



**Civil Justice Council consultation on vulnerability in the
civil justice system**

JUSTICE response

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. In 2019, JUSTICE produced a Working Party report called *Understanding Courts*, which set out recommendations aimed at improving the participation and experience of lay users in court and tribunal proceedings. These recommendations included encouraging a change in the culture of hearings; embedding the importance of professionals communicating in a way that lay people can follow through the use of plain language; providing clear and comprehensive information on the process of going to court in a variety of mediums; and taking the lessons from improved guidance on questioning vulnerable people – extending these to interactions with all lay court users.
3. We are pleased to see that the Civil Justice Council (“CJC”) has referenced that report, and that several recommendations in its consultation proposals mirror those from *Understanding Courts*. We wholeheartedly endorse the content of the preliminary report, and our response merely identifies areas where the report could be more prescriptive, as well as highlighting the need to consider and identify vulnerability within online justice processes.

Question 1.

Are there issues in relation to vulnerable parties/witnesses in the civil courts which have not been covered/adequately covered within this preliminary report? If so please give relevant details.

Training

4. At recommendation 3, the preliminary report captures the need for there to be more judicial training on:
 - (a) detecting/assessing vulnerability;
 - (b) case management where a party is vulnerable; and
 - (c) in the conduct of hearings (to include the direct questioning of witnesses).

5. We agree that more targeted training is necessary to ensure that the judiciary have the requisite skills both to identify vulnerability early in the process and to adapt case management and the conduct of hearings to accommodate vulnerability. In our view, the reference to “direct questioning of witnesses” at recommendation 3(c) ought to be clarified to reflect that what is being referred to are (presumably) adjustments for the examination of witnesses. We would suggest the following form of words:

“include the ~~direct questioning~~ **examination of vulnerable** witnesses.”

6. As acknowledged in the preliminary report, our Working Party report *Understanding Courts* recommended that the civil courts ought to have regard to the civil TAG toolkit¹ when dealing with vulnerability, a toolkit that sets out best practice with respect to those matters captured at recommendation 3 of the preliminary report.
7. However, we are keen to stress that it is not merely the judiciary who need focused training and guidance on vulnerability. Both the preliminary report² and *Understanding Courts*³ have identified judicial concern around advocates without the necessary training appearing in cases involving vulnerable witnesses. In our view, the final report from the CJC ought to emphasise that the need to identify and adapt to vulnerability is inherent to the role of the advocate.
8. The Advocacy and the Vulnerable Training Programme for advocates is currently voluntary,⁴ though we understand the intention is for it to become mandatory at some

¹ Available at <https://www.theadvocatesgateway.org/images/toolkits/17-vulnerable-witnesses-and-parties-in-the-civil-courts-2015.pdf> JUSTICE *Understanding Courts* (2019) chaired by Sir Nicholas Blake, recommended that the courts ought to have regard to the civil TAG toolkit for best practice in identifying, case managing and adjusting for vulnerable participants, para 4.16 available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/Understanding-Courts.pdf>

² At para 137, referencing *R v Biddle* [2019] EWCA Crim 86 where Lady Hallett expressed concern that there may still be advocates appearing in cases involving vulnerable witnesses who have not undergone the necessary training.

³ JUSTICE, note 1 above para 3.56 referencing the Lord Chief Justice, who observed that “...It is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training,” *R v Grant-Murray* [2017] EWCA Crim 1228, at para 226.

⁴ The programme has been designed to ensure that all advocates, when dealing with vulnerable witnesses, understand the key principles behind the approach to and questioning of vulnerable people in the justice system, irrespective of the nature of the allegation, or the jurisdiction in which the advocate appears: see ICCA website, <https://www.icca.ac.uk/advocacy-the-vulnerable>

stage and to capture around 14,000 advocates.⁵ Plainly, advocates dealing with vulnerable witnesses must have the requisite training to do so. Further, *Understanding Courts*⁶ and our most recent Working Party report *Prosecuting Sexual Offences*⁷ emphasised the need for professional training for prospective lawyers to embed awareness of vulnerability and adaption to lay court users from the outset of their careers. We understand that the Inns of Court College of Advocacy is devising a programme that would include this in relation to the Bar Professional Training Course.

9. As a further remark, the approach of a trained advocate to vulnerable witnesses has universal application across the courts. In *Understanding Courts*, the Working Party highlighted how Ground Rules Hearings have created a culture of advocates successfully adapting their questioning style to pitch their questions appropriately and in a manner that is easy to understand for vulnerable witnesses.⁸ The Working Party took the view that those principles are relevant for lay users generally, as witnesses are more likely to give a fuller, accurate account if questions are clear, short, follow a logical order and avoid comment or rebuke.

10. In our view, the CJC should emphasise that the principles which underpin the questioning of vulnerable witnesses have universal application across the civil justice system and can encourage a cultural or professional shift amongst professional court users as to how they treat lay users and their experience of procedural justice.⁹

Digitisation

11. The preliminary report identifies that the Reform Programme is migrating more and more court processes online.¹⁰ However, as the landscape of civil justice increasingly

⁵ See JUSTICE, note 1 above, footnote 234.

⁶ *Ibid*, para 3.49 – 3.56.

⁷ JUSTICE *Prosecuting Sexual Offences* (2019) chaired by HH Peter Rook QC para 4.49 – 4.59.

⁸ JUSTICE, note 1 above, para 3.59.

⁹ *Ibid*, para 3.62.

¹⁰ Which will include the ability for parties to commence claims online, as is currently available through Civil Money Claims Online, Civil Justice Council, 'Vulnerable witnesses and parties within civil proceedings: current positions and recommendations for change' (August 2019) para 87 available at <https://www.judiciary.uk/wp-content/uploads/2019/09/Vulnerable-witnesses-and-parties-consultation-September-2019.pdf> Additional processes that are being piloted where all of filing, case management and adjudication are potentially conducted online include: the pilot for appeals in the Social Security

shifts to emphasise digital by default, we remain concerned that insufficient regard has been given as to how vulnerability might be defined and identified within online processes, despite us raising this issue in our 2018 working party report *Preventing Digital Exclusion*.¹¹

12. In JUSTICE’s view two factors must be addressed to adapt for vulnerability in digital processes. The first factor is ensuring that the term “vulnerability” is sufficiently defined to capture the broad array of reasons why a person may be “vulnerable” when using an online process.

13. The term “vulnerable” in the judicial system denotes factors, whether inherent to a person or situational, which impede upon their ability to participate in a court or tribunal process.¹² The Advocate’s Gateway cites various risk factors that may bring a person within the definition of inherent vulnerability; being a child; lack of fluency in the English language; illiteracy; learning disabilities; hearing impairments; speech (or language) impairments; mental health conditions or impairments.¹³ Equally, it must be stressed that the situation which a person might find themselves in may impede their ability to participate in a judicial process when they are otherwise capable.¹⁴

14. JUSTICE’s 2018 report, *Preventing Digital Exclusion from Online Justice*, considered approaches that could be taken within the Reform Programme to make it more accessible to people who might otherwise be digitally excluded from online justice processes. The report identified various factors, both inherent and situational, which

and Child Support Chamber of the First-Tier Tribunal, First-tier Tribunal (Tax Chamber) and [Apply for a Divorce Online](#).

¹¹ JUSTICE, *Preventing Digital Exclusion from Online Justice* (2019) chaired by Amanda Finlay CBE para 2.81.

¹² See JUSTICE, note 1 above, para 1.21.

¹³ ATC The Advocates Gateway, 2017:5.

¹⁴ The Working Party in *Understanding Courts* stressed that a court process itself may render a person vulnerable, by virtue of the environment being unfamiliar, anxiety-inducing or improperly adapted to the needs of ordinary people, JUSTICE, note 1 above, in particular para 1.21. The JUSTICE Working Party report, *Mental Health and Fair Trial* (2017) chaired by Sir David Latham stressed that vulnerability ought to not diminish the agency of people captured under that term, and that “vulnerability” ought to be sufficiently robust to capture those who require support when they came into contact with the criminal justice system in order to understand and overcome pressures within it, para 1.13 available at <https://justice.org.uk/wp-content/uploads/2017/11/JUSTICE-Mental-Health-and-Fair-Trial-Report-2.pdf>

make a person vulnerable by virtue of inhibiting their ability to engage with an online justice process:¹⁵

- (a) older adults, those who are disabled or in care homes (inherent); and
- (b) those who are detained, or homeless or on low incomes, young people who are both on low incomes and left school before the age of sixteen, those based in rural areas with low broadband coverage and lack of access to physical services where they can get online (situational).

15. In June of this year, JUSTICE submitted a Committee Stage briefing¹⁶ to the House of Lords on the Courts and Tribunals (Online Procedure) Bill,¹⁷ where we recommended that the power to make the Online Procedure Rules ought to be exercised with a view to ensuring that people had sufficient support to initiate, conduct, progress or participate in electronic hearings.¹⁸ We were pleased that Clause 1 of the Bill was subsequently amended to emphasise the need for support to enable those who were digitally excluded to engage with online justice services.¹⁹

16. To our mind, the final CJC report ought to more strongly flag the challenge of vulnerability, specifically digital exclusion, within online justice processes and recommend that HMCTS and the Online Procedure Rules Committee adopt a working

¹⁵ JUSTICE (2018), *Preventing Digital Exclusion from Online Justice*, chapter 2, available at <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf> In a recent report, Dr Natalie Byrom from the Legal Education Foundation sought to capture a definition of vulnerability for the purposes of the Reform Programme. She suggested that what was necessary was one that captured both situational and inherent characteristics, with an emphasis on “those factors that inhibit participation in legal processes.” In the context of the Reform Programme, she suggested that the definition of vulnerability should reflect factors which are likely to “render an individual with a meritorious claim less able to participate in an online justice system”, Dr Byrom, ‘Developing the detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice’, (2019) p 11-12 available at <https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf>

¹⁶ Available at <https://justice.org.uk/wp-content/uploads/2019/06/JUSTICE-Courts-and-Tribunals-OP-Bill-Briefing-HL-Committee-Stage.pdf>

¹⁷ Available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0430/190430.pdf>

¹⁸ JUSTICE, note 17 above, para 10-11.

¹⁹ Clause 1(4) of the Courts and Tribunals (Online Procedure) Bill 2017-19 now provides that the when making the Online Procedure Rules, the committee must have regard “to the needs of those who require support in order to initiate, conduct, progress or participate in proceedings by electronic means.”

definition of vulnerability for the Reform Programme sufficiently robust to capture all the types of inhibitions upon participating in online legal processes identified above.²⁰

17. The second factor to consider is the need for digital systems to be built to identify vulnerability at an early stage. The interim report has correctly criticised the absence of a specific requirement to consider vulnerability and any need for assistance in each of the small, fast and multi-track case progression questionnaires.²¹ Certainly, the report is right to note that the ‘Hearing Requirement’ section of Civil Money Claims Online currently only asks whether a party “requires any support for the hearing?” and questionnaires for online processes will need to be drafted in a such a way as to flag vulnerability.²²

18. However, the flagging of vulnerability ought to take place at the earliest possible stage and there are obvious challenges with digital processes in doing this. Some types of inherent vulnerability may be readily apparent to advocates or judges in physical courts when they first see someone in person, and adjustments can be considered at that stage. But when a person is engaging with a digital process, there is no equivalent face-to-face opportunity to identify vulnerability. Some online processes, where decisions are made on the papers or based on early neutral evaluation,²³ will be made with judges interacting with parties wholly online, potentially without even the use of videoconferencing or phone calls.

19. The recent Legal Education Foundation report on the Reform Programme²⁴ recommended that HMCTS commit to embedding the collection of data points relating to vulnerability²⁵ at the earliest possible stage in the user journey. We agree with this

²⁰ On this, see Dr Natalie Byrom, ‘Digital Justice: HMCTS data strategy and delivering access to justice: Report and Recommendations’, (Legal Education Foundation, October 2019) para 4.13 and Figure 4-2 (which identifies the 13 attributes that need to be captured to assess vulnerability) available at <https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf>

²¹ This contrasts with the case progression forms in criminal proceedings, recently amended by the Criminal Procedure Rule Committee to ensure that both witness and defendant needs are appropriately addressed.

²² Civil Justice Council, note 10 above, para 89.

²³ For instance, the pilot for continuous online resolution in the Social Security and Child Support Chamber has trialled the use of interim decisions on the papers, a form of early neutral evaluation for benefits appellants prior to any face-to-face interaction occurring.

²⁴ Dr Byrom note 17 above.

²⁵ *Ibid*, recommendation 2, p. 7.

recommendation. Data and information on vulnerability in an online process ought to be collected and fed to a decision-maker as promptly as possible, to allow the case management and conduct of the proceedings to be adapted so a user can participate. One possibility is the introduction of a case progression questionnaire for online processes, akin to those offered in the various civil case tracks, as flagged at paragraph 17 above. But any inquiry or questionnaire on vulnerability in a digital process would have to be carefully considered and user-tested, to ensure the questions were eliciting the necessary answers. It would also need to take place sufficiently early in the process to make up for the fact that vulnerability in a wholly digital process cannot be flagged at an early face-to-face hearing, as is the case in a traditional court or tribunal process.

20. Where vulnerability is flagged early, a decision-maker could then make accommodations for the user. As part of the case management directions, they could advise a user on the availability of Assisted Digital support services in their area or ensure the party has access to an intermediary, if a video hearing is to be conducted and the capacity for a person to communicate is in issue.

Question 3.

Do you believe that there should be further or alternative recommendations? If so please set out relevant details

21. In the first section of our response, we have identified that training for advocates in dealing with vulnerable witnesses and ensuring online processes identify vulnerability are missing elements within the preliminary report. We suggest further recommendations dealing with those matters ought to be incorporated in the final report.

Recommendation 1: The Advocacy and the Vulnerable Training Programme ought to be a mandatory training programme for all prospective and current advocates.

Recommendation 2: Until such time as that programme is provided on a mandatory basis, courts should satisfy themselves that advocates appearing in matters involving vulnerable parties or witnesses are sufficiently trained.

Recommendation 3: HMCTS and the Online Procedure Rules Committee should adopt a definition of “vulnerability” for the purposes of the Reform Programme and online justice processes which captures both the inherent and situational factors that impede a person’s ability to effectively participate in online justice processes. This must include consideration of the factors by which a person is “digitally excluded”.

Recommendation 4: HMCTS online justice processes must be capable of capturing data points on vulnerability at an early stage in the user journey. HMCTS and the Online Procedure Rules Committee ought to give thought as to how that data can be made available to a decision-maker at the earliest possible stage, to allow them to adapt the case management and conduct of the proceedings to ensure a vulnerable user can effectively participate.