

## Written evidence from Transform Justice

Transform Justice is a charity which advocates for a fair, human and open and effective justice system.

Transform Justice has commented on and researched the digital court reform programme since its inception. In 2017 we published “Defendants on video – conveyor belt justice or a revolution in access?” <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>. During the pandemic we observed a number of magistrates’ court hearings in London. These were hybrid – with the judge and court staff in the court, but all other participants either in the court or appearing remotely. We will focus in this response on the criminal courts.

### Are criminal court delays a function of the pandemic?

Delays were already a problem in the criminal courts before the pandemic. Although prosecutions reduced over the previous ten years, judge sitting days were also reduced and courthouses closed. This meant that the duration of cases between first appearance and conclusion was already extending before the pandemic. In March, all trials were halted and only “urgent” cases were heard for a number of weeks. This caused an increase in delays for all criminal cases. The data is not yet available on which type of hearings are most affected, but anecdotal information suggests Crown Court trials are the most delayed. Lawyers are telling of trials where the defendant is on bail being listed for full hearing in 2022, and the government has just announced a proposed extension of custody time limits to accommodate delays in trials where defendants are on remand.

So criminal court delays are not caused by the pandemic but are exacerbated by it.

### How is remote participation affecting the “throughput” in criminal courts?

Prior to the pandemic, the digital court reform programme had been progressing relatively slowly. Indeed, HMCTS was criticised by the National Audit Office for letting its timetable slip. Online processes had been introduced via the single justice procedure, files had been digitised in Crown Court cases and video links between prisons and court were well established. A few police forces had also experimented with running a satellite court room within their custody suite. In these areas, defendants who had been detained post charge would appear for their first magistrates’ court hearing from a room in custody kitted out with video cameras. Their lawyer would normally be in court and would conduct their pre-hearing consultation on video. These courts were deemed “video remand” courts but this was a misnomer. First appearances decide remand or bail in those cases where the defendant pleads not guilty, but also deal with many cases where the defendant pleads guilty and is immediately sentenced, including to custody.

During the pandemic, it was decided that only these “overnight” court appearances would be prioritised given that defendants cannot be kept indefinitely in police custody. Normally PECS contractors would transport defendants from police custody to court and supervise them both in court cells and in the dock. During the pandemic, the independent PECS contractors decided that courts were not sufficiently covid-safe, and refused to transport and supervise prisoners as previously. As a result, the police agreed to run video links from custody suites in nearly all areas. A laptop was set up in a room and police officers and staff

acted as court staff, managing lists, setting up pre-hearing consultations and supervising the defendants and the resolution of each court hearing. Skype and later Cloud Video Platform (CVP) were used to link the custody suite to the court.

During the pandemic most lawyers for prosecutions and defence appeared remotely, as did probation. While relatively few cases were being heard, the magistrates' courts seemed to cope OK, though all involved seemed to be working well beyond the usual 5.00pm cut off. As the lockdown eased, more cases were listed including magistrates' trials and cases involving defendants who had been bailed.

It appears that this increase in cases highlighted an issue that had not been evident pre-pandemic – that hybrid (combination of remote and physical) hearings currently create more delay and more administrative work. Each hybrid hearing may take the same time as a traditional hearing but the gaps between hearings are greater. When a traditional court is running and an unexpected gap appears between cases, the list caller can just go into the court corridor and see who is ready to be heard. Cases can easily be swapped between courts if one is busier than another. Remote hearings do not have this flexibility – all timings need to be fixed and each participant needs to be available and online at the right time.

Court staff have more work administering hybrid/remote hearings than traditional hearings. In the latter all parties are asked in open court/by letter to attend court on a particular day. Once a magistrates' court hearing has been listed and communicated, administrative staff only need to act if participants do not turn up. In the case of remote hearings, administrative staff have to separately contact each participant to set up a specific time for a hearing and to contact them individually if they do not appear online. They need to resolve technical problems. Technical problems also create considerable delay – whether in starting the hearing or during the hearing itself if, for instance, sound quality is poor.

It is not quite clear what happened, but in May/June a decision appeared to be made to try to reduce the number of participants appearing remotely. Listings are a judicial function and judges seem to have decided to encourage participants to attend in person – partly presumably because they assessed that admin staff were at breaking point in terms of workload.

No data has been released about the impact of remote participation on the “throughput” of magistrates' court cases. However, my observations and gathering of evidence from court users suggests that remote participation introduced a considerable level of delay. Previous research indicates similar – a 2010 evaluation of a pilot of “video remand” courts (<https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report>) found that they were more expensive than traditional hearings and involved more adjournments. A more recent evaluation of such courts in Kent (<https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf>), found that adjournments increased in the video court.

The judicial drive to encourage lawyers to attend court in person is not always welcome. During the pandemic, lawyers had enjoyed the flexibility of working remotely from home and appreciated the saving of time and money. They are now resisting pressure to attend short administrative and procedural hearings which could be efficiently be done from home.

The police are, in contrast, not so keen on remote courts. They had to devote extra staff to running “police courts” and supervising defendants for many extra hours, without any extra money. Most custody suites have now stopped running satellite video courts and have returned to the pre-pandemic system. There is no evidence that defendants benefitted in any way from appearing from custody suites. Rather they found it much more difficult to communicate with their defence representative and they sometimes had to spend an extra night in police cells (due to courts running out of time to hear all cases).

#### Remote links from prisons to courts

Such links have been established since 2000 and are used for remand, sentencing and PTPH hearings where the defendant appears from the prison into the court. They have also been used by lawyers for pre-hearing consultations e.g. in the case of a remand review.

For pre-trial consultations, barristers and solicitors have previously preferred to meet their client in person in prison and have travelled far in order to do so. But such in-person lawyer visits have been banned during the pandemic. This did not pose a problem until trials were resumed. But more lawyers are now trying to book video slots for consultations with clients. Prisons do not have sufficient video-room capacity to meet the needs of both court hearings and lawyers’ consultations. Lawyers complain that they are having to delay trials because they cannot secure a pre-trial consultation with their client. They also complain that, even when slots are booked, prison staff too often fail to produce their client.

This is a small but important driver to criminal court delay currently. It could be resolved if prisons relaxed their no lawyer visits policy (while insisting on covid safety measures such as masks) or if they rapidly established more video rooms from which prisoners could talk confidentially to their defence representatives.

#### The threats to defendants’ rights from court capacity issues and delay

Transform Justice believes there are considerable threats to effective participation as a result of defendants being forced to appear remotely and lawyers and police station representatives choosing to do so. However, we acknowledge that for certain administrative and procedural hearings, using video links will reduce delay and should not prejudice effective participation.

Our assessment is that remote police station legal advice is not making any difference to court delays, but that the lack of proper pre-hearing consultations between lawyer and client (due to defendants being in custody before and for their court hearing) may cause hearings to last longer, as basic information is often missing. A few weeks ago, Director of Transform Justice, Penelope Gibbs observed a case where a woman defendant appeared from police custody. Despite being legally represented, no-one appeared to know why she had been arrested or what she was accused of. This caused considerable delay – a delay which would be unlikely if the lawyer had met their client in person.

The most serious threat to defendants’ rights arising directly from delay is to prisoners in pre-trial detention. Most of those remanded do not go on to get custodial sentences and a substantial proportion are acquitted. The criteria for custodial remand are very different to those for custodial sentences, but Transform Justice’s own research suggests pre-pandemic remand was over-used for both adults and children (<https://www.transformjustice.org.uk/wp->

[content/uploads/2018/12/TJ-December-2018-PRINT\\_V2-December.pdf](content/uploads/2018/12/TJ-December-2018-PRINT_V2-December.pdf),  
[https://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ\\_March2018report.pdf](https://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March2018report.pdf)).

The pandemic has exacerbated this problem since trials have been delayed and custody time limits extended. This means more innocent people will spend time in prison, in very difficult conditions. It is unlikely that the normal privileges for remand prisoners are currently available. In the case of some people on remand, they will be under pressure to plead guilty – particularly if they would spend less time in prison by doing so. This is explained well here by barrister Joanna Hardy [https://twitter.com/Joanna\\_Hardy/status/1302557035859447808](https://twitter.com/Joanna_Hardy/status/1302557035859447808).

### Triage prosecutions more effectively

During the pandemic a protocol was agreed between the police and CPS that only high risk cases should be charged and that only defendants accused of serious offences should be detained in police custody post charge. This made sense, though our observations of London magistrate court hearings suggested that the guidance was not always followed by frontline police. Most of those who appeared from police custody were released by the court at the end of their hearing, since they were accused of relatively minor offences and did not meet the criteria for remand/custodial sentence.

Most people who are convicted in magistrates' courts receive non-custodial sentences, of which the majority receive fines. In the case of these lower level offences, police could use out of court disposals or approaches as an alternative to prosecution. Many conditional cautions mandate completion of a rehabilitative programme and/or restorative justice and often the paying of compensation. The backlog in the courts could be considerably reduced if police were encouraged to use more such sanctions and if the CPS started refusing to charge some lower level offences for which the court sanction would be a fine or conditional or absolute discharge.

The use of out of court disposals in appropriate cases is popular with victims. As it is, victims of crime are suffering increased stress from the court backlog. It is likely that more victims will withdraw their co-operation if the cases in which they are involved are unduly delayed.

### How could the backlog be eased?

1. By investing in more court staff. More cases cannot be heard without an increase in staff. Those employed now are exhausted and often working extra hours. We understand the availability of staff, particularly legal advisors to be a greater restraint on increasing hearings than the availability of court-rooms.
2. Pause most remote hearings in criminal cases until we understand more as to how to reduce the delays caused by their extra administration and poor technology.
3. Resolve the problems caused by prisons banning in-person lawyer visits.
4. Stop "video remand" courts – whereby police stations host defendants' first court appearances. These cause delay indirectly by hampering lawyer-client pre-hearing consultations.
5. Actively promote the use of out of court disposals and approaches for lower level offences where the person who committed the crime admits guilt.

6. Use all courtrooms available in court houses. Once these are fully used, explore the use of other venues such as hotels for appropriate bail cases.

September 2020