

## Prisons and Courts Bill

### Equalities Statement: Virtual Hearings and Open Justice

#### Policy change summary

1. The Government proposes to expand the use of live audio and video link and conference technology to give the court more flexibility in managing criminal proceedings. This is in addition to the criminal courts' power to decide basic administrative issues without a hearing 'on the papers'. This will reduce inconvenience and increase efficiency for not just the courts, but criminal justice partners like probation, youth offending teams, prisons and the police, and also legal professionals. Victims and witnesses (and in youth cases, parents guardians and carers) may also benefit from not having to travel to court unnecessarily.
2. The principle of open justice – justice being seen to be done – is part of our common law and is enshrined under Article 6 of the European Convention on Human Rights (ECHR), the right to a fair trial. Maintaining open justice is a critical consideration as we deliver virtual hearings measures, as certain elements of criminal procedure will no longer be heard in a physical courtroom. Certain civil, family and tribunal cases will also be held virtually under existing powers, and some of these will be open to the public. We intend to enable members of the public to view or hear open hearings which are held 'virtually', using a screen located in a court building, as well as ensuring access for interested parties to listings and outcomes where appropriate (reporting restrictions will continue to apply).

#### ***Extending the use of live links and virtual hearings***

3. In the new system, the court may continue to direct for basic administrative decisions (such as an uncontested variation of bail terms) to be made without a hearing 'on the papers' (via a digital platform). Courts have an inherent power to do this in many circumstances, and as such we are not legislating to provide for this generally, though we will consider whether there are any specific existing provisions which preclude this and need amending. Where a hearing is deemed necessary by the court, this may not always require all parties to be present in the physical court room. Matters may be dealt with by a 'virtual enabled' hearing, where one or more of the parties appear before the court in a physical court room by way of a live audio or video link; or by 'fully virtual hearing', where there is no physical court room and the court and parties attend using telephone or video conferencing facilities. This may also be referred to as a 'wholly audio hearing' or 'wholly video hearing'
4. Where the court is satisfied that it is in the interests of justice, having considered any representations from the parties (and youth offending teams in youth cases), it will be able to use telephone and video technology in the following circumstances:

#### *Pre-trial & enforcement decisions*

- a. The court will be able to deal with pre-trial and enforcement issues either on the papers; via wholly audio hearing or wholly video hearing (fully virtual hearing); or with the use of live audio or video link (virtual enabled), regardless of whether the defendant is in custody.
- b. Contested bail applications cannot be decided 'on the papers'. Where the grant of bail is in dispute, the court will be able to make its decision in a wholly video hearing or will be able to make use of live video link. Where the conditions of bail are in dispute, the court will in addition be able to make its

decision in a wholly audio hearing or will be able to make use of live audio link.

### *Sentencing hearings*

- c. Sentencing will only be conducted on the papers in the circumstances set out under the existing Single Justice Procedure (SJP) for summary only, non-imprisonable offences. In suitable cases the court will be able to direct that the hearing at which a defendant is convicted and sentenced be conducted by wholly video hearing or using live video link (but not a wholly audio hearing or using live audio link).

### *Trials*

- d. The court will not be permitted to try any matters on the papers outside of the existing SJP (which does not include cases involving defendants aged 10-17 years).
- e. It will be possible to conduct trials in magistrates' courts for summary only, non-imprisonable offences by wholly video hearing. This would be where the SJP is applicable and the defendant has entered a not guilty plea and indicated that he or she does not want to be tried in accordance with the SJP and only where all parties and court agree to hold the trial by video. All other trials will be conducted in the physical court room.
- f. In all trials there will be additional provision for participants (including the accused) to attend and/or give evidence by live video link. There will also be provision for witnesses (other than the accused) to give evidence by live audio link where there are no suitable live video link facilities and all the parties agree.

### **Open Justice**

5. Legislation will permit the court to live stream fully virtual hearings to enable members of the public to view proceedings. We are proposing to enable members of the public or media to observe these hearings from one of a number of dedicated terminals in court buildings. A member of court staff would be available to facilitate access. We envisage that members of the public will be able to view the details of cases they are interested in online; if a case is scheduled to be heard virtually the listing will include details of how to observe the hearing.
6. We also want to protect the solemnity of the court as well as the rights of victims and witnesses, defendants and other members of the court by ensuring that the current prohibitions on photography and sound recording in courts will also extend to observers watching a live stream of a virtual hearing. The measures will make it an offence for a person to make, or attempt to make, an unauthorised recording or transmission of a virtual hearing live stream; a person observing such a live stream; or a person participating in court proceedings via live audio or video link. The member of court staff would also be available to ensure compliance with recording restrictions, and the consequences of breaching the prohibitions would be clearly displayed.

7. Although the virtual hearings legislation only applies to the criminal courts, civil and family courts and tribunals have existing powers to conduct fully virtual hearings in certain cases, some of which will be open to the public. As such, the open justice measures will apply to the criminal, family and civil jurisdictions and tribunals.

### **Equality duties**

8. The Public Sector Equality Duty comprises three limbs, set out in section 149(1) of the Equality Act 2010, whereby a public authority must, in the exercise of its functions, have due regard to the need to:
  - a. Eliminate discrimination (both direct and indirect), harassment, victimisation and any other conduct that is prohibited by the Act;
  - b. Advance equality of opportunity between persons sharing a relevant protected characteristic and persons who do not. This includes removing or minimising disadvantages suffered by people due to their protected characteristic, taking steps to meet the needs of people who share a particular protected characteristic, and encouraging participation in public life.
  - c. Foster good relations between persons sharing a relevant protected characteristic and persons who do not. This includes tackling prejudice and promoting understanding.
9. The relevant protected characteristics are race, sex, disability, sexual orientation, religion or belief, age, gender reassignment, pregnancy and maternity. The protected characteristic of marriage and civil partnership is also relevant to the first limb of the duty.

### **Equality considerations**

#### Direct discrimination

10. The proposals are not directly discriminatory within the meaning of the Equality Act as they apply equally to all court users: we do not consider that the proposals would result in people being treated less favourably because of the protected characteristic. In any case, we do not consider that making use of technology in this way will result in any party being treated less favourably. Whilst the mode of communication may have changed, the discussions and decisions will remain the same.

#### Indirect discrimination

11. As is the case more generally across England and Wales, there is over-representation of certain people in the criminal justice system who share particular protected characteristics, as shown below, who will be affected by the proposed measures. However, we do not consider that these measures will result in any indirect discrimination against people who share these protected characteristics as the measures are not expected to disadvantage court users. On the whole, users are likely to benefit from the reduction in inefficiencies and inconvenience these measures will bring, such as not having to travel to court unnecessarily. There will be safeguards in place to ensure that users who may struggle to participate using video or telephone technology are afforded a physical hearing. Assisted Digital provision will also be available to support users to access virtual or video-enabled hearings (see paragraph 11).

12. We also do not consider that enabling virtual hearings to be observed by members of the public (and ensuring that prohibitions on court recording apply to these proceedings) would cause any particular disadvantage to people who share particular protected characteristics.

#### *Race*

13. *Statistics on Race and the Criminal Justice System 2014* (Annex 1) show that people from Black and Mixed ethnic groups are overrepresented in prosecutions for indictable offences at magistrates' courts. The measures may therefore affect court users from these groups more than the general population because of their over-representation within the courts system but we do not consider that this will result in any discrimination, for the reasons set out above.

#### *Sex*

14. *Statistics on Women and the Criminal Justice System 2013* (Annex 1) show that men are overrepresented in the criminal justice system. The measures may therefore affect men more than women because of their over-representation but we do not consider that this will result in any discrimination, for the reasons set out above.

#### *Disability*

15. There is limited data available on the proportion of people with a disability in the criminal justice system. There is, however, evidence which suggests that disabled people are more likely to be a victim of crime than their non-disabled peers, and that disabled people are overrepresented in the prison population<sup>12</sup>. We have considered the impact on court users with disabilities in more detail at paragraphs 25-27 below.

#### *Sexual Orientation*

16. There is limited data available on the sexual orientation of court users. Regardless, we do not consider that these proposals will impact on those who share this protected characteristic.

#### *Religion or belief*

17. There is limited data available on the religion or beliefs of court users. Regardless, we do not consider that these proposals will impact on those who share this protected characteristic.

#### *Age*

18. Approximately 3% of defendants proceeded against at the magistrates court are below the age of 18<sup>3</sup>.
19. These measures will apply to children and young people in the criminal courts, and as such we have given consideration to whether the measures would be discriminatory to

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<sup>1</sup> Amongst 16-34 year-olds, 39% of disabled people reported have been a victim of crime compared to 28% of non-disabled people: Office for Disability Issues & DWP (January, 2014) *Disability facts and figures*

<sup>2</sup> Estimated 36% of prisoners have a disability, based on responses to survey questions about health, compared to an estimated 19% of the population based on survey criteria: Cunniffe, C., Van de Kerckhove, R., Williams, K., & Hopkings, K. (2012) *Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey* Ministry of Justice

<sup>3</sup> Magistrates Court Data Tool, Criminal Justice Statistics 2015

them. In light of their age and immaturity, alongside what we know about risk factors that can increase the likelihood of offending behaviour, there is a particular emphasis on communication with and participation of youths in court proceedings in the youth justice system. As a result, we are making sure that whenever a mode of hearing or communication is contemplated that is alternative to appearing in the court room in person, the court must consider whether it would be in the interests of justice having considered any representations from the parties and, in respect of a young defendant, the relevant youth offending team.

20. This means that where it is appropriate for the young defendant to participate in a hearing through means alternative to appearing in person in the court room, young defendants may still do so. For example, courts will have discretion to do this where the youth's condition – whether mental or otherwise – is so disturbed that his or her production would be a significant detriment to his or her welfare; or where the youth is being detained in a secure establishment at such a distance from the court that the travelling time from one to the other will be significant so as to materially affect the welfare of the youth; or where the youth is already serving a custodial sentence and the sentence to be imposed by the court is bound to be a further custodial sentence, whether concurrent or consecutive.
21. Given that there is a particular emphasis on the communication with and participation of youths in court proceedings, youths continue not to be subject to the SJP and therefore will not have a trial on the papers or trial of summary only non-imprisonable offences (where they enter a not-guilty plea) by video conference.
22. With regards to the open justice measures to enable observation of a fully virtual hearing, the current restrictions in place around public access in youth proceedings will continue to apply.

#### *Gender Reassignment*

23. There is limited data available on proportion of court users who are proposing to, are undergoing or have undergone a gender reassignment process. Regardless, we do not consider that these proposals will impact on those who share this protected characteristic.

#### *Pregnancy and Maternity*

24. There is limited data available on the proportion of court users who are expecting or have recently had a baby. Regardless, we do not consider that these proposals will impact on those who share this protected characteristic.

#### Discrimination arising from disability and duty to make reasonable adjustments

25. We will mitigate against any risk of discrimination arising from the extended use of live links and virtual hearings by establishing safeguards to ensure that these channels are only used under appropriate circumstances, and that the defendant is afforded a fair hearing. The court will always decide whether it is appropriate to conduct a hearing in a certain way, and the parties (including youth offending teams in youth cases) will also be able to make representations. In making its decision the court should consider whether any parties or witnesses have a disability (e.g. visually or hearing impaired) or are vulnerable and would benefit from face to face contact in order to effectively participate in the case. As set out in paragraph 11 below, users may be able to benefit from HMCTS Assisted Digital provision when accessing virtual or video-enabled hearings.

26. Participants with certain disabilities may find these measures have a positive impact as they will reduce the need to travel to court unnecessarily. Where users need to travel to a location with suitable video facilities this will either be at their local court or a closer location, which will be as or more accessible than current court buildings. We will also ensure that the observation screens located in court buildings are accessible for users with disabilities.
27. Assisted Digital provision (which were recently consulted on<sup>4</sup>) will ensure that the department's equalities duties are met, as support will address the digital access needs of individuals who are unable to engage with online services, ensuring they will not be denied access to justice, and will prevent any risk of discrimination arising from digitising our services. This would be available to participants in virtual or video-enabled hearings as well as professional users acting on behalf of their client so that people can make use of digital access if they so wish. The court should consider whether the parties have the required digital skills and access to technology in order to engage with a virtual hearing, and may direct for the hearing to be held in a physical court room as a result.

#### Harassment and victimisation

28. We do not consider there to be a risk of harassment or victimisation as a result of these measures.

#### Advancing equality of opportunity

29. Consideration has also been given to the objective of advancing equality of opportunity and we have concluded that it is unlikely to be of particular relevance to this proposal.

#### Fostering good relations

30. Consideration has also been given to the objective of fostering good relations between persons who share a relevant protected characteristic and persons who do not and we have concluded that it is unlikely to be of particular relevance to this proposal.

#### Summary

31. Our assessment of equality impacts is that these measures will not result in any direct or indirect discrimination of courts users with protected characteristics, but could affect some groups with protected characteristics more than the general population because of their over-representation within the courts system.
32. For increasing the use of live links and virtual hearings, this is not viewed as problematic as there will be safeguards in place to ensure that digital channels are only used in appropriate circumstances. Assisted Digital provision will also be available to support users of digital channels. In fact, users are likely to benefit from these proposals as they will reduce the need to travel to court unnecessarily.

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<sup>4</sup> 'Transforming our Justice System: assisted digital strategy, online conviction and statutory fixed fines', <https://consult.justice.gov.uk/digital-communications/transforming-our-justice-system-assisted-digital/>

## Annex 1: Evidence

The following statistics give an indication of the over-representation of certain groups in the criminal justice system, namely men and those from a BAME background. Age data for defendants in the criminal justice system was not available but the prison population statistics below indicate an overrepresentation of those aged under 40.

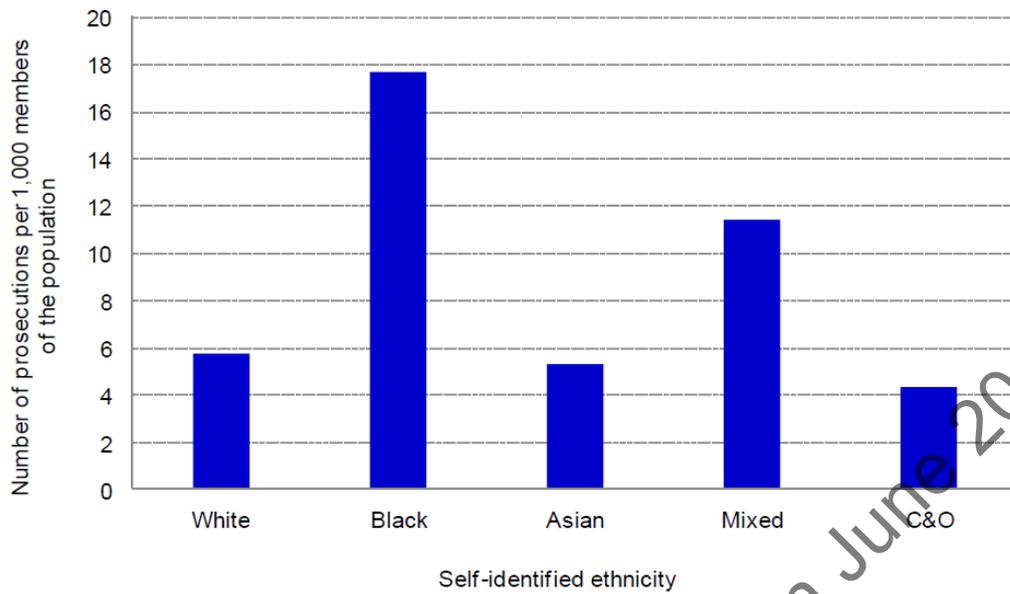
**Table A.01: Overview of Women and the CJS: Proportion of individuals in the CJS by gender compared to general population**

Data	Time period	Female	Male	Total
Population aged 10 and over	Mid-2013	51%	49%	49,994,815
Arrests	2012/13	15%	85%	1,072,068
Out of Court Disposals				
Penalty Notices for Disorder	2013	23%	77%	84,268
Cautions	2013	23%	77%	180,286
Court Proceedings	2013	25%	75%	1,347,278
Convictions	2013	25%	75%	1,112,148
Sentenced to Immediate custody	2013	8%	92%	92,295
First time offenders	2013	27%	73%	164,588
Offenders with previous cautions or convictions	2013	14%	86%	545,976
Prison population	30 June 2014	5%	95%	85,509
Under supervision in the community	31 Dec 2013	15%	85%	110,950

*Statistics on Women and the Criminal Justice System 2013, Ministry of Justice, November 2015*

This publication was archived in June 2017.

Figure 5.02: Rates per 1,000<sup>62</sup> members of the population of prosecutions for indictable offences at magistrates' courts, by ethnicity, in England and Wales, 2014



Statistics on Race and the Criminal Justice System 2014, Ministry of Justice, 26 November 2015

This publication was archived in June 2017.