



Bar Council response to the Online Procedure Rule Committee consultation on the Digital justice system: inclusion framework and pre-action model

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Online Procedure Rule Committee (OPRC) consultation on the Digital justice system: inclusion framework and pre-action model.¹

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales

¹ <https://www.gov.uk/government/consultations/digital-justice-system-inclusion-framework-and-pre-action-model>

- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Inclusion

Question 1: Are these the right purposes for the OPRC's Inclusion Framework? If not, why not and what other purposes should the Framework have?

1. The three stated purposes underpinning and informing the content of the Inclusion Framework seem sound and comprehensive.

Question 2: Are these the right aims for the OPRC's Inclusion Framework? If not, why not and what other aims should the Framework have?

2. The Inclusion Framework's aims are difficult to gainsay. That said, (i) the costs of the OPRC's pursuing those aims and (ii) the likelihood of third-party providers committing to those aims (and/or actually implementing those aims) are of course separate matters which require further consideration.

Question 3: Does the OPRC's draft Inclusion Framework correctly reflect the principles, standards and mechanisms necessary to ensure that digital inclusion is embedded from the outset in the work of the OPRC? If not, why not and what other principles, standards and mechanisms should the Framework include?

3. Without specialist input from those experienced in assessing digital inclusion in the legal space, it is difficult for us properly to comment on whether the draft Inclusion Framework correctly reflects the principles, standards, and mechanisms which are necessary to ensure that digital inclusion is embedded from the outset in the work of the OPRC in designing, implementing, and evaluating procedural rules and services (as per Paragraph 27 of the Public Engagement Document (PED)).

4. That said, the Foundational Principles of (i) inclusion as a justice imperative, (ii) user-centred design, (iii) accessibility by design, and (iv) data-driven design would appear to be appropriate in terms of embedding digital inclusion in the work of the OPRC (which will need to be rigorously cross-referenced to the Inclusion Framework at all material junctures).

5. Beyond Section 1, the content of the draft Inclusion Framework is arguably duplicative and could be simplified/streamlined: compare, for instance, Sections 3 and 4. Anything which makes engaging with the Inclusion Framework a lengthier (and therefore more expensive) exercise is likely to deter private sector engagement and delay public sector engagement, in circumstances where achieving critical mass and leveraging network effects will be crucially important.

6. Paragraph 31 of the PED states that “the Framework is a guiding document, intended to assist rule writers, technology providers, service providers and policymakers ... [offering] a practical roadmap to build digital justice services”.

7. In that connection, Paragraph 36 of the PED then continues as follows:

“Private or third-party providers whose tools interface with the justice system — such as those integrated via Application Programming Interface (APIs) or listed on official platforms — should also be expected to align with these standards, even if not legally bound by them in the same way. The Framework sets an expectation that such providers demonstrate inclusive design, publish disaggregated usage data, and support vulnerable users. The extent to which providers may fall away if they are expected to meet these standards, e.g. on resourcing grounds, is a dimension to the debate this document seeks to facilitate”.

8. We are concerned to understand the extent to which existing third-party providers have so far been canvassed on their willingness or ability to meet the standards in question. Further or alternatively, it will be extremely important for the OPRC to share this aspect of third-party providers’ responses to the PED. There is plainly a risk in devoting (amongst other things) significant senior judicial attention to the development of the OPRC’s vision of the Digital Justice System if the realisation of that vision will in practice be scuppered by a reluctance on the part of third-party providers to meet the necessary standards.

9. In that regard, is there any third-party provider in the digital justice ecosystem which currently satisfies the requirements of the draft Inclusion Framework? Case studies are likely to be helpful in getting the legal profession on board with the development of the Digital Justice System.

Pre-Action Model

Question 4: Are these the right purposes, scope and aims for the OPRC's Pre-Action Model? If not, why not and what other purposes, scope and aims should the Pre-Action Model have?

10. How does the Pre-Action Model actually engage section 24 of the Judicial Review and Courts Act 2022 (or Chapter 2 of that Act more widely)?

11. This was a point raised by the Master of the Rolls in the OPRC's meeting on 12 February 2024 (see Paragraphs 15 and 20 of the minutes).

12. The point was subsequently picked up at the OPRC's meeting on 15 April 2024, for which the minutes record the following (at Paragraph 8): "HT [*understood to be Helen Timpson at the Ministry of Justice*] confirmed there had been ongoing discussions with Ministry of Justice lawyers about the interpretation of Section 24. The committee agreed that they would not require a paper on this but requested to be advised of risks as things progress to ensure the OPRC stays within their statutory remit".

13. It does not appear (at least from the minutes) that this issue was subsequently discussed at any further OPRC meetings.

14. This raises questions as to the scope of the Digital Justice System, the Pre-Action Model, and "the jurisdiction of the OPRC" (a phrase used repeatedly in the PED: see Paragraphs 28, 49, and 85). Does, for example, the provision of a pre-action conference in respect of potential possession proceedings held on Teams and organised by email bring a barrister within the scope of the Pre-Action Model and/or within the jurisdiction of the OPRC?

15. To make two more specific comments:

- Is the express reference to "artificial intelligence" in Paragraph 84(1) necessary? If AI (in whatever guise) furnishes an efficient and effective digital method of identifying legal problems, accessing

legal advice, and resolving disputes, then it will fall within the scope of Paragraph 84(1) without more.

- It is not clear that AI needs to be singled out in this way, given that there is presumably much valuable work to be done in the development of the Digital Justice System which does not (or need not) involve AI.

16. In a similar vein, is the last sentence of Paragraph 85 necessary? The tone is jarring in an area which in practice relies heavily on underfunded and unglamorous third sector activity. We caution sensitivity as regards to potentially alienating these providers in favour of (hoped-for) LawTech providers.

Question 5: Does the OPRC's draft Pre-Action Model correctly reflect the principles and standards necessary to promote the wider use of efficient digital processes, including artificial intelligence, to identify legal problems, provide legal advice, and resolve disputes promptly? If not, why not and what principles and standards should the Pre-Action Model include to achieve this?

17. In considering the principles and standards which may be necessary to promote the wider use of efficient digital processes to identify legal problems, provide legal advice, and resolve disputes promptly, practical and financial feasibility must be kept firmly in mind. Given its high level of generality, however, it is unclear how the Pre-Action Model will apply in practice. A worked example would be extremely useful for public consideration going forwards.

18. Raising two further points:

- The Technical and Data Standards contained in Section 4 are extensive and onerous. They may be appropriate and desirable in the context of a public sector project, but we question whether it is likely that third-party providers will actually adopt these standards without any commercial incentive. What will happen to the cost of a mediation if the mediation provider is required to build out a digital infrastructure which “adopts common data models” and “facilitates interoperability and incoming/outgoing data exchange with other providers in the Digital Justice System”? (As a further point, the request/requirement to “demonstrate the financial

sustainability” in Paragraph 135 appears beyond the remit of a procedural rule committee to request/require.)

19. Paragraph 162 is also concerning: “Providers will have some flexibility in how they apply the standards to the context of their services and needs of their users, with core, legal or baseline requirements to be met in all material aspects”. What are these “baseline” requirements and “material” aspects in the context of Technical and Data Standards? Such a caveat may risk defeating the point of the wider Pre-Action Model.

Questions 6-10:

We have no contribution to make to these questions.

Bar Council²

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² This response was prepared for the Bar Council by members of the Legal Services Committee