

## Transform Justice briefing on the Prisons and Courts Bill

### Introduction

The Prisons and Court Bill was tabled on 23<sup>rd</sup> February 2017. It contains a number of proposals regarding prisons, the judiciary, whiplash and court reform. This briefing will focus on criminal court reform and on four key points:

- The criminal court proposals seem to have been introduced in some cases without research, evidence or informal or formal consultation with experts and stakeholders, including defendants
- The government is committed to saving money through the court reform programme, but most changes have not been costed, and the impact on remand and sentences has not been modelled
- The move to online and virtual justice threatens to significantly increase the number of unrepresented defendants, to further discriminate against vulnerable defendants, to inhibit the relationship between defence lawyers and their clients, and to make justice less open
- Our criminal justice system is very complex and its fairness rests on parties understanding and participating in the process. This is difficult to achieve even when everyone is in a courtroom. Fundamental principles of justice and human rights are risked if we take justice wholly or partially out of the courtroom

### Background

Many of the proposals in the bill have been floated as ideas, but few have been subject to rigorous external scrutiny. No-one would disagree that the courts need to be brought into the digital age. Files and information should be available in digital form, and court staff provided with the equipment and training they need to work digitally. Defendants and witnesses should receive texts or emails reminding them to come to court. Many of these changes are already underway and the challenge is simply to get the IT to work properly and systems to talk. But this bill goes much further.

Many of the bill proposals on court reform have been suggested in reports or speeches, either from members the judiciary or HMCTS, notably the Leveson Review of Efficiency in Criminal Proceedings<sup>1</sup> the statement on Transforming Summary Justice issued jointly by the Lord Chief Justice, the

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<sup>1</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf> Jan 2015

President of Tribunals and the Lord Chancellor<sup>2</sup>, and a white paper published in September 2016<sup>3</sup>. Some of the proposals were put forward in “What is a court?”, a report from the charity Justice<sup>4</sup>. The court reforms are enabled by a major capital grant from the Treasury of over £1 billion, which was originally agreed in 2015<sup>5</sup>.

The key principles behind the programme are to build on the strengths of the current system in terms of being just, proportionate and accessible. One of the key means of achieving that is to move hearings and parties out of the courtroom – so they are dealt with virtually or online.

### Consultation

Very few measures in the whole bill have been subject to formal consultation. On the court reform measures, a consultation elicited responses on the assistance needed to access digital services, and on online criminal convictions<sup>6</sup>. No other proposals regarding criminal courts were subject to formal consultation and, in many cases, they were not subject to informal consultation either. This lack of consultation is contrary to best practice in government policy-making. The Civil Service, and particularly the policy profession, has committed to open policy making, and to the seven “policy fundamentals” outlined in the Institute of Government’s report *“Making Policy Better: Improving Whitehall’s core business”* 2011. These fundamentals include “open and evidence based idea generation” and “responsive external engagement”. Mechanisms include informal and formal public and stakeholder consultation.

No reason has been given for the lack of open policy making in regard to many of these proposals. The government could also have put the bill forward for pre-legislative scrutiny by parliament, but has not done so.

### Evidence

Many of the proposals have a weak evidence base. It is asserted that they will make the system more just, proportionate and accessible, but without any supporting research or data, and without citing research which may suggest the contrary.

The inspiration for many of the ideas was a review of the system by Sir Brian Leveson but he pointed out in his introduction that *“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 major research or evidence gathering has been conducted since, and many of the proposals in the legislation go further than Sir Brian Leveson’s recommendations.

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<sup>2</sup> <https://www.gov.uk/government/publications/transforming-our-justice-system-joint-statement> Sept 2016

<sup>3</sup> [https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting\\_documents/consultationpaper.pdf](https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf)

<sup>4</sup> <https://justice.org.uk/what-is-a-court/>

<sup>5</sup> <https://www.gov.uk/government/news/ministry-of-justices-settlement-at-the-spending-review-2015>

<sup>6</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/590391/transforming-our-justice-system-government-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/590391/transforming-our-justice-system-government-response.pdf)

The impact assessment which has been produced with the bill<sup>7</sup> does not meet Sir Brian's ambition to calculate all the savings involved. Many of the impacts have not been costed (including infrastructure costs) and some impacts are not mentioned. In addition, no-one has modelled the potential impact of the court reform proposals on sentences – either more people being convicted or offenders receiving more punitive sentences, including longer prison terms – or of length of time on remand. This means that it is not clear whether the changes will save money or not.

There is little examination of the equality aspect of online and virtual courts, particularly for vulnerable defendants. This is partly because there is no research on how those who are vulnerable cope with these processes, as compared to being in the physical court, partly because the impact assessment suggests that a person's disability will always be known and declared. *"In making its decision [as to how the hearing should be conducted] the court should consider whether any parties or witnesses have a disability (e.g. visually or hearing impaired) or are vulnerable and would benefit from face to face contact in order to effectively participate in the case"*<sup>8</sup>. Many defendants and witnesses are reluctant to declare, or may not be aware of, their disability. Online and virtual processes can only exacerbate the assessment challenge, the risk that vulnerability will be "missed", and the ability of practitioners and lawyers to support.

Many of the proposals include children in the justice system. Defendants who are under 18 are the most vulnerable of all court users, who struggle already to participate in court proceedings. We feel that child defendants should be excluded from the virtual court and online proposals altogether. Existing legislation and the criminal procedure rules already allow for child defendants to participate virtually in exceptional circumstances.

### **Virtual hearings (clauses 32-33)**

Currently some parties "appear" in court by video link. Defendants and offenders appear by video-link from prison and from police custody. Witnesses appear by video link from another location in the court or from a van which comes to their home or workplace. Police witnesses give evidence from the police station. The use of video-links varies across the country, with London and Kent being at the vanguard.

The bill proposes a considerable expansion of virtual and telephone justice both for defendants and witnesses.

The rationale for the change is that *"we must make sure that the justice system is proportionate in order to save people time, shrink their costs and reduce the impact of legal proceedings on their lives. Justice delayed is justice denied"*.

### **History**

HMCTS first used virtual hearings in 1990s and the Ministry of Justice commissioned independent researchers to conduct an evaluation of a virtual court pilot<sup>9</sup>. This pilot involved two courts where defendants were encouraged to appear virtually from the police station. The evaluation of the pilot was published in 2010, and concluded that virtual courts as piloted were more expensive, may lead

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<sup>7</sup> <http://www.parliament.uk/documents/impact-assessments/IA17-003.pdf>

<sup>8</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/594234/equalities-impact-assessment-virtual-hearings.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594234/equalities-impact-assessment-virtual-hearings.pdf)

<sup>9</sup> <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

to more guilty pleas and longer sentences, and impeded the communication between lawyer and client. The economists who did the research modelled a scenario whereby virtual courts could lead to a small saving over ten years, but this relied on hearing six cases per hour, and excluded any impact on sentences.

Despite the conclusions of this research, virtual hearings for defendants were extended, and Sir Brian advocated an even greater expansion – for pre-trial and case management hearings. *“Such hearings are often essentially administrative in nature and it is unnecessary to gather the participants together in one room to deal with the matters that require resolution, save exceptionally when the interests of justice require it”*. Sir Brian advocated virtual hearings on the basis of convenience for judges, advocates and other parties, and to *“ease the pressure on courtrooms”*. He suggested also that court proceedings are behind the times, given *“business meetings are conducted in this way and surgical operations are carried out remotely”*. Sir Brian did not cite the Ministry of Justice evaluation on virtual courts, so did not address the challenges it posed. He did however footnote<sup>10</sup> research on video conferencing which appears to undermine its credibility. The research cited by Sir Brian suggests that those involved in video conferencing need to concentrate much harder: *“Faced with a higher cognitive load, users of video conferencing may economize when evaluating the information presented the speaker. They may economize by using heuristics, such as how likeable they perceive the speaker to be, rather than the quality of the arguments presented by the speaker when judging whether or not they will adopt or use the information presented by the speaker”*.

There is no equivalent UK research with defendants/offenders but Dr Carolyn McKay did research in Australia with prisoners who appeared remotely from prison into the courtroom<sup>11</sup>. She found that, despite the technology's efficiency benefits, it risked preventing meaningful contact with lawyers and judicial officers. *“Prisoners reported not understanding what was going on in court, feeling disconnected and not being able to allow judges and accusers to see them in person.”* *“You're a bit withdrawn from the whole process really, it's all going on there without you and, umm, you're just a face on a screen really,”* a 24-year-old male prisoner said<sup>12</sup>. In the research done by MoJ on the online court pilot, very few defendants chose to appear virtually rather than go to court<sup>13</sup>. Anecdotal evidence from prisoners in England suggests many are content to take part in hearings via video-link, but this is usually because the experience of going to court involves packing up all their worldly goods, getting up in the middle of the night, missing out on meals, travelling in a sweat box and then, if unlucky, ending up at different prison late at night from the one they left in the morning. If going to court were not associated with such negative experiences, they would prefer to go in person.

Research in other jurisdictions suggests that bail hearings conducted by video link result in more punitive outcomes for defendants than those conducted in the courtroom. Experiments in the USA have found that the financial level of the bail bond (the amount to be paid to obtain bail) rose when hearings were virtual. Courts in Chicago abandoned virtual hearings when this became clear<sup>14</sup>.

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<sup>10</sup> See footnote 18 <https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf> citing <http://www.leadingvirtually.com/is-video-conferencing-a-good-substitute-for-face-to-face-meetings/>

<sup>11</sup> <http://journals.sagepub.com/doi/abs/10.1177/1743872115608350>

<sup>12</sup> <http://www.smh.com.au/nsw/youre-just-a-face-on-a-screen-really-the-huge-technology-change-in-nsw-courts-20160914-grg2ow.html>

<sup>13</sup> <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

<sup>14</sup> <http://scholarworks.law.ubalt.edu/lf/vol45/iss1/4/> <http://www.cityandstatepa.com/content/phillys-video-bail-system-draws-continued-criticism>

The only other research we have on virtual hearings in England and Wales is a process evaluation of pre-trial cross examination of vulnerable witnesses<sup>15</sup>. This evaluated the process involved in a pilot allowing vulnerable witnesses to be cross examined in advance of their trial, sitting in a different location from the courtroom, appearing via video-link, with all the parties except the jury present. This pre-trial cross examination is designed to improve the experience for vulnerable witnesses, who frequently find giving evidence in front of a jury extremely stressful.

The process evaluation found that witnesses appreciated the opportunity to give evidence in this way, but the research was not designed to evaluate outcomes. In the sample cases involved there appeared to be more guilty pleas after pre-trial cross examination had been completed (than might be expected), but the numbers were small and the author himself wrote: *“findings from the monitoring data are based on a relatively small number of cases and findings may not be replicated under any roll-out”*. So no firm conclusions can be drawn from it about the impact of pre-trial cross examination on outcomes, either guilty pleas or convictions, though the experience of the witnesses was positive.

There is very little evidence on the impact of virtual hearings on juries, judges, on defendants’ participation in hearings, nor on the outcomes of those hearings. What evidence we have, whether from business or criminal justice, suggests the impact may be negative.

While the best research we have on outcomes<sup>16</sup> suggests virtual courts to be more expensive, and to result in more punitive sentences for defendants, we would suggest more research is urgently needed.

#### What the government is proposing

The government is proposing that almost any party to any court hearing will be allowed to take part by telephone or video link. Some hearings will have one or more parties on a telephone/video link while others will be wholly virtual/telephone, with no-one in the courtroom and all parties either on video or on the telephone, or a combination of the two.

Under the proposals, remand hearings, pre-trial and enforcement issues, disputes re bail conditions and witness evidence in trials (including from the defendant) can all be conducted in part or wholly by telephone or video, if the judges and parties wish.

The bill provides for summary only trials to be conducted wholly by video link, where the offence is non imprisonable, and conviction and sentencing, for any offence, can be meted out in a wholly video hearing.

#### Costs

The impact assessment cites some of the costs under “case management and allocation” and others under “virtual hearings and open justice”. It does not cost out most of the changes required, including IT costs for the provision of live video links, telephone and video conferencing and the provision of open justice. It estimates £3M will be saved in the employment of fewer ushers, £12M from reduced hearing times and £4.6M in reductions in prisoner escort service journeys.

#### Concerns

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<sup>15</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553335/process-evaluation-doc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf)

<sup>16</sup> <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

1. No research or testing has been done on these proposals and existing research (including the MoJ's own evaluation of the virtual court), suggests that there are no real savings in virtual hearings, that they result in more defendants being unrepresented and in more punitive sentences. Australian research suggests virtual hearings damage the defendant-lawyer relationship. We have no research on outcomes. While the virtual experience may be more convenient and less stressful for witnesses, we do not know whether juries are biased against evidence given virtually or in advance. In the absence of good data, evidence or research on the positive value of virtual hearings, we would urge caution.
2. We are concerned by the logistical and security implications of wholly audio and wholly video hearings. IT systems in the courts frequently break down now. If all four parties are in different places, we see the chances of one connection breaking down as high. We are also concerned as to how a phone link could be secure and confidential.
3. We question the need for virtual hearings. There is no, and still will not be (even after closures), a shortage of courtrooms. Many defendants and witnesses would prefer to appear in person than remotely. If the needs of witnesses were better met in court, they would be less stressed. Equally, we question the necessity of the police detaining so many low level offenders, thus necessitating either a virtual hearing from police custody, or an expensive trip in a secure van to the court.
4. All research suggests that vulnerable people – those with learning difficulties, mental health problems, addictions and other disabilities, English as a second language – are disproportionately represented amongst defendants. There is liaison and diversion in some courts and police stations but the roll out will take years to come. Meanwhile it will be more difficult for parties both to assess whether someone is vulnerable, and to support those needs, if they are remote from the courtroom.
5. We are concerned that without proper costings, the proposal is impossible to evaluate. We also note that a minimum of £2.6 million is to be spent on equipment etc by the police, a service whose resources are under strain. Is it the best use of police resources to facilitate virtual hearings for HMCTS?
6. There are indications that virtual hearings may lead to more punitive sanctions, longer prison sentences and more people on remand. Our prisons are in a volatile state with arguably too many prisoners to keep safe with the staff available. Any untested change which may increase prison numbers should not be risked.

### **Automatic online conviction and standard statutory penalty (35-36)**

The government is keen to replace postal and physical justice with online justice. They are progressing online justice processes in the civil and criminal spheres.

Already it is possible to both plead guilty and be convicted of a motoring offence online. If you are convicted of speeding or another minor traffic offence, you are encouraged to go online and, if you plead guilty, to pay the penalty and receive the conviction online. If you plead not guilty, you go to trial in the magistrates' court in the normal way.

The bill suggests an expansion of this system to more crimes, to be agreed under secondary legislation.

There is no research on the success or otherwise of the existing online criminal court. Currently many non imprisonable offences, where the defendant pleads guilty, are dealt with under the single

justice procedure, where a magistrate sits in a closed court and deals with each case administratively - on the papers – aided by a legal adviser.

### What the government is proposing

The government is proposing to replace the single justice procedure with a wholly online system for those who plead guilty. *“Around half of all cases heard in magistrates’ courts in England and Wales are summary-only, non-imprisonable offences where there is no identifiable victim and could potentially be tried under this procedure”*. The government has committed to getting agreement to particular offences going online via an “affirmative procedure”. The first offences put forward are: failure to produce a ticket for travel on tram/train and fishing with an unlicensed rod and line.

Under the online system, those who are charged with the offence will be offered the opportunity to go online, to see the evidence against them, plead guilty, be convicted and pay a standard penalty. Those who don’t want to use the online procedure, but still plead guilty, will go through the existing single justice procedure (SJP). The offences so far proposed are non-recordable offences – they are not entered on the police national computer - but offenders are subject to the rehabilitation of offenders act, which necessitates declaration of the criminal conviction to employers.

### Costs

There is a significant cost to this proposal as outlined in the impact assessment, and significant costs mentioned which have not been assessed, such as the design and maintenance of software. The assessment says that HMCTS will lose £1m in income (not clear in what time period) since offenders will pay less online than under the SJP system. It lists a number of impacts which will result in savings (improved collection rates, fall in court demand etc) but these are not costed.

### Concerns

1. Every conviction carries a criminal record. The risk of an online system is that those charged will not understand the full implications of pleading guilty, in terms of the rehabilitation of offenders act. It is essential that the offences concerned should be non-recordable.
2. Open justice (see below). The online system is closed.
3. People will plead guilty when they have a viable defence - just for convenience or because they do not realise they have a viable defence. The story of someone who forgot money for their bus fare and ended up with a £750 bill from the court<sup>17</sup>, illustrates the risk.
4. It is not clear why anyone should be prosecuted for failure to produce a ticket, if there is no evidence of fare evasion. They can be, and are usually, asked to pay a penalty fare or the full fare, on the spot, instead<sup>18</sup>.
5. The introduction of online conviction for motoring offences shows that the complexities of justice need very careful translation into an automated system. Soon after the system was set up, the paper driving licence was abolished. The system and the law were not adapted leading to offenders who used the online system, but forget to send their plastic licence, being financially penalised, despite the fact that no one needed their plastic licence<sup>19</sup>.

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<sup>17</sup> <http://www.standard.co.uk/news/london/mayfair-businessman-slapped-with-750-bill-after-being-allowed-to-ride-bus-for-free-by-the-driver-a3384966.html>

<sup>18</sup> [http://www.nationalrail.co.uk/times\\_fares/ticket\\_types/46592.aspx](http://www.nationalrail.co.uk/times_fares/ticket_types/46592.aspx)

<sup>19</sup> <http://www.transformjustice.org.uk/online-justice-a-cautionary-tale-2/>

### **Automatic online pleas (clause 23)**

There is no provision currently to plead guilty or not guilty online, or in writing, for most offences. But the new proposal is that defendants will be able to plead online for any offence for which they are charged.

This proposal has been trailed but not subject to any public or informal external consultation.

#### What is being proposed

The bill proposes that every person charged should be offered (in reality probably encouraged) to indicate their plea in writing, by which they mean online. No offender can plead until they are formally charged, but the bill suggests police officers, civilian staff working for the police, the court or a prosecutor should explain to those who are charged that they will be able to indicate their plea online and how to do so.

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.

However research suggests that 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<sup>20</sup>, suggested that entering a plea was one of times where those without a lawyer were most disadvantaged. Unrepresented defendants did not understand when they had a viable defence and should plead not guilty, but also pleaded guilty when the evidence against them was overwhelming, thus losing credit for an early guilty plea.

The other risk in putting pleas online is that the ability to challenge the charge is eliminated or delayed. The Leveson report emphasises 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 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”.*

#### Concerns

1. 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. Particularly for serious offences, we do not feel that defendants should be entering a plea unrepresented.
2. 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?

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<sup>20</sup> [http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL\\_Singles.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf)

3. If there is no hearing for, and thus discussion of, the charge and plea, 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.
4. How can an online plea system maintain the principles of open justice?

### **Open Justice (clause 34)**

The criminal court system is, unlike most family courts, open to outside scrutiny. The public and the press can watch and report on most adult criminal cases by walking into a court, and observing the proceedings. Even if one party is on a video screen, the rest of the parties are in court and the public can observe. The new reforms pose a number of challenges to open justice

- The wholly telephone or wholly video hearings will take place in the virtual world, not in the courtroom.
- Online pleas and online convictions will take place in a closed computer system.

Proposals on open justice are somewhat vague. In relation to the online conviction process, the explanatory notes say *“the Government intends to put in place measures that will maintain transparency, for example by regularising listings and publishing results online”*. But this does not explain how such information will be published.

The government is determined that the public should be able to observe wholly virtual hearings and will thus live stream the video and/or audio onto a screen or headset in the court. *“Members of the public will be able to travel to a local court building to view a virtual hearing using a dedicated terminal”*. A government announcement elaborates: *‘We will put booths in court buildings to allow the public to view virtual hearings as they take place from anywhere in England and Wales’*.<sup>21</sup>

### **Costs**

The proposals in relation to open justice are uncosted, including the cost of staff to supervise members of the public watching/listening to virtual hearings, of the space needed for the “booths”, and the cost of setting up and maintaining this facility.

### **Concerns**

1. Open Justice principles are based on the principle of open physical courts. The new proposals are an attempt to graft existing open justice principles onto new structures, but there has been no research and no consultation on them, so we have no means of gauging their impact.
2. Currently a member of the public can wander into a criminal court and work out who the parties are from their position in the courtroom. Or they can ask the usher for help in understanding what is going on. Even so, it can be confusing for someone unfamiliar with the system to understand proceedings. If the public have to “observe” cases through listening to a five way phone conversation, or some parties on video and some on the phone, they are likely to find the proceedings confusing. A court hearing has a certain drama and gravitas, which brings the criminal justice system alive. If the public can only access hearings virtually, we risk reducing public interest in, understanding of, and respect for the system.

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<sup>21</sup> <https://www.lawgazette.co.uk/law/courts-bill-viewing-booths-to-preserve-open-justice/5059937.article>

3. Currently any member of the public can publicise the outcome of a court hearing they have observed. But the government does not routinely publish convictions online. If it published online convictions online, it risks creating a disparity between those who are convicted in a court, and those convicted online. It also risks widespread flouting of the rehabilitation of offenders (ROH) act, which forbids, in most circumstances, publication of information on conviction after the ROH period<sup>22</sup>.

Contact: [Penelope@transformjustice.org.uk](mailto:Penelope@transformjustice.org.uk) @penelopegibbs2

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<sup>22</sup> <http://www.transformjustice.org.uk/how-can-justice-be-seen-to-be-done-in-an-online-system/>