



BRIEFING PAPER

Number 08865, 23 March 2020

Coronavirus Bill: implications for the courts and tribunals

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1. Overview

This is a fast-moving issue and should be read as correct at the time of publication.

The *Coronavirus Bill* includes provisions to expand the availability of video and audio link in criminal court proceedings. The Government says the aim of these measures is to ensure that courts “[can continue to function and remain open to the public, without the need for participants to attend in person](#)”.¹

The new legislative powers sit alongside a series of practical measures announced by the Lord Chief Justice. These measures affect criminal, civil and family proceedings. Similar non-statutory measures have also been introduced in the Scottish courts.

Concerns have been raised as to whether the Bill contains sufficient safeguards to protect vulnerable defendants and the principle of open justice. It has also been suggested that the initial non-statutory measures (particularly those postponing some but not all new criminal jury trials) did not go far enough to ensure social distancing measures in the justice system.

2. Existing law in the criminal courts

Current legislation enables ‘live links’ to be used at various stages of the criminal justice process. The current definition of ‘[live link](#)’ for these purposes requires the person to be able to see and hear, and to be seen and heard by, the court.²

The following existing provisions are relevant for the purposes of the Bill:

- [Section 51 of the Criminal Justice Act 2003](#), which enables witnesses (other than the defendant) to give evidence via live link in certain criminal proceedings;
- [Sections 22 and 23 of the Criminal Appeals Act 1968](#), which enable convicted individuals being held in custody to attend appeal proceedings via live link; and
- [Part 3A of the Crime and Disorder Act 1998](#), which enables adult defendants in custody or at a police station to attend certain preliminary, sentencing and enforcement proceedings via live link.

¹ Department of Health & Social Care, [Guidance: What the coronavirus bill will do](#), 17 March 2020

² section 56 of the *Criminal Justice Act 2003*

2 Coronavirus Bill: implications for the courts and tribunals

The legislation sets out various safeguards, including a requirement for the court to consider whether it is “in the interests of justice” to make a live link direction and to ensure the opportunity for the defence and prosecution to make representations.

The courts may also make use of technology – including live links and telephone facilities – through exercise of their own inherent jurisdiction to regulate their proceedings. It is common, for example, for pre-trial hearings and conferences to take place by telephone.

[Rule 3.2 of the Criminal Procedure Rules](#) and [section 3N of the Criminal Practice Directions](#) providing supporting guidance on the use of audio and video technology. These encourage the courts to exercise their statutory and other powers to conduct hearings by live link or telephone “where it is lawful and in the interests of justice to do so”.

The Criminal Practice Directions emphasise the need for the courts to consider issues such as whether the defendant can participate effectively via audio or video link, and the impact on communication between the defendant and their legal representatives.

3. Existing law in the civil and family courts

As the Lord Chief Justice for England and Wales [acknowledged on 17 March](#), existing legislation, and both the Civil and Family Procedure Rules, are already flexible (compared to the criminal courts) as to the circumstances in which parties can participate in a hearing through technological means.³ [There are already reported examples](#) of non-criminal courts resorting to video conferencing solutions in response to social distancing measures.⁴

For non-criminal courts and tribunals, the main impact of this Bill is on the extent to which proceedings may be broadcast (and therefore to do with the principle of open justice) rather than to do with the participation of specific parties to a case.

4. What changes does the Bill propose?

Full details are set out in the [Explanatory Notes to the Bill](#). The general theme is expanding the range of people and hearings that are eligible for live link directions, expanding the definition of ‘live link’ to include audio-only hearings, and providing for public participation and the keeping of court records.

The key provisions on participation of individuals in proceedings otherwise than in person are as follows:

- Section 51 of the 2003 Act (relating to witness evidence) would be expanded to cover anyone involved in a criminal trial who is giving evidence or otherwise participating in an expanded range of criminal proceedings – there would be a specific exception for jurors, who would continue to participate in person (clause 51 and Schedule 22 of the Bill).
- Sections 22 and 23 of the 1968 Act (relating to criminal appeals) would be expanded to match the new wider scope of section 51 (clause 51 and Schedule 22).

³ Courts and Tribunals Judiciary, [Coronavirus \(COVID-19\) update from the Lord Chief Justice](#), 17 March 2020

⁴ [John McKendrick QC, commenting on Twitter](#) on 17 March 2020

- Part 3A of the 1998 Act (relating to adult defendants in custody) would be expanded beyond defendants to cover all participants in preliminary, sentencing and enforcement hearings (clause 52 and Schedule 23).
- ‘Live links’ for all of the above would be expanded to include audio-only hearings as well as video hearings, and it would be possible for certain proceedings to take place wholly on the basis of audio or video links (Schedule 22, para 8).

Additionally, new provisions would be added to the *Courts Act 2003* and *Tribunals, Courts and Enforcement Act 2007* to provide for the broadcast and recording of video and audio proceedings, to enable the public to observe proceedings and to maintain court and tribunal records (clause 53 and Schedule 24). Unlike the other provisions in the Bill, this would include the civil and family courts and reserved tribunals, not just criminal courts.

5. Scotland and Northern Ireland

The Bill is principally concerned with courts and tribunals that form part of Her Majesty’s Courts and Tribunals Service. This means it affects both courts and tribunals in England and Wales at first instance, and reserved tribunals in Scotland and Northern Ireland.

Additionally, the Bill makes provision, in clause 55 and Schedule 26, covering the courts and devolved tribunals in Northern Ireland.

Scotland has a distinct legal system and therefore also a separate system of courts and devolved tribunals. Those courts and tribunals are not part of [HM Courts and Tribunals Service](#), but the [Scottish Courts and Tribunals Service](#). Any changes to criminal or civil video link arrangements in Scotland would, presumably, be a matter for the Scottish Government and Parliament. On Friday 20 March [an updated Practice Note was issued for criminal courts in Scotland](#), requiring much more extensive use to be made of live links.⁵

6. What safeguards does the Bill contain?

The Bill takes the same general approach as the existing legislation when it comes to procedural safeguards. The courts will only be able to make a live link direction under the new expanded provisions if they are satisfied it is in the interests of justice to do so, and if the parties have been given the opportunity to make representations.

A new Schedule would be added to the *Criminal Justice Act 2003*, which would set out a range of restrictions and limitations on the use of audio and video links (Schedule 23, para 7). For example, wholly audio proceedings would be limited to a narrow range of preliminary, incidental or bail hearings, and there would be restrictions on directing defendants to participate by audio link.

Dr Natalie Byrom, Director of Research at The Legal Education Foundation, has called for a number of additional procedural safeguards to maintain access to justice and open justice under the rule of law.⁶ Her recommendations include:

- delaying non-urgent trials;
- ensuring that existing guidance regarding vulnerable participants in the Criminal Practice Directions is properly applied, and dedicating resource to proactively

⁵ High Court of Justiciary, [Direction No.1 of 2020: Specified hearings for participation by a detained person through live television link](#)

⁶ Dr Natalie Byrom/Legal Education Foundation, [Briefing: Coronavirus Bill, Courts and the Rule of Law](#), 18 March 2020

4 Coronavirus Bill: implications for the courts and tribunals

identifying parties who may be considered vulnerable under existing law and practice directions;

- ensuring parties have effective access to legal advice, and monitoring the impact of fully video hearings on the ability of legal representatives to effectively communicate with their clients;
- ensuring judgments in remote cases are given in writing and made publicly available;
- monitoring and recording the failure rate of the technology used and the nature and extent of technical difficulties encountered;
- expanding technical support to parties and judges facilitating fully video hearings; and
- recording and transcribing all remote hearings.

7. Will the measures be enough to protect court users in practice?

Legal professionals are concerned that the Bill's measures alone won't be enough to protect court users, particularly those involved in Crown Court jury trials.

There have already been reports of [jurors involved in high profile trials being sent home](#) due to coronavirus concerns.⁷ On the morning of 23 March 2020 it was reported that the jury in the trial of three teenagers accused of the murder of PC Andrew Harper had been discharged after a third juror went into self-isolation over the weekend, following two jurors who had self-isolated the previous week.⁸ The trial has been adjourned.

The [Bar Council](#) called for the Government to "put an urgent halt to jury trials for the time being".⁹ The [Criminal Bar Association](#) made similar calls, arguing that jury trials represent "an ongoing public health risk in our courts with inadequate procedures in place". It has also criticised poor hygiene standards on the court estate, such as no soap, which it says "exposes court users to unacceptable risks".¹⁰

The [Lord Chief Justice in Northern Ireland](#) and the [Scottish Courts and Tribunals Service](#) have already announced that no new jury trials will be commencing in those jurisdictions until further notice.¹¹

On Tuesday 17 March, the Lord Chief Justice announced a [compromise position for England and Wales](#): no new jury trial should start in the Crown Court "unless it is expected to last for three days or less".¹² Cases estimated to last longer than three days and listed to start before the end of April 2020 would be adjourned. Trials currently underway "[would] generally proceed in the hope that they can be completed".

⁷ "[Coronavirus: Jury trials must be stopped to prevent virus 'Russian roulette', barristers say](#)", Independent, 18 March 2020

⁸ "[Coronavirus: Jury in PC Andrew Harper murder trial discharged over COVID-19 outbreak](#)", Sky News, 23 March 2020

⁹ Bar Council press release, [Bar Council calls on Ministry of Justice to urgently halt jury trials](#), 17 March 2020

¹⁰ Criminal Bar Association, [COVID-19: CBA Statement](#), 17 March 2020

¹¹ Department of Justice, [CORONAVIRUS \(COVID-19\) PANDEMIC - Court Business Continuity Arrangements](#), 17 March 2020 and Scottish Courts and Tribunals Service, [Coronavirus Update – Jury trials](#), 17 March 2020

¹² Courts and Tribunals Judiciary, [Coronavirus \(COVID-19\): Jury trials, message from the Lord Chief Justice](#), 17 March 2020

However, the position was revised on the morning of Monday 23 March, when the Lord Chief Justice announced that [no new jury trials would start](#) with effect from that morning. His statement said the following regarding Crown Courts:

1. My unequivocal position is that no jury trials or other physical hearings can take place unless it is safe for them to do so. A particular concern is to ensure social distancing in court and in the court building.
2. This morning no new trials are to start. Jurors summoned for this week are being contacted to ask them to remain at home, and contact the court they are due to attend. They will only be asked to come in for trials where specific arrangements to ensure safety have been put in place. In some cases, this may mean that jurors may be called in to start a new trial later on Monday. All hearings in the Crown Court that can lawfully take place remotely should do so and other hearings not involving a jury should continue if suitable arrangements can be made to ensure distancing.
3. Efforts to bring existing jury trials to a conclusion should continue. Social distancing in accordance with PHE guidelines must be in place at all times and at all places within the court building. Considerable imagination and flexibility may be needed to achieve that. This is already happening in some Crown Courts. HMCTS will continue to work to ensure that safety measures are in place in all parts of the court building in which trials are already taking place. The basic hygiene arrangements urged upon us by the Prime Minister must be available. Resident Judges, with HMCTS staff, will determine whether a trial can safely be continued.
4. If it is necessary to adjourn trials already underway for a short period to put those safety measures in place, this must be done.¹³

Legal commentators have doubted whether Crown Courts will be able to make “suitable arrangements” to ensure distancing. For example, the Secret Barrister commented “Most courts are ill-equipped to offer any such arrangements”.¹⁴

There is also some confusion about whether magistrates’ courts should still sit. The Lord Chief Justice’s statement said:

5. The same considerations, in relation to safety, apply to Magistrates’ Courts. Magistrates’ Courts will need to continue to deal with urgent work, in accordance with guidance given by the Judiciary to judges and staff. They are the first court to which all criminal cases are referred. All hearings that can lawfully take place remotely should do so if the facilities exist.¹⁵

In a Twitter exchange the Criminal Bar Association said it understood paragraph 5 to mean no new magistrates’ court trials should commence; however, Jon Collins – chief executive of the Magistrates Association – said his understanding was that magistrates’ court trials should continue so long as courts are satisfied they can ensure appropriate distancing.¹⁶

Delaying trials will itself raise what the BBC describes as “[a host of highly challenging issues for a criminal justice system that is already beset by time delays](#)”. Areas of concern include custody time limits for defendants held on remand, and the risk that barristers and solicitors will not be paid and may go out of business or have to lay off staff. The Criminal

¹³ Courts and Tribunals Judiciary, [Review of court arrangements due to COVID-19, message from the Lord Chief Justice](#), 23 March 2020

¹⁴ [Secret Barrister, commenting on Twitter](#) on 23 March 2020

¹⁵ Courts and Tribunals Judiciary, [Review of court arrangements due to COVID-19, message from the Lord Chief Justice](#), 23 March 2020

¹⁶ [Criminal Bar Association/Jon Collins exchange on Twitter](#), 23 March 2020

6 Coronavirus Bill: implications for the courts and tribunals

Bar Association has said that it is in discussions with the Crown Prosecution Service, Legal Aid Agency and Ministry of Justice regarding listing of cases and payment of fees.¹⁷

In a statement on 18 March 2020, the Lord Chancellor acknowledged the impact that delays will have on witnesses and victims “who will have to wait longer to see justice delivered in their cases”. However, he said that on balance delays were “preferable” to proceeding as normal given the likelihood of trials being aborted if jurors are not well enough to attend. He said that the Government would be making arrangements “to extend custody time limits for defendants held on remand in these cases”, and would be “working with the senior judiciary to address any backlog that develops this year”.¹⁸

Official practical guidance on the operation of the courts during the coronavirus pandemic is available on gov.uk: see [Coronavirus \(COVID-19\): courts and tribunals planning and preparation](#).

¹⁷ Criminal Bar Association, [COVID-19 resources](#) [undated]

¹⁸ Ministry of Justice, [Courts during coronavirus pandemic: Robert Buckland statement](#), 18 March 2020

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