

Written evidence from the Magistrates Association

About the Magistrates Association

The Magistrates' Association is an independent charity and the membership body for the magistracy. We work to promote the sound administration of the law, including by providing guidance, training, and support for our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the courts and the broader justice system. With over 12,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

Background

The Magistrates' Association is grateful to the Justice Select Committee for its invitation to submit written evidence to this inquiry. Open justice – and the associated maxim that justice must not only be done but be seen to be done – is a cornerstone of our criminal justice system and must be stoutly protected.

Criminal justice involves the state using its coercive force against an individual. Society needs to trust the state to exercise those powers with humanity and in ways which uphold the dignity and rights of the individual – and this trust can only be achieved and maintained if the process of justice is conducted in the open.

With the Covid-19 crisis and the impact of the upcoming legislative agenda on perceived openness of justice, this inquiry is timely.

The Magistrates' Association believes that, while much attention and scrutiny on issues of open justice is directed to higher courts, the principle is at least equally important in the magistrates' courts too, where all criminal cases begin, and the great majority of cases are concluded. As magistrates are arbiters of local justice, ensuring that justice is seen to be administered fairly and transparently has always been a principle of visceral importance to the magistracy. We are concerned that an unrelenting drive towards efficiency – a laudable aim – can conflict with the principles of open justice and can threaten it if it takes priority.

Key positions and conclusions

- Open justice must be a core priority. Efficiency is important, but open justice must prevail where the two are in conflict.
- Such prioritisation of open justice must ensure fair and effective participation for all defendants, victims, and witnesses. This is key to enhancing the sense of procedural fairness that open justice relies upon.
- Efforts to enhance open justice in courts – outside of the President of the Family Division's recent Transparency Review – have been piecemeal. There is little evidence that this is a stated priority of HMCTS.
- The Police, Crime, Sentencing and Courts Bill extends the use of remote hearings in wide-ranging and permanent ways without adequate safeguards to ensure that such extensions do not impede on the ability of defendants, victims, and witnesses to participate fairly and effectively.
- The MA reiterates previously expressed concerns around the opacity of certain processes, such as the Single Justice Procedure. Any operational benefit or efficiency improvement

provided by such processes must be looked at through the prism of the impact on open justice, which must always be paramount.

1. Current attempts to address and promote open justice

i) Transparency Review

The President of the Family Division's Transparency Review is a serious attempt to focus in on the issue of open justice. The MA welcomes the recent review, and believes the president took a measured and sensible approach to balancing the need for greater openness – for example, by making it easier for legal bloggers and journalists to report on what they see and hear in family courts – and the equally pressing need to protect those who appear in the family court.

We welcome this attempt to increase public confidence in the family court through greater transparency.

In addition to enhanced provision for media reporting, increased publication of judgements will also ensure that there can be greater and better-informed scrutiny of family proceedings. This will be beneficial for open justice, and the Magistrates' Association wholly supports this approach.

However, it is well known that that judges and magistrates in the family court are under considerable strain. The pressures on the family court system and the backlog of cases waiting to be heard makes it difficult for magistrates to devote time to anonymisation and publication of judgments. These proposals must therefore be accompanied by increased resources in the family court to ensure a real increase in transparency takes place.

The Government should use its upcoming magistracy recruitment campaign to address the need for such resources, which would aid in the objective of open justice in the way described and recommended by the Family Division President.

Of relevance to all courts is that legal advisers, who are the ones who input judgments in a form suitable for publication (or at least conduct vetting), are an important resource to the mission of open justice. There must be efforts to tackle the issues caused by the shortage of legal advisors on the part of HMCTS.

ii) Protecting open justice

Outside of the family jurisdiction, the Magistrates' Association is concerned that there is little observable evidence of a unified strategic expression from HMCTS of the importance of protecting open justice. Its annual report for 2020-21 – which understandably is dominated by plans for Covid-19 recovery – makes little mention of how their stated commitment to “openness” looks like in practical terms. We believe that the principle of open justice is so taken for granted that it can be overlooked when, for example, considering changes that affect media and public access to cases in jurisdictions other than family.

In particular, the importance of the principle of open justice for the crime jurisdiction in Magistrates' Courts should be centrally established without delay.

The MA recommends that HMCTS, the Judicial Office, and the Ministry of Justice make the protection of open justice one of their guiding principles. Proposals for reform of the justice system

should be viewed through the prism of their effect on open justice. Whether reforms aid or diminish open justice is at least as important as any operational benefit or efficiency they provide.

2. Concerns and issues about the transparency and accountability elements of open justice

i) Automatic Online Pleas and the Single Justice Procedure

The Magistrates' Association supports efforts to make the justice system more efficient, and we welcome the potential advantages of using the Single Justice Procedure to deal with some low-level offences. However, openness and transparency must not be compromised. The MA is concerned that with cases not taking place in a traditional public forum, it is difficult to achieve adequate transparency. We raised our concerns when the Single Justice Procedure was first introduced; we do not consider that this has been satisfactorily addressed by HMCTS or the Ministry of Justice.

It is important that transparency is not just linked to publishing outcomes but allows access to the process itself – public confidence is linked to public scrutiny of the process, which is not possible with the way that the Single Justice Procedure is currently delivered.

All Single Justice Procedure cases and outcomes are now published online but more serious cases heard in the magistrates' courts are not. This raises concerns about the disproportionality of publishing listing details in this way,

ii) Video/online hearings

The Magistrates' Association understands the need to allow criminal courts to deal with cases differently during the Covid-19 emergency. We have supported greater use of video and audio hearings in the current situation to reduce the spread of the virus. However, there are issues the MA would like to highlight around open justice in video courts:

- Attendees at court do not have to identify themselves or give a reason for observing. Those observing by video link must provide some contact details to get a link. Careful thought must be given to, for example, requiring ID to view proceedings as it might deter some from observing.
- A witness in a trial could quite easily watch other witnesses give evidence. In a physical courtroom, the ushers are aware of who witnesses are and they control access, but this cannot happen online.
- The potentially negative impact on witnesses of unknown numbers of anonymous people observing online.
- There is very little control over people filming and sharing video of court hearings.
- The decision about who can observe by video in the magistrates' courts is outside the gift of the bench, and is a decision usually made by administration staff, who may be argued do not understand the importance and implication of the decision to admit or not.
- If observers of a virtual hearing were limited, what explicable grounds might there be for not allowing observers? The limit to observers in a physical courtroom is space, but this doesn't apply to video. This may impact on perceived legitimacy.

There are no easy answers to these dilemmas for open justice created by video and online hearings. But that does not mean that the dilemmas should be ignored. The MA recommends that consideration of open justice is at the core of discussions about video and online hearings.

Furthermore, it should be a priority for research so that we can all understand the impact that video and online hearings are having on open justice.

3. Concerns and issues about fair and effective participation

Issues of fair and effective participation are an important element of open justice.

i) Remote/video hearings

The MA supported the emergency measures on remote hearings in the Coronavirus Act 2020 but it is unfortunate that the concerns we voiced, before the pandemic, about the impact of remote hearings on participation are still relevant and must be repeated. In the previous Justice Committee's 2019 inquiry on Courts and Tribunals Reform, the Committee noted our assertion "that fully video hearings were not appropriate for any cases involving litigants in person, vulnerable parties, cases where children have to attend, or contested hearings."¹

The MA maintains the position that video hearings are not appropriate for those which rely on the defendant's understanding and comprehension of the matter. Contested claims and trials must be held in a courtroom where possible to aid understanding and comprehension.

It is important to remember that where justices do not consider a fair trial can be achieved, they will halt the hearing. Rescheduling trials delays justice, inconveniences witnesses, and leads to backlogs in court work.

The emergency measures for remote hearings established as part of courts' Covid-19 response has led to the expansion of the "remote" element of hearings; previously, a remote hearing involved only defendants and witnesses accessing a hearing remotely. Now, the definition covers those hearings where *all* parties attend remotely.

A March 2021 [paper](#) from the MA's Adult Courts Committee noted that it is vital that the distinction is made between these fully remote hearings, and those where some parties use video or audio link.

Considering this, we are worried that the Police, Crime, Sentencing and Courts Bill does not capture this nuance. The Bill appears to repeal and replace the scheme for remote proceeding from the 2020 Act – which were always designed to be temporary and emergency in nature – on a permanent footing in primary legislation. Its inclusion of the 2020 powers does not also include its safeguards.

We have been clear that we are supportive of emergency measures, but that the current emergency must not be used as an excuse to accelerate reform. Our March 2021 report makes clear that, "where measures are in place as a temporary expedient, it must be very clear that they are not expected to continue beyond the emergency." This is what the Bill, in its current form, appears to do.

In addressing this specific point, a recent [paper](#) from the House of Lords Constitution Committee on the Bill paper noted that the provisions of the Bill go beyond the 2020 Act in "material ways". The Bill appears to expand the powers of the courts to use technology across a wider range of hearings and participants so that any person, including members of the jury in a criminal trial in the Crown Court, may take part in criminal proceedings through a live link.

¹ The predecessor Committee's final report is [here](#). The MA's evidence submission to that inquiry can be found [here](#).

The safeguards in paragraph 8 of Schedule 23 to the Coronavirus Act 2020 created an important caveat to the above. It restricts the “conduct of proceedings wholly as video proceedings” by confining them to a specified range of “preliminary or incidental” proceedings in relation to various appeals or trials. These safeguards will be removed from the Criminal Justice Act 2003 when Schedule 23 of the Coronavirus Act 2020 expires in March 2022.

The 2020 Act therefore contained safeguards that this Bill does not. The Bill could allow criminal trials to be held remotely without consent from the defendant. This unabated expansion of remote hearings without these safeguards or caution is unadvisable, and we would recommend that these safeguards are written back into the Bill.

This far-ranging provision operates on an assumption that everybody has the ability to engage with an online process. A May 2020 [independent evaluation](#) of video links by the Sussex Police and Crime Commissioner found several worrying issues that question this assumption. We noted our concerns then, that use of video was shown to have the following effects (when compared to traditional in-court appearances by defendants):

- More challenging for the demeanour of the defendant to be assessed
- More difficult for defence advocates to build rapport with their clients
- Loss of courtroom formalities, possibly exacerbating the sense of distancing experienced from the process
- More common to have disruptions due to the defendant
- Increased rate of adjournments in video court hearings
- The use of custodial sentences was more likely to be recorded in video court hearings, although this was mitigated using the online booking tool, possibly due to the assurance that all necessary documentation was in place before the hearing.

In many areas, the speed at which the pandemic forced changes to courts practice has outpaced the adequacy of existing court technology to support remote hearings during Covid-19. It is vital that legislation to allow remote hearings should not be introduced ahead of the reform programme's ability to deliver the systems needed to support them.

Further, Covid-19 has brought to light the impact of digital exclusion on the ability of a defendant to engage meaningfully with the process. The [Lloyds Essential Digital Skills Report 2021](#) found that 19% of people in the UK are unable to access the Internet, a significant proportion of which are nearly completely digitally excluded.

In evidence to the previous Justice Committee's inquiry into Courts and Tribunal Reform, we said that “[s]teps must be taken to ensure that the reform programme is compatible with retaining an open, transparent and fair justice system that is accessible to all”. We would reiterate this strongly in the context of the above proposed legislative changes.

ii) Online pleas and the Single Justice Procedure

We have above explained our concerns about online pleas and the Single Justice Procedure from the perspective of transparency and accountability. We also have concerns from the perspective of fair and effective participation. If the whole process is conducted without individuals being present, they may not fully appreciate the implications. Individuals may not be able to access, or realise the importance of, legal advice.

Underlying the Single Justice Procedure is a serious process regarding a criminal offence, but as the system may appear to be administrative rather than judicial, people may not realise the importance of responding and thus risk ending up with a criminal conviction without entering a plea.

It is therefore essential that information provided to defendants about the process must be clear and accessible. The loss of credit for guilty pleas and resulting additional costs, should be properly explained. Such information must also emphasise that pleading guilty will lead to a criminal conviction (and therefore a criminal record and the consequent implications of that).

We have expressed concern about the march towards online pleas in spite of this, and that enough information is not being given to defendants to understand the gravity of the situation. The MA would like to see more to be done to inform defendants about the process.

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