Ministry of Justice consultation: 'Transforming Our Justice System'

<u>A Response from the Law Centres Network</u>

Summary

- The case for reforming tribunal panel composition is argued insufficiently. It proceeds from worthy aims but does not identify current insufficiencies or problems to resolve. On closer inspection, the proposals do not really bear out the policy aims.
- The consultation documents present single policy options with little to suggest that others were even considered. The relative or absolute merit of the proposals advanced has little by way of empirical evidence to support it; we consider that adopting such radical changes without prior testing would be imprudent.
- Two omissions weaken the proposals: no consideration of the justice system in the round and the knock-on effect on proposed reforms on other areas; and no consideration of technologically-enabled participation to continue to include Non-Legal Members on panels but in a more economical way.
- We are unable to fully assess the adequacy of the consultation's impact assessment because the policy proposal itself lacks detail and specification. We are left to rely on unsupported assertions, some apparent contradictions, and an inadequate account of the kind and extent of impact on tribunal users.
- The impact assessments do not present a sufficient account of overall cost and benefit, shunting certain entirely quantifiable elements into the non-monetised realm of costs and benefits, thereby weakening the overall assessment.

Preface

1. The Law Centres Network (LCN, trading name of the Law Centres Federation) is the national membership body for Law Centres, which are law practices that are charities. Law Centres practice primarily in social welfare law and target their services at the people in greatest poverty and disadvantage in their communities. LCN exists to support and develop the work of Law Centres, to foster collaborations and innovation among them, and to act as their collective national voice on matters of social policy. Law Centres have been operating in the UK since 1970, and LCN was first established in 1978.
2. The following response will address Ministry of Justice (MoJ) proposals relating to the panel composition in tribunals, specifically the First-Tier Tribunal (FTT) Social Security and Child Support Chamber (SSCS). It will also refer to proposals regarding 'assisted digital' as relevant to the context of tribunals proposals.

Policy Proposals

3. The proposal to make Non Legal Members (NLMs) on panels the exception rather than the rule is made in conjunction with a proposal to hold more hearings through online platforms rather than face to face. However, it does not seem that MoJ has considered that the use of online platforms might help it address cost and availability constraints in deploying NLMs to panels. As it is considered appropriate that a judge hear a case online rather than in person, and that the platform enabling it would be sufficiently secure and discreet, it should be similarly appropriate to have NLM panel members do the same, and not necessarily from the same location. Should panel members need to confer in private, the same platform should enable this, too. There is nothing in the consultation papers to suggest that this option has even been considered. NLMs bring unique expertise that would not otherwise be available to the tribunal and which judges should not be expected to provide instead. The presumption in favour of their continued role on tribunal panels, particularly in SSCS cases, can and should continue, making use of online participation that MoJ currently proposes only for appellants.
4. We agree that the Senior President of Tribunals (SPT) should continue to be able to determine panel composition based on the changing neds of people using the tribunal system. Nevertheless, we consider that SPT should also be duty-bound before determination to consider aspects such as the nature of the case (for example, continuing to require NLMs in cases involving sickness and disability benefits); the complexity of the evidence and the ability of a specialist NLM to better extract it from documents and witnesses; the resources and supports available to the appellant to present their case (e.g. legal aid, pro bono support, no external assistance); if unsupported, the ability of appellants to present their case on their own; and, necessarily, the wishes of the appellant, including the importance of the matter to them. This last consideration would be central to appellants' impression that the tribunal is fairly run, that they specifically have been treated fairly, and therefore that their outcome – even if unfavourable – is a just one that they would be inclined to accept.
5. We are concerned about the real drivers behind the proposals, because there is little in the consultation documents to explain a) the problem with current panel composition, or b) what other options were considered beyond what is consulted on, which in itself is vague indeed, especially as regards mitigation. To pit the current arrangements as a legacy of previous provisions in counter-distinction from the present proposals as "a more forward-looking approach" is a false dichotomy. There is nothing to suggest or support the implication that NLMs on tribunal panels are less efficient or 'forward-looking' than judges sitting alone – especially when taking advantage, as above, of new digital platforms that are already proposed for judges.
6. Overall, we are concerned that the proposals aim at a radical change in the administration of justice that will have a considerable impact on access to justice. The case for them is made based on little evidence or argument; explores but one option – the one proposed; takes no account of recent experience in comparable jurisdictions

internationally; and rushes headlong into systemic change without so much as a pilot to empirically test it out. Indeed, this comment applies to proposals for 'assisted digital' as well, where the impact on users' experience of tribunals and justice would be just as radical. We strongly support prior piloting, testing and evaluation of both 'assisted digital' and changes to panel composition, echoing similar points made by the Civil Justice Council in its consultation response.

7. A glaring omission in the vision paper as well as the policy proposals consulted on is the consideration of the justice system in the round; not simply the courts and tribunals but legal aid, pro bono legal services, public legal education and information and auxiliary and assistive services and technologies already in place. Here, too, we are in agreement with the Civil Justice Council submission on this matter. In our experience, 'channel shifting' to online or telephone means in civil legal aid has resulted in a rupture between these channels and ongoing face-to-face assistance, that is even reflected in the statistics accounting for it. Introducing 'assisted digital' at the same time as a change to tribunal panel composition without accounting for existing supports or attempting to integrate some of them into the resulting provision is a problem in the making. Our discussion of the impact assessments below will elaborate on this.

Impact Assessments

A. Impact Assessment – Panel Composition

8. There is little in the consultation documents to indicate how the SPT would determine under the proposed reform in which cases NLMs were to be used. Similarly, there is no indication of the mechanisms proposed for claimants and their representatives to petition the SPT for a panel comprising NLMs. This suggests the likelihood of a wild swing from one presumption to its opposite that is not fully accounted for beyond trusting in the SPT's undertaking of his duties. As to the present consultation, this makes us unable to comment on the adequacy of the impact assessments, as the policy proposal itself is too vague.
9. The consideration that NLMs are needed 'in the interests of justice' begs teasing out. Justice needs to be done and to be seen to be done. Claimants who have made it to FTT/SSCS will have already gone through Mandatory Reconsideration, and are likely to have had no legal advice in preparing their appeal as Government had withdrawn legal aid for this. They will perhaps be reasonable in seeing the justice system stacked up against them to deny them their rightful entitlements. Also, having got this far, they are likely to be (rightly or wrongly) convinced of the merits of their case, and would be more likely to refuse to accept the FTT decision if unfavourable to them and appeal to the Upper Tribunal (UT).
10. Associated costs of Non Legal Members (travel, training, admin etc.) are not monetised at all, even though they clearly can be, with even a conservative estimate based on recent years' expenditure, weighted against workforce size and distribution. Similarly, the cost of supplementary training for judges is not monetised when some

projection can be made, and then offset against the savings on the NLM associated costs. Precluding these elements from the monetised costs and benefits significantly weakens the claim that the Net Present Value of proposals is zero.

11. There seems to be lack of clarity on whether judges sitting on their own will process cases faster or more slowly than current panels. While this unknown element is acknowledged, it is only as an assumption, whereas surely similar parallels could be drawn from other jurisdictions, from international comparators, from socio-legal studies or from prior input from SSCS process data. Probably the most insight could be derived from piloting the proposed scheme first, as suggested above, before proposing its nationwide rollout. While this was mooted several months ago by the SPT speaking publicly, it has clearly been dropped since and substituted by a determination and unexplained urgency to plough on despite known uncertainties.
12. Leaving monitoring and evaluation of the proposed reforms in the hands of HMCTS and MoJ (para. 49) will leave only part of the picture for public and parliamentary scrutiny. By abolishing the Administrative Justice and Tribunals Council and now winding down its half-successor the Administrative Justice Forum, there will remain no independent evaluation of the implementation of the proposed reform. We are concerned that this will deny this important policy change due scrutiny and will delay the recognition and response to issues arising from it. At the very least we would propose involving key stakeholders from outside MoJ and HMCTS in monitoring and evaluating this significant transition to enable a fast and well-considered mitigation of adverse effects in the interest of justice.

B. Equalities Statement

13. The Equalities Statement focuses on Non Legal Members as primary stakeholders to be affected by the proposals (as workforce) but addresses equalities impact on tribunal users only cursorily. In so doing it significantly understates the real-life impact of the proposals, specifically sick and disabled appellants at FTT/SSCS. In particular, as paragraph 3.4.8 acknowledges, currently SSCS appeals involving DLA, PIP or Attendance Allowance are required to include a Disability Qualified Panel Member (DQPM). It admits that due to the overrepresentation of people with disability among DQPMs they would be disproportionately impacted. However, it falls short of acknowledging the similarly disproportionate impact that this would have on appellants with disability, who would no longer have an empathetic perspective on the tribunal panel that is intimately familiar with their daily hardships due to secondary or related effects of their conditions.
14. There is also a great deal of acknowledged uncertainty about the proposals and their effects. Paragraph 3.7.2 admits that "we do not know at this stage the types of number of cases that will require multiple panel members or the way that they may be utilised" but has no problem asserting confidently that "it is likely that the demand for specialist panel members… will decrease". Tribunals statistics tell us that in 2015-16, nearly 42% of SSCS disposals involved PIP, DLA or Attendance Allowance appeals, which currently require DQPMs (as above). Over 80% of these disposals were at hearing, not on papers. Apart from changes to the internal distribution among them with DLA being

phased out and PIP introduction, there is little in the statistics to suggest a decrease in the current need for specialist panel members.

15. Similarly, paragraph 3.5 asserts that "user needs are likely to change in the future, particularly due to the advancement of digital technology and its use in the tribunal system." However, as things stand, nearly a fifth of the population (18%) is 'digitally excluded' through poverty, disadvantage, education/training or physical incapacity. It is presumptuous to assume that technology in use in the tribunal system will alone be able to reduce and ultimately eliminate users' digital exclusion. If MoJ is serious in its contention to provide a "user-focused tribunal service", it would do well to go beyond this kind of unsupported assertion, gauge current user needs as a baseline, and empirically test new provisions with the users on which it claims to focus.
16. Paragraph 4.3 states that "the SPT has an obligation to ensure that access to justice and the fairness of proceedings is maintained and we do not, therefore, expect these reforms to negatively impact tribunal users." We have faith the SPT's commitment to maintaining fair proceedings and access to justice. We do, however, have serious concerns about the MoJ's commitment to the same if these considerations are to depend, as proposed, on 'ministerial concurrence to spending' as regards future panel composition arrangements (para 1.2.1.3). As the tribunals already have a fixed and increasingly constrained budgetary framework, the real effect of this shift would be to put access to justice and redress second to political expediency.
17. Furthermore, throughout the consultation documents, there is little detail on prevention and mitigation of the adverse effect of proposals on tribunal users, in particular ones with disability, who stand to be directly and disproportionately affected. Instead, we have an assertion (in para. 3.3) that the SPT will "make sure that tribunals are accessible and are handled fairly", in part by "putting safeguards in place". In the absence of a pilot to learn from, or draft guidance, or even the most general indication of the intended safeguards, this is a 'jam tomorrow' proposition that offers little to rely on and even less to reassure tribunal users, who face fundamental change to their access to redress.

C. *Overarching Impact Assessment*

18. The summary of main impacts and best estimates (table 1) presents a simplified version of the details in the Impact Assessment an Equalities Statement. By its own admission, a monetised saving of up to £21m a year is, in context, still a 'neutral' outcome and itself not the main driver of the policy proposal. However, under benefits it notes only that "tribunal users would benefit from quicker decision-making"; gone is the ambivalence about the impact of withdrawing NLMs from panels and the knock-on effect it may well have on judges, necessitating not only supplementary training (which is acknowledged) but a more deliberative approach that would actually slow down decision making. For the main benefit to be in the non-monetised realm, but in a way that takes no account of tribunal users, amounts to an unsupported assertion that, 'take it from us', things will be fine.
19. The cumulative impact assessment is where it becomes clear that the proposals, with their projected impacts, do not quite bear out the professed policy aim. Proposals

claim to proceed from the intention to make the justice system "better, faster and more accessible, and with better outcomes for users" (section A para 2) that would be just, proportionate and accessible. Regarding a *faster system*, the impact assessments admit that MoJ cannot know whether proposals will result in faster listing or faster disposal. Regarding a *proportionate system* in its cost, speed and complexity, a modest saving on NLM costs is offset by additional costs of training judges instead and, again, a possible slowing down of their decision making.

20. The gap between the policy aims and the current proposals is particularly pronounced when it comes to tribunal users. Regarding a *more just system*, the overarching impact assessment's key assumptions section lists risks of impact on tribunal user outcome ("change in the number of successful appeals") and, consequently, an increase in the number of Upper Tribunal appeals. Regarding a *more accessible system*, relating among others to the intelligibility of SSCS, the same section accounts for a risk of "adverse impact on the experience of panel users". These users, who have not had recourse to civil legal aid for welfare benefits matters in over three years, will then be left to fend for themselves because, as the analysis of policy option 1 (assisted digital) admits, "assisted digital services may not be flexible or nuanced enough to provide the most efficient and cost effective assistance".
21. In conclusion, we should not be surprised if such impacts on tribunal users would end up having the same effect on access to justice as the introduction or raising of tribunal fees have had. That is to say, we have grave concerns that the proposals would lead to a reduction in the number of people accessing effective redress through FTT/SSCS.

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