

**Written evidence by the Law Society of England and Wales to the Prisons and Courts
Public Bill Committee**

24 March 2017

Summary

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent its 170,000 solicitors, promoting the highest professional standards and the rule of law.
2. The Law Society has spoken extensively to its members about the potential impact of introducing provisions to expand the use of technology in court. We have also collected their feedback about the introduction of a tariff system to compensate whiplash cases.
3. We welcome the Government's ambition to reform the prisons system and modernise courts and tribunals. We are working with Her Majesty's Courts & Tribunal Service (HMCTS) and the Ministry of Justice (MoJ) to make the most of developments in technology and to ensure modernisation enhances justice. There is therefore much to welcome in the Bill.
4. We believe that the Bill could benefit from the introduction of further safeguards in relation to the use of technology in court. We are also concerned about the implications that the reform of the compensation system for whiplash cases is likely to have on access to justice. Our priorities are as follows:
 - The introduction of preliminary proceedings in writing is welcome. However, the Bill should include safeguards to ensure that defendants are fully informed and aware of the consequences of indicating their plea in writing, or giving up their right to trial by jury. In addition, the use of written procedures should be restricted to summary, non-imprisonable offences, in case of an unrepresented defendant.
 - The Bill should include safeguards to ensure that the online conviction provision is limited to very minor (summary, non-imprisonable, with no identifiable victim, and no longer-term consequences for the defendant) offences.
 - The online conviction pilot scheme should include a minimum testing phase of two years from commencement of the process. The results of any scheme should be subject to further consultation before being extended to include other offences.
 - The Bill should clearly set out the qualifications of 'authorised persons' required to delegate judicial tasks to court and tribunal staff.

- Victims of road traffic accidents, including whiplash, should be able to recover legal costs and access justice. Therefore, a fixed tariff system to compensate whiplash claims should be excluded from the Bill.
- The Government should ensure that insurance fraud is tackled by proportional measures such as banning cold calling by claims management companies and imposing stricter regulation.

Court reform and organisation - Parts 2 and 3

5. The Law Society supports the Government's reform programme of the courts and tribunals system. We agree that pressure on courts and tribunals should be managed and mitigated, to take advantage of the opportunities that technology can provide to delivering a just, proportionate, and efficient justice system.
6. However, we believe that accessibility should be integral to the success of any digital service. It should not be limited to the design and development of any assisted digital service but to all aspects of the proposed reforms, from virtual hearings to digitised divorce.
7. Digital literacy should not be conflated with legal literacy - on this point, we welcome the MoJ's assurance that it will not mandate the use of digital channels, and the recognition that assisted digital services are not a substitute for proper legal advice and representation.

Conducting preliminary proceedings in writing: criminal courts (Clauses 23-30)

8. These provisions would allow for certain preliminary aspects of criminal proceedings to be conducted in writing, saving court users time and money. The Criminal Procedure Rules would introduce a 'written information procedure' by which a defendant can indicate their plea, have the case allocated to the Magistrates' or Crown court, and elect for trial by jury in writing, without physically appearing in court until their trial or sentencing hearing.
9. While we welcome the Government's intention to enable the conduct of criminal proceedings without the defendant and their legal representatives having to attend court unnecessarily, we believe there are serious risks associated with these procedural aspects of a criminal case.
10. Unlike many day-to-day activities that can be done on-line, being charged with a criminal offence could have life-changing consequences, and affect career prospects, employment, and the ability to travel abroad. Decisions as to whether to indicate a plea of guilty or not guilty, or to exercise the right to jury trial, are not always straightforward or easy to understand, and often require legal advice to properly make informed decisions.
11. The provision of information as set out in clause 23(4) about how the procedure works, the consequences of following it, information about the offence and about

legal advice and representation is welcome. However, written information about the criminal process and the options available may not have the same impact on a defendant as being told in person by a solicitor or, if unrepresented, by the court, with the opportunity to ask for clarification.

12. In addition to this, some defendants, both adults and children, have limited literacy and linguistic skills, and lead chaotic, unstructured lives, with frequent changes of address, which makes the use of a written process more difficult.
13. Therefore there is a need for adequate safeguards to mitigate the risk of invisible miscarriages of justice. In our view, the written procedure should be available only when the defendant has received legal advice, with the exception of cases involving summary only, non-imprisonable offences.
14. Issues of identity and access management should also be addressed, ensuring that the person using an online written procedure is in fact the defendant in the case, and controlling who has access to the system so that it cannot be abused or hacked.

Audio and video technology: criminal courts (Clauses 32-34)

15. These provisions would allow for the expansion of the use of audio and video technology in the criminal courts to include more types of participants (amending the Crime and Disorder Act 1998) and in more types of hearings (amending the Criminal Justice Act 2003) to 'appear' in court by video or audio means.
16. We cautiously welcome the introduction of such provisions. We believe that technology is a useful tool that, when used appropriately, can improve the efficiency of the criminal courts, not only for the conduct of simple court hearings, but also for facilitating the communication between a solicitor and their clients in custody.
17. However, the use of technology may not always be in the interests of justice. Our members who have been involved in the pilot schemes for 'virtual courts' in South London and Kent since 2009 have told us that it is inappropriate for video technology to be used for first hearings when the defendant is in police custody.
18. In 'virtual courts' defendants appear from the police station via a video link to the court where the magistrates are sitting. In our members' experience, the use of technology puts barriers to effective communication between the defendant, their legal adviser and the court at this important first hearing, when the decision about the defendant's liberty for the next few months - or longer - is taken. At this stage, other vital decisions about the case are expected to be made.
19. In contrast to what happens in later preliminary hearings from prison, when a solicitor has the opportunity to take full instructions from the defendant and has full details of the prosecution case, in the case of virtual first hearings defendants are usually prevented from having the option of seeing their solicitor face-to-face before the hearing.

20. The lack of direct contact hinders communication between the solicitor and their client, diminishing the solicitor's ability to take instructions. The prosecution and the defendant's lawyer are usually in the court room. If the solicitor chooses to be with their client at the police station than in court, their ability to communicate with the prosecution and the court is diminished, potentially damaging the first hearing's outcome for the client.
21. There is a real risk that defendants may be remanded in custody by the court, whilst they may have been bailed, if they had appeared in person. This may have a knock-on effect on the prison population and public expenses.
22. First hearings are a crucial stage in the criminal justice process where the defendant's bail application, or plea, is considered. The use of video technology or, worse, audio-only hearings, as contemplated by the Bill, creates a real risk of miscarriages of justice for the reasons explained above. We call on the Committee to ensure that the Government provides more detail on how the process would work in practice, including available exemptions.

Automatic online conviction and standard statutory penalty (Clause 36)

23. The Government has confirmed that it will proceed to pilot an online conviction process for certain train and tram fare evasions, and unlicensed fishing rod and line offences.
24. Before extending the scheme to other offences, we believe that there should be a minimum testing phase of two years from the commencement of the pilot process. The results of any pilot scheme should be published and subject to a consultation.
25. We also urge the Government to put in place safeguards to ensure that the defendants are aware of the consequences of entering a guilty plea online. This is particularly important if an offence results in a criminal record that can lead to restrictions in employment, travel or the ability to obtain insurance.
26. We note that the *Transforming Our Justice System* consultation defined offences as 'summary, non-imprisonable offences with no identifiable victim'¹. For the purpose of the Bill this definition has been shortened to summary, non-imprisonable offences, and no longer includes offences where there is no identifiable victim. We recommend that the full definition is included in the Bill, as it provides an important safeguard² for victims.

Prohibition of cross-examination in person in family proceedings (Clause 47, Part 4B)

27. We welcome the provisions on family proceedings which prohibit alleged perpetrators from cross-examining in person a witness who is the victim, or alleged victim, of

¹ https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf - paras 2.4 iii and 7.2.4 i

² https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/supporting_documents/consultationpaper.pdf see paras 2.4 iii and 7.2.1.

domestic abuse (31Q-31U). We also agree with the measures introduced to ensure that the court identifies a 'qualified legal representative' to cross-examine the victim (31V), if the defendant chooses not to have legal representation or cannot afford representation (and legal aid funding is unavailable).

28. However, we are keen to have more details on the practicalities, including identification and appointment of the qualified legal representative, and how these measures will provide adequate protection to victims of abuse.
29. The wording in the Bill appears not to restrict the prohibition solely to cross-examination in fact finding hearings on abuse. Throughout the family process the interaction is always between the two individuals who are separating. The prohibition of banning alleged perpetrators should apply to all forms of cross-examination, otherwise the alleged perpetrator could still directly intimidate the opposite party. It would be helpful if this positive development was confirmed.

Court and Tribunal staff: legal advice and judicial functions (Clause 50)

30. Clause 50 and Schedule 11 would allow court staff to exercise judicial functions across the different jurisdictions. We are concerned about the removal of the qualifications from primary legislation. This may allow non-legally qualified staff to carry out judicial functions beyond administrative tasks, as the type of functions they would exercise is not specified.
31. The qualifications required for those appointed to give legal advice to the justices of the peace are specified in Section 27 of the Courts Act 2003. Those appointed must:
 - Have a five year magistrates' court qualification; or
 - Be a barrister or solicitor with five years experience as a justices' clerk; or
 - Have previously been a justices' clerk
32. Section 2(5) also states that '*the Lord Chancellor may not enter into contracts for the provision of officers and staff to discharge functions which involve making judicial decisions or exercising any judicial discretion*'³. However, this exclusion is not referenced in the Bill and does not appear to apply to the revised definition of 'authorised persons'.
33. We recommend that judicial tasks and required qualifications of 'authorised persons' are defined in the Bill. We also recommend that requirements for authorised persons in terms of qualifications, training, and experiences should be a three year post-qualification experienced solicitor, barrister or chartered legal executive for all types of judicial function and this approach should be consistent across all courts and tribunals.

³ <http://www.legislation.gov.uk/ukpga/2003/39/section/2> the same qualification appears in s.40(3) of the Tribunals Courts and Enforcement Act 2007 "The Lord Chancellor may not enter into contracts for the provision of staff to discharge functions which involve making judicial decisions or exercising any judicial discretion" see <http://www.legislation.gov.uk/ukpga/2007/15/section/40>.

Judiciary - Part 4

34. Part 4 of the Bill contains provisions to introduce fixed term leadership roles for officeholders (Clause 56), increase the flexible deployment of judges (Clauses 56-59) and enable the Judicial Appointments Commission to recover costs from those who receive its assistance (Clause 60).
35. The Law Society agrees that a more flexible deployment of judges could lead to greater efficiency and ensure that sufficient judicial resource is available to the courts throughout the year. We would welcome more information about what additional training officeholders would be required to undertake before sitting outside of their primary jurisdiction to ensure quality and consistency of judgments.

Whiplash compensation - Part 5

Our concerns on the fixed tariff system

36. We oppose the Government's proposal to introduce a fixed tariff system (Clause 62) to compensate whiplash claims for the following reasons:
37. The proposed fixed tariff (set out in the Government's response to the consultation) is far too low. For example, the tariff for whiplash injuries where symptoms persist for up to 3 months is a mere £250. Compensation should be commensurate to the severity of the injury sustained and should reflect actual pain, suffering and loss of amenity. A 'one size fits all' approach is unfair as it penalises those who are suffering from more complex symptoms. If the Government is determined to introduce fixed levels of compensation, the proposed rate should be based on the average value or median value for that class of claims as prescribed in the Judicial College Guidelines.
38. Legal costs will not be recoverable. The tariff system combined with the proposals to increase the small claims limit to £5,000 means that all victims of road traffic accidents, not only victims of whiplash, would not be entitled to recover legal costs. This non-recoverability could deter victims from accessing legal representation or getting back modest costs related to their case. It could also deter victims from bringing legitimate claims before the courts.

Concerns on measures to tackle fraud

39. The Government has stated that whiplash reform has been introduced to tackle '*the problem of the industrialisation*' of whiplash claims. We welcome appropriate measures to tackle fraud and therefore, support the Government's proposal to ban pre-medical settlements for whiplash claims without medical reports set out in clause 64 and 65 of the Bill.
40. However, there is little evidence on the prevalence and value of fraudulent claims. According to an analysis conducted by the Association of Personal Injury Lawyers

(APIL) of the 2015 figures from the Association of British Insurers (ABI), fraudulent claims only account for 0.25% by volume or 1% by value of motor accident claims⁴.

41. The measures set out in the Bill may prevent genuine claimants from bringing their claims and therefore, are disproportionate to the problem the Government is seeking to address. To tackle fraud, we believe that the Government should:

- Ban cold calling by claims management companies (CMCs).
- Impose stricter regulation on CMCs.
- Encourage insurers to actively challenge and seek punitive measures for claims they believe are fraudulent.
- Encourage the Information Commissioner's Office (ICO) to provide guidance on data sharing practices in relation to insurance fraud.

Concerns on passing savings to consumers

42. The Government argues that proposals in the Bill will reduce annual insurance premiums by an average of £40. These savings are based on the estimated 'pass through rate' which is the proportion of savings insurers would pass on to consumers, estimated by the Government at 85%.

43. Pass rates are difficult to predict and it is not clear how the 85% savings rate has been calculated by the Government. We are skeptical that this level of pass through will be achieved.

44. There is no mechanism in place to hold insurers to account to effectively pass savings on to consumers. Only a few companies have indicated that they are prepared to do so and the Government has no powers of enforcement.

45. In the Justice Select Committee⁵ one-off evidence session on the Government's consultation on soft tissue injury claims in February, the ABI was unable to provide assurances that cost reductions for insurers would be passed on to consumers.

46. A report commissioned by the Law Society, APIL, and the Motor Accident Solicitors Society (MASS), from economic consultants *Compass Lexecon*, found that the methodology used for the Government's impact assessment was biased towards the insurance industry. We disagree that increased profits for the insurance industry should be considered as a wider public benefit, whilst at the same time losses to other stakeholders, such as solicitors and medical reporting organisations are not included⁶.

47. Therefore, when these savings are considered in relation to the losses to claimants arising from the proposed reductions in compensation, the net financial benefits to

⁴ <https://www.apil.org.uk/files/pdf/ConsultationDocuments/3345.pdf>.

⁵ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/government-consultation-on-soft-tissue-injury-claims/oral/46873.pdf>

⁶ <https://www.lawsociety.org.uk/news/press-releases/insurers-will-be-the-winners-and-consumers-the-losers-in-personal-injury-reforms-economic-study-shows/>.

the public as consumers and taxpayers are at best minimal or even outweighed by the costs.

Concerns on access to justice

48. The provisions included in Part 5 of the Bill, as well as the forthcoming measures to increase the small claims limit, will have a wider impact on the justice system. Particularly, these provisions may lead to:
49. An increase in litigants in person. It is reasonable to expect that an increase in the small claims limit would lead to an increase of litigants in person, placing an additional burden on court resources.
50. More pressure on the courts. As fewer claimants will instruct solicitors as a result of the proposals, it is likely that the courts and defendants will need to put additional resources into dealing with claims with poor or no merit. Solicitors have a valuable role to play in filtering out spurious, unmeritorious claims. As most personal injury claims are conducted on a 'no win, no fee' basis, solicitors have no interest in taking on weak claims.
51. Poor standards and advice. There is also likelihood that CMCs and 'professional' McKenzie friends would increase their share of the market. Unlike solicitors, McKenzie friends are not required to be regulated or insured, and they are not required to have any legal qualifications. CMCs are similarly subject to minimal regulation. We believe that they do not offer the right professional standards and protection that consumers need.

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