

Issues in the criminal courts during Covid19 as identified by Transform Justice

Open justice

Open justice is a key way of preventing and highlighting miscarriages of justice. We wrote to the committee previously on open justice, and the lack of it. Unfortunately, the situation has not changed. Though criminal courts are technically open, they are in effect closed. Regulation 6(2)(h) says that reasonable excuse for travel includes “to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings”, but most lawyers we have consulted believe this does not encompass a member of the public going to court simply to observe a hearing. No clarification has been issued on the matter. Furthermore, most members of the public would not want to risk their health (or police intervention) through going to court.

The other route which would allow the public to observe would be via digital channels. It is not clear how many criminal hearings which should normally be open to the public are being held on video/phone. [But we believe many are](#). It is technically straightforward for observers to join a “digital public gallery”. However, to our knowledge, no member of the public has yet been allowed to do so. We have tried to access digital hearings using the VEJ (video enabled justice) system used by five police forces. Unfortunately, access is subject to judicial discretion and no permission has been granted. We have been informed privately that a policy decision has been made *not* to allow any member of the public digital access to criminal hearings, but this has not been made public.

First appearances and remand

Without public access to courts it is difficult to ascertain what is going on in them. We understand that those remanded by the police continue to be produced in court (except where there is a video link from police station to court). We hope the police are remanding only those who pose a serious risk of committing further offences/absconding so fewer cases need to be dealt with in magistrates’ courts. Hard data and reliable information is impossible to obtain, but we have heard disturbing reports of defendants being brought to court who have or are suspected of having Covid19. This puts the advocate at risk and makes it difficult for them to take instructions. Some courts have facilitated lawyers social distancing from their clients (which is difficult in court cells) by enabling them to do the pre-hearing consultation in the courtroom with the defendant in the dock.

We do not know how many defendants are remanded by the court, nor how many are on remand currently in prison. We are concerned that the pressure to plead guilty is great for those at risk of being remanded by the court. Defendants will be advised that if they plead not guilty and are remanded, their trial is likely to be delayed for a very long time. This may lead some defendants to opt to plead guilty of crimes for which they have a viable defence. Equally some prisoners already on remand in prison may change their plea in order to be released from prison ([this happened pre Covid](#) but drivers have increased). Thus we have a very real prospect of miscarriages of justice. We need to monitor carefully the percentage of guilty pleas in this Covid period, particularly from unrepresented defendants, and enquire whether the frequency of plea change has increased.

We understand custody time limits have been extended by judges but need more information. How many prisoners have had their remand CTL extended and by how long? What are the mean, median and range of lengths of time on remand? How are these figures different to the non Covid period?

Video hearings – threats to defendants’ rights

We assume that prisoners are appearing via video link from prison for their court hearings and that many defendants are appearing from police station into court via video-link. The transition to video

and audio hearings threatens defendants' right to effectively participate. Previous research by [Transform Justice](#) and a [study commissioned by the government](#) indicated that video links impede effective participation and may prejudice justice outcomes. The 2010 evaluation of video links from police stations found that defendants on video were less likely to be represented, more likely to plead guilty and more likely to get a higher prison sentence.

Lawyers want to keep the wheels of justice moving and are doing their best to defend clients in these difficult circumstances, but our research on video hearings revealed the collateral damage – the harm to the lawyer-client relationship. Lawyers find it harder to develop a rapport with clients who appear over video, struggle to assess whether they have disabilities, and often have insufficient time to complete a proper pre-hearing consultation. During court hearings defendants find it much more difficult to give instructions to their lawyers, and to effectively participate – partly because they are physically disconnected, partly because technology (sound and visuals) is poor.

We have no data on the proportion of defendants who are unrepresented but are particularly concerned for this group, who struggle in a normal court to understand proceedings, and even more so when appearing virtually. Also, the EHRC recently published a [report](#) on the risks posed by virtual justice to those with mental and neuro disabilities. We recommend the committee follow up its findings and recommendations.

HMCTS has published [data](#) on hearings held virtually/face to face, but has not broken them down by jurisdictions. Transform Justice has asked for this information via FOI. The government also funded the PCC for Sussex to commission research on first appearances held using “video enabled justice” technology. The evaluation report is ready to publish and we would urge the PCC to release it to enable all of us to better understand the impact of video justice.

The resumption of criminal trials

The legislation allows for online criminal trials in the magistrates' courts but not jury trials. There has been much debate about whether jury trials should go online, but practically none about magistrates' court trials. We don't know if any have been held online, what the rationale is and how proceedings went. There is no information or data.

Transform Justice has [blogged](#) about the research evidence on online criminal trials. We are particularly concerned that the only research we have is on simulated trials and that no-one has ever simulated a fully virtual trial. Therefore we have no research evidence on the effectiveness and access of justice implications of fully virtual trials.

Lawyers are understandably concerned reduced caseloads mean some firms risk closure within months, leaving legal aid deserts across the country. Access to local, legally aided criminal defence services is crucial for a fair and functioning justice system. But the solution to the serious financial pressures firms face is to provide appropriate levels of financial support to help them survive this period, rather than switching to fully virtual trials without understanding the consequences for defendants' fair trial rights.

Technology

At the beginning of the Covid period the courts were using off the shelf software such as Skype for Business, which has been used and tested by millions of people. They are now rolling out the bespoke [Cloud Video Platform](#). We are not clear how it differs from Skype for business and are concerned that it is being rolled out without any published evaluation of its efficacy. It is also being rolled out without any facility to record proceedings.