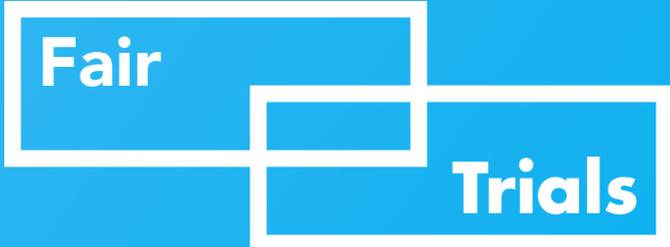


JUSTICE UNDER LOCKDOWN

A survey of the criminal justice system in
England & Wales between March and
May 2020



Fair

Trials

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.



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Contact:

Bruno Min

Legal Director (UK & International)

bruno.min@fairtrials.net

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The COVID-19 pandemic, and responses to it, have had an unprecedented impact on criminal justice in the UK. Since March 2020, courts have closed their doors to all but essential business, and conducting more hearings remotely. Suspects and defendants have found themselves further isolated as their access to essential support, including legal advice, is severely restricted due to health and safety concerns.

As the UK slowly recovers from the pandemic and emerges from the lockdown, it is crucial that the true impact of COVID-19 on the criminal justice system is better understood, so that appropriate measures can be taken to address the remaining challenges and the longer term impact of the crisis. Experts have predicted the likelihood of a successive of infections, and the possibility of reintroducing restrictions in the coming months and years, and experiences of criminal justice proceedings from the past three months will provide valuable lessons for the future.

Over a period of 2 weeks in May 2020, Fair Trials conducted a survey of individuals at the frontline of the criminal justice system, including defence solicitors, barristers, accredited legal representatives, judges, magistrates, police officers, CPS staff, and appropriate adults. They were asked to share their opinion of how COVID-19 had impacted fair trial rights in England & Wales since the lockdown began. We received 89 responses in total, the majority of which were from defence lawyers.

The results of the survey paint a deeply worrying picture of the criminal justice system in England & Wales under lockdown. Courts and police stations across the country have faced unprecedented challenges due to COVID-19, and drastic deviations from ordinary criminal procedures have had to be made to ensure the continued functioning of the justice system under these very unusual circumstances. However, it is apparent from the responses that the rights of defendants have, in practice, been largely overlooked, and it is questionable whether initiatives to safeguard suspects' and defendants' rights and their safety have worked effectively so far. As one respondent to the survey summarised:

“The rights of the defendant, and considerations for the defendant, are being eroded to the point where they are non-existent.”

Results of this survey show that:

- **Suspects in police custody are getting poorer quality legal advice and assistance, as solicitors' access to their clients and their attendance at police interviews are severely restricted;**
- **There is limited adherence to COVID-19 related health and safety standards in police stations, endangering public health, and putting the lives of suspects, defence lawyers, police officers, and their families at risk;**

- Remote hearings are having an adverse effect on defendants' right to access effective legal assistance, to participate effectively at their own hearings, and to review and challenge information and evidence being presented; and
- COVID-19 is causing lengthy and indeterminate delays to criminal proceedings, and custody time limits are being extended routinely due to those delays, meaning defendants are spending longer in pre-trial detention.

We also found that there was a lack of consistent approach across courts and police stations in England & Wales, regarding the physical and procedural adaptations they were making in response to COVID-19. This seemed to indicate that the level of protections for fair trial rights, and for the health and safety of those involved in criminal proceedings, varied according to which police station or court the proceedings took place, and which police officer or judge was in charge of those proceedings.

It is clear that many of the challenges identified in this survey are not confined to the several months in which the lockdown has been in place. So long as COVID-19 continues to be a generalised risk to the public, precautions (such as social distancing and the use of PPE) will need to be taken at courts and police stations for the foreseeable future, continuing to create obstacles for the exercise of defence rights. Already, we are beginning to see that COVID-19 is creating a long-term legacy of delays and backlogs to the criminal justice system, which in the absence of urgent action from the government to enhance capacity, could create extraordinary challenges and serious human rights violations.

Defence Rights in Police Custody

The overwhelming majority of respondents told Fair Trials that COVID-19 has had a negative impact on suspects' rights in police custody.

- 71% of respondents, and over 80% of defence lawyers told us that COVID-19 had a 'significant' or 'moderate' negative impact on suspects' ability to access prompt in-person legal assistance;
- 55% of respondents said that suspects' access to specialist assistance (such as interpretation and medical assistance) had been undermined; and
- 59% of respondents told us that the suspects' access to legal assistance during police interviews had been impacted negatively, either significantly or moderately.

Legal Advice

There was strong consensus amongst respondents that the quality of legal assistance had suffered significantly due to COVID-19 related restrictions.

It was apparent from the survey that the pandemic had severely limited in-person contact between suspects and their lawyers, and that legal advice and assistance were primarily being provided

remotely, either via telephone or video-link. However, this was mostly viewed as a poor substitute for in-person legal assistance. Lawyers expressed that it was challenging to build trust and rapport with their clients without meeting them in person, and that generally, it was more difficult to provide advice to and take instructions from their clients. It was also pointed out by some respondents that they were able to spend less time speaking to their clients because they could not see them in person.

Concerns were also raised that remote legal assistance had a particularly negative impact for vulnerable suspects, who require support for their welfare and effective participation during criminal proceedings.

“It's extremely hard to build a relationship suitable to gain the client's trust over the telephone. Add the pressures of the police station environment and people being scared for the health implications, and the impact on justice is severe. And that's without factoring in those clients with mental health difficulties, [and] vulnerabilities (e.g. due to age)”

Some lawyers also questioned the extent to which client-lawyer confidentiality was being respected during lockdown. Being unable to meet their clients in-person meant that it was harder to ascertain whether their conversations were being overheard by others, and to discuss crucial, sensitive matters. One respondent complained that on at least two occasions, police officers had tried to facilitate telephone consultations in an open custody suite, possibly in plain hearing distance of other detainees, and that on both occasions, an inspector was involved in facilitating the call.

The inability to provide effective legal advice is not just a source of frustration for lawyers – it also amounts to a violation of fair trial rights. The right to legal assistance is a ‘gateway’ fair trial right, enabling suspects and defendants to *inter alia* understand and exercise their rights, and ensure their rights are being respected at all stages of the criminal proceedings. Where police stations are unable to facilitate in-person access to a lawyer, further improvements are needed to provide adequate facilities that ensure suspects’ access to confidential legal advice remotely.

Police Interviews

Responses highlighted that suspects’ rights were being undermined due to restricted access to police interviews by lawyers, and other sources of support.

There seems to have been no consistent approach amongst the police to ensure legal, and other forms of assistance during police interviews. This has, on occasions, resulted in police interviews taking place in the absence of a lawyer or other essential sources of support, or suspects being detained unnecessarily.

One lawyer told us, for example, that one of her clients with COVID-19 symptoms required an interpreter who refused to attend the interview due to safety concerns. The police were unable to facilitate remote attendance by means of telephone or videoconferencing, as a result of which the suspect was not able to get legal advice, and he was charged without an interview. In another case, a different defence lawyer told us that her 14-year-old client was detained at a police station for 24 hours before being bailed, because the police could not find an appropriate adult.

It is evident from the survey that some police stations have begun to facilitate lawyer attendance at police interviews remotely via video-link. Some lawyers noted, however, that numerous video-conferencing equipment failures meant that defence representation attendance by telephone was becoming the default.

Further steps need to be taken by the police to not just ensure that lawyers and other individuals providing essential assistance to suspects are able to attend police interviews safely, but also ensure that alternatives to in-person attendance are available. Further training and investment in equipment seem to be necessary to make sure that remote attendance is as effective as possible a replacement for in-person assistance.

Health and Safety in Police Custody

Two-thirds of respondents were of the opinion that conditions in police custody had worsened moderately or significantly since the COVID-19 pandemic began.

Respondents expressed serious concerns about police attitudes to safety, noting that in some cases, there was a total disregard for social distancing, making police stations unsafe for detained suspects, lawyers, as well as the police officers themselves.

“The police appear to believe Covid-19 doesn’t spread in police custody units and adopt practices that are obviously unsafe”

Protective measures seem to be applied inconsistently across different police stations, and between different police officers.

For example, some police stations and custody sergeants (but not all) have been enforcing hand washing and making hand-sanitisers available to those attending police interviews, while respondents noted that interview rooms at most police stations are rarely large enough to allow social distancing. PPE is reportedly available only at some police stations, but even where they are, police officers are rarely seen wearing them.

Several lawyers were also concerned that despite the insufficient measures in place to prevent the spread of COVID-19 in police stations, they were still being expected, or even pressurised to turn up to attend interviews in person.

One respondent remarked that there were no tests being carried out at police stations, and that duty solicitors were expected to assume that it is safe for them to attend interviews so long as their client displays no symptoms.

“I am not sure when it will ever be safe to physically attend [interviews]. Some custody sergeants very much take the view ‘we are here, why aren't you?’.”

Law enforcement officials should not be exposing suspects in police custody to avoidable health risks, and further efforts should be made to enforce appropriate health and safety standards to prevent police stations from becoming the new epicentres of the pandemic. It is also essential that health risks do not act as a deterrent from the exercise the right of access to a lawyer, and they should not 'expect' lawyers and legal representatives to attend police interviews, where appropriate arrangements cannot be made to ensure their safety.

Remote Hearings

The results of the survey largely supported findings of existing research on the challenges regarding the use of video-link in criminal court hearings.¹ In particular, defendants' rights are being undermined on account of the difficulties in communicating with their lawyers and the court, and in reviewing and challenging information relevant to the proceedings.

The survey found that:

- 44% of respondents believe that remote hearings make it significantly more difficult for defendants to participate in the proceedings (with a further 19% saying that the impact on effective participation had been moderately negative);
- 67% of respondents thought that the remote hearings had a significant negative impact on the ability of defendants and their lawyers to communicate before and during hearings. A further 25% thought that there had been at least some or moderate negative impact; and
- 75% of respondents believed that remote hearings had made it harder for defendants and their lawyers to obtain, present, and challenge evidence; and
- 60% of respondents expressed that the use of video-link or telephone had a noticeably negative impact on the overall fairness of the hearings.

We are aware that some solicitors and barristers have expressed the view that the increased use of virtual hearings is a positive development, particularly for efficiency reasons,² but the results of this survey show that the majority of lawyers have significant concerns about their impact on defendants' rights. We are concerned that the Government could promote remote hearings as a way to address the backlog of criminal cases built up during the lockdown (and over the years prior to the pandemic) without adequately addressing these concerns.

¹ <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>;
<https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf>

² <https://thedailycourts.com/2020/05/09/the-virtual-court-revolution-remote-hearings-work-and-do-criminal-defence-solicitors-think-their-clients-get-a-fair-hearing/>

Communication

Survey responses clearly show that client-lawyer communications have been badly affected, meaning that defendants are finding it more difficult to consult with their lawyers, and to seek advice before, during, and after court hearings.

While some defence lawyers appear to attribute these difficulties to the poor quality or unreliability of the technology used to facilitate client-lawyer consultations, it was also highlighted that some courts are not appropriately set up to facilitate effective, confidential conversations between defendants and their lawyers. Courtrooms, for example, had to be vacated so that lawyers could speak to their clients in private, and when they were, minimal time was allowed for those conversations.

We were also concerned to learn that in some cases, judges were explicitly preventing post-hearing client-lawyer consultations from taking place via video-link or telephone, leaving defendants in custody stranded, with severely restricted access to legal advice.

“The Resident Judge at our local Crown Court has now forbidden post-hearing conferences in circumstances where the defendant is sent into custody (either sentenced or remanded in custody) and instead we have been told that we need to conduct post-hearing conferences by letter. It is outrageous that somebody is supposed to be legally represented and yet they are being sent into custody without the opportunity to see the representative straight after. How can anyone be sure that they've understood what has happened (particularly for those with language barriers, learning difficulties, mental health issues) and what the next steps are?”

Access to Information

Respondents explained that lawyers were often receiving information relevant to their hearings very late, and that it was more difficult to ask the relevant people for the right information without attending court. Technical issues were also cited as reasons for it being more difficult to adequately present evidence. Disclosure in criminal proceedings in England & Wales has already been recognised as a serious challenge,³ so it is worrying that virtual hearings might be worsening existing issues.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756436/Attorney_General_s_Disclosure_Review.pdf

Remand Custody and Trial Delays

The delays caused by the cessation of most trials during the lockdown have caused serious challenges for defendants, especially for those in remand custody, who are facing prolonged pre-trial detention as their custody time limits are extended.

Nearly half the respondents in this survey told us that, in their view, defendants were less likely to be remanded into custody during lockdown, and their responses seemed to suggest that judges were more likely to grant bail where possible, in an effort to reduce numbers of people in custody. However, where a defendant is already remanded in custody, they were more likely to spend longer in detention.

63% of respondents thought that the amount of time defendants spend in detention is likely to be 'higher' or 'much higher'. Responses suggest that custody time limits are being extended routinely as a direct result of delays to trial proceedings, and some defence lawyers expressed concern that judges were granting extensions with little regard for the necessity of continued pre-trial detention, whenever a trial was adjourned due to COVID-19.

"Quite frankly, [custody time limits] may as well not exist. They are extended as a matter of routine in our local courts and any argument against extending them is met with incredulity that one has dared advance an argument."

This propensity to extend custody time limits whenever there is an adjournment is particularly worrying, given that there are clearly very serious concerns about the length of delays. Many respondents told us that trials are being delayed for over a year and that, where there is an adjournment, there is often no new date set for hearings. This is creating confusion and uncertainty for defendants, especially for those in detention, who have little to no idea when their trial will take place, and how much longer they will be detained.

The Government has been asked to provide data on the impact of COVID-19 on custody time limits, but it has refused to do so, due to the 'disproportionate cost' of gathering such data.⁴

Several lawyers provided examples of cases in which defendants were facing inordinate delays in their criminal proceedings. We were particularly concerned to learn about the case of a 14 year-old-defendant, whose custody time limit was recently extended despite his very young age. Other examples included:

- An 18-year-old defendant arrested last year, whose trial for murder was due to take place in March. He is remanded in custody with no indication of when his new trial will take place;
- A trial that was due to be held in July, but now re-listed for October, where the defendant is unable to access his case papers due to COVID-19;
- A case of an 18-year-old defendant charged with robbery, who is still waiting for his retrial despite the fact that his legal proceedings began 2 years ago; and

⁴ House of Commons, Remand in Custody: Written Questions 48993 and 48994

- A trial that was due to begin in May 2020, that has now been adjourned to June 2021, meaning that the defendant will be on bail for over a year.

This is by no means an entirely new challenge faced by the criminal justice system in England and Wales, where courts had a backlog of over 37,000 cases even before the pandemic began. Some respondents remarked that COVID-19 had made the existing problems, attributable to the chronic underfunding of the court service, far worse to the extent that the criminal justice system is now on the brink of collapse.

“We are witnessing the collapse of the criminal justice system which is the inevitable product of austerity and court closures”

The backlog of cases built up during the COVID-19 lockdown is likely to have a long-lasting impact, resulting in inordinate delays to criminal cases, and prolonged pre-trial detention for many detained defendants. Criminal justice systems cannot function properly and cannot be expected to deliver justice in all cases if they are stretched far beyond capacity, and legally innocent defendants should not be stuck in detention on account of administrative failures and underfunding. It is essential that urgent action is taken to increase funding for the courts, and increase their capacity to cope with increasing caseloads.