Written evidence from The Centre for Justice Innovation

Executive Summary

We welcome the Justice Select Committee’s timely and necessary inquiry into the issue of courts and tribunals fees and charges, and, in particular, its focus on the criminal courts charge.

This response will focus on the criminal courts charge. We note that many groups with an interest in this area (including the Howard League for Penal Reform, the Magistrates Association and the Law Society) have already voiced concerns about the charge. These groups have cited worries regarding the disproportional impact of the charge on the least well-off offenders. There have also been doubts expressed around the practicality of collecting the charge, referencing the existing issues that the court service has in collecting the payment of financial penalties.

We share many of these concerns and we feel no need to repeat points that others are already making to the Committee. We do, however, want to make two further, and we feel, crucial points. Firstly, we know from the evidence base on procedural fairness in courts that when people feel fairly treated, even when decisions go against them, compliance with the law is increased. Based on the emerging evidence of how the charge is working in practice, the criminal court charge runs the risk of undermining defendants’ perceptions of fairness in the court process. This, in turn, will undermine their trust in the justice system and their willingness to obey the law in the future. Therefore, the criminal courts charge could perversely be storing up trouble for the future—by making courts less fair, it undermines courts’ authority and defendants’ respect for the law.

Secondly, we are troubled that, as recent cases suggest, the criminal court charge is making defendants change their pleas in order to avoid running the risk of incurring excessive penalties. This has the hallmarks of a plea bargaining system. While we take no position on whether plea bargaining would be useful in England and Wales, we do urge the Committee to consider whether the criminal court charge is introducing plea bargaining through the back door by making people (who would have previously fought their case) decide to plead guilty to avoid the negative consequences of the charge. We draw the Committee’s attention to evidence from the USA (where formal plea bargaining takes places) that plea bargaining can lead to wrongful convictions, purely on the basis of defendants making rational decisions in the ‘shadow of the trial.’ If plea bargaining is to become part of the English and Welsh justice system, it should be introduced following a full and frank public discussion of the implications and appropriate parliamentary scrutiny.

Based on these two points, we urge the Committee to encourage the Government to bring forward the scheduled review of the criminal courts charge to the earliest possible opportunity and that this review takes into account its impact on perceptions of fairness and to ascertain its impact on the pleas of defendants.
The Centre for Justice Innovation is a research and development charity which works to build a British justice system which reduces crime and in which all of our people can place their trust. We work by supporting frontline practitioners, advancing the knowledge base and promoting practice innovation and evidence in policy making.

One of our main areas of research and practice development is our ‘Better Courts’ work programme, which argues for a court system which embraces the evidence of procedural fairness and problem-solving. We have written our evidence with that body of knowledge in mind.

The impact of the criminal courts charge on procedural fairness

The evidence on procedural fairness

Rather than focussing on fairness as a matter of legal and constitutional rights, important as they are, the concept of procedural fairness emphasises individuals’ perceptions of how fairly they have been treated. Procedural fairness suggests that ensuring people feel fairly treated by courts makes for a more legitimate and effective justice system.

The evidence around procedural fairness has two important and consistent findings. Firstly, the evidence base shows that fair treatment is more important than the outcomes of criminal justice processes in improving public trust in the justice system. This principle has been demonstrated in a variety of contexts, from police stop and searches to family court to prisoner release and reintegration. As Ministry of Justice research puts it: “Fair and respectful handling of people, treating them with dignity, and listening to what they have to say, all emerge as significant predictors of legitimacy, and thus preparedness to cooperate with legal authorities and comply with the law. In other words, procedural fairness may not only be valued in its own right, but it may actually be a precondition for an effective justice system.”

Secondly, there is significant evidence that fair treatment can deliver improved compliance with the law. A recent study by the National Policing Improvement Agency and the London School of Economics found that “the most important factor motivating people to cooperate and not break the law was the legitimacy of the police ... Crucially, police legitimacy had a stronger effect ... than the perceived likelihood of people being caught and punished for breaking the law.” Similar impacts of procedural fairness have also been noted in the court setting. Enhanced procedural fairness has shown to produce increased compliance with court orders, such as a courts summons; and to reduce re-offending, even among the most violent offenders. Where people feel fairly treated, they are more likely comply with the orders of the court, even where decisions go against them. When they do not, they are less likely to obey the orders of the court and more likely to break law.

The evidence suggests that there are four key determinants of procedural fairness:

- Neutrality – do individuals perceive that decisions are made in an unbiased and trustworthy manner?
Respect – do individuals feel that they were treated with dignity and respect? Do they feel that their particular circumstances were taken into account by the court?

Understanding – do individuals understand how decisions are made and what is expected of them?

Voice – have individuals had an opportunity to be heard?

The impact of the criminal court charge on procedural fairness

We believe that the criminal courts charge is negatively impacting the perceptions of defendants on procedural fairness in three ways. Firstly, it may influence how defendants perceive the neutrality of the court. In its fact sheet on the criminal courts charge, the Ministry of Justice describes the thinking behind the charge as follows: “The Government considers that convicted adult offenders who use our criminal courts should pay towards the cost of running them. The criminal courts charge will make it possible to recover some of the costs of the criminal courts from these offenders.” The clear message is that collection of the criminal courts charge will be used to support the running costs of the court. This gives the courts system a financial interest in the verdict of the court.

This may lead defendants to feel the court is not neutral in reaching its decisions. If they feel that the court hearing their case has an apparent financial interest in the case, they may feel the court is not neutral when dealing with them. While there is no evidence that this financial interest is influencing court decision making, and we would not suggest that there is any likelihood that it would do so, it is important to consider how this may be perceived by the defendant. Creating an apparent conflict of interest runs the risk of undermining the defendant’s feelings of how fairly the court has treated them.

Secondly, we believe defendants may feel the court may not have treated them with respect when applying the criminal courts charge. Where the criminal courts charge applies, courts must impose the costs, without consideration of the ability of the offender to pay. As we have noted already, this regressive approach to setting costs is likely to create a disproportionate burden on defendants with low incomes and other submissions to the Committee will provide additional evidence on this issue. However, our point is subtly different. Where defendants are likely to feel that their individual circumstances have not been respected, this is likely to undermine their perception of the fairness of the court process. For example, in a case heard at Exeter Crown Court, a homeless man who pleaded guilty to three counts of shoplifting, stealing goods to a total value of £60, was ordered to pay a £900 court charge. Offenders disproportionately burdened in this way are likely to feel that their individual circumstances have not been respected and are less likely to view the court as acting fairly.

Third, defendants who enter a guilty plea due to financial pressures are likely to feel that their opportunity to express their voice has been unfairly curtailed. The criminal courts charge is structured in such a way that defendants who plead not guilty and opt for a trial face a significantly higher charge than those who plead guilty before the commencement of a trial. Depending on the type of offence and the venue in which the case is heard, opting for a trial will cost the defendant an additional amount of between £300 (for an indictable only offense) to £990 (for a triable either way offense which is tried in the Crown Court) if they are found guilty. Strongly penalising those defendants who opt for a trial and are then found guilty will discourage defendants from exercising their right to a fair hearing (a point we return to below). For example, in July of this year, a defendant representing himself at Mansfield Magistrates court who was accused of using threatening, abusive or insulting words and behaviour initially entered a plea of not guilty, stating that this was on the advice of a solicitor. When
the extent of the charges he might face were described to him, he then changed his plea to guilty. During sentencing, magistrates observed that the defendant was of good character and had acted to defend his son. Defendants like this one are likely to feel less fairly treated, as they were denied their opportunity to voice their views, in order to avoid the potential penalties they might face if they were to lose.

Undermining neutrality, undermining respect and denying voice is likely to make people feel they have been less fairly treated by our courts. If this is the case, the evidence on procedural fairness suggests that this is likely to have a significant impact on their likelihood of paying the court charge and their future willingness to obey the law. Therefore, the criminal courts charge could perversely be storing up trouble for the future — by making courts less fair, it undermines courts’ authority and defendants’ respect for the law.

The criminal court charge and plea bargaining

It is already clear from the evidence produced by the Howard League and others that some defendants believe that charge has made a material difference to their decisions to plead innocent or guilty. They have felt they had to weigh up the consequence of taking a case to trial, and possible facing the hazard of a hefty criminal court charge, against the lower penalties that a guilty plea attracts— this is the essence of plea bargaining. It is, of course, already the case that earlier guilty pleas attract discounts in sentencing. But we fear that the combination of the court charge and sentencing discounts is producing a justice system which bear some of the hallmarks of plea bargaining (albeit one where the bargain is not a public discussion in open court and one that is less flexible and fluid to changing negotiations).

We do not take a position on whether a formal plea bargaining system in England and Wales would be attractive. But, firstly, we do suggest that the Committee, and the Government, need to consider whether the charge does or does not accentuate the aspects of the justice system which already involve elements of plea bargaining as part of the charges’ formal review.

Secondly, in doing so, we also suggest that the Committee consider the evidence that existing systems of plea bargaining have a number of negative impacts. The first, and most obvious, is that it could persuade innocent people to enter a guilty plea, in order to get a more lenient charge and sentence. Under this criticism, even this informal system of plea bargaining may lead to wrongful convictions purely on the basis of defendants making rational decisions in the ‘shadow of the trial.’ There is substantial evidence from the United States that this does indeed happen under full plea bargaining, and that this happens with a disproportionate impact on black and ethnic minority defendants.

A second drawback, though much less significant, is on defendants where there is a wrongful conviction. The evidence, again from the United States, shows that innocent defendants, committed to going to trial to prove their innocence, suffer substantially worse outcomes where there is a wrongful conviction. This evidence shows that a small group of innocent defendants, who might be wrongfully convicted at trial, will face more punitive sanctions directly because they refuse pleas on the basis that they believe themselves to be innocent. Of course, the penalty faced by someone wrongfully convicted is of secondary importance — the wrongful conviction is a much more important matter. But this evidence would clearly suggest that the negative impacts of not pleading guilty should
be considerably lessened, in order to limit the effect it has on the small number of innocent people who may be wrongfully convicted following trial.

If plea bargaining is to become part of the English and Welsh justice system, it should be introduced following a full and frank public discussion of the implications and appropriate parliamentary scrutiny.

Conclusion

As we have said, others responding to the Committee have provided a greater amount of detail on the disproportionate impacts of the criminal court charge and expressed doubts around the practicality of collecting the charge. We share many of the same concerns.

We have, however, limited our response to assessing the impact of the criminal courts charge in two ways. Firstly, our analysis suggests that the criminal court charge has the potential to negatively impact defendants’ perceptions of how fairly they have been treated. The evidence from procedural fairness suggests that this is likely to impact on the effectiveness of the courts decisions and orders by lessening defendants’ willingness to obey the law.

Secondly, it is our view that the criminal court charge accentuates what is already an informal system of plea bargaining. While we take no position on whether plea bargaining would be useful in England and Wales, we do urge the Committee to consider whether the criminal court charge is making people who would have previously fought their case decide to plead guilty to avoid the negative consequences of the charge.

Based on these two points, we urge the Committee to encourage the Government to bring forward the scheduled review of the criminal courts charge to the earliest possible opportunity and that this review takes into account its impact on perceptions of fairness and its impact on changing the decisions of defendants.

About us

The Centre for Justice Innovation is a research and development charity which works towards a British justice system which reduces crime and in which the public can place their trust. We work by supporting frontline practitioners, advancing the knowledge base and promoting practice innovation and evidence in policy making.

The Centre for Justice Innovation is an initiative of the New York-based non-profit, the Center for Court Innovation.

29 September 2015
Endnotes

i For more on Better Courts, go to www.justiceinnovation.org
viii Papachristos, A, Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders, 2012, accessed at http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7426&context=jclc
ix Ministry of Justice ibid.
xiii Plea bargains are agreements between prosecutors and defendants whereby the latter plead “guilty” to an offense in return for a reduction in criminal charges or sentence recommendations.
xv Tor, A., Fairness and the Willingness to Accept Plea Bargain Offers, 2010, Notre Dame Law School.