



**Evidence for the Justice Select Committee concerning
the Criminal Justice System and COVID-19**

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1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – civil, criminal and administrative – in the United Kingdom. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual’s rights are protected and which reflect the country’s international reputation for upholding and promoting the rule of law. In the past five years JUSTICE has increasingly worked on digital aspects of justice, including virtual hearings and digital exclusion, and lay perspectives of the justice system.¹
2. The effect of the coronavirus outbreak and the resulting measures from Government will be acutely felt in the justice system. As the Lord Chief Justice recognised on 17th March 2020: “It is not realistic to suppose that it will be business as usual in any jurisdiction, but it is of vital importance that the administration of justice does not grind to a halt.”
3. In the two weeks since that message, all jurisdictions of the justice system have acted speedily, issuing guidance on alternatives to physical court hearings. JUSTICE has been advising and assisting HMCTS in producing guidance documents on remote hearings. JUSTICE will also be staging a mock virtual criminal trial with real barristers, a real judge, volunteer jurors and witnesses, and evaluated by an academic, to assist learning and to promote proactive troubleshooting within a mock environment.
4. JUSTICE agrees with the recent guidance on remote hearings in the Family Court and considers its aims and objectives to be of general application across all courts.:

[The justice system] must ensure the safety from infection of judges, court staff, lawyers and litigants whilst at the same time facilitating a hearing that permits the parties to fully participate, that ensures both procedural and substantive fairness in accordance with the imperatives of Art 6 and the common law principles of fairness and natural justice [and transparency]. The objective should be to make the remote hearing as close as possible to the usual practice in court.²

5. Each jurisdiction has its idiosyncrasies. However, a few key principles should lie at the core of decision making surrounding how justice is done differently at this critical time.

Decisions on paper

6. Replicating the live court experience as far as possible does not preclude decisions being made on paper, if written advocacy would be as just, fair and effective as oral advocacy. Ideally decisions on the papers will be by consent. If there is no consent, then the necessity and proportionality of any interference with the parties’ Article 6 rights must be at the core of any judicial decision to impose a decision on the papers, bearing in mind the audio and video facilities available.

One-Party by video/audio

7. In terms of ensuring proceedings are as close as possible to usual practice, this does not mean it is preferable for some litigants to be physically in one place with the judge and/or magistrates with one or two parties attending remotely. In fact, the opposite is true. Replicating the equality of arms which comes with attendees all hearing and seeing the same thing is critical to maintaining justice being *seen* to be done. During these times when physical contact must be reduced, this means creating a virtual court room, by audio

¹ See our reports *Understanding Courts* (2019), *Immigration and Asylum Appeals: A Fresh Look* (2018), *Preventing Digital Exclusion from Online Justice* (2018), *What is a Court?* (2016), *Complex and Lengthy Criminal Trials* (2016).

² *The Remote Access Family Court*, Mr Justice MacDonald, version 2, 25 March 2020, para 3.2.

or video technology, in which parties are equally present. As rules around physical contact relax in the coming months, especially with the introduction of the antibody vaccine, the justice system must not lose sight of this. Being the minority who attends a hearing virtually, compared with physically, can be alienating and can prompt disengagement.

8. It is also imperative that video technology is available in prisons and detention facilities to enable defendants and immigration appellants to take part in proceedings without delay.³

Virtual hearings

9. Courts should not be, but still are, daunting places for individuals. In creating a virtual court space, the lay court user's experience should be the principle guide. This means the court service proactively ascertaining what lay parties and non-party witnesses need to participate effectively in the hearings, including interpreters, reasonable adjustments, intermediaries, and time to have a conference with their representative. The need for lay parties to have available alternative and confidential means of communicating with their representative outside the virtual courtroom is critical.
10. Technical tests should ideally be done the day before with parties and witnesses, organised by the court. To preserve the solemnity of proceedings, JUSTICE recommends introducing guidelines before hearings for behaviour, dress and surroundings, as well as a protocol for when a video will be turned on or off, when microphones will be muted, who will be seen during evidence, and what to do if you lose connection. The judge and court clerk should be visible at all times that they are in the virtual courtroom.

Open Justice

11. As Lord Hewart CJ famously declared, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R v Sussex Magistrates, Ex p McCarthy* [1924] 1 KB 256 at 259). During extraordinary lockdown measures which are unparalleled in peacetime, the need to enable virtual public access to the justice system is renewed by the inability of the public to walk into a court room. The Court of Appeal (Civil Division) already streams court cases live, as does the Supreme Court.⁴ JUSTICE urges that streaming court cases online should be a priority to preserve open justice. The temporary provisions in the Coronavirus Act 2020, Schedules 23 to 27, allow courts to order the remote hearing is broadcast and recorded. Since these provisions criminalise any unauthorised recording or transmissions of broadcasts, there should be a warning at the bottom of the screen, as is already the case in the Court of Appeal.⁵
12. Streaming a virtual court room will necessitate one participant to stream their "view" – we would suggest HMCTS undertake this role. Streaming, rather than letting the public "join" cases as a participant, will preserve the separation between observing in the public gallery and participating in the case as well as conserving the bandwidth required to conduct the hearing. For cases with reporting restrictions, all efforts as would be appropriate in a physical hearing must be made to include the press as muted and non-visible participants of the virtual proceedings.⁶

³ Lateral thought will be required; if there are insufficient video-link rooms, secure laptops can be used to enable participation.

⁴ The Court of Appeal does so under an order of the Lord Chancellor under section 32 of the Crime and Courts Act 2013. The Supreme Court is excepted in the Crime and Courts Act and broadcasts live on its website and YouTube (the Supreme Court's website <https://www.supremecourt.uk/live/court-01.html>).

⁵ See for example its last broadcast on 18th March 2020 (https://www.youtube.com/watch?v=A8G45z_vJck).

⁶ The Press Association observed and reported on Mostyn J's fully remote Court of Protection case on 18 March 2020.