Written evidence submitted by Transform Justice to the Public Bill Committee (JRCB09)

Judicial Review and Courts Bill

Summary of concerns

Transform Justice has significant concerns about the increased use of online plea processes, the expansion of online criminal courts, and the elimination of local justice areas as put forward in the Judicial Review and Courts Bill. In summary:

- Some of the proposals have never been subject to public consultation and none are based on research evidence or successful piloting.
- Introducing online pleas will drive a reduction in the proportion of defendants with legal representation, worsening outcomes for unrepresented defendants who will not understand the implications of indicating a plea or pleading online.
- Efficiencies in the court process will be reduced by online pleas, because it removes the chance to identify wrong charges before they get to court, and makes it more difficult for defence lawyers to obtain disclosure of evidence.
- Online pleas compromise open justice principles by removing the opportunity for the plea hearing to be witnessed/observed.
- Children are prone to pleading guilty when innocent or when they have a viable defence, making online plea processes particularly inappropriate for children.
- The introduction of online pleas and the expansion of online conviction processes risk comprising the rights of defendants to a "*fair and public hearing*"[1]. In theory defendants can choose to waive this right, but it is not clear that they have the information or legal understanding to make an informed choice in this regard.
- Evidence from the current single justice procedure suggests that few defendants will effectively participate in the online criminal court.
- Disabled defendants are likely to suffer discrimination from increased use of online plea and automatic online conviction processes since there is no screening/identification process and no reasonable adjustments for those who don't understand what to do with the online plea form.
- The online conviction process discriminates against those on lower incomes.
- Increased use of online convictions raises concerns about security, open justice and prosecutorial abuse of the process.
- The elimination of local justice areas will remove any assurance of justice for the local community *by* members of the local community and end the self-governance of the magistracy.

[1] Art 6 Human Rights Act 1998 https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/5

Proposed amendments

The likely significant detrimental impact of these proposals on effective participation in justice mean we support the amendments put forward by Fair Trials and/or JUSTIE to delete clauses 3, 4, 6, 8, and 12 from the bill.

If removal of Clauses 3 and 6 is not possible, we propose/support the following amendments.

Clause 3 (expansion of automatic online conviction option):

- Requirement for a review of Clause 3 before it is introduced along with an equality impact assessment and assessment of impact on participation (put forward by JUSTICE)
- Legal advice/representation as a pre-requisite for online convictions (put forward by Fair Trials)
- Safeguards for defendants with additional needs by requiring the prosecutor to assess defendant suitability for the automatic online conviction option (put forward by JUSTICE and Fair Trials)
- Information provided to the accused person so they understand the consequences of agreeing to the automatic online conviction option (put forward by Fair Trials)
- Prevention of the use of automatic online convictions for recordable offences (put forward by JUSTICE)

Clause 6 (increased use of written/online pleas and indication of pleas):

- Requirement that defendants must be legally represented in order to indicate a plea in writing (proposed by JUSTICE and Fair Trials)
- Safeguards for defendants with additional needs by requiring the prosecutor to assess defendant suitability for the online plea process (put forward by Fair Trials)
- Requirement for prosecutors to obtain proof of receipt of information regarding written plea (see amendment on page 7)
- Pilot the expansion of written pleas in two police force areas before introducing the changes (see amendment on page 8)

New clause

- Require proof of receipt of information regarding single justice procedure cases (see full amendment page 9)

We also propose the following amendment to clause 42 (abolition of local justice areas):

- Consult on the abolition of local justice areas before any changes are made (see amendment on page 16)

More detail regarding the provisions and our concerns is provided below.

Background

In 2016 the government launched its digital court reform programme. Much of this has been implemented without the enactment of new legislation or public consultation. However, not all government ambitions can be fulfilled without legislation. In February 2017 the government tabled a bill – the Prisons and Court bill – to introduce new legislation required by the digital court reform programme. The Prisons and Courts Bill fell due to the election in May 2017. Parliament was not asked to reconsider the digital court reform proposals until March 2020 when the Coronavirus Act 2020 introduced an expansion in the use of audio and video links. Some elements of the original Prisons and Courts Bill were still however "unfinished business". The Judicial Review and Courts Bill (tabled July 2021) reintroduces almost word for word the same digital court reforms originally proposed in the Prisons and Courts Bill.

Absence of research and consultation for the proposals

Most of the proposals have never been subject to public consultation and are not based on research evidence or successful piloting.

The government contends that the measures will "*make our criminal courts more easily accessible to users and provide greater flexibility for the effective deployment of court resources; saving court time, reducing delays, delivering swifter justice, and supporting court recovery*", but there is little data or modelling to support this claim.

The government cites reports by Lord Justice Auld (2001 Review of the Criminal Courts) and Lord Leveson (2015 Review of Efficiency in Criminal Proceedings) as inspiring the proposals. Both these reports were written by judges, rather than the Executive or Parliament. Neither report was underpinned by new research as Lord Leveson himself pointed out in his introduction *"there has been no time or little opportunity for evidence gathering".* Also *"There is no quantitative analysis of the effect of the changes which are proposed. Within the constraints of the Review, it has not been possible to calculate how much will be saved by any participant in the criminal justice system by any single change, or combination of changes, to the way in which criminal cases are conducted"*. No significant relevant research or evidence gathering has been conducted since 2015.

Lords Auld and Leveson both supported the unified criminal court (the elimination of local justice areas) but neither expressed support for online pleas or online convictions.

The documents produced for the bill (fact sheet, explanatory notes and impact assessments) continually refer to online processes as an "option" for defendants rather than the default. But we are sceptical that many defendants who receive a postal charge understand from the letter that they have a genuine choice to opt for a physical court hearing rather than responding online or by post. (Indeed, the introductory page does not mention this option[2]). Even were defendants to understand they have a choice as to whether to go to court, it

[2] Documents obtained via FOI by www.appeal.org.uk, available to view at https://www.transformjustice.org.uk/wp-content/uploads/2021/08/Single-Justice-Procedure-Notice-TfL-andTV-Licensing.pdf

requires a sophisticated legal understanding to weigh up the benefits of going to court versus having a case dealt with "on the papers". Before proceeding with these proposals, we urge the government to conduct and publish research on defendants' understanding of the concept of viable defence and of mitigation, and of the factors to be taken into account in waiving the right to a "fair and public hearing".

The introduction of online pleas (Clauses 6 and 8)

The proposal to introduce an online plea (so that those who currently plead guilty/not guilty in open court can do so online instead) was first made in the 2017 Prisons and Courts Bill. It had not been subject to any public consultation and still hasn't. Our concerns centre on the pre-conditions of online pleas and on any proposal that unrepresented defendants might be encouraged and permitted to enter pleas online. Concerns articulated in our previous briefing for the 2017 Prison and Courts Bill[3] remain.

The assumption behind the proposal is that the plea hearing in the magistrates' or Crown Court is a purely administrative hearing, that people know whether they are guilty or not, and that no debate or discussion is necessary. There is also an assumption that the entering of a plea and any discussion in court concerning the plea does not need to be observed either by public observers, the media or witnesses of the crime (including the alleged victim).

The bill proposes that defendants should be able to plead/indicate a plea online to any crime, including murder and rape. The bill also proposes that those who plead guilty to any non-imprisonable summary offence should also have the "option" of having their conviction confirmed and sentence decided in their absence. "Where a defendant indicates an intention to plead guilty in writing, it will become binding (as if they had pleaded guilty at court) if the defendant also consents in writing that the magistrates' court may proceed to try, convict, and sentence them at a hearing in their absence."[4]

Concerns about the increased use of online pleas

A driver to lack of legal representation and worse outcomes

Providing the means to, and encouraging, defendants to plead online will lead to more defendants representing themselves (either just at that stage or throughout the process), since the process of "doing it yourself" may appear easy. The criminal justice system is complex, and its sanctions are life changing.

Contrary to the government's narrative, research suggests that the entering of plea is a complex decision which is, or should be, subject to advocacy in the courtroom. Transform Justice's research on unrepresented defendants in the criminal courts[5], suggested that entering a plea was one of the times where those without a lawyer were most

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[3] https://www.transformjustice.org.uk/wp-content/uploads/2017/04/Transform-Justice-Briefing-on-the-Prisons-and-Courts-Bill5-.pdf

[4] Para 15 p 6 https://publications.parliament.uk/pa/bills/cbill/58-02/0152/CriminalmeasuresImpactAssessmentsigned.pdf

[5] http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf

disadvantaged. Unrepresented defendants did not understand when they had a viable defence and should plead not guilty, but also pleaded not guilty when the evidence against them was overwhelming, thus losing credit for an early guilty plea if convicted.

The bill's explanatory notes and fact sheet[6] suggest that online pleas should only be entered if the defendant has legal advice. The impact assessment suggests that only those accused of "serious" offences will be prevented from entering a plea online without legal advice.[7] The legislation itself makes no mention of the need for legal advice when pleas are indicated online. The government says that the safeguard will be provided outside legislation – through mandating that online pleas for either way and indictable only offences be entered using the common platform, a new courts management computer programme. However we regard this safeguard as insufficient. In addition, we would advocate that no online plea should be entered until the lawyer concerned has full disclosure from the prosecution, and an opportunity to discuss the case with representatives of the prosecution. To prevent any potential perverse incentives, and to facilitate in-person discussion between parties where necessary, there should be no financial disadvantage for defence counsel in entering a plea at a court hearing rather than online.

For any offences where the sentencing/trial would currently be in open court, we believe that defendants should not be entering a plea unrepresented.

We note that the explanatory notes and legislation refer to entering an indication of plea, rather than entering a plea, but we do not believe that this difference is more than semantic, nor provides any extra safeguards. Once the plea has been indicated, it is clear that it will be treated as if it has been entered formally (and in the Section 12 procedure is binding anyway). Small print suggesting that the plea can be changed after indication is unlikely to influence the behaviour and understanding of an unrepresented defendant.

The proposal that defendants charged with non-imprisonable summary offences should be given the "option" of a section 12 procedure and convicted and sentenced in open court in their absence is particularly inappropriate for those without representation. The bill also facilitates the use of the section 12 process for imprisonable summary offences. In this case the plea is not binding, but a defendant may enter a plea for an imprisonable offence unrepresented.

Removes opportunities to change the charge early on

Another risk in putting pleas online is that the ability to challenge the charge is eliminated or delayed. The Leveson report emphasised the problem of people being wrongly charged (either over or under charged) and of the inefficiencies this causes – particularly if a charge is downgraded on the day of trial leading to the defendant pleading guilty. Sir Brian wrote: *"any failure to charge appropriately has a considerable impact throughout the life of that*

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[6] https://publications.parliament.uk/pa/bills/cbill/58-02/0152/en/210152en.pdf
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004585/jr-courts-bill-fact-sheet-courts-short-version.pdf

[7] Paragraph 59 https://publications.parliament.uk/pa/bills/cbill/58-02/0152/CriminalmeasuresImpactAssessmentsigned.pdf

case... For example, in the first quarter of 2014, 15% of all 'cracked' trials in the Crown Court were due to guilty pleas entered to alternative new charges offered by the prosecution for the first time on the day fixed for trial. A further 4% of cracked trials were primarily due to late guilty pleas being entered to new charges, previously being rejected by the prosecution... In such cases, although there will have been room for different decisions to be made prior to the date of trial, the seed for potential waste has been sown from the outset and could have been avoided had the initial charging decision been appropriate".

If there is no hearing for, and thus discussion of, the charge, the opportunity for the defence to challenge the charge, and for the CPS to correct their charging decision at an early stage, will be lost. As implied by Lord Justice Leveson, this may lead to inappropriate allocation decisions and/or increased delay at subsequent court hearings.

Risks criminal record consequences being overlooked

The implications of pleading guilty, even for some minor offences, are significant, including a criminal record for life. Will the online system fully signal all the implications of a criminal conviction? Is it suitable for a serious charge such as murder or sexual assault? This risk is increased in the case of those "opting" for the section 12 procedure. The current notices for the single justice procedure do not mention the implications of pleading guilty to a crime, including the criminal record that might be acquired and its ramifications.

Exacerbates disclosure issues

Defence counsel currently struggles to obtain full disclosure in preparation for advising their client re plea. Defence lawyers often rely on the court hearing to prompt full disclosure from the prosecution. We are sceptical that online pleas will improve existing disclosure challenges. If the prosecution misses key dates for online disclosure, delays may increase – the opposite of the intention of the bill.

Inappropriate for children

The notes make clear that children (those under 18) will be able to make online pleas, and "opt" to be convicted and sentenced (for any non-imprisonable offence) in their absence. All children accused of crimes are vulnerable and recent evidence suggests that they are particularly susceptible to pleading guilty when they are innocent or when they have a viable defence.[8] Given the need to screen children for health and welfare concerns and the complexity behind these plea decisions, we believe that online pleas and the section 12 procedure are inappropriate for child defendants.

Compromises open justice principles

How can an online plea system maintain the principles of open justice? Currently witnesses, alleged victims, the public and the press can witness a plea being entered in open court as well as any discussion in court about the plea. Even if the government provides information about pleas entered online, the opportunity for all those involved in the case to participate in and observe an open hearing will be lost. The section 12 procedure, through facilitating the exclusion of the defendant from the court, also diminishes open justice.

[8] https://evidencebasedjustice.exeter.ac.uk/current-research-data/incentivized-admission/

Discrimination against disabled people

The majority of those charged with criminal offences are not screened for health or mental health conditions. A few are screened in police custody and at court, but only if police officers, lawyers or court staff refer them. Defendants are more likely to have health and mental health conditions than the population as a whole. So many of those who plead will have hidden or unidentified disabilities, which may affect their ability to understand and process legal concepts in the absence of reasonable adjustments. The government's fact sheet and other documentation supporting the bill suggest legal representatives "will be able to identify any vulnerabilities". Some lawyers may be able to identify some vulnerabilities if they meet a client in person. But they (like police officers) are not specialists in mental health and disability, and they cannot be relied upon to identify hidden disability. In addition, unrepresented defendants who plead online will not meet a lawyer. Many defendants may receive a postal requisition for a crime, having been interviewed unrepresented. So, unless all those who are encouraged to plead online are subject to a health screening, reasonable adjustments will not be made. Assisted Digital (the service offered by HMCTS) is inadequate for this purpose since it is only accessed by those confident enough to open the postal charge, who understand they need help, who can afford to phone HMCTS, and who know they have a right to access the Assisted Digital service.

Proposed amendments relating to Clauses 6 and 8

Require proof of receipt of information regarding written pleas (Clause 6)

Amendment

Clause 6, page 11, line 37

Insert new subsection 5

"(5) The prosecutor must obtain proof of receipt by the accused of the information outlined in subsection (3)"

Effect

This amendment would require prosecutors to obtain proof of receipt of the information relating to written pleas sent to those accused, rather than just obtain proof that the information was sent.

Explanation

Across all offences, the response rate to single justice procedure charges is very low. Less than a third of defendants plead either guilty or not guilty to the offence they are charged with. There is no research on why so few defendants respond to postal charges via the single justice procedure. Those charged may not receive the letter, may not understand the letter, or may have mental health problems or learning difficulties which prevent them from responding to the letter.

All defendants who do not return a plea under the new proposals would be convicted and receive a criminal sanction (the maximum possible fine, costs and a criminal record) in their absence. Requiring the prosecutor to obtain proof of receipt of information relating to

written pleas would help mitigate the low response rate problems seen with the single justice procedure, and increase likelihood of effective participation in the justice process.

Pilot the expansion of written pleas in two police force areas before introducing the changes (Clause 6)

Amendment

Clause 6, page 18, line 5

Insert new subsection 4

"(4) The Secretary of State must, before the changes to the written procedure for indicating plea and determining mode of trial are introduced, conduct a pilot in two police force areas to evaluate the impact of the changes on effective participation in the justice process. The evaluation should include:

(a) the proportion of defendants with disabilities affected by the changes

(b) the impact on the effective participation of all defendants including those with disabilities

(c) the effectiveness of reasonable adjustment measures"

Effect

This amendment would require the expansion of online pleas and online indication of pleas to be piloted in two areas of England and Wales, and the pilot evaluated with published results, before any further changes are introduced.

Explanation

As outlined in our briefing, research suggests that encouraging online pleas could act as a driver to lack of legal representation, worse outcomes, and exacerbates efficiency issues encountered later in the justice process such a difficulties obtaining full disclosure from the prosecution. The Equality and Human Rights Commission said in its briefing that the provisions for in-writing pleas "risk the ability of people with certain protected characteristics to effectively participate in criminal proceedings".

The introduction of the online plea is said to save £25.5m based on savings in staff time given the estimated reduction in the number of plea hearings in court. However, there are no details of how exactly the saving is achieved, nor any costing for the extra court hearings which might need to be listed if indicative pleas need to be changed, of if disclosure is not forthcoming.

Given these serious concerns about the impact of the proposals on effective participation in the justice process, the changes should be piloted in two police force areas and an evaluation of the costs and impact of the changes (including on disabled people) published before wider roll-out is considered.

We also support the following amendments put forward by JUSTICE and/or Fair Trials:

- Deletion of Clause 6 so that the use of online plea processes for adults is not expanded further

- Deletion of Clause 8 so that children are excluded from participating in online plea processes
- Introduction of a requirement that defendants must be legally represented in order to indicate a plea in writing
- Introduction of safeguards for defendants with additional needs by requiring the prosecutor to assess defendant suitability for the online plea process

Require proof of receipt of information regarding single justice procedure cases (new clause)

Amendment

Part 2 Chapter 1

Insert the following new clause

"Proof of receipt of single justice procedure documents

(1) The Magistrates' Courts Act 1980 is amended as follows.

(2) After Section 16A (1)(c)(ii) insert

"(iii) The prosecutor has obtained proof of receipt by the accused of the information outlined in subsection (2)"

Effect

This amendment would require the court to be satisfied that prosecutors have obtained proof of receipt of single justice procedure information sent to those accused, rather than just obtain proof that the information was sent.

Explanation

The flaws in the existing single justice procedure process are clear from the extremely low response rate to single justice procedure notices; two thirds of defendants provide no plea at all in response to the offence they are charged with. This cannot be consistent with the aim to enable people to effectively participate in the justice process. This new clause would update the existing single justice procedure legislation in the Magistrates' Courts Act 1980 to require prosecutors to obtain proof of receipt of single justice procedure information. The implications of not responding to the single justice procedure notice are significant – the person is convicted and will receive a criminal sanction (the maximum possible fine, costs and a criminal record) in their absence. This change would mean those people who do not participate because they did not receive the letter are not disadvantaged and can participate effectively in the process.

Expansion of automatic online convictions (Clause 3)

There is no end-to-end online criminal court currently. Motorists can pay fixed penalties and defendants can make a plea for a motoring offence online, but the online criminal court (automatic online conviction) is a new concept. It was first introduced in the abandoned 2017 Prisons and Courts Bill and involves the defendant pleading guilty, being convicted and paying a fine – the criminal sanction – all via a computer form.

The new bill proposes using the online conviction process initially for just two offences – travelling without a valid ticket on a tram or train, and fishing with an unlicensed rod and line. These are currently dealt with via the single justice procedure, the closed court process whereby a lay magistrate sitting alone convicts and sanctions defendants pleading (or assumed to be pleading) guilty "on the papers" for low level offences. The bill's explanatory notes say that the online conviction procedure will be extended to further offences via secondary legislation. It seems likely that the government will transfer all those offences currently dealt with via the single justice procedure to this online criminal conviction process. The government may then use the single justice procedure for summary crimes currently dealt with via open magistrates' court hearings.

What we know about online convictions from the single justice procedure

The government consulted on the online conviction proposal in 2016[9] and many of the respondents expressed a range of concerns[10]. The 2017 Transform Justice briefing on the online conviction reflected these concerns[11]. None have been allayed in the interim, and there has been a lack of transparency in both the current single justice procedure (SJP) and the motoring "make a plea" system.

Since the introduction of the single justice procedure in 2015, problems about the justice it delivers have come to light. The process is similar to that used for automatic online convictions, but with arguably more safeguards, given all conviction decisions in the single justice procedure process are made by human beings - a lay magistrate with advice from a legal advisor. In the last six years, the government has used secondary legislation to considerably expand the range of offences dealt with via the single justice procedure, most recently to include Covid-19 breach offences.

Across all offences, the response rate to single justice procedure charges is very low. Less than a third of defendants plead guilty or not guilty to the offence they are charged with[12]. All defendants who do not plead are convicted and receive a criminal sanction (the maximum possible fine, costs and a criminal record) in their absence. There is no research on why so few defendants do not respond. It seems likely that many do not receive the postal charge. Given the safeguards in place for online convictions are fewer than for the single justice procedure, the problems with the single justice procedure will undoubtedly still apply.

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[9] https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf

[10] https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/results/transforming-our-justice-system-government-response.pdf

[11] https://www.transformjustice.org.uk/wp-content/uploads/2017/04/Transform-Justice-Briefing-on-the-Prisons-and-Courts-Bill5-.pdf

[12] Data provided in response to parliamentary question available here https://questions-statements.parliament.uk/written-questions/detail/2021-01-26/143756

Concerns about increased use of online convictions

Breach of right to a fair and public hearing

The European Convention on Human Rights requires that in the determination of a criminal charge "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". It also guarantees specific minimum rights for those charged with a criminal offence, including the right to be informed of the nature and cause of the accusation, to defend yourself in person, and to have the assistance of an interpreter. The right to a fair and public hearing can be waived by the defendant, but only if they fully understand the charge and the implications of waiving their entitlement. Evidence of defendants' experience of the single justice procedure and the lack of detail on safeguards suggests that defendants are unlikely to understand the implications of opting out of a public hearing and into the automatic online conviction process. This concern is supported by an analysis of the current SJP form.

Barrier to effective participation

All online conviction processes will start with a postal charge. These charges are sent through ordinary mail and there is no proof of their receipt. The fact that two thirds of defendants do not respond to submit a plea indicates that any criminal process which relies on defendants responding to a postal charge seems to present significant barriers to effective participation.

It is not clear why so few respond to postal charges via the single justice procedure, but those charged may not receive the letter, may not understand the letter, or may have mental health problems or learning difficulties which prevent them from responding to the letter. HMCTS provides "Assisted Digital" advice on how to fill in the physical/online form but all initial phone calls are charged at local rates (unlike phone calls about benefits which are free). For people on low income such calls may be unaffordable.

Whatever the reasons why the majority of defendants do not plead, it is clear that the SJP system does not support effective participation. Given that the process is so similar, and the offences the same as those dealt with under the SJP, the online criminal conviction process seems unlikely to support effective participation.

Disability discrimination

The Equality Act requires public bodies to make reasonable adjustments for those with disabilities. The online conviction process, like the SJP, does not properly support the use of reasonable adjustments. There is no proper assessment of those charged for mental or physical health disabilities. Yet many of defendants will have hidden disabilities which may never have been previously identified.

The recent joint inspectorate report on neuro-disability and the criminal justice system[13] emphasised the need for default screening of all criminal suspects and defendants for disability, including neuro-disability, and this proposal has been supported by the Lord

[13] https://www.justiceinspectorates.gov.uk/cjji/media/press-releases/2021/07/neurodiversity-in-criminal-justice-system-more-effective-support-needed-say-inspectorates/

Chancellor. But there is no screening of defendants at pre-charge, charge, or conviction stage in the SJP/online conviction process. Defendants are asked on the form to tick if they have a disability, but that disability might have prevented them opening the letter or understanding the form. In addition, if the defendant has an as yet unidentified disability, they will not be in a position to declare it.

The equality impact assessment[14] suggests that the changes proposed "*have the potential to have adverse effects on the basis of age, disability, and ethnicity (linked to socio-economic disadvantage) to the extent that some groups are less internet or digitally enabled than others*". But there are no reasonable adjustments put forward to meet the needs of defendants beyond the Assisted Digital Service[15] which can only be accessed if the defendant has received, opened and understood the letter outlining the charge and is able to spend their own money on a phone call. The Assisted Digital Service does not provide legal advice, merely assistance in filling out the form. No free legal advice is available to defendants for such offences.

Defendants can in theory opt to have a hearing in the physical magistrates' court, but it is not clear that disabled defendants are given sufficient information on the advantages of this – that a physical court hearing might provide them with proper reasonable adjustments and the possibility of guidance from the legal adviser.

Discrimination against those on low incomes

Under the SJP procedure (and in any court hearing), defendants sanctioned with a fine are asked to state their means to enable the judge/bench to adjust the fine. But the online conviction procedure results in everyone being fined the same amount, thus disadvantaging those on lower incomes.

The equality impact assessment suggests that defendants on low incomes will be made aware of the possibility of opting out of the online system and opting in to a physical court hearing, in which means would be taken into account. However, we feel this is not a sufficient safeguard against this financial disadvantage for people on low incomes. It relies on defendants understanding that an alternative to the online system is available and that the alternative might result in a different level of fine. Legal education is low, particularly amongst those on low incomes and those who have disabilities. Judging whether, on the balance of probabilities, it would be advisable to follow an alternative procedure is a complex legal decision which most defendants would struggle to make.

Open justice

The online conviction process is even more closed than the single justice procedure. The judge in the single justice procedure sits in a closed court which is not accessible to the public or the press. But listings for each day's cases are published online and the results available in individual cases. There is no data or public information for offences dealt with under the current online motoring conviction system, so there is no open justice or

[14] https://publications.parliament.uk/pa/bills/cbill/58-02/0152/CriminalmeasuresImpactAssessmentsigned.pdf
[15] https://www.gov.uk/guidance/hmcts-services-digital-support

transparency. In addition, the theoretical online process is not accessible for scrutiny. It is only visible to those who have been charged.

Security

Information is difficult to obtain, but it seems that the processes for the online conviction system may not be sufficiently secure. The single justice procedure plea form only requires someone to confirm that the name, address and date of birth details presented on the form are correct. The defendant doesn't even need to write their own date of birth. This is an incredibly low level of security – far less than the gov.uk Verify scheme[16] which is used by other government departments. We are concerned that a stranger could very easily get hold of the postal charge and fraudulently fill in the form. The identity details required are quite insufficient for a process which results in criminal conviction and sanction.

Prosecutorial abuse of process

Concerns about this risk were articulated in an academic paper in 2017[17]: "*The Prison and Courts Bill made provision for a number of penalties to be imposed upon conviction – including for the offender to pay compensation and prosecution costs as determined by the prosecutor. It is clear from the decision in* R (on the application of Faithfull) v Ipswich Crown Court[16] *that under English law a compensation order forms part of the determination of sentence.*[17] *It seems then* prima facie *inappropriate, and in contravention of Art.6, that the prosecution – instead of an independent and impartial tribunal – decides the compensation to be imposed: their discretion restricted only by the maximum that can be imposed for that offence under the automatic online conviction procedure…Questions must also be raised as to whether these changes would set a negative precedent for justice as a whole. The prosecution's ability to set the amount of compensation to be paid amounts to a sentence being imposed in a criminal court by one of the parties to the case and it is difficult to see how this is not abjectly contrary to the principle of a fair trial even if it is ECHR compliant".*

In addition, the processes and practice of the prosecutors in current single justice procedure and online conviction cases are not subject to public scrutiny. The CPS is subject to inspection and publishes a range of data on outcomes. But the CPS is not the prosecutor in these cases. SJP cases are all prosecuted by state agencies such as the police, the BBC and rail companies. These prosecutors are not subject to any scrutiny process or specific guidance, and are not inspected. None publish data on their prosecutions.

Extension of eligible offences

The bill mentions only two new offences which will be subject to the online conviction process. Other offences will be added via secondary legislation. We are concerned that this will open the floodgates to a range of offences which may or may not be suitable. The offences subject to single justice procedure have been steadily extended via secondary legislation such that currently the majority of all criminal offences charged in England and

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[16] https://www.gov.uk/government/publications/introducing-govuk-verify/introducing-govuk-verify#how-its-safe

[17] https://www.archbolde-update.co.uk/PDF/2017/Archbold%20Review%20Issue%204%20PRESS.pdf The Prison and Courts Bill: Online courts and the right to a fair trial By Sebastian Walker

Wales are dealt with via the single justice procedure. These include breach of Covid-19 regulation offences (where many of the prosecutions were based on a misinterpretation of the law) and offences of school non-attendance, where the defendants (parents of the children concerned) are invariably very vulnerable. Secondary legislation of this kind receives virtually no scrutiny, so we are concerned that decisions as to suitable additional offences will, in effect, be in the control of the Executive, rather than Parliament. Such secondary legislation is also not subject to public consultation.

Testing

The 2016 green paper[18] suggested that the online conviction system should be tested using three offences before any decision was taken to make it permanent. *"We propose to test the system with a small number of summary, non-imprisonable offences in the initial phase of introducing the online conviction and fixed fine scheme, which would be: Railway fare evasion, Tram fare evasion, Possession of unlicensed rod and line. If this initial phase is successful, we plan to bring other offences, particularly certain road traffic offences, into the system in future"*. There is no public record of any testing for online convictions completed since and no mention of the need to test in the documentation produced for the current bill. We would suggest that the government's original proposal to fully test online conviction before implementation should be followed.

Proposed amendments relating to Clause 3

We support the following amendments put forward by JUSTICE and/or Fair Trials:

- Introduction of a requirement for a review of Clause 3 before it is introduced along with an equality impact assessment and assessment of impact on participation
- Introduction of safeguards for defendants with additional needs by requiring the prosecutor to assess defendant suitability for the automatic online conviction option
- Prevention of the use of automatic online convictions for recordable offences
- Information provided to the accused person so they understand the consequences of agreeing to the automatic online conviction option

The abolition of local justice areas

The government is proposing to abolish all local justice areas and organise all magistrates and magistrates' courts into one national justice area, across the whole of England and Wales.

The abolition of local justice areas has been on the government's agenda for many years. Currently all magistrates' courts are divided into local justice areas. Each local justice area hosts a magistrates' bench led by a Bench Chair. Magistrates have been organised locally for hundreds of years, though the size of local justice areas has increased in recent times. Magistrates' have prided themselves on their self-governance and on delivering local justice for local people. Magistrates' recruitment has been based on these local justice areas and

[18] https://consult.justice.gov.uk/digital-communications/transforming-our-courts-andtribunals/supporting_documents/consultationpaper.pdf

has been implemented by Advisory Committees, each of which is a non-departmental public body.

Lord Justice Auld in his report proposed that local justice areas should be abolished to facilitate listing and to enable the paid judiciary to gain greater control over the (seen to be unruly) magistracy. His proposal is now 20 years old and no-one has updated or done research to justify its supposed benefits. The proposal has not been subject to public consultation.

The government is following Lord Auld's proposal to abolish all local justice areas on the basis that *"This will provide the courts with the freedom and flexibility to manage their caseloads more effectively and ensure that cases are dealt with sooner and in more convenient places. It will also help create a more unified criminal court through the restructuring of the leadership and management arrangements for magistrates' courts, so they can be more closely aligned to the Crown Court".*

We have concerns about the impact of the government's proposal on local justice and on magistrates' self-governance.

1. Curtailment of local justice. Magistrates are representatives of the people and must have a connection to the area in which they sit. An applicant to the magistracy must currently live or work in their local justice area, so they understand the area, its crime trends, and its people. All magistrates are members of a bench made up of other magistrates local to that area. The abolition of local justice areas is likely to lead to a diminution of local justice, including a weakening of the links benches currently have with local criminal justice agencies. The proposal also subsumes the nationhood of Wales.
2. Diminished independence of the magistracy. Magistrates have historically retained an independence from the paid judiciary and governed themselves through democratic processes. They have managed their own on-going training and disciplinary processes. All leadership roles have been subject to democratic election by peers. There are no details in the government's proposals, but it looks as if these democratically elected posts will be abolished, and all the functions currently carried out voluntarily by magistrates will be taken over by paid judges and court staff. This will diminish the independence of the magistracy and impede their ability to influence how their peers are managed and trained. It will be, in effect, a take-over of responsibility by the senior judiciary. Given magistrates' status as members of the community and "representatives of the people", and their expertise in management, this is not appropriate.
3. Implications for recruitment and training. Advisory committees are based on local justice areas and the members of each committee are local people. These NDPBs organise and recruit new magistrates for each locality. Advisory committee members are public appointees, of whom two thirds are local magistrates. To abolish local justice areas without also abolishing advisory committees makes little sense, but there is nothing in the legislation about this, merely a hint in the fact sheet19 that this may follow: "This (abolishing local justice areas) will also enable arrangements

for the recruitment, training, and management of magistrates to be brought in line with the rest of the judiciary on a national basis in England and Wales". Transform Justice has previously proposed reform of the magistrates' recruitment process[19], but it should always have a local component, be independent of the judiciary itself (as is the Judicial Appointments Commission) and allow for magistrates themselves to participate in recruitment processes and decision-making.

Proposed amendment relating to Clause 42

Consult on the abolition of local justice areas

Amendment

Clause 42, page 52, line 4

Insert new sub section 7

"(7) Before introducing the changes outlined in section (1), the Secretary of State must consult with relevant stakeholders on the impact of the proposals."

Effect

This would require the government to consult on the abolition of local justice areas before any changes are introduced.

Explanation

The elimination of local justice areas will remove any assurance of justice *for* the local community *by* members of the local community and end the self-governance of the magistracy. In addition the Law Society, in its briefing on this bill, highlight that the abolition of local justice areas "will likely see more trials listed in courts far away from defendants and witnesses, which will inevitably lead to more court attendance being conducted remotely. This would be a significant change from the present system." The proposal to abolish local justice areas has never been publicly consulted on. This amendment would require the government to consult relevant stakeholders thoroughly on the significant impact of the abolition of local justice areas before legislating for such a change.

Overall concerns about the economic impact assessment

There is too little research, data and piloting of the digital reforms for the economic impact statement to be relied on[20].

The impact assessment suggests that there is a negative net public value (£-0.49m) for the introduction of online criminal convictions, i.e. that the cost of the process is greater than the current system.

The introduction of the online plea is said to save £25.5m based on savings in staff time given the estimated reduction in the number of plea hearings in court. However, there are no details of how exactly the saving is achieved, nor any costing for the extra court hearings

[19] https://www.transformjustice.org.uk/wp-content/uploads/2016/03/TJ-JAN_JUSTICE-COMMITEE-ENQUIRY_FOR-PRINT.pdf

[20] https://publications.parliament.uk/pa/bills/cbill/58-02/0152/CriminalmeasuresImpactAssessmentsigned.pdf

which might need to be listed if indicative pleas need to be changed, of if disclosure is not forthcoming.

The elimination of local justice areas is estimated to have a positive net public value of £2.9m. This is based on one identified saving - in the resourcing of transfer of fines orders (saving £0.5m per year). Though this reform seems sensible, we challenge the assumption that removing the need for transfer of fines orders can only be achieved through abolishing local justice areas.

There may be savings for HMCTS in implementing some of these proposals, but we do not believe fair trial rights and open justice are ever worth sacrificing. It seems likely that the introduction of online pleas for unrepresented defendants and automatic online conviction will create considerable barriers to effective participation, and increase the risk of miscarriages of justice, as has happened with the prosecution of Covid-19 offences.

Conclusion

We are concerned that these online proposals have been put forward mainly for cost saving reasons, without sufficient evidence to allay concerns on the risk to fair trial rights and the risks of discriminating against disabled people and those on lower incomes. We recommend that parliament require proper testing and evaluation of all these proposals before they are implemented nationally. In the case of online pleas, these should only be used by (and tested on) defendants with legal representation and there should be no financial incentive for lawyers to enter pleas online rather than in court, given a lawyer may judge a court hearing to be necessary.

The abolition of local justice areas may appear to be a purely administrative change. But it has significant implications for local and Welsh justice and for the self-governance and independence of the magistracy. We suggest the government consult magistrates and the public about this change before legislating.

Further information

To discuss this briefing please contact Penelope Gibbs, director of Transform Justice at penelope@transformjustice.org.uk. For more of our work see www.transformjustice.org.uk.

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