

Court and tribunal reforms inquiry: written evidence submitted by centre for justice innovation

Summary

- The Centre for Justice Innovation seeks to build a justice system which all of its citizens believe is fair and effective. Our mission is to champion practice innovation and evidence-led policy reform in the UK's justice systems.
- Our work with service users and practitioners, and the wider evidence base, clearly indicates that a trip to a criminal court in England and Wales often does not feel fair for the people who go through it. But, in our view, Her Majesty's Court and Tribunal Service (HMCTS) reforms can not only be judged on their potential impact on the people involved in court cases, whether members of the public or court professionals, but also on their impact on the public's perceptions of the legitimacy of their criminal court system.
- In our report, *Just Technology*, published in 2018, we explored public attitudes to online court processes and virtual hearings as substitutes for physical hearings in court for criminal cases. We found:
 - **There is public scepticism about the use of virtual hearings in criminal courts for most offences and also for trials:** 74% of those polled reject the use of virtual hearings for murder cases; 64% oppose it for use in rape cases; and 58% oppose it for use in burglary cases. There is a majority against its use in trials (67% opposed vs 17% in favour) while there are majorities for its use in sentencing hearings (44% v 40%) and remand hearings (46% v 36%).
 - **There is majority public support for the use of an online criminal court process for low-level criminal matters resulting in a fine:** 66% of the public support the idea, while only 20% oppose it.
- We found that a majority of the public expect the justice system to all but the most minor offences seriously, which, in their view, requires a physical court hearings. This suggests there is an expectation from the public and a duty on the state to take many criminal matters so seriously that the formality and ritual of a physical court appearance is necessary to retain the public's confidence in the legitimacy of the criminal court system.

We recommend that:

- The Ministry of Justice should introduce primary legislation, which should introduce a presumption toward physical court hearings for all trials, and for all hearings in cases where the offences are triable either way or indictable. Parties should be required to make representations to the court about if they believe why a fully virtual hearing would be more suitable in particular cases or if a witness should appear virtually in an otherwise physical hearing.
- In primary legislation, there should be a clearly enshrined right for to guarantee that no court participant should be compelled or incentivised to opt for a virtual hearing if they wish to attend court physically.

Court and tribunal reforms inquiry

Question 1: What are the effects on access to justice of court and tribunal centre closures, including the likely impact of closures that have not yet been implemented; and of reductions in HMCTS staffing under the reform programme? For users, how far can online processes and video hearings be a sufficient substitute for access to court and tribunal buildings?

The 'structured mayhem' of the existing criminal court process

1. Our research and the wider evidence base clearly indicates that a trip to a criminal court in England and Wales often does not feel fair to people who go through it. In 2017, our research highlighted that young adult court users, who often have variable brain development and maturity, find the court process particularly confusing and one in which they have little agency or voice. ¹ This research fits into a broader evidence base which shows that criminal court users with specific vulnerabilities, ² such as mental health issues, ³ find the court process bewildering. The Institute for Criminal Policy Research described users' experience of the criminal court as 'structured mayhem', finding that "delays, adjournments and scheduling problems often cause frustration, anxiety and inconvenience to victims, witnesses and defendants."⁴
2. We have, in principle, been supportive of the Ministry of Justice's attempts to find new ways to widen access to justice to our courts and to make the court process, easier and fairer for court users across the court system. We recognise that many other jurisdictions are exploring and investing in ways to use online courts processes that may avoid unnecessary hearings, including even for low-level criminal matters where there is a guilty plea. We also recognise that many other jurisdictions are using, to varying levels of intensity, audio/video hearings (so called 'virtual hearings') to avoid unnecessary trips to court and provide more flexible ways of working. ⁵
3. Nonetheless, in listening to and exploring the potential for online court processes and virtual hearings, we have grown concerned about their applicability in criminal courts, especially for criminal court users with specific vulnerabilities. However, we are aware that many partners are writing or have written to the Committee with these concerns and we will not seek to duplicate them here.

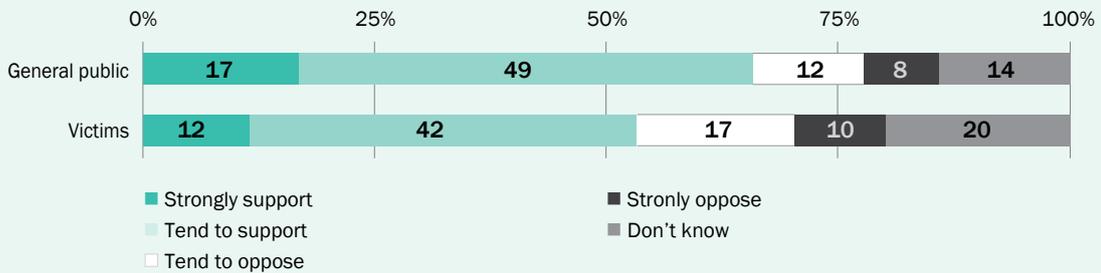
The importance of public perceptions of legitimacy

4. Aside from the concerns outline above, we strongly argue that the HMCTS reforms must also be judged on their likely impact on the public's perception of the legitimacy of the criminal court system. How will that perception change if online processes and video hearings are substituted for physical hearings? Does logging on, pleading guilty and paying your fine meet the public's expectation of what should happen when someone is guilty of a crime? Do virtual hearings fit the public's expectation of the criminal court system and if so for what offences and what types of court hearing?
5. To answer those questions, we explored public attitudes to both online and virtual courts, via two focus groups and a YouGov public survey in our report, *Just Technology: emergent technologies and the justice system... and what the public thinks about it*, published in 2018. ⁶
6. On online courts, people in our focus groups thought that pleading, being sentenced and paying fines online for minor criminal matters was a good idea. ("There are some things that if you can save time doing it, I would sooner do it that way", woman, London group; "If it's fines, it's understandable, I think that's better online", man, London group.) The survey (figure 1) found that 66% of the public support the move, while only 20% oppose it. The picture for victims is slightly different, with 54% supporting it, and a higher proportion opposing it (27%).

Figure 1: online court cases

Survey respondents were asked if they supported or opposed introducing online court cases.

Question 2: The courts are introducing technology where for some minor crimes people could plead guilty online and pay a fine without having to go to court. Do you support or oppose introducing this change? By public and self-identified victims of crime. (Total:1658 GB Adults 7/8 March 2018)

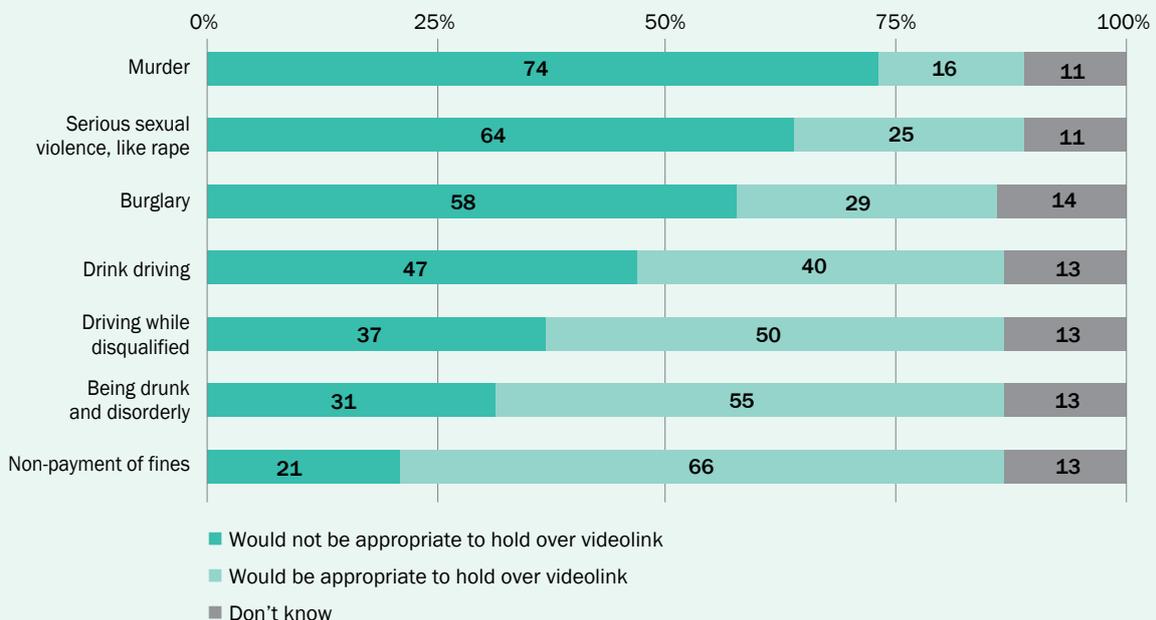


- In both the focus groups and the survey, a majority of the public does not feel comfortable with virtual hearings in criminal court. The focus groups felt people must attend court in person for most offences. This, they argued, was vital for the legitimacy of the court system –the accused should feel the formality of the occasion. (“I think [offenders] should face a judge”, woman, London group).
- This was reflected in the survey (see question 2) which clearly shows that the seriousness of the offence is important in determining whether video technology should be used. A majority reject its use for offences all the serious offences we included. Indeed, we only found majority support for those offences that are triable only summarily.

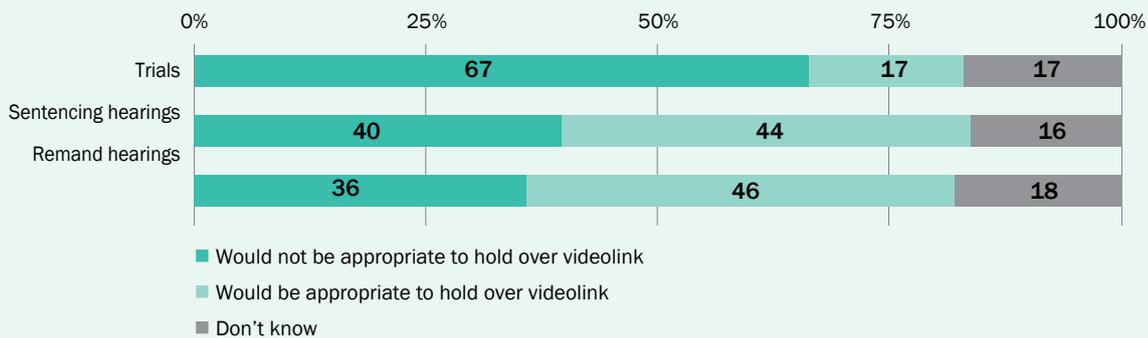
Figure 2: virtual hearings

Survey respondents were asked if they supported or opposed introducing video technology in court in order to conduct virtual hearings. First, respondents were asked whether they thought video technology was or was not appropriate for use in criminal court cases for particular types of offences. Second, respondents were asked whether they thought video technology was or was not appropriate for use in particular types of criminal court hearings (trials, sentencing hearings and bail/remand hearings).

Question 3: Do you think it would or would not be appropriate to hear the following types of court cases via video links? (Total:1658 GB Adults 7/8 March 2018)



Question 4: Do you think it would or would not be appropriate to hear the following types of court hearings via video links? (Total:1658 GB Adults 7/8 March 2018)



9. When considering the types of hearing in which the public may consider a virtual hearing acceptable (question 3), there is a large majority against its use in trials (67% opposed) while there are majorities (albeit slim) for its use in sentencing (44% in favour) and remand hearings (46% in favour).
10. Taking these findings together, overall we found that once matters reach a certain level of severity, a majority of the public expect the courts to provide a serious venue in which these matters are heard. For a majority of the public, that means physical court hearings. The focus groups, for example, gave us the strong impression that the trial was seen as the most serious hearing and that it was vital that the seriousness and solemnity of such a performative event was conducted in one geographic place, with all the various rituals attached (even when members of the focus groups poked fun at some of these rituals themselves).
11. Our work suggests that there is an expectation from the public and a duty on the state to take some matters so seriously that the formality and ritual of a physical court appearance is necessary to retain the public's confidence in the legitimacy of the criminal court system. This lack of public support is a challenge to the wider application of the technology as currently envisaged by HMCTS.
12. A study into the use of video hearings in the USA shows a highly variable pattern in how video technology is being deployed. For example, the law in Indiana provides a very general rule for court appearances by video conference and does not limit the video conferencing to a particular hearing or appearance type (as long as the certain requirements are met). Vermont, on the other hand, has implemented rules which specifically prevent the use of video conferencing in hearings such as criminal trials and violation of probation hearings.⁷ It is worth remembering that Lord Leveson's review of criminal courts stated that "that trials and sentencing hearings – certainly as regards the latter when imprisonment is a possibility – will continue to take place conventionally in a courtroom with all the participants gathered together."⁸ Clearly, many see that a balance needs to be struck and, at present, it is not clear HMCTS's plans are successfully balancing these competing priorities.

Question 4: Have the Ministry of Justice and HMCTS consulted effectively on the reforms, and maintained sufficient communication?

13. We have been pleased to feed in views into the criminal court reform plans via the Defendant Voice Engagement Panel. However, as our response makes clear, we strongly feel there has not been enough public consultation and engagement on the proposed reforms. Moreover, given the fall of the Prisons and Courts Bill in 2017, we strongly believe that these proposals have not had the necessary parliamentary scrutiny, especially given the need for important modifications to the existing plans that we believe need to be enshrined in primary legislation (see below).

Recommendations

14. We have a number of recommendations. First, we recommend the Government ought to introduce primary legislation that introduces a presumption toward physical court hearings for all trials, and for all hearings in cases where the offence are triable either way or indictable. We expect in cases this serious the public would expect these hearings to be in a physical courtroom. A strong presumption toward a physical court hearing in these cases for contested and sentencing hearings underlines the seriousness with which the state takes both the liberty of the individual and the gravity of the offence (as well as providing all the benefits of face-to-face communication).

15. The second recommendation is that no court participant should be compelled to opt for a virtual hearing if they wish to attend court physically— everyone must have the right to their day in court. If the matters are so important as to require a criminal court proceeding, then, by extension, we must guarantee everyone the right to hear the case in person. This principle has been stated and re-stated by senior judges but this needs to be made explicit within any new legislation. Moreover, making that right a reality that participants can freely choose requires them to be made aware of that right and not pressured or incentivised into taking the digital route.

16. These changes are simple and well within the power of Government to legislate. Striking a balance between efficiency and justice is always tricky and we can see that, over time, increasing the amount of technology in court could have benefits. But the legitimacy of the system, in the eyes of the court user and the public, is vital. It is because we take the performative role of courts so seriously, because we see that they play a part in demonstrating to the public that the justice system is a serious place, that we urge incremental innovation. The legitimacy of the justice system is too important to undermine.

Endnotes

1. Centre for Justice Innovation. (2018). *The voice of young adults*. Accessible at: http://justiceinnovation.org/wp-content/uploads/2018/11/CJI_YOUNG-VOICES_DIGITAL.pdf and Centre for Justice Innovation. (2018). *A fairer way: procedural fairness for young adults at court*. Accessible at: <http://justiceinnovation.org/portfolio/fairer-way-procedural-fairness-young-adults-court/>
2. Jacobson & Talbot. (2009). *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Prison Reform Trust. Accessible at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/vulnerable%20defendants%20in%20the%20criminal%20courts.pdf>
3. McConnell & Talbot. (2013). *Mental health and learning disabilities in the criminal courts Information for magistrates, district judges and court staff*. Prison Reform Trust. Accessible at: http://www.mhldcc.org.uk/media/493/rmiprt_mhldcc_sept2013.pdf
4. Jacobson, Hunter & Kirby. (2015). *Inside Crown Court: Personal experiences and questions of legitimacy*. Bristol: Policy Press.
5. See: Bridenback. (2016). *Study of State Trial Courts: Use of Remote Technology. Final Report*. National Association for Presiding Judges and Court Executive Officers. Accessible at: <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>; European Commission for the Efficiency of Justice. (2016). *Thematic report: Use of information technology in European courts*. European judicial systems. Efficiency and quality of justice. CEPEJ STUDIES No. 24. Accessible at: <https://www.coe.int/T/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2024%20-%20IT%20report%20EN%20web.pdf>; Ministry of Justice, Republic of Ireland. (2005). *Report: The Committee on Videoconferencing*. Accessible at: <http://www.justice.ie/en/JELR/VIDEOen.pdf/Files/VIDEOen.pdf>;
6. Bowen & Gibbs. (2018). *Just Technology: Emergent Technologies And The Justice System... And What The Public Thinks About It*. Centre for Justice Innovation. Accessible at: <http://justiceinnovation.org/portfolio/just-technology-emergent-technologies-justice-system-public-thinks/>
7. The study concludes that across the individual states “certain proceedings in a criminal case have a wider acceptance of remote technology, including first appearance and arraignment, while the constitutional considerations in criminal evidentiary hearings, trials, and sentencings make the use of remote technology without consent of the defendant less likely.” See: Bridenback. (2016). *Study of State Trial Courts: Use of Remote Technology. Final Report*. National Association for Presiding Judges and Court Executive Officers. Accessible at: <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>;
8. Leveson. (2015). *Review of Efficiency in Criminal Proceedings*. Judiciary of England and Wales. Accessible at: <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

About the Centre for Justice Innovation

The Centre for Justice Innovation seek to build a justice system which all of its citizens believe is fair and effective. We champion practice innovation and evidence-led policy reform in the UK’s justice systems. We are a registered UK charity.

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