

## Written evidence submitted by The Law Society

The Law Society of England and Wales is the independent professional body that works globally to support and represent 220,000 solicitors, promoting the highest professional standards and the rule of law.

### Introduction and summary

1. Overall, the Law Society has been supportive of the court reform programme. We agree a modernised court service would benefit all users, but this must not come at the expense of justice. Some of our members have reported to us that these reforms allow access to process, rather than access to justice.
2. This response is informed by feedback from many of our members of their experience of the courts and of the reform programme. This has included surveys and feedback discussions with practitioners.
3. We strongly support investment in technology that improves working practices in the courts system. However, our view is that technology should only be fully implemented once it has been proven to work and strongly tested and evaluated.
4. The Law Society has a strong concern about the timescales of the court reform programme and its fast rollout. Feedback from some of our members has been that the speed of change and the number of changes all at once has been problematic. As set out in our five-point plan to resolve the courts backlog,<sup>1</sup> technology can drive efficiency in courts, however, rolling out unfinished or untested software drives delays and costs. Completion dates of projects still in development should be adjusted so they are realistic and achievable.
5. There is need for more transparency around the true progress and success of the services being rolled out, particularly the Common Platform. HMCTS tends to focus on the positives of the rollout, despite this not always aligning with the member feedback we receive about how the services are working in practice.
6. One of the common technology issues cited in our survey with members' experience in the courts was the lack of consultation about introducing new technology.<sup>2</sup> HMCTS should maintain strong engagement with the legal profession as well as non-professional users regarding remote hearings and services that have been mandated and those that are still in development.
7. Furthermore, we continue to call for better data collection as this will show where investment is needed and what changes are working.
8. We are also still awaiting the publication of the interim evaluation report on the progress of the reform programme. The Ministry of Justice had committed to publishing this in December 2022, there is still uncertainty as to when this will be published.

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<sup>1</sup> <https://www.lawsociety.org.uk/campaigns/court-reform/news/five-point-plan-to-fix-court-backlog>

<sup>2</sup> <https://www.lawsociety.org.uk/topics/research/are-our-courts-fit-for-purpose>

## **The progress HMCTS has made against its plans in the face of changing circumstances**

9. The pandemic led to an acceleration of elements of the reform programme, namely the use of video hearings. The Law Society previously raised concerns before the pandemic regarding the limited testing of this new technology.
10. Other aspects of the reform programme were paused, understandably, to focus on the court recovery efforts during the pandemic. We would like to commend the work done by HMCTS during this time to keep the wheels of justice turning.
11. However, we continue to be concerned about the speed and number of changes of the reform programme, especially while the courts are under pressure to tackle significant backlogs.
12. In 2019, HMCTS had announced a one-year extension to the reform programme. This took into account our concerns about the risk that the fast pace of the programme would not allow sufficient time for proper testing, evaluation and evidence that the technology works. We are therefore concerned that the end date of the programme (December 2023) remains unchanged with some projects still waiting to properly start, for example the possession project.
13. The National Audit Office (NAO) report revealed that despite increasing the programme's budget by around 10% in 2021, HMCTS does not expect to meet the December 2023 deadline. We believe that rather than rushing to meet an arbitrary deadline and risking more issues, HMCTS needs to:
  - Extend the timeline for the programme.
  - Adjust completion dates for ongoing projects to be realistic and achievable.

## **Remote hearings**

14. Remote hearings were invaluable in keeping the justice system operating during the pandemic. HMCTS had admitted that their research base for remote hearings prior to the pandemic was very limited but that they would test across a wide number of hearing types and jurisdictions.
15. Our experience, however, was that they were testing a small number of jurisdictions and categories of hearings (e.g. tax tribunal and testing applications for injunctions by victims of domestic violence) with the expectation that findings can be extrapolated across all types of hearings.
16. The Law Society has previously said that it is important that when any pilot is evaluated, the limitations of the data are recognised, and that conclusions are not extrapolated too far beyond the specific parameters of the evaluation.
17. The HMCTS evaluation report published in December 2021 reflected concerns we and our members have raised that in some scenarios remote hearings are unsuitable and can have a serious impact on access to justice and may not be suitable for vulnerable people.
18. While some people with disabilities find their access to the courts and tribunals helped by remote technology, other disabled lawyers have reported accessibility issues that have had a serious impact on their experience in court:

*“The technology access for disabled persons is limited. The tribunals in particular are very rarely able to provide recordings or transcripts potentially needed by users. The hearing loops don’t often work, no recording access etc. Also, quite often when judge’s read bundles they are always out of sync with what the representatives have because they use different technology programmes to those in the legal field or members of the public.”*

*(‘Are the physical buildings and technology fit for purpose?’ survey respondent)*

19. The HMCTS report made the important point that the perceived safety benefits of being able to remain at home may have driven up satisfaction with remote hearings. We believe it will be necessary to repeat the survey (undertaken in May 2021) to see how views may have changed and how they differ in terms of remote hearings outside the theme of the pandemic.
20. HMCTS has indicated that this will be done with their new Video Hearings Service (VHS) which will replace the Cloud Video Platform. HMCTS must ensure it improves the reliability, functionality, and sophistication of such platforms.
21. A Law Society survey,<sup>3</sup> found that in London only 13% felt that technology was to a large extent fit for purpose. Overall, respondents reported problems with the usability of technology, such as the screens being too small, not being able to link to the network, the sound being too low, and technology experiencing glitches or not working at all.
22. From the outset of the court modernisation programme, we’ve been emphasising the importance of analysing fully the impact of remote hearings on access to justice and on justice outcomes. This should include analysis of:
  - different types of party
  - their perception of whether justice was done
  - their ability to understand and take part in proceedings.

We believe it’s also critical to have:

- rigorous and comprehensive data collection
  - consultation with both the legal profession and court users
23. Robust data collection will allow us to properly evaluate the impact of COVID, and make sure lessons are learned and applied to future reforms. This may be addressed in the interim evaluation report of the reform programme.

### **Online services**

24. The Law Society agrees that the digitisation of existing processes, which aims to improve inefficient paper-based services, will make processes more accessible, simpler, faster, and more cost efficient for court users, and will improve efficiency for legal professionals through better case management systems; indeed in some areas, such as divorce petitions, it has already done so.

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<sup>3</sup> <https://www.lawsociety.org.uk/topics/research/are-our-courts-fit-for-purpose>

25. However, the NAO report acknowledges that some services are not yet operating as expected, for example many probate cases needed manual interventions by court staff despite the relevant project being marked as complete.

### **Online probate**

26. Online probate was one of the earlier projects within the programme and was made available to all professional users in October 2019.
27. We agree that it is more streamlined and was particularly helpful during the pandemic in terms of remote working. We also agreed in principle with mandating the online professional applications but argued that the system must be fit for purpose before being fully rolled out. The Law Society stated that practitioners will want to have assurances that the online systems are working and fully tested, and that the service levels will not decline.
28. It is therefore disappointing that our members continue to experience issues with the level of service provided by HMCTS in terms of timeliness, to the detriment of their clients.
29. As of December 2022, from document receipt to grant issued paper applications took 15 weeks without stops and 25.4 weeks when stopped. It must be noted that the turnaround time for digital applications without stops is much quicker, taking 2.3 weeks, however with stops they are taking 16.4 weeks.
30. Before the service was reformed, it used to take on average up to ten working days for legal professionals to obtain a Grant (in non-taxable estates).
31. We have regular probate user group meetings with HMCTS where we, and other stakeholders, can provide direct feedback to the probate team who listen and respond to the concerns we raise. We have found this engagement beneficial and appreciate that they are making efforts to rectify the performance issues however our members, and their clients, understandably expect better performance levels for reformed services.

### **Civil strand**

32. Feedback from some of our members practising within the civil jurisdiction have stated that due to the number of changes, they are uncertain which ones will be permanent fixtures due to the number of iterations which no doubt will have been costly (there has been the County Court Bulk Issuing Centre, Online Civil Money Claims, CE-filing, the RTA portal and the Damages Claim Service).
33. Our members have stated that given the importance of the rule of law and access to justice there is concern that even if slight changes are being made then these should be done gradually in order to be able to measure the impact before moving on to the next change.
34. Furthermore, simplified online processes which do not clearly set out what the potential outcomes of the process are, give rise to potential risks for lay users. This is particularly concerning if there isn't appropriate flagging of relevant risks, and signposting to relevant legal resources/services.
35. We have raised our concerns with HMCTS about the importance of ensuring that people have the necessary prompts and opportunities to get good quality legal advice and representation from qualified professionals at the points when they need it.

36. An example of where this is particularly relevant is the ambition to extend the small claims process (in the Online Civil Money Claims service) to claims above the small claims limit, because of the risk of adverse costs if the claim failed. Making it easier for litigants in person to issue proceedings above the small claims limit will increase the risk that people who are insufficiently informed will bring ill-advised proceedings, and potentially end up with a substantial order against them to pay the other party's legal costs.

### **Family platforms**

37. The Family Public Law portal was mandated in 2022. Member feedback indicated that there was very limited or no initial training on the system, that there was little notification about the mandation and use of it was essentially a 'baptism of fire'.

38. Members have stated that the platform in its current form is not easy to use and have expressed concern regarding issues with its functionality including but not limited to:

- instances where solicitors are not getting the necessary notifications
- finding documents by accident
- issues with the portal and the courts' ability to communicate with each other
- Reports of cases being significantly delayed due to issues with the portal

39. For the private family law service, which is still being developed, members have expressed concern about its progress, noting that HMCTS have left it too late to undertake sufficient testing (before the current end date of the programme).

40. This concern was validated when the project team stated that the original end date of December 2022 would not be met and is now expected to finish some time in 2023. Members have said, however, that the draft build of the private family law service seems to have learnt from mistakes of other platforms and that the dashboard appears more functionalised.

41. A further concern is that once the service is rolled out and more people are using it, more flaws may become apparent and there won't be enough capacity to solve the problems quickly enough.

42. Members have also stated that as the majority of private law cases are now dealt with by Litigants in Person (LiPs) they would be very concerned if LiPs had to use and navigate these systems and what impact this would have on this service which is already overstretched.

### **Possession project**

43. The possession project is still in the early stages of development, and we are still waiting for the plans to be shared. We appreciate this has been impacted by the work with the Department for Levelling Up, Housing and Communities and that HMCTS are considering options for delivery of the project due to the need of understanding the impact of the Renter's Reform Bill, which will affect future design. HMCTS must ensure sufficient engagement and testing will be undertaken with our members and other key stakeholders before the service is rolled out.

## **Whether HMCTS has planned and rolled out its new digital case management system, Common Platform, effectively**

44. Despite positive feeling towards the description of the Common Platform at the start of the reform programme, the reality of its progression has been the opposite. Our members have provided frequent feedback expressing concern about its functionality, accessibility and reliability.
45. Members expressed concern in initial consultations with HMCTS that the Common Platform prototype would not be effective as a case management system.
46. Based on member feedback, and comments from other users including court staff, it is clear that despite significant funding and consultation, the Common Platform is not delivering what it set out to. Issues with the system are also adding to the courts backlog.
47. Our members who have access to the Common Platform have stated that it is not user friendly and from the outset the platform has been significantly impacted by a number of issues including, but not limited to:
  - Cases dropping off the system meaning the court not having a record of the case
  - Difficulty accessing case papers
  - Directions not showing on the system
  - Technical errors and frequent breakdowns
  - Courts starting late because judges, legal advisers and staff can't access the system
48. In September 2021 the Common Platform national rollout was paused due to performance, stability and technical issues which was kept under review by HMCTS and the judiciary. The rollout resumed in March 2022 but almost immediately issues continued to be raised by defence solicitors and other legal professional working within the courts.
49. There has been ongoing concern that HMCTS and the Ministry of Justice has not been fully transparent on the true progress of the rollout. HMCTS has previously said that they are not concerned about the Common Platform impacting hearing timings and put reports of such issues down to users adapting to the system.
50. Member feedback indicates it is not a case of users adapting but for the system which is currently not fit for purpose to be reviewed.
51. Since October 2022 there have been several instances of strike action by legal advisers and court associates at more than 60 magistrates' courts due to the current state of the Common Platform. This suggests court staff too are facing similar issues to our members.
52. There have also been issues with communication from HMCTS about the rollout of CP e.g, the implementation in South Yorkshire was paused at relatively short notice with little clarity on the reasons why, causing confusion among practitioners. HMCTS Chief Executive Nick Goodwin did share a letter sometime after outlining the reasoning.

53. We urge greater commitment from the Government to address the issues with the common platform that are severely impacting services, alongside properly resourcing the criminal justice system so it can function as society needs it to.

### **Whether HMCTS is on course to make a smooth transition to business as usual when the reform programme closes**

54. Considering the reform programme has been scaled back quite significantly from its original plans, timescales are still questionable. Due to the issues cited by our members using services that have been mandated and now classed as 'business as usual', it is difficult to envisage HMCTS sufficiently completing the remaining work by December 2023.
55. As noted, we are still awaiting the interim evaluation report, which will scrutinise the success of services rolled out to date. This has been delayed since December 2022, with no publication date available.

### **Funding**

56. As we reach the end of the formal programme, it is clear the reform programme needs more time, money and investment in developing the various services for them to be ready for 'business as usual'.
57. We are concerned that once the programme ends there is no certainty as to where the required resources will come from. The Ministry of Justice must confirm funding for these projects will be continued and sustainable.

### **Communication**

58. Another area that could be improved, and which could help with the transition to business as usual, is accessible information on all the individual projects within the widescale reform programme. Details about some schemes are hard to find and HMCTS seems to rely on third parties, including the Law Society, to reach practitioners and promote individual projects.
59. While we are happy to support HMCTS to promote the reform programme to our members, information on the programme should also be clearly accessible and available to all.
60. Members have stated that they find webinars on how to use the new platforms beneficial, however, their experience has been that these are usually conducted near mandation making them feel that they are not as prepared as they would like to be. Recorded webinars shared in advance would help with a smoother transition to business as usual (provided the systems are functioning as expected).
61. More positively, it must be noted that HMCTS has recommenced their quarterly communications forum with us and other legal professional bodies, which will provide a channel for us to flag any issues of concern. We hope this engagement will lead to further improvement in the comms shared with our members to ensure they are best prepared to adapt to the services as they move to business as usual.

### **March 2023**