Introduction.

The Kent Law Society is one of the oldest Law Societies in England and Wales. It has 500 members and represents Solicitors from all over the County covering all areas of law. Kent was the largest procurement area by value in the 2015 Ministry of Justice Criminal Duty Contract Tender. It has two Crown Courts and 6 Magistrates Courts where many of our members practice on a daily basis. The Society recognises the unique place that our criminal justice system has in the world and that it is seen as a beacon of fairness and good practice to many around the world.

The Society is committed to preserving and enhancing the quality of criminal advocacy in our courts.

We have made some general observations concerning the "Transforming Our Justice System" paper but have limited our response to the specific questions posed in the consultation paper to questions 1 – 6 of the Consultation.

General Observations.

We are justly proud of the place our justice system holds in the world. We agree that our justice system has an international reputation for fairness where an individual can appear before the courts knowing that that their matter will be judged solely on its merits, by an independent tribunal. It is on the strength of our criminal justice system and the independence of our judiciary that many choose to make England and Wales their jurisdiction of choice bringing £3.6bn of export earnings per year to this country. We also acknowledge that the primacy of England and Wales' position is under threat from international competition and that in order to meet these challenges we must adapt and embrace new technology. However it must not be forgotten that it is justice and not process which has made us the jurisdiction of choice and therefore extreme caution must be paid to any changes to our system which might detract from the perception that justice may be harmed or diminished.

We note the recognition of the need for the judiciary to be drawn from the widest possible pool of talent and yet we are experiencing a growing shortage of criminal lawyers[1] (the pool from which many of the judiciary are found) particularly in the South of England due to the levels of remuneration which have resulted following over twenty years of stagnation and cuts to the legal aid rates paid for such work. If our system is to be successfully transformed and retain its position in the world there must be a sufficient number of talented lawyers engaged in the system. Any plan which seeks to successfully transform our justice system must address this issue.

In the section entitled "Building blocks of reform" (p5-6) we note the reference to "virtual hearings" and the intention to extend these. We in Kent have been at the forefront of the use of video technology in the criminal courts and would commend much of its use making it easier and cheaper for hearings to be conducted. However we would caution against a greater roll out of these practices without first ensuring a proper evaluation is made of the impact of such changes on the justice outcomes. The physical separation of the advocate from the tribunal has led many to conclude that the advocate's effectiveness is adversely

affected if they are not physically present before the tribunal they address. Defendants who are denied the opportunity to meet with their lawyer face to face before the first hearing have expressed a lack of confidence in the fairness of the proceedings. The removal of decision making from local justices through the "regionalisation" of magistrates courts has led to questions as to the delivery of justice to the local population. These and many other justice considerations remain untested and not even researched, with the potential risk of harm to the standard of justice which our system delivers.

Under the heading "Impact on the judiciary and legal professionals" it is recognised that the proposed reforms will have a major impact on the work of lawyers. We are aware that as part of the reform proposals, consideration is again being given to extended hours for court sittings. Again in Kent we have experienced previous pilots for such extensions to the current court hours. We have very serious concerns in relation to extended hours as this will inevitably lead to at least criminal defence lawyers being required to work a greater number of ours to the already very long hours worked making the prospect of new entrants to this type of work even less likely than at present. With the shortage of lawyers that already exists this is a very worrying matter and is not consistent with the stated goal of "building a more just society".

In relation to the section headed "Unifying the criminal courts" we note the comment that "we have already increased flexibility as far as we can to ensure that cases are heard close to where offences are committed". We certainly agree, as stated above, that this is a laudable and indeed important justice goal, yet we do not see how recent developments of closing courts and testing the concept of regional virtual courts whereby offences committed in Norwich or Hartford are dealt with in Chatham in Kent some 130 and 55 miles apart demonstrate this objective. Therefore we hope to see that, as further plans for reform are unveiled, they will resile from the use of distant courts and focus on effective ways of delivering local justice so that cases are heard close to where offences are committed.

[1] *Paragraph 19 House of Commons Committee of Public Accounts Efficiency in the criminal justice system, First Report of Session 2016-17 27th May 2016*

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

The overriding principal in consideration of all of the above channels must be one of justice.

Para 7.1.3 considers the percentage of information technology users across the UK. The consultation should consider the percentage of "typical" court users across the UK including, for instance, those with learning difficulties and mental health issues or non-English speaking defendants that enter the criminal justice system. There is a realistic risk that the percentage of "digitally excluded" is much higher than is suggested.

The consultation refers to face to face assistance but gives very vague information as to how this would be provided, who would provide it and at what level the assistance would be set at. Face to face assistance simply providing technical assistance for completion of the form

would be inadequate. This would not safeguard an individual's understanding of the case against them.

The telephone help service, unless provided by those with qualified legal knowledge, will have the same pitfalls as above.

Whether by telephone, web chat, face to face or paper, without attention to detail, justice is at risk.

Para 7.1.6 – refers to the ability to make a plea on line. The consultation as a whole appears to have either little concern or little insight into the potential users of online courts. Within the scope of this question the only reference to a defendant not understanding the consequences of their decision is at *para7.2.4 vii*, *(The court would have the power to reverse convictions and have the matter retried, in the event the defendant did not understand the consequences of their decision to accept the conviction and total penalty)* and only then, this is after the event. The consultation does not go on to explain how it would ever determine the defendant failed, for example, to discover he/she had entered an equivocal plea, or failed entirely to understand what they were pleading to. The consultation simply refers to the court having the power to reverse a decision. The concern would be as to how the defendant becomes aware of his failure to misunderstand his decision, at worst pleading guilty to an offence he was not guilty of. No matter how low level the conviction/sentence, the defendant should be entitled to a "just" process and outcome. The online system fails to take account of this in any true sense. The consultation gives no information as to how any lack of understanding, on the part of the defendant, is avoided, nor any detail of what checks might be put in place. The consultation focuses on ensuring the defendant understands how to use the "self-server online" system in terms of understanding the use of the technology itself, but appears to have no regard as to whether justice is being served. In addition, by providing this online service, there is risk of temptation for a defendant to use the system as a form of convenience. Face to face interaction with a court clerk, for example, at the very least creates, to some degree, a natural safeguard.
The consultation appears to have no regard to those individuals that may have learning difficulties, mental health issues or lack capacity (Brief comment at para 7.1.8 to visually impaired and low literacy). Safeguards as to how they are identified and then protected must be considered.

Para 7.2.4 – v refers to defendants being presented with all the relevant evidence against them. In the current virtual courts in Kent the evidence presented is often, at best, questionable. When face to face with a Prosecutor, a defence advocate through their experience and expertise, is able to advise defendants as to those inadequacies and seek the necessary information from the prosecution. This is already extremely difficult when the defendant and defence advocate appear remotely; often information is outstanding following the virtual hearing. However, the defence advocate is in a position to advise the defendant of the situation and advise on any next steps. Without the advocate the defendant may have simply entered a plea and been convicted and sentenced without being any the wiser. It is concerning that the defendant who is able to consider the evidence on-

line may also lack important information. They will not have the necessary expertise and experience to appreciate whether important information may be lacking.

In conclusion, these processes should only be put in place if they are genuinely improving efficiency and justice rather than being a way of simply saving costs at the expense of justice.

Q2 Do you believe that any channels are particularly well suited to certain types of HMCTS service?
State your reasons

There cannot be a one size fits all approach to the stated aim of making court and tribunal services more accessible as different areas of the justice system have different needs and deal with different types of people. While it may be that those dealing with Employment Tribunals may have experience in using technology, those charged with criminal offences may not. The presumption that those with mental health problems and addictions can conform to a digital system is misguided.

It is not possible to say any channel is particularly well suited to certain types of HMCTS service because it will depend too much on the type of matter and the person seeking to use the service. It is too simplistic a question to provide a definitive answer, the experiences in all fields from all sides should be considered.

Telephone - those who have simple queries may be able to be assisted by a simple telephone call but those who have learning difficulties will need a more "hands on" approach. A concern is that those answering the telephone will not have sufficient knowledge to deal with anything other than the most basic queries. For matters involving the filling in of a form, it will depend on the form and what it relates to. It is a leap of faith to presume that the 70% of people who are not "digital self-servers" will be able to be assisted in this way. There is too much evidence from other professions that as soon as a system relies on telephone advice the quality of the advice reduces and is more difficult to access. Those who are vulnerable will probably not use the telephone and therefore not have access to the system in the manner desired.

Webchat - this may be of assistance to those who are "digital self-servers" but those who are not will be unable to be assisted in this manner. Court users who work within the justice system may be able to progress matters in this way but the public who are unused to the forms and procedures will not.

Face-to-face - the benefit of face-to-face interaction, if provided by someone with appropriate training will be greater for those who are vulnerable and not "digital self-servers"; however, if provided by a third party organisation, there would have to be safeguards to ensure proper quality of service and training is given.

It is impossible to say if any of the above channels are more appropriate in respect of the justice system as a whole. The two new services being developed raise questions, for instance, in respect of making plea online for low level traffic offences'. If 70% of those using

the system are not technologically advanced enough to deal with the channels, are they not likely to plead guilty just to bring the matter to a close? It would be of concern if more criminal offences were to be dealt with in this way as the evidence obtained would not be scrutinised appropriately. The other area is to assist those applying for financial help towards court fees or those on low incomes. It may be that these are likely to be those who are "digitally excluded" and who may as a result be prevented from accessing the justice system. It seems that the aim is to reduce costs more than increase access and that includes obtaining legal advice. If people are left without access to legal advice and have to use a system they cannot utilise, they are likely to give up and the numbers of those using the services may fall. It is too simplistic to say what a particular channel may be suited for without analysing the full service provision.

Question 3: Do you agree with the principal of a statutory fixed fine process for those who enter an online guilty plea and are content to proceed with the process?

No, we do not agree with the principal of a fixed fine process as we believe that it is not consistent with a criminal justice system where it is understood that there may be many factors which would mitigate against a fixed sentence being imposed and which call for a qualitative judgement on the appropriate sentence to pass. That the level of sentence has been set at a fine rather than a discharge is more in keeping with a civil penalty such as a parking ticket than with a criminal conviction. The move to automated sentencing in criminal cases ignores firstly the reality that defendants will be inclined to get the matter over with rather than challenge and secondly, that defendants may accept the criminal conviction without necessarily understanding the potential long term consequences of doing so.

The move to an automated sentencing regime is indicative of a reform to a criminal processing system away from a criminal justice system. If there are to be automated punishments then they should be civil in nature and not criminal. Consideration of de-criminalising the proposed measures should precede any attempt to automate any punishment that may be associated with infringing these measures.

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

Please list additional considerations.

I. In absence

Anybody who regularly appears in the magistrates' court will be aware of the problems that occur when defendants are dealt with in their absence. On a daily basis people appear before the courts for driving whilst disqualified which has stemmed from their having entered a guilty plea by post. Neither the original explanation nor the sentence are adequately explained to the defendant.

II. Understanding

Every criminal case is unique in its details. Often defendants fail to understand the court process and the charges against them. This would be increased if defendants are simply dealing with an online system. There is no standard video or web chat that would be able to assist with legal and technical enquiries. People will be pleading guilty without the support of legal advice in either the form of a solicitor or a clerk.

III. Virtual court

Those of us who regularly appear before the virtual courts understand all too well the inadequacies of the system regardless of what the MOJ wish to publish about its success. People still fail to understand that they are in fact in a court of law.

It is a time consuming and an inefficient way of dealing with people. The changeover between cases takes a disproportionate amount of time. This will be increased where under the current proposals most of the cases involve defendants who will be representing themselves.

IV. Language

Difficulties with diverse culture

V. By computer

This is perhaps the most dangerous proposal put forward in many a year. Which in itself is an achievement. To allow a pick and mix justice system is absurd. Defendants being allowed to decide on their guilt by seeing the proposed sentence is naive in the extreme. People will be pleading guilty "to get it out of the way" or "cheaper to plead guilty than to fight it".

Question 5: Do you think that the proposed safeguards are adequate (paragraphs i-x above)?

Please state your reasons.

The proposed safeguards are inadequate. They fail to take account of the issues that already exist with the Criminal Justice System and are an attempt to make it look as if issues are understood and properly accounted for but do not convince those with knowledge of the CJS. If this system is to be used only in appropriate circumstances then the reality seems to be that appropriateness is not sufficiently defined. The types of cases to be utilised initially for an online system have been well chosen to convince many that there is no problem with these proposals but at the same time there is built in to the proposals a desire to widen the online system considerably. Something as ground breaking as this should be well investigated to ensure it will work and ought to be introduced at a more appropriate time ie when the CJS has managed to produce a computerised system that is robust and combines all the present systems into one so as to remove the duplication and room for error and delay that is presently the norm.

i. *Only specified summary only, non-imprisonable offences would be eligible for this process; where the offence does not have an identifiable victim, is relatively straightforward and a fixed penalty may be appropriate.*

This is hardly a safeguard as such offences can have a serious impact on the character of the defendant, their family life and career. Making the system as easy as buying a book on Amazon creates many issues not least amongst them is the fear that people will take the soft option that does not require them to move from their living room chair. Those who come into contact with the CJS for the first time are likely to be sufficiently afraid and/or embarrassed that they will look to avoid meaningful interaction with the system.

ii. The defendant would have to actively opt-in by entering a guilty plea online and agreeing to this process. If the defendant wishes to plead guilty but does not wish to accept the fixed fine or the online conviction (for example, because they want to explain mitigating circumstances or provide information about their means) they can instead choose to have a magistrate consider that information via the Single Justice Procedure or have their case heard in court. Pleading not guilty would mean the case is automatically listed for trial.
See the comment immediately above. There may have been no research carried out into how people will react to this system. There are dangers that the easy option that will not require any real interaction with the CJS will be too tempting. The more vulnerable a person is and the more they rely on others who think they are doing the right thing by avoiding further stress and simply paying online, the more there is a danger of criminalising the vulnerable when it should not happen.

iii. Prosecutors would have discretion as to whether a particular case is suitable for this process in light of the evidence or aggravating factors such as repeat offending.
Repeat offending would be a clear indicator of a need to avoid a person buying their way out of a court appearance but the modern way is for a prosecutor not to look at a file until they are already at court or the hearing is imminent. The idea is laudable but in practice will be meaningless.

iv. All prosecutors will still be required to meet the statutory test for prosecution – that is there is sufficient evidence to prosecute and it is in the public interest. Prosecutors will remain accountable for their decisions.
Those working in the CJS do not see that prosecutors are held accountable for their decisions or even their lack of decision making. There is therefore no point in claiming prosecutors will remain accountable as the status quo does not achieve what is claimed.

v. *Defendants would be presented with all the relevant evidence against them and the potential consequences, such as the disclosure regime for the conviction. Before electing to go down this route, they would be given details of the prospective fixed fine (and any additional elements such as compensation or costs) to allow defendants to make an informed decision.*
This is bizarre as the system at present is that even someone who is intending to plead not guilty on an allegation much more serious than the offences under discussion does not get 'all the relevant evidence' and therefore such a proposal included as a safeguard would tend to question the whole concept. There is no way that this can be achieved. This must be known and yet it is put forward. It casts doubt on the genuineness of any and all proposed safeguards. Presumably the ability to plead guilty online will be the headline in any explanation. The chances that any vulnerable person with little or no education will be able to read on and fully understand the great deal of information, most of which is technical in

nature, are slim at best. Decisions might be taken for such vulnerable people on the basis of convenience.

vi. Defendants would be able to seek help to engage with the process through assisted digital channels if they wished.
If the help is to be provided by the Court Service then that must mean that no legal advice will be given. The help will be to assist to navigate the online service and thereby encourage people to take the easy option rather than the correct option. If the advice is to be given by third parties then who are these others and who is paying?

vii. The court would have the power to reverse a conviction and have the matter retried, in the event that the defendant did not understand the consequences of their decision to accept the conviction and total penalty.
On the assumption that the Courts Service is content that it has set up a fair online system that is clear and simple, on what basis will the court overturn an apparently unequivocal guilty plea and who is going to bring this to the attention of the court when the defendant has finished worrying about the matter by pleading guilty online and paying the fine with their credit card? It is an offer that has no value and is not therefore a safeguard. Any person who did not understand the consequences of their decision will not have the resources to question that decision at a later date. The idea is just window dressing.

viii. Current early guilty plea discounts would continue to apply whether the guilty plea was entered online or in other ways (e.g. via post).
This is not a safeguard and the reader with knowledge of the CJS will conclude that the author(s) were merely desperate to pad out a poor list.

ix. Defendants who are unable to pay the total penalty immediately would be able to agree a repayment plan.
Again, this is not a safeguard and the reader with knowledge of the CJS will conclude that the author(s) were merely desperate to pad out a poor list. This would simply be a necessary part of the system to comply with the law.

x. If, in the future, driving offences which carry penalty points are brought into scope of this process, there will be a system to handle points and the potential for disqualification via "totting up", to remove cases that are not appropriate for the online system.
We do not understand why this statement of intent is included as a safeguard. Quite clearly a great deal of planning and testing of public opinion will have to take place before extending such a system. It is therefore another item that is not a safeguard and another indication that the author(s) were merely desperate to pad out a poor list – assuming there is something special in putting forward a list of 10.

Question 6: Do you agree that the offences listed above are appropriate for this procedure and do you agree with our proposal to extend to further offences in the future, including driving offences? Please state your reasons.

The offences listed are not necessarily suitable for this procedure.

Railway fare evasion and tram fare evasion are both offences of dishonesty and the potential impact for some individuals who are convicted is going to be more wide ranging than for others. This would not be reflected in the proposed procedure.

Any fixed procedure would also fail to take into account the Justice in each individual case. Railway fare evasion by an individual who had the money to pay but chose not to, would not be differentiated from an individual who had no means to pay the fare. There needs to be Justice in the way each case's mitigation is considered. Failure to take into account the mitigation involved in each case would not achieve Justice.

The procedure would also remove all possibility of representations being made to the prosecutor at court. Representations can affect the decision of the prosecutor as to whether it is in the public interest to proceed with the case or not. An online procedure removes the possibility of this taking place at an initial stage. The only option would be to either enter a not guilty plea and await making representations at trial, or relying on the prosecutor considering representation made in writing, which may not be given due consideration.

With an online system there would also be no assessment of the prosecution case at any stage. There would be no overview of whether the offence had been proved or not. The procedure would simply rely upon a prosecutor confirming the evidence existed.

Whilst Driving offences carry penalty points and guidelines exist for the various offences, there is still Judicial discretion as to the number that are to be applied in each case. Speeding offences can vary in their severity even if the amount by which the speed limit was exceeded is identical. By way of example passing a school at 35 mph in a 30 mph limit at 15:30 is far more serious than doing so at 03:30. An online procedure could not take into account the difference in each case. It would not provide justice in, arguably, either case.

A fixed penalty procedure already exists, which is used by the police in respect of offences believed by them to be suitable. Thereafter there must be Judicial overview to ensure Justice is seen to prevail, rather than administrative expediency. If the fixed penalty scheme is not considered appropriate then, for the same reasons, an online system would not be appropriate.

To conclude, we do not believe the proposed system to be fit for purpose for any offences that are within the Criminal Justice system.

Vanda James – President of Kent Law Society
26 October 2016