

Title	Briefing for the Justice Select Committee on coronavirus and the courts
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About the Magistrates Association

The Magistrates Association (MA) is an independent charity and the membership body for the magistracy. With over 14,000 members across England and Wales, we are a unique source of information and insight on magistrates' courts and the only independent voice of the magistracy.

Background

As a result of the coronavirus pandemic there have been very significant changes to the way that courts are operating. The number of courts in use has been reduced substantially and it is mostly district judges, rather than lay magistrates, who are sitting in magistrates' courts. Further changes, including a greater use of video and audio links, are expected. A significant amount of guidance has therefore been issued providing advice and support to judicial office holders, court staff and all court users. That so much has been done in the midst of an unprecedented public health crisis is impressive and there is no doubt that all involved in managing the courts' response to the coronavirus pandemic – including the government, the senior judiciary and HM Courts and Tribunals Service (HMCTS) – are working extremely hard to keep court users safe and ensure that the justice system continues to operate. They have the MA's full support and our comments below should be seen in that context.

Issues of concern

1) Court cleanliness and hygiene

Keeping courts clean must be a priority in the current circumstances. This includes providing wipes for court iPads and hand sanitiser and ensuring that hand washing areas have soap. Prior to work being focused in a small number of courts and the temporary closure of others our members were, however, reporting concerns that there was still more to do on this. While we recognise and welcome ongoing efforts to improve the situation, court cleanliness must therefore remain a priority, particularly when more courts reopen and more cases begin to be heard. Measures must also be put in place to enable all court users to maintain a safe distance from each other, including by having magistrates sit in benches of two (rather than three) so they can keep apart from each other more easily.

2) The use of video and audio hearings

In normal times, the MA has concerns about the use of phone or video hearings because of the impact their use can have on fair participation, as previously set out in evidence to this Committee. However, we support greater use of remote hearings in the current situation to reduce unnecessary contact and transmission of coronavirus. Particular thought should, however, be given to the following issues:

- a) Priority consideration must be given to ensure that defendants appearing via video or audio link are able to access legal advice, as this is more challenging where they are appearing remotely.
- b) In the past, where defendants and witnesses have appeared remotely they will have done so via dedicated video link suites. It is now likely that they will access hearings from their own devices, with the provisions of the Coronavirus Act stating that the suitability of the facilities should be a consideration in whether a hearing can be carried out by video or audio link. Guidance will be needed for the judiciary on how to make that judgement, as part of broader guidance for judicial officer holders on how to assess whether the use of video or audio links is appropriate.

- c) While we support the greater use of audio and video links in these circumstances (as long it remains at the discretion of the magistrates or judge), we also suggest that their use is unlikely to be appropriate where parties are deemed particularly vulnerable or for any trials involving defendants under the age of 18 years. Guidance should reflect this.
- d) Where video or audio links are used, it is essential that all parties are able to fully participate. Guidance, and potentially training delivered remotely, should be provided for the judiciary on how best to facilitate this. We do not, however, think that it would be possible for magistrates sitting as a bench of two or three, and needing to work with a legal advisor, to access a hearing remotely from home, which should be taken into consideration when planning listing.
- e) As part of the current court reform programme, increased use of live links for court hearings is planned. It may therefore be useful to capture the impact of their use during the coronavirus pandemic, and in particular capture the experiences of defendants and other participants, to inform the future court reform programme. It must also be recognised, however, that these are exceptional circumstances and emergency solutions identified now, even where they can be made to work in the short-term, may not be fit for purpose for the longer term.

Within the context of plans to expand the use of video links, we also support recent calls for the urgent publication of the available information from the evaluation of the Home-Office funded Video-Enabled Justice programme, sponsored by the Sussex Police and Crime Commissioner.¹

3) Remand, sentencing and recall

Many of the decisions made by courts will not only be affected by the new processes that have been introduced (including increased adjournments), but also by wider changes in service provision for those bailed, remanded or sentenced. As part of the judicial decision-making process, magistrates and judges will need to take into account all such factors and will therefore require up-to-date and accurate information, particularly from the probation service, on which to base their decisions.

For remand decisions, courts will need to consider whether defendants who are remanded will spend longer periods of time in custody than normal as trials are not currently being conducted, especially if that is longer than the average sentence for the offence they have been charged with. It is also the case, however, that it may be more challenging than in normal circumstances to put in place an effective bail package as relevant services (including tagging) may be unavailable. The provision of accurate information to the courts on what is available and guidance on how the decision-making process may be affected by the current circumstances would therefore support sentencers in their decision-making.

Further, when it comes to sentencing, most elements of community orders (such as unpaid work, programme requirements and attendance centres) are likely to be unavailable, while tags cannot be fitted. The effect of fines on households already struggling financially in the current economic climate, and of custody with the increased health risks associated with coronavirus, will also be considerations. As a result, sentencers will have very limited options and are likely to have to deviate from existing guidelines. To ensure consistency of approach, new guidance is therefore needed to support judicial office holders in their decision-making in these circumstances.

Finally, sentencers take into account the impact of any court order on the individual. Given the inherent risk of transmission of coronavirus in custodial institutions, along with reduced staffing levels limiting the regime that can be provided, the impact of remanding, sentencing or recalling someone to custody may be more difficult to assess than normal. Sentencers will also recognise that sending somebody to prison for a short period of time creates churn in the prison estate, which risks contributing to the spread of coronavirus. Similarly recall back to prison (especially when for the 14 day period) creates significant risk to that individual and the community, and should only be used when proportionate to that risk.

¹ <https://www.lawgazette.co.uk/news/open-justice-campaigner-calls-for-video-remand-data-to-be-published/5103692.article>

Overall, courts therefore need up-to-date and accurate information about current circumstances, including what options (for bail and sentencing) are available. We also believe that guidance from the senior judiciary on these issues, updated as necessary as circumstances change, may be beneficial to assist sentencers in understanding the impact of these unprecedented circumstances. Guidance should also be made public, to ensure transparency of structural decision-making processes.