

GENERAL CRIME BRIEFING NOTE

NEW PROVISIONS UNDER THE CORONAVIRUS ACT 2020 TO ENABLE CRIMINAL COURTS TO DEAL WITH HEARINGS USING REMOTE LINKS

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Legislation: Coronavirus Act 2020, ss.53-56 and Schedules 23 to 26; Criminal Justice Act 2003 ss.51-56 and Schedule 3A; Crime and Disorder Act 1998, ss.57A-57F and Schedule 3A

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Introduction

1. As the courts grapple with the requirement to try and deal with hearings remotely, practitioners will need to consider the new legal landscape following the enactment of the Coronavirus Act 2020, to determine if the hearing can proceed without the defendant and/or other key individuals being physically present in the courtroom.
2. This note addresses the main court hearings in both the Magistrates' Courts and Crown Court. As matters develop, the QEB team will continue to revise this briefing, taking into account the evolving procedural and legal issues that will inevitably arise.
3. The key changes to the law under the Coronavirus Act 2020 that are addressed in this note are sections 53 to 56 (and the associated schedules 23 to 26 of the Act) and the changes they make to the Criminal Justice Act 2003 (hereafter the 'CJA') and the Crime and Disorder Act 1998 ('CDA'). Sections 51-56 of the CJA are amended by the Coronavirus Act 2020 and a new Schedule 3A is inserted. Likewise, sections 57A-57F of the CDA are amended and a new Schedule 3A inserted. References to the CJA and CDA in this note accordingly refer to those provisions as amended by the Coronavirus Act 2020, unless otherwise stated. There are also relevant amendments made by the 2020 Act to other acts, including the Criminal Appeal Act 1968, the Criminal Justice Act 1988 and the Magistrates' Court Act 1980.

What was the position before the enactment of the Coronavirus Act?

4. The CDA and the Criminal Procedure Rules ('CrimPR') already provided for some pre-trial and sentencing hearings to be dealt with remotely. Although the Crown Court has historically utilised video link more frequently than other courts dealing with criminal matters, CrimPR 2.1(1)(a) and (c) make plain that the remote hearing provisions apply to all cases in the Magistrates' Courts, Crown Court and the criminal division of the Court of Appeal.
5. The definition of 'court' as set out in CrimPR 2.2(1) is: "*a tribunal with jurisdiction over criminal cases. It includes a judge, recorder, District Judge (magistrates' court), lay justice and, when exercising their judicial powers, the Registrar of Criminal Appeals, a*

justices' clerk or assistant clerk". Accordingly, for the purpose of all hearings, it is the constitution of the tribunal itself that creates a court, rather than the building.

6. Although the CrimPR and the Criminal Practice Direction ('CrimPD') provided for the parties and the judge being in different locations, for the purposes of a live link hearing, it was envisaged that ordinarily there would be someone present in the courtroom or a physical location at which members of the public could observe proceedings.
7. The provisions of the CDA, prior to amendment by the Coronavirus Act, permitted an accused who was in police or prison custody to appear at any preliminary hearing via a 'live link'. A 'preliminary hearing' was defined as "*a hearing in the Crown Court, before the time that a jury is sworn or when a guilty plea is accepted (see: section 11A Prosecution of Offences Act 1985) or when the magistrates' court starts to hear evidence or accepts a guilty plea (section 11B of the 1985 Act)*". Any defendant so appearing was deemed to be present at the hearing. The CrimPD extended this facility, where appropriate, to those on bail.
8. A 'live link' was defined as, "*an arrangement by which a person can see and hear, and be seen and heard by, the court when that person is not in the courtroom*" (CrimPR 2.2(1)). Therefore, before the Coronavirus Act, no remote platform could be used for live link hearings, if it did not provide for all participants to see and hear the tribunal. Accordingly, telephones plainly could not be used if the relevant power was in respect of a 'live link' alone.
9. In relation to trials, there were the well-known statutory provisions under the Youth Justice & Criminal Evidence Act 1999, sections 16 and 17, for vulnerable witnesses to give evidence via video link or under the CJA, section 51, for a witness to give evidence through a live link from another location, if it was in the interests of efficient or effective administration of justice.
10. However, in terms of the trial generally, the power to proceed remotely was limited before the Coronavirus Act. Even the power under section 51 of the CJA was restrictive and all the circumstances of the case had to be considered.
11. The courts have previously not been in favour of witnesses generally giving evidence by telephone, where a video link was unavailable (see: *Hampson* [2012] EWCA Crim 1807, [2014] 1 Cr App R 4 (28)).
12. The only provision for a *defendant* to give evidence via live link was pursuant to section 33A of the Youth Justice and Criminal Evidence Act 1999. This section only applies if a defendant's ability to participate in the proceedings is compromised by his or her lack of intellectual ability or social functioning (in the case of a juvenile), or by a mental disorder or a significant impairment of intelligence and social function (in the case of an adult) and use of live link would enable more effective participation.
13. Under the previously existing provisions of the CDA 1998, the court could pass sentence and conduct a committal for sentence, on a defendant in custody who attended by live link (i.e. by video). The court could also allow a defendant who was not in custody and who wished to attend his or her sentencing by live link to do so by such means.

14. In *R v Gavin* [2010] EWCA Crim 2727, the Court of Appeal stated that, given there was a discretion to conduct a trial in absence of the defendant (as set out in *R v Jones* [2002] UKHL 5) then, “*A fortiori it must in principle be open to a judge to permit sentencing and related hearings to take place even where the defendant is involuntarily absent*”.

What are the key changes in the Coronavirus Act?

15. The amendments to the CJA and CDA expand the courts’ powers to use technology across a wider range of hearings and with a number of different participants. The changes to the CJA introduce remote hearings for ‘eligible criminal proceedings’ and the changes to the CDA allow for a range of audio and video links to be used in preliminary, sentencing and enforcement hearings.

What are the specific changes under the CJA?

16. The definition of ‘eligible criminal proceedings’ is provided in Schedule 23 at paragraph 2(3), which amends section 51(2) of the CJA:
- a) *a summary trial;*
 - b) *a criminal appeal to the Crown Court and any proceedings that are preliminary or incidental to such an appeal;*
 - c) *a trial on indictment or any other trial in the Crown Court for an offence;*
 - ca) *proceedings under section 4A or 5 of the Criminal Procedure (Insanity) Act 1964;*
 - cb) *proceedings under Part 3 of the Mental Health Act 1983;*
 - cc) *proceedings under section 11 of the Powers of the Criminal Courts (Sentencing) Act 2000 or section 81(1)(g) of the Senior Courts Act 1981 or section 16 of this Act in respect of a person who has been remanded by a magistrates’ court on adjourning a case under that section of the 2000 Act;*
 - d) *an appeal to the criminal division of the Court of Appeal and any proceedings that are preliminary or incidental to such a hearing;*
 - da) *a reference to the Court of Appeal by the Attorney General under Part 4 of the Criminal Justice Act 1988 and any proceedings that are preliminary or incidental to such a reference;*
 - e) *the hearing of a reference under section 9 or 11 of the Criminal Appeal Act 1995 (c. 35) and any proceedings that are preliminary or incidental to such a hearing;*
 - f) *a hearing before a magistrates’ court or the Crown Court which is held after the defendant has entered a plea of guilty;*
 - fa) *a hearing under section 142(1) or (2) of the Magistrates’ Courts Act 1980 or under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000;*
 - g) *a hearing before the Court of Appeal under section 80 of this Act and any proceedings that are preliminary or incidental to such a hearing, and*
 - h) *any hearing following conviction held for the purpose of making a decision about bail in respect of the person convicted.*

17. The court may direct that a person (save for a jury member) take part in the eligible criminal proceedings through the use of a live audio link or a live video link. A person who takes part in such proceedings, in accordance with a new remote hearing direction, is deemed to have attended or appeared before a court, however the requirement to do so was imposed or expressed (section 53A(1) CJA).
18. A direction may now be given for a judge or justice to take part in eligible criminal proceedings through a live audio link or video link (section 51(1A) CJA).
19. The amendments to the CJA substantially increase the availability of live video links at all stages of the court process. Audio live links are also introduced.
20. However, the list of eligible criminal proceedings that can be held *wholly* through audio link is limited under Schedule 3A CJA. Examples of such proceedings are hearings following conviction, in order to impose or vary conditions of bail and preliminary or incidental hearings to: a criminal appeal to the Crown Court; an appeal to the criminal division of the Court of Appeal or an Attorney-General's Reference.
21. A defendant cannot take part in eligible criminal proceedings through a live audio link for the purpose of giving evidence (Schedule 3A CJA, paragraph 3(2)).
22. In relation to eligible criminal proceedings that can be conducted *wholly* by video link, Schedule 3A CJA introduces further limitations and the proceedings are restricted to a list that includes: an appeal against sentence to the Crown Court; an appeal against conviction where the trial was via video link and the parties consent to the appeal be conducted in the same way; preliminary or incidental hearings to appeals to the Court of Appeal and certain summary trials.
23. If the entirety of the eligible criminal proceedings are conducted via a live link (audio or video), the location of the hearing will be determined by where the member or members of the court are situated (section 53A(3) CJA).
24. The most significant amendments to the CDA concern sections 57A - F, in that audio links have been introduced and there is no longer a requirement that the accused be in custody or the police station for the provisions to bite.
25. However, hearings to which Part 3A CDA applies (under section 57A(1) CDA) are not eligible criminal proceedings for the purposes of the CJA.

What are the specific changes relating to the CDA?

26. By virtue of section 57A(1A) CDA, the provisions under the CDA apply to 'preliminary hearings' and 'sentencing hearings' in the course of proceedings for an offence and enforcement hearings.
27. The amendments made to sections 57A and 57B CDA expand the availability of live link attendance to include all persons participating in the hearing, not just the accused in custody or in the police station.

28. Section 57B(3B)(a) provides for a judge to take part in a preliminary hearing through a live audio link or a video link.
29. The definition of 'preliminary hearing' in CDA section 57A(3)(e) remains the same for the purpose of pre-trial hearings. 'Sentencing hearings' and 'enforcement hearings' are dealt with later on in this note.
30. The definition of 'live link' has been replaced with 'live audio link' (section 57A(5) CDA) and 'live video link' (section 57A(7) CDA) to expand the power to conduct remote hearings by telephone, in certain circumstances.
31. Section 57A(4) CDA provides for a person to 'take part in a hearing' remotely, either by giving evidence in the hearing and/or attending a hearing, when not giving evidence.
32. Preliminary hearings can be conducted *wholly* by audio, if a direction has been given pursuant to sections 57B, 57E or 57F CDA. Such directions can be given by the court of its own motion or by a party making an application (section 57B(3A) CDA). The court may not give a such direction unless:
 - a) It is in the interests of justice; and
 - b) The parties have had an opportunity to make representations, including the youth offending team if applicable.
33. When determining if such a link is in the interests of justice, all the circumstances of the case will be considered, including in particular (section 57B(3J) CDA):
 - a) In the case of a witness:
 - (i) the importance of their evidence to the hearing;
 - (ii) whether a direction will inhibit the ability of a party from testing effectively the witness' evidence; and
 - b) With regards to any participant in a hearing:
 - (i) the availability of the person;
 - (ii) the need for the person to attend in person;
 - (iii) the views of the person;
 - (iv) the suitability of the facilities at the place where the person would take part in the hearing;
 - (v) whether the person will be able to take part effectively.
34. A defendant may also not take part in the proceedings through a live *audio* link for the purpose of giving evidence in any preliminary matter (Schedule 3A CDA, paragraph 2(1)).
35. A person other than the accused may not give evidence during any preliminary hearing, through a live audio link, unless the conditions set out at Schedule 3A CDA, paragraph 2(2) are met, namely:
 - (a) There are no suitable arrangements whereby the person could give evidence via video link; and
 - (b) The parties agree to that person giving evidence through audio link.

What about bail hearings?

36. A court may not refuse or revoke bail at a preliminary hearing, if any person appears via audio link, other than for the purpose of giving evidence and the defendant objects to the refusal or revocation of bail i.e. where the application is contested (section 57B(8) CDA). Such hearings may be conducted via video link.
37. Schedule 3A CDA, paragraph 3(3) adds two additional restrictions to the use of audio link during a contested bail application, in that a person other than the accused may take part in the hearing via audio link, only if they are giving evidence and:
- (a) there are no suitable arrangements whereby the person could give evidence via video link; and
 - (b) the parties agree to that person giving evidence through audio link.

What about arraignment?

38. Pursuant to section 57B(9) CDA the court will not be able to accept a guilty plea at a preliminary hearing where any person takes part in the hearing, save for the purpose of giving evidence, by *audio* live link. A not guilty plea may be entered using audio facilities; a guilty plea may only be entered where all parties are present or using a video link.
39. Schedule 3A CDA, paragraph 6(3), adds a further two conditions with regards to a person, other than an accused, taking part via audio link, for the purpose of giving evidence during such a hearing. These additional conditions are:
- (a) There are no suitable arrangements whereby the person could give evidence via video link; and
 - (b) The parties agree to that person giving evidence through audio link.

What is the position regarding trials?

40. A trial at the Crown Court and a summary trial, come within the definition of an 'eligible criminal proceeding' under the CJA.
41. Under section 51(1) CJA the court can direct that a person involved in a Crown Court, or summary trial, may take part via a live audio or video link, if it is in the interests of justice to do so (see: section 51(4) CJA). The court's powers to make such a direction extend to a defendant. This is made clear in Schedule 23 at 2(2) of the Coronavirus Act, which substitutes in section 51 'a person' for '*a witness other than the defendant.*' However, a defendant may not give evidence or take part in the proceedings via a live *audio* link (Schedule 3A CJA, paragraph 4(2)). This therefore rules out the defendant participating by telephone for obvious reasons.
42. A juror is excluded from the ambit of the new legislation; pursuant to section 51(1B) CJA, no such live link direction can be made for any member of the jury to take part in eligible proceedings.

43. When considering a live link direction, the court will need to have regard to all the circumstances of the case including, in particular, those set out in the amended section 51(7):
- (a) If the direction concerns a witness -
 - (i) the importance of their evidence;
 - (ii) if a party's ability to test the evidence effectively may be inhibited;
 - (b) If the direction concerns a participant in the proceedings -
 - (i) the availability of the person;
 - (ii) the need for the person to attend in person;
 - (iii) the views of the person;
 - (iv) the suitability of the facilities in place where the person would take part in the proceedings;
 - (v) whether the person will be able to take part effectively.
44. A person (other than a defendant) may not take part in the proceedings through a live audio link unless the conditions in Schedule 3A, paragraph 4(3) are met:
- (a) The participation is only for the purpose of giving evidence;
 - (b) There are no suitable arrangements whereby the person could give evidence via video link; and
 - (c) The parties agree to that person giving evidence through audio link.
45. Section 54 CJA has been amended to give a warning to the jury about live evidence (audio or visual) by a witness (including the defendant) in proceedings before the Crown Court.
46. Pursuant to Schedule 3A CJA, paragraph 2(8), a summary trial will only be able to be conducted wholly through live video links if:
- a) a written procedure notice has been served on the defendant but the offence is not being tried in accordance with section 16A of the Magistrates' Courts Act 1980 (trial by a single justice on the papers); and
 - b) the parties agree to the proceedings being conducted wholly as video proceedings.
47. The court may not deal with a person for contempt of court (including enquiring into conduct) through a live audio link, although evidence may be called remotely (section 51(12) CJA)

What is the position regarding sentencing?

48. The attendance of parties at a sentencing hearing in the Crown Court has been altered by the changes made to sections 57A and 57E CDA.
49. The use of a live link in sentencing hearings was previously limited to certain defendants and only catered for video link. The old definition of live link has been omitted and new live audio link and video link definitions inserted (section 57A(5) and (7) CDA).
50. The definition of a 'sentencing hearing' has also been altered under section 57A(3) CDA to now be any hearing following conviction which is held for the purpose of:

- (a) proceedings relating to the giving or rescinding of a direction under section 57E CDA;
- (b) proceedings (in a magistrates' court) relating to committal to the Crown Court for sentencing;
- (c) sentencing the offender or determining how the court should deal with him in respect of the offence;
- (d) determining how the offender has complied with a sentence given in respect of an offence or how the offender should be dealt with in respect of compliance with such a sentence.

51. Pursuant to section 57E(1) CDA, the court may now make a live link direction to require, or permit, a person to take part in a sentencing hearing through a live link (audio or video). Taking part in a hearing has been defined as either giving evidence and/or attending a hearing, when not giving evidence (section 57A(4) CDA 1998). This power includes the power to give a direction for a judge or justice to take part via audio or video link.

52. Under Schedule 3A CDA 1998, paragraph 9(1), an offender may not take part in a sentencing hearing through a live *audio* link.

53. Pursuant to paragraph 9(2), Schedule 3A CDA, a person, other than an offender, may only take part in a sentencing hearing via audio link, if:

- (a) They are giving evidence;
- (b) There are no suitable arrangements whereby the person could give evidence via video link; and
- (c) The parties agree to that person giving evidence through audio link.

54. The Court may not make any live link (video or audio) order unless it is satisfied that it is in the interests of justice for that person to take part via a live link and the parties have been given the opportunity to make representations, including the youth offending team, if applicable (section 57E(2) CDA). The circumstances to be taken into account when deciding to make a direction are set out in section 57E(6E) CDA, namely:

- (a) If the direction concerns a witness -
 - (i) the importance of their evidence;
 - (ii) if a party's ability to test the evidence effectively may be inhibited;
- (b) If the direction concerns a participant in the proceedings -
 - (i) The availability of the person;
 - (ii) The need for the person to attend in person;
 - (iii) The views of the person;
 - (iv) The suitability of the facilities in place where the person would take part in the proceedings;
 - (v) Whether the person will be able to take part effectively.

What about contempt of court?

55. Schedule 3A CDA, paragraph 2(2) does not apply to preliminary hearings at which the court is minded to deal with a person for contempt of court. On those occasions,

Schedule 3A CDA, paragraph 4 applies. That states that the accused may not take part through an audio link and a person other than an accused may not take part unless:

- (a) They are giving evidence;
- (b) There are no suitable arrangements whereby the person could give evidence via video link; and
- (c) The parties agree to that person giving evidence through audio link.

56. The court may not sentence a person for contempt of court at eligible criminal proceedings through a live audio link (section 51(12) CJA)

What is the position regarding confiscation hearings?

57. There is no reference to confiscation proceedings specifically in the new sections of the CJA or the CDA. However, confiscation proceedings may be covered by the definition of sentencing hearing, which includes in section 57A(3) CDA the following:

Sentencing the offender or determining how the court should deal with him in respect of the [offence (including reviewing, amending or revoking such a sentence or determination)]; [...]

58. In the absence of a specific reference to confiscation and any argument regarding relevant case law (the previous section had a similar provision), it seems likely that such proceedings will be able to take place remotely as 'sentencing hearings'.

What is the position with regard to enforcement hearings?

59. 'Enforcement hearings' are defined in section 57A(3) of the CDA as:

A hearing relating to collection, discharge, satisfaction or enforcement of:

- a) A sum that has been adjudged to be paid on conviction by a magistrates' court or the Crown Court.*
- b) A financial penalty that is enforceable in accordance with section 85(6) and (7) of the Criminal Justice and Immigration Act 2008 as if it were such a sum (including a hearing to determine whether a financial penalty is so enforceable)."*

60. Pursuant to sections 57A and 57F of the CDA, in relation to an enforcement hearing, the court may give a live link direction of its own motion, or on an application by a party, for a person to take part in an enforcement hearing through a live audio link or a live video link, if it is in the interests of justice to do so and the parties have had the opportunity to make representations (including the Youth Offending Team where relevant). Such a direction may be given in relation to all subsequent enforcement hearings before the court or to a specified hearing.

61. The direction can be applicable to:
(a) a judge or justice;

- (b) several, or all of the persons, participating in the enforcement hearing (whether giving evidence or not);
 - (c) some, or all parts, of the enforcement hearing; and
 - (d) a person who is outside the UK.
62. A person who takes part in a hearing in accordance with such a direction is to be treated as complying with any requirement for that person to attend or appear before court, or surrender to the custody of the court, for the purposes of participation in that hearing.
63. There are specific restrictions in respect of the powers in the Act concerning enforcement hearings, namely:
- (a) The person liable to pay the relevant sum of money may not take part in proceedings through a live audio link for the purposes of giving evidence (Schedule 3A CDA at paragraph 12(1);
 - (b) A person, other than the person liable to pay the relevant sum, may not give evidence through live audio link for the purpose of giving evidence unless there are no suitable arrangements for video link and the parties agree to the audio link (Schedule 3A CDA, at paragraph 12(2);
 - (c) Where the court is minded to impose imprisonment or detention, the defaulter may not take part in the hearing through live audio link (Schedule 3A CDA, paragraph 13(2)).
 - (d) A person other than the defaulter may not take part via audio link unless their participation is only to give evidence, there are no suitable arrangements that can be made for video link and the parties agree to audio link (Schedule 3(A) CDA at paragraph 13(3).

What is the position regarding committals for sentence?

64. A hearing before a Magistrates' court or the Crown Court, which is held after the defendant has entered a plea of guilty, falls into the category of 'eligible criminal proceedings' under the CJA.

What is the position regarding appeals to the Crown Court?

65. A criminal appeal to the Crown Court and any proceedings that are preliminary or incidental to such an appeal fall into the category of 'eligible criminal proceedings' under the CJA.
66. An appeal to the Crown Court which is only against sentence may be conducted wholly as video proceedings.
67. An appeal to the Crown Court which arises out of a summary trial can be conducted wholly as video proceedings if the summary trial was itself conducted wholly as video proceedings and the parties agree.
68. Any preliminary or incidental proceedings to a criminal appeal to the Crown Court can be conducted wholly as video proceedings.

What about the Criminal Procedure Rules and the Practice Directions?

69. The CrimPR and CrimPD, until they are amended to deal with the changes, remain applicable to the new provisions, unless the rules are inconsistent with the legislation or have been amended by the Coronavirus Act. The only specific amendment to the substance of the CrimPR by the 2020 Act is in Schedule 23, at paragraph 6(1), which makes plain that in any rule that relates to sections 51 and 52 CJA, each reference to ‘live link’ should now be read as: “live audio links and live video links”.
70. Crim PR 3.2(4) sets out that a live link direction may be made at a pre-trial hearing *“...only if the court is satisfied that the defendant can participate effectively by such means, having regard to all the circumstances including whether the defendant is represented or not.”*
71. CrimPD3N.4 makes plain that:
It is the duty of the parties to alert the court to any reason why live links or telephones should not be used where CrimPR3.2 otherwise would oblige the court to do so; and where a direction for the use of such facilities has been made, it is the duty of the parties as soon as practicable to alert the court to any reason why that direction should be varied: CrimPR 3.3(2) and 3.6.
72. CrimPD 3N.4 to 3N.7 set out factors that the court should consider when determining the appropriateness, or otherwise, of remote proceedings. It may be more helpful to set out the directions in full:

3N.4 The word ‘appropriate’ in CrimPR 3.2(4) and (5) is not a term of art. It has the ordinary English meaning of ‘fitting’, or ‘suitable’. Whether the facilities available to the court in any particular case can be considered appropriate is a matter for the court, but plainly to be appropriate such facilities must work, at the time at which they are required; all participants must be able to hear and, in the case of a live link, see each other clearly; and there must be no extraneous noise, movement or other distraction suffered by a participant, or transmitted by a participant to others. What degree of protection from accidental or deliberate interception should be considered appropriate will depend upon the purpose for which a live link or telephone is to be used. If it is to participate in a hearing which is open to the public anyway, then what is communicated by such means is by definition public and the use of links such as Skype or Facetime, which are not generally considered secure from interception, may not be objectionable. If it is to participate in a hearing in private, and especially one at which sensitive information will be discussed – for example, on an application for a search warrant – then a more secure service is likely to be required.

3N.5 There may be circumstances in which the court should not require the use of live link or telephone facilities despite their being otherwise appropriate at a pre-trial hearing. In every case, in deciding whether any such circumstances apply the court will keep in mind that, for the purposes of what may be an essentially administrative hearing, it may be compatible with the overriding objective to proceed in the defendant’s absence altogether, especially if he or she is represented, unless, exceptionally, a rule otherwise requires. The principle that the court always must

consider proceeding in a defendant's absence is articulated in CrimPR 3.9(2)(a). Where at a pre-trial hearing bail may be under consideration, the provisions of CrimPR 14.2 will be relevant.

3N.6 Such circumstances will include any case in which the defendant's effective participation cannot be achieved by his or her attendance by such means, and CrimPR 3.2(4) and (5) except such cases from the scope of the obligation which that rule otherwise imposes on the court. That exception may apply where (this list is not exhaustive) the defendant has a disorder or disability, including a hearing, speech or sight impediment, or has communication needs to which the use of a live link or telephone is inimical (whether or not those needs are such as to require the appointment of an intermediary); or where the defendant requires interpretation and effective interpretation cannot be provided by live link or telephone, as the case may be. In deciding whether to require a defendant to attend a first hearing in a magistrates' court by live link from a police station, the court should take into account any views expressed by the defendant, the terms of any mental health or other medical assessment of the defendant carried out at the police station, and all other relevant information and representations available. No single factor is determinative, but the court must keep in mind the terms of section 57C(6A) of the Crime and Disorder Act 1998 (Use of live link at preliminary hearings where accused is at police station) which provides that 'A live link direction under this section may not be given unless the court is satisfied that it is not contrary to the interests of justice to give the direction.'

3N.7 Finally, that exception sometimes may apply where the defendant's attendance in person at a pre-trial hearing will facilitate communication with his or her legal representatives. The court should not make such an exception merely to allow client and representatives to meet if that meeting can and should be held elsewhere. However, there will be cases in which defence representatives reasonably need to meet with a defendant, to take his or her instructions or to explain events to him or her, either shortly before or immediately after a pre-trial hearing and in circumstances in which that meeting cannot take place effectively by live link.

73. The court's case management powers at CrimPD 3.5(2)(d) permit the court to: receive applications, notices, representations and information by letter, by telephone, by live link, by email or by any other means of electronic communication.
74. CrimPD 3N.12 details the further factors that a court should take into account, when considering a live link direction at sentencing stage, including:
- (a) the penalty likely to be imposed;
 - (b) the importance of ensuring that explanations of sentence can be given satisfactorily (for the defendant, for other participants and for the public, including reporters); and
 - (c) the preferences of the maker of any Victim Personal Statement which is to be read aloud or played.

What about the technical infrastructure for such changes?

75. There does not appear yet to be the robust infrastructure in place needed to make all hearings remote. The current system in the criminal courts, the Justice Video Service (JVS), is only designed to work between three fixed endpoints (prisons, courts and police stations). However, HMCTS indicated last week that they have begun the process of unlocking the JVS so that it can also work with other laptops, which will mean that users outside of the three categories of locations will be able to connect remotely. HMCTS stated that they were increasing their capacity to do this. It appears that there may have been difficulties with this system, as HMCTS has moved to using Skype Business. Updates are regularly provided on: <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>.
76. This is however a long-standing problem. As recently as October 2019, the House of Commons' Justice Select Committee recommended that HMCTS should not introduce fully video remand hearings before robust piloting and evaluation had taken place, accompanied by sufficient investment in video equipment and reliable WiFi. The Committee stated that:

We are concerned by evidence suggesting that some defendants appearing by video link face communication barriers with the court and their legal representatives, and that there appears to be no guidance on facilitating participation. We recommend that, by April 2020, HMCTS develop guidance in consultation with stakeholders on recognising and addressing communication barriers that may affect vulnerable defendants in court. [...] We do not consider that the interests of justice are served by HMCTS providing video equipment that is unreliable or of poor quality, nor by providing inadequate video conferencing facilities for defendants and their legal representatives. HMCTS must expedite planned investment in upgraded video equipment and WiFi facilities throughout the criminal courts estate, as well as expanding video conferencing facilities for the defence.” [paragraphs 71-72 of HC 190].

77. HMCTS have asserted that their audio-conferencing system could cover ‘a third of the rooms across the whole court estate, in all jurisdictions’ and that they expected to have complete coverage by April 1 2020. It is not known what the position will be with regards to participants in the criminal justice system in rooms outside the court estate.
78. HMCTS also stated only recently that: “*public galleries in court rooms will remain open to public access and dedicated press seats will continue to allow journalists to report on hearings*” That must however have been recognised as being insufficient to meet the threat of the pandemic, given the reality of the current situation. The Coronavirus Act now provides for hearings, that are conducted wholly as audio or video proceedings, to be broadcast for the purposes of enabling the public to follow the proceedings and to be recorded (Schedules 25 and 26). It is not known what technology will be used to broadcast the proceedings or how these provisions will operate in practice with respect to the criminal justice system.

What about the future?

79. Whilst technical innovation has existed in the past (e.g. utilising satellite links, or having evidence relayed by telephone from abroad) the redefinition of where and indeed what a Court is, in order to keep them 'open' during this emergency, may have significant implications for how we administer, engage with and dispense participative justice in the future. Although the Act is emergency legislation, intended by the legislators to remain in force only for as long as necessary to respond to the pandemic, if the expansion of remote hearings is deemed to be a success, will any of the changes become permanent?

This briefing note was produced by Edward Henry QC, Susannah Stevens and Philip Stott, with assistance from Anna Bond and John Morrison (pupils). This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at <https://www.qebholliswhiteman.co.uk/>.