



**Ministry of Housing, Communities and Local
Government**

**Considering the case for a Housing Court: call for
evidence**

JUSTICE consultation response

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. We are pleased to be able to provide this response to the call for evidence for a Housing Court.
3. The Call is timely, since in 2019, JUSTICE will be convening a Working Party to consider a new housing dispute forum. Our early view is that there is a case for the consolidation of the vast majority of housing claims into one forum which adopts digitisation and best practice with respect to litigants in person to produce a more efficient, fair and accessible housing dispute system.
4. Our intention is that the Working Party will be constituted by housing law barristers, solicitors, First-tier Tribunal (Property Chamber), Upper Tribunal, District and Circuit judges, court and tribunal staff, academics involved in housing law, in particular those with experience in qualitative research of housing law need, NGOs supporting unrepresented people, local authority landlords and/or mortgage providers and relevant consultees from the Ministry of Justice. We expect the Working Party report to be completed in 2019.
5. The terms of reference are liable to change, but draft terms include:
 - (a) whether a new forum ought to be a “tribunal”, “court” or some kind of amalgam of the two;
 - (b) how the court estate can best be deployed to accommodate a new housing forum;
 - (c) whether there is scope for a new housing forum to operate on a peripatetic basis to respond to court closures;
 - (d) how alternative dispute resolution mechanisms, such as structured negotiation, can best be implemented into the process for certain types of claims and how such mechanisms might be embedded within any digital processes;
 - (e) whether there might be merit in a “digital track” within any putative housing

forum, which would allow certain, appropriate disputes to be resolved through continuous online resolution;

- (f) how case workers might be deployed in the forum in a way that promotes access to justice;¹
- (g) how might applications best be joined up with enforcement;
- (h) how procedural mechanisms and case management approaches can best promote understanding and participation for litigants in person;
- (i) what approach ought to be taken to costs and legal aid in any new jurisdiction; and
- (j) how can the new forum take best advantage of the fluidity in judicial deployment provided for by the Tribunals Court and Enforcement Act 2007 which means that First-tier Tribunal judges can sit in the County Court and vice versa?²

6. The Working Party will take evidence to produce practical and realistic proposals for how a new housing forum might operate and make use of digitisation and other efficiencies to improve access to justice. However, as the Working Party will likely not report until late 2019, our consultation response to the Call for Evidence paper is constrained to narrowly addressing structural and procedural matters that arise in parts 3 and 4. Nevertheless, we would be very happy to provide further evidence and ideas to the Ministry as our work progresses, and, where appropriate, invite the Ministry to provide its current thinking to the Working Party.

¹ The JUSTICE Working Party report, *Delivering Justice in an Age of Austerity* proposed the creation of “Registrars” for use in the civil courts. Registrars or case workers are court staff that would promote access to justice and facilitate user understanding of the court process by taking an investigative approach toward case management. This includes through clarifying information or evidence needed to narrow substantive issues in dispute, to ensure that lay users were not disadvantaged by their lack of knowledge about procedure, JUSTICE, *Delivering Justice in an Age of Austerity* (2015), available online at <https://justice.org.uk/justice-age-austerity-2/>. This proposal has been given effect through section 3 of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, which proposes an expansion of the functions of authorised court and tribunal staff so that they may “provide legal advice to judges of the family court and justices of the peace” and that they may “exercise judicial functions where procedure rules so provide.”

² Fluidity is possible because amendments to the County Courts Act 1984 made by the Crime and Courts Act 2013 and by virtue of provisions of the Tribunals Court and Enforcement Act 2007 mean that all Tribunal Judges (save for those in employment tribunals) can hear cases and decide issues within the jurisdiction of the County Court and all County Court judges can hear cases and decide issues within the Tribunal’s jurisdiction.

Q18. From your experience what could be made better or easier in the court processes to provide users with better access to justice in housing cases?

7. A significant barrier to access to justice in housing disputes, alluded to at paragraph 31 of the Call for Evidence paper, is the need for claimants, in certain instances, to hold hearings in both the County Court and First-tier Tribunal (Property Chamber) to resolve a dispute.
8. Sir Geoffrey Vos has remarked that requiring a party to initiate parallel proceedings in separate jurisdictions to deal with different aspects of one substantive housing or property dispute is liable to “increase costs, cause additional delay and in some cases, stress and frustration associated with an illogical judicial process”.³
9. In addition, satellite litigation over jurisdiction inevitably benefits the richer party whom is able to run up costs to a level where the other party is no longer willing to shoulder the costs risks.⁴
10. In property law, this problem is currently being dealt with through “cross-ticketing”⁵, where First-tier Tribunal (Property Chamber) judges are being deployed to sit in the County Court⁶ for certain disputes as part of the Residential Property Dispute

³ Sir Geoffrey Vos, ‘Professionalism in Property Conference 2018’, 9 May 2018, available at <https://www.judiciary.uk/wp-content/uploads/2018/05/chc-speech-property-lecture-09052018.pdf>

⁴ On the disproportionality of costs arising when addressing the issue of concurrent jurisdiction in property law, see *Avon Grounds Rents Ltd v Child* [2018] UKUT 204, which is addressed from paragraph 18 below.

⁵ Cross-ticketing or flexible deployment refers to two possible mechanisms. The first is where a tribunal judge with specialist experience and the authority to do so is deployed to sit as a County Court judge for matters solely within the jurisdiction of the court (or vice versa). Secondly, in circumstances where a claim partly traverses court and tribunal, a judge may hear the entirety of the claim in one sitting, exercising concurrent jurisdiction as a judge of both the County Court and the First-tier Tribunal.

⁶ First-tier Tribunal (Property Chamber) judges have been able to hear property cases and decide issues within the jurisdiction of the County Court on account of the legislative changes described at footnote 2.

Deployment Pilot (“the Pilot”).⁷

11. Rather than holding parallel hearings between court and tribunal, the Pilot has proceeded on the basis that judges would sit concurrently, hearing the entirety of any particular claim in one sitting, and use the full array of powers available to them to resolve a particular dispute.⁸

12. To facilitate this approach on a longer-term basis Judge McGrath, President of the First-tier Tribunal (Property Chamber) has proposed to the Civil Justice Council the addition of a “courts and tribunals track” under Civil Procedure Rule (CPR) 26.⁹

13. While the precise details of this proposed change need to be worked out, including whether the CPR and/or the Tribunal rules ought to apply, we broadly understand the proposal as follows:¹⁰

(a) parties can seek or oppose allocation to the track;

(b) the track allows for proceedings in both the county court and tribunal to be heard concurrently, i.e. by one judge in one sitting, most likely with the claim heard in its entirety by a tribunal judge in the tribunal;

(c) where parties elect into the “courts and tribunals track”, cases would be sent by the county court to be administered by tribunal staff. To facilitate this arrangement, it is proposed that regional Tribunal offices are to be designated as county court offices.

14. We are generally supportive of the use of “cross-ticketing” to address one of the main current access to justice issues in housing disputes caused by concurrent jurisdiction and think that the use of such a mechanism should be supported through

⁷ See Judge McGrath, ‘Report on Property Chamber deployment project for Civil Justice Council meeting 26th October 2018’ para 10 available at <https://www.judiciary.uk/wp-content/uploads/2018/11/property-chamber-deployment-project-report-oct2018.pdf>

⁸ *Ibid.*

⁹ *Ibid* p. 4, 23.

¹⁰ *Ibid* p. 23.

amendments to the CPR and/or tribunal rules on an as needs basis. We envisage that the creation of a “courts and tribunals track” would make cross-ticketing culturally normal and go a long way to ameliorate the access to justice issues caused by concurrent jurisdiction in housing law.

15. However, we note that when the Civil Justice Council first proposed “cross-ticketing”, the “overwhelming preference of respondents and participants was for a housing court to be established”¹¹; if the creation of such a forum was “not realistic, there was a consensus in favour of the flexible use of judiciary in order to avoid a multiplicity of proceedings, to effect savings and to enhance consistency and to ensure that judicial expertise was appropriately targeted.”¹²
16. We recognise that cross-ticketing has therefore been offered as a pragmatic solution, in circumstances where there was little impetus for the creation of a solitary housing jurisdiction. We consider that there is much value in exploring a single court or tribunal jurisdiction to resolve housing disputes.
17. Moreover, the Pilot has not been without its problems, particularly in relation to the applicable costs regime and procedure in circumstances where concurrent jurisdiction has been exercised.
18. In *Avon Grounds Rents Ltd v Child* [2018] UKUT 204 (“*Avon*”) the Upper Tribunal (“UT”) considered an appeal from a first instance decision heard in the First-tier Tribunal (Property Chamber) (“FTT”) by a Tribunal Judge exercising jurisdiction as both FTT and County Court judge. The appeal had been brought primarily on the basis that the judge had made decisions outside the power of a FTT judge while purporting to exercise his FTT, as opposed to County Court, powers.
19. The UT recognised that in “identifying which subsidiary issues ought properly to be treated as being included within the scope of the questions transferred, it is not appropriate to be too pedantic”¹³ but that there remained an important qualification,

¹¹ See ‘Interim Report of the Working Group on property disputes in the courts and tribunals’ (Civil Justice Council, 2016) para 2, available at <https://www.judiciary.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf>

¹² *Ibid.*

¹³ *Avon* para 46 – citing *Cain v London Borough of Islington* [2015] UKUT 0117.

in that “the FTT has no power to extend its jurisdiction, or to arrogate to itself a jurisdiction to determine questions which the County Court had no power to transfer to the FTT for determination”.¹⁴

20. The UT held that the FTT had tried to determine the County Court costs of the dispute by treating them as a variable administration charge, which the Tribunal had not been entitled to do.¹⁵ The UT said that what ought to have been done was for costs to have been dealt with after the main hearing using the “county court hat” available to the judge.¹⁶

21. The jurisdictional issues that arose in *Avon* were highly complex and arose in the context of what was, objectively, a low value claim.¹⁷ Without the benefit of counsel, participants would have found the complex issues of cross-ticketed jurisdiction and costs extremely difficult to navigate. Given the volume and breadth of unrepresented people navigating the court system in housing claims, this is a cause for concern.

22. In modifying the housing dispute system so as to best promote access to justice, the Government ought to be aware of the limitations of the cross-ticketing pilot, in circumstances where a consolidated, solitary jurisdiction may conceivably be offered.

Q23. On the whole, the First-tier Tribunal provides fair access to justice for property cases. Do you agree or disagree with this statement?

23. As a general remark, we think the approach taken by FTT judges towards litigants in person is one that ought to be adopted across the justice system to promote access to justice.

24. Tribunals have been designed for litigants in person to use. The overriding objective requires the tribunal to avoid unnecessary formality and seek flexibility in the

¹⁴ *Ibid* para 47.

¹⁵ *Ibid* para 50.

¹⁶ *Ibid* para 52.

¹⁷ The UT set aside the judgment of the First-tier Tribunal and substituted judgment for the appellant for £473.16 and £2,323.80 for legal costs, court issue and hearing fees, *Avon* para 80.

proceedings¹⁸ while the rules require that the tribunal “ensure, so far as practicable that the parties are able to participate fully in the proceedings”.¹⁹ That objective is reflected in the way in which tribunal judges conduct and manage hearings to ensure that users are able to effectively participate in the proceedings.

25. In an FTT hearing observed by a JUSTICE lawyer in October 2018, the absence of legal representation for any of the parties to a Houses in Multiple Occupation (“HMO”) licensing matter necessitated the panel take an involved approach to the hearing, in order to progress the case.

26. The presiding judge took an active role in the questioning of witnesses and went to some length to facilitate parties’ understanding of the proceedings by “signposting” their thinking to the parties. They explained out loud why a particular piece of evidence was important, the significance of further evidence that needed to be adduced and who held the respective burdens. Notwithstanding that the hearing involved sensitive questions of fact and law, the parties were able to follow and effectively participate in the proceedings.

27. Tribunal judges also tend to engage in more active case management to help litigants in person identify issues in dispute,²⁰ while Tribunal Caseworkers are increasingly being empowered to carry out functions of a judicial nature²¹ to assist parties, which reflect better processes to aid access to justice for those without representation than in the County Court.

28. Beyond management prior to and the conduct of the hearing, information and

¹⁸ See for instance Rule 2(2)(b) of The Tribunal Procedure (Upper Tribunal) Rules 2008.

¹⁹ Rule 2(2)(c) of The Tribunal Procedure (Upper Tribunal) Rules 2008 and equivalent in other tribunal procedure rules. The upcoming JUSTICE Working Party report, *Understanding Courts*, recommends the overriding objective across all jurisdictions reflect the need for professionals to have as a primary consideration the effective participation of lay users, JUSTICE, *Understanding Courts* (forthcoming, 2019) p. 25.

²⁰ Robert Thomas, ‘From ‘Adversarial v Inquisitorial’ to ‘Active, Enabling, and Investigative’: Developments in UK Administrative Tribunals’ (September 10, 2012). Available at SSRN: <https://ssrn.com/abstract=2144457> p.3.

²¹ See for instance Practice Statement authorising Tribunal Caseworkers First-tier Tribunal (Immigration and Asylum Chamber) to carry out functions of a judicial nature, 9 October 2018 and Practice Statement authorising Tribunal Caseworkers First-tier Tribunal (Social Entitlement Chamber) to carry out functions of a judicial nature, 19 July 2018 available at https://www.judiciary.uk/publications/?filter_type=publication&search=&tax-single-subject=-1&tax-single-publication-type=-1&tax-single-publication-jurisdiction=980&tax-single-publication-court=-1&date-range-after=&date-range-before

signage available within the Property Chamber buildings helps users feel comfortable with the process, with place cards for “Landlord” and “Tenant” used to indicate where parties should sit within hearing rooms. This kind of signage is a simple touch, but goes a long way to promote understanding, comprehension and effective participation in court processes, and ought to be standard practice across the spectrum of jurisdictions hearing housing claims.²²

Part 4: The case for structural changes to the courts and the property tribunal

29. As mentioned at the beginning of this consultation response, JUSTICE is in the process of convening a Working Party to consider a housing law forum for the 21st century.

30. As such, it would be inappropriate for this submission to make any binding recommendation as to which of the proposals set out in the Call for Evidence paper are the most appropriate. However, as a general remark, we think that more guidance is needed to help users navigate the court and tribunal process.²³

31. In the context of housing law, the vulnerability of court users, the absence of legal representation for a large portion of claims and the prospect of losing one’s home make it acutely important that participants are given the necessary information to effectively participate in the process.²⁴

32. Later this week, JUSTICE is launching a Working Party report, entitled *Understanding Courts* which has, as its aim, improving the experience of lay users in

²² Other tribunals, such as the Asylum Support Appeals Tribunal, also use place cards. However, they use the terms “Appellant” and “Respondent”, which lay users may not understand.

²³ In a recent survey of court and tribunal participants commissioned by HMCTS, more than a third of users reported that the information they had received was not good enough. Users reported that information from HMCTS was lacking, and that they ultimately received the information needed from intermediaries or online research, Ministry of Justice, ‘HM Courts & Tribunals Service: Citizen User Experience Research’ (HMCTS Customer Insight Team 2018), p. 9-10 <https://www.gov.uk/government/publications/hmcts-citizen-user-experience-research>

²⁴ We understand that HMCTS is currently working on a “What to Expect at Court” leaflet, initially in the Immigration and Asylum Chamber, which will be sent out with all notices of hearing and is intended to be a superior standard of leaflet to that which is currently made available at courts. We understand that if the leaflet is successful, it will be extended to other jurisdictions. We welcome this initiative, as the provision of up to date and accurate information to participants prior to their hearing is essential for effective participation.

the justice system. The report seeks to set out practical recommendations to improve the experience of lay people using our courts – both in terms of the information available to them ahead of the hearing and the way that they are communicated with by legal professionals at hearing centres and during proceedings. Following the launch, we will make available to the Ministry a link to the electronic version and a hard copy of the report.

33. A key recommendation of the report is for HMCTS to publish accessible, easy to follow and practical information on what lay users can expect from their hearing, including the role of legal professionals, guidance on navigating the court building, the layout of the hearing room, the order of proceedings and how evidence is given.²⁵ The Working Party recommended HMCTS provide one central source for this information, promoted to appear as the top search result when a user enters keywords such as ‘going to court’ into search engines.²⁶
34. There are a number of pre-existing resources that could be co-opted and built upon for this purpose. For instance, You & Co, Victim Support’s youth programme, has produced an “interactive courtroom”, featuring cartoon images that proceed stage-by-stage through a magistrates’ or Crown Court hearing.²⁷ The images depict what a juvenile witness will experience when they go through the court process and include explanations of the content of the “layout of both the Crown Court and magistrates’ court. When a user drags their mouse onto a “Hotspot” located next to a person or a piece of court infrastructure, a pop-up box explains in plain English its role and significance.²⁸
35. Beyond interactive guidance, the JUSTICE Working Party recommended that the HMCTS repository described at paragraph 33 above ought to also include “a prominently featured, engaging, clear and high quality production video entitled ‘What to expect at Court’”. The video, which would be produced by HMCTS, would include court professionals explaining their roles and lead viewers through actual

²⁵ JUSTICE, footnote 19, p. 1-2.

²⁶ *Ibid* p. 31.

²⁷ Available online at <https://www.youandco.org.uk/courtroom/index.php?page=home>

²⁸ JUSTICE, footnote 19, p. 31.

court locations, to give a realistic picture of court processes as well as cover practical and procedural information.²⁹ The Working Party recommended that the video also be made available at a range of physical locations proximate to the court experience, including in court waiting areas, cells and vulnerable witness suites.³⁰

36. We will be discussing with HMCTS the development and deployment of such resources within the context of housing law, to assist lay users in understanding what they can expect from, for instance, a possession claim in the County Court.

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²⁹ *Ibid* p. 33.

³⁰ *Ibid* p. 34.