

Response of the Equality and Human Rights Commission to the Consultation:

Consultation details

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About the Equality and Human Rights Commission

1. The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights. It contributes to making and keeping Britain a fair society in which everyone, regardless of background, has an equal opportunity to fulfil their potential. The Commission enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. It encourages compliance with the Human Rights Act 1998 and is accredited by the UN as an 'A status' National Human Rights Institution. Find out more about the Commission's work at: www.equalityhumanrights.com

The relevant legal framework

2. Article 6 of the European Convention on Human Rights (ECHR) sets out the right to a fair trial. Read with Article 6, Article 14 of the ECHR guarantees freedom from discrimination in relation to the right to a fair trial. Most rights in the ECHR, including the right to a fair trial, have been given domestic effect by the Human Rights Act 1998 (HRA). Section 6(1) of the HRA provides that public authorities must not act incompatibly with the incorporated rights.
3. Article 6(1) ECHR sets out the right of effective access to civil courts and tribunals. The European Court of Human Rights has established that litigants should have a 'clear, practical and effective opportunity' to go to court.¹
4. Articles 6(2) and (3) ECHR guarantee specific minimum rights for those charged with criminal offences. These include the rights to be informed in a language which they understand and in detail of the nature and

¹ *De Geouffre de la Pradelle v France* [1992]

cause of the accusations against them; to have adequate time and facilities for the preparation of a defence and to examine witnesses against them.

5. As well as complying with the UK's obligations under the ECHR, the proposals should also reflect other international human rights obligations. Of particular relevance is the UN Convention on the Rights of People with Disabilities (UNCRPD). Article 4 of the UNCRPD requires States Parties to promote the full realisation of disabled people's rights, including by adopting all appropriate legislative, administrative and other measures. Under Article 13, States Parties must ensure effective access to justice for persons with disabilities on an equal basis with others, to facilitate their effective role as participants in all legal proceedings.
6. The Government must ensure that the protection and promotion of disabled people's access to justice rights are taken into account in all public policies and programmes.
7. It is unlawful under the Equality Act 2010 for both the Ministry of Justice (MOJ) and its executive agency HM Courts and Tribunal Service (HMCTS) to discriminate in providing services or exercising public functions because of the protected characteristic of disability. Discrimination can take a number of forms, including direct and indirect discrimination, discrimination arising from disability, and a failure to make reasonable adjustments. In exercising their functions, the MOJ and HMCTS are also required under the public sector equality duty to have due regard to the need to: eliminate unlawful discrimination, advance equality of opportunity (including having regard to the need to remove or minimise disadvantages) and foster good relations. This requires assessing the impact of any new service on users who share protected characteristics and taking this into account when developing proposals and after they have been implemented through monitoring and evaluation.

8. The Commission is the statutory body tasked with encouraging compliance with the UK's obligations under international human rights law. We also have responsibility for enforcing domestic equalities legislation. We respond to the Government's proposed changes with this legal framework in mind.

Consultation response

9. The Commission welcomes the opportunity to respond to this consultation on changes to the justice system, including digitisation of court services, online convictions and the composition of First-Tier Tribunal panels.
10. We note that the consultation document indicates that consideration is also being given to other reforms to the system, and we feel it is important to also refer briefly to these proposals here. The consultation refers to possible reform of the family court and employment tribunal systems. Significant human rights issues arise in both of these areas and the Commission will wish to be involved in the development of any such proposals. Further, the Commission notes that the Government has set out its intention to improve signposting to relevant dispute resolution mechanisms. The Commission considers that the existing proliferation of alternative dispute resolution mechanisms, ombuds, tribunals and courts is confusing and difficult to navigate for those seeking to access justice. We therefore welcome this proposal. However, in our view, consideration should be given to whether the Government could do more to help those seeking justice to navigate the system by, for example, establishing a single portal, through which those seeking to access justice are directed to the most relevant dispute resolution mechanisms.

Assisted digital

Questions 1 and 2

11. We have not directly answered the questions set out in the consultation document. Our reason is that we consider that the MOJ needs to give greater attention to designing and developing services that will provide solutions which promote access to justice, based around users' needs. In our analysis it is crucial that the focus remains on ensuring equal access to justice rather than solely on ensuring equal digital access. If the starting point is that the courts must be accessed digitally, and the questions focus on how to make digital courts more accessible, it may not be possible to ensure equal access to justice. If the starting point is that justice must be accessible, one way of promoting access to justice for some may be digitisation, but further solutions may need to be developed for others.
12. The consultation document proposes improving technology and putting more services online in order to make court and tribunal services more accessible and easier to deal with.
13. In our analysis, the key criterion in assessing the suitability of these measures is whether they will allow all users equal access to justice and full participation in the justice system.
14. We agree with the consultation document, which recognises that some might face barriers in accessing digital court services. Internet access and usage has been increasing in recent years. However according to the latest data, around 14% of households do not have access to the internet in their homes (ONS, 2015b)².

² Office for National Statistics (2015), 'Internet users, 2015'. Available at: <http://www.ons.gov.uk/ons/rel/rdit2/internet-users/2015/index.html>

The aim of the UK Digital Inclusion Charter to reduce those who do not have access by 25% is noted

15. There is evidence of a relationship between use of online services and characteristics protected under the Equality Act 2010. The National Audit Office found just 40% of households with one adult aged 65+ had an internet connection and that in the 65+ age group there is a gap as between men and women using the internet which widens further at 75+³. There is a similar more pronounced trend as between disabled people and non-disabled people which again widens as they get older. In 2013, white people were less likely to have accessed the internet than people from ethnic minority groups and a greater percentage of people in the “higher managerial, administrative and professional” group accessed the internet than all other socio economic groups. Those who do not have access are disproportionately older, with lower incomes, disabled, from certain ethnic groups and often lower levels of education.⁴
16. Furthermore, there are differences in internet usage by country. In 2013 people in Wales in 2013 were less likely to have used the internet in the last three months than those in England and Scotland. For people claiming benefits, gaining access to the necessary technology can be particularly difficult. The National Audit Office (2013) noted that the Government needed to put its plans in action if a 'them and us' situation for those who are offline is to be avoided, while the Scottish Government's earlier review of digital participation looked at the evidence available on barriers to participation to identify which groups of people should be targeted and how (Scottish Government, 2012). Although the data it cites is now several years old, at that time 52% of people in the 15% most deprived areas had home internet access, compared with 70% in the rest of Scotland.⁵

³ Office for National Statistics (2014), 'Internet Access - Households and Individuals, 2014'. Available at: <http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2014/index.html>

⁴ <https://www.equalityhumanrights.com/en/britain-fairer/britain-fairer-report/supporting-evidence/education-domain>

⁵ <https://www.equalityhumanrights.com/en/britain-fairer/britain-fairer-report/supporting-evidence/education-domain>

17. We appreciate that the potentially indirectly discriminatory impact of digitising court services is acknowledged and that steps to mitigate such impact through “assisted digital” services have been detailed. We also welcome that the consultation document recognises the need to learn from the number of recent initiatives across Government that have delivered assisted digital support to smaller user groups.

18. The consultation document outlines four channels to assist those who may otherwise be digitally excluded: face-to-face assistance, telephone assistance, web chat and access to paper channels. We are not clear, at this stage, that such measures will adequately overcome barriers for all those who might otherwise be excluded from accessing justice. Such measures may remove barriers for some but may inadvertently create new barriers for others. For example, research findings from the Public Law Project⁶ suggest that the introduction of a mandatory telephone advice gateway⁷ as the only route to legal aid for cases involving discrimination, debt and special educational needs has had an adverse impact on access to advice for people with limited English language skills. The Equality Statement does not assess whether any other reasonable adjustments outside of “assisted digital” might be appropriate to ensure access to justice. The suitability of the proposed channels will depend on how they are tailored to the needs of particular users, how users’ needs are identified and how decisions about which channel a user will be able to access will be made. This detail is not in the consultation document.

⁶ Public Law Project. Keys to the gateway: an independent review of the mandatory Civil Legal Advice Gateway, 2 March 2015. Available at: <http://www.publiclawproject.org.uk/resources/199/anindependent-review-of-the-mandatory-civil-legal-advice-gateway> [accessed: 25 October 2016].

⁷ For an overview of how this system works, see: Anthony, H. and Crilly, C. (2015), *Equality, human rights and access to civil law justice: a literature review*, Equality and Human Rights Commission Research Report 99, p. 18. Available at: <http://www.equalityhumanrights.com/publication/equalityhuman-rights-and-access-civil-law-justice-literature-review> [accessed: 17 October 2016].

Online convictions

Questions 3 and 4

19. Whilst we are not opposed in principle to an online conviction system, as far as we are aware, there has been no published review into the SJP and therefore we are unclear how the Government can properly assess the implications of simplifying the SJP even further in the form of an online conviction system that has no judicial involvement. A review of the SJP should be undertaken to assess the impact on access to justice for all and any particular impact on people sharing protected characteristics. This would align with the continuing nature of the MOJ's human rights and PSED obligations.
20. We welcome the Government's recognition that some defendants would need to engage with this process through other channels and that a paper channel will remain available for those who are unable to use digital channels, even with assisted digital services. We reiterate the points made above in relation to the digitisation of services, particularly in relation to tailoring services appropriately to mitigate any disadvantage arising for those who share protected characteristics or who are otherwise digitally excluded. It is imperative that those who are unable to engage digitally, require assistance or require reasonable adjustments are not disadvantaged, for example by a reduced penalty being offered only if a defendant pleads guilty online.
21. Open justice has been described as a fundamental principle of the common law⁸ with it being a general principle of our constitutional law that justice is administered by the courts in public so it is open to public scrutiny⁹. Taking criminal cases not only out of the hands of the judiciary

⁸ *Times Newspapers Ltd, Re* [2016] EWCA Crim 887

⁹ *BBC, Re* [2014] UKSC 25

but also conducting them in private could have implications for the public trust and confidence in our criminal justice system.

22. One of the economic rationales for the online convictions system set out in the Impact Assessment is that the reduced need for physical court hearings would result in the reduced need for space in court buildings. As set out in our response to the October 2015 consultation on the provision of court and tribunal estate in England and Wales, changes to the court infrastructure need to be carefully balanced against the need to provide facilities and services that ensure access to justice is not compromised and enabled everyone to participate fully in the justice system without discrimination.

Question 5

23. Removing judicial officers from the conviction process is a significant step that potentially impacts defendants' rights under Article 6 ECHR. Changes to case management elsewhere in the justice system¹⁰ have not taken this path but retained the use of legally qualified officers to ensure that the legal issues are identified by those with knowledge of the law and procedure and so assessment of what further evidence is needed can be carried out. Judges play an important role in identifying and addressing any avoidable imbalance in the situation of the prosecutors and the defendant, such as learning disabilities and/or mental health issues on the part of the defendant. The consultation document does set out certain safeguards but these lack detail and therefore it is not possible to establish whether they are adequate.
24. The Commission is also concerned by the potential impact on those people with certain protected characteristics, for example disabled people with learning disabilities who may not be able to understand the consequences of pleading guilty online. To this end non-registered

¹⁰ Mental Health jurisdiction of the Health, Education and Social Care Chamber; Administrative Appeals Chamber, Employment appeals Tribunal; General Regulatory Chamber and Special Education and Disability Needs Tribunal

intermediaries¹¹ are available for vulnerable defendants who are subject to court proceedings and may have difficulty in participating effectively in court proceedings. The Commission is of the view that further consideration of equivalent safeguards is needed.

25. The MOJ should analyse carefully the likely impact of a system of online convictions on the likelihood that defendants will engage in the system without seeking legal advice. We would be concerned if an online system had the impact of encouraging defendants to engage in the criminal justice system without seeking legal advice. Linked to this is a question of whether sufficient time will be given in the process to allow defendants to obtain legal advice between being notified of the decision to prosecute and the deadline to enter their plea online. Article 6(2) and (3) ECHR include fundamental protections for those facing criminal charges. Any online process which involves an accused person foregoing those rights must include sufficient mechanisms and safeguards, including access to legal advice, to enable them to understand the implications of “opting in” to the online process and potentially pleading guilty as envisaged in this consultation.

26. The proposal confirms that prosecutors will still be required to meet the two-stage test for prosecution and that they will remain accountable for their decisions. As there is no judicial involvement in the process, it is unclear how accountability will work in practice if there is no one reviewing prosecutors’ decisions to prosecute. A similar question arises in relation to the pre-determined penalty. There is a range of fixed penalties available for the offences identified which includes potential by law offences as well as costs and compensation. The consultation document does not explain whether fines will be fixed at the same level for all guilty pleas, or will be set on a case-by-case basis. If the latter, the consultation document fails to say who will determine the matter is sufficiently straightforward for this process to be appropriate or set the penalty. The apparent absence of effective review by an independent

¹¹ In the absence of S104 Coroners and Justice Act 2009 being brought into force

judicial tribunal to ensure consistency in our analysis raises concerns about how the standards required by Article 6 are being met.

Question 6

27. Whilst the types of cases involved are described in the consultation document as “routine”, any criminal conviction (particularly a “dishonesty” offence such as fare evasion) can have serious implications for a defendant particularly in relation to their current and future employment. Should this initiative be extended beyond the offences of railway and train fare evasion and possession of unlicensed rod and line, further consideration of which types of offences are appropriate to be dealt with by an online court will be required to ensure that it is Article 6 compliant.

Composition of panels in tribunals

28. The current rules relating to panels in the First-Tier Tribunal (FTT) allow the Senior President of Tribunals (SPT) to set the composition of tribunal panels in the unified system, but he is required to have regard to the arrangements that existed before the tribunal transferred into the unified system. This means that generally a tribunal will have a legal member as well as non-legal members sitting.
29. The proposal is to:
- remove the existing requirement for the SPT to consider the arrangements that were in place previously, and
 - provide that a tribunal panel in the FTT is to consist of a single member unless otherwise determined by the SPT.

Question 7

30. We welcome the fact that panel composition will remain a matter for the SPT. We agree with the consultation document that any changes to the composition of tribunal panels must ensure that cases are dealt with by

panels which have the appropriate specialist knowledge or expertise. That will enable tribunals to achieve the overriding objective of dealing with cases fairly and justly.¹²

31. The consultation document states that the current requirement to have regard to the past composition of tribunals means that in practice many tribunal panels are based on historical precedents rather than the most appropriate specialist expertise or knowledge for individual cases in 2016. However, the consultation document and supporting documents do not provide any analysis of what specialist expertise or knowledge is actually required to deal with individual cases justly in 2016.
32. We consider that the Impact Assessment does not contain sufficient evidence to justify the conclusion that the default position for all Chambers should be a panel of one. It refers¹³ to examples drawn from the Immigration and Asylum Chamber, Special Educational Needs and Disability tribunal (SEND) and the Employment Tribunal. However, we consider that further analysis is required before generalised conclusions applicable to all First-Tier Tribunal Chambers can be drawn from these jurisdictions. In particular:
 - the SEND example involved a reduction from three panel members to two, with judges continuing to sit with one non-legal member rather than sitting with no non-legal members;
 - in the Employment Tribunal the default position is that a case will be heard by a panel of three¹⁴; and
 - the comparison of unfair dismissal outcomes covers a period (2007-2014) when proceedings in Employment Tribunals were influenced by a number of factors (including the introduction of fees and of ACAS early conciliation). This makes it difficult to accurately assess the impact of the change in panel composition.

¹² Set out, for example, at rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. There are equivalent provisions in the procedure rules for other chambers.

¹³ At paras 33-45.

¹⁴ Employment Tribunal Act 2006, s.4.

33. We note that the Impact Assessment also focuses on user outcome and does not explicitly consider the possible impact removing non-legal members may have on user experience of the tribunals. In particular, there does not appear to be consideration whether the change may impact differently on those with different needs and experiences arising, for example, from a disability or another protected characteristic under the Equality Act.
34. We agree with the consultation document that non-legal members are a vital part of our judiciary, not only because they bring skills and expertise that would not otherwise be available to the tribunal but also because they “help us make sure that our judicial system is truly representative, not only of society but of the people who appear in front of our tribunals”¹⁵. We consider that careful consideration should be given to ensuring that any changes do not impede disabled people’s ability to fully participate in any tribunal proceedings given the emphasis on such participation, for example in the UN Convention on the Rights of People with Disabilities¹⁶. For example in some cases in the Social Entitlement Chamber a panel must currently include a non-legal member experienced in dealing with the physical or mental needs of disabled persons either through their work with disabled persons in a professional or voluntary capacity or are themselves disabled. Their own experiences of disability can assist in ascertaining facts that an individual lacking this experience might not be able to adduce: “According to one judge in the Social Entitlement Chamber, NLMs with a disability qualification are seen as being particularly able to question appellants with diminished capacity on grounds of disability and as being less inhibited in their questioning.”
35. We are concerned that given the wide range of cases that the different FTT chambers deal with, the Impact Assessment does not differentiate between the types of cases heard in each of the Chambers. For

¹⁵ Consultation Paper, para 7.3.2

¹⁶ See in particular articles 13 and 29 of UNCRPD.

example, mental health tribunals include a non-legal panel member who is a psychiatrist and therefore has important clinical experience to bring to decisions.

Question 8

36. We consider that the obligation for the SPT to have regard to arrangements in place previously for the various tribunals is useful. Those past arrangements reflect the diversity of their functions and jurisdictions and the requirement is a useful reminder that a “One size fits all” approach may not adequately reflect that diversity. We accept the importance of not being hampered by historical precedent but are not clear why a requirement to have regard prevents the SPT from making changes where they are justified.
37. The Government has also not considered the impact on diversity in judiciary of significantly reducing the number of non-legal members in tribunals. The 2016 judicial diversity statistics show that 14% of non-legal members said they were BAME compared with only 10% of tribunal judges.¹⁷

Impact and equalities impact assessment

Questions 9, 10 and 11

38. The Commission values the work undertaken by MOJ to prepare a statement of equality impact in relation to each of the proposals in the consultation. The consultation document provides a short summary of data available on the current profile of users, rather than up-to-date information about the likely impact of the current proposals on users. However, in our analysis, the assessment should be significantly strengthened by further qualitative evidence of how the proposals would potentially impact on court users with a range of protected

¹⁷ Judicial Statistics 2016 - Courts and Tribunals Diversity Tables 2016. Available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/diversity-stats-2016-tables.xls>

characteristics, rather than just statistics showing the protected characteristics of those likely to use the system. An understanding of how the proposals might affect different groups in practice might come from engagement with user groups, responses to consultations and data about digital interaction with the justice system.

39. We welcome the equality analysis in relation to the three proposals.

However:

- The equality assessment on “Assisted Digital: Court Reform” solely relates to the “assisted digital” proposals focussing on ability to use digital services without looking more broadly at the impact of digitisation on access to justice and participation in the justice system. For example, the assessment says in relation to the duty to make reasonable adjustments that “the proposal to implement Assisted Digital support is a reasonable adjustment in itself”.
- The inclusion of an Accessibility and Inclusion team and the acknowledgment that detailed analysis is required to ensure the new service is accessible and mitigate any negative impact on users who share protected characteristics is welcome. However, further consultation with groups representing the interests of potential users with different protected characteristics is needed to understand their particular needs and the barriers they face.
- In addition to the issues raised about digitisation, the online convictions proposal currently does not adequately explain what steps will be taken to ensure compliance with the requirements of Article 6 (including Articles 6(2) and (3)) of ECHR.
- Furthermore the current evidence base relating to the composition of tribunals does not provide enough information about the impact of the proposed changes to panel or on participation in and access to justice from the user’s point of view to enable a proper assessment of the proposals made. This is a particular concern given the lack of focus on the different users of the different tribunals making up the First-Tier tribunals. User groups for some tribunals will, by definition,

predominantly consist of people sharing protected characteristics such as disability. There is no analysis of the impact on those users of having no non-legal members (especially those who are disabled or have a particular understanding of disabilities) on Tribunal panels.