

Written evidence from the Magistrates Association (COV0105)

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 14,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

Background

The MA have two concerns in relation to risk to outcomes that may impact on the human rights for specific groups in relation to some of the measures introduced to combat coronavirus. The first is that the increased use of technology to hold the majority of hearings in the justice system virtually will restrict the fair participation of those with identified vulnerabilities including learning disabilities or communication difficulties, which could impact on their right to a fair trial as set out in Article 6. The second is that the more restrictive powers available to police may impact on young BAME men in particular, which could impact on Article 14 rights which should protect groups from discrimination.

Article 6 and Virtual hearings

The Coronavirus Act 2020 has made changes to allow audio and video link to be used to deal with criminal hearings (Sections 53-56 and Schedules 23 to 26), with specific limitations on when audio only or video may be used (set out in new Schedule 3A of the Criminal Justice Act 2003). Final decisions as to the use of either remains with the bench, with certain criteria being set out in the legislation, including ensuring all parties can make representations, YOT are involved for those under the age of 18 years and that the use of audio or video is in the interests of justice. Considerations of when it is appropriate in a specific case will include what the facilities are like being used to access the hearing, and the ability of parties to effectively participate.

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, which could limit Article 6 rights to a fair trial.¹ However, we support greater use of remote hearings in the current situation to reduce unnecessary contact and transmission of coronavirus. We understand the need to allow criminal courts to deal with cases differently during this emergency, and welcome the safeguards put into the legislation to ensure either video link or audio link are only used where appropriate.

However we are concerned about possible disproportionality in respect of certain cohorts in respect to their access to justice where virtual hearings are being used. This could therefore engage both Article 6, and the right to be protected from discrimination as set out in Article 14. There a number of specific factors that could impact negatively on people with disabilities and children or young

¹ See previous MA responses including [Bach Commission into Access to Justice 2016](#); [Response to Vision Paper on Transforming Justice 2016](#); [Consultation on Transforming Justice Proposals 2016](#); [Prisons and Courts Bill Briefing 2017](#); [Fit for the Future consultation 2018](#); [Public Accounts Committee Inquiry into Transforming Courts and Tribunals 2018](#)

people, including less opportunity for any vulnerabilities to be identified, less access to virtual hearings and more challenges to participating fairly and effectively.

1. Identification of vulnerabilities

Before the responses to coronavirus were introduced, there were multiple opportunities for an individual's vulnerabilities to be identified, including assessments by Liaison and Diversion teams at both police stations and court buildings, meetings between clients and their legal representatives and by the bench or other court staff. The shift to virtual hearings removes face to face meetings, and therefore limits opportunities for vulnerabilities to be identified. Even where confidential virtual meetings are facilitated between an individual and their legal representative, the nature of the meeting is changed, and this may impact on how comfortable people are to raise the fact that they have relevant vulnerabilities which may impact on their ability to follow and engage with hearings.

2. Access to virtual hearings

It is also possible that disabled individuals are less able to access online or virtual processes. The Justice Select Committee found that "poor digital skills, limited access to technology, low levels of literacy and personal disadvantages experienced by particular groups create barriers to access to digital justice services."² Statistics for 2019 on internet usage in the UK from the Office for National Statistics (ONS) demonstrated that in comparison with overall figures of 91% of adults in the UK, only 78% disabled adults were recent internet users.³

3. Fair and effective participation

The MA is, however, concerned about the potential negative impact video technology could have on ensuring fair and effective participation, which is a fundamental principle of justice and a human right as set out in Article 6. In particular individuals who are neuro-diverse, who have learning disabilities or mental health issues, along with children and young people may find it more challenging to communicate via audio or video link. Evidence provided to the Justice Select Committee Inquiry into Courts and Tribunal Reforms illustrated potential unfairness as a result of individuals struggling to follow and engage with hearings carried out remotely. This led the committee to state: "We are concerned by evidence suggesting that some defendants appearing by video link face communication barriers with the court and their legal representatives."⁴

Recommendations

The MA propose certain recommendations that could reduce the negative impact of increased use of remote hearings.

Firstly, 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. This is particularly important for those accessing family court hearings, where the majority of parties are currently litigants in person.

² <https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf>, para 38

³ <https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2019>

⁴ <https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf>, para 71

Secondly, as all decisions as to whether a remote hearing is appropriate remain at the discretion of the judiciary, and the bench is responsible for ensuring facilitating a fair hearing, guidance, and potential training delivered remotely, should be provided to cover the following issues:

- a) 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.
- b) Any decision that a remote hearing is not appropriate will likely require an adjournment, and therefore delay in the process. It is understood that a fair hearing is always of paramount importance, but the impact of lengthy delays must also be considered. This would be especially relevant if an individual has been remanded in custody, awaiting a hearing or, in respect of family hearings, urgent decisions are being made to place children in care.
- c) Where video or audio links are used, it is essential that all parties are able to fully participate. Special measures and the use of intermediaries or interpreters may not be possible remotely, or may be of restricted use. For example, simultaneous translation requires the interpreter to be alongside the defendant, so it may be necessary to only consider using sequential translation to support an individual for whom English is not their first language. Guidance, and potentially training delivered remotely, should be provided for the judiciary on how best to facilitate fair and effective participation without use of normal special measures.

Article 14 and Police powers

A key response to the pandemic has been to empower police to enforce new regulations relating to restricting movement of individuals, prohibiting gatherings and closing premises not selling essential goods. Failure to comply with requirements set out in [The Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#) is an offence, but police can issue Fixed Penalty Notices to deal with non-compliance immediately.

Legislating for these powers and implementing them has necessarily been done at speed, and a priority has been to provide accurate guidance to all police forces to ensure consistent use of powers. However, there has been no time to introduce training on the use of these powers in practice. This is concerning as during these times of crisis, public confidence in the police (along with the wider justice system) is more important than ever. The fundamental principle underpinning policing in the UK is 'policing by consent', and confidence in the actions of police is directly linked to achieving consent. Enforcement of new powers, however necessary, must still be seen as legitimate. This is especially important when the aim of those new powers is considered, as reducing unnecessary movement is the key priority in keeping people safe and public compliance with the restrictions is vital.

The Lammy Review⁵ built on the work of previous reports and inquiries to look at disproportionality for Black, Asian and Minority Ethnic people in respect of justice outcomes. The Review found arrest

rates were higher for those from minority ethnic backgrounds, with Black men being three times more likely to be arrested than White men.⁶ The use of Stop and Search by police has been a particular concern, in respect to the impact falling disproportionately on BAME communities. Although it was acknowledged that many police forces were taking steps to change practice, the Review referenced figures showing that “those who are Black were over six times more likely to be stopped”.⁷ There is therefore a risk that restrictive police powers may engage Article 14, by potentially discriminating against people from minority ethnic backgrounds. The Lammy Review also made a direct link from disproportionate use of police powers to a lack of trust in the justice system amongst BAME communities. It stated that 51% of BAME people believe ‘the CJS discriminates against particular groups and individuals’, compared with 35% of the British-born white population.⁸

Recommendation

Given the wider context of a high level of distrust amongst BAME communities in respect of the use of police powers, and the risk to a negative impact on Article 14 rights, it is vital that the new powers provided to police to prevent the spread of coronavirus are not disproportionately used against minority communities. It is also important to consider how to gain public trust and confidence in the new powers, as this is the best way to ensure public compliance with the restrictions placed on their movement. Specific consideration must be given to gaining the trust of those communities who have historic reasons to mistrust the police. The MA proposes that one solution to both minimise disproportionate use of powers, and increase confidence in them, is to ensure there are processes in place to scrutinise police actions, with outcomes of any scrutiny made publically available. We have long called for all police areas to have scrutiny panels considering a random selection of police out-of-court disposals and identifying learning where needed. Obviously, it would be challenging for panels to meet in person during this pandemic, but scrutiny could still be offered either through virtual meetings or the use of electronic communication. We recommend that the MoJ work with the Home Office and Police and Crime Commissioners to ensure that alternative ways are found for existing panels (including youth scrutiny panels) to work, and for panels to be established in areas where they do not exist, so there can be scrutiny of the use of powers introduced through [The Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#).

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf

⁶ Ministry of Justice, Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales, table 5.1 (2016) – <https://www.gov.uk/government/publications/black-asian-and-minority-ethnic-disproportionality-in-the-criminal-justice-system-in-england-and-wales>

⁷ Home Office, Police powers and procedures England and Wales year ending 31 March 2016 (2016) – <https://www.gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2016>

⁸ Centre For Justice Innovation, Building Trust How our courts can improve the criminal court experience for Black, Asian, and Minority Ethnic defendants, pg 11 – (2017) <http://justiceinnovation.org/wp-content/uploads/2017/03/Building-Trust.pdf>