

## 1. No. 1 – Email

**From:** McFarlane J (John) <John.McFarlane@gov.scot>  
**Sent:** 11 May 2020 15:44  
**To:** Cabinet Secretary for Justice <CabSecJustice@gov.scot>; [Redacted]@gov.scot  
**Subject:** FW: Jury Trial Announcement

For info

**From:** CHERRY, Joanna  
**Sent:** 11 May 2020 15:15  
**To:** McFarlane J (John)  
**Cc:** MACASKILL, Kenny  
**Subject:** Fwd: Jury Trial Announcement

Please can you make sure Humza sees this. Thank you. Joanna

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**From:** Secretary of State <[secofstate@Justice.gov.uk](mailto:secofstate@Justice.gov.uk)>  
**Sent:** Monday, May 11, 2020 3:11:59 PM  
**To:** CHERRY, Joanna <[joanna.cherry.mp@parliament.uk](mailto:joanna.cherry.mp@parliament.uk)>  
**Subject:** FW: Jury Trial Announcement

Good Afternoon,

Please find attached letter from the Lord Chancellor.

[Redacted]

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**2. No. 2 - Attached to email 1**

[Redacted]

E <https://contact-moj.dsd.io/>  
www.gov.uk/moj  
102 Petty France  
London  
SW1H 9AJ

The Right Honourable  
Robert Buckland QC MP  
Lord Chancellor & Secretary of State for Justice

Joanna Cherry QC MP  
Scottish National Party Justice and Home Affairs Spokesperson  
House of Commons  
SW1A 0AA

11th May 2020

Dear Joanna

**RESUMPTION OF JURY TRIALS**

Throughout the coronavirus outbreak, court staff, the judiciary, legal professionals and all those who support people coming to court, have worked tirelessly to keep the wheels of justice turning, and turning safely, for those who need them most.

Since the start of the pandemic, we've worked closely with senior judges in making decisions to ensure we prioritised the most urgent cases and used our courts and tribunals in the most effective way to support them.

These decisions have resulted in huge changes to our ways of working, including far wider use of technology to allow the continued running of as many hearings as possible, remotely. Some hearings have continued to take place in person by following public safety advice, introducing additional cleanliness and hygiene measures, and observing strict social distancing rules in all our buildings that are open to the public. But to date that has not included jury trials.

I am delighted that following the Lord Chief Justice's earlier announcement, which I wholeheartedly support, the courts are now in a position to take some early steps towards the safe resumption of jury trials, with approval from Public Health England and Public Health Wales.

I'm hugely grateful to Mr Justice Edis and those on the jury trials working group for bringing us to this point, and for their ongoing work that will enable us to understand how it may be possible to conduct trials more widely going forward, when safe to do so.

The judicially-led group, which has been considering ways to safely restart jury trials when the time is right, includes representatives from the Law Society, Bar Council, Criminal Bar Association, HMCTS, Crown Prosecution Service, Prisoner Escort and Custody Service,

Ministry of Justice, HM Prisons and Probation Service, National Probation Service, National Police Chiefs Council and Legal Aid Agency. I'd like to say thank you to them all.

Safety will of course remain paramount always and those buildings that hear jury trials will continue to follow the clinically-informed Government guidelines of the day at all times.

Any person who plays a part in a criminal trial – including victims, witnesses, jurors, and legal professionals – is making a huge contribution to society that is rightly recognised as an essential reason to leave their home. They have our gratitude and they deserve our protection – and measures are being put in place to support everyone who comes to court, in whatever capacity, to do so without putting themselves at unnecessary risk.

Yours ever

**RT HON ROBERT BUCKLAND QC MP**

### 3. No. 3 - Email

**From:** [Redacted]@gov.scot. **On Behalf Of** Cabinet Secretary for Justice  
**Sent:** 06 April 2020 15:27  
**To:** Cabinet Secretary for Justice <CabSecJustice@gov.scot>  
**Subject:** FW: Jury trials

[Redacted] – can you add this email as briefing for the Joanna Cherry meeting tomorrow?

**From:** McFarlane J (John)  
**Sent:** 06 April 2020 15:12  
**To:** Cabinet Secretary for Justice ; [Two names redacted]  
**Subject:** FW: Jury trials

For awareness –suggestions from Justice.org.

**From:** CHERRY, Joanna <[joanna.cherry.mp@parliament.uk](mailto:joanna.cherry.mp@parliament.uk)>  
**Sent:** 06 April 2020 15:05  
**To:** MACASKILL, Kenny <[kenny.macaskill.mp@parliament.uk](mailto:kenny.macaskill.mp@parliament.uk)>; McFarlane J (John) <[John.McFarlane@gov.scot](mailto:John.McFarlane@gov.scot)>  
**Subject:** Jury trials

I had a good chat with [Redacted] from Justice this morning and I attach her follow up email. They are very focussed on video/virtual proceedings.  
I also spoke with [Redacted] chair of Facba. They are very keen that whatever compromise is reached juries are retained in some form. They are working on expanding options discussed in their initial response published last week including using exiting court room spaces etc to facilitate social distancing eg utilising the public gallery this would enable some jury trials to take place while we are in lockdown. Then thereafter they have a number of ideas for facilitating what would be a smaller backlog.  
Looking forward to discussing tomorrow.  
Joanna

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**From:** [Redacted]@justice.org.uk>  
**Sent:** Monday, April 6, 2020 12:03:32 PM  
**To:** CHERRY, Joanna <[joanna.cherry.mp@parliament.uk](mailto:joanna.cherry.mp@parliament.uk)>  
**Subject:** Video hearings

Hi Joanna,

Really good to speak with you and thank you for taking our thoughts on this.

For info, this is what I sent to HMCTS last week in respect of fully video/virtual proceedings. We are also testing a mock trial on Wednesday with everything done remotely to see if it will work, from which we will have a clearer picture of the possible pitfalls. Given that nothing is currently progressing, our aim is to see whether we can conduct fair trials fully online.

HMCTS has prepared guidance for participants, staff and the judiciary on conducting audio and video proceedings and we have provided feedback on that as well. We are also liaising over the questions that they have identified in need of solutions for keeping things going.

A number of academics are already working in this field and I would be very happy to connect Scottish Government with them.

Best wishes,

[Redacted]

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#### 4. No. 4 Attached to email 3

### JUSTICE Suggestions on Video Hearings for HMCTS

During these times of emergency procedure for Covid-19, JUSTICE considers that:

- Every effort should be made to progress hearings of all kinds
- For hearings to enable effective participation and equality of arms between all parties it will be necessary for all parties to take part in a video hearing, where they are able to do so
- If technological or other difficulties prevent a person joining a proceeding virtually, adaptations to in-person hearings may need to be considered
- If this is not possible, the hearing must be adjourned until those technical or other difficulties are addressed or adaptations to in-person hearings can be made

To enable fully video hearings to take place, careful attention is needed to ensure proceedings will be fair. We note below issues and possible solutions to achieve this aim.

#### Open justice

- Where a hearing is usually open to the public, this will need to be replicated online.
- Can there be a courts hearings page with a daily cause list, with links to what is being broadcast?<sup>1</sup> The public ought not to join the hearing in the same way as parties. This will keep observers and participants with standing separate, in a similar way to the court and the gallery in physical court spaces, allowing people to listen and leave as they chose with no disruption.
- The cause lists will need sufficient detail of the issues – e.g. offence or kind of hearing.
- Proceedings will also need to be recorded. All recorded public hearings could go on a Youtube channel like the civil court of appeal and Supreme Court. Legally, they do this by way of an order from the Lord Chancellor under s.32 Crime and Courts Act 2003. However, the Coronavirus Act 2020 provides that, in relation to proceedings which are wholly video or audio, the judge *may* order they are broadcast to the public. (See Schedule 25, section 1 applies to all courts and section 2 to all tribunals).
- Since these provisions criminalise any unauthorised recording or transmissions of broadcasts, there should be a warning at the bottom of the screen, as is already the case in the Court of Appeal.<sup>2</sup>
- Storage capacity will be needed for this - National Archives.
- The view of the virtual courtroom which should logically be broadcast should be that of a passive participant, with no sight of any interparty “chat” function.
- In private hearings or hearings with reporting restrictions, all efforts as would be appropriate in a physical hearing must be made to include the press as muted and non-visible participants of the virtual proceedings.<sup>3</sup>
- Other difficulties include not always knowing who is speaking - participants must be named and labelled appropriately by role. The HMCTS administrator should have the ability to label participants.
- Cameras of participants should always be on (subject to special measures - see heading). However, in the CoP case it was reported that cameras were switched off to avoid all the movements of parties being distracting during evidence, and also because of bandwidth

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<sup>1</sup> Such as Supreme Court TV <https://www.supremecourt.uk/watch/uksc-2019-0057/judgment.html>

<sup>2</sup> See for example its last broadcast on 18<sup>th</sup> March 2020 ([https://www.youtube.com/watch?v=A8G45z\\_vJck](https://www.youtube.com/watch?v=A8G45z_vJck)).

<sup>3</sup> The Press Association observed and reported on Mostyn J's fully remote Court of Protection case on 18 March 2020.

problems. Even if the latter limits some cameras, the judge, the advocate speaking and the lay party(ies) should always be on.<sup>4</sup>

- Information protected by reporting restrictions will be heard, but cannot be publicly reported by those present. As HMCTS official guidance states, “The media are entitled by law to hear and be present at all open court proceedings (including those with reporting restrictions in place).” In this scenario, it clearly wouldn’t be appropriate to publicly live-stream proceedings.
- Transcripts – See Otter technology and inbuilt recording with Skype/Teams/Zoom.
- Reporting restrictions – need to include details on the list or have a page with orders made like in Scotland <https://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders>
- Decisions should be recorded or reasons written and made available for public consideration.<sup>5</sup>
- Can disable or remove members of the public for commenting inappropriately. Ask to mute microphone or control that by judge/administrator.
  - o *See above - this is alleviated if HMCTS stream one participant view on youtube, for the public to observe, not to participate.*

### Accessing the hearing

- People must be able to familiarise themselves with the technology ahead of the hearing, like a court familiarisation visit. A test call should be available.
- Sufficient time ahead of the hearing must be built in for people to join without becoming overly nervous. This can be facilitated by them joining into a waiting room
- For trials where documents are to be shared on screen and marked it will be helpful for at least the judges and advocates to have two screens and an ability to extend the display. The technology must have the facility to mark a document
- For proceedings that have online filing procedures, participants will need to be able to view the digital documents on a separate device or have the papers sent to them.
- For shorter hearings, video conferencing tools need to be accessible by mobile phone – not everyone will have access to a desktop or laptop. *NB, this will only work for hearings with few participants. It may not work where witness evidence is needed.*

### Visual

- Creating the court environment is important to establishing the solemnity of proceedings.
- This must be emphasised ahead of a person entering the call -people should join initially in a waiting room facility and should receive guidance on joining – their appearance, finding a private room and having a blank background
- the judge should display a court logo background.

### Court etiquette/formality

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<sup>4</sup> <https://www.pressgazette.co.uk/journalists-praise-courts-for-open-justice-via-video-link-during-coronavirus-crisis/> But Compare, <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/> For me, there was a marked lack of empathy displayed for Sarah throughout this hearing (Sarah’s own legal team excluded, of course). This was partly – perhaps largely – accounted for by the fact that, except when Sarah was giving her witness statement and being cross-examined, she was not visible to other participants. Due to bandwidth problems, the judge asked everyone (except himself) to turn off video-cameras unless they were giving evidence or questioning a witness. Nobody – except those of us in the room with her – could see how upset Sarah became at various points and so they didn’t modify their behaviour to avoid causing her unnecessary distress.

<sup>5</sup> See <https://inform.org/2020/03/24/covid-19-the-uks-coronavirus-bill-and-emergency-remote-court-hearings-what-does-it-mean-for-open-justice-judith-townend/>

- The Tax chamber has created a handout for what the judge should be saying – this is likely to be universal for all hearings. – This is used that to test the connection and introduce ground rules for the proceeding. Judge in the tax chamber picked up very quickly that things are different and the online process needs explaining.
- At the start of hearings involving videoconferencing, a DSO or the Judge, should check in with the parties as to how they are connected to the hearing (i.e. laptop, tablet, mobile – if the latter, connected to Wifi or data) and there should be frequent check-ins from a judge with all parties, for technical issues
- Judge should also check that the lay parties are following the process. Rather than a yes/no, perhaps asking a party about a particular aspect to assess understanding will be more successful.

#### Reflections from CoP hearing:

- The sense of decorum and professionalism should remain and the dress code should not be relaxed from how those should be dressed in a court room. Interruptions should be kept to a minimum.
- There were some external noise factors, dogs barking and phones ringing which were distracting.
- Muting sound and video whilst evidence is being given was helpful.
- Counsel and legal teams chatting during breaks should be kept at a minimum or a different platform could be used to allow counsel for instance to leave the plenary and speak privately while they wait for the hearing to begin. It might distress parties or witnesses to listen in on casual conversations.

#### Length

- Additional time will be needed for technical difficulties, to facilitate an inevitable communication lag between participants.
- Additional breaks are necessary since concentrating in a video hearing is more tiring.

#### Administrator

- A call centre in Stoke that does all of the remote assistance for the Tax Chamber and other CVP pilots.
- Court staff are going to need to do this themselves. They will need training to be familiar with the technology and to manage problems during a hearing. This will need multiple practice runs ahead of real hearings.
- IT support must be readily available and scaled up.

#### Panel composition

- magistrates courts and tribunals where have panel members; jury trials
- A national jury pool could be used to enable sufficient jurors to participate. The same could be used for magistrates hearings and tribunal panels.
- Broadband connections and technical capacity will need to be tested
- This may risks a less diverse pool of adjudicators – every effort must be taken to ensure diversity where possible
- If it is not possible to conduct virtual jury trials (see after JUSTICE mock trial), flexible use of court space is required - jurors kept separate in different rooms or judge and lawyers in the court room and others on screen
- Legal points – block jurors’ sound and vision during the matter or put them in a breakout room. Try to deal with as many points ahead of the hearing as possible

- Deliberation will need to take place in a breakout room. There will need to be a 360 degree check of their room to ensure it is private. Jurors can be asked to sit with the door in view so that if anyone enters, this can be addressed,
- *Contempt* – judge and lawyers would need to check on whether jurors are concentrating. Could ask jurors to submit questions of witnesses to keep them focussed. Questions are really useful to check their understanding.<sup>6</sup>

### Lay people's experience

*"I'd like the judge and lawyers to know that this hearing was not about bigging yourselves up because you did the first Skype trial. This is about my Dad."*<sup>7</sup>

- Clients are perhaps less likely overall to feel like or see justice is being done if the way in which hearings are conducted is exclusionary in any way (lawyer) – there must be considerable effort to *include* the lay parties.
- Remote justice can amplify the 'informal' aspect of courtroom interaction because it is equally accessible to everyone online. Perhaps, for some parties this humanises the legal process. For others, this kind of levity threatens the formal justice process and diminishes the legitimacy of the court: it can work to underline the impartiality of the process by displaying how 'pally' some of these professionals are with one another.
- Digital support needs to be ramped up – Good Things Foundation needs to increase their capacity to offer over the phone assistance and remote support of clients – with a confidential communication channel.
- Support Through Court has asked that there be guidance issued for LiPs, so they know what they can expect to happen. RCJ Advice have flagged the prospect that remote phone calls or videocalls could reveal a party's location in DV cases – they have passed this on to the President of the Family Division for next set of guidance.

### Witnesses and live evidence

- If the witnesses are being called by a represented party, the court needs to clarify in advance of the hearing whose responsibility it is to contact the witness and test their bandwidth, get them set up on Skype, etc – will the court do this or the lawyers for the represented party?
- If the party calling a witness is an LiP, the court should offer to do this for the party.
- At directions hearings when a video hearing has been decided upon, it will be very useful to order a witness template, with estimated cross-examination times for each witness, etc, to then be sent to witnesses, to help them anticipate what to expect and when.
- Advocates must meet witnesses ahead of the hearing as they would usually do for in-person proceedings – a Skype call must either be arranged by the party representatives or the court to enable this to happen.
- For anyone about to give evidence, there must be a 360 degree check of their room to ensure it is private. Witnesses can be asked to sit with the door in view so that if anyone enters, this can be addressed
- Interpreter – need to ensure sufficient breaks in speech to enable interpretation to take place as simultaneous interpretation will not be possible. This is usual for any multi-lingual

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<sup>6</sup> This is already done in standard trials in some jurisdictions, e.g. In France directly ask a question orally – judge turns and asks them once the examination has completed. Arizona uses pieces of legal paper, write question, hand to judge, show to lawyers to verify is ok, and then ask to witness. If an expert, in NSW they just ask it orally and then engage in a bit of discussion about what they mean. If a character witness, have to vet. Increases engagement from jury.

<sup>7</sup> <http://www.transparencyproject.org.uk/remoted-justice-a-family-perspective/>

conferencing and is perfectly achievable but may need more breaks in the hearing to allow for concentration span.

#### Reflections from CoP hearing:

- There were difficulties for witnesses in knowing whether or not to continue as there was cross over speaking. One advocate tried to deal with this by making it clear the question had stopped but this had limited success. (witness). Judicial introduction will need to address communication over the link

#### **Client-lawyer and inter-parties communication**

- Virtual “break-out rooms” are necessary for confidential communication away from the hearing.
- This is ideally a breakout room function within the video conferencing technology. But if this is not available, there needs to be a confirmed alternative method of communication, e.g. mobile telephone, and the opportunity to virtually breakaway [i.e. by muting and disable the video in the court hearing video connection] whilst instructions are being taken. How this will be achieved should be confirmed at the beginning of any hearing if the client and representative are not co-located.
- The communication channels between a party and anyone assisting them to understand the hearing (e.g. an interpreter or intermediary) must be checked at the start of any hearing.
- Inter-parties communication is critical to ensuring issues are narrowed at court. This should also be through breakout rooms, but if not, separate prehearing meetings should be encouraged to be set up between parties (in appropriate cases, i.e. not in LiP cases where there is any kind of domestic abuse alleged).

#### **Evaluation**

- Academic observation of the hearings is needed to monitor procedural justice
- Advocates, judges, court staff and parties (the latter, if willing) could be asked to complete surveys on their experience.

**5. No. 5 - Email**

**From:** McFarlane J (John) <John.McFarlane@gov.scot>

**Sent:** 13 July 2020 16:37

**To:** [Redacted]@gov.scot

**Cc:** [Redacted]@gov.scot ; Cabinet Secretary for Justice <CabSecJustice@gov.scot>

**Subject:** FW: Update on Counter-Terrorism and Sentencing Bill and draft letter to send to UK Government

[Redacted] – have we seen the amendment that relates to Orders for Lifelong Restrictions?  
Cab Sec might be speaking to Joanna Cherry tomorrow so grateful for any updates.

thanks

[Redacted]

**6. No. 6 - Email**

**From:** McFarlane J (John) <[John.McFarlane@gov.scot](mailto:John.McFarlane@gov.scot)>  
**Sent:** 13 July 2020 16:38  
**To:** Cabinet Secretary for Justice <[CabSecJustice@gov.scot](mailto:CabSecJustice@gov.scot)>  
**Subject:** RE: CT bill

Yes – if he can but check with him first.  
Thanks

**From:** [Redacted] **On Behalf Of** Cabinet Secretary for Justice  
**Sent:** 13 July 2020 16:32  
**To:** McFarlane J (John)  
**Subject:** RE: CT bill

He has got a busy day tomorrow with calls, 1630 or 1700 work?

**From:** McFarlane J (John) <[John.McFarlane@gov.scot](mailto:John.McFarlane@gov.scot)>  
**Sent:** 13 July 2020 16:00  
**To:** Cabinet Secretary for Justice <[CabSecJustice@gov.scot](mailto:CabSecJustice@gov.scot)>  
**Subject:** CT bill

Can you give me a slot in the diary for the Cab Sec to have a conference call with Joanna Cherry. Is there any availability tomorrow afternoon?