

Submission in response to the Transforming Our Justice System consultation - assisted digital strategy, online conviction and statutory fixed fines

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Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.): Lecturer and researcher in media and information law at the University of Sussex; volunteer member of the Transparency Project core group.

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If you would like us to acknowledge receipt of your response, please tick this box: yes (email is fine)

Address to which the acknowledgement should be sent, if different from above: same as above (email is fine)

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

This submission is made on behalf of the Transparency Project, which is a registered charity (no. 1161471) with purposes related to the advancement of education of the public and the promotion of the sound administration of law, particularly in relation to family law.

Introduction

1.1 This submission is prepared by Dr Judith Townend, University of Sussex, on behalf of the Transparency Project. The Transparency Project is a registered charity (no. 1161471) with purposes related to the advancement of education of the public and the promotion of the sound administration of law, particularly in relation to family law. It explains and discusses family law and family courts in England & Wales, and signposts useful resources to help people understand the system and the law better. It works towards improving the quality, range and accessibility of information available to the public both in the press and elsewhere. Dr Townend is a lecturer in media and information law at the University of Sussex, who has a specific research interest in access to information and access to courts data. She has convened several roundtable discussions on the subject of access to courts data, and is editor of the *Justice Wide Open* working papers (City University London, 2012). She is a member of the Transparency Project's core group.

1.2 The submission is approved by the trustees of the Transparency Project, whose members include practising and academic lawyers, with specialisms in family law.

1.3 This consultation asks for responses on its 'Transforming Our Justice System' consultation, with an extended deadline of 10th November 2016. The Transparency Project group's interest in this project relates to how the reforms will impact on public access to information about court

proceedings, specifically family. More generally, we (the Transparency Project core group) perceive the Government's current programme of reform as an important opportunity to assess and improve the current systems for processing and disseminating information from courts and tribunals in England and Wales. Although the Transparency Project has wider interests in the operation of the family courts, this submission focuses on issues associated with access to information across all types of courts (not limited to family). There are likely to be significant issues for access to justice and legal representation associated with the proposed reforms that we do not address in this submission.

- 1.4 The Government and Judiciary wishes to develop a system that is 'just, and proportionate and accessible to everyone – a system that will continue to lead and inspire the world'. Providing free, reliable and well-organised resources from courts and tribunals is essential to upholding these important principles and achieving this commendable vision. Ensuring open justice is also an essential element of the rule of law. However, it cannot be said that the UK currently leads the way on access to courts information or what might be described as 'digital open justice'; in fact, it lags behind many countries and its information systems are inconsistent, expensive and overly reliant on third party commercial and non-profit providers.
- 1.5 Moreover, there are important ethical as well as legal questions to be addressed with regard to the way in which courts information is communicated in the digital age. Further policy guidance is needed, based on consultation among key stakeholders, such as legal practitioners and academics, justice charities and the media, on appropriate models of access. Alongside this, there must be robust and accountable systems for processing and releasing data to the public. Too often, public access to information is an afterthought, which leads to mistakes in the data released to third parties (including inadvertent release of sensitive and confidential data), or insufficient information being made available.
- 1.6 The types of data which need attention, which have been discussed at recent events held at the Information Law and Policy Centre at the Institute of Advanced Legal Studies and the Open Data Institute, include: court transcripts, courts listings (both full and restricted), court results / outcomes, court judgments, court sentencing remarks, reporting restriction notifications and reporting restriction orders, court documents such as claim forms or statements of case, skeleton arguments, and other documents referred to in open court proceedings (such as those described in *R (On the application of Guardian News and Media) v (1) City of Westminster Magistrates Court (2) Government of the United States* [2012] EWCA Civ 420).
- 1.7 Although we were pleased to note the discussion of 'greater transparency' and plans for publication of open data about the justice system in the joint statement announcing the consultation, we were disappointed to note that the format of this initial consultation only allowed a very limited type of response to the extensive reforms proposed in civil and criminal court procedures. The question of transparency is not limited to the publication of open data about courts performance, as discussed below. We suggest that future consultation exercises on the proposed justice reforms, and investment in new IT systems, include a wider range of questions and specifically address the issue of public access to courts information.

In response to questions of the consultation deemed relevant to our expertise and interests (Qs 1,2,4 and 11)

Assisted Digital

Question 1: Do you agree that the channels outlined (telephone, webchat, face-to-face and paper) are the right ones to enable people to interact with HMCTS in a meaningful and effective manner? Please state your reasons.

- 2.1. We note that 7.1 on Digital Assistance makes no explicit mention of public access to courts and tribunals information. The Judiciary and HMCTS must also consider how individual citizens of varying levels of digital competence and access are able to access public court documents and public court proceedings.
- 2.2. Providing more digital resources could be of great benefit to people with disabilities that prevent them from attending and observing court. In this way, greater digital access could improve access to court materials for some people. However, if the sole method of access is via digital means, there is a risk that some people of limited digital means will be unable to attend court as a public observer or access materials to which they are entitled. The different methods described should not be available only to direct participants in court cases, but also public users of the courts who wish to observe hearings, or access documents.
- 2.3. It is essential that measures are put in place for public access to public court proceedings that are conducted via virtual means, such as video, telephone and online services. It is concerning that such provisions are not discussed in any detail in the consultation documents. Such access should be as integral to the system of the future, as the notion of 'open justice' is to the current, courtroom model, with its press benches and public galleries, and based on the long-held principle that justice should not only be done, but seen to be done.
- 2.4. For the avoidance of doubt we consider that open justice requires either physical or digital access to public proceedings without prior or special arrangement - i.e. any courts access system should allow members of the public (including the media) to attend or view public proceedings without pre-booking places. On our current understanding, it appears that the proposals will lead to significant numbers of proceedings being conducted in effect in private, where these are currently conducted in public. We urge the Ministry of Justice and Judiciary to provide more detail on their specific plans for physical and digital access to virtual proceedings and open these plans to further consultation.
- 2.5. Whilst we recognise that many family court hearings are heard in private for specific reasons and in accordance with the law, even in family proceedings there are important questions about how the media access hearings in private that they are entitled to attend.

Question 2: Do you believe that any channels are particularly well suited to certain types of HMCTS service?

- 2.6. The provision of public court documents would suit a digital system: e.g. a database in which a user can log in and retrieve court documents which are open to the public, such as claim forms in certain civil proceedings. At present, there are very cumbersome paper-based systems for accessing documents to which the public is legitimately entitled. Such databases should make documents available on a case or party name basis, as well as case number, since a member of the public may not know the number of the case they wish to find. Additionally, these materials could also be organised or indexed by the category of proceeding (e.g. libel, negligence, personal injury, etc.) and by date (of filing, or of hearing) and court.
- 2.7. Other types of courts information that could be made publicly accessible via digital means include the fact of a reporting restriction in a case (with the details of the reporting restriction being made available to certain registered users, such as journalists, via a restricted database). This type of model was proposed by the Law Commission in 2014, based on a successful pilot exercise on the recording of S4(2) Contempt of Court Act 1981 postponement orders. However, no such system has yet transpired. (Reference: Law Com No 344, http://www.lawcom.gov.uk/wp-content/uploads/2015/06/lc344_contempt_of_court_court_reporting.pdf).

- 2.8. Consideration should be given to providing, in a central database, consistent and comprehensive access to court orders such as injunctions and contempt of court rulings required to be given in open court and published.
- 2.9. The government and judiciary should further consult on what types of courts information should be made available as open data to the open web (and therefore potentially discoverable through social media platforms or search engines). It may not be appropriate – for both legal and ethical reasons – to make all types of court data ‘open data’. It may be possible and appropriate to make data available in restricted formats but there needs to be proper consultation on what type of data should be published, in what format, and with what type of access.

Online convictions and statutory fixed fines

Question 4: Do you think that there any additional considerations which we should factor into this model? Please list additional considerations.

- 3.1. The impact on open justice and access to court information should be considered as part of any plan to introduce online procedures that replace proceedings that would have otherwise taken place in open court. A functioning justice system must be observable by third parties – not only by members of the press, but ordinary members of the public, and other professionals such as those working for NGOs or in research.
- 3.2. The government and judiciary should further consult on how much of these type of proceedings should be made publicly available, and in what formats. A wide range of public and specialist views should be taken on what and how much of this type of information should be in the public domain, and in what form.

Impact and equalities impact assessments

Question 11: Do you agree that we have correctly identified the range of equalities impacts, as set out in the accompanying Equalities Impact Assessments, resulting from these proposals?

- 4.1. We are not in a position to answer the specified question, but offer the following observations on the Impact Assessments.
- 4.2. IA MoJ022/2016 (online convictions) states that outcome information for cases processed via the Single Justice Procedure or an online process (without a magistrate) will be made available to the public. At para. 23 it states that ‘Listings and results would be published’ [for online convictions]. We are concerned that the government and judiciary does not offer further detail on the format in which this information would be made available, or seek specific responses on this part of the reform. Systematic and comprehensive criminal listings and results have not been published online by the courts previously, so if the proposal is to publish these on court websites and to the open web, this is a matter on which there should be further consultation. Legal professionals and justice charities (such as those representing ex-offenders), as well as media organisations should be consulted on such plans. It might be appropriate, for example, to make such data available via a restricted database for a limited period of time, rather than automatically publishing to the open web. The impact of publication on defendants convicted of these summary only non-imprisonable offences via the online process is not considered in paras 41-5. If data is being made available indefinitely to the open web (which is not clear from the consultation document or IA), then there may be discrimination, equality of opportunity and other issues to consider.
- 4.3. Consideration should be given to the introduction of safeguards, limits or access filters to prevent a possible conflict between publication of information about criminal convictions and

the Rehabilitation of Offenders Act 1974. We would also welcome consideration of any data protection issues.

- 4.4. In its section on 'Affected Stakeholder Groups, Organisations and Sectors', IA MoJ022/2016 (online convictions) makes no reference to the general public or media who may be impacted by the proposed reform.
- 4.5. We are pleased to note that IA MoJ019/2016 on Assisted Digital does make reference to Court Users, including members of the public, businesses and legal service professionals. However, the section on 'Option 1: Implement Assisted Digital Package' [paras 15-18] and the section on Benefits to Court and Tribunal Users [33-35] make no explicit reference to court users who may wish to access information about proceedings but are not directly involved.
- 4.6. There are no Costs outlined for Court and Tribunal Users for Option 1 – is this a deliberate or accidental omission?
- 4.7. Para 1.6, p. 11 of the Equalities statement in that IA MoJ019/2016 on Assisted Digital states: 'We will consider whether we need to amend our equality considerations in light of the responses to the consultation'. We suggest that Court Users wishing to access information about court proceedings (such as ordinary members of the public as well as the media, NGO representatives and researchers) who may not be direct parties to proceedings should be considered in this assessment.
- 4.8. IA No: MOJ018/2016 (over-arching IA) makes reference to Civil and criminal court and tribunal users including members of the public and businesses but does not explicitly address issues associated with access to information in its cost/benefit analysis.
- 4.9. One risk that should be considered with the increasing use of digital systems is the potential for breaches of data security, and the mistaken release of data that should not be in the public domain. This does not appear to be included in the IAs on Assisted Digital or Online Convictions. We re-iterate our earlier point above, that HMCTS needs robust and accountable processes for processing and releasing data from courts.