Magistrates Association

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Response to	**Request for views on sanctions for procedural default**
Issued by	**Criminal Procedure Rules Committee**

The MA warmly welcomes the Criminal Procedure Rule Committee's (CPRC's) consideration of a new approach to sanctions for procedural default. The Court of Appeal's call in *R v DS and TS* to review whether the current sanctions are adequate fits in with the comments in the President of the Queen's Bench Division (PQBD) Review of Efficiency in Criminal Proceedings in which the MA participated. The MA entirely agrees that there must be a genuine and meaningful expectation that deadlines are met and that justice is not delayed by procedural failings from any party.

It follows that the MA supports the CPRC's recommendation of a new Practice Direction for convening compliance courts in cases of repeated procedural default. There needs to be an effective mechanism to hold parties to account for default without good reason, which should be judicially-led.

A national protocol

The MA would also argue for a nationally-agreed protocol for compliance courts, so that there are clear standards and expectations which can be followed throughout England and Wales. Such a protocol would, of course, need to be flexible enough to allow for local circumstance. In particular, locally-based organisations (particularly police forces or firms of solicitors, for instance) are harder to deal with in a uniform way than national ones (the CPS).

The problem is, however, England and Wales-wide, and there thus needs to be a clear set of expectations across England and Wales. Without a clear national steer, we are unlikely to see consistent action throughout England and Wales. An overall national approach would also provide clarity for national organisations like the CPS, rather than a patchwork of potentially different standards.

Procedural default warnings

The MA would suggest that a compliance court could be convened after a given number of formal procedural default warnings, given in open court.

The question then arises: what scale of default requires a formal warning? The Criminal Procedure Rules (CPRs) give the court power to take action over any failure to comply with a rule. The MA would suggest that the test should be whether the default causes material inconvenience. One default,

remedied on the same day, could be passed over with an oral reminder to comply with the CPRs in future: but if an adjournment is required, then a formal warning should be issued in open court. There should be a mechanism for appeal of any recordable default, but clearly the process should not become unduly cumbersome. The MA suggests appeal should lie to a compliance court: presumably these would hear more than one case at a time, so there is no reason why appeals could not be heard there too.

In order to hold the parties to account, the MA would argue that there needs to be a formal record, with a court register at each court building in a standardised format for the noting of procedural default warnings. The judge or chairman of the bench should be able to issue a formal warning, in open court, to any party in material default. The details of the case and the issues leading up to the issue of a public warning should be recorded in the court register. The court register should be available to the presiding judges and the Judicial Business Group. The court register should be a public document, subject to necessary redactions to comply with any court orders and to protect vulnerable individuals.

Of course, the aspiration would be that where a warning is issued, it serves its purpose and that no further action is therefore required. The MA would suggest that the CPRs require any party which receives a warning to consider the substance of the default in accordance with an established and published procedure, in such a way that the process could be reviewed in a compliance court if required. The CPRC could consult with the Law Society and the Criminal Bar about the requirements they might put in place for such a procedure in the case of law firms and barristers.

The composition of compliance courts

If compliance courts are to serve their intended purpose, it will be important to convene them quickly and regularly. The best way to do this is to ensure that a wide pool of judicial office holders is available to undertake this work, and so all judicial office holders should be able to sit on compliance courts after being appropriately trained. It makes particular sense for magistrates to play a full role given the emphasis which has been placed on supporting them to take a more robust approach to case management.

The MA would envisage that a group of judicial office holders would be trained to carry out this work, but it would be important to ensure that all paid judges and magistrates are fully aware of the new approach and of the criteria for issuing procedural default warnings. It could also be beneficial to recommend that, where practicable, judicial office holders with relevant experience would be best placed to sit on compliance courts: having one or more youth magistrates to hear about defaults in a youth case, for instance. This is also work which the MA would suggest could, with appropriate training, potentially be carried out by a single magistrate (as can be done already for a wide range of other roles).

If compliance courts are to have the desired impact, it will also be important for a senior member of staff from an organisation which is summoned to appear before compliance courts to attend. There should be some flexibility over the exact rank of person summoned, partly to reflect the fact that different levels may be appropriate for different sizes of organisation and partly to allow for escalation in the event of continued defaults.

Sanctions available to compliance courts

The MA appreciates that there are concerns about the use of financial sanctions or, ultimately, contempt of court proceedings in the event of sustained non-compliance. However, it would also argue that without either of these options, compliance courts are essentially left with only admonishment as a sanction. In order to give them teeth, it would argue that meaningful sanctions should be available. A court would be unlikely to issue fines in the first instance: the MA would suggest this might be at the top end of the range for a first appearance, and contempt of court might only be made available for a second high-level case within two years.

The MA would not envisage seeing fines being levied on a routine basis. Of course, the ultimate aim of compliance courts would be to make them (in the words of Leveson LJ) 'self-extinguishing' due to high compliance. However, the MA would support having concrete sanctions available as a follow-up in cases of prolonged non-compliance. There would, of course, also need to be a mechanism for appeal – perhaps to a second compliance court with a different bench. If single magistrates were able to convene compliance courts, there might then be an appeal to a bench of three.

How many warnings should trigger a compliance court summons?

The MA would suggest that three warnings in relation to the same case should trigger a summons.

It is more difficult to strike an appropriate balance when dealing with a number of warnings relating to different cases in the same area (over a rolling year, perhaps). With a court register available in electronic copy, HMCTS would be able to identify when the appropriate number was met or exceeded. This number could vary to some extent depending on the size of the organisation. However, given that most cases in the magistrates' courts are completed in one day, failing to provide for a compliance court summons in situations where the same organisation repeatedly defaults would risk rendering them ineffective for the vast majority of criminal cases. The MA would suggest that responsibility for initiating a compliance court should sit with the Judicial Business Group, which could choose to delegate it to the Justices' Clerk for magistrates' courts if necessary.

The MA is not in a position to give a firm view on the ideal number of cases like this which should trigger a compliance court hearing. It would suggest that the CPRC consult with some of the relevant organisations to identify such a figure, though if three warnings in one case is considered a sufficient default to trigger a compliance court then this might be considered a starting point for such consultations.