



Bar Council response to the Transforming Our Justice System: Assisted Digital Strategy, Online Conviction and Statutory Fixed Fines consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled Transforming Our Justice System: Assisted Digital Strategy, Online Conviction and Statutory Fixed Fines.¹

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. This response covers only the Assisted Digital Strategy, online conviction and statutory fixed fines elements of the consultation. As such, it answers Questions 1-6, and 9-11. The Bar Council will also respond to the panel composition element, Questions 7 and 8, before the amended deadline.

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.

¹ Ministry of Justice (2016), Transforming Our Justice System: Assisted Digital Strategy, Online Conviction and Statutory Fixed Fines.

5. As a preliminary point, Questions 1 and 2 seem to relate to the “steps [which] need to be taken by HMCTS to ensure support is provided to those people who need it to interact with the reformed justice system”,² and on that basis to be directed solely at the steps which need to be taken to put “digitally excluded groups” in as good a position as “digital self-servers” to access the court system. This is different from the more fundamental and important question whether the new online court service provided by HMCTS will provide effective access to justice for either group.
6. There are two aspects to effective access to justice via an online court: one is the ability to use the technology itself; the other is the ability to navigate the legal process. As to the second, neither the “Transforming Our Justice System” document nor the accompanying summary of reforms and consultation describes the “innovative technology” which HMCTS envisages will form part of the online court system,³ or states whether, for example, as proposed by Briggs LJ in his “Civil Courts Structure Review Final Report”, HMCTS’s new online court services will “provide interactive triage designed to assist [unrepresented litigants] to articulate their claim, and to upload their evidence”,⁴ or if so, how. It is not possible to express a view about how effectively even “digital self-servers” will be able to navigate the new online court services without knowing more about the “innovative technology” or any “interactive triage” system which is proposed.
7. The proposed channels seem to be appropriate for some users but the Bar Council would suggest that additional channels are also considered for particular purposes, such as use of intermediaries and use of email, and possibly text messaging solely as a reminder/back-up (owing to concerns about security and the lack of audit trails to demonstrate for the success/failure of receipt). Also, additional flexibility should be considered for the channels identified, which specifically assist disabled members of the public remotely, rather than requiring users to use specific channels or assuming that certain channels are appropriate for all categories of users. In addition, we note that it is part of the Assisted Digital government strategy to provide alternative mechanisms to facilitate use of digital services; examples could include provision or funding of IT resources such as at post offices, retail outlets, libraries. Without the provision of such facilities we cannot see how the Online Court could meet the anticipated need for Assisted Digital. Therefore we would expect to see these developed as part of the Assisted Digital response from HMCTS.
8. 18% of the adult population rarely or never use the internet at all.⁵ 28% of disabled people are not online (rarely access/have never used the internet) and older people are more likely to be offline than other age groups (41% of people aged over 65 are

² Ministry of Justice (2016), Assisted Digital: Court Reform – Impact Assessment dated 15 September 2016, Summary: Intervention and Options.

³ Ministry of Justice (2016), Transforming our justice system – summary of reforms and consultation, paragraph 3.1(i).

⁴ As above, Paragraph 6.9.

⁵ Cabinet Office (2013), Government Digital Strategy.

not online).⁶ A higher proportion of the elderly are female.⁷ Notably the figures provided in the consultation demonstrate that 70% of the population fall within the categories requiring digital assistance or are digitally excluded.

9. If existing channels of engagement, such as intermediaries, are excluded, this is likely to be a disadvantage for these groups and therefore potentially discriminatory.
10. Many members of the population who use the internet use it for information only and not transactions. Many of the people who are content to use the internet may not be familiar with legal matters and therefore may be unwilling to engage with such matters digitally. Although “digital by default” may well be a cost-saving policy, there appears to be a presumption that all users will have to use digital unless they “cannot” do so. This is too restrictive an approach and is not consistent with the “no one left behind” commitment from HMCTS intended, it is assumed, to ensure that services are available to those who are reluctant to or cannot use the service fully digitally. Encouragement to use the services digitally is, of course, entirely sensible, however any mandatory requirement to use the services only through digital channels must be avoided.
11. Such persons are likely to wish assistance through third parties such as legal advisors, especially for legal matters, especially since trust and privacy in online interactions are issues of concern for a substantial proportion of the population. Given that accessing many HMCTS services involves the disclosure of privileged information and sensitive personal data, it is particularly important that such information is protected during the process of accessing HMCTS services.
12. Use of intermediaries is common for interaction with government services – see e.g. HMRC filing. Intermediaries who are able to guide the person through the process provide value for the person and for the system.

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

13. Given the breadth of HMCTS services and the differing characteristics of the users and their needs it is not possible within the given timeframe to provide a response addressing all HMCTS services. It is unclear whether the types of HMCTS services under consideration include those proposed for the future or solely existing services. We are aware that Lords Justice Briggs and Ryder have indicated that any Online Court will be an entirely new legal procedure, unlike the current approach, and therefore it is impossible for us to predict what avenues or channels would be appropriate. In the circumstances, the following general comments are provided.
14. Face to face services are recognised as being particularly important for accessing HMCTS services required urgently or on an emergency basis at the point of use, e.g. at Courts. Face to face services are also important where the needs of the user are not

⁶ Cabinet Office (2014) Government Digital Inclusion Strategy.

⁷Office for National Statistic (2011), 2011 Census: Section 6 – The structure of the population of the United Kingdom.

apparent from digital services or where forms are unclear. Users with literacy or language problems will also benefit from face to face channels and provision of interpreters/translators. Many people are unlikely to require court services more than once during their lifetime and are therefore likely to find the experience stressful and alien. The level of trust placed in the system means that, in our experience, litigants feel reassured and more confident in the justice system when engaging face to face.

15. Telephone services are important for information services and for remote access for services especially where physically accessing services is a problem, e.g. where local courts are closed, for convenience and where users are not online. Text messaging could be used to prompt user as to deadlines or approaching hearing dates, and has been used effectively by GPs and hospitals for a similar purpose, but we note the concerns set out above concerning security and audit trail so would suggest that this is used solely as a reminder/backup. Webchat is useful for digitally able users providing it is also available outside normal working hours and is able to provide comprehensive assistance rather than being limited as is sometimes the case with commercial entities (e.g. because they use staff working in other countries who do not have access to the user's data or have insufficient training in the relevant area). Where advice is likely to be required intermediaries will be most useful. The present proposals do not appear to address diversity of language issues and we suggest that this is where paper channels are likely to continue to be required.
16. The Bar Council would also note that while litigants would potentially be able to access the relevant services 'at home', this does not necessarily mean that they would be able to access those services remotely. For example, it is vital that there is sufficient Wi-Fi coverage in courts so that users can access assistance without incurring data usage costs and that appropriate facilities should be provided at Court for those who do not have smart phones, tablets or laptops.
17. We agree that user research is required for assisted digital in relation to all services but note that where this has been carried out, e.g. the "Help with fees service", it was on a very small scale and did not seem to have captured all users of the types that would need the assisted digital services, so could not claim to be representative. The reliance on the use of Google questionnaires is particularly likely to miss the digitally averse. We question whether, as a result, this has captured all the issues.

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.

18. The Bar Council agrees with the principle, since it has the potential to benefit defendants. However, we have concerns over its practical application as set out in our answer to Questions 4, 5 and 6 below.

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

19. The assumption underlying this proposal is that all those affected will be able to access and use the internet. The Ministry of Justice's own figures in paragraph 7.1.3

show that only 30% can use digital services unaided; over half require help and 18% are excluded. The Impact Assessment states “If some of those who want to engage digitally are unable to, access to justice would be compromised and volumes would be impacted: assisted digital arrangement will need to be put in place.”

20. The sorts of arrangements envisaged are set out in paragraph 7.1.5 and it is vital these are in place before there is any roll-out. The numbers of those potentially affected by the proposal, yet unable to engage effectively digitally, are significant and any assisted arrangements will need to be properly funded and staffed to be effective for otherwise the great majority of those affected will not benefit. We bear in mind the evidenced severe problems that many members of the public experience when attempting to engage with publicly-funded helplines (such as HMRC) and suggest that a failure to ensure proper access to these services will see justice denied when, as we set out below, this process requires people to accept a criminal conviction within a limited period of time.

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

21. The Bar Council thinks that the proposed safeguards are adequate, subject to the points made below.
22. As an additional safeguard, defendants ought to be informed before beginning the process that they have the right to consult a lawyer and if they are in doubt about any aspect of the process, they *should* consult one.
23. We would also strongly suggest a clear warning that pleading guilty will result in a criminal record. There is no evidence that defendants will be made aware of this potentially serious consequence. Of the offences initially to be brought into scope, fare evasion is arguably more serious than (e.g.) many motoring offences because there is intent to avoid payment. By using an online procedure that is similar to (e.g.) parking fines, defendants may be misled about the gravity of the offence to which they have pleaded guilty.

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.

24. The Bar Council agrees that the offences listed are appropriate for this procedure, but would wish to see a full evaluation of this scheme before it is extended to other offences. Minor road traffic offences that carry only points would seem to be the obvious extension subject to suitable arrangements for “totting” disqualifications.

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?

- **Assisted Digital**

- **Online Conviction and Statutory Fixed Fine**

Please state your reasons.

25. On Assisted Digital, the Impact Assessment appears to deal with the effect of the policy of changing to digital access to HMCTS services and the binary question of providing or not providing assisted digital, rather than the separate issue of the impact of introducing the assisted digital channels proposed. Further, only limited evidence has been referred to in the impact assessment as to how the users including those with protected characteristics will be affected and none which assesses the impact of particular assisted digital channels on users with particular protected characteristics. There appears to be a recognition of the lack of evidence but no evidence of research on or assessment of user requirements for each channel and each service. In the circumstances it is difficult to see how the impact assessment has captured all the potential impacts.
26. The following table identifies the issues in relation to Assisted Digital (taken from Digital Inclusion Strategy, December 2014). These are the impacts which should be considered in relation to each of the proposed channels, each of the Protected Characteristics and each of the services.

The challenges that people face

Access	Skills	Motivation	Trust
Accessibility	Literacy skills	Risks	Identity
Location	Digital skills	Necessity	Security
Cost	Security skills	Financial benefits	Standards
Technology	Confidence	Social benefits	Reputation
Infrastructure		Health and wellbeing benefits	
Language			

27. We have no specific comment to make on the impacts of the online conviction and statutory fixed fines element of the Impact Assessment, other than those set out above.

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

28. Please see our response to Questions 1 and 2.

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

- **Assisted Digital**
- **Statutory Fixed Fine**

Please state your reasons.

29. Please see our response to Question 9.

Bar Council

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