

# **COVID (O) – Compliance and Enforcement**

## **Issue**

1. The purpose of this discussion is to understand the extent of the backlog in the courts system and agree how cases related to breaches of Covid rules can be expediated.

## **Recommendation**

2. For the Attorney General to make a further order specifying Coronavirus Restrictions offences so that they need not be prosecuted by the CPS. This would allow police to prosecute these offences through the Single Justice Procedure (SJP) which is the most effective tool for managing these cases through the court system.

## **Operational context**

3. As of 16<sup>th</sup> December, there were c.23k Fixed Penalty Notices (FPNs) issued by police for breach of COVID regulations. The payment rate for these fines is approximately 45% (which is the equivalent payment of other FPNs e.g. motoring offences). There have since been more FPNs issued over the Christmas period and the overall volume currently stands at c34k.
4. From mid-December we estimate that there are currently 13k unpaid FPNs, of which 2k have been prosecuted through the courts; this leaves an outstanding backlog of 11k cases. This doesn't include unpaid FPNs issued over the Christmas period and we can expect the number of unpaid FPNs to increase over time, especially as police take firmer enforcement action.
5. It's important to note that there is a variable rate of attrition due to insufficient evidence and, therefore, not all these cases will progress through to court. The overall attrition rate is currently around 44%, and so only approximately 56% of those unpaid FPNs will be prosecuted in court. This figure is variable across police force; there is a review process in place to consider FPNs before they are proceeded with.
6. These cases are all dealt with in the magistrates' courts, and currently form a relatively small proportion of the overall caseload (e.g. the total caseload for the magistrates' courts in November was over 108k cases). There is a limited impact on the Crown court as only appeals from the magistrates' court are heard there.

## **Options to improve efficiency – Utilisation of the Single Justice Procedure (SJP)**

7. On 2 June, the Attorney General made the Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2020 which set out that specified

Coronavirus Restrictions offences need not be prosecuted by the CPS. This meant the police were able to prosecute these offences through the Single Justice Procedure (SJP). From a court perspective, this was an effective tool for managing these cases; these SJP cases were prioritised over other SJP cases and from August to October 92% of cases were heard on the first available date (28 days after the notice was served on the defendant). The main benefit to this process is in expediting the prosecution.

8. Since June, new regulations were introduced and the Attorney General was asked to make a further order to cover all coronavirus regulation offences, including future offences. The rationale set out that, for reasons of parity, the further Regulations offences should be dealt with in the same way as the offences already included in the Order given that they concern offences which are summary-only and punishable only by a fine. In addition, the SJP reduces the need for court listings and court attendance (cases are dealt with by a single magistrate outside a courtroom, and without the defendant or prosecutor attending).
9. There were, however, concerns about mis-charging of Regulations offences including charging in the wrong jurisdiction and charging those who are homeless with leaving the place where they are living without reasonable excuse. In addition, the NPCC published figures showing the young men from black, Asian and ethnic minority backgrounds are almost twice as likely to be issued with fines for Regulations offences compared to their white counterparts.
10. Due to the mis-charging and disparity concerns, the Attorney General did not make an Order in relation to the further offences and suggested that the CPS make arrangements to take conduct of these prosecutions, rather than the police. The Attorney General did, however, agree to keep this decision under review and set out that she would be willing to amend the Order if there was a strong case presented to do so. At the point at which this decision was taken, the number of FPNs being issued had dramatically reduced (only 15 had been recorded in the previous 4 weeks).

### ***Alternatives to the Single Justice Procedure***

11. Since this decision was made, the CPS have been unable to prosecute these cases under SJP due to operational challenges including processes, staff and software. Instead the CPS have had to prosecute these cases by requisition in N/GAP (Not/Guilty Anticipated Plea) courts. Without the SJP option, the police have been compelled to commence cases by postal requisition with hearings in open court (rather than handled remotely). From a court perspective, the requisition process is a less efficient way of managing these cases:
  - a. The process is less flexible as cases must be heard on a specific date in a specific courtroom (as opposed to the SJP process which can be heard on any date and any place);

- b. It's more resource intensive, and costly, as it requires more than one magistrate, an usher and a CPS prosecutor (as opposed to the SJP process which only requires one magistrate and one legal adviser);
- c. Each additional requisition case places pressure on the system by delaying other cases. Furthermore, defendants are required to attend court for requisition hearings whilst SJP cases can be managed remotely. This increases footfall in to the courts at a time when courts are being encouraged to conduct hearings remotely where possible due to the national lockdown;
- d. Currently, in most parts of England and Wales, a requisition case takes double the time from issuing the charge to first hearing (c.56 days in comparison to 28 days).
- e. Prior to issue, requisition cases require more input by the police, and require input by CPS. In SJP cases, CPS is not involved unless a defendant pleads not guilty.
- f. Subsequent offences (from December), if dealt with by requisition, will have to be listed in conventional GAP and NGAP courts with all other criminal cases. The additional cases will import some degree of delay to all conventional proceedings.

12. If the SJP option is not currently available, HMCTS intend to deal with the backlog by running blitz courts in February and March where possible to work through the outstanding cases. These cases are being prioritised over other cases, under the direction of the Senior Presiding Judge. In addition, HMCTS is working with the police and CPS to encourage the use of the plea by post procedure to try and speed up proceedings and reduce footfall; Senior Legal Managers are working with police and CPS locally to make arrangements, but this will be dependent on staffing resource in HMCTS and CPS.

### **Steps required to implement the preferred approach (Single Justice Procedure)**

13. In order for the police to be able to prosecute the further coronavirus regulation offences through a Single Justice Procedure (SJP), the Attorney General would need to make a further statutory instrument in relation to these prosecutions. The Attorney General previously stated that she would be willing to do this if presented with a strong case, particularly demonstrating the numbers justifying a further order, although close monitoring of the use of the SJP would be required to mitigate concerns regarding mis-charging and disproportionality.
14. The Attorney General's Office have been clear that this order would need to specify which coronavirus regulation offences it would apply to. The Order could not include 'yet to be defined' future criminal offences as the Attorney General needs to retain the ability to consider the precise terms of future offences in deciding whether proceedings for those offences should be specified.

15. There is a strong argument, however, for all existing coronavirus regulations to be included in this order as otherwise a mixed economy would be created for dealing with these offences (i.e. some offences would be managed through the SJP process, whilst others would require a requisition hearing). The impact on the defendants themselves would be minimal, as they cannot be compelled to attend under either procedure, and under either procedure they can attend a court hearing if they wish.

## **Annex: Update on Nightingale courts and additional court spaces**

There are currently 19 Nightingale courts providing 36 additional courtrooms. Additional Courts and Tribunals Capacity (ACTC) programme is continuing to secure locations for a third phase of Nightingale venues providing 40 courtrooms open to the end of June (5 courtrooms from this phase are already available). In addition, we are extending the leases of the phase one and two Nightingale courts beyond March 2021 where there is a requirement and an extension can be secured.

In addition to the increased provision of hearing spaces provided by Nightingale courts, ACTC have hired a number of smaller venues to provide jury assembly and deliberating space and have successfully installed modular buildings in spaces attached to existing courts which provide jury deliberating space; these PortaKabins currently free up 27 courtrooms for jury trials.

When social distancing relaxes, we anticipate that landlords will want to return to commercial activities which may restrict our ability to further extend licences should we wish to do so. However, in such circumstances, it is likely that any changes will also increase the availability of hearing spaces in HMCTS existing estate.