



Coronavirus (COVID-19): The impact on prison, probation and court systems

Fair Trials submission to the Justice Committee

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Our work combines: (i) helping suspects to understand and exercise their rights; (ii) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (iii) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

1. Introduction

- 1.1 We welcome the opportunity to submit evidence to the Justice Committee's inquiry into the impact of COVID-19 on prison, probation and the court systems. The COVID-19 pandemic, and responses to it, have had an unprecedented impact on criminal justice in the UK.
- 1.2 Suspects and defendants, especially those in detention or custody, have found themselves further isolated as their access to legal advice and other essential support, has been severely restricted. Courts have been conducting more hearings remotely, including via video-link or telephone hearings, but evidence shows that these measures have a negative impact on the right to a fair trial, particularly on defence rights, and they disproportionately result in custodial sentences. Defendants are also facing prolonged pre-trial detention as custody time limits are extended.
- 1.3 Cases of COVID-19 have been widespread in prisons and immigration detention centres, while detainees have languished in poor conditions, often amounting to solitary confinement. Detained people are reliant on the state for their health and safety, and it is not possible to follow the government's advice on COVID-19 in prison and immigration detention settings. Despite setting a clear and necessary target to reduce the prison population, the government has comprehensively failed to meet that target.

- 1.4 In addition, we believe that there are such significant and serious issues with disproportionate policing and fines under coronavirus laws and regulations, and unlawful prosecutions under those laws, that, while not directly within the scope of this inquiry, warrant urgent attention from the Justice Committee.
- 1.5 This submission includes the results of a survey conducted of individuals at the frontline of the criminal justice system, over a period of 2 weeks in May 2020, including defence solicitors, barristers, accredited legal representatives, judges, magistrates, police officers, Crown Prosecution Service (CPS) staff, and appropriate adults. They were asked to share their opinion of how COVID-19 had impacted fair trial rights in England & Wales since the lockdown began. The results of the survey paint a deeply worrying picture of the criminal justice system in England & Wales under lockdown.
- 1.6 Fair Trials' COVID-19 Justice Project has actively monitored and tracked changes to criminal justice systems globally, and we bring this comparative perspective and expertise to this submission.¹
- 1.7 While the lockdown is easing in England and Wales, the serious problems and recommendations noted in this submission, are especially relevant. Not only has COVID-19 exacerbated pre-existing issues in the criminal justice system and resulted in long-lasting repercussions, but the official and unofficial responses by government and those in charge of elements of the criminal justice system have had, and will continue to have a significant impact on suspects, defendants and detainees.
- 1.8 These changes, which include significant modifications to criminal procedure, need to be properly scrutinised to ensure that people's rights are not infringed or forgotten, particularly those in custody or detention. This is important not just because of the possibility of a COVID-19 'second wave', but also the possibility that some of these temporary and 'emergency' changes may continue beyond their original purpose and even become permanent.

¹ <https://www.fairtrials.org/covid19justice>

2. Defence Rights in Police Custody

- 2.1 The right of access to a lawyer during police interviews is an essential fair trial right, giving suspects a way of redressing the very significant imbalance of powers when they are most vulnerable to rights abuses in their criminal proceedings.
- 2.2 The unique circumstances created by COVID-19 has necessitated modifications to the way in which this right is facilitated in England and Wales. The facilitation of remote legal assistance has been identified as one way to address this challenge, and live link and telephone conferencing has been used to facilitate remote attendance by solicitors at police interviews. However, there are risks that this approach will have a negative impact on defence rights that outlast pandemic. Defence representatives have described the significant differences and difficulties in providing advice to suspects and people detained in police custody via video-link or telephone, to the point where it was negatively impacting on defendant's rights and access to legal assistance and advice. It cannot be assumed that remote legal assistance is, in general, an equal substitute for in-person legal assistance.

Fair Trials' survey

- 2.3 Our survey of individuals at the frontline of the criminal justice system found that suspects in police custody have been receiving poorer quality legal advice and assistance, due to severe restrictions on solicitors' access to their clients and on their attendance at police interviews. It also found that there is limited adherence to COVID-19 related health and safety standards in police stations, endangering public health, and putting the lives of suspects, defence lawyers, police officers, and their families at risk.
- 2.4 The overwhelming majority of respondents told Fair Trials that COVID-19 has had a negative impact on suspects' rights in police custody.
 - **71% of respondents, and over 80% of defence lawyers told us that COVID-19 had a 'significant' or 'moderate' negative impact on suspects' ability to access to prompt in-person legal assistance;**
 - **55% of respondents said that suspects' access to specialist assistance (such as interpretation and medical assistance) had been undermined; and**
 - **59% of respondents told us that the suspects' access to legal assistance during police interviews had been impacted negatively, either significantly or moderately.**

Legal advice

- 2.5 There was strong consensus amongst respondents that the quality of legal assistance in police custody had suffered significantly due to COVID-19 related restrictions.
- 2.6 The pandemic has severely limited in-person contact between suspects and their lawyers, and it is apparent from our survey that in many cases, legal advice and assistance have been provided remotely, either via telephone or video-link. However, this was mostly viewed as a poor substitute for in-person legal assistance. Lawyers expressed that it was challenging to build trust and rapport with their clients without meeting them in person, and that generally, it was more difficult to provide advice to, and to take instructions from their clients. It was also pointed out by some respondents that they were able to spend less time speaking to their clients because they could not see them in person.
- 2.7 Concerns were also raised that remote legal assistance had a particularly negative impact for vulnerable suspects, who require support for their welfare and effective participation during criminal proceedings. As one respondent stated:

“It's extremely hard to build a relationship suitable to gain the client's trust over the telephone. Add the pressures of the police station environment and people being scared for the health implications, and the impact on justice is severe. And that's without factoring in those clients with mental health difficulties, [and] vulnerabilities (e.g. due to age)”

- 2.8 We have further concerns that the lack of in-person contact between solicitors and their clients might be preventing them from assessing their clients for vulnerabilities. Where these vulnerabilities, including cognitive impairments, are not identified, there is a real risk that suspects will be deprived of the additional support and procedural adaptations needed to safeguard their rights.
- 2.9 Some lawyers also questioned the extent to which client-lawyer confidentiality was being respected during lockdown. Being unable to meet their clients in-person meant that it was harder to ascertain whether their conversations were being overheard by others, and to discuss crucial, sensitive matters. One respondent complained that on at least two occasions, police officers had tried to facilitate telephone consultations in an open custody suite, possibly in plain hearing distance of other detainees, and that on both occasions, an inspector was involved in facilitating the call.
- 2.10 **The inability to provide effective legal advice is not just a source of frustration for lawyers – it also amounts to a violation of fair trial rights. The right to legal assistance is a ‘gateway’ fair trial right, enabling suspects and defendants to *inter alia* understand and exercise their rights, and ensure their rights are being respected at all stages of the criminal proceedings. Where police stations are unable to facilitate in-person access to a lawyer, further improvements are needed to**

provide adequate facilities that ensure suspects' access to confidential legal advice remotely.

Legal and other essential assistance during police interviews

- 2.11 Responses highlighted that suspects' rights were being undermined due to restricted access to police interviews by solicitors, and other sources of support.
- 2.12 There seems to have been no consistent approach amongst the police to ensure legal, and other forms of assistance during police interviews, despite the joint protocol on police interviews adopted by the NPCC, CPS, Law Society, the CLSA and LCCSA in April 2020. This has, on occasions, resulted in police interviews taking place in the absence of a lawyer or other essential sources of support, or suspects being detained unnecessarily.
- 2.13 One lawyer told us, for example, that one of her clients with COVID-19 symptoms required an interpreter who refused to attend the interview due to safety concerns. The police were unable to facilitate remote attendance by means of telephone or videoconferencing, as result of which the suspect was not able to get legal advice, and he was charged without an interview. In another case, a different defence lawyer told us that her 14-year-old client was detained at a police station for 24 hours before being bailed, because the police could not find an appropriate adult.
- 2.14 Survey responses indicate that some police stations have begun to facilitate lawyer attendance at police interviews remotely via video-link. Video link provides a vital means of obtaining legal assistance where there are extenuating circumstances that prevent the physical presence of a solicitor. However, it cannot be assumed that remote legal assistance is, in general, an equal substitute for in-person legal assistance. There are clear benefits to the physical presence of a lawyer during police interviews, given that there are various forms of crucial assistance that cannot be provided otherwise. For example, the physical presence of a solicitor can help suspects by:
- Reassuring them, so that they feel less isolated and intimidated;
 - Enabling additional checks on their welfare and capacity to participate effectively during the interview;
 - Preventing police officers from going 'off record' and asking questions outside the interview; and
 - Helping to manage police aggression.²

The presence of legal professionals in police custody has, in particular, been widely recognised as an effective and essential deterrent to police violence and the use of torture.³

² JUSTICE Scotland, 'Legal assistance in the police station' (2018)

³ Richard Carver & Lisa Handley (eds), *Does Torture Prevention Work?* (Liverpool University Press 2016)

- 2.15 Some lawyers noted that numerous video-conferencing equipment failures meant that defence representation attendance by telephone was becoming the default, further undermining their ability to provide meaningful legal assistance.
- 2.16 Despite these challenges, the Home Office announced plans in June 2020 to review Code C of PACE to officially endorse the use of live link and video conference link in police interviews, for an initial period of 12 months. The use of these systems might have been necessary at the height of the pandemic, but we would question the benefits of these changes to PACE at this stage, where there is a nationwide easing of the lockdown.
- 2.17 Our survey has also highlighted the lack of precautions taken by police officers to ensure that it is safe for suspects, solicitors, and providers of essential assistance (such as appropriate adults and interpreters) to attend police interviews. Respondents noted, in particular, the lack of adherence to social distancing rules, and the absence of PPE. We are concerned that the risky environments in police stations might disincentivise lawyers from providing in-person legal assistance to their clients. While the use of live or telephone conference link provides a way in which solicitors can provide legal assistance safely, this only helps solicitors. It does little to ensure the safety and well-being of suspects in custody.
- 2.18 Further steps need to be taken by the police to not just ensure that lawyers and other individuals providing essential assistance to suspects are able to attend police interviews safely, but also to ensure that effective alternatives to in-person attendance are available. Further training and investment in equipment seem to be necessary to make sure that remote attendance is a suitable replacement for in-person assistance.

Recommendations

- 2.19 Fair Trial has produced a set of recommendations on safeguarding the right to a fair trial in the context of remote justice, including in custody, which are attached as an appendix to this submission and as follows:⁴
- **All prisons and detention facilities should have adequate facilities to make sure that all detainees have effective and frequent access to telephones (and other permissible forms of instant communication). This may include updating, or increasing the number of equipment to cope with increased demand.**
 - **Prisons and detention facilities should aim to make video-conferencing facilities available for defendants.**

⁴ Appendix I and

<https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>

- **Strict confidentiality or defendant-lawyer communications should be respected. Defendants should have access to secure spaces for confidential discussions, out of earshot from prison staff and police. Communication channels should be secure, so that calls cannot be intercepted or recorded.**
- **Where there are restrictions on client-defendant correspondence (including, for example, the frequency and length of phone calls), these should be significantly relaxed to compensate for the reduction of in-person legal visits.**
- **The use of telephones (and other permissible forms of instant communication) should be made available free of charge to prisoners when communicating with their lawyers.**

3. Remand Custody and Trial Delays

3.1 The additional delays caused by the cessation of trials due to COVID-19 have exacerbated pre-existing challenges for defendants, especially for those in remand custody, who face prolonged pre-trial detention as custody time limits are extended, with COVID-19 now a further significant and additional reason for such extensions.

Fair Trials' survey

- 3.2 The Government has so far refused to provide information on applications to extend Custody Time Limits and how many people have been held in custody beyond the statutory time limit.⁵ However, our survey of defence solicitors, barristers, accredited legal representatives, judges, magistrates, police officers, Crown Prosecution Service (CPS) staff, and appropriate adults indicates the extent of the problem.
- 3.3 Nearly half the respondents to our survey told us that, in their view, defendants were less likely to be remanded into custody during lockdown, and their responses seemed to suggest that judges were more likely to grant bail where possible, in an effort to reduce numbers of people in custody. However, where a defendant is already remanded in custody, they were more likely to spend longer in detention.
- 3.4 63% of respondents thought that the amount of time defendants spend in detention is likely to be 'higher' or 'much higher'. Responses suggest that custody time limits are being extended routinely as a direct result of delays to trial proceedings, and some defence lawyers expressed concern that judges were granting extensions with little regard

⁵ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-19/48994/> and <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-19/48993/>

for the necessity of continued pre-trial detention, whenever a trial was adjourned due to COVID-19. One respondent made their view clear:

“Quite frankly, [custody time limits] may as well not exist. They are extended as a matter of routine in our local courts and any argument against extending them is met with incredulity that one has dared advance an argument.”

3.5 This propensity to extend custody time limits whenever there is an adjournment is particularly worrying, given that delays are often lengthy and adjournments can be indeterminate. Many respondents told us that trials are being delayed for over than a year, and that where there is an adjournment, there is often no new date set for hearings. This is creating confusion and uncertainty for defendants, especially for those in detention, who have little to no idea when their trial will take place, and how much longer they will be detained.

3.6 Several lawyers provided examples of cases in which defendants were facing inordinate delays in their criminal proceedings. We were particularly concerned to learn about the case of a 14 year-old-defendant, whose custody time limit was recently extended despite his very young age. Other examples included:

- An 18-year-old defendant arrested last year, whose trial for murder was due to take place in March. He is remanded in custody with no indication of when his new trial will take place;
- A trial that was due to be held in July, but now re-listed for October, where the defendant is unable to access his case papers due to COVID-19;
- A case of an 18-year-old defendant charged with robbery, who is still waiting for his retrial despite the fact that his legal proceedings began 2 years ago; and
- A trial that was due to begin in May 2020, that has now been adjourned to June 2021, meaning that the defendant will be on bail for over a year.

3.7 This is by no means an entirely new challenge faced by the England and Wales criminal justice system, where courts had a backlog of over 37,000 cases even before the pandemic began.⁶ Some respondents remarked that COVID-19 had made the existing problems, attributable to the chronic underfunding of the court service, far worse to the extent that the criminal justice system is now on the brink of collapse. One said:

“We are witnessing the collapse of the criminal justice system which is the inevitable product of austerity and court closures”

⁶ <https://www.theguardian.com/law/2020/jun/30/criminal-cases-backlog-could-take-a-decade-to-clear-watchdog-warns>

- 3.8 **The backlog cases built up during the COVID-19 is likely to have a long-lasting impact, resulting in inordinate delays to criminal cases, and prolonged pre-trial detention for many detained defendants. Criminal justice systems cannot function properly and cannot be expected to deliver justice in all cases if it is stretched far beyond capacity, and legally innocent defendants should not be stuck in detention on account of administrative failures and underfunding. It is essential that urgent action is taken to find solutions to this challenge, including by increasing funding for the courts, and increasing their capacity to cope with increasing caseloads.**

4. Remote Justice

- 4.1 The Coronavirus Act 2020 gives the courts in England & Wales power to direct the remote attendance of almost anyone (from judges to interpreters, but excluding jurors) to almost any type of hearing, including where an individual's liberty is at stake.⁷
- 4.2 We welcome the fact that Government is taking extraordinary measures to keep the criminal justice system operational, with the aim of preventing even longer delays in criminal proceedings and ensuring that urgent matters, such as pre-trial detention hearings, are not postponed for significant periods of time. It is inevitable that the justice system will face a considerable backlog of cases, an issue exacerbated by the likely shortage of funds caused by the negative impact of lockdowns on the economy.
- 4.3 However, the human rights impact of remote justice procedures, and in particular, the implications on the right to a fair trial should not be ignored. Research, considered in-detail below, shows that remote justice has a negative impact on the right to a fair trial, particularly on defence rights. Remote hearings are having an adverse effect on defendants' right to access effective legal assistance, to participate effectively at their own hearings, to review and challenge information and evidence relevant to the proceedings, and they disproportionately result in custodial sentences.
- 4.4 Therefore, any decision on the extent and practicalities of using remote justice tools beyond the emergency period should be taken cautiously, after a full assessment of their impact on the right to a fair trial, and only where strictly necessary, where, after full consideration on a case-by-case basis, it can be deemed not to have a negative impact on defendants' rights.

The impact of remote justice on fair trials

⁷ Coronavirus Act 2020, Schedule 23

- 4.5 The evidence on the use of remote justice measures and their effect on the fairness of trials, particularly for defendants, is damning.
- 4.6 A 2017 study conducted on video hearings in the United Kingdom by Transform Justice⁸ found that defendants appearing via video-link are more likely to be unrepresented and thus unable to navigate the proceedings.⁹ The study also found that lawyer-client consultations on video are frequently overheard by others because the rooms in which they are held are not properly soundproofed, and because either or both sides sometimes need to shout to be heard, due to the poor sound quality of the connection.¹⁰ As noted above and below, these same poor connection issues, and resulting effects on defendants' ability to communicate, receive advice and give instructions, and have confidential discussions, are also the case in police stations, courts and prisons.
- 4.7 The Equality and Human Rights Commission published an interim report on video hearings and their impact on effective participation in April 2020.¹¹ It concluded that video hearings are unsuitable for disabled people, such as those with learning difficulties, cognitive impairment or a mental health condition.¹² Many of those interviewed *"strongly urged that disabled defendants should be able to attend remand or interim hearings in person, where relevant, by way of an adjustment"*.¹³ The report also noted that *"opportunities to identify impairments and make adjustments"* were lost or reduced where defendants appeared in court by video link. The EHRC were concerned that the emergency use of remote justice may *"place protected groups at further disadvantage and deepen entrenched inequality."*¹⁴
- 4.8 A study carried out by the Ministry of Justice in 2010 into video-justice, conducted over a year in two magistrate's courts, also evidenced the significant impact of virtual justice. The report found that *"the physical separation of defendants... made it harder for defence and CPS advocates to communicate before and during hearings"* and that the time pressures of fixed video 'slots' resulted in *"hasty justice"*.¹⁵
- 4.9 A March 2020 report on 'video-enabled justice' funded by the Home Office, and carried out by the Sussex Police and Crime Commissioner in conjunction with the University of

⁸ <http://www.transformjustice.org.uk/>

⁹ <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

¹⁰ <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

¹¹ https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf

¹² https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf

¹³ https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf

¹⁴ <https://www.equalityhumanrights.com/en/our-work/news/preventing-health-crisis-becoming-justice-crisis>

¹⁵ <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

Sussex, reinforced many of these same concerns, especially with regard to defendants' and lawyers' experiences in the process.

- 4.10 The report found that defendants appearing video video-link were less likely to have legal representation. Even when they did, there were serious issues. The report stated that *"loss of face-to-face contact in video court can create challenges in terms of advocates developing trust and rapport with their clients"* and *"appearing over the video link could make defence advocates less effective, particularly in relation to bail applications."*¹⁶ Defendants who were questioned as part of the report said they felt like *"caged animals"*, with one adding that they felt *"treated a bit more like a human being"* in a physical court hearing.¹⁷
- 4.11 While not directly analogous to the criminal context, the Civil Justice Council's review of the impact of the COVID-19 pandemic on the civil justice system, particularly the swift expansion of the use of remote hearings, also found that measures mandated by the pandemic have reduced the availability and accessibility of legal advice. The review found that the impact of reductions in advice disproportionately affected those on low incomes. Almost half of all hearings in their sample experienced technical difficulties, with little or no technical support to deal with the issues.¹⁸

Disproportionately severe outcomes

- 4.12 The most concerning issues with the use of video or other remote justice measures has been the evidence that it has a negative impact on criminal justice outcomes, especially the evidence that it increases the likelihood of a custodial sentence.
- 4.13 The March 2020 report funded by the Home Office concluded that individuals whose cases were handled remotely are more likely to be jailed and less likely to receive a community sentence. The proportion of unrepresented defendants receiving custodial sentences was higher than the rate for represented defendants. Moreover, those sentenced in the more traditional court settings were more likely to receive fines or other community sentences.¹⁹ The 2010 MOJ study into video justice also found that the rate of guilty pleas and custodial sentences were higher in the video pilot than in traditional courts.²⁰

Fair Trials' survey

¹⁶ <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

¹⁷ <https://www.independent.co.uk/news/uk/home-news/coronavirus-court-hearings-jail-sentence-remote-lockdown-a9500101.html>

¹⁸ <https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>

¹⁹ <http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>

²⁰ <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>

4.14 The results of our survey largely supported findings of the existing research on the challenges regarding the use of video-link in criminal court hearings. In particular, defendants' rights are being undermined on account of the difficulties in communicating with their lawyers and the court, and in reviewing and challenging information relevant to the proceedings.

4.15 The survey found that:

- 44% of respondents believe that remote hearings make it significantly more difficult for defendants to participate in the proceedings (with a further 19% saying that the impact on effective participation had been moderately negative);
- 67% of respondents thought that the remote hearings had a significant negative impact on the ability of defendants and their lawyers to communicate before and during hearings. A further 25% thought that there had been at least some or moderate negative impact; and
- 75% of respondents believed that remote hearings had made it harder for defendants and their lawyers to obtain, present, and challenge evidence; and
- 60% of respondents expressed that the use of video-link or telephone had a noticeably negative impact on the overall fairness of the hearings.

4.16 **The results of this survey show that the majority of lawyers have significant concerns about their impact on defendants' rights. We are concerned that the Government could promote remote hearings as a way to address the backlog of criminal cases built up during the lockdown (and over the years prior to the pandemic) without adequately addressing these concerns.**

Communication

4.17 Survey responses clearly show that client-lawyer communications have been badly affected, meaning that defendants are finding it more difficult to consult with their lawyers, and to seek advice before, during, and after court hearings.

4.18 While some defence lawyers appear to attribute these difficulties to the poor quality or unreliability of the technology used to facilitate client-lawyer consultations, it was also highlighted that some courts are not appropriately set up to facilitate effective, confidential conversations between defendants and their lawyers. Courtrooms, for example, had to be vacated so that lawyers could speak to their clients in private, and when they were, minimal time was allowed for those conversations.

4.19 We were also concerned to learn that in some cases, judges were explicitly preventing post-hearing client-lawyer consultations from taking place via video-link or telephone,

leaving defendants in custody stranded, with severely restricted access to legal advice. One respondent to the survey informed us:

“The Resident Judge at our local Crown Court has now forbidden post-hearing conferences in circumstances where the defendant is sent into custody (either sentenced or remanded in custody) and instead we have been told that we need to conduct post-hearing conferences by letter. It is outrageous that somebody is supposed to be legally represented and yet they are being sent into custody without the opportunity to see the representative straight after. How can anyone be sure that they've understood what has happened (particularly for those with language barriers, learning difficulties, mental health issues) and what the next steps are?”

Access to information

- 4.20 Respondents explained that lawyers were often receiving information relevant to their hearings very late, and that it was more difficult to ask the relevant people for the right information without attending court. Technical issues were also cited as reasons for it being more difficult to adequately present evidence.

Lack of safeguards

- 4.21 The serious concerns raised by reviews and reports about the impact of remote justice on defendants’ rights and justice outcomes need to be thoroughly analysed before video-link hearings become commonplace in ordinary criminal proceedings.
- 4.22 Most government guidance so far focuses on putting in place the technology necessary for carrying out remote hearings and responding to immediate needs in terms of equipment malfunction and user guidance.²¹ There is no requirement for an impact assessment of the new measures; there is no requirement or mechanism within the Coronavirus Act for the court to assess the vulnerability of defendants and its impact on their ability to participate in remote justice.
- 4.23 Within the “interests of justice” test laid out by the Coronavirus Act, the views of the defendant are just one factor to be considered.²² The defendant’s views are not determinative, and they may hold only as much weight as the views of the Crown Prosecution Service.
- 4.24 The “safeguarding” provisions within the Coronavirus Act do not properly safeguard the defendant. Instead they mostly provide safety blankets as to when proceedings can or cannot take place “wholly” by video or audio link. The problem with these safeguards is

²¹ <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

²² Coronavirus Act, Schedule 23

that for a hearing to take place “wholly” by video link every person involved must be involved remotely. If just one participant is physically present, the safeguard is rendered meaningless. This lack of meaningful protection and consideration of defendants’ rights in the justice process raises serious concerns as to whether remote justice is fair justice.

Impact assessment

- 4.25 The serious concerns raised about the impact of remote justice on defendants’ rights and justice outcomes need to be thoroughly analysed before video-link hearings become commonplace in ordinary criminal proceedings.
- 4.26 Government must take proactive steps to carry out its own impact assessment, in addition to the data collected by non-governmental organisations, academics, lawyers and international organisations. The Ministry of Justice is in the best position to collect and analyse the vast amount of data available.²³ With remote justice systems currently being introduced on a massive scale, this presents a unique opportunity to collect data and gain more understanding on the impact of these systems on the fairness of criminal proceedings, as well as their usefulness in terms of time and cost savings.²⁴
- 4.27 The need to carry out a proper impact assessment of virtual justice was highlighted by the House of Commons Committee of Public Accounts in its November 2019 report. This noted that HM Courts and Tribunals Service “*risks undermining public confidence in the fairness of the justice system by proceeding with its reforms without sufficiently demonstrating it understands the impact on justice outcomes or people.*”²⁵
- 4.28 Government needs to set clear objectives in terms of the benefits this move intends to achieve before considering moving remote justice systems beyond the emergency period, and the perceived time and cost savings need to be properly calculated and weighed against the potential impact on the fairness of criminal proceedings and justice outcomes.²⁶
- 4.29 Fair Trials has produced a set of recommendations on remote justice impact assessments, attached as an appendix to this submission.²⁷

Safeguarding the right to a fair trial in remote justice proceedings

- 4.30 It is essential that the criminal justice system continues to function, including the processing of criminal cases, while safeguarding the rights and welfare of criminal

²³ <https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>

²⁴ <https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>

²⁵ <https://publications.parliament.uk/pa/cm201919/cmselect/cmpubacc/27/27.pdf>

²⁶ <https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>

²⁷ Appendix II and <https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>

defendants, especially those who are detained. However, it is also essential that the UK does not rush to adopt remote justice measures without properly considering their impact on criminal justice, and any decisions to make them more permanent should be based on sound evidence.

- 4.31 Defendants should be able to exercise their rights fully and effectively, even when they are not physically present in court, and are unable to meet their lawyers in person. It is crucial that any decisions to introduce or expand the use of remote court hearings are informed by human rights concerns, and accompanied by appropriate safeguards to protect the rights of defendants.

Recommendations

- 4.32 Fair Trials has produced a guide to safeguarding the right to a fair trial during remote justice proceedings, attached as an appendix to this submission, which sets out clear and detailed recommendations that should be followed in order to ensure and protect fair trials in the context of remote justice.²⁸ In the context of remote justice, the key recommendations are as follows:

When determining whether or not a court hearing should take place remotely, the following factors inter alia should be taken into consideration:

- **the length of delays and their likely impact on the rights of defendants (particularly where the defendant's period in pre-trial detention is likely to be prolonged);²⁹**
- **the nature of the hearing, including:**
 - **the complexity of the case and the matter being dealt with;**
 - **the need to call witnesses; and**
 - **the likely impact of the hearing on the rights of the defendant (for example, if it puts the defendant at risk of deprivation of liberty);**
- **the availability and quality of equipment and systems used for communication between the court and the defendant; and**
- **the existence of impairments or other factors that could negatively affect the defendant's ability to participate effectively in court proceedings. Where**

²⁸ Appendix I. See also:

<https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>

²⁹ <https://www.fairtrials.org/sites/default/files/The%20Public%20Health%20Need%20to%20Keep%20People%20Out%20of%20Detention%20Practical%20Guidance.pdf>

there are strong justifications that mandate the use of remote justice procedures, remote hearings should only take place if there are adequate safeguards in place that address various threats to the right to a fair trial.

5. Prison Conditions and Prisoner Releases

- 5.1 In April 2020 it was reported that there were nearly 2,000 suspected cases in prisons, but no data was released in the public domain.³⁰ In mid-April it was reported that over half of prisons in England and Wales had coronavirus cases.³¹ On 2nd June, it was confirmed officially that there had been at least 1,329 cases in prisons;³² however as testing is only done on admission to hospital, and hospitalisations are a fraction of cases, the actual numbers of inmates with COVID-19 in prisons are likely to be far higher.³³
- 5.2 On 27 March 2020, almost 600 organisations, grassroots networks and activist groups, academics, lawyers and other professionals and individuals called on the government to immediately reduce the number of people in detention settings.³⁴ On 4 April, the government announced that 4,000 ‘low-risk’ prisoners would be temporarily released to control the spread of COVID-19.³⁵ As of 29 May, only 128 prisoners have been released under the End of Custody Temporary Release Scheme and compassionate release in light of COVID-19.³⁶
- 5.3 Detained people are reliant on the state for their health and safety, and it is not possible to follow Government advice on COVID-19 in prison and immigration detention settings. Lockdown restrictions in prisons have meant that tens of thousands of prisoners have been - and are still – held in what amounts to prolonged solitary confinement, kept in a cell for 23 hours a day.³⁷ Others have been locked up without access to showers for weeks at a time.³⁸ Moreover, HM Inspectorate of Prisons has reported that children at young offender institutes have been kept in their cells for more than 23 hours a day.³⁹

³⁰ <https://www.theguardian.com/society/2020/apr/28/nearly-1800-possible-coronavirus-cases-in-uk-prisons>

³¹ <https://www.newstatesman.com/2020/04/more-half-prisons-have-coronavirus-cases-england-and-wales>

³² <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-05-19/49084>

³³ <https://www.theguardian.com/society/2020/apr/21/richard-garside-uk-lagging-behind-europe-coronavirus-prisons>

³⁴ <https://www.inquest.org.uk/covid-19-letter>

³⁵ <https://www.theguardian.com/society/2020/apr/04/up-to-4000-inmates-to-be-temporarily-released-in-england-and-wales>

³⁶ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-06-01/51783/>

³⁷ <https://www.thetimes.co.uk/article/coronavirus-prison-concern-forces-ministers-to-look-for-more-cell-space-fb3pgpbrg>; <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2020/06/Womens-prisons-SSV-2020.pdf>

³⁸ <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2020/05/Locals-SSV-web-2020.pdf>

³⁹ <https://www.bbc.co.uk/news/uk-england-kent-52573415>

These conditions risk breaching international standards on inhuman and degrading treatment.

- 5.4 The government has a legal and moral obligation to protect the lives of detained persons from a foreseeable danger to their health. Under Article 2 of the European Convention on Human Rights as incorporated by the Human Rights Act, the government has a duty to protect the right to life of those detained. In addition, the use of detention also disproportionately impacts Black, Asian and ethnic minority (BAME) individuals, who make up 27% of the prison population.⁴⁰ As Black, Asian and ethnic minority (BAME) individuals are also at higher risk of dying from COVID-19,⁴¹ this makes the need to reduce the prison population an urgent humanitarian necessity, and crucial for tackling racial inequalities in the criminal justice system.
- 5.5 **Keeping people in prison and detention during this pandemic threatens the lives of prisoners, staff, healthcare workers - and the public health at large. Without appropriate action, prisons and other detention facilities could also become future epicentres of the pandemic. The government must significantly reduce the prison and immigration detention populations in order to protect and safeguard detained peoples' health.**

6. Policing COVID-19 & the Rule of Law

- 6.1 While this is not within the scope of this inquiry, we believe that there are such significant and serious issues with disproportionate policing and fines under coronavirus laws and regulations, and unlawful prosecutions under those laws, that it warrants attention from the Justice Committee.

Unlawful prosecutions

- 6.2 There have been multiple cases of wrongful convictions under the Coronavirus Act and the Health Protection Regulations. So far, every single one of the 53 prosecutions under the Coronavirus Act have been unlawful.⁴² In April, 6% of prosecutions under the Health Protection Regulations were unlawful, and in May, just under 10% of prosecutions under the Health Protection Regulations were unlawful.⁴³

⁴⁰ <http://www.prisonreformtrust.org.uk/WhatWeDo/Projectsresearch/Race>

⁴¹ <https://www.theguardian.com/world/2020/may/10/equality-watchdog-urged-investigate-impact-on-bame-people-london-mayor>

⁴² <https://www.cps.gov.uk/cps/news/cps-announces-review-findings-first-200-cases-under-coronavirus-laws> and <https://www.cps.gov.uk/cps/news/cps-review-finds-improvements-coronavirus-charging-compliance>

⁴³ Ibid

- 6.3 Prosecutions have been brought against homeless people under the Health Protection Regulations, despite the regulations specifically excluding homeless people. For example, in Manchester in April 2020, a man was charged for breaching the requirement to restrict movement, despite being homeless.⁴⁴ The Crown Prosecution Service identified a further 4 cases in May where homeless people had been prosecuted in contravention of the regulations.⁴⁵
- 6.4 This is a significant and unacceptable rate of unlawful prosecutions. These systemic failings are putting fundamental rights and justice at risk in this crisis and threatening trust in the criminal justice system. The Crown Prosecution Service must continue to review all cases under the Coronavirus Act and Health Protection Regulations.

Fines and criminalisation

- 6.5 There are also serious issues with the enforcement of Health Protection Regulations through financial penalties, the Fixed Penalty Notices (FPNs). The latest statistics released by NPCC show that 15,715 FPNs have been recorded in England up to 8th June for breaches of the Health Protection (Coronavirus, Restrictions) Regulations 2020, and in Wales, 2,282 FPNs have been recorded in the same timeframe, up from the 799 issued up to 11th May, to a total of 17,997 FPNs across both England and Wales.⁴⁶
- 6.6 Analysis of NPCC figures by Big Brother Watch has shown a significant disparity between the rates at which FPNs are issued in different areas of the country, with police in North Yorkshire issuing over 20 times more FPNs than in Staffordshire (adjusted for population size).⁴⁷
- 6.7 Moreover, police forces have also been rescinding FPNs issued. Analysis shows that at least 21 forces rescinded (issued but did not process or finalise) FPNs between 27th May and 8th June as their overall FPNs recorded decreased, indicating a high number of FPNs that had been issued incorrectly. For example, Surrey Police rescinded at least 134 FPNs in this period: the force had recorded 632 FPNs up to 27th May but recorded FPNs dropped to 498 as of 8th June – a decrease of 21%. Staffordshire Police similarly appeared to have rescinded at least 17% of FPNs in this period and West Midlands 11%.⁴⁸

⁴⁴ <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/charge-breaching-coronavirus-lockdown-law-18063383>

⁴⁵ <https://www.cps.gov.uk/cps/news/cps-review-finds-improvements-coronavirus-charging-compliance>

⁴⁶ <https://news.npcc.police.uk/releases/statistical-update-on-lockdown-fines-given-by-police-in-england-and-wales>

⁴⁷ <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/06/Emergency-Powers-and-Civil-Liberties-Report-May-2020-Final.pdf>

⁴⁸ Big Brother Watch, Fair Trials & others, Joint Letter to the NPCC, 30 June 2020
<https://bigbrotherwatch.org.uk/wp-content/uploads/2020/07/Reply-from-Big-Brother-Watch-Ors-to-Police-Chiefs-June-2020.pdf>

- 6.8 There are many cases of children being issued FPNs, although there is not power to do so under the Regulations. 39 children were recorded to have been wrongly fined in just the first three weeks of the Health Protection Regulations being in force, up to 15 April 2020.⁴⁹
- 6.9 We are concerned that people are being forced to pay FPNs, at what is an extremely difficult time financially for many, even if they have been inappropriately issued. FPNs are issued on the spot, with less scrutiny than prosecutions and without the additional checks of the CPS or magistrates, and the only way a person can contest a FPN is to risk a prosecution, incurring significant legal and financial risks.
- 6.10 It has been acknowledged by the CPS and the police that their failings to apply the Coronavirus Act and Health Protection Regulations correctly has led to many unlawful prosecutions. It is entirely correct that these prosecutions have been reviewed and indeed it has uncovered numerous unlawful prosecutions, as considered above. However, it is contradictory to accept this while denying that there is any issue with the thousands of FPNs issued by police.
- 6.11 If, at a conservative estimate, 10% of the 17,997 FPNs recorded in England and Wales were unlawfully issued, this would account for 1,800 unlawfully issued FPNs. This represents serious injustice during the pandemic that must be investigated and remedied.

Discrimination

- 6.12 In addition, the latest police figures on FPNs show a serious racial disparity, with Black and Asian people punished disproportionately more than white people.
- 6.13 Nationally, Black, Asian and ethnic minority (BAME) people in England are 54% more likely to be fined under coronavirus rules than white people.⁵⁰ Whilst 3.5% of the population in England is Black, Black people received 5% of fines issued in England. Asian people represent 7.8% of the population in England but received 13% of FPNs. This disparity occurs even with no ethnicity being recorded for 23% of those receiving FPNs.⁵¹
- 6.14 London's Metropolitan Police are twice as likely to fine Black people than white people. Black people make up 12% of London's population but received 26% of fines. White people make up 59% of London's population but received 46% of the total. Black people have also been disproportionately arrested for alleged breaches of COVID-19 lockdown

⁴⁹ <https://www.independent.co.uk/news/uk/crime/coronavirus-lockdown-uk-children-fine-police-latest-a9466541.html>

⁵⁰ <https://www.theguardian.com/world/2020/may/26/bame-people-fined-more-than-white-population-under-coronavirus-laws>

⁵¹ <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/05/Letter-to-Martin-Hewitt-from-Big-Brother-Watch-Ors.pdf>

rules, making up 31% of arrests. White people were again under-represented, making up 38% of arrests.⁵²

- 6.15 The same discriminatory approach can be seen on a force-by-force basis. Through Freedom of Information (FOI) requests, Liberty obtained the ethnicity breakdown of FPNs issued by 25 police forces. 18 police forces evidenced statistically significant ethnic disproportionality between FPNs issued to Black, Asian and ethnic minority people and white people, with some up to 7 times more likely to fine Black, Asian and ethnic minority people than white people.⁵³

“The most ethnically disproportionate use of fines was the Cumbria police force, where BAME people were 6.8 times more likely to be fined than white people. Other heavily disproportionate forces were Avon and Somerset, where BAME people were 4.4 times more likely to be fined than white people, Lincolnshire, where BAME people were also 4.4 times more likely than white people to be fined, and Suffolk, where BAME people were 4.1 times more likely to be fined than white people.”⁵⁴

- 6.16 These statistics show a worrying disparity at the national level and indicate systemic discriminatory policing. On the basis of the misinterpretation of the hurriedly drafted and implemented Coronavirus Act and repeatedly-changing Regulations, and the numerous wrongful prosecutions that have stemmed from them, the examples of wrongfully applied fines, and their clearly discriminatory application both nationally and force-by-force, it is highly likely that a significant number of FPNs have been wrongly issued and that there is a continued risk of FPNs being wrongly issued.

- 6.17 **We believe that an urgent national review of all FPNs issued under emergency laws is required. The government should also implement a way to challenge FPNs without having to face a criminal prosecution in the magistrates’ court.**

⁵² <https://www.theguardian.com/uk-news/2020/jun/03/met-police-twice-as-likely-to-fine-black-people-over-lockdown-breaches-research>

⁵³ <https://libertyinvestigates.org.uk/articles/police-forces-in-england-and-wales-up-to-seven-times-more-likely-to-fine-bame-people-in-lockdown/>

⁵⁴ <https://libertyinvestigates.org.uk/articles/police-forces-in-england-and-wales-up-to-seven-times-more-likely-to-fine-bame-people-in-lockdown/>

APPENDIX I

Fair Trials, 'SAFEGUARDING THE RIGHT TO A FAIR TRIAL DURING THE CORONAVIRUS PANDEMIC: REMOTE CRIMINAL JUSTICE PROCEEDINGS', 30 March 2020⁵⁵

⁵⁵

<https://www.fairtrials.org/sites/default/files/Safeguarding%20the%20right%20to%20a%20fair%20trial%20during%20the%20coronavirus%20pandemic%20remote%20criminal%20justice%20proceedings.pdf>

APPENDIX II

Fair Trials' Impact assessment recommendations⁵⁶

Fair Trials recommends that in order to fully assess the impact of remote justice on the right to a fair trial, the impact assessment should as a minimum cover the following aspects:

- Statistical data on number, types and categories of cases heard, length of proceedings
- Statistical data on the number and length of hearings, including adjournments related specifically to hearings being conducted remotely
- Experience of defendants, including vulnerable defendants, in particular those with visual or auditory impairments, cognitive differences, and mental health challenges.
- Experience of lawyers, judges (jurors), prosecutors and other trial participants such as victims and witnesses
- Impact on defence rights, including the ability to prepare and present a defence, confidential access to a lawyer before and during the hearing, submission and examination of evidence, access to witnesses.
- Impact on availability and quality of interpretation and other court services
- Impact on presumption of innocence and open justice
- Analysis of fair trial issues raised on subsequent appeals
- Impact on justice outcomes, including rates of pre-trial detention, conviction, sentences, and guilty pleas.

⁵⁶ <https://www.fairtrials.org/news/commentary-impact-assessment-remote-justice-fair-trial-rights>

Abstract geometric shapes consisting of overlapping squares and rectangles in various shades of blue, located in the top left corner of the page.

SAFEGUARDING THE RIGHT TO A FAIR TRIAL DURING THE CORONAVIRUS PANDEMIC: REMOTE CRIMINAL JUSTICE PROCEEDINGS

Abstract geometric shapes consisting of overlapping squares and rectangles in various shades of blue, located in the middle left of the page.

Fair

Trials

Contents

- p.3 Introduction**
- p.4 Remote or In-Person Hearings?**
- p.4 Issue 1: Access to a lawyer and effective legal assistance**
 - a) Access to legal assistance for defendants in detention
Recommendations
 - p.5 b) Effective legal assistance before, during,
and after remote court hearings**
Recommendations
- p.6 Issue 2: Effective participation**
Recommendations
- p.7 Issue 3: Access to information**
Recommendations
- p.7 Issue 4: Presumption of innocence**
Recommendations
- p.8 Issue 5: Vulnerable defendants and
other defendants with special needs**
Recommendations
- p.8 Issue 6: Data Collection and Impact Assessment**
Recommendations

Safeguarding the right to a fair trial during the coronavirus pandemic: remote criminal justice proceedings

The Coronavirus (COVID-19) pandemic is now a global health emergency, affecting more than a billion people worldwide. In more and more countries, normal life has effectively been suspended, as sweeping measures are introduced to control the spread of the disease by way of 'lockdowns', bans on social gatherings, and the closure of public facilities. These measures have also had an impact on criminal justice systems, as access to courts and prisons have come under severe restrictions, and as non-essential travel has become almost impossible in many countries.

The administration of justice cannot come to a total standstill, whatever the circumstances. It is essential that states continue to carry out essential functions, including the processing of criminal cases, and safeguarding the rights and welfare of criminal defendants, especially those who are detained. Many states have temporarily postponed all non-urgent court hearings, but with no clear end of the crisis in sight, various jurisdictions across the world are seeking ways to keep the courts running through means of remote access, including via video-link or telephone hearings.

The increased use of remote justice proceedings might be introduced initially as a temporary measure, but once in place, there is every likelihood that they will be made permanent, especially if there are perceived costs and efficiency advantages. It is essential that states do not rush to adopt these measures without properly considering their impact on criminal justice, and any decisions to make them more permanent should be based on sound evidence.

We welcome the fact that states are taking extraordinary measures to keep their criminal justice systems operational, preventing lengthy delays in criminal proceedings, and ensuring that urgent matters, such as pre-trial detention hearings, are not postponed. However, the human rights impact of remote justice procedures, and in particular, the implications on the right to a fair trial should not be ignored. Defendants should be able to exercise their rights fully and effectively, even when they are not physically present in court, and are unable to meet their lawyers in person. It is crucial that any decisions to introduce or expand the use of remote court hearings are informed by human rights concerns, and accompanied by appropriate safeguards to protect the rights of defendants.

Various human rights advocates have already outlined concerns about remote justice and its impact on the rights of defendants.¹ In this paper, Fair Trials summarises these concerns and provides practical recommendations to inform states that are either considering adopting or expanding the use of remote communications systems in criminal justice proceedings, or are in the process of implementing them.

¹ For example, Transform Justice '[Defendants on video – conveyor belt justice or a revolution in access?](#)'; Legal Education Foundation '[Briefing: Coronavirus Bill, Courts and the Rule of Law](#)'; Anne Wallace '[Courts and Coronavirus: Is Videoconferencing a Solution?](#)'; Advocates Gateway '[Planning to question someone using a remote link](#)'

Remote or In-Person Hearings?

As a general rule, defendants should be able to participate in criminal justice proceedings in person, and it is especially crucial that they are physically present in the courtroom during trial. Defendants' absence from the courtroom seriously undermines their ability to participate in criminal justice proceedings effectively, and the exercise of the rights of the defence.

Even in these extreme and unusual circumstances, there should be strong preference for court proceedings to be conducted in person to safeguard the rights of defendants. Non-urgent criminal trials, in particular, should not take place if the defendant cannot be physically presented in court for public health reasons. However, we acknowledge that criminal justice systems need to continue to function during this global health crisis, and courts will need to resort to remote hearings to deal with urgent matters, and to prevent an unprecedented backlog of cases that could harm the effective administration of justice in the future.

When determining whether or not a court hearing should take place remotely, the following factors inter alia should be taken into consideration:

- the length of delays and their likely impact on the rights of defendants (particularly where the defendant's period in pre-trial detention is likely to be prolonged);²
- the nature of the hearing, including:
 - the complexity of the case and the matter being dealt with;
 - the need to call witnesses; and
 - the likely impact of the hearing on the rights of the defendant (for example, if it puts the defendant at risk of deprivation of liberty);
- the availability and quality of equipment and systems used for communication between the court and the defendant; and
- the existence of impairments or other factors that could negatively affect the defendant's ability to participate effectively in court proceedings.

Where there are strong justifications that mandate the use of remote justice procedures, remote hearings should only take place if there are adequate safeguards in place that address various threats to the right to a fair trial.

Issue 1: Access to a lawyer and effective legal assistance

a) Access to legal assistance for defendants in detention

In response to the COVID-19 pandemic, prisons and detention centres across the world have been limiting or banning visits, leaving detainees further isolated from the outside world. These measures are no doubt understandable given the need to protect both detainees and prison staff, but they are interfering with the right of access to essential sources of support, including legal assistance.

Restrictions and bans on in-person visits are making defendants increasingly reliant on telephones and other forms of remote communication to maintain contact with their lawyers. Reports suggest, however, that prisoners in some jurisdictions are facing additional restrictions on phone calls as a result of the COVID-19 pandemic (for example, due to concerns that prison staff will be exposed to health risks by having to accompany prisoners to telephones). Phone calls from prisons in some countries are also not free of charge, meaning that many prisoners will also be significantly disincentivised if not outright prevented from communicating with their lawyers.

There is also a risk that reliance on remote communications will undermine the quality of legal assistance. Restrictions on the frequency and length of telephone calls, for example, could affect the ability to provide and obtain legal advice, and the lack of in-person meetings might make it harder for lawyers to establish rapport and a strong working relationship with their clients.

² See Fair Trials' [Practical Guidance on Pre-Trial Detention during the COVID-19 outbreak](#).

Recommendations:

- All prisons and detention facilities should have adequate facilities to make sure that all detainees have effective and frequent access to telephones (and other permissible forms of instant communication). This may include updating, or increasing the number of equipment to cope with increased demand.
- Prisons and detention facilities should aim to make video-conferencing facilities available for defendants.
- Strict confidentiality of defendant-lawyer communications should be respected. Defendants should have access to secure spaces for confidential discussions, out of earshot from prison staff and police. Communication channels should be secure, so that calls cannot be intercepted or recorded.
- Where there are restrictions on client-defendant correspondence (including, for example, the frequency and length of phone calls), these should be significantly relaxed to compensate for the reduction of in-person legal visits.
- The use of telephones (and other permissible forms of instant communication) should be made available free of charge to prisoners when communicating with their lawyers.

b) Effective legal assistance before, during, and after remote court hearings

Video-link hearings can make it very challenging for lawyers and defendants to interact with each other, and this could have serious implications on the quality and effectiveness of legal assistance. Video-link hearings deprive the opportunity for defendants to meet their lawyers in person, in secure, private environments where confidential discussions can take place. They can also make it much harder for lawyers and defendants to communicate discreetly during the hearing.

Where consultations between a defence lawyer and the defendant are made possible before or during the hearing through a courtroom video conference equipment or phone, there are concerns about the confidentiality of these consultations (given the possible presence of court or prison staff at either end), and possible pressure or time limits on the consultations.

Recommendations:

- Defendants should be given sufficient time before, during, and after court hearings to consult their lawyers.
- Courts should be equipped with adequate facilities to enable confidential video-conferencing or telephone calls between defence lawyers and defendants without undue time pressure. These might include separate spaces in courts with video-conferencing equipment for lawyer-defendant consultations.
- Defendants should be given access to secure rooms or areas, before, during and after hearings, where they can communicate with their lawyers confidentially.

Issue 2: Effective participation



Technological developments in recent years have made significant improvements to video-conferencing systems, but the physical absence of the defendant from the courtroom is likely to have an impact on their ability to participate fully and effectively in their own criminal proceedings. This is a particularly serious challenge, where the defendant is unrepresented, and has no-one physically present in the courtroom to advocate on their behalf. Without legal assistance, defendants are likely to find remote hearings even more isolating, stressful, and disorienting.

Limitations in video-conferencing systems could mean that defendants not only find it more difficult to follow and understand the proceedings, but that they are also prevented from observing the courtroom in its entirety. Defendants might be deprived of the possibility of reading nonverbal cues from other courtroom participants, for example, to ascertain the mood of the jury or judges. They may also be limited in their ability to confer confidentially with counsel during proceedings. There are likely to be significant challenges where hearings involve the filing or assessment of evidence. Unless there are adequate facilities for defendants to file and inspect evidence during court proceedings, they will be deprived of their ability to defend themselves.

Defendants could also be prevented from participating in their court proceedings where there are technical issues affecting the quality of audio or video such as delays, echoes or interruptions.

Recommendations:

- Where a defendant is unrepresented in a remote hearing, judges, prosecutors, or court staff (as appropriate) should proactively assist the defendant to ensure that they have access to legal assistance.
- Legal aid eligibility rules should be reviewed to ensure that no defendant taking part in remote court hearings is unrepresented for financial reasons.
- Video-link equipment should imitate courtroom participation as much as possible. Defendants should be able to get a full view of the courtroom, and be able to observe all courtroom participants.
- Where remote hearings involve the filing or review of evidence, the defendant should be given access to facilities that enable them inspect evidence and submit evidence during the hearing.
- Equipment and communications systems used for remote hearings should provide continuously reliable sound and video.
- Hearings should be halted where connection is interrupted, and only continue once the problem has been fixed.
- Technical support should be readily available at courts and detention facilities to fix faults that affect the quality and reliability of audio and visual communications.
- Defendants should be able to contact their lawyer confidentially during proceedings to ask for clarifications or to confer and provide instructions.

Issue 3:

Access to information



Defendants could face further restrictions on their access to information, and in particular, access to the materials regarding their case, as a result of measures introduced to control the spread of the coronavirus. This is a particular challenge in jurisdictions where defendants can only access case files at specific sites (such as police stations or courthouses), or they are reliant on case files to be brought to places of detention. Restrictions on travel, and the closure of certain facilities (such as courthouses) could have a significant impact on the right of access to information, particularly for defendants in detention.

Recommendations:

- Defendants and defence lawyers should be given access to case files in a way that enables defendants to exercise their defence rights effectively.
- Defendants should be given physical or electronic access to the case file, free of charge.

Issue 4:

Presumption of innocence



The fact that a defendant is not physically produced in court should have no impact on how they are presented in court proceedings. However, if defendants do not physically leave their places of detention to attend their hearings, there is an increased likelihood that they will appear in court, via video-link, as 'prisoners'. They might, for example, still be wearing prison clothes, or they could appear on screens with a background clearly showing that they are in prison.

Recommendations:

- Defendants in detention should be presented in clothing appropriate for court hearings, and they should be given access to facilities that allow them to wear appropriate clothing.
- Defendants should be presented during video-link hearings with a neutral backdrop, that does not suggest that they have been deprived of their liberty.

Issue 5:

Vulnerable defendants and other defendants with special needs

Remote justice procedures have implications on the rights of all defendants, but their impact is no doubt especially severe for vulnerable defendants, and those with other special needs (such as interpretation and translation needs).

Defendants with mental impairments, in particular, face serious barriers to effective legal assistance and to effective participation in most normal court settings. Depending on the defendant and the type of impairment, remote justice procedures could severely worsen these challenges, making it even more difficult for them to understand and follow court proceedings. There are similar challenges for those with language assistance needs, who face additional barriers to communication.

Recommendations:

- Defendants taking part in remote criminal justice proceedings should be subject to an individualised needs assessment, so that any impairments that affect their ability to participate effectively can be identified.
- Depending on the type of vulnerability or impairment, remote justice proceedings might not be appropriate at all. If they are, individualised procedural adjustments should be made to facilitate effective participation.
- Defendants with language or other communication assistance needs should be given access to suitably qualified professionals to aid communication with the court and with their lawyers. As far as possible, language and communication assistance professionals should be present in the same room as the defendant during court proceedings.

Issue 6:

Data Collection and Impact Assessment

The unprecedented circumstances brought about by the COVID-19 pandemic are likely to result in the expansion of the use of video-conferencing technology into new areas of criminal proceedings, and into more jurisdictions. The real impact of video-link and other forms of remote communications systems on criminal justice outcomes and on the fairness of criminal justice proceedings needs to be better understood.

The reliability of the equipment and systems used for remote justice proceedings should also be monitored, so that it is possible to evaluate whether or not systems being used are fit for purpose. Any decisions on the continuation or further expansion of remote justice procedures should be based on solid evidence.

Recommendations:

- Data should be collected to monitor the impact of remote justice procedures on criminal justice outcomes and fairness of criminal justice proceedings.
- The reliability of equipment and systems used for remote justice proceedings should be monitored.



fairtrials.org



[@fairtrials](https://twitter.com/fairtrials)



[FairTrials](https://www.facebook.com/FairTrials)