



Coronavirus - Bail and custody time limits protocol for protecting the rights and lives of prisoners and their families

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The time to act is now. We all have a role to play.

Drafted by Lucie Wibberley, Victoria Meads, Patrick Roche and Keir Monteith QC of the Garden Court Chambers Criminal Defence Team.

Please circulate this protocol to all of your professional contacts working within the criminal justice sector.

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This document is intended to draw your attention to the serious risks to life that prisoners face during the Covid 19 crisis and to suggest ways to reduce them. It is not intended to be a definitive statement of what needs to be done. You may have other ideas which are equally or more valid. What is certain is that action needs to be taken if lives are to be saved.

THE RISKS

1. We need to act now to protect the rights and lives of prisoners who face two immediate risks a) from the virus if they are vulnerable to it and b) from violence within a prison caused by unrest in the event that staffing levels fall due to the coronavirus epidemic. Serving prisoners are outside of the scope of the protocol we suggest below, which is intended for use by criminal defence barristers and solicitors representing remanded prisoners and for any criminal court considering bail and custody time limits during the coronavirus epidemic. However the urgent issues we raise are issues for the entire prison population and we therefore also raise concerns on behalf of serving prisoners within this section of the document and make suggestions in relation to emergency release provisions.
2. The UK has the largest prison population in Western Europe; 83,500 as of 20.3.20. Our prisons are overcrowded and dangerous. The older prison estates, some of which are Victorian, are unsanitary. They are not equipped to deal with the emerging health crisis. We have a recent history of prison riots, triggered by these overcrowded, unsanitary and unsuitable living conditions and compounded by a crisis in prison staffing.
3. The direct risk to life because of the virus is particularly acute, as for the general population, for vulnerable prisoners (over 70's, underlying health conditions, and in women's prisons, pregnant prisoners). However prisons house people whose health, and respiratory health in particular, may be severely comprised for a variety of reasons that do not obviously place them in a high risk category, most notably drug use. Therefore hidden within the prison population there may be a disproportionately high number of people with undiagnosed health vulnerabilities, relative to the general population. We do not yet know, therefore, whether mortality rates within prison populations will mirror those of the wider population. There is good reason to fear that they will at least equal, and will potentially exceed, those outside prison.
4. Any unnecessary increase, particularly within the vulnerable cohorts, of prisoners who contract the virus will add an unnecessary and avoidable strain to what is already anticipated to be an overstretched NHS. Prisoners sent out of prison for treatment require guards, thereby further depleting prison officer numbers at a critical juncture.
5. The indirect risk to lives caused by disorder in the event prison staffing levels fall as prison officers either contract the virus or self-isolate because of suspected symptoms or to protect family members is another serious risk to life, across the prison population, during the course of the coronavirus epidemic. There is a particular concern in relation to the safety of youths in this regard. Youth detention facilities have consistently in recent years been found to be unsafe places for children and youths, primarily because of the high levels of violence.
6. Defendants are presently telling us that prison officers are warning of 24/7 lock up, for however long is necessary, in the event either the virus needs to be contained within a particular establishment, or the staffing levels fall below what is required to maintain order on the wing. Locking prisoners into their cells, many of which are already over-crowded or unsanitary and often both, generates a wholly predictable risk of violence. Riots in prisons in the UK as recently as 2019 are a stark warning that many of these institutions continue to teeter on the brink. Unrest in prisons in Italy occurred after measures were brought in to restrict contact between inmates and their families, to slow the spread of the virus. It is unclear at time of writing whether UK prisons will continue to be able to facilitate legal and social visits for much longer.

7. Prisons have one safety valve to reduce pressure; reducing the number of prisoners. The numbers of prisoners can only rapidly be reduced in two ways; sending fewer people to prison, or letting more out. We advocate both as a matter of urgency.
8. Now is the time for all criminal courts to consider, in every ongoing case in which a defendant is remanded, and for every new case coming into the system, where the balance lies in the application of the Bail Act and whether an extension to Custody Time Limits should be granted. Families need support and help on the outside as never before to navigate school closures, grandparents in isolation and the difficulty in maintaining the food supply for vulnerable family members. Soon, families of defendants will experience bereavement and critical illness of relatives, because of the virus. Risks of further offending and failing to surrender will need to be re-evaluated, case by case, as the national situation changes rapidly. To comply with Articles 2 and 8, courts will need to consider on applications for bail, whether Defendants may have a role to provide support for other family members in ways that will mitigate the impact of the virus on their close relatives. We need to act proactively, not reactively, to prevent crisis situations for families and mitigate those that arise.
9. Now is the time for prisons to implement executive release (release ahead of schedule) for certain prisoners close to their release date; those that do not pose a risk to the public; those on short sentences and to give particular consideration to the safety of youths and children if they are to remain within the prison estate during this crisis. Appropriate candidates who are not a danger to the public can be managed in other ways at this time of national emergency (24 hour home detention curfew, for example) to reduce the pressure on the prison system to ensure it does not fail at this critical juncture and in doing so endanger the lives of either prisoners, or prison officers, unnecessarily. We suggest that if youths or children can be safely released (ie without risk to the public) for example under home detention curfew, they should be, as a matter of urgency. Consideration should be given to immediate release for all of those serving less than 6 month sentences and a temporary halt to the imposition of sentences of this length or less should be imposed (6 months is the maximum custodial sentence that the Magistrates Court can impose). These are prisoners who will all be released on license within 3 months (half-way point of sentence) in any event. If a prison becomes a breeding ground for coronavirus (large numbers of people in close proximity) those serving short sentences will act as a continuing source of the infection for the wider community upon release, as may prison officers entering the establishment and returning to their families on a daily basis. This is foreseeable and can be mitigated. Countries around the world have now either used, or are actively considering, similar measures to reduce prison numbers. By acting quickly and decisively the UK can limit the impact of the virus on an already dangerously overstretched prison service, in a way that does not generate an unacceptable risk to the public and reduces the health risk for the wider population.
10. Now is the time to give careful consideration to release of certain prisoners in the 'vulnerable' category (over 70, pregnant, underlying health condition) who can be further assessed for home-based isolation (enforced by tag) to protect them from the virus. Particular consideration should be given to early release of appropriate candidates within the extensive cohort of elderly prisoners who are, by age alone, in the accepted 'vulnerable' category of people susceptible to Covid-19, and - in conjunction with (very frequently) myriad underlying health conditions are elevated to the highest categories of vulnerability. Some prisoners may already be on home leave, then returning to the prison, accentuating the risk of spreading the virus into the prison population, because they cannot 'self-isolate' away from the prison (in the way a visitor can) in the event they have symptoms. Releasing those prisoners on license early would reduce that potential source of transmission to the prison population and reduce the size of the population overall. These are prisoners already deemed safe for home leave. The Criminal Justice Boards in every region, and the Parole Board, have an urgent and proactive role to play, with the Prison Service, to save lives both within the prison population, and the wider population, by limiting the potential for spread of the virus overall, and particularly to those acutely vulnerable to it.

11. Further to a legal challenge brought by Duncan Lewis Solicitors on behalf of Detention Action, we understand that the Home Office are taking fast and unprecedented action to reduce similar pressures in immigration facilities by releasing detainees. Media reports suggest 300 detainees (from a population of approximately 900) have been released (presumably bailed) in recent days.
12. The Criminal Justice System now has a clear duty under Article 2 to put its own house in order, as the NHS is doing, to prepare for what is to come. The same applies to each and every one of us who work within the system.
13. We suggest the following protocol is adopted, as a starting point, by all criminal defence practitioners, prosecutors and criminal courts, as a matter of urgency, in relation to remanded defendants.

SUGGESTED PROTOCOL FOR LAWYERS REPRESENTING REMANDED DEFENDANTS AND COURTS DEALING WITH BAIL APPLICATIONS AND CTL EXTENSIONS

Bail and CTL Extensions

Defence lawyers should immediately review, on a case by case basis, the position of each of our presently remanded clients and think again about whether any of them (if they so instruct) should in fact be making bail applications or, if there is a sentencing hearing on the horizon (and particularly so in the magistrates), what the alternatives to custody are. What are the foreseeable risks for any given defendant remanded beyond Custody Time Limits? What are their personal circumstances? Are they in the vulnerable category? Do they have family members on the outside who now need help because vulnerable / self-isolating? Are there avoidable risks to family members on the outside that can be mitigated, safely, by release of a defendant on a stringent bail package? There should be no assumption that in the coming weeks and months prisons will be able to continue to facilitate social visits. The impact on remanded and serving prisoners, particularly those with mental vulnerabilities, when and if social visits are stopped, cannot be overstated, nor the impact on the maintenance of good order across the prison estate.

Procedure for urgent applications concerned with liberty in the event a court building closes

Every Resident Judge at every Crown Court, and the lead District Judge at every Magistrates Court Centre and Youth Court, is required to put in place an emergency protocol for use in the event the court building is closed (basically, what phone number do we then use for hearings that must take place because it concerns bail or a CTL) and to circulate that protocol to the Bar with immediate effect.

If a court centre were to close its doors for a week, or a matter of days, because it has inadequate staffing (for example) how would an urgent bail application take place? (eg my mum's in hospital/ she has died, I need to organise the funeral, no one else can, my pregnant partner is in isolation, there is no one to care for the kids...) How would we contact the allocated duty judge? What phone number should we use? We cannot wait to see what happens, then react. Where liberty is concerned, a line of communication must remain open. Identify all of your remanded clients now, consider their personal position, contact the court your case is at, find out what their procedure will be in the event they have to close their doors in the coming weeks, even for a matter of days and don't take no for an answer. Remote hearings in these scenarios, can work (we all have phones). But only if the procedures are prepared and understood by all, now. Although courts do not ordinarily depart from the principle of public justice, applications and hearings concerned with liberty MUST continue, even in the event court buildings close.

Prison Visits and Client Conferences

Think about a scenario where a prison cannot facilitate visits. How are we going to access clients and how will they tell us what is going on? If they have a landline in their cell, as some do, the practical solution may be they call their solicitor, we arrange a conference call with solicitor and client, and where possible advise over the phone. In some cases that would be a wholly inappropriate substitute for a face to face con, and we shouldn't settle on their behalf for second rate justice (particularly so if the cell is shared, legal privilege would not be protected). In other cases, it may simply become necessary, where instructions are required quickly (urgent bail application) subject to further and appropriate guarantees that such calls are not recorded by the prison.

However, phone calls can cost client's money (we understand up to around £2 for 10 minutes). Legal conferences over the phone may be too expensive for all prisoners to finance and they would not ordinarily be expected to do so.

Prison Governors, with Government support, could waive with immediate effect the cost of phone calls for any prisoner, to ensure family and legal communication remains as effective as it can in the wholly foreseeable event face to face visits stop or are disrupted. In the event of 24/7 lock up, for prisoners without phones in their cells, distributing mobile phones, suitably restricted in scope, may be the only practical solution. The more lines of communication can remain open, the less likely disruption and protest will be in the event face to face visits cease.

Remote Hearings

The MOJ are putting a huge amount of emphasis on remote hearings as a safe alternative to lawyers attending at court. Remote hearings involving defendants only work in the event the defendant can participate, not just at the hearing, but in conference with their lawyer before and after the hearing for advice and instructions. In the event a prison enters lock down, movement of prisoners stops, including to the video link room. In any event, one prisoner after another using the video link room, if they have coronavirus or it has become widespread within an establishment, carries an obvious risk of simply spreading the virus further. Lawyers self isolating at home, or unable to enter court buildings/ chambers building because they are closed, or because we are being encouraged wherever possible to work remotely to comply with PHE guidance to limit the spread of the virus, cannot link to prison video link facilities in any event. Provision of remote access from cells (laptop/ tablet, which can then be disinfected after use) for the purpose of legal/ family communication for a specified period of time (for example via Business Skype/Skype) on suitably limited devices is possible and can be achieved quickly. It may have been unthinkable a matter of weeks ago. The world has now changed.

Sanitation in Prisons

We are presently demanding as a profession that courts provide us with the basics, hand wash and so forth, to comply with PHE directions in the event we continue to be required to attend at court for some hearings. However our clients are in prisons where not every prisoner has access to disinfectant for cells or sanitary conditions to wash their hands. Concerns have repeatedly been identified in HM Inspectorate reports in recent times concerning grotesquely insufficient basic hygiene conditions across the prison estate. This now needs to be addressed and prioritised within prisons as matter of urgency. There is an on-going and obvious lack of PPE for prison and health care staff; let alone for prisoners. This raises the level of risk not just for people working in and living in prisons, but across the prison estate; to visitors, lawyers, and therefore in turn, to the wider community. Prisons are not, and never can be, even if 'locked down', closed communities; prison officers will still need to come and go. Poor sanitation in prisons already places prisoners and prison officers at risk, coronavirus extends to that risk to the wider community.

We all have a role to play in seeking information from clients and making that information public, about the conditions pertaining within all prison establishments at this juncture, to prevent them from becoming institutionalised coronavirus epidemics in their own right.

Our Duty

It would be unconscionable if we, as a profession, judges, barristers and solicitors combined, waited until a prison gets into crisis and then shouted that something should have been done about it. We enter these establishments regularly. We know the risks already prevalent, both of violence, and to health, better than most. We must use our collective voice as a matter of urgency to influence Judges at every level; Magistrates, Resident Judges, the Senior Judiciary, Prison Governors and Policy makers. We can and we must relieve the pressure on our prisons in an effort to maintain safe conditions for those detained and working within them during the coronavirus epidemic.

The time to act is now. We all have a role to play. Please circulate this protocol to all of your professional contacts working within the criminal justice sector.

Lucie Wibberley, Victoria Meads, Patrick Roche, Keir Monteith QC
Garden Court Chambers Crime Team
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Garden Court Chambers
57-60 Lincoln's Inn Fields
London, WC2A 3LJ

