

Who builds digital government? Accountability in the private sector’s “agile” reconstruction of the administrative justice system

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I. Introduction

While the idea of institutional design has always lurked in discourse about the state, the drive to “take design seriously” has accelerated in recent decades. In the constitutional sphere, there is a growing body of scholarship concerned with “constitutional design” as a discrete activity.¹ In the administrative law scholarship, however, there has been much less explicit focus on the nature of design practices.² But, in the often dark, windowless rooms of the UK’s administrative justice system, a hidden design revolution is occurring as government services and systems are digitalised. So-called “agile” design practices—which government entities “must use” when building and running government digital services—are changing how administrative justice systems in the UK are being constructed.

“Agile” design is an alternative approach to software development which has spread across industry and now government. It has no settled definition, but it almost has a language of its own. Descriptions of the method typically emphasise the perspective of the “users” of systems, developing “prototypes” on an iterative basis, and consistently testing systems with users to gather regular feedback. “Agile” is put forward as an alternative to the traditional “waterfall” model of design, where public sector digital system design is based on operational assessments by officials. “Waterfall” methods are sequential: they start with planning, followed by procurement, design, and construction, and entire systems are then rolled out in one “big

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¹ See e.g. T. Ginsburg, *Comparative Constitutional Design* (Cambridge University Press 2012).

² Though there are a few exceptions, see e.g. A. Le Sueur, ‘Designing Redress: Who Does it, How and Why’ (2012) 20(1) *Asia Pacific Law Review* 17; C. Hodges, ‘Delivering Administrative Justice: Implications for System Design’ in M. Hertogh, R. Kirkham, R. Thomas, J. Tomlinson, *The Oxford Handbook of Administrative Justice* (Oxford University Press 2022).

bang.” Under an “agile” model, by contrast, systems are continually iterated, often released gradually in a series of “phases” or as “components.” This design method should be non-linear: designing, building, and testing are to occur simultaneously.³ Within this broad framework, many “tools” to support “agile designers” have also been developed. For instance, “journey-mapping” tools—which seek to help designers to understand how users come to use a service and what they experience at each step of the process—are now common. The dark, windowless rooms are being coated in post-it notes from “design sprints” and filled with “user designers” on beanbags. New tools, job titles, skills, and approaches are spreading across the civil service and influencing how administrative justice systems are being built.

Agile design practices are consistently portrayed as representing a profound attempt to change the emphasis within the design process from elite (*i.e.* political and civil servant) judgement to user experience.⁴ The transition from a traditional “waterfall” model towards “agile” will, it is argued, place “user needs” at the centre; design will be organised around the “discovery” of these needs, testing products to gather feedback and learn about how systems are actually experienced. This represents a potentially very significant change in approach and emphasis.

Scholars are now catching up with this sea change; a debate that seeks to interrogate the influence and impact of agile design is growing.⁵ Some argue there are significant benefits to the adoption of agile design processes. They can, for instance, lower the risk of the type of large-scale IT disasters for which the UK was once infamous. They also hold the potential to give users of the system a greater voice in the design process, and to create digital services which genuinely work for people. Yet, there has been no shortage of criticism, including that: policy questions about how government should deliver benefits and services risk being subsumed into technocratic “user design” processes; that government policy still sharply sets limits on the capacity of genuine user-focused design to be possible; and that the design processes often fail to work, including due to the difficulties of engaging with communities that are sceptical of government.

³ See e.g. GOV.UK, *Service Manual: Agile and government services: an introduction* (accessed 13 October 2022), at: <https://www.gov.uk/service-manual/agile-delivery/agile-government-services-introduction>

⁴ F. Johns, ‘From Planning to Prototypes: New Ways of Seeing Like a State’ 82(5) *Modern Law Review* 833; A. Clarke and J. Craft, ‘The Vestiges and Vanguard of Policy Design in a Digital Context’ (2017) 60(4) *Canadian Public Administration* 476; J. Tomlinson, *Justice in the Digital State* (Bristol University Press), Ch. 4.

⁵ For a survey of this emerging debate, see n 4 above.

This short analysis article attempts to contribute to this developing debate—as well as the more established debate on outsourcing in administrative justice—by showing how agile design also represents a major new frontier in the contemporary public-private divide. The present reality is quite simple: while the government now has a large and growing community of agile design specialists within civil service ranks, it heavily depends on contracted-in agile designers from the private sector to fulfil its vast demand. These private sector actors are now taking on more responsibility in building our administrative justice systems. We make two main observations about this state of affairs. First, we provide insights into the scale and nature of contracted-in design activity by examining contracts for agile services, and how they operate within the broader landscape of administrative justice design. Second, we show how this form of outsourcing—which effectively transfers more of the distinct public power to determine the construction of the administrative justice system to the private sector—raises important new questions of accountability. We cannot hope to answer those questions within the confines of this piece, so our aim, more modestly, is to provoke a conversation.

II. Contracting for design

As serious efforts have been made to bring the building of digital government systems in-house over the past decade, agile design has been proselytised across the UK public sector. The beanbags and post-it notes have been met with enthusiasm, and agile design is frequently described in blog posts penned by civil servants as revolutionary, “a mindset,” or “a way of life.”⁶ This methodology has been widely adopted, and agile expertise within government is increasing. Many central government departments now have dedicated divisions populated with “agile delivery managers,” “user researchers,” and other “agile specialists.”⁷

Demand for agile expertise is now ballooning as the government aims to deliver “world-class digital services to the public” during a “new era of digital transformation.”⁸ Myriad new

⁶ See e.g. Mike Bracken, ‘You can’t be half agile’ *GOV.UK Blog: Government Digital Service*, 10 July 2015, at: <https://gds.blog.gov.uk/2015/07/10/you-cant-be-half-agile/>

⁷ This phenomenon is not unique to the UK. “Agile” has been enthusiastically adopted by civil servants in Canada, the United States, and Australia, among others. See e.g. A. Clarke, ‘Digital government units: what are they, and what do they mean for digital era public management renewal?’ *International Public Management Journal*, 23:3 (2020) 358-379.

⁸ Central Digital & Data Office, *Policy paper: Transforming for a digital future: 2022 to 2025 roadmap for digital and data*, 9 June 2022, at: <https://www.gov.uk/government/publications/roadmap-for-digital-and-data-2022-to-2025/transforming-for-a-digital-future-2022-to-2025-roadmap-for-digital-and-data>

digital systems are being built through which individuals interact with government, including in important areas of high-volume administrative decision-making such as welfare benefits and taxes. This accelerating demand for agile expertise is widening the gap between ambition and capacity, and many government bodies have been tendering for specialist assistance in building these systems, explicitly pointing to their insufficient internal agile capabilities. Central government departments and local councils are contracting with enormous corporations and boutique IT consultancies alike to “provide specialist teams” who will help build government systems using agile methods. Crucially, rather than being commissioned to build services according to detailed instructions, these actors are being brought *into* government service design processes, fundamentally shaping how services work and how individuals experience them.

One prominent example of these developments can be seen at HM Revenue and Customs (HMRC). It is moving decisively towards a digital self-service model for the vast majority of its interactions with customers and various digital transformation programmes are underway. Front-facing services such as “Apply for or Add to A Child Benefit Claim” are being digitalised and many other new initiatives are in progress. But despite HMRC Digital winning the “Best Use of Agile” award in 2017 and placing agile and “the customer and their journey” at the heart of its work, companies are being contracted-in to help build various digitalised tax services.⁹ For instance, from 2019 to 2021, the Department contracted with People Source Consulting, a consultancy with under 100 employees, for £20 million to assist with the delivery of the customer-facing digital front-end of its core services. Required to provide specialist teams with experience of agile, including “agile project management,” the supplier was responsible for managing the delivery of products and services.¹⁰ This is one of many similar contracts for external assistance with HMRC digital service delivery. Opencast Software has been brought in as “a partner to deliver both the design and technical aspects of new front facing digital services” for 2021 to 2023, “providing technical agile specialists

⁹ S. Rowlands, ‘Best use of agile for digital tax platform,’ *GOV.UK Blog: Life at HMRC*, 4 April 2017, at: <https://lifeathmrc.blog.gov.uk/2017/04/04/best-use-of-agile-for-digital-tax-platform/>; See P. Schofield,

‘Becoming a transformative IT organisation,’ *GOV.UK Blog: Life at HMRC*, 31 January 2019, at: <https://lifeathmrc.blog.gov.uk/2019/01/31/becoming-a-transformative-it-organisation/>

¹⁰ See <https://www.contractsfinder.service.gov.uk/notice/ce67e91f-4013-4a09-95d4-b84a668a96c3?origin=SearchResults&p=2>

incorporating work in scrum teams and delivering in phased sprints.”¹¹ In 2018, Capita won an £8.7 million contract to help deliver front-facing digital services.¹²

The Department for Work and Pensions (DWP), which has similarly built up considerable internal agile expertise, also nonetheless contracts at scale for agile service design. For example, in 2018, Scrumconnect Consulting won a £3.9 million contract to assist Pension Delivery Services to “transform the customer experience of Government, providing easy access to pension services” as part of DWP’s encouragement of digital self-service interactions. The contract requires Scrumconnect to provide a specialist team to help create new and redesigned online services, undertaking user research, design, and software development work.¹³

Where even the government bodies with the most internal agile capabilities are contracting for entire teams to design and create new digital services, it is clear that this trend is far-reaching. The gap between capacity and demand remains large, and private sector consultants seem to be heavily relied upon.¹⁴ Government departments across the board have made countless similar contracts for external agile experts to help build digital services—from the Department for Education’s £4.5 million contract with Hippo Digital for agile teams, to HM Courts and Tribunals Service’s (HMCTS) £2.9 million contract with Kainos Software for a team of agile specialists to complete the design, build, and deployment of Divorce and Financial Remedy software.¹⁵

That private sector actors are creating software for government is by no means a new phenomenon. But “agile” changes the nature of this outsourcing. In the words of Baroness Lane-Fox, a key figure in the government’s adoption of agile, the *point* is to “shift the lead in

¹¹ See <https://www.contractsfinder.service.gov.uk/notice/086d73bb-7f95-4c72-a8b9-1c7715b9d03f?origin=SearchResults&p=1>

¹² See <https://www.contractsfinder.service.gov.uk/notice/03e4eb3b-e394-44c1-bb0b-e57d07413faa?origin=SearchResults&p=4>

¹³ See <https://www.contractsfinder.service.gov.uk/notice/1f8c199d-aad4-4e74-885d-9ed819514749?origin=SearchResults&p=5>

¹⁴ Government spending on consultants has been rapidly increasing in recent years: see National Audit Office, *Departments’ use of consultants to support preparations for EU Exit* (7 June 2019). See also M. Mazzucato and R. Collington, *The Big Con: How the Consulting Industry Weakens our Businesses, Infantilizes our Governments and Warps our Economies* (Penguin, forthcoming 2023)

¹⁵ See <https://www.contractsfinder.service.gov.uk/notice/2591521b-b2d4-4caa-a7c5-e2d4c7cf2946?origin=SearchResults&p=4> and <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/8720>

the design of services from the policy and legal teams to the end users.”¹⁶ Instead of civil servants designing in detail from the outset and instructing IT companies accordingly, the idea is to shift the locus of planning and decision-making; design should also be more continuous, based on ongoing testing and iteration. From an administrative justice perspective, therefore, agile is worthy of our attention because this methodology significantly increases the importance and power of those involved in building administrative justice systems. They are now playing more of a key role within decisions determining what the system will do, how it will work, and how users will experience it. In the above-mentioned examples, consultants have been brought in to help *design* front-facing government systems, thereby shaping how individuals will experience the tax system, pension services, and courts and tribunals. Their design decisions will influence how information and options are presented to users on a digital tax interface and how the process of claiming a benefit online is navigated. This, in turn, has implications for how—and whether—fundamental services are accessed.

Further, as the starting point for agile design is the “discovery” of user needs, contracts focusing on this initial discovery phase are of particular interest here. User-centred design seeks to cede governmental control over the processes of defining the problem as well as devising the solution. Where consultants are relied upon to “discover” users’ needs and design appropriate solutions, they exercise influence over this problem definition stage, shaping what is to be adopted in the first place. This is clear from the wording of tenders: Deloitte was awarded a £1.9 million Service Design Partnership contract with the Ministry of Defence in 2021, tasked with delivering the “discovery phases to detail user needs and fully document the problems that are to be resolved” and “identifying candidate solutions to meet the needs,” subsequently working alongside existing teams to develop prototype solutions.¹⁷

Within these processes of “discovering user needs,” these private sector actors are generally responsible for determining who the “users” are. Many different groups “use” digitalised administrative justice systems, including frontline staff, volunteers such as librarians who help individuals navigate digital systems, and those who are themselves claiming a benefit, but the consultancies determine the category of relevant users. They are

¹⁶ M. L. Fox, *Directgov 2010 and beyond: Revolution not Evolution*, Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60993/Martha_20Lane_20Fox_s_20letter_20to_20Francis_20Maude_2014th_20Oct_202010.pdf

¹⁷ See <https://www.contractsfinder.service.gov.uk/notice/50af477e-1144-4ab4-8fc3-d8862a99771b?origin=SearchResults&p=4>

responsible for selecting the “users” with whom they will do research and upon whom they will “test initial products.” As these processes inform decisions about what kind of digital system should be built and its design features, these companies’ sampling methods—and their ability to reach more vulnerable and excluded groups—matter. Their decisions to conduct “user research” with individuals who have limited English language skills, or people in situations of serious vulnerability, for example, will affect the considerations that go into these design processes. Companies with “agile design” capabilities are now often being charged with “user research” in contexts with more marginalised communities and people with more diverse needs. Opencast Software, for example, was awarded a £4.1 million contract with the DWP for 2022 to 2023 to “plan, design and carry out research activities and share insights to inform improvements to user experiences and to inform design” of various health and disability related services, including the provision of a digital channel to apply for Personal Independent Payments.¹⁸

Influence during early service design is particularly clear when the government contracts for user-centred *policy* design. In 2022, the Department for Levelling Up, Housing and Communities (DLUHC) awarded a contract of up to £8 million to Zaizi Ltd to “support particularly user-centred policy outcomes with user-centred design and digital skills.”¹⁹ User-centred design specialists are being brought in “to research, design and possibly support the implementation... of user-centred policies,” and will work primarily with DLUHC policy staff. Consultants are entrusted to help determine what the problem is, ascertain citizens’ needs, propose a digital solution, and create the system.

Local governments, too, are contracting for agile services—indeed, contracts seem particularly far-reaching in this context, where staff have far less agile capability. Experts are often contracted-in to advise councils on how to do digital transformation projects writ large. Devon County Council, for example, awarded a contract of up to £1 million to PwC as “a strategic partner to provide additional capability” to advise on, design, build, and deliver a range of digital services.²⁰ They are not just designing and building, but seemingly advising more generally on the entire process. Even through smaller contracts, councils seem to be

¹⁸ See <https://www.contractsfinder.service.gov.uk/notice/c327e403-978c-4def-97e9-64ffe1967cf8?origin=SearchResults&p=8>

¹⁹ See <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/17126>

²⁰ See <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/15049>

effectively handing over responsibilities for the conceptualisation, design, and creation of the portals and services through which citizens interact with them: Buckinghamshire County Council awarded TPXimpact a £106,000 contract to provide “a multi-disciplinary service design team to carry out research, design and prototyping for the ‘digital front door’ to community, health and adult services.”²¹ The same company was awarded almost £440,000 as the City Of Bradford Metropolitan Council’s Digital Transformation Partner; this seemingly included redesigning all council services as part of a “fundamental organisational transformation.”²²

Even in instances where more of the design and development occurs in-house, agile invites other forms of influence from technology companies. Rather than government instructing an IT company on what to build, agile approaches often entail the intertwining of consultants into government, as contracted-in specialists sit in government offices full-time, working alongside civil servants in hybrid teams. Such instances might therefore be better described as “insourcing” rather than “outsourcing.” Specifically, external specialists are frequently brought in on short-term contracts as “agile delivery managers” who will manage teams of civil servants, including in public bodies with internal agile expertise. DWP Digital, for example, has issued several such contracts. Even where government employees with agile expertise are designing services in-house, consultants are managing them, likely shaping the processes and resulting systems.

These influences are also having an impact on organisational cultures within the public sector. Agile is seen to entail organisational change, challenging existing ways of working. Recent tenders for agile services invariably include requirements that contractors build civil servants’ agile capacity. Stand-alone contracts for the provision of “agile coaching” have also proliferated, and some consultancies specialise in such training and change management. Some contracts are small, such as Nasim Consulting’s £48,000 contract to train 250 staff at the Driver and Vehicle Licensing Agency on agile methodologies.²³ Others are more far-reaching, such as IT consultancy Agilesphere’s £1.26 million contract with the Ministry of Justice to provide “agile coaches” who will “challenge existing thinking” and “embed agile.”²⁴

²¹ See <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/8931>

²² See <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/6098>

²³ See <https://www.contractsfinder.service.gov.uk/notice/d422f1c7-1e21-4da5-aae1-61158471e498?origin=SearchResults&p=1>

²⁴ See <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/4867>

The trend of contracting-in agile expertise may be accelerating. In 2022, an enormous £4 billion Pan Government Collaborative Agreement was established for the provision of digital, data and technology specialists to facilitate large-scale digital transformation programmes across government.²⁵ The 51 awarded suppliers include large companies such as Deloitte and Capita as well as consultancies with fewer than 50 employees. Reliance on external agile specialists seems to be here to stay. This is so despite the fact that this approach has often failed to deliver on promises. Universal Credit is an oft-quoted example of this,²⁶ and HMCTS' efforts to create a unified case management platform across the criminal justice system has seen various difficulties. HMCTS adopted an agile approach and contracted-in agile expertise, but hundreds of millions have been spent on a service which has suffered delays, technical glitches, and left HMCTS facing industrial action from court staff.²⁷ This is reminiscent of previous large-scale IT disasters delivered using waterfall methods—but insiders have been especially critical of “so-called ‘agile experts’ who have been in charge of managing the programme.”²⁸

III. Rethinking accountable design?

The growing reality is that—far beyond simple outsourcing of certain public functions—private sector actors are increasingly designing the public sector itself. Consultants are being “insourced” to design key front-facing government systems, determining how systems governing taxes or pensions work and how individuals interact with these services. While agile design seeks to shift the emphasis within the design process from elite civil servant judgement to user experience, it seems that “agile designers” represent a new kind of elite which is

²⁵ See <https://www.contractsfinder.service.gov.uk/Notice/efcd4360-a035-48a2-9543-7e91a97295a3>

²⁶ The promised flexibility and user-centeredness of agile methodologies have, for example, been called into question in the context of Universal Credit. Agile is purported to provide an iterative approach allowing for frequent changes and rapid problem-solving, but the DWP insists that certain key changes to the IT system cannot be made. For example: DWP claims that it is impossible to suspend repayments of ‘advance payments.’ The Work and Pensions Committee has noted: “It is surprising that an agile system like Universal Credit does not have the built-in flexibility to allow Ministers to suspend Advance repayments in a time of crisis.” See House of Commons Work and Pensions Committee, *DWP’s response to the coronavirus outbreak* (22 June 2020). The Department also argued before the Court of Appeal that amending assessment periods would require “a wholesale move away from automation back to a former method of manual calculation” and a system “rebuilt from scratch”. See *Secretary of State for Work and Pensions v. Johnson and others* [2020] EWCA Civ 778, at paras 78 and 81.

²⁷ See <https://www.pcs.org.uk/news-events/news/hmcts-management-face-significant-industrial-action-if-they-dont-think-common>

²⁸ Quoted in K. Hall, ‘Hundreds of millions “wasted” on UK court digitisation scheme,’ *The Register*, 3 April 2017

becoming embedded into government. This intertwining of private sector designers with the public sector and, in particular, their growing role in building administrative justice systems, therefore raises a wide range of questions. In this final section, we identify some of the most pressing questions in this respect pertaining specifically to accountability. We focus on four questions that appear to be central.

First, exactly who is making important design choices when a private sector actor is brought into government to design an administrative justice system? A striking feature of the work of contracted-in agile designers responsible for developing administrative justice systems is that their role is often quite nebulous, and there is certainly extensive variation in the levels of involvement and potential influence on the face of the contracts. Some design contractors will have a limited role, such as “coaching” public officials to work in certain ways when developing systems. While that still exerts influence, other contracts grant what appears to be a significant degree of authority over how systems are constructed. For instance, some private sector designers working within the administrative justice system are empowered to define the terms of the “problem” that their later design work is supposed to address. Within systems that may determine the rights and entitlements of the public, this power to frame the problem is considerable, and raises important questions about the kinds of values and conceptions of “users” that might be being brought into these design processes. Crucially, as we have seen, many of the contracts—whether they appear to entirely hand off design responsibilities to private sector teams or grant a less significant role—bring specialists into government to work alongside civil servants. It is therefore difficult to know who is making important design choices within these “hybrid” assemblages. The simple question of “who is accountable for what?” is one of the first-order questions in any inquiry into accountability and, in the modern administrative justice system, it is often far from clear who has built what, who decided it should be built that way, and whether decision-making power surrounding design lies in the hands of the public or private sector.

Second, how do traditional mechanisms of accountability within procurement law apply to contracts for agile design? Mechanisms to ensure accountability across the public-private divide have long been an important part of the debate on outsourcing.²⁹ As regards the

²⁹ A.C.L. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press 2001).

use of private sector designers, the commitment to agile methodologies often means that traditional means of accountability in this domain may struggle to gain traction. For instance, though the terms of contracts for agile services are mostly accessible, they are often extremely vague. Given the nature of agile, the whole purpose, as Baroness Lane-Fox's words quoted above make clear, is to *not* have system design determined by operational, policy, or legal officials but to pass the responsibility for building systems to people with expertise in "user design." Those agile experts then, given their philosophy and ways of working, typically insist on the freedom to "iterate" as they design systems. Indeed, government guidance on agile states that "Governance should be simple and supportive", and should "give decision-making authority to teams so they can focus on delivering."³⁰ It is therefore inherently difficult to write a clear contract for agile design processes and, as a result, it is less clear how their performance can be evaluated. These are, of course, not entirely new problems—terms of public contracts are often complex and what compliance looks like in practice is often not easy to define. Yet, contracts for agile design services are usually by necessity drafted in broad terms, and this is, therefore, a particular issue in this context.

Third, how are the outcomes of this private sector design work monitored more generally? A major question in outsourcing is, separate from the terms of the contracts, how results are evaluated for success. To put it bluntly, for all the money that is spent on agile design in the UK public sector, there is remarkably little publicly available evidence that it actually works, either from a government operational point of view or from the point of view of users of the systems. Of course, vanity statistics are published from time to time about how a "high percentage of users found a new system designed using agile methods much better," but information of this kind is within the realm of government promotion more than that of rigorous evaluation. It is unclear whether the key features which are claimed to set "agile" apart—the centrality of user research, opportunities for continuous feedback, and regular improvement of services in accordance with users' experiences—are really being put into practice. It is also unclear whether users are truly given opportunities to provide feedback which will improve these systems, and whether these systems are actually meeting their users' needs. Meanwhile, difficulties and failures have already emerged in large-scale agile projects, as we saw in the example of HMCTS's unified case management platform. It is vitally important to know if

³⁰ GOV.UK Service Manual: Governance principles for agile service delivery, at: <https://www.gov.uk/service-manual/agile-delivery/governance-principles-for-agile-service-delivery> (last accessed 13 October 2022)

contracted-in designers are doing work that improves outcomes and, at the same time, if public officials are making good decisions when they decide to contract them in.³¹ Accountability requires an understanding of the standards to which those being held accountable are to be held and some kind of mechanism to monitor and evaluate performance against those standards. Again, there do not seem to be any particularly clear answers to this question in the case of contracted-in agile design services.

Fourth, how do traditional methods of scrutiny stand up to this kind of contracting? It has been observed that the trend towards “governance by design” often involves the suppression of important policy choices into “design processes.”³² From one perspective, this is arguably the point of agile—to build systems based on user experience and views, rather than informed by policy officials, and to move decision-making power about how a system works away from legal and policy teams. Yet the reality is that, where this happens, what are fundamentally policy choices are passed into the hands of the private sector employees who are operating outside of the public sector paradigm. They become the ones making the seemingly small choices which ultimately have a significant cumulative impact on how the administrative justice system works. Arguably, the iterative nature of agile design obscures the inevitably political nature of the decisions involved, making them appear as technocratic choices and often leaving traditional accountability institutions—such as Parliament or watchdogs—struggling to interrogate important design decisions, with the role of the private sector clouding this even more.³³ Thus, while a fundamental question of accountability is “how are those we need to hold to account held to account?”, once again, the contracting-in of agile designers makes it difficult to provide a clear answer to this question.

The spread of agile practices across the UK government is changing how administrative justice systems are being constructed, and issues surrounding these changes are beginning to receive increasing scholarly attention. But we have sought to add to this debate in noting that these changes also raise important questions as to *who* exactly is designing and building digital government. It may well be that agile design practices are indeed shifting the power to define problems, solutions, and design choices away from civil servants and towards the individuals

³¹ This, of course, relates to a broader problem beyond outsourcing design, see *e.g.* National Audit Office, *Use of consultants and temporary staff* (HC 603, 2016).

³² D.K. Mulligan and K.A. Bamberger, ‘Saving Governance by Design’ (2018) 106(3) *California Law Review* 697.

³³ *Ibid.*

who use and rely on government digital systems, thereby enabling more user participation in design processes, though this remains an open question and, as above, the chosen sampling methods will require scrutiny. But the reality is also that the locus of decision-making in design is being transferred from one “elite” group—civil servants—to a different “elite” group—contractors with agile expertise. This shift is worthy of attention.

This growing role of private sector designers in the public sector raises vital questions about effective accountability for the design of administrative justice systems, including who is accountable, to whom, against what standards, and how accountability is to be achieved. The questions we have raised above are far from a comprehensive survey; there are, no doubt, many more. This has serious implications, and such questions therefore demand more attention from scholars of administrative justice than they have received thus far. We must pay close attention to *who* is building the administrative justice system and *how*, as this inevitably shapes what gets built. This may have significant implications for accountability as government is digitalised.