



**HMCTS Proposal on the provision of court and
tribunal estate in England and Wales: Consultation
Paper
JUSTICE Response**

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For further information contact

Nadia O'Mara, Legal Researcher

Email: nomara@justice.org.uk direct line: 020 7762 6414

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. Established in 1957, JUSTICE is a UK-based all-party human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. JUSTICE has worked for many years to promote a legal system which embraces effective access to justice as its most basic element. Fundamental rights and freedoms and the rule of law are the hallmarks of a civilised society. Effective access to justice can be considered essential to any system which purports to uphold legal rights. Without effective access to justice these fundamental freedoms cannot be enforced, removing a system's vital checks and balances and rendering rights meaningless.
2. In the face of ongoing state retrenchment, we continue to work to improve access to justice for ordinary court and tribunal users. For example, in April 2015, we published the report of a Working Party of our membership on *Delivering Justice in an Age of Austerity*, focused on the civil courts and tribunals, chaired by The Rt. Hon Sir Stanley Burnton.¹ The report proposes far-reaching, 'root-and-branch' reform of the current system, including proposals that we believe will be of use to Her Majesty's Courts & Tribunals Service (HMCTS) during reform of the court estate. Additionally, in July 2015 we published a report reassessing the use of the dock in criminal trials.² We looked at how the use of space in courts can enhance or impede fair trial rights. The report recommends the abolition of the dock in criminal trials, a proposal which if implemented would allow criminal trials to be heard in a variety of flexible spaces.
3. On 23 June 2015, the new Lord Chancellor and Secretary of State for Justice announced his intention to work with the judiciary to reform the courts in England and Wales. The stated aim of the reform is to create a modern and efficient justice system which takes into account developments in technology. This process has begun with this consultation on the closure of 91 courts across the country, which includes suggestions of possible broader reform. We welcome the opportunity to contribute to this consultation

¹ The report is available on our website, at <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>

² JUSTICE, 'In the Dock: Reassessing the use of the dock in criminal trials' (2015), available from <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf>

and to contribute to the broader discourse on the reconfiguration of the court estate in England and Wales.

4. In light of the longer-term implications of the proposals contained in the Consultation Paper, JUSTICE has established a Working Party of its membership to consider: ‘What is a court?’ chaired by Alexandra Marks. This group will consider the role of courts in the delivery of justice, and the principles which must guide reconfiguration of the court estate. The Working Party will seek inspiration from comparative jurisdictions, and aim to provide a holistic perspective on reform. This Consultation response will be supplemented by the Working Party report, though nothing in this response should be taken as the views of the group. The group will report March 2016 and we hope that its findings will be valuable to the on-going reform process.

The Consultation

Do you agree with the proposals? What overall comments would you like to make on the proposals?

5. JUSTICE welcomes that attention is being paid to the configuration of the court estate. The estate is a valuable, as well as an expensive part of our justice system. Courts and tribunals have a critical practical as well as symbolic role in the justice system and in civic life more broadly. However, as is acknowledged in the Consultation Paper, many of our courts are not fit for that purpose and constitute not only a drain on public funds, but an impediment to access to justice. We agree that in certain cases, the closure or consolidation of court buildings may benefit the justice system as a whole.
6. JUSTICE is concerned that the current court closures be informed not just by how courts are used at the moment, but also how judicial processes are likely to develop in the next five to ten years and beyond, and what ‘courts’ will be needed to facilitate these processes. Key criterion in this regard should be flexibility of space, both in terms of space and design and also the contracts related to their operation. In this regard, the ability to use the court estate flexibly in the future – and to facilitate access to justice and fair trial regardless of the fluctuating investment in the justice system – will be key.

7. We note that this is not the first round of court closures in recent times, with closures of 105 courts between May 2010 and June 2015.³ It is important for HMCTS to evaluate the effect of those closures and whether they met the anticipated goals. We note that in the last decade there have also been a number of initiatives to channel hearings to larger court centres, for example with the establishment of family court centres in London and civil justice centres such as those in Manchester and Bristol. It is similarly important that the current process of reconfiguration be informed by the experience of these courts.
8. We welcome the presentation of data to support closure of the courts listed. However we are concerned that some of the calculations used to determine capacity may be inaccurate. For example, a member of JUSTICE informed us that for the Tunbridge Wells County Court and Family Court, the workload figure presented for the 2014/15 financial year of 17% use of capacity relates to the Circuit Judge's courtroom only. When the District Judge's hearing rooms are included, the usage figure increases to over 80%. If the Ministry of Justice did in fact only monitor the Circuit Judge's hearing room, then it is clear that the results presented in the Consultation Paper under-report the usage of the court building. The majority of hearings in County Courts take place before District Judges, so if the same exclusion has been applied for other courts, the starting point is likely to be inaccurate and ignores the majority of cases heard.
9. Our membership has also expressed concerns regarding the particular logistical challenges faced in Wales and rural communities. The difficult terrain and limited provision of public transport warrants careful consideration. In areas where public transport is slow, infrequent, unreliable and expensive, court closures may present significant obstacles to access to justice. Further, travelling significant distances presents the greatest challenge to vulnerable court users such as disabled persons, the elderly and single parents. This is not desirable. In our view, the travelling times to and from court, treated as acceptable in the Consultation Paper, in some cases do not take full account of the experience of vulnerable and impoverished court users. These concerns may be allayed by the provision of more 'local' alternatives, as outlined below.

³ Written answer from Lord Faulks, the Ministry of Justice, to written parliamentary question (HL1535), 16 July 2015

Are there other particular impacts of the provisions that HM Courts & Tribunals Service should take into account when making a decision? Please provide details.

10. Courts and tribunals play a practical as well as symbolic role in the communities they serve. A significantly reduced court estate has the potential to greatly alter how communities view and interact with the justice system, and accordingly its standing in public life. The Consultation Paper sets out the principles guiding the development of these proposals as: ensuring access to justice; delivering value for money; and enabling efficiency in the long term. Recent reforms of the justice system have unfortunately seen the second principle – delivering value for money – take precedence over the other two. This, in our view, has contributed to a justice system in crisis; one that neither provides proper access to justice nor an effective, efficient service. The principles guiding reform must be balanced carefully to achieve a desirable result. The following ought to be taken into account when HMCTS is making decisions based on the provisions in the Consultation Paper.

'Vanishing trial'

11. The Consultation Paper suggests that many courts and tribunals are “unused or underused”. We consider that rather than being part of a natural process, this may, at least in part, be the result of austerity policies such as cuts to legal aid and increased court fees. Academics have described this phenomenon as the ‘vanishing trial’.⁴ The academic discussion around this topic has gained in intensity in recent years,⁵ including commentary which suggests “the recent decline of trials in England and Wales is in no sense an inadvertent or unintended event”, and is instead the result of deliberate Government policies.⁶ From this perspective it is “more probable that the courts are not being brought cases to try rather than the courts [...] simply trying fewer cases”.⁷

⁴ M Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’, *Journal of Empirical Legal Studies*, Vol 1, Issue 3 (2004), pp. 459-570

⁵ See: H Kritzer, ‘Disappearing Trials? A Comparative Perspective’ (2004) 1 *JELS* 735; R Dingwall and E Cloatre, ‘Vanishing Trials? An English Perspective’ (2006) 1 *J Disp Resol* 51

⁶ R Dingwall and E Cloatre, ‘Vanishing Trials? An English Perspective’ (2006) 1 *J Disp Resol* 51, p. 63

⁷ *Ibid*, p. 62

12. This is a regrettable position for the justice system to find itself in. It is in stark contrast to the “overloading” of the courts which arose out of the “greatly extended legal aid” brought about by the Legal Aid and Advice Act 1949.⁸ What is needed is a court estate that can respond effectively over time to variable factors such as fluctuating legal aid. The court estate should not be reconfigured on the basis of current public funding levels but rather in a flexible and anticipatory manner centred on the needs of its users.

Access to justice

13. HMCTS must put access to justice for the individual court user at the centre of these reforms. As stated in the introduction, access to justice is essential to the enforcement of legal rights. This jurisdiction has a proud history of open justice and fair trials. This reputation has been shaken in recent years by sweeping cuts and ‘austerity justice’. JUSTICE does not believe however that access to justice necessarily means access to a court. Our recent report⁹ on the civil justice system proposes a new vision of dispute resolution, one which relies on judicial officers, utilising alternative spaces. JUSTICE advocates innovation and believes much can be gained from reimagining our courts, including through the use of technology. However, this must be done in a manner which avoids detriment to vulnerable court users and with access to justice at its heart.

Judicial ritual

14. JUSTICE considers that the ritual and symbolism attached to the court and the judicial process ought to be taken into account when considering the reconfiguration of the court estate. Judicial tradition is deeply embedded within the justice system in this jurisdiction. While some elements of this tradition are arguably anachronistic, other elements play a role in reinforcing the legitimacy of judicial institutions. The official language, required procedure, codes of conduct and judicial dress are all commonly accredited with giving authority to the court. Further to this, it has been argued that “the environment in which the trial takes place can be seen as a physical expression of our relationship with the

⁸ See: Royal Commission on Assizes and Quarter Sessions (1971), *Royal Commission on Assizes and Quarter Sessions, 1966-69*, Commission under the Chairship of Lord Beeching. HMSO, p. 33 (Beeching Report)

⁹ Delivering Justice in an Age of Austerity, see above.

ideals of justice”.¹⁰ It is therefore paramount that HMCTS carefully considers the impact that the far-reaching reforms proposed in this Consultation Paper may have on justice being ‘seen to be done’. Caution should be exercised to ensure that the valuable elements of our legal traditions are maintained, while less useful elements are replaced with modern manifestations. “Legal architecture can associate law with tradition and conservatism or can equally well symbolise a commitment to change and innovation”.¹¹

15. The importance of symbolism is relevant to the Consultation Paper’s emphasis on the better use of technology in the courts; in the suggestion that technology could be used to remove certain legal matters from the courts entirely; and the proposed use of other civic or public buildings for hearings. Innovative research into the implications of some of these reforms is taking place in other jurisdictions.¹²

Are there alternatives to travelling to a physical building that would be a benefit to some users? These could include using technology to engage remotely or the use of other, civic or public buildings for hearings as demand requires. Please explain your answer, with specific examples and evidence of the potential demand for the service where possible.

A different vision of dispute resolution

16. Traditionally, courts have been the sole ‘sites’ of justice in England and Wales. It does not seem likely that this will be the case in the future as the justice system changes to adapt to technological advancements and modern modes of dispute resolution. Accordingly, we need to change the way we think about courts: what we need from them and the role they play in the justice system.

17. In *Delivering Justice in an Age of Austerity*, the JUSTICE Working Party proposed a vision for a streamlined dispute resolution process that is designed to be accessed by unrepresented parties, supported by an integrated online and telephone information,

¹⁰ L Mulcahy, ‘Legal Architecture: Justice, Due Process and the Place of Law’, (Routledge, 2010), p. 1

¹¹ Ibid

¹² For example, the on-going research of Professor David Tait and Dr Meredith Rossner entitled ‘Just Spaces: security without prejudice in the wireless courtroom’, further information available from http://www.uws.edu.au/justice/justice/research_projects

advice and assistance portal. In summary, this new model of dispute resolution would feature a primary dispute resolution officer who, through proactive case management, will get to the heart of cases quickly, drawing on their expertise and authority to resolve as many cases as possible using alternative dispute resolution methods. In practical terms, such a process would require fewer traditional court rooms and more flexibly deployed meeting rooms and back office space.

Use of technology

18. JUSTICE strongly supports the expanded use of technology in the justice system. We agree that a significant number of legal matters, particularly in civil and family law, could be dealt with more efficiently and more fairly through the use of technology. In our report discussed above we suggest, alongside our primary proposal of a new model of dispute resolution in the civil courts and tribunals, the development of an integrated online and telephone service which would provide effective access to information, advice and assistance for the majority of those who would not otherwise have access to such services, while also freeing up scarce personally delivered services to those who need them most. The JUSTICE Working Party on Complex and Lengthy Trials is currently looking at how to handle the problems arising out of cases lasting more than three months at trial, including how technology can be used to expedite arduous processes and make the trial process clearer and more effective.

19. JUSTICE is not alone in its support for the technological advancement of the justice system. The Civil Justice Council (CJC)'s Advisory Group on Online Dispute Resolution (ODR) published its report in February 2015.¹³ In its report, the Advisory Group strongly advocated the introduction of online dispute resolution for low value claims. The Group's main recommendation was that HMCTS should establish a new, Internet-based court service. The chair of the Advisory Group, Professor Richard Susskind OBE, served on our Working Party and many of the views expressed in the report reflect those found in the JUSTICE report. JUSTICE supports the recommendations laid out in that report.

¹³ Available from <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>

20. A number of jurisdictions across the world are making concerted and creative efforts to provide legal services through dynamic platforms. Outside the justice system, innovative approaches to dispute resolution are used in this jurisdiction among others. Detailed accounts of these systems can be found in the JUSTICE report on *Delivering Justice in an Age of Austerity*, the CJC's Advisory Group report,¹⁴ and Roger Smith's *Digital Delivery of Legal Services to People on Low Incomes*.¹⁵ For the purposes of this consultation, we believe the following examples to be of particular utility:

- **Rechtwijzer 2.0** <http://www.hiil.org/project/rechtwijzer>
This online service is designed to assist parties resolve disputes through a process that takes them from problem diagnosis, through facilitated, Q&A-based framing of their case, to problem solving and assisted negotiation, and finally to various forms of online alternative dispute resolution.
- **Canadian Civil Resolution Tribunal** <http://www.civilresolutionbc.ca/>
This is an online tribunal designed as an alternative pathway to the traditional courts for resolving small claims through a process which is intended to be more convenient and less costly.
- **Financial Ombudsman Service** <http://www.financial-ombudsman.org.uk/>
The purpose of the FOS is to resolve disputes between consumers and financial businesses quickly and with the minimum formality. The process is geared towards early and informal resolution.
- **Resolver** <http://www.resolver.co.uk/>
This is a UK-based online tool that assists consumers to raise complaints with suppliers and retailers.
- **Traffic Penalty Tribunal** <http://www.trafficpenaltytribunal.gov.uk/>
The Traffic Penalty Tribunal of England and Wales has recently launched an online portal that enables users to appeal, upload evidence and follow cases and hearings under one evidence screen and account.

21. It is our view that technology can radically improve access to justice, both in the courtroom and by providing alternative methods of dispute resolution which, as mentioned in the Consultation Paper, may not require litigants to travel to a physical

¹⁴ See report pp. 11-16, 'Examples of ODR in action'

¹⁵ Commissioned by the Legal Education Foundation and published in December 2014, available from <http://www.thelegaleducationfoundation.org/digital-report>

building. The justice system – and indeed the legal profession – in England and Wales have been remarkably slow at adapting to the needs of the Information Age. Whether by choice or necessity, it is time for the system to catch up. As more moves online, what is needed of work spaces will change. The vision needs to be forward thinking as the quantity and quality of technology available hopefully improves.

22. With all that said, we are concerned that technology could be hailed as a ‘silver bullet’ for the justice system. Whatever its potential, technology cannot replace certain elements of the current system nor should it. Moving judicial processes online presents a series of challenges such as ensuring a fair judicial process; maintaining an open and transparent system; and facilitating the development of the common law. JUSTICE believes that if approached intelligently most of these concerns can be overcome, particularly in the civil and family law contexts. Criminal justice provides a greater challenge given the need to retain an adversarial process to test the prosecution’s case and maintain a fair trial, which in our view cannot be adequately provided outside of a traditional courtroom (absent technological advancements well beyond our realistic ambitions). However we also consider that many simple procedures could easily be done online and that more matters could be dealt with by out of court disposals. We also note that there is great work progressing on the digitalisation of the courts in this context which has potential to improve the efficiency and effectiveness of the criminal justice system.¹⁶

23. Finally, we must remember that many of the tools necessary to implement a technologically advanced system are yet to be developed. As mentioned above, other jurisdictions have made great strides towards realising systems of justice with advanced in-court technology and online tools for the provision of legal advice and dispute resolution. Much inspiration and learning can be taken from these examples. What must also be appreciated is the amount of time and resources spent in order to achieve the successes seen. HMCTS will have to invest significant resources to develop a system which adequately serves the exigencies of society today. We would hope that this sort of investment would be possible with the sale of some of the courts which are agreed to be underperforming.

¹⁶ For example the criminal justice efficiency programme, detail available from <https://www.justice.gov.uk/about/criminal-justice-system-efficiency-programme>. Note also the on-going work of the JUSTICE Working Party on Complex and Lengthy Trials which aims to report its findings in early 2016 <http://justice.org.uk/our-work/areas-of-work/criminal-justice-system/complex-and-lengthy-trials/>

'Town hall justice'

24. The justice system as it stands in England and Wales is highly centralised. The judiciary, the courts and tribunals, the legal aid system are all managed from London. While many elements need to remain national, a great deal more than is necessary has been removed from local ownership and focus. JUSTICE welcomes a renewed consideration of local justice, and believes there is much to be celebrated about it. Reengaging communities should form part of any reform of the justice system and presents exciting possibilities. Our justice system's origins are axiomatically local, and it is possible that past practices may provide inspiration for the system of the future.
25. However, while JUSTICE broadly supports the 'idea' of using local civic or other public buildings for judicial functions, we are concerned that the concept is not at all explicated in the Consultation Paper or elsewhere. While the idea might sound attractive, without close consideration of the implications of such a policy it risks facilitating further limitations on the capacities of the current system. JUSTICE encourages historical and cross-jurisdictional research into what 'town hall justice' previously looked like in England and Wales, and how it operates in other jurisdictions where similar policies have been implemented. The transfer of many matters out of the courts and into other public buildings presents a number of practical considerations which must be taken into account. This will be an area of consideration for our Working Party.
26. The justice system in England and Wales formerly operated on a more local basis than we see in the current system. Up until the Courts Act 1971, much of the justice done in England and Wales took place in courts of assize and quarter sessions. These periodic courts were replaced by the single permanent Crown Court that we know today. Proposals for the abolition of the periodic courts and their replacement with the Crown Court were laid out by the Beeching Commission in its report of 1969. JUSTICE considers it imperative that the Government carefully considers the situation as it stood at that time in order to understand why the system of 'town hall justice' was abolished. It would be unwise for a policy to be pursued which essentially goes back in time, particularly if the concerns remain the same.

27. JUSTICE supports the use of flexible spaces in the courts.¹⁷ However, holding judicial sessions in buildings other than courts also presents challenges. One example is maintaining the appropriate separation of the parties to the case. We do not support a vision of ‘town hall justice’ which reverts to the situation that existed prior to the establishment of the Crown Court in which: “[a]ccused persons, litigants, witnesses, jurors and police officers, and even solicitors and counsel conferring with clients, all jostle[d] together in embarrassing proximity in halls and corridors which, far from providing any elements of comfort, may well [have been] stacked with the paraphernalia associated with the other uses of the building, such as dismantled staging, parts of a boxing ring, or the music stands for a brass band contest”.¹⁸

28. We therefore suggest that any alternative building used must have the appropriate facilities for the case at hand. This would include separate entrances and waiting spaces for the parties; rooms for judge and counsel; rooms for other necessary services; a victim/witness support service; and appropriate security provision, among other elements. Even if a building is not a court, it must have the necessary elements of a court. This will vary depending on area of law and nature of proceedings. It is imperative that judicial proceedings maintain their integrity and that court users are provided with all necessary services.

Please provide any additional comments that you have.

29. This Consultation Paper presents a valuable and timely opportunity for a considered debate about the configuration of the court estate in England and Wales. JUSTICE strongly encourages HMCTS to approach the consultation process and the subsequent reform in a manner which places the court user at its centre. We look forward to sharing our Working Party’s deliberations with HMCTS in the near future.

¹⁷ See our above mentioned report on the use of the dock in criminal trials

¹⁸ Beeching Report, p. 47