



JUSTICE

**Response to Consultation on Transforming our
Justice System**

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Introduction

1. Established in 1957, JUSTICE is an all-party human rights and law reform organisation, its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. JUSTICE has always worked to promote a legal system which embraces effective access to justice as the most basic element of any system which purports to uphold legal rights. Without access to justice, fundamental freedoms cannot be enforced, removing a system's vital checks and balances and rendering rights meaningless.
2. JUSTICE welcomes the opportunity to respond to this consultation. Much of the justice system – across civil, administrative and crime – is outdated and inefficient. It lacks the flexibility and technological capacity required of a modern justice system. The austerity agenda of the government has provided the impetus for reflection and reimagining of how the system could work differently. Facilitated by an unprecedented investment from the Treasury, the HMCTS reforms will close many courts and invest in technology. The digitisation of the justice system presents the opportunity for great efficiencies – making resolution of legal disputes and access to redress speedier, and more accurate, and reducing the cost of proceedings. However, the strongest opponents of the change proposed note that the reforms risk excluding people who lack online access to the digital justice space. In particular, people without means, elderly people, those not fluent in English and people with learning difficulties or mental ill-health may be unfamiliar with using digital technology and may struggle to engage digitally. This may exacerbate their legal problems rather than resolve them.
3. JUSTICE recognises that technology now drives the everyday lives of many individuals and businesses, and that it is time for this development to be reflected in our courts and tribunals. Users should be able to interact with the system using the tools and technology they utilise in other areas of their lives, with inbuilt support for non-digital users. As Lord Justice Ryder said in his address to the Bar Conference this year:

“For some, digital access will itself be an improvement. It will make the justice system something that is more closely associated with the way they already live. It will remove the barrier that unfamiliarity and fear of formal process can pose for some. For others, we are designing a whole programme of assisted digital access. Specialist providers whose expertise can be made available to assist litigants in person, those with disabilities, special needs and vulnerabilities, will be commissioned to provide a coherent service that most of us know is presently a pipe dream. We intend to make that dream a reality.”¹

4. In our *What is a Court?* Report, we emphasised the importance of technology and its potential to meet user needs and maximise access to

¹ Lord Justice Ryder, speech to the Annual Bar Conference 2016, 15th October 2016.

justice. In many instances, the needs of court users can be met – and their participation in the proceedings facilitated – by technical solutions which do not require their physical presence. Nor is it always in the best interests of the parties to be brought together for a physical hearing and the extended timescale for resolution that creates.

5. Digitisation can offer improvements in access to justice. For ordinary people, the court system can be distant, daunting and costly.² Properly designed, a digital system will be more intuitive and provide access for emerging generations of court and tribunal users – for example, by allowing them to engage with the justice system through a mobile phone application or online programme. Online facilities can enable individuals who would find it difficult to travel to a physical courtroom, and engage with a traditional adversarial process, to access justice.
6. JUSTICE therefore sees the digitisation of the courts and tribunals as a welcome inevitability, while recognising the fact that Government digitisation projects have traditionally encountered substantial challenges. We are optimistic that these challenges can be mitigated through appropriately designed systems and software.
7. One issue that must be mitigated as far as possible, and resolved fully if access to justice is to be assured for everybody, is the lack of broadband provision in some parts of the country. Only 80% of rural households in the UK have standard broadband availability, compared to 98% of urban households.³ Lack of access to the internet in rural areas is compounded by the fact that transport links are also often poor: in 2009, 42% of households in the most rural areas had a regular bus service nearby compared with 96% of urban households.⁴ A digitised system allowing access from home would be most useful for those who, conversely, are the least likely to have broadband access. Moreover, a legal system which excludes or provides a deficient service to portions of the population is incapable of upholding the principle of access to justice.

² Ipsos MORI, conducting interviews with 508 legal professionals, found that “88% of legal professionals agreed that ‘The court process is intimidating to the general public’”, see Hodge Jones & Allen, *Innovation in Law Report 2014*, p.16, available online at <http://www.hja.net/wp-content/uploads/hja-innovationin-law-report-2014.pdf>. This tallies with the findings of a recent report, based on interviews with professional and lay court users, that the Crown Court experience has “many distressing, stressful and perplexing aspects” for court users, which “extend far beyond...readily definable vulnerabilities”, see J Jacobson, G Hunter & A Kirby on behalf of the Criminal Justice Alliance, *Structured Mayhem: Personal Experiences of the Crown Court* (2015), pp.3 and 5, available online at <http://criminaljusticealliance.org/wp-content/uploads/2015/11/Structured-Mayhem1.pdf>, which draws upon research from J. Jacobson, G. Hunter and A. Kirby, *Inside Crown Court: Personal experiences and questions of legitimacy* (Policy Press, 2015)

³ Tinder Foundation, ‘Doing Digital Inclusion: Rural Handbook’, October 2015, p.1, available at http://www.tinderfoundation.org/sites/default/files/research-publications/doingdigitalinclusion_rurallinks.pdf

⁴ *Ibid*, p.1.

The Consultation

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.

8. Telephone, face-to-face assistance, web chat and access to paper channels for those who need it are proposed by this Consultation, but there are very few details about how this support would work and interact. 'Assisted digital' support is in the early stages of development, and we understand from HMCTS that its parameters will continue to evolve over the next four years. As a result, we are unable to comment with any specificity on what is proposed without seeing the concrete details. Below we set out the concerns and principles that we consider, and that we trust are already being considered, are necessary to ensure that a digital system provides sufficient support to enable all users to engage effectively with it.

A principled approach:

9. HMCTS' approach to assisted digital must be a principled one, and the principles 'just', 'proportionate' and 'accessible' have been identified as underpinning the proposals set out in the Consultation.⁵
10. 'Just' must include (as per the Overriding Objective under CPR rule 1.1, Crim PR rule 1.1 and rule 2 of the Tribunal Rules⁶) ensuring parties are on an equal footing – one party cannot be undermined by its relative technical inexperience.
11. 'Accessible' must include access to justice. Moreover, the principle of access to justice must apply to those whose disability, educational attainment, age, ability to understand the language, culture or resources prevent them from utilising digitally accessed HMCTS services.
12. The principle of open justice must also be kept in mind when considering an increase in remote participation. Digitised processes constitute a sea change in how openness and transparency in the justice system are upheld. Our Working Party for *What is a Court?* was of the view that, in civil proceedings, technology can in fact increase public participation in the justice system, and allow justice to 'cast a wider net'. For example, the move to a paperless system means that more documents will be available in soft copy and can

⁵ 'Transforming our Justice System: summary of reforms and consultation', (Ministry of Justice, September 2016), (the Consultation), Foreword by Sir Oliver Heald QC MP, p 3, available at https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/consultationpaper.pdf .

⁶ General Regulatory Chamber Tribunal Procedure Rules, Health Education and Social Care Chamber Tribunal Rules, Immigration and Asylum Chamber Rules of Procedure, Social Entitlement Chamber Tribunal Procedural Rules, Tax Chamber Tribunal Procedural Rules, War Pensions and Armed Forces Compensation Chamber Tribunal Rules.

therefore be published online. However, digitisation does of course pose challenges to open justice, for example in cases where all the parties are participating in a hearing remotely, including the judge. Although in the case of the small claims track, or even magistrates' courts, there may not often be a large public presence, the government needs to seriously think about how open justice can be preserved, and even take the opportunity to improve on its implementation. In the case of online guilty pleas, this should at least include publishing the outcomes of those cases online.

13. The reforms proposed include more virtual hearings, where parties participate remotely.⁷ In such cases, a live stream, whether visual or audio, could provide openness for the general public and press. If there is concern over the appropriateness of public engagement with this process, the stream could be broadcast from or to a designated and controlled location – such as a room in a court or tribunal building. Procedural rules could govern whether the public should be excluded in exceptional circumstances.

The type of support offered:

14. At this stage the thinking seems to be that face-to-face assistance and a telephone help service will offer assistance along the lines of “aiding completion of an online form”⁸ while webchat will help users with “online processes”.⁹ This suggests that users will have to use separate channels for different types of assistance (technical, procedural, etc.), meaning in turn that they may have to utilise more than one channel (one or more of which may be beyond them for whatever reason) in the course of their engagement with the online court, and may end up being passed from one channel to the next if they initially access the wrong channel. One of the frustrating things about contacting private sector providers is being passed from one internal department to the next, and often having to explain an issue afresh to each person one speaks to – or worse, getting cut off in the course of a transfer. Whether or not this would apply in the case of the online court - or whether, if it did, it would actually represent a worse situation than the one currently encountered by physical court users in search of assistance - the digitisation of the courts is an opportunity for *improvement* and the creation of a user-focussed court service. It should therefore be possible for the user to contact HMCTS via whatever channel they are comfortable with, and to get through to an individual who will take ownership of their query and liaise with whichever internal department(s) are necessary on behalf of the user.
15. The availability of different access points for different forms of assistance also throws up issues of internal communication within HMCTS. It is vital that a thorough audit trail is maintained. This may have Data Protection Act implications, that will have to be acknowledged and an appropriate procedure prepared.

➤ Advice:

⁷ Consultation, para 1.5(iii).

⁸ Consultation, para 7.1.5

⁹ Ibid.

16. HMCTS seems to be suggesting an online court which obviates the need for legal, or at least procedural, advice by being simple and easy to follow¹⁰ (while at the same time suggesting that the legal professions are finding their own ways of providing legal advice that is affordable¹¹). We assume that HMCTS will be taking advantage of the opportunity presented by the digitisation of the courts to provide a lot more comprehensive, easy-to-follow procedural information to users than is currently easily accessible to users via a 'one stop shop', particularly as remote participation makes it harder for court users to access any advice, from on-site charities such as the Personal Support Unit as well as from HMCTS staff.¹² Webinars, careful signposting, embedded videos, etc., could satisfy many procedural queries users may have (allaying some of the recourse to assistance via the channels proposed), in a format that is familiar to many and that they are comfortable interacting with. In that way, it is also an opportunity to dispense with the exclusionary, archaic or unintelligible elements of the traditional courtroom procedure and language.

17. Therefore, in addition to the channels outlined, we feel that users could be further supported by video guides¹³ demonstrating how to fill out forms, state their case, or pay fines for example, and booklets with step-by-step instructions with images. Interactive webinars¹⁴ could help users prepare, whilst detailed guides available to print-at-home or from the local post office should be available for those who wish to understand the process and the legal aspects in greater detail. This would build on efforts being taken across government to provide additional support to service users. Efforts to ensure the process meets the needs of those with learning difficulties or who are digitally illiterate should not prevent others from understanding their case

¹⁰ "There will be a new, highly simplified procedural code. An online form will guide people through their application and the progress of their case. This new approach will be designed to promote more conciliatory approaches to dispute resolution, and to be understandable to non-lawyers, helping ordinary people resolve their issues in a low-key way, without needing expensive legal representation to help them understand what to do." (p.6)

¹¹ "For lawyers especially, innovation will be invaluable: to find new ways of delivering services, of simplifying working practices, of focusing more on meeting the needs of all their clients, from defendants to families and civil claimants. Much is already being done by the legal professions, but the reforms will enable them to be much more ambitious. We are confident that they share our commitment to working together to shape a modern court system that will be a significant contribution to building a more just society." (p.7)

¹² Though they will continue to have access to online advice such as that provided by the Citizens Advice Bureau in relation to taking action in the small claims court (available at <https://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/small-claims/>).

¹³ For example, the Civil Resolution Tribunal for resolving disputes in British Columbia features an introductory video, available at <https://www.civilresolutionbc.ca/self-help/#se-start>. Manitoba justice provides a video on how to fill out a petition for divorce, available at <https://www.youtube.com/watch?v=MRKFtWusw9Y&index=1&list=PLsitmE9n3YNKwt07CeUFpX74A2TggYNeK> and how to apply for a domestic violence or stalking protection order, available at <https://www.youtube.com/watch?v=tR8rHXtLWVQ&index=2&list=PLsitmE9n3YNKwt07CeUFpX74A2TggYNeK>

¹⁴ Such as those provided by HMRC e.g. at <https://attendee.gotowebinar.com/register/6682344967614295554>

and the legal process in depth. Digitisation offers an opportunity for increased agency that should be encouraged.

18. As we suggested in our *What is a Court?* Report, interactive diagnostic tools could be used to navigate the user through the law and procedure applicable to the facts of their case, to aid their understanding and ensure that the right outcome is reached. These should also be able to identify what information or evidence is likely to be required to resolve the dispute, and how this may be obtained. The National Health Service model in NHS Direct, which had interactive diagnostic tools as well as useful information on treatment and when to seek the help of a professional, integrated with a helpline staffed by trained medical staff, was one such example.¹⁵ Another current example is British Columbia's Civil Resolution Tribunal, which provides a 'Solution Explorer'¹⁶ helping users to identify the nature of their problem.

19. It should be borne in mind that moving to a digital court system places additional responsibility on the individual. Text message, email and calendar notifications should be utilised to remind individuals of what is required of them.

➤ Staff training:

20. The channels outlined in the Consultation have been widely used in the private sector for some time, with varying degrees of effectiveness. A helpline is operating for *Make a Plea*, for which there will no doubt be feedback as to its usefulness for users available to Government for analysis.¹⁷ What is important across all channels is the training of the staff operating them.

21. Of key importance is training for the staff behind the telephone, web chat or face-to-face services, as well as IT technicians. In our *What is a Court?* Report, we emphasised the importance of staff training in delivering a user-focussed service.¹⁸ Throughout the evidence-gathering process for *What is a Court?* the importance of human resources to the efficient, effective and accessible operation of the courts and tribunals was mentioned repeatedly by members of the judiciary, those in legal practice and representatives of the advice sector. This includes staff attitude. Across all features, the guiding principle should be that staff actively engage in helping to resolve the person's problem, rather than simply providing information which they are then expected to follow up for themselves.

22. It is essential that the system users receive consistent and accurate information and advice from staff, whichever channel of communication they engage through.

¹⁵ This is unfortunately no longer available.

¹⁶ Available at <https://www.civilresolutionbc.ca/self-help/#se-start>

¹⁷ <https://www.makeaplea.service.gov.uk/helping-you-plead-online/>

¹⁸ *What is a Court?*, paras 2.25, 2.31, and 5.11.

The need to digitise ambulatory services:

23. Digitisation of courts and tribunals will induce government departments whose decisions are subject to appeal to digitise their own application procedures: otherwise, for every appeal where the application form and /or related materials have to be sent to the tribunal (or court), the department would have to pay staff to manually scan those documents and upload them to the relevant appellate website. Some do already expect applications to be made online.¹⁹
24. Assisted digital should therefore be available not just to those appealing decisions but to those making applications to government departments in the first place. The Government could, of course, choose to do this in a piecemeal fashion, with each government department developing its own digital systems and assisted digital services. However, so as to achieve economies of scale and ensure uniformity of access to the relevant online application processes, we recommend that consideration is given to designing a comprehensive system from the outset.

The proposed channels

Telephone:

25. In the private sector, millions of consumers in the UK now have access to the benefit of telephone helplines, for example, as an add-on to life, house or motor insurance, by virtue of taking out a credit card or as part of an employment benefits package. The volume of calls to such helplines is enormous and the scope of the support offered may typically extend to detailed assistance or even the drafting of a letter – certainly the filling in of forms. Many companies' primary communication channel with customers is the telephone.²⁰
26. The HMCTS telephone service should contain several features to ensure a properly effective service. JUSTICE identified these in the recommendations of our *Delivering Justice in an Age of Austerity* report:
 - (1) At the operational level, sufficient staff should be employed to keep waiting times to a reasonable duration. For callers who cannot get through immediately, there should be an opportunity to request a call back as an alternative to waiting on hold. At the very least, accurate information should be provided regarding the likely waiting time, and regarding times which are less busy.

¹⁹ For example job seekers allowance, <https://www.gov.uk/jobseekers-allowance/how-to-claim>, which through a series of pages directs applicants to their local Jobcentre Plus phone number if they can't apply online <https://www.gov.uk/contact-jobcentre-plus>.

²⁰ Except for a pilot programme which enables an enquirer to work out whether they are financially eligible for legal aid: <https://www.gov.uk/check-if-civil-legal-advice-can-help-you>.

- (2) The telephone service ought to be available seven days a week, with contact hours spanning beyond usual working hours to enable users' convenient access after their own work or caring obligations.
- (3) Callers should not be required to listen to a menu of call options that relies upon their judgment to correctly direct themselves to the relevant service. This would be confusing and increase their anxiety around the issue. There should be a human triage process to direct them to the assistance that they need.
- (4) To reduce obstacles for callers with speech or learning difficulties, JUSTICE would advise that callers should not be greeted with an intelligent automated service requiring them to verbalise their personal or case details or reason for calling in order to be directed to the correct department. Should an automated greeting be required, we would encourage that the telephone service does not redirect callers to the FAQs on the website as this may delay, confuse or deter callers from continuing with the verbal communication route they have selected, and indeed may require. The telephone service should not assume that a user has not already attempted to resolve their query online.
- (5) Staff answering the telephone should possess a range of relevant expertise, enabling them to give accurate and comprehensive assistance in relation to a variety of the most frequent problems. Telephone staff should have access to the digital platform. Oral assistance should be followed up in writing, and where appropriate, with further minor assistance (for example, writing a letter on behalf of the user). To increase continuity and consistency across each service, and even each adviser, we feel it would be beneficial for all parties if transcripts or notes from the call are sent to callers.
- (6) Staff on telephone duty should have access to specialist back-up advice for more complex problems. There should be time targets ('turn around times') for the delivery of specialist advice. It should be possible for the specialist adviser to contact the caller directly, either online or by telephone.
- (7) The service should provide for referrals, for example, in relation to those individuals who require face-to-face support, where the legal issue is one in which ongoing legal support is likely to be needed and/or where another provider might be able to provide follow-up assistance more promptly. To this end, an up-to-date country-wide directory of service providers should be maintained by the telephone service. Referrals should be followed up to ensure they are actioned. In appropriate cases the telephone staff should contact a provider directly to ensure that an appointment can be made within a reasonable period.
- (8) Provision should be made for callers who cannot speak English adequately. This should take the form of ascertaining contact details and arranging a call back by a member of staff speaking the relevant

language; a conference call with an interpreter might be arranged. Multi-lingual channels could even be incorporated.

- (9) Finally, it will be necessary for the option of telephone assistance to be clearly signposted to the user throughout the online process. This might take the form of directing an enquirer to the relevant pages of the online platform, discussing the case in a chat-box, or directing the enquirer to the telephone service. Alternatively, a request received on the online platform should be signposted or referred where appropriate for telephone assistance where certain criteria are fulfilled – i.e. the problem cannot be addressed by an intuitive/dialogue/flowchart process on the website.

Webchat:

27. Webchat provides an immediate source of support and information to users and can provide reassurance to individuals unfamiliar with the online form, terms or phrases used, or the process.
28. Webchat is increasingly used in the private sector. It requires basic computer literacy and so doesn't move outside the scope of those who are already capable of engaging with an online court in terms of the customers it can provide additional assistance to. Webchat also requires people (both users and staff) to be able to communicate effectively in writing, which means it is more limited than face-to-face or telephone channels, which are verbal.
29. As some people are likely to prefer webchat to the telephone, it is important to have both available. That said, it seems to us that most if not all of the conditions we have suggested are needed for the telephone helpline²¹ would also be needed for an effective webchat based service.
30. As with the telephone service, sufficient staff should be employed to keep waiting times to a reasonable duration. An optional call-back service should be offered where waiting times extend beyond a certain point. The webchat service should also be available seven days a week, including outside of usual working hours.
31. Staff answering the webchat service should possess a range of relevant expertise, enabling them to give accurate and comprehensive assistance in relation to a variety of problems. They should have access to specialised back-up advice for more complex problems. Again, there should be time targets for the delivery of this advice.
32. Given that many users may not have used online chat functions previously, we would suggest that the webchat function is clear, available on every page and pops up into the main screen when the adviser responds, without requiring the user to maximise or minimise the discussion thread. The chat

²¹ See para 26 above.

function should also proactively identify individuals who may need assistance and raise the chat window with them.

33. To ensure a smooth and consistent approach across all channels, users should be provided with a transcript of the discussion and HMCTS should also retain a copy in case of further contact with the user. As with the phone service, the adviser ought to be able to transfer the user to an alternative adviser if necessary.
34. In all communications with the user, access to both telephone and webchat support should be made clear, including with a webchat button on all e-communication for any immediate queries or concerns.
35. An instantaneous translation service could be incorporated into the design of the webchat channel for those with language difficulties. We acknowledge that this would not provide 100 per cent accuracy, but it would be better than no service at all, so long as the limitations of the service were made clear and were followed with an option for a telephone-based interpretation service should the user not understand the translation or process, to occur at a later time.

Face-to-face:

36. Digital and telephone platforms will not be suitable or immediately available for certain individuals, either because of their personal characteristics or the resources available to them. As the Consultation focusses on the digitally excluded, we understand the term 'face-to-face' to refer to 'in person' services, rather than 'face-to-face' facilitated by Skype or another online video platform.
37. In the context of state retrenchment, an advantage of providing telephone and webchat channels as well as face-to-face services is that face-to-face resources can be reserved for those who really need them i.e. who cannot interact successfully via telephone or webchat because they have no effective access to online or telephone services, or who are unable to understand and use materials presented in that format. This group consists disproportionately of the elderly, those with learning difficulties, those with hearing or sight impediments, and those for whom English is not a first language. Personally delivered assistance must continue to exist so as not to further disadvantage those who may to some extent already be socially excluded.
38. These face-to-face channels must include access to a computer if they are to accommodate the needs of people who are prevented from accessing an online process because they don't have one, or because they do not have access to the internet. In our *What is a Court?* Report we proposed the creation of resource hubs,²² located in courts and in other publicly available venues as deemed appropriate, including third-party spaces. HMCTS will

²² *What is a Court?* Paras 5.6 – 5.9.

have to give some thought as to which spaces are suitable, in the context of closures and retrenchment across the public sector. Libraries, doctors' surgeries, community centres and job centres might provide possibilities. The resource hubs should be equipped with a number of internet connected computer and telephone stations, as well as hardcopy pamphlets and guides. They should be staffed by empathetic, knowledgeable individuals who can assist users to navigate online systems and answer questions. In short, they should assist litigants to help themselves in a supportive environment.

39. Face-to-face services must be available country-wide. As Lord Justice Gross said recently in relation to court and tribunal estate rationalisation, local justice must be an imperative: “[t]here cannot be a justice postcode lottery, excluding remote rural areas”.²³ This applies to the availability of face-to-face services. Those most likely to require them may also be the least mobile in society. Face-to-face services must be accessible to them. This may entail training staff outside the shrinking courts and tribunals’ estate – for instance, librarians working in public libraries might be trained to advise litigants on using the online court. However, we acknowledge that the concurrent retrenchment of other public services, which might have been utilised for such a purpose, makes it difficult to identify providers that could cover the whole country whilst ensuring consistent standards of service.

➤ Existing advice services:

40. The Consultation does not discuss how a face-to-face service provided by HMCTS would interact with existing voluntary support services, such as the Personal Support Unit (PSU), which is located in some courts around the country, except to say that some face-to-face services will be provided by third-party organisations, which may mean services such as the PSU.

41. If existing third party services such as the PSU are to be used for the face-to-face channel, it is not clear if they are to be expected to provide technical support - to broaden the scope of assistance they currently provide. Currently, the PSU (for example) provides assistance to litigants on filling in forms and organising papers and thoughts, amongst other things. Will they be requested to provide support on navigating an online system, and on technical problems?²⁴ If not, HMCTS should consider providing face-to-face technical support in the same space to avoid the need for users to travel to different locations for different types of assistance.

42. The PSU staff also provide emotional support in the courtroom. Assuming they can provide this support in the context of an online court – perhaps by

²³ Sir Peter Gross, ‘Providing Sufficient Resources for the Courts and Judiciary as a Fundamental Constitutional Obligation’, speech at the Commonwealth Magistrates’ and Judges’ Association Conference in Georgetown, Guyana, 19th September 2016, p.7, available at https://www.judiciary.gov.uk/wp-content/uploads/2016/09/gross-lj-guyana-final-sept-16.pdf?_ga=1.138843252.639870395.1477487198

²⁴ Something incidentally they may be well equipped to provide: in Brigg’s LJ *Final Report*, para 6.18, he notes that the PSU says it uses a lot of student volunteers who are a class well placed to advise on technical matters.

sitting next to the person as they navigate the website – this may mean that the user who needs emotional support will have to travel to court anyway, to access the PSU, which of course defeats some of the objects of remote access (for the user, at least). Perhaps, given that the online court will avoid the need to appear before a judge in a court building, the fears some users experience, and which the PSU seeks to allay, will not arise. But it will also throw up challenges and antagonisms of its own, mainly technological. For some users, unfamiliar and possibly incomprehensible online processes will create a new class of challenges, which the PSU and other organisations may not be (immediately) equipped to help them with.

Paper:

43. In his final report on the civil courts structure, Lord Justice Briggs concludes that it is not realistic to solve the problem of the computer challenge by the permanent retention of a parallel paper-based equivalent to online access. He cites the example of the paper system existing alongside the new online issue and filing service in the Rolls Building by CE File, resulting in an expensive hybrid service. Though he does point out that this is only a stop-gap service. In the same way, he says that a paper based alternative to the Online Court cannot be allowed to be a permanent feature.²⁵
44. However, recourse to paper will be necessary while there are still people who choose or who are only able to use paper-based services due to a lack of available technology or technological awareness. We acknowledge that this proportion of the general population is likely to diminish over time.

Other considerations:

45. As with all customer services, where necessary there will should be provision to make a complaint about the service received. This must be clearly visible on the site. As we have said above, effective staff training – here, on dealing with complaints in a meaningful and effective way – is vital. It must also be borne in mind that complaints will be more likely with an online court accessed remotely, since there is more opportunity for misunderstanding in the context of non-face-to-face interaction. This will need to be managed.

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

46. Given the differing needs of court and tribunal users, we think it is important to have the full range of channels available for all types of HMCTS service to

²⁵ Briggs LJ *Final Report* p.39, para 6.15, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>

ensure that users are able to access the service in a way that they can understand.

47. We take this opportunity to state, however, that some procedures/areas of practice will not be appropriate for a fully online procedure at all, regardless of any support channels available. For instance, some tribunals that assess incapacity (and also, to an extent, honesty and credibility). It is hard to envisage how this could be done effectively through a wholly digitised system.
48. It is therefore concerning that the government has listed, amongst the types of cases that it considers to be immediately suitable for completion entirely online (as opposed to simply being started online, which is HMCTS' aim for *all* cases), appeals to the Social Security Tribunal,²⁶ while the potential for Mental Health Tribunals to be "digital by default" is to be explored.²⁷
49. Also, although it may benefit some appellants – such as those whose mental ill health or physical disability prevents them from leaving the house - to be able to participate in their hearings remotely, research and testimony indicates that Social Security Tribunal appeals conducted in person result in success much more often than those done on the papers.²⁸ The impact of digitisation on the success rates of these cases should be assessed carefully. It does not appear in the Impact Assessment provided.
50. Another area of practice we consider are problematic for digitisation is immigration and asylum appeals. These concern applicants who may be culturally, as well as technologically, linguistically and legally, be disadvantaged to a greater degree than in any other context. Applicants may also be traumatised by their past experiences. Generally speaking, they represent an extreme on the scale of litigants requiring support and assistance. The Impact Assessment does not take into account these vulnerabilities or combination of vulnerabilities and how they may be exacerbated by an online system. JUSTICE will soon be establishing a Working Party considering the effective and fair operation of the Immigration and Asylum Chamber in light of the move to online working.

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.

²⁶ Consultation, p.6.

²⁷ Ibid, p.15.

²⁸ See Profs Dame Hazel Genn & Cheryl Thomas, 'Tribunal Decision-Making: an empirical study,' (UCL Judicial Institute and the Nuffield Foundation, 2013), available at http://www.nuffieldfoundation.org/sites/default/files/files/Tribunal_decision_making_vFINAL.pdf

51. In principle, a simple, quick and focussed procedure that obviates the requirement to attend court, where appropriate, is to be welcomed. It would also reduce the waiting time currently experienced by those who plead guilty to traffic offences online through the *Make a Plea* facility.²⁹ However, the design of the online process will be critical to ensuring that the prosecution process remains fair.

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

52. For some summary offences, HMCTS envisages a process where defendants resolve their cases immediately, using an entirely automated system. Users would simply opt in to the system where they wish to plead guilty, and the system would produce a conviction and issue a standard fixed fine plus costs. We are concerned that these procedures must comply with the article 6 ECHR right to a fair and public hearing. Where this right is waived, it must be established in an unequivocal manner and must be attended by safeguards commensurate with its importance. It must be shown that the defendant understood what the consequences of waiver would be.³⁰ It must be made clear what the procedure is and how it compares to a public court hearing. That is, clear to all defendants, including those with language or communication difficulties.

53. Although the Consultation does not raise the prospect, we would be concerned if the online fixed fine were to differ from that available in court for a guilty plea. There will already be a strong incentive to plead guilty from the ease and efficiency that the online process provides (see above). A reduced fine would further risk guilty pleas being entered in circumstances where they should not.

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

54. HMCTS rightly recognises that safeguards must be inbuilt to the online system to ensure that defendants are able to make an informed decision as to plea. In particular, safeguard (v) states that “[d]efendants would be presented with all the relevant evidence against them and the potential

²⁹ <https://www.gov.uk/make-a-plea>

³⁰ See *Jones v the UK*, app no. 30900/02, admissibility decision 9th September 2003, where the ECtHR held that “the applicant, as a layman, cannot have been expected to appreciate that his failure to attend on the date set for the commencement would result in his being tried and convicted in his absence and in the absence of legal representation. It cannot be said, therefore, that he unequivocally and intentionally waived his rights under Article 6”. The case was deemed inadmissible for other reasons.

consequences, such as the disclosure regime for the conviction”.³¹ Information would include “details of the prospective fixed fine (and any additional elements such as compensation or costs) to allow defendants to make an informed decision.” Safeguard (ii) would require defendants to actively opt-in to the process, with the single justice procedure or a court hearing as alternative options. These safeguards laudably seek to ensure that defendants using the online convictions process make an informed decision about whether to plead guilty.

55. The design of the online conviction system must be conceptualised in full appreciation of the fact that the online guilty plea process puts the defendant in an entirely novel position. Utilising this process takes defendants out of the court setting, where judges, other legal professionals and court staff are available to provide informal advice, and the court is able to fulfil its duties to the unrepresented defendant under the Overriding Objective (Criminal Procedure Rules, rule 1.1). Furthermore, in court, a defendant is directed through the process. There is no need for the defendant at court to navigate the procedures for themselves. Whilst giving defendants the freedom and control to navigate their own convictions is potentially a very positive progression, leaving an individual to deal with an entirely alien system in isolation and without support risks creating a false liberty.
56. There is some evidence that users have difficulties in navigating the criminal justice system remotely when left to their own devices. The Single Justice Procedure has presented challenges for many users, as is evidenced by online chat forums³² which demonstrate both the frustrations and fears of unsupported users of the Single Justice Procedure, as well as the fact that they have nowhere to turn for advice other than informal online chatrooms, which can provide only unregulated advice from unknown sources. For some users, the sense that they are being asked to engage with a very serious process, with very serious outcomes, prevents them from navigating processes that they would otherwise find relatively straightforward. This ‘fear’ factor must not be ignored, and the system must be designed to overcome it as far as possible.
57. Full information and tools for interpreting the process must be made available to ensure effective and informed engagement, particularly given that an online system puts added pressure on defendants to forego their article 6 ECHR right to a hearing before an independent tribunal (as we have stated above) for the sake of convenience. In particular, defendants must be provided with the tools so as to be able to make an informed decision on plea and penalty. We stress that we are not advocating a form of online ‘diagnosis’ or legal advice as to appropriate plea, but rather that defendants must be given the tools to be able to make that decision for themselves. To this end, we also highlight that sufficient safeguards be in place to ensure

³¹ We assume this means the fact that convictions will have to be disclosed in some circumstances, such as when applying for certain jobs.

³² For instance, <http://www.pepipoo.com/forums/lofiversion/index.php/t107492.html>, <http://www.getoutofdebtfree.org/forum/viewtopic.php?f=74&t=96781&sid=7c5f113cfe3d95c3a00c129ee6db1e94&start=10#.WBiNj9WLTct>, and <http://www.justanswer.co.uk/traffic-law/9dcrq-asking-question-behalf-daughter-holly-a.html>, accessed 4th November 2016.

that the prosecutor, which in the types of cases put forward for the online court will in many instances be a private sector organisation running a public service, submits all disclosable evidence to the online platform rather than only the evidence that supports their case.

58. The defendant utilising the online conviction system will have to be able to interrogate their own actions and decide whether they were guilty or not of the offence charged. This means ensuring that the defendant is aware of the elements of the offence charged. A clear and certain way to do this would be to take the defendant through each stage of the offence, and ask them to state whether or not they agree that it applies to them.³³ Each element of the offence would be set out on a separate page, and the defendant would be presented with the option to either click 'agree'/'yes' – to indicate that the activity described applies to them – in which case they move on to the next page and the next stage of the offence, or 'disagree'/'no', in which case their case is diverted to the Single Justice Procedure for consideration by a magistrate – or, at least, the defendant is taken to a page which gives the defendant the option to proceed to the Single Justice Procedure on the basis that they have entered a not guilty plea. If at any stage a specific item of evidence would be required, there could be the option to 'upload' that evidence for consideration by a magistrate.

59. For example, in the case of the offence of fishing with an unlicensed rod under s. 27 Salmon and Freshwater Fisheries Act 1975, it is a defence to have had permission from the appropriate agency to take fish in circumstances which would otherwise require a licence [ss. 27(2)]. This permission must be in writing [per ss. 27(11)(b)]. Clicking through the elements of this offence, the defendant should be presented with a page which asks whether they had written permission from the appropriate agency. If the answer is 'yes', there should then be the option to upload a scanned image of this permission. The questions might be as follows:

- (a) Were you fishing in [area] at [time]?
- (b) Did you have a license to fish in [area] on [date]?
- (c) Did [appropriate agency] otherwise give you permission to fish there in writing?
 - (i) If so, did you fish in the way the [appropriate agency] said you could in the letter?

This step-by-step process would ensure that checks were in place to identify any possible defence, which the defendant could not be expected to know about.

➤ Explanation of consequences of pleading guilty:

60. Once the defendant has clicked through all the elements of the offence and agreed that they apply, the offence is made out. At this stage, the defendants should be provided with full information as to the consequences

³³ This would mirror to an extent the process of reading out the charge sheet in the physical courtroom before taking a plea from the defendant.

of pleading guilty, including that the defendant will have a criminal record, but also extending to the consequences of a conviction beyond the immediate sentence. A criminal conviction can have long-term consequences for an individual, and those using the online procedure must be made aware of them, as they would be if they were appearing in court or receiving legal advice from a lawyer. A criminal record has the potential to impact on a person's:

- (i) Employment prospects: for instance, certain jobs or voluntary work require a Disclosure and Barring Service (DBS) check (previously a Criminal Records Bureau (CRB) check);
- (ii) Sentence in relation to future offences;
- (iii) Travel: passport and visa processes that may exclude offences

61. In our view, these potential ramifications need to be clearly signposted with actual examples demonstrating specific potential outcomes.

➤ Sentencing and mitigation:

62. The option to provide mitigation should also be inbuilt into the process. If, after going through the process we have set out, the defendant is sure that they wish to plead guilty, they should then be presented with the option to either pay the fixed fee, or to state that they should only pay a portion for whatever reason. Potential mitigating factors should be set out, for the defendant's information. We take inspiration from the traffic penalty tribunal.³⁴ This provides information on the grounds for appeal against a Parking Penalty Charge Notice, by way of a series of drop down boxes which explain each ground in straightforward language and provide examples of scenarios which might satisfy it. Importantly, the site informs users that they do not need to decide for themselves which ground applies, and that the adjudicator will do so for them.³⁵ In a similar way, the online conviction site should provide information about what constitutes mitigation, but not require the defendant to perform a plea in mitigation themselves, instead sending the case on to the Single Justice Procedure for consideration by a magistrate, who would decide on the appropriate sentence (i.e. fine).

Open justice

63. As with the civil context, the principle of open justice must be safeguarded in the case of an online convictions procedure. In our briefing to Parliament on the Criminal Justice and Courts Bill 2014, which introduced the Single Justice Procedure, we highlighted our concern that a magistrate deciding cases and sentences while sitting in private undermines the principle of open justice and risks public trust and confidence in the criminal justice system. In

³⁴ <https://www.trafficpenaltytribunal.gov.uk/>

³⁵ See <https://www.trafficpenaltytribunal.gov.uk/grounds-of-appeal-parking-penalty-charge-notice/#/>

written evidence to the Public Bill Committee, the Magistrates Association recognised this concern about closed hearings, saying:

“The MA is well aware that few members of the public attend to listen to and observe cases where the defendant is absent. However it is a principle of British justice that cases are heard and the results are made known in public and we would be sorry to see this principle abandoned, even for the cases which this Bill deals with. We would be concerned if the general public perception became that these cases were no longer criminal cases handled by magistrates with the same rigour as every other criminal case. MPs might like to consider whether these proposals will trigger an adverse public reaction among those who distrust politicians, are increasingly suspicious of police integrity and who say that the Government is at war with motorists”.³⁶

64. We agreed with the Magistrates’ Association that so as to avoid the paper procedure being seen as a secret process not open to scrutiny,³⁷ courts must publish the details of when they use the paper procedure, and the outcome in each case. This should also be done with any online convictions and penalties, to support the maintenance of the principle of open justice, which is another key facet of the right to a fair trial.
65. It is essential that the judicial process remains transparent, and all cases resolved online are promptly published and accessible to the public. The process must not appear, or be interpreted as, an opportunity for individuals in public office to plead guilty discreetly online, nor allow the judicial process to become anonymous.

Victimless crimes

66. Safeguard (i) proposes to limit the online process to offences which do not have “an identifiable victim”.³⁸ JUSTICE disagrees with the concept of a ‘victimless’ crime. Society as a whole suffers in the case of every offence. This is what legitimises the criminal justice system’s interference with peoples’ lives. Moreover, the offences suggested as immediately suitable for the online process have very clearly identifiable victims. For instance, possession of an unlicensed rod injures the Environment Agency by causing it a loss of revenue (which it must ultimately recoup from the public purse), which it requires to maintain rivers. In any event, we do not consider that this

³⁶ Written evidence submitted by the Magistrates Association to the Criminal Justice & Courts Public Bill Committee, March 2014, available at <http://www.publications.parliament.uk/pa/cm201314/cmpublic/criminaljustice/memo/cjc20.htm>.

³⁷ Magistrates’ Association, *Briefing for House of Commons 2nd Reading of Criminal Justice and Courts Bill 2014*, 19 February 2014, available at http://www.magistrates-association.org.uk/dox/briefings/1394563832_mp-briefing-2nd-reading-criminal-justice-courts-bill-21-feb-2014.pdf

³⁸ Consultation, para 7.2.4, p.15.

in itself offers a relevant safeguard for a defendant being offered the opportunity to plead online.

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.

Offences involving dishonesty

67. Railway fare evasion, tram fare evasion and possession of unlicensed rod and line are offences involving dishonesty. That is, they are all offences requiring a mental element. Bearing in mind what we have said above about the isolated position of the defendant navigating the online convictions system, asking someone in that position to plead unequivocally to an offence involving a mental element is particularly onerous and would require the surest of safeguards and the provision of full and comprehensible information to enable them to make an informed decision.
68. The same is true of the concept of possession with intent. We are not altogether certain which of the two offences under section 27 Salmon and Freshwater Fisheries Act 1975 HMCTS is referring to when it uses the phrase “possession of unlicensed rod and line”, or whether both offences are considered suitable for the online process. Under subsection 1(a), a person may be guilty of an offence of fishing by any licensable means without a license. That is a basic offence, where the defendant is alleged to have been ‘caught in the act’. It is relatively easy for the non-legally trained, unrepresented defendant to plead to. Under subsection 1(b), however, there is an offence of being in possession of an unlicensed rod *with intent* to use it for the purpose of fishing. If it is envisaged that the offence is suitable for online conviction, this is a much more complex offence to prove and for which there may well be a defence, e.g. the defendant was in possession of a rod and line in that place, but was not going to fish there. HMCTS must devise a system which explains the offence and the opportunity to put forward an alternative account, which would ensure an unequivocal plea.
69. With offences involving dishonesty, the long-term consequences are wider and potentially more severe. While any conviction is a serious matter and having a criminal record at all may potentially impact on a person’s life in ways beyond the sentence imposed, the consequences of being convicted for an offence involving dishonesty are potentially more wide-ranging than, for instance, a conviction for a low level assault or public order matter. Even if the specific offences suggested by the Consultation at this stage are relatively minor and may be suitable for an online plea and penalty process, the door has nevertheless been opened for more serious offences to be deemed suitable in the future. Defendants engaging with the online conviction process must be provided with commensurate information to be able to make an informed decision as to plea on the specific offence charged.

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.

70. JUSTICE agrees that it is right to review the rules which regulate the composition of tribunal panels, to see if they remain fit for modern conditions, particularly in the light of wider changes to tribunals envisaged by the Consultation Document. We therefore do not oppose the principle that the SPT should be able to determine panel composition based on the needs of people using the tribunal system. However, the Consultation is more specific than the question posed: it envisages amending the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 by providing that a tribunal panel in the First-tier Tribunal is to consist of a single member unless otherwise determined by the SPT.³⁹ Moreover, the key to understanding the impact of such a change will not lie in the change to the Order, per se, but in the practice statements the SPT issues to specify what is to happen in practice in each tribunal. Finally, it is not the changing needs of the people using the tribunal system that is necessarily driving these reforms but the move towards a more just, proportionate and accessible justice system as envisaged in the Consultation.
71. JUSTICE therefore does not oppose the question, as posed, (provided the word 'changing' is removed,) but urges the government to proceed with caution before assuming that a single panel member should be the default option for all tribunals. In short, we agree with the principle that panel composition should reflect the needs of the users but have concerns as to how this will be implemented in practice.

The ongoing need for non-legal members:

72. In particular, in the Social Security and Child Support Chamber, JUSTICE recommends that single panel members are not the default in cases involving Personal Independence Payments (PIP), Employment Support Allowance (ESA) and Disability Living Allowance (DLA). We have heard from a number of JUSTICE's members, themselves tribunal judges, expressing concerns in that regard. At present in ESA cases there is always a medical member who is a qualified doctor, usually of considerable experience, and in PIP and DLA cases an additional member with special expertise in the caring needs of the disabled. The question at issue before the Tribunal in such cases is whether the appellant's disability (or illness) affects their functioning in terms of such matters as preparing a meal, dressing, mobilising, reading, managing their toilet needs, etc., and whether or to what extent points should be allocated to them for these activities. In determining the credibility of the appellant's appeal, medical evidence is essential, and the questioning of the appellant by the medical member (and where

³⁹ Consultation, para 7.3.6.

appropriate the disability member) fundamental to the proceedings. A very important point here is that for a seriously ill or disabled person it is much easier, generally, for them to answer questions during the hearing where the questions come from a doctor rather than a lawyer. The current high success rates of these appeals (65% for PIP, 60% for ESA and 57% for DLA between April and June 2016)⁴⁰ show the serious inadequacies of the department's initial decision-making process, and the need for a robustly constituted expert tribunal to review them. JUSTICE accepts that there may be cases where the presence of both a doctor and a member with specialist expertise in disability may be unnecessary. However, we would not support a default position that the tribunal consists of a single judge without any additional members unless, as we outline below, the trial judge is given the power to order additional panel members where they consider it necessary to do so in the interests of justice.

73. We are equally persuaded by the arguments of the Mental Health Alliance⁴¹ amongst others of the need to retain additional panel members in cases before the Mental Health Tribunal though, here again, there may be cases, determined on an individual basis where this is unnecessary.

Evidence base:

74. JUSTICE also recommends that the government undertake a fuller statistical analysis before relying on the limited statistical evidence available concerning the impact of similar changes in the Immigration and Asylum Chamber (IAC) and the Special Educational Needs and Disability Chamber (SEND) to conclude that the same will hold true in other tribunals.⁴² We are particularly concerned that:

- (i) The Consultation refers to the number of IAC allowed appeals remaining constant, but only the figures for deportation cases are given. Furthermore, as the Consultation Document states, it is for the President of the Chamber or a Resident Judge to determine that further panel members are needed in the interests of justice. Evaluation of the statistics cannot be undertaken without knowing in how many cases that option was exercised, and whether there was any correlation between the success of appeals and the cases in which further specialist members were added to panels.
- (ii) The Consultation refers to the number of SEND decisions appealed from the First-tier Tribunal to the Upper Tribunal as remaining constant. However, SEND panels always include at least one non legal member (NLM) with relevant specialist expertise. Moreover, we understand from our members working as tribunal judges in the SEND that the reduction from two NLMs to one has not been consistently applied since its

⁴⁰ Tribunals and gender recognition certificate statistics quarterly: April to June 2016, Main tables, Tab SSCS.3

⁴¹ Letter to Sir Oliver Heald QC MP of 6 October 2016 from the Mental Health Alliance available at: <http://bipolaruk.us3.list-manage1.com/track/click?u=31bb9e4c3daebe4cfa82162e6&id=db308e3a0e&e=df4ba93086>

⁴² Consultation, para 7.3.5.

introduction.⁴³ It is therefore not possible to draw any conclusions from the number of appeals from SEND as to what the consequences would be if both NLMs were to be removed. Furthermore, the number of appeals from the First-tier Tribunal to the Upper Tribunal in SEND has always been very small,⁴⁴ and appeals from two person panels will be only a sub-section of the total, so it is questionable whether any conclusions can be drawn from so limited a cohort.

Determining Panel Composition:

75. While it seems right to us that any change to the constitution of a jurisdiction's panels is a decision for the SPT, the SPT's decision should only be enabling, as it is currently in the IAC (see above) and the SEND. In the SEND, although the SPT has approved two-person panels, the trial judge, having reviewed the papers, has the option to ask for a second NLM⁴⁵; our members in the SEND tell us that, in practice, the trial judge requests permission of the Deputy President of the Chamber but that this is never refused. We understand that both arrangements work reasonably well and locate the decision at a lower level than the SPT, in accordance with the principle (albeit usually applied in other contexts) of subsidiarity.
76. We wish to emphasise the importance of having a mechanism for over-riding the presumption that a single judge should sit alone in tribunals situated at a relatively local level to allow for flexibility, avoid unnecessary bureaucracy and ensure that tribunal panels continue to have the requisite expertise to determine cases fairly and justly. In particular, we recommend, that no higher level of approval is needed to add additional NLMs than that of the first-instance judge hearing the case and that (higher) judicial approval is only needed where a case officer recommends additional panel members at the case management stage. In our view, the judge having conduct of the case is best placed to determine whether or not additional panel members are needed, especially where such need only becomes apparent at the trial stage. This is possible in cases where particular circumstances have not been apparent on the papers.
77. We suggest that the Tribunal President, Deputy President or Residing Judge should have more of an oversight role in this regard, monitoring how the mechanism works in practice and reporting back to the SPT with a view to issuing further guidance to trial judges if necessary.

⁴³ The tribunal's jurisdiction was widened following the Children and Families Act 2014 as a result of which panels reverted back to three so that members could gain experience in the new legislation as quickly as possible.

⁴⁴ In the last three years for which we have published statistics (1 September – 31 August 2013, 2014 and 2015) there were only 126, 137 and 108 SEND decisions of the first-tier tribunal where the decision was not in favour of the applicant; the proportion or number of those decisions appealed to the Upper Tribunal is not given; see tab SEND.1 of SEND Annual Tables available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483768/tribunals-send-tables.xlsx

⁴⁵ Practice Statement: Composition Of Tribunals In Relation To Matters That Fall To Be Decided By The Health, Education And Social Care Chamber On Or After 16 December 2015, paragraph 6b, available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/12/hesc-amended-practice-statement.pdf>

78. Additionally, we recommend that the rules allow for either party to the proceedings to make an application for appointment of additional NLMs, as it should not be assumed that the need for such members will be identified by the case officer or judge.

79. JUSTICE further recommends that the government pilots any changes to panel composition before the decision is confirmed. That was the procedure when certain SEND appeals first came to be heard by a two member panel, and following the successful pilot, the new constitution was confirmed.

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.

80. As stated in our response to Question 7 (above), the SPT's decision to determine whether multiple specialists are needed to hear individual cases should only be enabling. We recommend that the SPT establishes broad principles to guide those judges (or case officers) taking such decisions as to who will do so on a case by case basis. We recommend that such broad principles are set for, and arrived at in consultation with, each individual tribunal as the considerations at stake in each tribunal will necessarily be different.

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?

81. We have set out above that we do not think that the online Impact Assessments have taken into account the needs of particular groups who are unlikely to be able to engage online at all and how they will be assisted. This needs to be factored in. With regard to the proposed alterations to panel members in the tribunals, the Impact Assessment does not recognise court users as a stakeholder group likely to be affected by reduced NLMs. We find this surprising as the reduction in specialist NLMs will have a direct impact on the experience and outcome of the case for the affected person.

JUSTICE

10th November 2016