

Centre for Justice Innovation response to Ministry of Justice “Transforming our Justice System” consultation paper

Summary

In principle, we welcome the introduction of technology to modernise court processes and make them more accessible. We agree with Lord Justice Ryder that the challenge is to use technology that “strengthens rather than dilutes the rule of law and which enhances the citizen’s access to justice.” In that spirit, **we believe that the proposed online conviction process must have additional safeguards before it is implemented.**

First, we believe that **the introduction of the online conviction and statutory fixed fine process must be subject to independent judicial scrutiny.** This is vital to guarantee public confidence in it and the anticipated expansion of online systems in court more broadly. This scrutiny could be similar to that already provided in out of court disposals, where magistrates’ panels scrutinise case samples.

Second, it **must be fair to defendants who do not and/or cannot engage with the online service.** They must be able to enter a guilty plea at their first physical hearing and still be entitled to full credit for an early guilty plea.

Third, **the system must feel fair and defendants must be given a clear understanding of the process.** The system and accompanying online guidance needs to be written in plain English and the consequences – both direct and indirect (for example, on employment) – of a guilty plea must be should be explained clearly before a plea is entered.

Four, **the assisted digital support that is suggested in the consultation misses a vital opportunity to spread high quality legal expertise and advice more widely than ever before through better use of technology.** Rather than making the court process cheaper through technology, as is implied in this consultation, we should be *increasing* access to justice and ensuring that the innovation works for everyone. Therefore, we argue that the online support channels which will form part of the conviction and statutory fixed fine process should encompass the provision of basic legal information for all defendants, using combinations of artificial intelligence and human advice, and not just the provision of digital assistance in navigating the use of the online system, as is proposed. In addition, defendants using the online system should also be able to access legal information through other offline channels, including face to face. Both online and offline legal advice and support models must be independent and seen to be independent of HMCTS.

We also **welcome the continued commitment to problem-solving criminal and family courts in the consultation,** which seek to address many of the factors that lead to people coming back to our courts time and time again. We would, however, note that while problem-solving is being explored in a number of sites in England and Wales, without a co-ordinated effort to document and evaluate those projects, they will not represent a meaningful trial of the approach. Our recent report *Problem-solving courts: a delivery plan* sets out an affordable, practical and sustainable plan for developing a suite of problem-solving pilots, which may be of interest to ministers and officials considering this issue.

Introduction

1. The Centre for Justice Innovation is a research and development charity which works to build a British justice system which reduces crime and in which all of our people can place their trust. One of our main areas of work is on court reform,¹ where we have argued for a court system which embraces the evidence of procedural fairness and problem-solving. We have written our evidence with that body of knowledge in mind.

The proposed online conviction and statutory fixed fine system

2. In principle, the Centre for Justice Innovation welcomes the introduction of technology to modernise the court process and make it more accessible. We agree with Lord Justice Ryder that the challenge is to use technology that “strengthens rather than dilutes the rule of law and which enhances the citizen’s access to justice.”²
3. In that spirit, we believe that the proposed online conviction process must have additional safeguards before it is implemented, namely that: (i) it is subject to independent judicial scrutiny; (ii) it is fair, and does not penalise the digitally excluded; (iii) it feels fair by giving people a clear understanding of the process; (iv) its introduction is used as an opportunity to improve access to justice more broadly; (v) it provides an opportunity to re-think how low-level offences are penalised more generally.

Independent judicial scrutiny

4. Without necessarily having access to legal advice, as proposed in this consultation, defendants in online conviction cases will find it even more difficult to challenge charging and sentencing decisions. We believe that there needs to be a system of scrutiny of online convictions in order to guard against the misapplication of the process or miscarriage of justice. Justice “must be seen to be done.”³
5. We therefore argue for a national system the scrutiny of online convictions. It could draw from innovations which many local areas have made in the scrutiny of out-of-court disposals, where a sample of disposals are reviewed by panels of magistrates to ensure that powers are being used appropriately. Indeed, not having this process would be perverse— cases that are not serious enough to go to court and which are handled summarily out of court would be subject to scrutiny while cases serious enough to go to court would not be.
6. In our view, only independent, judicial scrutiny is able to help build public confidence in the online conviction system. Any administrative or executive scrutiny, no matter how honestly and fairly administered, is liable to be perceived as biased on behalf of the state. We believe that this independent judicial scrutiny should publish annual findings from across the country, to increase the transparency of the system.

No penalties for opting for a physical court hearing

7. As the consultation paper makes clear, vulnerable defendants may experience obstacles in accessing an online system. It must be fair to defendants who do not and/or cannot engage with the online service. Therefore, we would strongly suggest that defendants who do not engage with the online service and enter a guilty plea at their first physical hearing should be entitled to full credit for an early guilty plea. Nor should any incentive be offered to defendants to use the online system, beyond the additional convenience.

Ensuring that the online conviction system is procedurally fair

8. Research has demonstrated that when people feel fairly treated by the justice system, they are more likely to cooperate with it, more likely to comply with court orders and, ultimately, more likely to obey the law in future.⁴ This procedural fairness research demonstrates that people's perceptions of fairness are less influenced by the actual decisions themselves, such as charges, verdicts and sentences and most influenced by how those decisions are reached and if it has felt a fair and easy-to-understand process.
9. Clear understanding is a key underpinning of procedural fairness. To achieve that in the online conviction and statutory fixed fine system, the system and accompanying online guidance needs to be written in plain English and legal terms should be explained clearly. Moreover, the online system must clearly set out the process to be followed, and the consequences – both direct and indirect – of a guilty plea. This needs to include matters such as the consequences of a criminal record, including information on how criminal records can affect employability, immigration status and others collateral consequences.
10. In order to give people more of a voice online, we would suggest that the online portals for the online conviction system and the single justice process should be incorporated into a single, seamless system, which offers all defendants the opportunity to offer mitigating information and / or information about means without facing additional administrative burdens.

A broader programme to improve access to justice

11. While appearing at court can be disproportionate for individuals charged with some of the least serious offences, it can also offer opportunities for defendants to access various forms of support and advice. Our research in magistrates' courts has demonstrated that defendants coming to court often access various forms of advice around the law and court procedures, outside of formal legal representation. Almost all defendants attending court are able to access a consultation with a duty solicitor, including, in our observations, many defendants who are being charged with a non-imprisonable offence.
12. This free legal advice, available physically at court, can be particularly important to unrepresented defendants, who represent a growing issue in our courts.⁵ In our own research, we have seen that unrepresented defendants are often offered informal guidance on court procedures by courts staff such as ushers, list callers and legal advisors and that judges and magistrates endeavour to ensure that unrepresented defendants are able to understand the court process and have an opportunity to ask questions. In addition to the legal advice that is available physically in court, defendants attending some courts can also receive other services intended to reduce the likelihood of reoffending such as NHS England-funded liaison and diversion services and community advice and support services⁶.
13. As we move low-level criminal cases from physical court appearances to the proposed online process, we believe that we must not only replicate the formal processes and procedures of the court case but also replicate and improve the range and quality of advice that can be present when a defendant is physically at court. However, we do not believe that the assisted digital support that is suggested in the consultation is close to being adequate in replicating the existing support and advice available at court. What is envisaged seems to be support that helps users simply to navigate the system.
14. Instead, the online digital support should be much broader. It should encompass and take advantage of new technology in order to provide basic legal advice to more people than has previously been possible physically at court. We are already seeing the private sector using simple, decision-tree based artificial intelligence (AI) to advise citizens in getting mortgages, for example,⁷ and seeing the range of tasks artificial intelligence is solving getting ever more complex, such as in helping corporate clients navigate financial regulations⁸ and even

predicting court decisions.⁹ HMCTS should invest in the development of supportive AI that can provide legal advice to users. This online, AI legal advice could support or supplement remotely accessed human legal advice, at least in the immediate future.

15. In addition to online legal advice, we also recognise that the 18% of the UK population who are digitally excluded¹⁰ are likely to be over-represented in the population of defendants. We therefore suggest that a comprehensive, independent offline advice channel must be included alongside legal support available online. Our discussions with practitioners who work with this group suggest that this offline support should include the ability to access telephone advice and face-to-face, via a drop-in model, in a convenient location.¹¹
16. In addition, we argue that both online and offline support should share similar characteristics. First, it must be independent of HMCTS. Clients accessing legal advice and support will be advised on whether it is in their best interests to accept online conviction, and, implicitly, whether to enter an early guilty plea. For this reason, it is important that it is, and is seen to be, independent of HMCTS. We suggest therefore that it could be, for example, provided by trusted civil society organisations with experience of advice giving such as Citizen's Advice, independent advice providers or law centres.
17. Second, online and offline legal advice and support should provide support beyond legal advice. The online conviction process is likely to include a high number of defendants with vulnerabilities including mental illness, addiction and learning difficulties. For this reason, it should be provided by, or in partnership with, an established advice provider with strong local links and experience of working with vulnerable groups. In order to reduce reoffending, the provision of assisted digital support should also offer referral to support services for vulnerable clients, as is already provided by those courts with liaison and diversion services and community advice and support services.
18. In short, if we focus solely on making the court process cheaper through technology, as is implied in this consultation document, without *increasing* access to justice and ensuring that the 'innovation works for everyone, we will have missed a once in a generation opportunity to ensure that a new innovation is made to work for everyone.

The status of online convictions

18. The introduction of the online conviction system offers an opportunity for a rethink of the status of the lowest tier of criminal convictions in our justice system. Currently, prosecution for these relatively minor offenses means a criminal record that can be visible to employers for up to 11 years, and can have further knock-on effects on immigration status. Moving these offences to online systems heavily implies that these offences are now being seen as less important and less serious than offences which result in a court case.
19. Therefore, we believe there is a real need to consider whether those offences processed online should be treated more similarly to out-of-court disposals, such as cautions, which spend much less time on the disclosable criminal record and have less severe collateral consequences.
20. Moreover, we believe this could lead to a more general re-appraisal of the consequences of guilty pleas in both the online system and out of court disposals, to examine whether the current consequences are proportionate.

Problem-solving courts

21. We welcome the ambition expressed in the vision paper to explore the opportunities for problem-solving methods and the recognition of the promising problem-solving practice that

is already in place in a number of locations, including St Albans Crown Court, South Sefton Magistrates' Court and Manchester and Salford Magistrates court. Evidence suggests that, when used appropriately, problem-solving courts which are based in existing court buildings can reduce reoffending and save money for the taxpayer.¹²

22. However, we would note that while the current set of problem-solving projects are promising, they do not constitute a trial of the approach. Their ability to adopt best practice is constrained by a number of factors including limited powers to review community orders and respond to breach. They also lack any formal outcomes evaluation programme. Whilst these projects are promising and should be supported, as currently constituted they will not produce evidence which enables us to assess the effectiveness of problem-solving courts in England and Wales.
23. In a recent paper,¹³ we set out a delivery plan for delivering a range of pilot problem-solving courts which can provide a robust test of the value of the approach in England and Wales. The plan suggested that the delivery of problem-solving courts should be built around five principles:
 - a) New problem-solving courts should be built around a combination of judicial leadership with local service innovation and should find the resources for running costs from local sources rather than central government
 - b) Practice in local courts should be based on existing evidence about what works
 - c) New pilot sites should develop consistent approaches which can be replicated elsewhere
 - d) Sites will require practice development support to help them understand the evidence base, manage stakeholders, implement consistent approaches and institute evaluation
 - e) New problem-solving courts should align with concurrent technological change including the use of video conferencing and the common platform for case management.
24. We believe that, by following these principles, the Ministry of Justice can deliver a sustainable, practical and effective set of problem-solving courts.

ENDNOTES

¹ For an overview of our Better Courts programme, see Phil Bowen and Stephen Whitehead (2015) *Better Courts: A Blueprint for Innovation*. (London: Centre for Justice Innovation). Available online at <http://www.justiceinnovation.org/better-courts/publications/better-courts-blueprint-innovation>

² The Rt. Hon. Sir Ernest Ryder, Senior President of Tribunals, *Raising the Bar: Innovation and global opportunity for a forward thinking profession*. Keynote Address at the Family Law Conference, October 2016

³ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259

⁴ See Emily Gold LaGratta and Phil Bowen (2014) *To be fair: procedural fairness in courts* (London: Centre for Justice Innovation / Criminal Justice Alliance). Available online at <http://justiceinnovation.org/portfolio/to-be-fair-procedural-fairness-in-courts/>

⁵ The proportion of defendants dealt with in the Crown Court who are known to have had legal representation has decreased by 2 percentage points between 2010 and 2015. The proportion of defendants represented at first hearing by an advocate only, with no solicitor representation, has increased since 2010. Of those in 2015, 18% (16,500) did not have a solicitor, compared to 2% (2,300) in 2010. While there is no public data on legal representation at Magistrates Courts, a study on unrepresented defendants in 2016 found that the magistrates it surveyed “were overwhelmingly of the view that the problem of the lack of representation had got worse over time in the magistrates courts.” See Penelope Gibbs (2016), *Justice denied? The experience of unrepresented defendants in the criminal courts* (London: Transform Justice) Available online at http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf

⁶ For more information on community advice and support services see Stephen Whitehead (2015) *Better Courts Case-Study: Plymouth Community Advice and Support Service* (London, Centre for Justice Innovation). Available online at <http://justiceinnovation.org/portfolio/advice-and-support-in-practice/>

⁷ Sarah Davidson (2016) *Artificial intelligence comes to mortgages but would YOU feel comfortable taking financial advice from a machine?* This Is Money. Available online at <http://www.thisismoney.co.uk/money/mortgageshome/article-3765065/Artificial-intelligence-comes-mortgages-feel-comfortable-machine-giving-financial-advice.html#ixzz4O6GbXLSP>

⁸ Economist (2016) *Watson and financial regulation: It knows their methods*. Available online at: <http://www.economist.com/news/finance-and-economics/21709040-new-banking-rules-baffle-humans-can-machines-do-better-it-knows-their-methods>

⁹ Sarah Knapston (2016) *Artificially intelligent ‘judge’ developed which can predict court verdicts with 79 per cent accuracy*. Telegraph. Available online at: <http://www.telegraph.co.uk/science/2016/10/23/artificially-intelligent-judge-developed-which-can-predict-court/>

¹⁰ Government Digital Strategy (2013)

¹¹ Drawn from interviews with a range of advice practitioners which form part of a research project on the provision of advice for offenders to be published by the Centre for Justice Innovation in late 2016.

¹² Phil Bowen and Stephen Whitehead (2016) *Problem-solving courts: an evidence review* (London: Centre for Justice Innovation) available online at: <http://justiceinnovation.org/portfolio/problem-solving-courts-an-evidence-review/>

¹³ Phil Bowen and Stephen Whitehead (2016) *Problem-solving courts: a delivery plan* (London: Centre for Justice Innovation). Available online at: <http://justiceinnovation.org/portfolio/problem-solving-courts-delivery-plan/>