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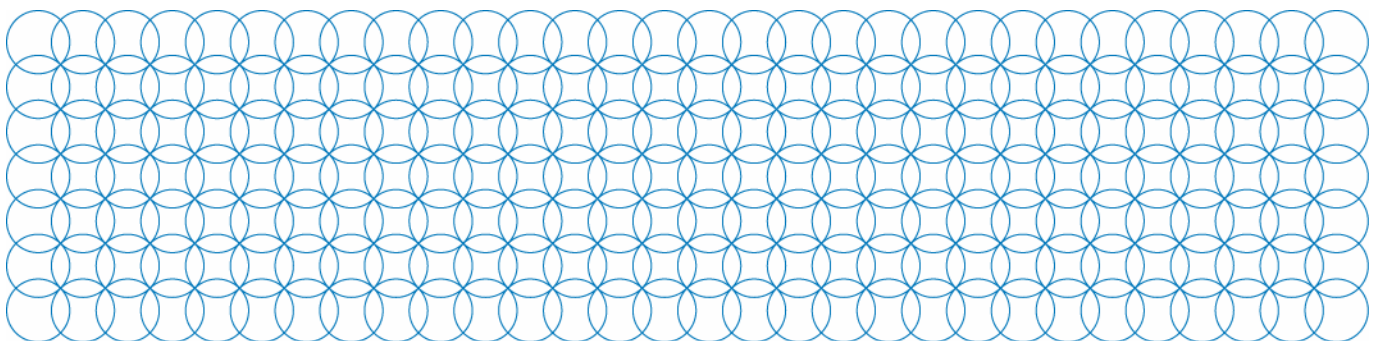
Pandemic Flu

Planning Guidance for agencies and others involved in the Justice System

Consultation Paper CP23/08

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A consultation produced by the Ministry of Justice.

**This information is also available on the Ministry of Justice website:
www.justice.gov.uk**

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Executive summary

The establishment of contingency plans for responding to a flu pandemic in the justice system is part of the government's wider pandemic planning, details of which may be found on the government's pandemic website: <http://www.ukresilience.gov.uk/pandemicflu.aspx>. All agencies and sectors are required to have validated plans in place by the end of 2008.

The aim of the guidelines is to bring together assumptions and response strategies of the various agencies involved in the justice system in England & Wales. This will enable planners at different levels within agencies to check consistency of their plans with their agency's national position, and also check that their plans take account of the positions being taken by other agencies and the needs of other stakeholders.

A pandemic is likely to affect the justice system in two key ways:

- unavailability of staff, judiciary and other parties, including witnesses and jurors, to progress a case or attend a hearing, due to illness or pandemic related reasons. Whilst this disruption will be spread over an extended period of about 15 weeks, peak absence levels will only be experienced for a few weeks. However, even a low level of absence could prevent jury panels from being maintained for jury trials.
- the need to manage the prison population in relation to infection control.

Arrangements already exist under normal business arrangements for coping when individuals are unable to attend hearings, and there are processes enabling prioritising, rescheduling or moving of cases. These arrangements have been tried and tested during periods of industrial action and other localised events of longer duration. In a pandemic, absence levels will generally be lower than during industrial action, but will last for longer, and affect all areas at broadly the same time. This presents a potential risk in relation to cases or actions that have to be completed by certain time limits, but with prioritisation and the time-scales involved in a pandemic it is expected that statutory obligations can be met. Performance against targets is likely to suffer, particularly for less urgent work.

It is intended that the use of existing powers, many of which involve judicial discretion, will continue to be determined on a local basis. It is not intended to escalate to a pre-determined set of 'emergency arrangements' on declaration of a pandemic or particular UK alert level.

Introduction

1. This paper sets out for consultation the planning assumptions and response strategies being proposed by the various agencies who together deliver the justice system in England and Wales. It does not apply to Scotland (other than a few tribunal offices that are part of the MoJ Tribunals Service). The consultation is aimed at the agencies and other stakeholders who have a role in keeping the system running.
2. This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 35 have been followed.
3. An initial Impact Assessment has been completed and does not indicate that the co-ordination of agency plans is likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or the public sector. Consequently, this paper does not contain an Impact Assessment. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper.

4. Copies of the consultation paper are being sent to:

HM Courts Service

The Tribunals Service

The National Offender Management Service

The Crown Prosecution Service

The Association of Chief Police Officers

The Office for Criminal Justice Reform

The Judiciary

The National and Local Criminal Justice Boards

Family Justice Councils

5. However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

6. This guidance provides a planning framework for the justice system, focused on the potential disruption that may be caused by an influenza pandemic. It is aimed at contingency and business continuity planners and it aims to provide consistency on issues such as planning assumptions, response strategies, escalation arrangements, and reporting. Existing local plans should be reviewed against this framework and build on well-established local contact arrangements and practices. The guidance will also be of interest to public bodies and other users of the system.
7. The Justice system plays a key role in the maintenance of law and order and public confidence in and respect for democratic institutions, rights and responsibilities, the safety of individuals and the protection of property. It depends on the effective participation of numerous agencies and other participants, so planning is vital to ensure services can be maintained during periods of disruption.

The threat

8. An influenza pandemic is a natural phenomenon, instances of which have occurred from time to time for centuries, including three times during the last century. They present a real and daunting challenge to the economic and social well-being of any country as well as a serious risk to the health of its population.
9. The conditions that allow a new pandemic virus to develop and spread continue to exist, and some features of modern society, such as air travel, could accelerate the rate at which the virus spreads. Experts agree that there is a high probability of a pandemic occurring, although the timing and impact of future pandemics are impossible to predict.
10. Pandemic Influenza is considered one of the most severe natural challenges likely to affect the UK. However, sensible and proportionate preparation and collective action by all involved can help to mitigate its effects.
11. The firm emphasis of the Government's strategy is to develop and strengthen preparations for the potentially devastating impact of a pandemic. Government will continue to take every possible step to prepare for and mitigate the potential health and wider socio-economic effects. The Government's overarching strategic approach to doing this is set out in [Pandemic Flu: A national framework for responding to an influenza pandemic](#).
12. The **National Framework** is based on the idea that all plans and preparations depend upon the active support of individuals and communities. It therefore promotes sensible and proportionate preparation and collective action by all the organisations involved:
 - Government, both local and central;
 - essential services;

- business and other organisations in e.g. the third sector;
- the public and communities; and
- the media.

13. All of these have a role to play in helping to mitigate the health, social and economic effects of a pandemic.

Planning across the Justice sector

14. Pandemic contingency plans are to be in place and validated by the end of 2008. This guidance note provides central guidance that has been agreed by lead planners within each of the agencies of the justice system. Each agency will develop their own plans, which should take account of the issues identified in these guidelines to achieve co-ordinated planning across the justice system.
15. **Criminal justice** planning for a possible pandemic is being co-ordinated through an inter-agency working group led by the Ministry of Justice and involving representation from:
- ACPO
 - CPS
 - HM Courts Service
 - The Tribunals Service
 - The Office for Criminal Justice Reform
 - HM Prison Service
 - The National Probation Service
 - The Legal Services Commission
16. The approach builds on contingency arrangements that have already been tried and tested in live situations including flooding and industrial action, but having regard to the risks posed by the differing scale and duration of impact. Key dependencies have been identified and their resilience reviewed against agreed planning assumptions and a shared awareness of how each agency expects to respond.
17. It is expected that the CJS Inter-agency Contingency Planning group will convene at the early signs of a pandemic. CJS ministers will be regularly briefed trilaterally (Home Office, MoJ, CPS) on developments and the need to enact emergency powers.
18. **Civil justice** planning is similarly being co-ordinated by the Ministry of Justice where representatives of civil and family business, and of the Tribunals Service have reviewed assumptions, dependencies and risks. The Local Family Justice Councils provide a consultative forum to help raise awareness.

Involvement of judiciary, Criminal Justice Boards, Family Justice Councils

19. We are engaging with the Judiciary to ensure strategies and options do not conflict with exercise of judicial judgement, and to identify judicial concerns that may require

alternative contingency solutions. Local Criminal Justice Boards and Family Justice Councils also have an important role in supporting shared awareness of plans and assumptions.

Importance of compatibility based on common and agreed assumptions and awareness of respective responses/priorities

20. Most services depend on the contributions of several parties, either as service providers or as part of a supply chain. This is particularly true for the criminal justice system which relies on the co-operation of the police, CPS, courts, judiciary, prison and probation services, custody escort services, lawyers, teams such as victim and witness support, and the attendance of those involved as defendants, witnesses, jurors, etc. This also applies, though to a lesser extent, in relation to civil jurisdictions including tribunals.
21. Each of the services is required to have their own contingency plan and their effectiveness depends on how well the plans work together. Understanding what assumptions are being made by others in the chain and how they will respond is vital. This document therefore sets out expectations agreed at a national level, which should be reflected in local plans.

Liaison with Local Resilience Forums

22. The Civil Contingencies Act requires category 1 and 2 responders to co-operate in the local resilience area. The principle mechanism for such co-operation is the local resilience forum.
23. The CCA and concept of category 1 and 2 responders primarily relates to local authority activities including emergency services. However, local planners within the justice system who are part of government agencies should ensure that they engage with other relevant agencies in their area or region to confirm communication arrangements (these arrangements already exist for 'business as usual' and other forms of disruption). In addition, planners should make contact with their Local Resilience Forum, to ensure it is aware of any essential service issues, and to ensure that any actions taken by the LRF do not compromise agencies' own contingency plans.

Validation and testing

24. These guidelines are based on plans established at a national level within each agency and lead planners have had sight of the assumptions of other agencies. Planners should validate their strategies by considering the level of impact on critical areas, having regard to the range of absence levels they might experience, the availability of other stakeholders, and the effect on case-flow. Modelling of case-flow is being investigated to see what help and objectivity might be provided.
25. At the local level, managers and planners should satisfy themselves that their plans are consistent with their agency plans and clarify with other agencies, through forums such as the Local Criminal Justice Boards, how local inter-agency co-ordination will work during a pandemic period.

26. If there are concerns about proposed strategies or points of the system or processes are identified as being at particular risk of failure, these must be reported to your agency planning lead:

HMCS Frank Taylor (frank.taylor@hmcourts-service.gsi.gov.uk)

Tribunals Service Michael Keen (michael.keen2@tribunals.gsi.gov.uk)

HM Prison Service Joel Standing (Joel.standing@hmps.gsi.gov.uk)

CPS Keith Milburn (Keith.Milburn@cps.gsi.gov.uk)

LSC Michael Atkin (Michael.atkin@legalservices.gov.uk)

Police Gary Locker (ACPO) (gary.locker@cabinet-office.x.gsi.gov.uk)

Planning assumptions and impact

Clinical attack rate and absence levels

27. Business should follow guidance in the National Framework. This advises planning for:

- One or more pandemic phases of about 15 weeks duration each
- Reasonable worst case of up to 50% absenteeism over the 15 week period
- Absence peaking at about 20% in the peak 2-3 week period (roughly mid-phase) but with absences of up to 35% in small specialist units in the peak phase.
- These peak absence figures include the range of absences including other illnesses and those with caring responsibilities.

Note: levels within prisons are likely to be higher (see below)

Impacts

28. A pandemic is likely to affect the justice system in two key ways:

- unavailability of staff, judiciary and other parties, including witnesses and jurors, to progress a case or attend a hearing, due to illness.
- the need to manage the prison population in relation to infection control.

29. These impacts are likely to affect the justice system in the following key areas:

- arrest, charging and availability of legal advice
- availability of parties for jury trials
- availability of parties in urgent civil cases, including care proceedings and mental health reviews
- managing prisons with reduced staff cover and the need to control infection
- ability to deport individuals in failed asylum or immigration cases

30. Time-critical activities that are dependent on the availability of a small number of specialists are particularly at risk. Planners must also identify dependence on 3rd party suppliers.

31. In a pandemic, absence levels will generally be lower than during events such as industrial action, but will last for longer. This presents a potential risk in relation to

time-limited action, but with prioritisation and the time-scales involved it is expected that statutory obligations can be met.

32. Whilst priority will be given to maintaining essential services, every effort will be made to maintain business as near normal as possible. It should be recognised, however, that performance against targets is likely to suffer, particularly for less urgent work.
33. The position in the Prison Service is more complex in that the expected infection rates in closed communities is expected to be significantly higher, with infection rates of 90% over the pandemic period, with staff absence peaking at up to 50%. Even at these levels of absence, prisons will be able to operate above their minimum baseline of patrol status, though prisons may have to impose reduced regimes for prisoners and visitors.
34. The challenge of managing infection control within prisons, working with Primary Care Trusts, is likely to be significant. Planning guidance has already been issued to Governors in Prison Service Instruction 29/2006. This is currently under review and further guidance may be issued.
35. There may also be speculation that disruption to public services and diversion of police resources could result in an increase in lawlessness. That will primarily be an issue for police priorities, but it is possible that those likely to perpetrate crime will be equally affected by a pandemic, offsetting any potential increase. The general assumptions and strategies outlined in this document will continue to apply.

Plan activation

36. Arrangements for activation of plans and introduction of contingency solutions should be linked to the WHO pandemic phases and UK Alert levels, as communicated by the Department of Health. Within this framework each agency will need to determine when particular contingency solutions are activated and ensure other stakeholders are aware of when any changes in practice are to be made.

WHO International phases	Significance for UK	response
Inter-pandemic Period		
1	No new influenza virus subtypes detected in humans	UK not affected
2	Animal influenza virus subtype poses substantial risk	UK has strong travel/trade connections with affected country UK affected
Pandemic Alert Period		
3	Human infection(s) with a new subtype, but no new human to human spread to a close contact	UK not affected
4	Small cluster(s) with limited human-to human transmission but spread is highly localised, suggesting that the virus is not well adapted to humans	UK has strong travel/trade connections with affected country
5	Large cluster(s) but human-to-human spread still localised, suggesting that the virus is becoming increasingly better adapted to humans	UK business affected but no domestic cases

Pandemic Period			
6	Increased and sustained transmission in general population	UK Alert level	Planning groups to issue awareness message but emphasise business as usual.
		1 Virus/ cases only outside the UK	Planners to establish readiness. Arrange official and ministerial representation at COBR if required, with briefing.
		2 Virus isolated in the UK	Announce activation of preventative controls and temporary HR arrangements, including advice to staff/ customers to stay away if ill. Confirm arrangements to staff and raise awareness of controls
		3 Outbreak(s) in the UK	Start weekly (and exception) reporting to Departmental leads, input to Civil Contingencies Secretariat and shared with Inter-agency group. Businesses to make contingency decisions affecting service delivery.
		4 Widespread activity across the UK	Maintain controls and monitoring.
Post Pandemic Period			
	End of pandemic: Return to inter-pandemic period		Planners announce lifting of controls and temporary HR arrangements but monitor to reintroduce in further wave. Businesses to confirm arrangements to address backlogs. Planners to evaluate and learn lessons. Concluding status report to CCS and Management Boards.

Response strategies

37. This section sets out the broad approach being adopted by each part of the justice system to address the main impacts of a pandemic. It is acknowledged that absences will make it difficult to maintain normal services. There will therefore be a general prioritising of cases by courts and tribunals.
38. Arrangements already exist as a matter of normal practice to deal with absenteeism and unavailability of parties for hearings, and there are processes enabling prioritising, rescheduling or moving of cases. These arrangements have been tried and tested during localised disruptions for events such as fires and floods and more widely during periods of industrial action and form the basis of the strategy for responding to a pandemic.
39. In reviewing the suitability of existing strategies a number of activities have been identified as being at risk of being adversely affected by an outbreak of pandemic flu, but all are considered to be capable of being managed within existing powers.

Criminal justice

40. A summary of the main stages and involvement of parties may be found at Annex A.

Arrest and charging: the Police and CPS

41. The criminal judicial process starts with the police and covers the reporting, investigation and prosecution of a case including the matter appearing at Court, and the defendant receiving a custodial or non-custodial sentence.
42. The police service is the first of the criminal justice agencies to respond to crime, but the process of taking business through the criminal justice system involves all partners at an early stage.

Issues for the Crown Prosecution Service

43. The Crown Prosecution Service (CPS) has the power to conditionally caution in summary and either way offences¹, and already uses these powers in a relatively

¹ All criminal offences currently fall into one of three categories. **Summary offences**, which include most motoring offences and other relatively minor matters such as drunkenness, common assault and prostitution, are triable only in a magistrates' court. **'Either-way' offences**, including theft, drugs offences and some involving violence against the person, are triable either by a magistrates' court or by the Crown Court. And **indictable only offences**, such as murder, rape and robbery, must be tried by the Crown Court. The 1999 caseload (measured at the point at which cases left or were dealt with by a magistrates' court) breaks down as follows:

Summary	'Either-way'	Indictable only
1,369,000	480,000	33,000
73%	26%	1%

small proportion of summary offences. During a flu pandemic the CPS could use its power for either way offences, hence a conditional caution could be issued without the need for a court appearance. There are also other disposals such as simple cautions that allow some offences to be brought to justice outside the courts system. Reduction in cases brought before magistrates should help offset any delays due to staff absence and could allow the release staff from Magistrates' courts to duties at Crown Courts.

44. As a means of obviating the need for a defendant to attend Court conditional or simple cautions would, under the current circumstances, only apply to limited and lesser offences.
45. The provisions of the Director's Guidance and the Code would still have to be applied by Prosecutors unless modified for emergency conditions. This would inhibit many offences falling into these categories. Annex A of the Director's Guidance on Conditional Cautioning could be changed without legislative amendment.
46. If punitive conditions were allowed there would be more scope for the use of Conditional Cautions
47. The Public Interest element under the Code for Crown Prosecutors could be a consideration in the event of a pandemic, which could impact on a Prosecutorial decision.

Legal Advice

48. The CPS currently provides an out-of-hours advice service to Police (CPS Direct) through prosecutors working at home via telephone/networked computer. This service could be extended during an outbreak of pandemic flu to enable greater availability of CPS Direct during office hours, thereby supplementing the provision of charging advice to Police within time limits.
49. The Legal Services Commission runs the legal aid scheme in England and Wales, providing information, advice and legal representation to help two million people each year access justice.
50. The Community Legal Service (CLS) helps people with civil legal problems such as family breakdown, debt and housing. The Criminal Defence Service (CDS) helps people who are under police investigation or facing criminal charges.
51. Administration will be covered by normal business continuity arrangements, moving work between sites if needed. The 'Magistrates courts exceptional cases unit' is single unit and will need priority cover. Contracts require solicitors to be able to transfer work, enabling cover of priority cases when allocated solicitors are not available.

Courts and hearings

Prioritisation of court cases

52. During a pandemic, courts are likely to suffer a reduction in capacity in trying to manage full caseloads. HMCS's strategy will be to prioritise cases. Current guidance categorises bail applications and custody time limit applications as top priority and thereafter custody cases, and cases involving persistent young offenders, youths and vulnerable victims (further detail can be found in Annex B). Minor summary offences (e.g. road traffic matters) may not be listed as a priority. The courts also have broad powers under existing legislation (Criminal Procedure Rules 2005) for dealing with such an eventuality.

53. The following table lists cases in order of priority in the Crown, Magistrates and Civil & Family courts:

Priority	Crown	Magistrates	Civil & Family
1	Bail applications Custody time limit applications Urgent family cases before High Ct Judges Urgent applications e.g. PII applications, Terrorism Act etc	Urgent family cases (emergency protection orders, prohibited steps, renewal of interim care etc) Custody cases (charge in custody, overnight arrests, arrest warrants etc)	Interim care orders Any urgent family hearings including breach of injunction arrests
2	Custody cases PYO/Youth cases Sensitive/high profile cases and cases involving children and vulnerable witnesses/victims	Out-of-ours cases Scheduled family cases Sensitive/high profiles cases and cases involving children and vulnerable witnesses/victims	Out of hours cases Accelerated possessions
3	Preliminary hearings Plea and case management hearings	All other work	All other work
4	Bail cases		
5	Non-custodial appeals		

Jury trials

54. It is unlikely that lengthy jury trials will be held during an outbreak because of the difficulty in maintaining a jury panel for any period of time.

Custody time limits

55. Due to increased absences of judiciary, staff and others during a flu pandemic, and the associated reduced turnover of court activities, it may prove necessary to seek an extension of the time a defendant remains in custody prior to court proceedings. Annex A sets out the available options to deal with this matter and recommends in the first instance using existing legislation under the Prosecution of Offences Act 1985. This provides for either application to the court on a case-by-case basis to extend the limits, or for the Secretary of State to change the limits in a general way through new regulations under the Act.

Prisons

56. Planning for pandemic flu is underway in prisons based on a Prison Service Instruction issued by Her Majesty's Prison Service (29/ 2006). In relation to a potential shortage of staff, prisons will use existing powers to operate a reduced regime. Arrangements will need to address the following areas of risk:

Sentencing to high-risk locations

57. During an outbreak of pandemic flu, legal (human rights) arguments may be raised against defendants being sentenced to high risk locations such as prisons, as levels of illness and death could be greater in such closed communities. The allocation of prisoners to particular locations is a matter for the Prison Service following sentencing, and decisions will need to take account of capacity and its strategy for managing infection.

Infection control

58. With infection levels in prisons expected to be significantly higher than in the general population, governors will need to work with their Primary Care Trusts to develop strategies for managing infection control and for the care of those who have contracted influenza. Guidance has already been provided in Prison Service Instruction PSI 29/2006. It is anticipated that the peak period will arrive earlier in prisons than in the general population but will then trail off over a longer period.

Remand population

59. Whilst prisons will prioritise the availability of prisoners where required to be delivered to court for hearings, there will almost certainly be a reduction in trials (it will be difficult to start a lengthy jury trial). It is expected that this may increase the remand population, though the potential increase will be offset by a reduction in the number of defendants remanded in custody. This will partly reflect other police priorities and the exercise by the police and CPS of options such as fixed penalties. The existing monitoring of the prison population will provide early warning of problems.

60. Fixed penalties are unlikely to be suitable to the types of cases where the defendant would otherwise have been remanded in custody.

Reduced prison regimes

61. Staffing shortages may require the restriction of regimes with prisoners confined to cells for extended periods. Worst case planning for infection rates in prisons envisage 90% infection with peak absence of up to 50%. Even at these levels, prisons should be able to provide in excess of the minimum patrol cover and ensuring prisoners continue to receive meals and basic human rights.

Visiting Rights

62. Prison staffing pressures and, possibly, efforts to reduce the spread of the virus into or from prisons, may need visiting rights to be curtailed during a pandemic. Any reductions of visiting allowances would need to be considered in the context of prisoners' human rights. Existing Prison Rules do provide for the Secretary of State to alter prisoners' visits allowances on a temporary basis, and that would be considered at the time.

Impact on under-19s

63. The same approaches on sentencing and on early release would be used for under-19s as for adults during a flu pandemic, as the legal issues - surrounding ECHR and public safety - will apply equally.

64. Note: we will aim to optimise the use of prison video link technology to avoid unnecessary prisoner movement. The Virtual Court prototype was successfully operated in London in 2007 and is being further developed for piloting in 2009.

Probation Services

65. Each Probation Area is responsible for its own contingency plan and they report directly to their own Boards. Priorities for the probation service are:

- Management (assessment and supervision) of high risk offenders
- Accommodation of High Risk offenders – (Approved Premises)
- Enforcement of orders and post release licences
- Supervision of orders
- Preparation and delivery of Court Reports

66. There are guidance and procedures in place for reporting issues of Serious Further Offences and Deaths in Approved Premises.

Civil Justice & Tribunals

67. HM Courts Service manages business across the courts estate (covering Crown, Magistrates, Family and Civil). The aim will be to use existing legislation to ensure business as usual as far as possible and where this cannot be achieved to prioritise business in order of importance (see table page 19).
68. Whilst the overall aim of planning is to maintain, as near as possible, business as usual within the judicial process during a pandemic, it is recognised that the process may slow down due to staff absences and give rise to bottlenecks and disruption in some areas. Priority will be given to cases involving loss of liberty or hardship.
69. HMCS has developed a contingency plan for dealing with a pandemic, which is adapted from its plans for industrial action, and the rules that already exist for dealing with unavailability of parties, including through illness, on a day to day basis. This applies equally to criminal and civil jurisdictions.
70. The aim will be to use existing legislation to ensure business as usual as far as possible and where this cannot be achieved to prioritise business in order of importance, with maintenance of essential services as a minimum.
71. HM Court Service will consider how to keep services running at forecast levels of absence. This would include the following:
 - Identifying the key personnel – guidance suggests the following groups would be critical to keeping maximum numbers of courts running during an emergency: Judiciary, legal advisers, listing officers, court clerks, Ushers/jury bailiffs, security staff and parties to case (defendants, witnesses, jurors)
 - Identifying activities dependant on external stakeholders/providers and whether they share the same priorities – this would require constant liaison with stakeholders to gauge the effect of the pandemic and adjust court business accordingly.
72. The above information will be reviewed as information on the particular characteristics of the pandemic becomes available. Unlike the industrial action scenario, the effect of a pandemic is unlikely to curtail the courts operation to the same extent as during a universally applied strike. However, in depleting the workforce, particularly if key staff are severely affected, the pandemic scenario could call for decision making and adjustments to court lists on a day-to-day basis for several weeks.

Care proceedings

73. The main civil risk relates to urgent emergency protection order applications which may lead to care proceedings, due to the urgency, dependency on specialist presence, and potential impact on family life of these applications. The onus is on the local authority to demonstrate that an emergency protection order or interim care order should be continued and there are strict time limits and judicial case management for these types of applications. It is expected that local authority social

services teams will be able to prioritise urgent hearings and consideration will be given to use of video links.

- 74. Greater use may be made of existing police powers to protect a child in an emergency for up to 72 hours.
- 75. An outbreak of pandemic flu would affect the capacity of the system to list and hear cases as well as the ability of parties, experts and other witnesses to attend court. The judiciary would be able to prioritise each family case taking into account the impact on the child, family or adult applicants, of any delay in listing.

Tribunals Service

- 76. Irrespective of tribunal type, all cases handled by the Tribunals Service are subject to time limits and in this regard, an outbreak of pandemic flu is highly likely to affect the capacity of the system to list and hear cases. Each tribunal has its own contingency plan.
- 77. The Tribunals Service would prioritise resource towards key activities and prioritise particular case types within jurisdictions having particular regard to cases involving loss of liberty or hardship and benefit entitlement. Emergency powers are not expected to be required.
- 78. Overarching contingencies in the Tribunals Service would aim to ensure all Tribunal hearings are maintained and all customer facing/frontline services continue as near to normal service as possible.
- 79. It is not envisaged that in the medium/long term of a flu pandemic, the Tribunals Service would request high level policy changes of ministers. It is very likely however that any policy changes made in other government departments would have a knock on effect to the subsequent appeals submitted to Tribunals against those departments' decisions.
- 80. Within jurisdictions, case prioritisation would take place where deemed necessary. Prioritisation would take place using the following factors:
 - Cases would be prioritised whereby the individual’s liberty is in question.
 - Cases would be prioritised where there is significant impact to an individual's livelihood.

81. TS priorities by jurisdiction

Priority	AIT	ETs	SSCSA	Special Tribunals
1.	Bail cases	Hardship cases (involving tied accommodation)	Hardship cases (no benefit in payment)	MHRT Section 2 cases (Non Restricted / Restricted)

2.	SIAC/POAC cases		Child Support cases (if hardship identified)	Asylum Support – all cases
3.			DLA appeals for children	

82. Tribunal Case type priorities

Priority	Jurisdiction	Case Type
1.	AIT	Bail Cases
2.	AIT	SIAC / POAC cases
3.	MHRT	Section 2 cases (Non-Restricted / Restricted)
4.	SSCSA	Hardship cases (no benefit in payment)
5.	Asylum Support	All cases
6.	SSCSA	Child Support cases
7.	SSCSA	DLA appeals for children
8.	ETs	Hardship cases (involving tied accommodation)

83. Overarching contingencies in the Tribunals Service would aim to:

- Ensure all Tribunal hearings are maintained
- Ensure customer facing/frontline services continue as near to normal service as possible.

Asylum and Immigration Tribunal

84. Time limits are prescribed for the listing, promulgation and service (by Border and Immigration Authority (BIA)) of asylum appeals and the resulting determinations. There is also a special fast-track process for straightforward asylum cases, but that is triggered when BIA decides a case. The time-limits and processes are not statutory, but they are defined in secondary legislation.

85. An outbreak of Pandemic flu would clearly affect the capacity of the system to list and hear cases (as well as the ability of appellants and representatives to engage with the system). However as asylum cases are prioritised, it is expected that additional time to a hearing is expected to be relatively small.

86. Any significant delay could be felt in non-asylum cases. Time limits thereafter (promulgation of decision by AIT; service of decision by BIA) would be unlikely to attract a great deal of attention, and any delay through adjournment, because of a

lack of judge/appellant/rep/interpreter would be entirely reasonable (while still undesirable) under such circumstances.

87. There is a potential difficulty if an individual is required to be returned to another country, but that country has imposed border closures. Guidance for immigration adjudicators is being obtained from the senior immigration judge.

Other Jurisdictions

88. The focus will be on prioritising cases affecting loss of liberty or hardship. In Social Security Appeals, cases dealing with entitlement to benefits would be prioritised due to the significant impact on an individual's livelihood.
89. In the Mental Health Review Tribunal, there will be a need to ensure that all parties involved in reviews will continue to be available, including health care specialists. Such reviews, determine whether patients are detained under supervision or allowed back in to the community. The exposure of workers across the health sector increases the risk of absenteeism. Whilst all those working in the health sector may be at greater risk of infection, it is not expected that mental health practitioners will be diverted to other work and should therefore be able to cover any urgent hearings.

Planning, monitoring, reporting and co-ordination

90. In the period immediately preceding a pandemic, and during its course, there needs to be a consistent approach to cover the activation of plans and any escalation of contingency measures. This requires effective sharing of information with consistent ratings of impact, enabling effective aggregation of status returns.

Monitoring & reporting

91. Information relating to the impact of a pandemic needs to be collected at the local level and shared locally as well as escalated within agencies. This will keep service partners informed of pressures and enable prioritisation of potentially scarce resources.

Weekly reporting against aim of maintaining essential services

92. It is envisaged that weekly status reports will be produced as at mid-day each Friday, aggregated within agencies, to reach Departmental leads by 5pm.

93. They should cover business impact and indicate levels of employee absence.

94. A 'traffic light' system of assessing status is recommended (R/A/G), based on the ability to maintain services.

Highlighting inter-agency problems

95. Reports should identify any aspects of inter-agency difficulty, indicating any actions taken locally, thereby enabling decisions at the lowest possible level.

Exception reporting

96. Exception reports should be escalated (or may be requested) between normal weekly reports where an urgent decision is required to address an actual or potential failure of essential services

Escalation to agency leads

97. Reports must be escalated to lead planners within the agency at National level, where they should be shared with the relevant agency board.

Production and sharing of agency level reports

98. Within MoJ, the various agency returns will be copied to the Corporate Security & Business Continuity Branch, who will collate returns to form an MoJ summary. This will be presented to MoJ's Corporate Board and Ministers, and copied to the Civil Contingencies Secretariat. Other Departmental leads should similarly copy to their Boards/Ministers and CCS.

99. Agency / Departmental leads should also provide copies of their summary reports to their representatives on the Inter-Agency Contingencies group. This group will monitor co-ordination issues to anticipate potential problems and provide briefing of their respective ministers on issues requiring attention.

Reporting to the Civil Contingencies Secretariat

100. Departmental leads will submit summary returns to the Civil Contingencies Secretariat to inform the Common Recognised Information Picture (CRIP) that is presented to the Civil Contingencies Committee, which it is expected will be meeting regularly during a pandemic.

Return to normal - post pandemic

101. In all areas, it is likely that the prioritisation of cases will mean that a backlog of lower priority work will build up. Decisions will also be needed as to when any contingency solutions should cease and normal practice resumed.
102. It is therefore important that management teams maintain arrangements for monitoring the build up of backlogs and are able to prioritise.
103. The post-pandemic phase should also include a review of arrangements: what worked well and what did not. This is particularly relevant for pandemic flu where there remains a risk of a second or subsequent waves, where arrangements may need to be re-activated at short notice.

Annex A

Powers enabling flexibility to manage impacts

Custody Time Limits

1. In response to a pandemic flu outbreak, it may prove necessary to seek an extension of the time a defendant remains in custody prior to court disposal².
2. The Prosecution of Offences (Custody Time Limits) Regulations 1987 set out maxima (for example, from committal to trial it is 112 days).
3. The preferred option is use of Section 22 (3) of the Prosecution of Offences Act 1985. This enables application to a court on a case by case basis, to extend these limits, if the court is satisfied there is good and sufficient cause, and the prosecution has acted with all due diligence and expedition.
4. The Secretary of State might also change the limits in a general way through new regulations made under the 1985 Act.
5. There remains an option to use emergency legislation to extend custody time limits (where Civil Contingency Act requirements are met – emergency, necessity, urgency and proportionality). Any decision to exercise this options would need to address the counter-argument that this would be *ultra vires* - the prohibition on regulations which “alter procedure in relation to criminal proceedings”
6. In the case of existing legislation, possible problems may arise where, at the time of any request, the prosecution cannot say with any degree of foresight when a trial could start. The more uncertain the timeframe of any specific extension, the more rigorous the court will be in looking at public safety based arguments or evidence and human rights (in very general terms, the longer the delay the more likely extension will be refused).
7. Any extension of custody time limits could also have a potential impact for the Prison Service and officials here would also have to be engaged – particularly where a general extension was put in place.

CPS Issues

Conditional cautioning

8. During an outbreak of pandemic flu, whether to extend the power to conditionally caution/fine without the need for a court appearance
9. CPS Prosecutors have the power to conditionally caution in summary and either way offences; however at present this power is limited internally by the CPS to summary offences.

² See also page 20 (paragraph 55) – charging advice within custody time limits

10. Conditional cautioning applies where the prosecution can prove and the defendant admits an offence. In this regard, Crown Prosecutors have the power to decide whether a person is to be made the subject of a conditional caution and the conditions applicable under section 23 of the Criminal Justice Act 2003 and section 37B(3) of the Police and Criminal Evidence Act 1984.
11. In circumstances such as an outbreak of pandemic flu, the DPP may extend prosecutors' powers to include certain either way offences, if this was considered to be in the public interest.
12. As a means of obviating a defendant attending Court conditional or simple cautions would, under the current circumstances, only apply to limited and lesser offences. The provisions of the Director's Guidance and the Code would still have to be applied by Prosecutors unless modified for emergency conditions. This would inhibit many offences falling into these categories.
13. Annex A of the Director's Guidance on Conditional Cautioning could be changed without legislative amendment.

Charging advice within custody time limits

14. During an outbreak of pandemic flu, CPS Direct could be extended to supplement the provision of charging advice within custody time limits.
15. The CPS currently provides an out of hours advice service to Police (CPS Direct) through prosecutors working at home via telephone/networked computer. The CPS may decide to extend this service during an outbreak of pandemic flu to enable more prosecutors to provide a remote advice service, thereby supplementing the provision of charging advice to Police within time limits.

Prioritisation of court cases

16. During an outbreak of pandemic flu, a Court might seek to manage its case load with a reduced capacity by, for example, not listing minor summary offences (eg: road traffic matters).
17. A court is under a duty actively to manage its cases (e.g. identification of needs of witnesses, monitoring progress of case, discouraging delay). In fulfilling this duty, it has various powers and it may therefore "fix, postpone, bring forward, extend or cancel a hearing": rule 3.5(f). Criminal Procedure Rules 2005.
18. This is a broad power and gives room for Courts to focus on those cases that need prioritising in an emergency (the court still however has to respect the interests of witnesses, victims and jurors in carrying out its duty). The power may be exercised locally by judges.
19. From a legal perspective, Article 6 European Convention of Human Rights (ECHR) will be relevant. This provides for a right to fair trial "within a reasonable time" and as such, cases cannot be left hanging indefinitely.
20. Where deciding between prioritising cases involving detained defendants and others

cases, Article 6 rights will need to be weighed against Article 5 rights. However in general the fair balance will be struck in favour of the detained case.

Prison issues

Sentencing to high risk locations

21. During an outbreak of pandemic flu, defence lawyers may argue against their client being sentenced to a high-risk location, such as a prison, because prisons are closed communities and may have much greater levels of illness and deaths compared with the rest of the community.
22. To counter any such argument, the relevant authorities should be seen to have followed reasonable steps in trying to minimise the risks to prisoners, whilst having regard to the risk to the public.
23. Decisions as to which institution a prisoner should be committed to, are made by the Prison Service, following sentencing. This is therefore primarily an issue for the prisons rather than the judiciary.
24. In deciding whether/where to send a person to a prison, and in trying to minimise the risks, points to consider are:
 - Does the flu pandemic create a real and immediate risk to the life of that person (e.g. the prisoner)?

This will involve establishing whether there is an outbreak at the prison; and if someone catches the virus what is the risk to their life?
 - What steps can be taken to protect the life and health of the prisoner/s and are those steps going to be judged appropriate/reasonable in the circumstances?
25. The Prison Service accepts that it will not be possible to keep pandemic flu out of prisons and the emphasis will therefore be on using Department of Health guidance and local primary care trust expertise to treat cases.
26. In deciding upon any particular prison, account may have to be taken of travel restrictions. It should also be noted that pressure on the prison population is also likely to be a factor to militate against a capacity to move prisoners to flu- free areas.
27. From a legal perspective, the State has a common law obligation to take reasonable steps to protect those in its custody. Article 2 ECHR is also engaged. This will apply during a pandemic to conditions in prisons and to sentencing decisions, which lead to individuals being sent to prison.
28. Article 3 ECHR (torture, or inhuman or degrading treatment) might also be engaged. Prisoners sometimes rely on this, alleging poor conditions and/or lack of access to treatment. There is a threshold tolerated under Article 3. This will again depend on the facts.

Visiting Rights

29. The question of visiting rights and the impact on the prisoner's human rights would need to be considered as part of pandemic flu planning.
30. Existing Prison Rules provide for the Secretary of State to alter prisoners' visit allowances on a temporary basis.
31. A prisoner's security category has no bearing on their statutory domestic visits entitlement, which is covered by the Prison Rules, Standing Order 5: Communications, and Performance Standard 44: Prisoners' Family Life.
32. Although a legal challenge could be expected, in an extraordinary scenario such as an influenza pandemic, Standing Order 5 provides for the authority of the Secretary of State to alter prisoners' visits allowances on a temporary basis.
33. From a legal perspective, the ECHR aspect is primarily Article 8 (i.e. stopping visiting would infringe the prisoner's, and family members' right to respect for family life) - However in an emergency context it should be straightforward to justify the infringement under Art 8(2) ECHR, e.g. in the interests of public safety or for the protection of health.

Under 19's

34. Whether there may be a difference on sentencing and early release for under-19's as opposed to full adults.
35. No further action required as advice at this stage would indicate no material difference and legal issues - surrounding ECHR and public safety - will apply equally.
36. In principle emergency regulations may be used (if existing legislation does not suffice and the CCA requirements are met).
37. Similarly current advice would indicate that there would be no additional human rights obstacles for under-19s than adults - in terms of human rights the obligations to those in custody apply equally.

Criminal Justice System - Process Chart

Annex B

Process stage	Offence	Arrest	Magistrates court	Crown Court	Sentence
Note	Level and pattern may change during pandemic	Some released on Bail; others in police custody (possibly courts under operation safeguard)	1 st appearance and hearing		Custodial and community based sentences
Stakeholders		Police CPS (charging advice) Defence Solicitors / LSC Bail-tag contractors Courts if held in court cells.	Magistrates & staff Defendant Police PECS (if remanded) CPS Defence Solicitor Legal Aid Probation (reports) Interpreters Local authorities (secure youth accommodation)	Judiciary & staff Defendants PECS (surrender to bail or transport from prison) Prison Service/PFI CPS Defence Solicitors/Bar Jurors Witnesses Witness service Victim Support Interpreters Loggers/stenographers Probation	

Dependency		Availability of advice	Police build file and pass to CPS. Availability of parties and reports.	Availability of all parties (defendant doesn't need to attend all hearings)	
Strategy		Use of CPS Direct. Use of cautions and fixed penalties.	Cases prioritised	Cases prioritised (unlikely to start long jury trial at peak of pandemic). Prioritise court appearances	Reduced prison regimes

PART 2: Questionnaire

We would welcome responses on the assumptions and response strategies contained within the attached draft guidelines. In particular:

- a) Do you agree the conclusion that existing powers, coupled with prioritisation, will be sufficient to maintain key activities without the need for emergency powers? If you disagree, what powers do you think may be needed?
- b) Do you consider any particular areas of identified priority activity are at real risk of failure? If so, which activities are they, what is likely to cause the problem and how might the problem be resolved?
- c) Are there any other areas of business that should be identified as priority activity and why?
- d) Do you consider that existing local communication arrangements, including day to day operational contacts, Local Criminal Justice Boards and Family Justice Councils, will provide an adequate means for sharing inter-agency information on local issues during a pandemic? If not can you suggest any additional measures that might assist.
- e) Do you feel that there are any overarching equality and diversity issues that should be considered, over and above anything that individual agencies should be taking into account?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 28 November 2008 to:

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SW1H 9AJ

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Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm> and on the UK Resilience website: <http://www.ukresilience.gov.uk/pandemicflu.aspx>.

Alternative format versions of this publication can be requested from the above contact.

Publication of response

A paper summarising the responses to this consultation will be published in December 2008. The response paper will be available on-line at <http://www.justice.gov.uk/publications/consultations.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you

could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 1326, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 33.

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