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Response to	A proposal to make new rules about the use of live links and telephone conferences for the conduct of hearings
Issued by	Criminal Procedure Rules Committee
Link to consultation	www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/Invitation-to-comment-on-proposed-live-links.pdf

General remarks

The MA welcomes the opportunity to contribute to the Criminal Procedure Rules Committee's consultation on rules relating to the use of live link and telephone conferencing.

A move towards more digital hearings has the potential to save a great deal of time and expense for all involved in the criminal justice system, and it is very welcome that the whole issue is being considered as part of the system's response to the Leveson Review. However, the undoubted potential for efficiency gains must be balanced with ensuring the principle of fair hearings. Access to justice and the ability for defendants to participate fully in the court process are both paramount.

The MA's general view on the extension of powers to conduct business by live link has been that this would need to be considered on the merits of any particular proposal, balancing factors such as the quality of the evidence given, the impact on defendants' rights, the wishes and interests of victims and witnesses, the probability of achieving more reliable attendance of those witnesses and the reliability of the live link. It approaches the CPRC's proposals in this spirit.

While supporting some extension of live link and telephone conferencing, the MA does not support their use for conducting:

- initial bail/remand hearings
- contested hearings
- sentencing hearings
- appeals.

The MA accepts the principle of live link for:

- third and subsequent remand hearings
- certain second remand hearings
- administrative hearings.

These must always be considered on a case by case basis and at the discretion of the court. We welcome the fact that the court retains this discretion in the draft rules. The MA also believes that

national criteria should be established, setting out the necessary requirements for any location to be approved as suitable for the use of live link.

The MA fully recognises the important role live link testimony can play in allowing vulnerable witnesses and defendants to give evidence and its comments in this submission are not intended to suggest a narrowing of the court's ability to order live link for these groups. Rather, its aim is to ensure that the court process supports vulnerable victims and defendants appropriately, while preserving access to justice and ensuring that where live link is used, the venues are appropriate and accessible.

The MA would note that the draft rules seem to be working on the assumption that digitisation will be fully in place by the time the new rules are brought into force. The MA recognises that these rules are intended to be permissive, so that live link can be used more as and when it becomes available, but this question will clearly have major practical consequences for their implementation.

1 Are the proposed rule amendments worthwhile? Bearing in mind what is recommended by the Review of Efficiency in Criminal Proceedings, would it instead suffice to leave unamended the general duty and the general discretions for which the Criminal Procedure Rules already provide?

In general terms, the MA does not object to greater clarity on the use of technology in courts. The use of a reliable video link and telephone conferencing platform clearly has the potential to increase efficiency, and at a time when the court estate is reducing, it may also be able to reduce travel times and practical problems relating to access for court users. Some stronger encouragement to make use of this technology is therefore welcome, with the understanding that the technology needs to be in place first, with appropriate venues and secure access to live link. Case management, in particular, could be conducted virtually and/or digitally.

However, this must be balanced against the need to ensure a fair trial, where the defendant can participate fully and engage with all aspects of the hearing. It is also crucial that justice is both done and seen to be done, and that the proper ability of the court to hear and evaluate arguments and evidence is upheld. The MA would, in this connection, point out that the draft version of the presumption that the court has a duty to order a live link is very broad indeed.

The MA welcomes the fact that trials will continue to be held in person (with special measures where appropriate). A person charged with an offence must have full and effective access to his or her advocate in the courtroom, rather than via a video-link, and both advocate and defendant must be able to engage properly in the proceedings. The barrier imposed by a video-link would make it much more difficult for the defendant to intervene and instruct their solicitor during the hearing.

However, the MA opposes sentencing hearings being dealt with via live link or telephone conferencing. Like trials, decisions are made by the court after argument, and the question of what judgment it makes about the evidence it hears at that stage is crucial. The right of the defendant to proper participation, and full and effective access to their advocate, in the courtroom remains vital at this stage.

The MA also believes that contested bail applications should be held with the defendant in person. Bail applications are among the most important magistrates can take, given that they can involve restricting a person's liberty where that person has generally not yet been convicted of a relevant offence, if bail is refused. Even in uncontested cases, the court does not have to accept an agreement between the parties and will apply the same tests it always would. Since defendants will often have had less (if any) opportunity to instruct a lawyer at this stage, proper opportunity to engage with the process is particularly important.

Finally, the MA also opposes conducting more hearings without the defendant being present where contested matters require the court to make a decision. Again, the defendant needs to be able to engage fully in the process and with his or her lawyer.

Locations for live link facilities

The MA would note that there is no clarity in the draft rules on the locations from which people would be able to access a live link, or on whether defence advocates would be in the courtroom or with defendants. We would argue that clear national criteria need to be set out in an appropriate place, whether in guidance or a criminal practice direction, so that the interests of justice are protected throughout England and Wales. The MA would propose that locations should be independently assessed against these national criteria and approved as suitable for use in respect to live link.

The MA argues that there should be a requirement to specify which approved location the defendant should attend to give evidence. The location of a live link has important implications both for privacy at the other end of a telephone, where this is required, and for ensuring anyone dialling in or accessing a live link is in an appropriate location with the capacity for accessing it securely. This should include the ability for the court to know who is in any room with a live link, especially in youth cases.

It would also be helpful for the court to have a list of approved locations at its disposal in order to avoid putting it in the position of trying to evaluate the technical capacity or general appropriateness of a particular venue without necessary information. Such a list could be agreed by local Judicial Business Groups, subject to the clear national criteria mentioned above.

It is worth mentioning that all these concerns apply particularly strongly to vulnerable defendants. The MA would want to see particularly careful consideration given to the challenges to the participation of defendants with learning disabilities, for instance. We would also note that the magistrates' courts are the venue in which defendants are most likely to arrive with vulnerabilities as yet unidentified.

Concerns specific to the youth court

All the MA's concerns about live link or telephone conferencing which apply to the adult court also apply to the youth court: this section only relates to additional concerns.

Parliament has specifically decided that greater engagement in youth courts is appropriate, and it is used throughout England and Wales. This makes the ability of the young person to attend and participate in hearings all the more important. It is also important to note that the young person must have a responsible adult with them during hearings and that the court needs to be able to ensure this.

Finally, unlike the adult court, the youth court limits public access in general, with only individuals appropriate to the case being present. It is harder to ensure this is happening over video link. The bench must be able to satisfy itself that there are only authorised people in the room.

2 Is it right for the proposed duties to rest primarily on the court? Would it be more appropriate instead to impose duties on the parties?

Given the overriding duty on the court to actively manage the case, it would seem logical for this to include the question of technology as well as (for instance) where hearings are held.

However, there does not seem to be a clear hierarchy between live link and telephone conferencing: the MA's understanding of the text is that the 'default' assumption would be live link except in the cases specified as eligible for telephone conferencing, but greater clarity would be welcome. The level of engagement permitted by live link is clearly considerably greater than telephone conferencing, so the MA would want to see the boundaries of telephone conferencing carefully defined.

The MA notes that no criteria are given for reasons when the court might order an in-person hearing. We support leaving the decision to the court: it is worth noting, however, that some form of training or guidance (or perhaps a criminal practice direction) would help to give some indication of when this discretion might be exercised. These could include the interests of justice, defendants' rights in relation to effective participation, the wishes of witnesses and victims, particular vulnerabilities any party might have, and the extent to which issues are disputed between the parties.

In discharging its duties, it will be particularly important for the court to ensure that unrepresented defendants can participate fully in the process. In particular, the court will have to satisfy itself that the necessary safeguards and support are in place if an unrepresented defendant is to be expected to attend some or all hearings via live link or a telephone conference. The court cannot rely on the assumption that unrepresented defendants will automatically know how to use equipment or be able to participate effectively in such hearings.

3 Would it be helpful to remind parties of their obligation to help the court comply with these explicit duties by including reminders in all the relevant forms? – reminders, that is, for applicants to indicate whether they think a hearing should be convened or not and, if it should, then whether the parties should attend physically or instead by live link or telephone.

Yes, this would be helpful. Reminders to the parties to make their case in situations where they feel live link or telephone conferencing is not appropriate would be particularly useful. The broader the range of court business which can be carried out in this manner, the more important some kind of reminder will become.

On a related note, the MA would welcome clarification about the requirement on the parties to assist the court. Does this mean that the defence could be ordered to send communications via email, or would the court need to know they had the facilities before making such an order? This would, clearly, be particularly relevant in cases with unrepresented defendants.

4 Should the Criminal Procedure Rules include a definition of 'telephone conference facility'?

The MA would welcome some degree of definition, and would suggest that this should include some requirements to ensure the court process is managed appropriately: secure access would be an obvious example.

5 Should the proposed rules acknowledge specifically the potential use of a live link to conduct a pre-trial discussion as well as a pre-trial hearing?

The MA's view on this would depend on what exactly a pre-trial discussion means for the purpose of these rules. This is not defined: the MA is not aware that such discussions, involving magistrates or a district judge, could be anything other than a hearing.

If this proposal relates to discussions which involve legal advisers as opposed to magistrates and district judges, the MA would want to clarify that any proposal to extend the scope of such discussions would need to be considered separately and in full.

6 Is it helpful to ensure consistency of expression between rules 3.2, 3.5 and 5.1? Or is that unnecessary?

The MA would tend to agree that consistency of expression aids understanding and avoids anomalies in interpretation, but does not have a particularly strong view on this question.