



PLP submission to the Justice Committee inquiry on the access to justice impacts of court and tribunal reforms

About PLP

The Public Law Project ('PLP') is an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers.

Within this broad remit PLP has adopted three strategic priorities in our plan for 2017-2022:

- Promoting and safeguarding the Rule of Law during a period of significant constitutional change;
- Working to ensure fair and proper systems for the exercise of public powers and duties, whether by state or private actors; and
- Improving practical access to public law remedies.

To achieve these aims, PLP undertakes research, policy initiatives, casework, and training

PLP's work on online courts

Within the above framework, a key focus area our work is the development of online courts and the ongoing HMCTS reforms. Our activities in this area have so far included:

- Undertaking research and evidence-gathering. In April 2018 we published a report on the digitalisation of tribunals;¹
- Building a network of advisers and practitioners who are or will be affected by the introduction online tribunal/court process and assisted digital processes;
- Organising events and training on these issues. In November 2018 we organised a roundtable event where practitioners were able to share information and concerns about the reform programme; and
- Contributing to reports published by JUSTICE² and the Legal Education Foundation.³

¹ <https://publiclawproject.org.uk/resources/the-digitalisation-of-tribunals-what-we-know-and-what-we-need-to-know/>

² JUSTICE, '[Preventing digital exclusion from online justice](#)', 4th June 2018.

³ Byrom, N., '[Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice](#)' (2019)



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PLP has also submitted responses to the Ministry of Justice's 'Fit for the future: transforming the court and tribunal estate' consultation,⁴ and to the consultation on proposed changes to Rule 39 of the Civil Procedure Rules.⁵

Substantive response to call for evidence

1. PLP will support policy which increases the accountability of public decision-makers, enhances the quality of public decision-making, and improves access to justice. PLP believes that the introduction of online procedures may meet these aims if implemented well but, crucially, the impact of any reforms need to be fully understood before changes are made.
2. It is welcomed that the Justice Committee's inquiry focuses on access to justice. It is important to recognise that access to justice incorporates several core public law values and principles, and is not simply about speed or cost.⁶ For example:
 - Access to legal advice and representation where required to ensure effective access;
 - Participation in fair and effective hearings;
 - Open and transparent processes;
 - Receiving lawful decisions with adequate reasons; and
 - The ability to pursue and enforce remedies.
3. The statutory duties placed on those ultimately accountable for the leadership of these reforms—which allude to these core public law values and principles—are worth recalling. The Constitutional Reform Act 2005 makes specific reference to the constitutional principle of the rule of law, and the Lord Chancellor's constitutional role in relation to that principle.⁷ Similarly, section 2(3) of the Tribunals, Courts and Enforcement Act 2007 places similar duties on the Senior President of Tribunals:

(3) A holder of the office of Senior President of Tribunals must, in carrying out the functions of that office, have regard to—

- (a) the need for tribunals to be accessible,
- (b) the need for proceedings before tribunals—
 - (i) to be fair, and
 - (ii) to be handled quickly and efficiently,

⁴ <https://publiclawproject.org.uk/resources/fit-for-the-future-transforming-the-tribunal-and-court-estate-consultation-response/>

⁵ <https://publiclawproject.org.uk/resources/response-to-consultation-on-changes-to-part-39-of-the-civil-procedure-rules/>

⁶ PLP considers the four categories adopted by the Legal Education Foundation in '[Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice](#)' (N. Byrom, 2019) to be useful and appropriate.

⁷ Section 1, Constitutional Reform Act 2005.



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- (c) the need for members of tribunals to be experts in the subject-matter of, or the law to be applied in, cases in which they decide matters, and
- (d) the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals.

4. PLP is concerned that the reforms, as they are currently being implemented, do not appear to be paying sufficient attention to core public law values and principles, or to the paramount importance of fairness. Moreover, the current trajectory appears to be towards a justice system which is weakened and not improved. **We therefore call upon the Justice Committee to recognise that renewed emphasis, within the reform programme, ought to be placed upon ensuring access to justice and protecting other foundational principles of justice. We also call upon the Justice Committee to recommend that a framework for continued and rigorous review and evaluation of the reforms ought to be put in place.**
5. The reform project is vast, as the Committee's wide terms of reference reflect. We therefore offer an indicative list of our core concerns with the reform project, centred on PLP's three priority concerns:

(a) Promoting and safeguarding the Rule of Law during a period of significant constitutional change.

- i. The pace of the closure of courts and tribunals is currently far greater than the pace of court modernisation and preparedness for greater use of digital technology. The modernisation programme will be of little real benefit if public confidence in the justice system is diminished further;⁸
- ii. There are serious concerns that court closures and aspects of the modernisation programme will have a disproportionately adverse impact on certain groups, some of which will have protected characteristics under the Equality Act 2010;⁹
- iii. It is understood that by March 2023, HMCTS expects to employ 5,000 fewer staff.¹⁰ This will also have an adverse impact on court users for similar grounds to those addressed by points (i) and (ii) above. Public-facing court staff perform a vital role in assisting court users;

⁸ PLP provided more detailed written submissions on court closures to the 'Fit for the Future' consultation, including submissions on the impact on those with protected characteristics.

⁹ For a report on the impact of digital exclusion in rural areas, in relation to Universal Credit, see the Citizens Advice Rural Issues Group Report, 'Universal Credit: From a Rural Perspective', September 2018.

¹⁰ National Audit Office, '[HM Courts & Tribunals Service: Early progress in transforming courts and tribunals](#),' 9th May 2018, page 5, para. 3.



- iv. HMCTS have not been transparent enough with regards to their research, testing, planning and consultation. Practitioners, court users and other stakeholders have not been given enough opportunity to scrutinise the work being done. Instead, much of the design is occurring within closed focus groups and similar processes. Insufficient Parliamentary time been allocated for scrutiny of this work. In terms of HMCTS' evaluation, it is PLP's understanding that an advisory panel will be established in the spring of 2019 to assess the reforms in terms of fairness, access to justice, and costs, with an interim report published in 2021.¹¹ We support this but far more needs to be done in terms of ensuring continued rigorous scrutiny.

(b) Working to ensure fair and proper systems for the exercise of public powers and duties, whether by state or private actors:

- i. There are serious and evidence-based concerns about the impact of online proceedings on the fairness of hearings and dispute resolution procedures. These range from concerns about the ability of participants in hearings to fully engage, to issues about judges' ability to assess the credibility of witnesses. A further factor is that confidence in the technology at HMCTS' disposal to enable the systems to work properly is not high. HMCTS has not publicly produced evidence which eases these concerns.
- ii. One specific example of a process concern here is how, in the recently announced next phase of digitalisation in the Social Security Tribunal, it became apparent that this included the implementation of a 'preliminary view' stage. This was announced at one of the HMCTS 'Roadshow' events in Exeter on 27th February 2019.¹² On analysis of the contents of the slides from the roadshow event, the following concerns are noted in relation to the model proposed for digital 'preliminary views' for Personal Independence Payment appeals:¹³
 - There is no breakdown of points awarded in the body of the tribunal's preliminary view, which makes it hard for an appellant to fully assess and judge whether to accept the preliminary view or proceed with a hearing.

¹¹ Ministry of Justice, '[Evaluating our reforms: Response to PAC recommendation 4](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775588/Public_Accounts_Committee_Recommendation_4_31_Jan_2019pdf.pdf),' January 2019
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775588/Public_Accounts_Committee_Recommendation_4_31_Jan_2019pdf.pdf

¹² <https://www.gov.uk/guidance/hmcts-tribunal-reform-event-26-february-2019>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782155/Exeter_Tribunals_event_-_Slidedeck.pdf



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- It is not clear how representations or legal arguments feature in this system, which appears to only be concerned with obtaining further evidence.
- There is nothing about appeal rights in the screens about ‘accepting the tribunal’s view’ – indeed, appellants are told that they will not be able to change their mind.
- It is not clear how, if at all, a representative would be able to be actively involved in this system.
- It is not clear how much weight the panel for a live hearing would have to give to the preliminary view, if any – especially since the appellant has to explain why they want to proceed to a hearing.

PLP is concerned that such a plan is demonstrative of a failure to properly understand how procedures ought to be shaped by public law principles and values.

(c) Improving practical access to public law remedies:

- i. PLP is concerned about the impact of the programme of court closures on practical access to public law remedies. In some contexts, physical access to courts is the only route to accessing effective justice. Closing courts and hearing centres, despite claims about the benefits of online processes, will have a range of effects. HMCTS has not produced anything which suggests the basis for court closure decision is rigorous impact analysis.
- ii. PLP is concerned about how the growing use of digital platforms may exclude certain members of society, particularly those who are vulnerable or disadvantaged. ‘Assisted Digital’ services have been promoted by HMCTS as a possible mitigation against digital exclusion, in order to allow practical access to a more digital justice system. The plan around Assisted Digital services is not wholly clear and there appear to be multiple complex issues which are yet to be addressed sufficiently. For instance, PLP is concerned that it will be almost unavoidable that those providing ‘assisted digital’ services will, inadvertently or otherwise, provide legal advice to court and tribunal users. The effect that such advice could have on lay court users could be significant.¹⁴ It is not clear how assisted digital advice or guidance is to be recorded or monitored. PLP notes that in the Ministry of Justice’s Impact Assessment on ‘assisted digital’ and court reform there is no mention or consideration of the possibility of HMCTS-endorsed assisted

¹⁴ See, for example, Catrina Denvir’s research report prepared for the Civil Justice Council, ‘[Assisted Digital Support for Civil Justice System Users](#)’, April 2018.



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digital providers providing legal advice.¹⁵ Nor is there any mention in the Good Things Foundation's recent report to the HMCTS Equalities and Inclusion Engagement Group.¹⁶

Conclusion

6. It is imperative that those responsible for designing any system of justice understand that in doing so, '[s]peed and efficiency do not trump justice and fairness. Justice and fairness are paramount.'¹⁷ Indeed, as Sedley LJ observed in *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481, para 8:

'The choice of an acceptable system is in the first instance a matter for the executive... But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency...'

7. The court reform programme must be founded on a proper understanding of the paramount importance of fairness, and of the relationship between access to justice and the rule of law.¹⁸ It must also pay proper regard to the core public values and principles which underpin access to justice.

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¹⁵ Ministry of Justice, '[Assisted Digital: Court Reform Impact Assessment](#),' 15th September 2016.

¹⁶ Good Things Foundation, '[HMCTS Equalities and Inclusion Engagement Group Face-to-Face Assisted Digital Update](#),' September 2018.

¹⁷ *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber) & Others* [2015] EWCA Civ 840, para 22, *per* Lord Dyson MR.

¹⁸ See, for example, *R (UNISON) v Lord Chancellor* [2015] UKSC 51, *per* Lord Reed at paras 66-71 in particular.