



Response to the MOJ consultation on “Transforming our justice system”

7th November 2016

Introduction

1. The South Eastern Circuit (SEC) represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.
2. On 15th September 2016, the MOJ set out a summary of reforms and a consultation in relation to “Transforming the Justice System”: <https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/>. The consultation was extended to the 10th November 2016 to reflect that two of the documents relating to this consultation (the Online Convictions/Statutory Fixed Fine Impact Assessment & Equalities Statement, and the Panel Composition Equalities Statement) were not uploaded correctly when the consultation launched. These were subsequently reissued.

3. The consultation document refers to reforms which are wide ranging and encompass both the Courts and Tribunals.
4. The stated principles underpinning the reforms are that the justice system will be *just, proportionate* and *accessible*. The intended practice is that these principles will deliver “*swift and certain justice*”.
5. Notwithstanding the wide ranging areas of proposed reforms, Chapter 6 of the consultation specifies that:

“at this stage, views are invited on three specific elements:

- a. *Assisted digital facilities;*
 - b. *Online conviction and statutory fixed fine: and*
 - c. *Panel composition in the Tribunals”*
6. On behalf of the South Eastern Circuit, we welcome the opportunity to contribute to this consultation. The fundamental principles of *open justice* and *access to justice* remain at the core of our responses.

Executive summary

7. The judiciary and practitioners in the legal profession have and continue to engage constructively with the modernisation and digitisation of the justice system.
8. It remains fundamental that any reforms do not deter, inhibit or prevent access to justice. A modern justice system needs to be accessed by all, including those who are vulnerable or have difficulties in using digital and online processes.

9. A move towards online processes or conducting virtual hearing must not be at the expense of the principle of open justice. This means that justice is open not only to the parties but also to public scrutiny.
10. Assisted Digital: The consultation and the impact assessment recognise that 70% of users will require “varying levels of assistance” to use digital services. We welcome the intention that support will be provided to ensure users can access these digital processes. This will be a significant challenge that will require appropriate funding and a blend of support to cater for the broad spectrum of user needs.
11. Online convictions and statutory fines: We understand that technology can have the potential to save time. However, the online system is a far-reaching proposal that removes a magistrate/judge from the entire process. It raises an important question whether it is appropriate that the treatment of criminal offences in terms of plea and sentencing becomes automated. Is it right that the automated treatment of a criminal offence removes judicial involvement or oversight?
12. The difficulty obvious in the Consultation Paper in identifying a suitable offence indicates the challenge of this scheme. If an offence is ‘low level’ and suitable for adjudication without human involvement, consideration should be given to declassifying it as a criminal offence. The subsequent treatment of such activity, akin to parking offences, would appear to be a safer and proportionate course.

13. Composition of Tribunals: There is no evidence-based material provided to support the significant proposed changes to the composition of tribunals. Nor is it clear how the “*changing needs of people using the tribunal system*” have been or are to be measured.
14. We agree in principle that the Senior President of Tribunals (SPT) should be able to determine panel composition. However, there should be compelling reasons to move away from the current composition.
15. Caution should be exercised in removing or minimising the role of non-legally qualified members from panels. Their input, as part of a two or three-person panel, serves to improve the quality of decision-making and imports the important participation of the public in the Tribunal system.
16. We have provided examples in relation to the Employment Tribunal (ET) and the Social Security and Child Support (SSCS) Tribunal to underline how those Tribunals already tailor the composition of panels to specific classes of cases.
17. Our detailed response to the consultation questions is set out overleaf.

Assisted digital

Question 1: Do you agree that the channels outlined (telephone, webchat, face-to-face and paper) are the right ones to enable people to interact with HMCTS in a meaningful and effective manner?

Please state your reasons.

18. It is important to recognise, as the consultation states at para 7.1.2, *“that not everyone will be able to engage with these processes and we need to take steps to provide support to those people who need it to interact with the justice system”*. Indeed, the statistics cited refer to 52% of the UK population who use government digital services only *“with assistance”*.
19. Significantly, 18% of the UK population remain “digitally excluded” and it will be imperative that those who are unable to use digital services are supported and catered for.
20. The SEC welcomes the stated intention of HMCTS to ensure that everyone must be able to use their services and that all Court users are helped to interact with its digital services.
21. The ‘channels’ seem comprehensive. Experience shows that ready access on the telephone to a friendly and informed helper can save much time and make things much easier. A system whereby the aider can access the screen being used by the court user through remote access technology might also be helpful, although there may be accompanying security risks.

Question 2: Do you believe that any channels are particularly well suited to certain types of HMCTS service?

Please state your reasons.

22. Different services and different users will probably need different types of help. It is likely that a blend of services will need to be required to cater for the range of needs and to maximize the ability of users to access and utilise these digital services. The SEC considers that the iterative development of services is likely to be the best guide to which particular channels are useful to end users, and so seeking appropriate feedback from Court users will be important.

Online convictions and statutory fixed fines

Question 3: Do you agree with the principle of a statutory fixed fine process for those who enter an online guilty plea and are content to proceed with the process?

Please state your reasons.

23. We understand that technology does have the potential to create more time for Magistrates' Courts to deal with more complex and demanding cases. However, this proposed course raises both question of principle and in relation to its practical implementation
24. The online system is a far-reaching proposal which would remove a magistrate/judge from the entire process. We have concerns whether it is appropriate that the treatment of criminal offences in terms of plea and sentencing is automated. Where any criminal offence becomes automated this removes judicial involvement or oversight of the whole process

25. The argument that these proposed offences are “low level” cases and non-imprisonable does not remove the need for this wider question to be confronted.
26. An alternative is for such “low level” offences to be de-criminalised and be dealt with as civil penalties akin to parking.

Question 4: Do you think that there any additional considerations which we should factor into this model?

Please list additional considerations.

27. There are additional considerations which should be factored into this model.
28. Of particular concern is the selection of Railway Fare Evasion & Tram Fare Evasion as suitable offences to roll out this model. These are dishonesty offences, a guilty plea to which could have far-reaching consequences for a person's life, notably in terms of employment, financial affairs and travel. Arguably, offences such as these should properly be considered by a defendant in the current way, rather than being presented as “lesser” offences, as they would be within this model.
29. The model does not, it appears, make provision for access to the system by a defendant's legal representative. This should be provided for with a separate login made available when required. Some offences within this model may not be covered by Legal Aid, but there are many defendants who will nonetheless

wish to instruct a lawyer privately.

30. Further, this model should only be rolled out nationally on a firm evidence base: in this regard we invite the Minister to publish the results of the Lavender Hill trial.

Question 5: Do you think that the proposed safeguards are adequate (paragraphs i-x above)?

Please state your reasons.

31. We do not consider that the proposed safeguards are adequate. As set out above, the system should be accessible to legal representatives.

Question 6: Do you agree that the offences listed above are appropriate for this procedure and do you agree with our proposal to extend to further offences in the future, including driving offences?

Please state your reasons.

32. Some driving offences potentially are suited to this procedure.
33. We do, however, have concerns about the rationale for the choice of the other offences, namely Railway Fare Evasion & Tram Fare Evasion. As well as being dishonesty offences (again, see comments above re the potential consequences

of convictions for these offences) they arguably *do* both have a clear and identifiable victim: the train company and tram company respectively.

34. We would encourage the Minister to give careful thought to the choice of additional offences.

Panel composition in tribunals

Question 7: Do you agree that the SPT should be able to determine panel composition based on the changing needs of people using the tribunal system?

Please state your reasons.

35. We agree in principle that the Senior President of Tribunals (SPT) should be able to determine panel composition. However, there must be compelling reasons to justify moving away from the current composition. The need to save money must not be the justification for such a course (see para 7.3.9).
36. Caution should be exercised in removing or minimising the role of non-legally qualified members from panels. Their input, as part of a two or three-person panel serves to improve the quality of decision-making and imports the important participation of the public in the Tribunal system. Furthermore, from the viewpoint of the user-often an appellant, their confidence in the tribunal is likely to be enhanced by the fact that a panel includes a non-legal member and is formed of more than one person.
37. The proposal at 7.3.6 amending the First Tier Tribunal (FTT) and Upper Tribunal (Composition of Tribunal) Order 2008 arguably goes too far in providing that a Tribunal panel in the FTT will consist of a single member

unless otherwise determined by the SPT.

38. For Employment Tribunals, it is not clear how the “*changing needs of people using the tribunal system*” are to be measured. If it is considered necessary to reflect the diversity of the local communities who use the tribunals in the panel which determine claims, then the use of non-legal members may achieve it – and presumably be quicker and cheaper than changing to legally qualified judicial members.

Question 8: In order to assist the SPT to make sure that appropriate expertise is provided following the proposed reform, which factors do you think should be considered to determine whether multiple specialists are needed to hear individual cases?

Please state your reasons and specify the jurisdictions and/or types of case to which these factors refer.

39. The Tribunal system is broad and diverse and it is unattractive and counter intuitive for the Consultation to invite considerations or justifications in relation to individual Tribunals/Chambers. We suggest that the proper and indeed transparent course is for the Consultation to highlight the considerations they, in conjunction with the SPT, consider to be appropriate. These then could be incorporated or underpin any proposed amendment of the Order as set out above and at para 7.3.3.

40. Again, within the spirit of being constructive, we approach two Tribunals from the perspective of users, lawyers and those who sit as fee-paid Tribunal Judges.

Social Security and Child Support Tribunal (SSCS)

41. In the Social Security and Child Support Tribunal (SSCS) the system of panel composition is already tailored to meet the different types of cases. '01' cases are comprised of a single legally-qualified judge, as they involve interpretation of entitlement provisions, whereas '03' and '04' cases are comprised of two or three panel members, being a legal qualified member, a doctor/medical member and for cases involving disabilities (03), a disability-qualified member. The need for a medical member remains essential, as the Tribunal makes findings as to the extent of an appellant's mental or physical impairment. Further, the input of a disability-qualified member, a lay member, provides invaluable expertise and enhances the quality of decision-making.

42. In this Chamber, there remains a real need for the expertise of a medically and disability qualified member. The Chamber deals with some of the most vulnerable appellants who invariably have no legal representation. The Chamber furthermore is an *inquisitorial* tribunal as opposed to an *adversarial* one, and there is a real benefit in having panels comprising of more than one person.

Employment Tribunals

43. It is not understood that this current consultation relates to Employment Tribunals – any change to the composition of which would require its own consultation exercise. The example of the altering use of non-legal members in Employment Tribunals however indicates that it may provide useful insight for other tribunals.
44. Section 4 of the Employment Tribunals Act 1996 provides for when cases in the ET are to be heard by a judge alone, and when by a full panel. Even where cases are generally to be heard by a judge alone, there is a power (s4(5) ETA 1996) for a judge to direct a full panel to hear the case if, having regard to any views expressed by the parties, there is a likelihood of a dispute on facts or law that make it desirable for the case to be heard by a full tribunal. Since the ET (Composition of Panels) Tribunal Order 2012 (SI 2012/998), unfair dismissal claims have “generally” been considered by a judge sitting alone. It is not understood that any statistics have been kept as to the number of unfair dismissal cases which have been determined by a full panel since the change came into force. Anecdotally, none are known of. Parties do not tend to make the applications to have a full panel. Again, no research has been done into why this is so (if indeed this is the case).
45. This response starts from a position that the use of panel members in ETs enables a wealth of real ‘life experience’ to be brought into the decision making process, assisting not only in forming judgments, but in ensuring confidence of the users, and is therefore advantageous. Against the background of non-legal members not being used in unfair dismissal claims since the 2012 order, it is submitted that this seems to indicate that the SPT needs to maintain a ‘broad

brush' approach that claims under certain jurisdictions ought to be heard by a full panel – rather than seeking to introduce a more bespoke case-by-case consideration.

46. At present, it is most often in discrimination cases that non-legal members sit. The 'real life' experience of non-legal members can be particularly valuable when conflicting needs or demands of workers/employees with different but equally protected characteristics requires determination. By way of example, the case of *Ladele v London Borough of Islington* notably involved a Christian Registrar who objected to officiating at same-sex marriages; perhaps less well known is the 'background' fact of numerous complaints and grievances being raised by 'gay' staff members who took personal offence to the beliefs of the Christian claimant. Another example may be the determination of flexible working requests, where an employer may face seemingly equally compelling reasons from a disabled employee, a parent who needs to provide childcare or an older employee who wants to be able to reduce their working hours prior to retirement. Having the experience of non-legal members in determining a discrimination claim by any such employee ensures that alongside the essential application of relevant legal principle, there is a reality touchstone.
47. Anecdotally, being able to have a panel of three decision-makers who between them have different characteristics (most visibly, gender and race) adds considerably to the confidence of users of the system, who very often consider themselves to be members of a "minority". This is particularly so when panels are required to determine conflicting factual accounts. Indeed, it is understood that there has been some research (by the UCL Judicial Institute) about the benefit of having a discussion between panel members before reaching a judgment, with initial views as to determination being altered or potentially altered in some 39% of cases.

Impacts and equalities impacts

48. The updated/corrected impact assessment links are set out below for ease of reference:

https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/assisteddigitaliaandeia.pdf

https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/onlineconvictioniaandeia.pdf

Question 9: Do you agree that we have correctly identified the range of impacts, as set out in the accompanying Impact Assessments, resulting from these proposals?

- a. Assisted Digital*
- b. Online Conviction and Statutory Fixed Fine*
- c. Panel composition in the tribunals*

Please state your reasons.

Assisted digital

49. The consultation and the impact assessment recognize that 70% of users will require “varying levels of assistance” to use digital services. This is a significant challenge that will require appropriate funding and a blend of support to cater for the broad spectrum of needs of users.

50. Furthermore, as the impact assessment sets out, certain Tribunal/chambers have a substantial amount of users who have a disability and particular care is required:

“Disability is a criteria for some Social Security benefits so digitising the Social Security Tribunal process is proportionately more likely to affect those with disabilities than the general population. Individuals with a disability are approximately four times more likely to have never used the Internet than individuals without a disability and so are also more likely to require assisted digital support to engage with online services”

51. Whilst the Consultation recognises this need, there is no detail at this stage how the needs of this particular group will be catered for.

Online conviction and statutory fixed fine

52. The range of impacts identified in the assessment document is of relevance and assistance in recognizing the challenges with “on line conviction and statutory fixed fine”:

Effective safeguards are needed to the mitigate risk of defendants making uninformed decisions, or being inappropriately channelled into the process. If some of those who want to engage digitally are unable to, access to justice would be compromised and volumes would be impacted: assisted digital arrangement will need to be put in place. It is assumed that a prosecutor will make the decision to filter cases into this process. The concept of an ‘algorithm’ to determine suitability of cases for the process / penalty (i.e. driving offences) may invite challenge.

53. The impact assessment fails to refer to the wider public interest and confidence issue that a criminal plea and sentence would be automated and have no judicial involvement or oversight.

Panel composition in the tribunals

54. There is minimal information in relation to this area of reform. At the heart of the suggested reform is the contention:

Most tribunals currently reflect historic arrangements that may be out of date and do not tailor the expertise of the panel according to the case

55. There is no evidence-based material to support such a significant change to the composition of tribunals. Indeed the contention is qualified by the phrase “*may be out of date*”.

56. To take one example in the SSCS chamber, there is likely to be an adverse impact where lay members or specialist medical/disability members are removed from current 03/04 SSCS cases. A tribunal would lose the expertise a lay member or medical member brings to those cases where disability and impairment of mental/physical function lie at the heart of the subject matter.

Question 10: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform?

Please state your reasons.

57. The impacts assessment indicates the difficulties in identifying those who will be impacted by the online conviction proposal:

“Our assessment of the equality impacts is that this proposal will not result in any direct discrimination but could potentially indirectly impact some groups which have protected characteristics. Safeguards will be in place to mitigate these where appropriate. We are satisfied that the proposal is lawful as it is a necessary and proportionate means of achieving the policy aims set out in the consultation document.

The exact nature of any potential indirect impacts cannot be fully assessed until the decisions have been made around which case types are eligible for this process and what the appropriate fixed fines for these should be (para 14-15)”

58. It is germane to note that a defendant would have to elect to participate with this on-line process and can still utilise the normal court process. This coupled with efforts to provide online support, may serve to minimise the impact on those individuals with protected characteristics.

59. The existence of a voluntary elective scheme and preservation of the alternative to a digital process remain imperative to ensure access to justice and to minimise discrimination be it direct or indirect.

Question 11: Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessments, resulting from these proposals?

- *Assisted Digital*
- *Statutory Fixed Fine*

- *Panel composition in the tribunals*

i. Please state your reasons.

60. These are addressed under the answer to questions 9 & 10.
