Written evidence submitted by the Magistrates' Association (PCB 13)

MA briefing on the Prisons and Courts Bill: Public Bill Committee

1. The MA is a national charity governed by its members with a mission to provide a voice for magistrates, support its members in administering the law and educate people on the role of the magistracy in England and Wales. Magistrates in England and Wales deal with over 90% of criminal cases and make up 85% of all judicial office holders: the MA promotes their work, the interests of justice and the sound administration of the law.

2. Each section of this briefing summarises the most relevant provisions of this part of the Bill before giving the MA's position. We have also included some suggested amendments and identified clauses about which the MA have particularly grave concerns.

Clauses 23-30 and Schedule 3: Conducting preliminary proceedings in writing: criminal courts

Summary of provisions

3. Clauses 23-29 deal with creating a new terminology of a 'written information procedure'. In practice, this significantly increases the share of proceedings which can be carried out in the defendant's absence if s/he agrees. This is done by requiring Criminal Procedure Rules to provide for allowing people to give specified information in writing and for how the court can use this information. This can only be done in connection with managing criminal proceedings.

4. This covers:

- giving a written indication of plea (but not actually pleading)
- allowing mode of trial decisions to be taken in the defendant's absence by consent
- allowing the right of election in low-value shoplifting to be exercised or not via the written procedure
- notifying a person that a case is required to be sent to the Crown Court (in this case, the court proceeds to do this forthwith)

Schedule 3 makes comparable provision for children and young people.

MA position

5. The MA welcomes the potential for increasing efficiency via greater use of the written information procedure where defendants are aware of the implications and proper support is available to those who need it, especially where the decision is routine (such as sending indictable-only cases to the Crown Court). It is important to note that that even if these decisions (specifically mode of trial decisions) are not taken in open court, they remain judicial decisions, made on the basis of submissions and argument.

6. **The MA believes that the operation of these clauses will depend critically on the support available to access these different channels.** This means there must be consistency of advice or support via all the different channels, as well as consistency of outcome for people interacting in different ways. Similarly, there must be a process of appeal if in any cases the written procedure has an impact on the outcome. Another potential area of concern is ensuring confidentiality for any personal information shared via the proposed channels.

MA position: preliminary proceedings in writing for children and young people

7. **The MA believes that preliminary proceedings in writing for children and young people could only be appropriate with the most robust safeguarding measures.** In the case of children and young people, vulnerability can be assumed due to their age and the corresponding cognitive development and emotional maturity. While HMCTS have indicated that safeguarding measures will be put in place, the quality and reach of these will be instrumental in ensuring that these mechanisms and processes are suitable for children and young people. One might question how far safeguarding measures could alleviate these concerns.

8. While the Bill outlines that the court **may** or shall ascertain whether a child or young person's parent or guardian is aware that the written proceedings are taking place/that a written indication has been given, and provide information about the written proceedings to that person if he or she is not aware of them, the MA cannot conceive of a situation when this would not be necessary. It should also be noted that no assumption can be made that a parent or guardian will be able to understand the situation in order to adequately support or advise the child or young person. Legal advice would also be necessary in these cases.

9. The MA would have equal concerns regarding the power to proceed where the accused is absent, as children and young people will have specific communication needs which may not have been adequately met so as to justify proceedings continuing without their presence. Furthermore, such a process would present difficulties in ensuring accessible communication and understanding of any decisions going forward. The indication of plea in cases covered by Schedule 3 matters, because it can have an impact on whether a case is kept in the youth courts or sent to the Crown Court. It is therefore vital that the court knows the young person understands the implications of his or her indication of plea, which means this should be done in person. Allocation decisions should be taken in person for the same reasons. It is worth noting here that Parliament has decided the youth courts are the appropriate venue for a young defendant to be tried, apart from the gravest of crimes – which is why it recently legislated to allow the youth courts to send cases to the Crown Court for sentence following trial if their sentencing powers were deemed inadequate.

Suggested amendments

10. At present, the MA is not clear that sufficiently robust safeguards are in place for children and young people and **would urge the Public Bill Committee to vote against Clause 30 (which gives effect to Schedule 3) and Schedule 3 standing part of the Bill**.

Clause 31: Conduct of criminal proceedings on the papers

Summary of provisions

11. This clause allows the Lord Chancellor to make provision to enable or facilitate the making of preliminary or enforcement decisions on the basis of documents before the court. These regulations can include amending, repealing or revoking any provision of an Act or any provision made under an Act. The Lord Chief Justice must concur with regulations made, and they are subject to the affirmative resolution procedure.

12. Enforcement decisions are defined as decisions relating to the collection, discharge, satisfaction or enforcement of a sum imposed on conviction by a criminal court, a financial penalty enforceable in accordance with 85(6) and (7) of the Criminal Justice and Immigration Act 2008 (relating to penalties imposed by other EU member states).

13. Preliminary decisions are defined as any decision in the course of criminal proceedings to be made before the start of the trial, but excluding acceptance by the court of a guilty plea.

MA position

14. **The MA would emphasise that case management decisions are judicial decisions, not administrative ones.** They are fundamental to the right to fair trial and to ensuring a fair and effective process for all parties. It is therefore vital that the relevant information is available to the judiciary in a) deciding whether a hearing is needed or a decision can be made on the papers and b) making the actual preliminary or enforcement decision. This may require the court seeking further information in some cases. It is worth noting that a majority of the 448 MA members who responded to our online survey in October/November 2016 felt that taking more decisions on the papers with a single justice would reduce transparency and public confidence.[1] This is clearly a broad statement, but it does highlight the need to take care to ensure that these proposals are taken forward with care.

15. **The MA agrees that some efficiencies can be made in this area, but all interested parties must be offered a full and meaningful opportunity to present evidence. The fair participation of defendants is critical – the court must be able to respond to individual circumstances to ensure no miscarriages of justice or situations where a convicted offender is set up to fail.** With enforcement decisions, for instance, there is a danger that the non-payment of fines can escalate where early intervention and an appropriate, timely response could resolve matters early on. The court must be able to decide a full hearing is necessary where appropriate. It is worth noting that some of the most important decisions in these proceedings will relate to vulnerable people, including ensuring fair participation for vulnerable defendants – in deciding the need for special measures in trials, for instance. It is crucial that the detailed rules, if no further detail is included on the face of the Bill, must be fully scrutinised by Parliament.

Suggested amendments

16. The MA would suggest the following amendment to **preserve judicial discretion in dealing with cases on the papers**:

> Clause 31, page 32, line 31, at end insert–
>
> "( ) Provision may not be made in regulations under this section to remove the discretion of the court to decide whether it is in the interests of justice to make preliminary decisions or enforcement decisions on the basis of documents before the court."

Clauses 32-34: Audio and video technology in criminal courts, and public participation

Summary of provisions

17. These clauses give effect to Schedules 4-6 of the Bill.

18. Schedules 4 and 5, relating to the Criminal Justice Act 2003 and the Crime and Disorder Act 1998 respectively, permit a person (as opposed to a witness apart from the defendant, as at present) to take part in eligible court proceedings through video or audio link if so directed by the court. As they relate to magistrates' courts, these are:

- trials (both summary and on indictment)

[1] Data available on request.

- appeals, including preliminary and incidental hearings
- hearings before a magistrates' court or the Crown Court after the defendant has pleaded guilty
- hospital or guardianship orders under the Mental Health Act 1983
- remands by magistrates' courts for medical examination
- appeals to the Crown Court against bail decisions.
- any hearings following conviction for the purpose of deciding about bail in respect of the person convicted
- preliminary hearings in the course of proceedings for an offence where the defendant is being held in custody
- sentencing hearings in the course of proceedings for an offence where the defendant is being held in custody
- enforcement hearings.

19. The court must be satisfied that it is in the interests of justice to issue such a direction, and the parties and (for those aged under 18) youth offending team must be able to make representations. The same requirements apply to rescinding a direction.

20. The court will be required to give its reasons for not conducting all the proceedings via audio or video link and, as regards each person, reasons for not asking them to take part via audio or video link (or for rescinding any live link direction). A court composed of a single justice may discharge these functions.

21. A court may not refuse or revoke bail for a person at an eligible proceeding if anyone participates via live audio link other than for the purpose of giving evidence and the person subject to bail objects to any refusal or revocation, unless the general right to bail does not apply. A person cannot be dealt with for contempt of court via live audio link except for the purposes of giving evidence.

22. However, new schedules to the Criminal Justice Act 2003 and Crime and Disorder Act 1998 (also inserted) will impose some restrictions on when proceedings can be conducted wholly as audio or video proceedings. For audio, the conditions relevant to magistrates are as follows:

- proceedings are preliminary or incidental to an appeal to the Crown Court arising from a summary trial
- proceedings are preliminary or incidental to an appeal against summary convictions referred by the Criminal Cases Review Commission to the Crown Court
- proceedings are a hearing following conviction for deciding whether to impose or vary bail conditions
- proceedings are a hearing following conviction for deciding whether to grant or refuse bail and either the general right to bail does not apply or the decision is not disputed.

23. No defendant can take part in proceedings through live audio link for the purpose of giving evidence, for a sentencing hearing or in a hearing which does not meet the conditions set out above for proceedings to be carried out wholly by audio hearing. No other person can do so unless there are no suitable arrangements for live video link and both parties agree (and apart from preliminary and incidental hearings, this can only be done for the purpose of giving evidence).

24. For video, the conditions relevant to magistrates are as follows:

- an appeal to the Crown Court against sentence only in the magistrates' court
- an appeal to the Crown Court arising out of a summary trial itself conducted wholly via video proceedings where both parties agree

- proceedings are preliminary or incidental to an appeal to the Crown Court arising from a summary trial
- proceedings are preliminary or incidental to an appeal against summary convictions referred by the Criminal Cases Review Commission to the Crown Court
- proceedings are a hearing following conviction to decide about bail
- a summary trial where a written procedure notice has been served on the defendant, the case is not being dealt with via the single justice procedure and both parties agree
- varying or rescinding magistrates' court sentences.

25. Parallel provisions are made for sentencing hearings, disputed bail hearings and preliminary hearings in Schedule 5. Schedule 6 makes provision to allow the court to broadcast proceedings to allow the public to see and view proceedings and may direct an audiovisual or audio record to be kept. It will be an offence to make or attempt to make an unauthorised recording or transmission.

MA position: general

26. **The MA does not believe that video link and audio link should be included in the same clauses or, as in several cases, treated as interchangeable in the way that they are in the Bill.** They are, in fact, fundamentally different processes, and it should be emphasised as strongly as possible that circumstances where video link may be appropriate will very frequently not be ones where audio link is in any way acceptable. We note that, of the 448 members surveyed by the MA and responding,[2] 50% felt an increase in virtual hearings would reduce public confidence. This suggests mixed views overall, but strengthens the case for proceeding with caution.

MA position: video link

27. **The MA recognises that the use of a reliable video link could increase efficiency, but this must be balanced with ensuring the principle of fair and effective justice.** Access to justice and the ability for defendants to participate fully in the court process are both paramount. Extensions of virtual hearings must be considered in response to particular cases, 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.

28. **The MA does not support extending wholly virtual hearings to any trials and is concerned that, contrary to previously stated intentions, the Bill extends these to some summary trials.** It does not support the extension of live link to:

- most decisions involving vulnerable people (see below for the MA's position on children and young people)
- remand decisions
- sentencing.

29. **The MA believes that contested bail applications should be held with the defendant in person.** Bail applications can involve restricting a person's liberty where s/he has not generally been convicted of a relevant offence. 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.

[2] Data available on request.

30. **Similarly, the MA opposes dealing with sentencing hearings via live link.** Like trials, decisions are made by the court after argument. The question of what judgment it makes about the evidence it hears at that stage is crucial. The right of the defendant to effective participation, and full access to their advocate, in the courtroom remains vital at this stage. It is also important to note that understanding why a sentence has been given and what it entails is closely linked to compliance with that sentence.

31. **Where virtual hearings are used, these must always be considered on a case-by-case basis and at the discretion of the court. The requirement that the court must justify *not* using video or audio link is damaging in this respect, as it establishes a presumption that this is appropriate in most cases, meaning that the court could only diverge in unusual circumstances.** However, we welcome the fact that the court will retain discretion. 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. There are several questions around the security of the lines, identifying parties and whether parties can see each other which need to be addressed. The MA would note that reports from liaison and diversion services will be crucial in assessing whether it is appropriate for video link is appropriate for defendants with learning disabilities or communication difficulties, in particular.

32. **The MA recognises the role live link can play in allowing vulnerable witnesses and defendants to give evidence and has no wish to narrow the court's ability to order live link for these groups.** However, the MA believes the choice must also lie with the witness and cannot be removed for reasons of efficiency or resource: it must never be presumed that witnesses will not want to attend. They must be offered in-person attendance, with appropriate support, if that is their preference.

MA position: audio link

33. **It is particularly important to exercise great care in the use of telephone conferencing.** In particular, it is never appropriate for evidence to be given via audio link: this method is incompatible with the court's fundamental role of assessing the validity and accuracy of testimony. Audio link should only be used for the most uncontentious and routine of administrative proceedings.

34. There is a significant potential for miscommunication if audio link is used – for instance, if the link temporarily went down, a party might not even be aware they missed something in the process. It is important to recognise that there will be cases where, even if video link is appropriate, telephone conferencing is not. A brief opportunity to appeal on the basis of misunderstandings or failure in communication systems should also be given consideration.

35. An additional option would be for audio-only proceedings to have to be agreed as an option for the court to consider in writing by all parties before the court makes its decision. The decision remains a judicial one, irrespective of agreement between the parties.

MA position: video link for children and young people

36. Schedule 4 makes it clear that there cannot be a direction for a hearing to take place via video link where the defendant was under 18 at the time of the offence unless the relevant youth offending team has been given the opportunity to make representations. **This safeguard is welcome, but we would also want to emphasise the safeguards contained in Criminal Practice Directions, which highlight that it will usually be appropriate for a youth to be produced in person at court to facilitate proper engagement.** The court should deal with any application for use of a live link on a case-by-case basis, after consultation with the parties and the Youth Offending Team and it rarely will be appropriate for a youth to be sentenced over a live link. Arrangements must be made in advance of any live link hearing to enable the youth offending worker to be at the secure establishment where

the youth is in custody – or they must have sufficient access to the youth via the live link booth before and after the hearing.

37. **The MA would also draw attention to the principle that the judicial office holder should retain ultimate discretion over this decision.** As stated in the Criminal Practice Directions, it is usually appropriate for a child or young person to appear in person and it will rarely be appropriate to sentence him or her via live link. This must never be used for efficiency or resource concerns but only if it is decided it is in the best interests of the child.

MA position: audio link for children and young people

38. **The MA cannot conceive of a situation where it would ever be appropriate for a child or young person to participate in a hearing via audio link only. No under-18 should be required to do this in any circumstances.** Developmentally, communication with children and young people can be challenging within legal hearings and audio only participation would leave judges unable to ensure that the child or young person was fully understanding the process.

MA position: transparency

39. **While the question of transparency of court proceedings is clearly important, there are also several questions around security in transmitting proceedings which need to be addressed.** The MA believes that further information about how this could operate practically and how different parts of, for instance, a proceeding with multiple parties could be transmitted is required. It is unclear how courts would readily put the infrastructure in place for the public to be able to watch such proceedings on entry.

40. **The MA is unclear why audio or video link court proceedings should be recorded (as opposed to transmitted) when in-person proceedings are not: the magistrates' courts are not courts of record and this introduces an inconsistency.** This ties into a wider MA concern regarding the Government's stated intention of publishing results of virtual proceedings (and, for that matter, single justice proceedings): it creates an inconsistency between those tried for and convicted of more serious offences, whose convictions would not be routinely published. Further, such an approach would violate the requirements of the Rehabilitation of Offenders Act and potentially impact on offenders long after a conviction became spent. This is not a proportionate or appropriate way to address concerns about transparency.

Suggested amendments

41. The MA is suggesting amendments to **remove provision for defendants or other witnesses giving evidence via audio link** (via amendments to Schedules 4 and 5), **remove provision for any trials to be conducted wholly as video proceedings** (via amendments to Schedule 4) and **remove provision for any bail hearings to be heard wholly as audio proceedings** (via amendments to Schedule 4).

> *Schedules 4 and 5 – removing provisions for allowing the giving of evidence via audio link:*
>
> Schedule 4, page 79, line 7, leave out from 'proceedings' to 'through' in line 8.
> Schedule 4, page 79, line 14, leave out from 'part' to 'through' in line 15.
> ➔ *These amendments are consequential and remove references in passing to giving evidence via audio or video link.*

Schedule 4, page 83, line 27, leave out from 'evidence' to '.' in line 31.

➔ *This amendment removes references to giving evidence via audio link in certain preliminary and incidental hearings which would be inserted into the Criminal Justice Act 2003.*

Schedule 5, page 94, line 15, leave out from 'evidence' to '.' in line 19.

➔ *This amendment removes references to giving evidence via audio link in certain preliminary hearings which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 94, line 33, leave out from 'link' to '.' in line 38.

➔ *This amendment removes references to giving evidence via audio link in disputed bail hearings which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 95, line 8, leave out from 'link' to '.' in line 14.

➔ *This amendment removes references to giving evidence via audio link in fitness to plead proceedings which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 95, line 25, leave out from 'link' to '.' in line 31.

➔ *This amendment removes references to giving evidence via audio link in disputed bail hearings which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 95, line 38, leave out from 'link' to '.' in page 96, line 2.

➔ *This amendment removes references to giving evidence via audio link in accepting a guilty plea which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 96, line 17, leave out from 'link' to '.' in line 23.

➔ *This amendment removes references to giving evidence via audio link in sentencing hearings which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 97, line 3, leave out from 'evidence' to '.' in line 7.

➔ *This amendment removes references to giving evidence via audio link in enforcement hearings which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 97, line 24, leave out from 'evidence' to '.' in line 29.

➔ *This amendment removes references to giving evidence via audio link in enforcement hearings where the court is minded to impose detention or imprisonment which would be inserted into the Crime and Disorder Act 1998.*

Schedule 5, page 97, line 37, leave out from 'evidence' to '.' in line 43.

➔ *This amendment removes references to giving evidence via audio link in contempt of court hearings which would be inserted into the Crime and Disorder Act 1998.*

Schedule 4 – removing provisions for conducting certain proceedings wholly as audio or video proceedings:

Schedule 4, page 82, line 7, leave out subsections (6) and (7).

➔ *This amendment removes references to conducting proceedings wholly as audio hearings for bail hearings to impose or vary convictions, and for certain hearings on granting or refusing bail, following conviction, which would be inserted into the Criminal Justice Act 2003.*

Schedule 4, page 83, line 9, leave out subsection (8).

➔ *This amendment removes references to conducting proceedings wholly as video hearings certain summary trials which would be inserted into the Criminal Justice Act 2003.*

Clauses 35-36: Automatic online conviction and standard statutory penalty

Summary of provisions

42. These clauses cover the creation of a new automatic online conviction process, where a defendant who pleads guilty and agrees to be dealt with under this process would be convicted automatically and sentenced automatically. This would be applicable to such summary-only, non-imprisonable offences as specified in a statutory instrument by the Secretary of State, which would have to be approved by both houses of Parliament. Fines, compensation, costs, surcharges and (where relevant) driving endorsements could be included here. These would be fixed by order for different classes of offence and, potentially, different circumstances for the same offence. They would be specified in statutory instrument under the negative resolution procedure.

43. Schedule 7 makes consequential amendments.

MA position

44. **The MA fundamentally disagrees with the proposal to create an administrative tier of automated process for certain offences as an infringement on the discretion afforded to judicial office holders to make transparent and equitable decisions.** Judicial office holders have the duty to respond to the specific details of a particular case to ensure the fair administration of justice. Any process which does not involve a decision maker with such a duty to uphold the fair administration of justice risks undermining the fundamental principles our criminal justice system is built on. The MA is concerned that these proposals are not framed within established rule of law principles. Specifically the principles of transparency and independence:

- Transparency requires an open justice system: justice "must be seen to be done".
- Independence requires the important role of decision making to be taken by an independent and unbiased judiciary.

45. It is a core principle of our justice system that decisions are carried out transparently, so that everyone has the opportunity to see for themselves that a judgment was reached in a fair and understandable way. It is unclear how the principle of transparency can be assured via an online, automated system while ensuring proportionality. The criminal justice system demands that, in order that each case be dealt with appropriately, a defendant must be treated as an individual and all relevant details be taken into consideration. **It is not possible for an automated system to respond to cases in this manner.** This is why an independent decision maker must be involved at some point before a criminal case is resolved.

46. It is important to note that the Bill as drafted would allow the Secretary of State to specify different levels of penalty for the same offence depending on (inevitably subjectively determined) individual circumstances. **If clear criteria for imposing different levels of penalty for the same offence are not**

set out by the Secretary of State (and approved by Parliament), this effectively leaves the *definition* of different levels of offence – almost tantamount to the definition of different offences – in the hands of prosecutors. If, for instance, different categories are simply specified as 'serious' or 'aggravated' forms of an offence, the discretion afforded to prosecutors in what constitutes a 'serious' form would be almost unfettered. Given that the automated process would remove any flexibility around sentences, charging decisions will assume much higher importance.

47. This is inappropriate in principle and poses fundamental problems. **These different categories would presumably be 'either/or': there will be no scope for gradation of the penalty in borderline or difficult cases, where offending behaviour is on the cusp of two levels of seriousness.** This is exactly the kind of situation where an independent judiciary can balance aggravating and mitigating factors and deliver an appropriate sentence. An automated procedure can do no such thing.

48. **The MA is therefore concerned that the proposals could impact on perceptions of the legitimacy of the criminal justice system.** Anything which undermines the legitimacy of the system is, in and of itself, very dangerous but extensive research has also shown that if people perceive the system to be less legitimate, public confidence in and compliance with the system also reduces. It has been shown that pre-existing expectations of what a process should look like impacts on perceptions of fairness; therefore it is possible that a shift from legal hearings being dealt with by the judiciary in open court to automated processes may be unpalatable for many people. It is worth noting that, when surveyed by the MA, 65% of the 448 members who responded felt an automated process would impact negatively on public confidence, while 59% felt it would impact negatively on transparency.[3]

49. **The MA would point out that it seems perverse that the automated procedure would effectively involve less responsiveness to individual circumstances than is currently available with out of court disposals (OCDs).** OCDs or community resolution schemes are aimed at diverting people from re-offending at the earliest stage possible. They respond to the least serious crimes carried out by first-time offenders, but individual officers (within a framework with senior officers providing oversight and usually independent scrutiny of decisions via scrutiny panels) can respond to the specific factors of a case to decide an appropriate and proportionate outcome. An automated process for cases either deemed too serious for police intervention or involving repeat offenders loses that flexibility ensuring cases are dealt with in a manner that takes account of all relevant aspects of the specific situation, which is a fundamental part of a fair justice system.

50. The Bill would in principle allow the Secretary of State to specify the same class of offences which he or she can specify as eligible for the single justice procedure. **The MA would point out that offences subject to an automated procedure should surely be less serious than those which still have to be dealt with by the independent judiciary, albeit by one magistrate rather than a bench.** Further, summary offences can still have a major impact on victims and communities, as well as defendants: criminal records can have long-term impacts, and being disqualified from driving can cause significant hardship. The process should not be simplified to the point where individuals do not fully realise its seriousness.

51. **The MA would specifically point out that in its consultation paper, HMCTS stated that this process would be restricted to cases without an identifiable victim.** We note that no such restriction is placed on the face of the Bill and, indeed, that provision is made for compensation to be awarded as part of this process. It is hard to understand who would be compensated if no victim can be identified, which seems at clear variance with the originally stated policy intent. We would welcome clarification on this point.

[3] Data available on request.

52. **The judiciary are independent decision-makers within the CJS, trusted to make unbiased decisions, and to decide punishment without their input could allow miscarriages of justice.** Although the provision for a court to be able to set convictions and penalties aside is welcome, it is vital for a justice system in a democratic society to minimise potential miscarriages in the first place. The judicial role in deciding criminal cases is a vital safeguard in guaranteeing a fair process and should not be removed from any of these cases. The MA appreciates that there is provision for a magistrates' court to set aside convictions or penalties, but an appeal process is not a substitute for a fair, robust process. **Appeals should be exceptional; they should not be required to serve as the main safeguard in place.** In particular, any suggestion that appeal is the appropriate policy response to the problem that a vulnerable defendant might realise later on that they were engaging in an automated process which they did not understand at the time is unacceptable.

53. **In any event, the MA would query why it is deemed necessary to introduce an automated process before the single justice procedure has been fully rolled out and evaluated to assess its efficiency and effectiveness.** The stated aim of legislating to allow certain cases to be dealt with on the papers by a single justice was to provide a more efficient system. Similarly, digital working throughout the courts system has only recently been introduced; until it has been established what efficiencies will be provided by a digitised court system where some cases are dealt with by a single justice on the papers, it cannot be known whether it is necessary for fundamental changes to the system to be made.

54. **The MA notes the high proportion of defendants who are dealt with in magistrates' courts who have identified vulnerabilities, including learning disabilities, low literacy rates and substance abuse problems.** It is therefore particularly concerning that automated processes are being considered for this cohort. Under no circumstance should any automated process be introduced until a solution has been found on how to ensure those who are unable or unwilling to use digital processes are not disproportionately affected with detrimental outcomes.

55. **If an automated process is introduced, then support and advice will be absolutely crucial.** There are concerns that have to be addressed in relation to all the proposed channels for communication which have been cited by HMCTS; ensuring any support is fair and effective must be a priority. The MA would suggest there should be systemic scrutiny of any agency or individual who provides support or advice to ensure they are held to account. In addition, there must be a process by which someone who is provided with wrong or inaccurate advice can challenge a resulting outcome so that any negative impacts can be removed.

56. **The MA would be wholly opposed to any idea of providing incentives to participate in an automated process rather than a trial process with judicial oversight.** It would be impossible to ensure fair outcomes as between different defendants in such circumstances.

57. **Lastly, the MA would suggest that the very real risk of unfair outcomes demands that any introduction of automated processes be done very slowly and carefully.** The danger of any impingement of the fair administration of justice is of such importance that any system should be trialled extensively before any thought of piloting with real cases.

Suggested amendments

58. The MA fundamentally disagrees with these clauses in principle and in practice. **We would urge the Public Bill Committee to vote against Clauses 35 and 36 and Schedule 7 standing part of the Bill.**

Clauses 37-45: Online procedure: the civil and family courts and the tribunals

Summary of provisions

59. Clauses 37 to 45 of the Bill provide for a variety of procedures relating to the making and amending of online procedure rules which require parties to civil, family or tribunal proceedings to use the online procedure. Of the three types of proceeding identified, only family proceedings fall within the remit of the MA.

60. The rules may provide for all or any part of the procedure to be conducted online, with provisions to allow complex cases to be transferred out of the online procedure to the appropriate court or tribunal. Clause 38 provides a non-exhaustive list of the factors by reference to which proceedings may be specified as coming within the scope of the online procedure, including the legal basis of the proceedings (for example, a breach of contract) and the factual basis of the proceedings (for example, a money claim), and the value of any claim within the proceedings.

MA position

61. **The concerns raised by the MA in relation to other clauses in the Bill covering online procedures similarly apply here.** It has often been emphasised that family law cases are complex and require human insight and understanding, the opportunity for which being significantly reduced under an online procedure. Quite aside from this, the family courts are all too familiar with the issues caused by parties to family proceedings having insufficient legal support, and this is only likely to increase if cases are being conducted online.

62. The Bill and the explanatory notes do not make it clear which family law proceedings specifically have the potential to be brought online - however, factors to consider include: (a) the legal basis of the proceedings; (b) the factual basis of the proceedings; (c) the value of the matter in issue in the proceedings; (d) the court or tribunal in which the proceedings are to be brought or continued. Without further framework, it is not possible to predict how each matter will be assessed against these factors.

Clause 46: Powers to remit proceedings to another court

Summary of provisions

63. This clause inserts a new Section 46ZA into the Senior Courts Act 1981. It allows the Crown Court to:

- send cases back to the magistrates' courts where a person has been sent to the Crown Court for trial
- send cases where a person has been committed for sentence back to the magistrates' courts
- send cases where a person has been sent to the Crown Court for trial and pleaded guilty to the magistrates' courts for sentence.

64. The Crown Court must be satisfied that the magistrates' courts would have power to impose an adequate sentence within their powers. In the case of an either-way offence being sent for trial, the defendant (if aged over 18) must also consent to this power being exercised, either in person or consenting for the power to be exercised in his/her absence. The Crown Court must also take into account any other offence before the Crown Court that is related to the offence being considered (whether involving the same defendant or a different one). If the Crown Court has power to send the case back for a person aged under 18 and decides not to, it must give reasons.

MA position

65. **The MA, while holding no fixed position on this clause, would argue that the best way to ensure cases are kept in the magistrates' courts would be to commence sections 154-5 of the Criminal Justice Act 2003 and extend their jurisdiction.** There is no evidence to suggest that magistrates are unduly punitive or inclined to send cases within their powers: the MA's research showed that where cases were committed for sentence, but sentenced by the Crown Court within magistrates' powers, legal provisions or further information at the Crown Court hearing almost always explained this.

66. There is a real danger that time and money will be wasted by cases being sent to the Crown Court, only to be returned to the magistrates' courts. Efficiencies will only be maximised if unnecessary cases are retained in the magistrates' courts in the first place.

Clause 47: Prohibition of cross-examination in family proceedings

Summary of provisions

67. The provisions contained within clause 47 prohibit cross-examination by perpetrators convicted or charged with unspent offences (which are to be specified in regulations) against the victim. This is also extended to those subject to an "on-notice" injunction whilst the injunction is in force. Clause 47 also allows the court to make a direction prohibiting cross-examination in other circumstances (i.e. where the quality of the evidence would be diminished or where it would cause significant distress).

68. The court must consider whether there is an alternative means for the witness to be cross-examined or for the relevant evidence to be otherwise obtained. The party in question may instruct their own lawyer, but if not then the court must consider whether it is in the interest of justice for the court to appoint a lawyer to represent the interests of (but not be responsible to) the party in cross-examination.

MA position

69. **Similar provision already exists in the criminal courts, and the MA has long called for these powers to be available in Family Court - so we warmly welcome this clause.** It will protect vulnerable individuals in the Family Court, while requiring the court to appoint legal representation where cross-examination is required. It is important that the judiciary have adequate training and guidance to support any decisions to be made under these clauses. It will also be important to identify appropriate offences under this clause carefully – cases where actual bodily harm was charged, but without a clear indicator that the charge constituted domestic abuse, would be a good example of an area where protection might not be ensured. We hope this will be considered and, if needs be, clarified. It is also worth noting the context of wider reductions to legal aid, which is key to the current need for this clause.

Clauses 50-51: Court and tribunal staff: legal advice and judicial functions and abolition of local justice areas

Summary of provisions

70. These clauses give effect to Schedules 11 and 12 in the Bill.

71. Schedule 11 removes reference to the role of justices' clerk from statute. Their role is limited by Part 2 of the Courts Act 2003 to the work of magistrates. In order to broaden the role of these lawyers to provide leadership across all jurisdictions, the Government states it is removing this role from statute, but not function.

72. Clause 51 abolishes local justice areas. Schedule 12 effects the abolition of local justice areas, allowing magistrates' courts to transfer cases from one court to another at any time without requiring physical attendance at the original court, and makes consequential amendments in a large number of areas. Court business will be able to be conducted by any court in England and Wales.

MA position

73. **The MA does not support the removal of justices' clerks' duties from statute.** We believe that ensuring named positions are responsible in statute for duties currently carried out by clerks remains a necessary safeguard. However, the MA makes no comment on the individual role of justices' clerk in and of itself.

74. **The MA is concerned that changes to local justice areas, leadership structures for magistrates and legal advisers must be carried out not just following full and open consultation, but also ultimately in conjunction with each other.** It could be damaging if changes were made in a piecemeal way without full consideration of the impact of other reforms. Losing magistrates' bench structures could, without proper replacements involving magistrates, also damage magistrates' sense of belonging to a collegiate group. Magistrates are concerned that strategic changes are being introduced without their having sight of the whole picture.

75. It is also important to note that, as with court closures, increased flexibility from removing LJAs could well have an impact on magistrates' travel times and where they are expected to sit. It will be important to ensure that magistrates are not expected to travel for unrealistically long periods of time or to make onerous journeys, or to face other unreasonable challenges, simply to sit. The direct impact on magistrates of court closures is already significant.

76. While we await the detail of these changes, they fit with the recent consultation on a proposed new structure for legal advice. In that connection, the MA welcomes the proposed new section 67B of the Courts Act 2003, preserving the principle that no authorised person is subject to the direction of the Lord Chancellor or any person other than the Lord Chief Justice (or a judicial officeholder nominated by him or her) when performing the functions of a court or judge. This provides a clear line of accountability for legal advisers to the judiciary, while emphasising that there must be no compromising of the principle that legal advice is independent of the executive.

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