-admits-cuts-rushed-through-without-research/5045500.article)
characterised the implementation of cuts under LASPO “The government was explicit it needed to make these changes swiftly…It was not possible to do research about the current regime”\(^2\) She told the Public Accounts Committee in December 2014 that research on the impact of the cuts was only done after they had been introduced as the “imperative” was to shrink the budget. Only the most diehard of ministerial loyalists will say that LASPO has improved access to justice. Most court staff, advice agencies and lawyers consider it to have been the most retrograde set of revisions since legal aid was introduced in 1949. Our fear is that the Courts Reform Programme will be another utterly misconceived set of reforms.

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?

We consider that courts have been closed at least in part on a false premise that court buildings were under-utilised. HMCTS has been asked to provide robust evidence of under-utilisation which has not been forthcoming. At a public meeting on the 3 October 2018 Susan Acland-Hood, Head of the Court Service confirmed that utilisation rates were obtained from information collated by ushers. A visit to any county court or magistrates court will reveal that ushers rarely sit down long enough to catch breath never mind conduct empirical research on judge’s sitting times and box-work hours to justify court closures.

We are concerned that under utilisation rates are inaccurate and that HMCTS is gaming the system to justify its closure programme. For example:

- The Law Society obtained evidence that Buxton County Court, which had 3 court rooms had been closed on the basis it had 4 court rooms and was therefore under-utilised.

- In Brentford County Court 3 court rooms have remained unused since September 2018. At a meeting in September 2018 the court manager confirmed that she was not allowed to list cases in the 3 empty court rooms as she did not have the funds to employ Deputy District Judges.

- In the months before Bow County Court was closed down, judges were handling two lists at a time, which gave the impression that court rooms were standing empty.

There has been no research on the impact of court closures in respect of participation by communities who have lost courts and any hardship caused by the closures of local courts.

There has been no research or meaningful engagement with the issues faced by courts and court staff having to take up the work of courts that have closed. The only research we are aware of was done independently by Dr Olamide Adisa\(^3\) and looked at the effects in Suffolk and we recommend her paper to the committee.

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\(^3\) [https://www.uos.ac.uk/sites/default/files/Research%20Report%20Access%20to%20Justice%20FINAL.pdf](https://www.uos.ac.uk/sites/default/files/Research%20Report%20Access%20to%20Justice%20FINAL.pdf)
Concerted attempts to engage HMCTS on the crisis at Clerkenwell & Shoreditch County Court, after closures at Lambeth and Bow led to a massive increase in work there, have run into brick walls.

The reduction in court staff has led to delays in hearings; telephones unanswered; missing files; administrative delays; and delays in billing. Waiting more than 5 months for a 5-minute hearing and 1 to 2 years for a trial is not unusual. However, making all preliminary hearings and trials virtual is not the answer. Although some hearings can be dispensed with many involve issues of law which need to be properly presented and considered. We consider that this could amount to a breach of Article 6 of The Human Rights Act 1998.

If by 2023 the projected staff cut is to be 6,500 then we believe this raises considerable issues regarding access to justice with corners cut and backlogs certain. Moreover, staff welfare is already suffering in ways well documented by the PCS Union and will suffer further.

We do not see any justification under any of the stated key principles of the reforms for extended court hours. There is no suggestion that court user’s preferences will be met by extended court hours even if a relatively few people might find extended hours convenient. HMCTS cannot have it both ways. If court buildings are being under-utilised, then why the need for extended hours? One of the courts for pilot on ‘flexible hours’ is at Brentford County Court where 3 of the courts have remained empty for the last 6 months. It makes no sense to extend the hours of the court in the way proposed when the funds are not being provided by HMCTS to fill the courts within the usual court hours.

We suggest that the pilot does not go ahead while the court transformation project is in such turmoil. We have grave concerns about the discriminatory and potentially unlawful effect that the longer court hours will have on court staff and advocates who are carers, a large proportion of whom are women. The intention is that the court will extend hours from 8am to 7pm. Advocates could potentially have hearings across 11 hours, and at random times, making it impossible to arrange any childcare or cover for ill or disabled family members.

With regard to online participation and resolution Boston Consulting Group said in 2016 “Ultimately without better insight, we cannot be sure which users under what circumstances, value efficiency and time -saving over other things which may be important to them such as having their ‘day in court’”

In the criminal justice system, we are aware of an increase of people who have entered guilty pleas online only to seek to reopen the plea once they have realised or been advised that they have a defence or that the initial charge is based on inaccurate information. Magistrates as well as defence lawyers worry that more adverse decisions on bail and sentence are imposed on those who appear remotely. Again, there has been no research and evaluation of this critical area.

Seasoned tribunal staff are concerned about the vulnerability to fraud which now marks the online probate system because documents are no longer scrutinised but uploaded digitally.

Experts in communication disorders and learning disabilities believe that virtual court hearings disadvantage people with those impairments. However, no system wide research has
been carried out.

Millions of people live in poverty or are classed as ‘working poor’. Many of them do not own laptops or tablets. Local libraries offering access to computers are dwindling in number. Although many people now own a telephone capable of internet access but people on low incomes or benefit struggle to top up their credit. Social exclusion equals digital exclusion and leads to inability to access justice online.

3. **Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication, with:**
   a. Judicial office holders at all levels of seniority?
   b. The legal professions and the advice sector?
   c. Other relevant stakeholders?

There is a lack of publicly available information about what the HMTCS intends through these reforms which makes the process opaque and impossible to engage with meaningfully.

We have spoken to academics who say that engagement with them has been top down with HMCTS not taking feedback into account. HMCTS has not published any information on the cross-cutting impact of the changes.

In relation to consultation which has taken place, this has been done in private sessions with selected “stakeholders”. No documents are released. Suggestions or criticism have not been published. This is not proper consultation and is corrosive of confidence and trust.

The Law Centre’s Network reports that engagement group meetings were suddenly suspended and then cancelled. When the National Audit Office report came out it revealed many issues that were not discussed in meetings. That left those who were supposed to be ‘engaging’ feeling excluded from the real process.

In some areas of reform the MOJ/HMCTS display an inadequate understanding of the issues at hand. Civil Enforcement is one such area. The project summary from the last Quarterly Update Autumn 2018 describes the civil enforcement workstream as follows:

> “Reviewing the structure of civil enforcement to deliver better information and increase the likelihood of successful enforcement. This includes increased guidance, a simplified process, and a digital system to increase efficiencies.”

HMCTS’ rhetoric here needs to be challenged. As it stands the reform objectives appear based on an assumption that enforcement is nothing more than an administrative act to secure the provision of orders made in the court. That assumption leads to a conclusion that successful and desirable reform will make the process of securing the outcome for a ‘winning’ party as efficient and quick as possible. The assumption is wrong. How wrong can been seen by a brief read of the Civil Procedure Rules Committee’s consultation on the

enforcement of possession orders. In some areas of civil law, enforcement processes are subject to almost as much judicial oversight as the proceedings themselves with ‘losing’ parties often having the right to stay or suspend enforcement, or even intervene at enforcement stage in order to set aside the judgement itself.

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?**

In short, no. HMCTS has not published its logic models or intended outcomes. There is widespread concern that HMCTS, the MOJ and the senior judiciary is introducing a huge change in ways of working based on a very thin evidence base with no explanation as to the impact on access to justice.

In relation to digital case handling HMCTS says this is meant to be for the least complex cases but we have no information about how it will assess for complexity or whether that is even possible.

There are assumptions that in various court and tribunal settings people prefer to be able to engage through video but no one knows about the impact on access to justice, whether convenience for some trumps efficacy and stakeholders are trying to have question these assumptions with very little information, or misleading information.

For example, video hearings have been running in criminal courts since 2000 e.g. a video link into court from prison, or a video link into a magistrate’s court from a police station. However, since the introduction of this technology there has been no research and evaluation about impact. Now HMCTS propose using video link into civil courts when they have not evaluated its use in criminal courts.

A 2010 MOJ report found that people who appeared via video link entered more guilty pleas and fewer were represented by lawyers. Perhaps this is one of the intended consequences? If so this should be stated plainly. Currently, no one knows what the reason for increased guilty pleas and self-representation may be but the correlation should be investigated. For example, we do not know how the use of video links impacts upon judges’ views and behaviours and whether video-linking a person into a court room from a police station so disengages people that they sacrifice equality of arms.

There is a growing distrust of the scant and carefully packaged information which is promulgated. HMCTS “Customer Insight Team” published a report in 2018 entitled HM Courts & Tribunals Service Citizen User Experience Research. Given there has been a complete dearth of official research this was a notable event. As a result of a Freedom of Information request by Transform Justice we now learn that user feedback expressing dissatisfaction with online and virtual justice was excised from the published report.

“The previously unpublished survey data shows that users of the justice system who had physically been in court were almost 50% more likely to strongly agree that they had

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been listened to; that the courts were open and accessible; and that they were able to participate and take part with confidence.

While 40% of court users strongly agreed they had been listened to, just 27% of those whose cases had been dealt with outside a physical courtroom felt that way. The gap was the same for how open and accessible they felt the process was, and how able they were to participate and take part with confidence.

There was also a contrast in what people felt they had achieved. While 39% of those whose cases were dealt with in court strongly agreed that they could do what they needed to do, for those not in court, the proportion was just 31%. " (our emphasis)

How can any of us have confidence that the reform programme has access to justice as an overriding objective when HMCTS seemingly manipulates the publicly available results of its own research?

**Recommendations:**

1. The recommendation is that the logic models should be made available. It is difficult to evaluate something without the underlying data.

2. HMCTS must publish more meaningful information about its overall intentions and be honest in reporting evidence that is critical of its reforms or the manner in which they are being achieved.

3. Research must be done and published. The Legal Education Foundation report Developing the Detail: Evaluating the Impact of Court Reform in England and Wales is vital and its recommendations in respect of evaluation should be adopted in full.

4. HMCTS must engage meaningfully and reset the atmosphere with academics, stakeholders and the public in order to resolve the sense of corner-cutting and bad faith that has arisen in the course of the reforms so far.

5. Until proper evaluation is done and published HMCTS should halt all further court closures and should conduct urgent research into past court closures to see if the fairness and access to justice imperative, particularly for vulnerable court users has been breached. If the research finds that it has, then court closures should be reversed or other provision for local court service should be reinstated.

6. Likewise, further forays into the use of video for hearings should be curtailed until proper evaluation has been done.

7. HMCTS must also revisit the reforms to ensure that they meet all of the stated aims including fairness and access to justice for all.

18th March 2019

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