Public Accounts Committee
Inquiry into the Court Reform Programme: progress review
Bar Council written evidence

About Us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

This submission addresses the questions the Committee has sought evidence on.

Executive Summary

Barristers' experience of the consequences and impact of the Reform programme generally reflects what is stated in the National Audit Office's Report on the "Progress on the courts and tribunals reform programme"[1] published in February 2023.

While there are some discrete areas of palpable success, such as the online divorce and online probate services, these are generally in parts of the HMCTS away from the day-to-day work of the Bar, the court room. The Bar Council has significant concern that for professional users of the courts as well as the litigant, overall experience of the justice system has not significantly improved despite the spending of in excess of £1.1 billion to date. Ambition has run far beyond the capacity to deliver (as reflected in the curtailing of a large number of the programmes over the past couple of years including, notably, that the CPS will not adopt Common Platform for its own operations). In relation to the operation of the 'court room', as generally described, where barristers spend most of their professional time, the implementation of reform has repeatedly failed to take account of the advice, input and experience of practitioners despite the Bar Council and barristers always being ready to offer assistance.

The Bar Council shares the thrust of the conclusions of the NAO Report, including that it is, unfortunately, far from clear that even when finally completed the benefits of the Reform programme will outweigh the costs and loss of service it has entailed (such as the effective end to the principle of local justice through mass court closures). While some aspects of Reform constitute welcome improvements, there would have been better ways to spend the budgeted £1.3 billon.

Question 1 – The progress HMCTS has made against its plans in the face of changing circumstances

1 https://www.nao.org.uk/wp-content/uploads/2023/02/progress-on-courts-and-tribunals-reform-programme-1.pdf. The Bar contributed evidence towards the NAO report on the topic of Common Platform by way of group interviews arranged through the Bar Council.

1. Progress has been slow. In criminal courts, Common Platform has been beset with difficulties and delay. At least so far as the Bar is concerned, the designers and procurers appear to have a limited understanding of working needs and practices and displayed a marked reluctance for the system to be designed in conjunction with, and for the benefit, of professional court users. There is little visible evidence of any other beneficial aspect of the Reform programme in Crime for professional users and litigants. As detailed below against Question 3, in the family courts ambition is unmatched by the realities presented by the dilapidated and unreformed state of the court estate which renders real progress unrealisable. In the civil courts it is difficult to identify any palpable change of significance other than, as with other parts of the court system, the mass closure of courts.

2. Experience at the 'coal face' suggest that progress by way of the Reform programme appears to have ground to a halt. Just one example is that the Bar Council's Legal Services Committee had demonstrated to it the remote video hearings service over one year ago. The stated intention was for this to be a single remote hearings service to be rolled out to all jurisdictions and to replace reliance upon different and external providers and completed across the Court estate by March 2023. On demonstration this seemed to the group of barristers present, representing a host of different practice areas, a rather good initiative and intended resource (though many practical suggestions to improvements were made), however, precious little has been heard since about this service. It is unclear whether this is one of the projects that has been shelved.

3. In practice the changing circumstances of COVID and recovery have not helped what was, in any event, a flawed programme. In theory the pandemic should have assisted in the delivery of technological reforms as there was an obvious impetus for all to create and engage with remote working. However, the systems that have been, and are being, put in place do not work efficiently. Those who design the systems appear to do so in a vacuum rather than with a proper understanding of how those who use the courts actually work, and they have not, for example, shadowed advocates, court staff and judges to see systems in operation.

4. For example, one project for Scheduling and Listing under the Reform Programme is a new IT system called "ListAssist" which is designed to help Court Listing Officers to allocate cases. This new system started being rolled out in 2022, after being piloted from early 2021, but the experience of barristers on the ground is that Listing Officers still fail to check with the barrister's chambers on whether a barrister is available before listing the case. This means that the barrister who has prepared the case then has to 'return' it to another barrister and the preparation time is wasted. There is still the practice of 'over listing' where the courts, in an attempt to reduce the backlog, list far too many cases in the expectation that several of them will turn out to be guilty pleas. However, the result of over listing is that barristers have to give up their time to be at court for cases that have no prospect of being called on.

5. Another detrimental practice that is continuing is the use by some courts of 'Warned Lists' or 'floaters' where a barrister has to keep their diary free for the prospect that a case might be called on. These cases cause difficulties and stresses for all parties involved. Barristers often need to prepare for more than one case at once, on the off-chance that a case comes in – which they commonly do not, according to anecdotal evidence from our members. Often, these are types of cases that junior practitioners take at the start of their careers. The result of the above practices is that these junior practitioners have to cope with preparing multiple cases at once, and, since the cases keep on getting delayed, the junior practitioners often fail

to acquire the benefit of the jury advocacy experience that they need for professional development.

6. The response of HMCTS is that listing is a judicial function and therefore nothing to do with court staff. However, it is the court Listing Officer who actually organises the lists, and the problem of failure to consult barristers' availability, is not one that has been solved by use of the new IT system. Listing issues have been prevalent throughout the justice system in the last few years. Our members have reported anecdotally that there were issues with listing in the lower-level civil courts from early 2022 and more recently with listing in the High Court.

Question 2 – Whether HMCTS has planned and rolled out its new digital case management system, Common Platform, effectively

7. The Bar Council has commented on the rollout of the Common Platform on several occasions. Specifically, in a report published in November 2022 entitled "Access Denied: The state of the justice system in England and Wales in 2022",[2] it stated,

> *"While the Crown Court Digital Case System (CCDCS) was broadly appreciated, the Common Platform – the digital case management system being rolled out by HMCTS across criminal courts in England and Wales – is widely perceived as being a failure. Court users have struggled to log on to the system, there are doubts about the design of the platform, and our participants were unsure whether the roll-out was still happening as they felt there was little information or take-up."*

8. Additionally, in response to the National Audit Office's Report on the "Progress on the courts and tribunals reform programme"[3] published in February 2023, Nick Vineall KC, the Chair of the Bar, released a statement which stated:

> *"The Bar Council supports the need for court and tribunal reforms, and it is essential reform is delivered efficiently, effectively, and in ways that do not come at the cost of access to justice.*
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> *"Many of the problems with the court reform programme identified in the NAO report echo the experiences we have heard from barristers on the ground. It is clear that the problems with the Common Platform have caused real concerns but the thinking behind it makes sense and getting the delivery right will be a key component of the strategy for reform.*
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> *"We note the HMCTS response recognising the need to put things right and we will continue to work with HMCTS on the programme to make sure all court users can realise the benefits of reforms."*[4]

9. The Bar Council has significant concerns about the progress of the Common Platform, in particular whether it is fit for the purpose of replacing the Crown Court Digital Case System (CCDCS). Barristers who have engaged with the system so far report substantial problems for barristers and more generally. For example, Crown Court staff appear to be not properly capable of using the system efficiently, in particular the system's requirement for reasons for the outcome of a hearing to be selected from a fixed list of reasons, leading to delays in dealing with long court lists.

2 https://www.barcouncil.org.uk/resource/access-denied-november-2022.html
3 https://www.nao.org.uk/wp-content/uploads/2023/02/progress-on-courts-and-tribunals-reform-programme-1.pdf
4 https://www.barcouncil.org.uk/resource/court-reform-programme-must-not-come-at-the-cost-of-access-to-justice.html

10. For barrister users specifically, there are equally serious concerns that the Common Platform, as designed, will decrease, rather than increase, efficiency. Although a period of transition is, of course, to be expected, we believe that the failures in design, caused by the unfamiliarity of those designing the system with how barristers and other professional court users actually work, will needlessly and seriously exacerbate and lengthen any teething problems. There is real doubt that any benefits of this revised and massively expensive system will outweigh the problems caused.

11. First, those designing the system appear to be under the impression that barristers work in structured hierarchical organisations, with professional and well-resourced IT support of their own. That assumption has led to a reliance on 'organisation administrators' as being the gateway through which access to user accounts is initiated and run. Although some barristers do work for large firms, the vast majority are self-employed, either in chambers of varying size and resources, or sometimes as sole-practitioners. Over-reliance on the concept of 'organisation administrators' rather than HMCTS providing comprehensive round-the-clock support directly will cause problems. For some barristers there may not be a tech-savvy available 'organisation administrator' who is, at best, likely to be a chambers practice manager or similar. (Such practice manager is an employee whose salary is paid from the earnings of a group of barristers). The HMCTS helpline is available only from 8am to 6pm. Most criminal barristers will prepare cases, particularly late returns, outside of those hours as a matter of course (as evening working for self-employed barristers is sadly routine), but also due to childcare commitments and the pressure of in-court work. If self-employed barristers cannot access the system, or encounter problems, outside of HMCTS designated working hours, they will be unable to contact the helpline and may well have no access to their 'organisation administrator', if there is one. An automated re-registration system and/or a round-the-clock helpline would help avoid the scenario whereby hearings have to be adjourned because an advocate has been unable to access the papers the previous evening, or over the weekend.

12. Secondly, members of the Bar Council have become aware that despite members of the Bar Council and the CBA advising HMCTS for months that barristers and their clerks needed to be able to grant access to another lawyer, for example as a late return, or to allow a pupil to work on a case, no action has been taken on this request. The current system, CCDCS, has the ability to do this, but the Common Platform does not allow it. The result is that access rights have, instead, to be granted by a defence solicitor. The access rights of criminal barristers should be extended so that they can pass the case on to another barrister in the circumstances of a 'late return'. This necessity can arise where, for example, a barrister is unwell in the evening and a new barrister needs to take over in court the following morning, but the solicitor is unavailable to grant access to the new barrister. It is a considerable disappointment that barristers who have been advising clearly of the need for this facility appear to have been ignored.

13. Thirdly, it has been the experience of those members of the Bar Council who have used the system that the available online user guides are not of sufficient quality to assist all barristers. Again, they do not appear to have been created by people familiar with how those using the courts work. For example, there are references to 'defence lawyers' with no addressing of the position regarding those self-employed barristers instructed by the CPS or other prosecuting bodies. The failure properly to analyse who "defence lawyers" are and how they work serves only to cause confusion – for example referring to defence lawyers 'self-serving' the initial

details of the prosecution case. Also, it took members of the Bar Council who have been engaged in the process of consulting with HMCTS over many months a significantly long time (over a week) and multiple direct communications with HMCTS staff to determine that barristers and their clerks could not grant each other access, something that should have been immediately apparent from the available on-line guidance. The Bar Council has raised these and other issues with the guidance with HMCTS. The result is that the guidance is apparently now still being significantly revised by HMCTS.

14. Fourthly, some useful benefits to the current systems have not been replicated in the new system. For example, under the current 'Xhibit' sign-in system, the ability to see the identity of one's opponent greatly aids in locating that person and talking to them in good time before the case is called on in court, a practice which causes enormous savings of court time. It is unclear whether that will be replicated with Common Platform sign-in procedures – it does not appear to be at present.

15. Fifthly, there has been a lack of awareness surrounding the system's rollout. Many practitioners have been unaware of the system or what it was for. They simply were told a couple of years ago that they needed to sign up for this new system and have been left confused by the rollout. Further information needs to be shared with the Bar and other system users about the purpose of Common Platform and better information needs to be provided about how to use it, as outlined above.

Question 3 – Whether HMCTS is on course to make a smooth transition to business as usual when the reform programme closes

16. This is highly doubtful. Court process and administration was in difficulties prior to the Reform programme and remains so. It is unclear, unfortunately, what is meant by a "smooth transition to business as usual". Certainly, it is doubtful that the system post-Reform is better than the system prior to it.

17. It is difficult to envisage the Family Court Reforms enabling business as usual. The portal is clumsy and list assist simply does not work. It is difficult to see any benefit in the reform programme for court users.

18. The court estate in many cases is not fit for digital working. It is often reported as having issues with building upkeep and maintenance, and cases get adjourned due to the lack of investment in the facilities. This is also negatively impacting the case backlogs which are endemic throughout the justice system. Without sufficient investment in the court estate to facilitate the move to these new digital systems, the issues will continue to arise.

19. In respect of the criminal courts, again it is not clear that the reform programme will come to a successful conclusion. The current potential for significant disruption as the Common Platform becomes more widespread is concerningly high. Other elements of the reform platform, for example the new portal and system for pre-recorded testimony under s.28 Youth Justice and Criminal Evidence Act 1999, appear to be in a state of flux with serious delays and what is, at present, an uncertain outcome.

The Bar Council
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