Written evidence from Amanda Finlay CBE (CTS0055)

Access to Justice Impacts of Court and Tribunal Reform

I am responding as an individual with a long standing engagement in access to justice: from 1971 to 2009 as a civil servant in the Ministry of Justice, and since then in a range of roles: as an Executive Board Member of Justice, a former member of the Civil Justice Council, and a former Trustee of Law Works. I was Deputy Chair of The Low Commission on The Future of Advice and Legal Support. I am Chair of Law for Life, a public legal education charity which runs the website Advicenow. In 2018, I chaired a Justice working party on Preventing Digital Exclusion from Online Justice.

Executive Summary

- The HMCTS Reform Programme to deliver “Transforming our Justice System” has the potential to improve access to justice for many people who are currently excluded by lack of means and lack of access to legal advice, BUT
- ONLY if the online processes include enough built in information and guidance on the legal issues involved, and signpost to more detailed sources of online advice, such as Advicenow.
- HMCTS should recognise that many of their users will require assistance with both the Online and the Court elements because their lack of digital capability will go hand in hand with lack of legal capability.
- Co-location of digital assistance with existing sources of legal assistance would ensure that users’ needs are better met.
- Even the digitally capable will need support with legal issues because of the importance of what is at stake.
- At the same time, for the digitally capable, the simplicity and familiarity of filling in forms on line risks making momentous legal processes deceptively easy and does not always draw attention to the possible implications of what seems no more than another click.
- User testing with ordinary citizens has its limitations as they will mainly test the ease of digital interface and their understanding of the questions asked. They do not know what they do not know, unlike legal professionals, advice workers and public legal information experts.
- These professional experts should be brought in at the very earliest stages of development to ensure that legal issues are addressed at the start and not just in subsequent iterations of beta systems, by which time it becomes more difficult to make changes.
- HMCTS have taken welcome first steps to collect information on protected characteristics of users, and to learn from user engagement with the Online Court. This needs to continue and to be shared more widely with others.

Question 1
1. For those who are digitally capable, the potential benefits of accessing justice services online rather than in person include a more accessible and understandable way of interacting with the court, increased convenience, reduced cost, and the ability to stay better informed of the progress of one’s case, without the “delays, and constraints that come with physical hearings”. But to make the most of this, they will need access to more information about legal issues and matters to take into consideration, particularly as the Reform Programme moves into more complex areas of family private law, such as child contact and financial arrangements. Tribunal users will need detailed help to understand how best to make their appeal. This help could either be built into the Online Court or could be signposted at each key stage to websites such as Citizens Advice, Shelter, and Advicenow which has resources specifically developed for the Family Justice Council and Civil Justice Council on Going to Court without a Lawyer.¹

2. For the 70% of the UK population identified by the MOJ Consultation Paper “Transforming our Courts and Tribunals”² who may be either “digital with assistance” or "digitally excluded” the risk of detriment is significant unless HMCTS can develop more effective ways of reaching out to them and supporting them. These users are predominantly the most vulnerable members of society and also those who experience the most problems and are the heaviest users of public services. They will need help with more than the digital elements of the Online Court and may well need face to face personal assistance to take or to respond to a legal case.

3. At present, HMCTS is focussed on providing Digital Assistance through its pilot partner, Good Things Foundation. Feedback from HMCTS suggests that use of this assistance has been limited and that they are exploring alternative models for delivery. Providing only Digital Assistance ignores the reality that most of these users will need expert or legal support. The 2018 Justice Report on Preventing Digital Exclusion from Online Justice³ suggested that these digital and legal support services should be co located where possible, using trusted faces, and trusted places, as recommended by the Low Commission.⁴

4. But it is also important to recognise that the need for assistance with digital processes is not necessarily confined to those who might be classed as the digitally excluded. Many people, even those who are normally confident with digital interaction, when faced with a justiciable issue – that is a problem that could be taken to a court or tribunal, or where the individual needs to respond to a court case- may be situationally vulnerable and may feel the need for assistance, often driven by concerns about the complexity and unfamiliarity of the court process itself. The Master of the Rolls, Sir Terence Etherton, reviewing the experience of Money Claims Online so far in March 2018, highlighted the need for procedural assistance even from the self-selecting group who were using the system in private beta mode.⁵

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¹ AdviceNow, Going to court or tribunal without the help of a lawyer, available at https://www.advicenow.org.uk/content/going-court-or-tribunal-without-help-lawyer
³ https://justice.org.uk/our-work/areas-of-work/assisted-digital/
5. Some of this is understandable and justifiable nervousness generated by the importance of what is at stake. HMCTS believe that the multi channel approach will provide some assistance here as this allows people to move from independent online to assisted online, to phone assistance from the Court and Tribunal Service Centres, and even, if necessary, to paper. But most of this assistance focuses on getting the digital element correct: filling in the forms. The more important need is to understand the legal issues involved, the legal procedures that have to be followed and the implications of any decisions that are made as part of this process.

6. Lord Justice Briggs (as he then was) in his Civil Courts Structure Report set out his vision of a new Online Court which was to move away from “an adversarial court designed by lawyers for lawyers” to an Online Court that would be “a new, more investigative court designed for navigation without lawyers”. In particular it needed to have a more informative, and proactive role in which the court – in either its virtual or its human manifestation – ensures that litigants:
   • Understand what they are doing;
   • Know how to provide the information that is needed to decide their case justly; and
   • Fully comprehend the consequences of any choices they may make along

7. That was a challenging ambition. The Civil Justice Council ODR Advisory Group in its response to the Briggs Interim Report highlighted the difficulty of a fully automated Stage 1 Online Court and the need in the interim to continue to support the range of legal websites, such as Advicenow, Citizens Advice and Shelter which enable users to browse and understand legal issues. Resources focused on helping people without a lawyer are an essential accompaniment to the current Online Court because they can give more detailed information in a more informal and understandable way.

8. These websites do not give legal advice. They provide comprehensive information, including the possibilities of alternative routes to resolving a dispute, and then detailed step by step practical, not legal, guidance on how to take a claim/defence forward at each stage, including explanations of the legal and procedural issues a litigant needs to be aware of.

9. If this sort of information and practical guidance – NOT legal advice – could be built into the Online Court, step by step, it would make the processes more intuitively obvious online. It would promote trust and confidence, help people to work out what needs to be done, and help them know how to do it. The Advicenow guides on Going to Court without a Lawyer already give people this knowledge, skills and confidence.

10. In the meantime it is particularly important that HMCTS flag up the consequences of particular decisions in the Online Court that may be irrevocable and may have significant consequences. In family cases, even the decision to make a divorce application can have significant repercussions if the applicant is a victim of domestic abuse or if the partner is from abroad and there might be a risk of child abduction. These “red flags” are the issues that a family lawyer would pick up at the very start of a divorce consultation. When an individual...

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8 Advicenow, Going to court or tribunal without the help of a lawyer, available at https://www.advicenow.org.uk/content/going-court-or-tribunal-without-help-lawye
can make the application online, without advice, there need to be online “red flags” to ensure that they recognise the potential risks of this seemingly simple online step.

11. As the monetary jurisdiction of Money Claims Online is increased, online claimants and defendants will need to be warned about the risk of costs exposure. Online Guilty pleas in criminal cases need to ensure that people understand the consequences of a criminal record for their future as well as the possible defences that a solicitor might draw to their attention. The Justice Report on Preventing Digital Exclusion from Online Justice recommended slowing down these easy “one click “steps to ensure that people were informed and thought about the consequences.9

Question 3

12. HMCTS is committed to developing its prototypes with potential users and this gives valuable information about how people engage with online systems. But this engagement is primarily with ordinary people who have no expert legal knowledge of the issues involved. They do not know what they do not know and cannot always tell when they need more information or context.

13. HMCTS has engaged with the advice sector, the legal profession and public legal information experts such as Advicenow at successive stages of the development of its online prototypes but too often this has been AFTER the development of the first proof of concept, or sometimes at an even later stage. Insights, which would have been useful at the very start, are more difficult to build in at later stages. And it is difficult for project teams to recognise the importance of concepts and information which are unfamiliar to them (as indeed to their users) and which the legal professionals know will be crucial as the case develops.

14. This situation is exacerbated by the fact that the HMCTS project team will be working on one stage at a time so they are not actually working on an “end to end “process. That is why the Justice report recommended a pilot of an “end to end “process to ascertain what information and actions might be necessary at earlier stages of the process.10 This issue will become more important as the Online Court moves into case management of tribunal cases and online resolution of children and financial matters in private family law cases.

Question 4

15. HMCTS have taken welcome steps to build a profile of the protected characteristics of their users, on a voluntary basis. This, added to gender and age and postcode, has the potential to provide basic information on the distribution of use of the Online Court and how that matches up with existing information about the distribution of legal need. HMCTS are also committed to an ongoing programme of user engagement and feedback, and to learning from management information about the use of the Online Courts, including the ability to plot where people stop using online applications – an essential first step to finding out why they stop. The Justice Report11 urged HMCTS to collect and make available the widest range of data possible. In addition, HMCTS and external experts should conduct more research

9 https://justice.org.uk/our-work/areas-of-work/assisted-digital/
10 https://justice.org.uk/our-work/areas-of-work/assisted-digital/ Recommendation 14 HMCTS should conduct end-to-end pilots of online justice services and investigate outcomes, including the varied experiences of claimants, defendants and witnesses. They should learn from hearing and enforcement stages what is required at earlier stages.
(including qualitative research) about how people behave in an online environment and on choices between various “Assisted Digital” channels.

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