



POLICE, CRIME, SENTENCING AND COURTS BILL

VIDEO AND AUDIO LINKS IN CRIMINAL PROCEEDINGS

FAIR TRIALS, TRANSFORM JUSTICE & JUST FOR KIDS LAW BRIEFING FOR COMMITTEE STAGE IN THE HOUSE OF LORDS

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INTRODUCTION & SUMMARY

The proposals set out in Part 12 of the Police, Crime, Sentencing and Courts Bill to expand the use of remote hearings via video and audio links in criminal proceedings will significantly impact the right to a fair trial and equality in the criminal justice system.

The pandemic prompted huge shifts in how we work, socialise and engage with public services. Many activities that would previously have taken place in person were moved online in order to minimise the infection risks associated with travel and gathering indoors. The courts were no exception, where use of video and audio hearings for criminal cases was significantly expanded to reduce the need for groups of people to gather in courtrooms.

While it is sensible to review the role that virtual technology can play in a post-lockdown world, we argue that some circumstances are too significant, and have such potentially serious consequences, to take place 'remotely'. The processes through which a person accused of a crime might wish to defend themselves and plead innocent or plead guilty, is one such example.

Although during the pandemic video and audio link proceedings have been implemented as an exceptional measure to facilitate the continuance of criminal justice proceedings, the long-term normalisation of this practice could undermine fair and equal justice for the foreseeable future, negatively impacting defendants, including children and those with vulnerabilities. It also conflicts with international legal standards on the right to a fair trial.

Clause 169 of the Bill would enable the use of video and audio links for a very wide range of criminal proceedings including: a preliminary hearing, a summary trial, a trial on indictment, appeals to the Crown Court, sentencing hearings, bail hearings, proceedings under the Criminal Procedure (Insanity) Act, and under the Mental Health Act.¹ However, the safeguards set out in Clause 169(4) and 169(6) of the Bill, considered below, giving broad but unspecific discretion to judges, are not sufficient. In addition, they are also less protective than existing primary legislation on the use of live-links in criminal justice settings, specifically police interviews.

The right to be present at trial is recognised in European and international human rights standards as a fundamental guarantee of the right to a fair trial,² and is closely connected to the right to a hearing. Video hearings can be a restriction of those fundamental rights. The Government has committed to guarantee enjoyment of these rights and must comply with its legally binding obligations.

Multiple pre-pandemic studies have shown that remote justice proceedings are an inadequate substitute for in-person hearings, with vulnerable and younger defendants especially at risk of unfair hearings. Research has evidenced that remote hearings can interfere with defendants' rights to access effective legal assistance, to participate effectively at their own hearings, and to review and challenge information and evidence relevant to the proceedings, particularly in the case of vulnerable defendants. There is evidence, including from the Government's own research, suggesting that remote hearings disproportionately result in custodial sentences.³ In spite of this overwhelming evidence, the Government has attempted to assert that, "*No one has suggested that, during the pandemic, any particular defendant or witness has been especially badly served*"⁴ and that video and audio links have had "successful use during the pandemic".⁵ However, the Government has not undertaken or commissioned any impact evaluation or assessment *during the pandemic* on the effect of these exceptional measures that it now seeks to make permanent, including observational and

¹ Clause 169(3)

² Article 14(3)(d) ICCPR, Article 6(3)(c) ECHR

³ Terry, M., Johnson, S. and Thompson, P. 'Virtual Court pilot: Outcome evaluation', in *Ministry of Justice Research Services 21/10*, December 2010. <<https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>>; Fielding, N., Braun, S. and Hieke, G. 'Video Enabled Justice Evaluation', March 2020. <<http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>>

⁴ Chris Philp, PCSC Bill Committee Stage 16th Sitting, Thursday 17 June 2021, Hansard [https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill\(SixteenthSitting\)](https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill(SixteenthSitting))

⁵ The Minister of State, Home Office (Baroness Williams of Trafford), PCSC Bill Second Reading House of Lords, Tuesday 14 September 2021, Hansard <https://hansard.parliament.uk/lords/2021-09-14/debates/4D726E25-3924-4BB5-B399-4C839D773815/PoliceCrimeSentencingAndCourtsBill>

ethnographic research, disaggregated data gathering, or research on the impact on remand, sentencing, and legal representation.

The current Bill is severely lacking in protections against unfair trials and unequal justice due to the use of video and audio link hearings in criminal proceedings, and this must be rectified.

1. VIDEO AND AUDIO LINKS CAN INFRINGE ON THE RIGHT TO A FAIR TRIAL

- 1.1 **Where an accused person is entitled to an oral hearing in criminal proceedings, they are also entitled to be present, and a video hearing is a restriction of that right.**
- 1.2 The European Court of Human Rights (ECtHR) has determined that presence at the hearing is a necessary precondition for the effective exercise of the right to defend oneself in person, to examine or have witnesses examined and, where relevant, to have the free assistance of the interpreter.⁶ This right is particularly important at first appearances such as initial “remand” hearings (the first appearances for those remanded post charge by the police), where the court can assess a physically present person in a way that it cannot via video or audio link.
- 1.3 The right to a public hearing with the presence of the suspect or accused person is of fundamental importance not only to the defence, but also to the public. This right allows the defence to present its case, in person, to a judge or the bench, and allows the public to exercise its scrutiny and therefore maintain trust in the justice system.
- 1.4 The ECtHR has found that suspects or accused persons’ participation in proceedings by videoconference is not *per se* contrary to the European Convention on Human Rights (ECHR) but resorting to a video hearing is a restriction of the right to be present. Therefore, in any given case, the use of remote proceedings must serve a legitimate aim, and the arrangements for giving evidence must comply with requirements for due process.⁷
- 1.5 The right to a fair trial also guarantees the right of a person to participate effectively in their criminal trial. This right has been defined to include the right to hear and follow the proceedings. The ECtHR has found in that regard that people appearing in the hearing through video-link “*must be able to follow the proceedings and to be heard without technical impediments.*”⁸ Remote hearings may be more complex for suspects or accused persons to navigate than in-person ones, especially if they are unrepresented or their lawyer is not with them in the same

⁶ ECtHR, *Marcello Viola v. Italy (No.2)*, App. No. 45106/04, Judgment of 5 October 2006, para. 52.

⁷ ECtHR, *Marcello Viola v. Italy (No.2)*, App. No. 45106/04, Judgment of 5 October 2006, para. 67

⁸ ECtHR, *Sakhnovskiy v. Russia*, App. No. 21272/03, Judgment of 2 November 2010, para. 98

room. Technical problems also impede enjoyment of the accused's rights.⁹ Understanding what is happening in the trial and being able to make interjections either themselves or through their defence lawyer is vital for effective participation.

- 1.6 In any event, remote participation in criminal proceedings cannot be treated as equivalent to physical participation and must therefore remain an exception. As the extensive evidence below confirms, remote proceedings pose significant risks to the fairness of hearings/proceedings and trials.

2. THE BILL UNDERMINES EXISTING OBLIGATIONS AND PROTECTIONS REGARDING LIVE-LINKS IN OTHER CRIMINAL JUSTICE SETTINGS (POLICE INTERVIEWS)

- 2.1 **Existing primary legislation already acknowledges the need to be cautious with the use of video and audio links, which the provisions of the Bill undermine.** The Police and Criminal Evidence Act 1984 (PACE) Code C sets out several obligations on police custody officers when assessing whether a detainee is fit to be interviewed using a live link.¹⁰ A police custody officer must decide, on a case-by-case basis, whether it is appropriate to use a live link to carry out a police interview, adhering to the following obligations:

- The custody officer must be satisfied that the detainee is fit to be interviewed, and if necessary, **the officer must consult with “appropriate healthcare professionals... determining and considering the risks to the detainee’s physical and mental state”;**¹¹
- *“Vulnerable suspects... shall be treated as always being at some risk”*¹²
- **“Each decision must take account of the age, gender and vulnerability of the suspect, the nature and circumstances of the offence and the investigation and the impact on the suspect of carrying out the interview by means of a live link”**¹³
- *“the custody officer must consider whether the ability of the particular suspect, to communicate confidently and effectively for the purpose of the interview is likely to be adversely affected or otherwise undermined or limited if the interviewing officer is not physically present and a live-link is used”*

⁹ Transform Justice, the National Appropriate Adult Network and Fair Trials, ‘Not Remotely Fair? Access to a lawyer in the police station during the Covid-19 pandemic’, February 2021 <https://www.transformjustice.org.uk/wp-content/uploads/2021/02/Not-Remotely-Fair-Report-Feb2021.pdf>. See also further examples provided by Just for Kids Law in Sections 5.16 – 5.19 of this briefing.

¹⁰ Police and Criminal Evidence Act 1984 (PACE) Code C, para 12.9 – 12.14

¹¹ PACE Code C, para 12.3

¹² Ibid.

¹³ PACE Code C, para 12.9A

- The custody officer must inform the suspect of the decision to use a live-link, and **the suspect “must be asked if they wish to make representations that the live-link should not be used or if they require more information”**
- The suspect also has the right to make representations at any time during the use of the live-link that it should cease and a physical interview be arranged.¹⁴

2.2 While this legislation applies to police interviews, at the very least the same standard of protections should also apply to a defendant or accused person in a court setting. The vague requirements in clause 169 undermines these already existing obligations.

3. VULNERABLE DEFENDANTS MUST BE ASSESSED BEFORE A VIDEO OR AUDIO LINK HEARING

3.1 **Vulnerable defendants are especially at risk of unfair trials where trial proceedings are conducted remotely.** According to the Equality and Human Rights Commission (EHRC), video hearings are unsuitable for disabled people, such as those with learning difficulties, cognitive impairment or a mental health condition.¹⁵ It has noted that *“opportunities to identify impairments and make adjustments”* were lost or reduced where defendants appeared in court by video link. The EHRC were also concerned that the emergency use of remote justice may *“place protected groups at further disadvantage and deepen entrenched inequality.”*¹⁶

¹⁴ Ibid

¹⁵ Equality and Human Rights Commission, ‘Inclusive justice: a system designed for all: Interim evidence report’, April 2020.

https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf

The EHRC conducted a survey which showed that many criminal justice professionals viewed it as part of their role to help recognise and / or identify whether a defendant or accused person has any impairments. The majority of their responses stated that impairments sometimes get missed. The reasons for this include a lack of awareness or understanding about impairments; no processes in place to flag identification (particularly for minor offences being dealt with using the single justice procedure in England and Wales) and a lack of accountability as a result of professionals sharing responsibility. In England and Wales, 97 out of 132 respondents said impairments are sometimes missed. Equality and Human Rights Commission, ‘Inclusive justice: a system designed for all: Findings and Recommendations’, June 2020

https://www.equalityhumanrights.com/sites/default/files/ehrc_inclusive_justice_a_system_designed_for_all_june_2020.pdf

¹⁶ Equality and Human Rights Commission, ‘Preventing the health crisis from becoming a justice crisis’, 22 April 2020. <https://www.equalityhumanrights.com/en/our-work/news/preventing-health-crisis-becoming-justice-crisis>

- 3.2 The EHRC has also pointed out that “*poor connections cause important information to be missed*”, and they “*can cause disconnection and separation from people and legal process*”,¹⁷ significantly restricting vulnerable people’s access to justice.
- 3.3 A recent Criminal Justice Joint Inspectorate (HM Inspectorates of Prisons, Probation, Constabulary and Fire & Rescue) report ‘Neurodiversity in the Criminal Justice System: A review of evidence’ (Neurodiversity Report)¹⁸ found that at arrest, the behaviour of neurodivergent people may not be recognised as a manifestation of their condition, or may be misinterpreted, which could make them more likely to be arrested, and diversion away from custody and the criminal justice system may not be considered. According to Home Office-commissioned research by the National Appropriate Adult Network,¹⁹ 22% of suspects in police custody are mentally vulnerable but only 6.2% are identified and recorded as such by the police, indicating that the current screening process for vulnerabilities in police custody is inadequate.
- 3.4 The Neurodiversity Report found that, for example, elements of police custody processes (such as booking in and searches), and the custody environment itself, could also be unsettling to a neurodivergent person. This could lead them to exhibit behaviours which are interpreted as noncompliant and may mean they do not receive the support they need. Neurodivergent people may also struggle with elements of police custody: they may not fully understand the processes involved and without appropriate support they may not be able to effectively engage with the investigation or have someone to advocate on their behalf. At court, people with mental health issues or neurodivergence may be more likely to be held on remand before trial. For example, at trial, neurodivergent people may plead guilty inappropriately (based on their neurodivergent thinking or compliant behaviour, for example), and their neurodivergence may not be considered in sentencing decisions.²⁰
- 3.5 The Neurodiversity Report concluded that liaison and diversion services should **screen individuals attending magistrates’ or Crown courts, in order to assess their needs:**

“It is vital that neurodivergence is recognised in advance of court hearings, so that adjustments can be made if required, including the possibility of support through

¹⁷ Equality and Human Rights Commission, ‘Inclusive justice: a system designed for all: Interim evidence report’, April 2020. https://www.equalityhumanrights.com/sites/default/files/inclusive_justice_a_system_designed_for_all_interim_report_0.pdf

¹⁸ Criminal Justice Joint Inspectorate, ‘Neurodiversity in the Criminal Justice System: A review of evidence’, July 2021. <https://www.justiceinspectors.gov.uk/cjji/wp-content/uploads/sites/2/2021/07/Neurodiversity-evidence-review-web-2021.pdf>

¹⁹ <https://www.appropriateadult.org.uk/downloads/research?download=63:there-to-help-3-2020>

²⁰ *Ibid*

the process to make sure individuals understand and can engage with proceedings. Equally, relevant information needs to be communicated to magistrates and judges so that the needs of individuals are understood, and their behaviour is not misinterpreted. It was noted in the round table sessions, for example, that autistic individuals might admit things they had not done (compliance) or plead based on their neurodivergent ('black and white') thinking, potentially leading to inappropriate outcomes in court".

However, the Magistrates Association has noted that the reality is that *"pressure on courts to turn cases around quickly meant that the option to adjourn, pending further assessment, was not always used".*²¹

- 3.6 The Neurodiversity Report also noted that changes to legal processes during the pandemic, such as audio or video links, *"impacted more severely on neurodivergent individuals than others",* and that

"legal representation by phone could be problematic and confusing for those with learning or communication difficulties, who may struggle to understand who they are speaking to or what is being said – barriers that might go unnoticed with the absence of visual cues. Court hearing cancellations and delays can also be a cause of anxiety and confusion, particularly for those with neurodivergent conditions".

- 3.7 **Vulnerable defendants are especially vulnerable to unfair trials where trial proceedings are conducted remotely.** There is currently no reliable system to identify those who have mental health or neurodiverse needs and cognitive impairment disabilities, particularly considering that these are often 'hidden' disabilities and the defendant may be reluctant to disclose them.

'Judicial discretion' is an insufficient safeguard

- 3.8 By contrast to the above evidence, the Government's equality impact assessment of the measures contained in the Bill found that

"On balance, we do not consider that expanding the availability of live links or that making use of technology in this way would result in people being particularly disadvantaged because of any protected characteristic. Ultimately, judicial

²¹ *Ibid*

*discretion remains in place as to whether it is appropriate for a video hearing to take place”.*²²

- 3.9 Government Minister Chris Philp MP has also suggested that “*the safeguards already built into clause 168 [now 169] and its associated provisions*” are sufficient as it gives judges “*a wide range of discretion*”. He said that it was for the judge in court to assess a defendant and their interests, particularly in the absence of legal representation:

*“the judge has to lead them, ask them questions and ensure that their interests are properly accounted for by the court in a manner that is impartial and fair” as “the judge himself or herself will—and does—carefully talk the defendant through the implications”.*²³

- 3.10 **Judicial discretion cannot be exercised properly if the judge is not able to properly assess an individual – an ability which is significantly restricted during video and audio link hearings.** As Lord Thomas of Gresford acknowledged during second reading,

*“Central to its success in convicting the guilty and acquitting the innocent is the ability of magistrates and the jury, as finders of fact, to assess the credibility and accuracy of the evidence of a witness, and that includes the defendant. [...] we rely upon body language, expression and tone of voice in making these assessments. We look at the whole person.”*²⁴

- 3.11 **A judge is not able to assess the defendant’s fitness or possible vulnerability, and discharge discretion, if there is no health assessment or screening information made available.** A former judge and current Professor of Criminal and Penal Justice, University of Cambridge, Nicola Padfield, has spoken about judicial concerns:

“Many of us are deeply concerned about the growing use of ‘video justice’, despite real concerns about how this can distort the quality of justice, not least by limiting the ways in which judge and defendant (and others) communicate. It seems obvious

22 Ministry of Justice, 'Equality impact statement: courts', updated 14 July 2021.

<https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-overarching-documents/equality-impact-statement-courts>

²³ Chris Philp, PCSC Bill Committee Stage 16th Sitting, Thursday 17 June 2021, Hansard [https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill\(SixteenthSitting\)](https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill(SixteenthSitting))

²⁴ Lord Thomas of Gresford, PCSC Bill Second Reading House of Lords, Tuesday 14 September 2021, Hansard <https://hansard.parliament.uk/lords/2021-09-14/debates/4D726E25-3924-4BB5-B399-4C839D773815/PoliceCrimeSentencingAndCourtsBill>

*that the law should require defendants to be appropriately screened and supported by mental health services before they can be required to appear by video”.*²⁵

3.12 In the House of Commons, the Government minister did acknowledge that there was an obligation to assess whether children should face a live video or audio link hearing, due to the statutory duty on the welfare of the child, but did not address why this was not also appropriate for vulnerable adult defendants:

*“It is important that the court can take a balanced judgment, rather than a presumption one way or the other. Critically, however, there is already a statutory duty to have regard to the welfare of the child. (...) Ultimately, however, I do not think that it is appropriate for us to seek to legislate for everything in detail, as some of the amendments seek to do”.*²⁶

3.13 In July 2021, the then Lord Chancellor and Secretary of State for Justice, Rt Hon Robert Buckland QC MP, **“screening is absolutely essential if we’re really going to get to the heart of the needs of those who come into contact with the criminal justice system”**. He also stated that it was **“barmy that we do not know more about the people who we have responsibility for”**, and that **“Screening will [...] really open the door”** about the way in which people are dealt with in court. He said *“it’s an ineluctable truth [that] the number of people in the system with that type of need is disproportionately higher than the rest of the general population”*, an issue which he *“hears every day”*. He promised that *“there will be action”*. We agree with these sentiments and hope that action is taken in this Bill to address this.

3.14 **There is no reliable system or method within current video and audio link criminal proceedings to identify those who have mental health issues, neurodiverse and/or cognitive impairment disabilities, particularly considering that these are often hidden and/or the defendant may be reluctant or unable to disclose.** This must be rectified in the Bill to prevent the potential for unfair trials of vulnerable defendants.

3.15 While we recognise that these provisions will be accompanied by guidance and criminal procedure rules, we consider that the need for a health needs screening is so important to protect the right to a fair trial that it should be set out clearly in the Bill.

25 Nicola Padfield is a former Recorder (part-time judge), Professor of Criminal and Penal Justice, University of Cambridge, and Life and Hon. Fellow, Fitzwilliam College, Cambridge.

²⁶ *Ibid*

4. VIDEO AND AUDIO LINKS RESTRICT ACCESS TO LEGAL ADVICE AND EFFECTIVE LEGAL REPRESENTATION

4.1 **The ability to access legal advice and effective legal representation can be impeded if the defendant appears on video or audio link.** Fair Trials has found that lawyer-defendant communications have been badly affected during the COVID-19 pandemic, meaning that defendants are finding it more difficult to consult with their lawyers, and to seek advice before, during, and after court hearings.²⁷ Some of these difficulties are attributable to the poor quality or unreliability of the technology used to facilitate client-lawyer consultations.

4.2 The former judge and current Professor of Criminal and Penal Justice, University of Cambridge, Nicola Padfield, has said that:

*“Many of us are deeply concerned about the growing use of ‘video justice’, despite real concerns about how this can distort the quality of justice, not least by limiting the ways in which judge and defendant (and others) communicate”.*²⁸

4.3 A March 2020 report on ‘video-enabled justice’ funded by the Home Office and carried out by the Sussex Police and Crime Commissioner in conjunction with the University of Sussex also found that *“loss of face-to-face contact in video court can create challenges in terms of advocates developing trust and rapport with their clients”* and that *“appearing over the video link could make defence advocates less effective, particularly in relation to bail applications”*.

4.4 During the second reading in the House of Lords, the impact of remote proceedings on the parties’ ability to communicate effectively during criminal proceedings was also recognised. Lord Pannick explained that:

“Counsel, both prosecution and defence counsel, have to engage with the jury through advocacy and through their questions to witnesses. All of this is much more difficult to achieve through a video screen. [...] Most of us lawyers and judges in this House will testify from our own experience in the past 18 months that a remote

²⁷ Fair Trials, ‘Justice Under Lockdown: A survey of the criminal justice system in England & Wales between March and May 2020’, 2020. Pg 8

https://www.fairtrials.org/sites/default/files/publication_pdf/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf

²⁸ Nicola Padfield is a former Recorder (part-time judge), Professor of Criminal and Penal Justice, University of Cambridge, and Life and Hon. Fellow, Fitzwilliam College, Cambridge.

*hearing is a far less effective means of communication than a live hearing in the courtroom”.*²⁹

4.5 Not all defendants who are offered the facility of video or audio link are legally represented and they might not have appropriate advice about the benefits of appearing in person.

Remote hearings can interfere with defendants’ rights to participate effectively at their own hearings, and to review and challenge information and evidence relevant to those proceedings.

4.6 Baroness Drake has also identified practical challenges facing ordinary people in virtual hearings, including:

*“limited broadband access; phones or iPads shared between users in a household; no private space; a dependency on pay-as-you-go phones and expensive data packages; sensory impairments; and limited digital literacy. Yes, they may use email, but electronic document management may prove impossible for many lay users. Remote hearings can make it difficult for lawyers and their clients to communicate, frustrate users if they cannot see or understand what is going on, and undermine litigants’ ability to engage”.*³⁰

5. VIDEO AND AUDIO LINK HEARINGS CAN LEAD TO DISPROPORTIONATELY SEVERE OUTCOMES

5.1 Remote court proceedings can produce less favourable criminal justice outcomes for defendants, and disproportionately result in custodial sentences.

The March 2020 report on ‘video-enabled justice’ funded by the Home Office and carried out by the Sussex Police and Crime Commissioner concluded that individuals whose cases were handled remotely were more likely to receive a custodial sentence.

5.2 Moreover, those sentenced in the more traditional court setting were more likely to receive fines or other community sentences:

29 Lord Pannick, PCSC Bill Second Reading House of Lords, Tuesday 14 September 2021, Hansard <https://hansard.parliament.uk/lords/2021-09-14/debates/4D726E25-3924-4BB5-B399-4C839D773815/PoliceCrimeSentencingAndCourtsBill>

³⁰ Baroness Drake, Queen’s Speech debate, Tuesday 18 May 2021, Hansard Volume 812 <https://hansard.parliament.uk/Lords/2021-05-18/debates/33A25936-7C04-40A5-8CAD-EB920FB58292/Queen%E2%80%99Speech>

“The use of custodial sentences was more likely to be recorded in video court hearings... The use of community orders was also recorded more frequently in non-video court hearings”.³¹

The proportion of unrepresented defendants receiving custodial sentences was also higher than the rate for represented defendants.³²

- 5.3 A previous Ministry of Justice 2010 evaluation of a ‘virtual courts’ pilot also found that the rate of guilty pleas and custodial sentences were higher in the video court than in traditional courts.³³
- 5.4 These findings have very serious ramifications for our justice system as more hearings take place remotely and unsafe convictions harm victims and undermine public trust.

6. CHILDREN MUST APPEAR IN PERSON

- 6.1 **Children in court, many of whom have communication difficulties, struggle to understand what is happening and to participate effectively in proceedings. These problems are exacerbated by children appearing remotely by video link.** Children are less likely to understand what is happening when on video link, can’t consult their lawyer properly nor communicate well with the judge. This is in contravention of the UN Convention on the Rights of the Child, which gives children clear participation rights, and sets out the fundamental right of the child to be heard in the context of criminal justice proceedings.³⁴
- 6.2 Alliance for Youth Justice’s research on the use of video links with child defendants indicates children already struggle to understand what is happening in court and video link makes this worse.³⁵ Most concerning, the research indicated children on video link are less likely to appreciate the seriousness of the situation or present themselves well and may prejudice their

³¹ Fielding, N., Braun, S. and Hieke, G. ‘Video Enabled Justice Evaluation’, March 2020.

<<http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf>>

³² *Ibid*

³³ Terry, M., Johnson, S. and Thompson, P. ‘Virtual Court pilot: Outcome evaluation’, in *Ministry of Justice Research Services 21/10*, December 2010. <<https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/virtual-courts.pdf>>

³⁴ UN Committee on the Rights of the Child (2009) General Comment No. 12: The right of the child to be heard CRC/C/GC/12, Paragraphs 57 to 64

³⁵ <https://www.ayj.org.uk/news-content/they-just-dont-understand-whats-happened-or-why-an-ayj-report-on-child-defendants-and-video-links>

outcomes. This is borne out in earlier research by Transform Justice³⁶ which surveyed criminal justice practitioners on the impact of video hearings:

“Children do not appreciate they are in a court not on a computer game” (YOT officer).

“You can only see their face and there is little interaction. In my experience unless you have time with the young person to prepare, it is very hard to tell the difference between surly teenage behaviour, a total lack of confidence and/or significant learning difficulties and a lack of understanding” (YOT officer).

6.3 Just for Kids Law also provided a recent example where remote proceedings have prevented effective participation and legal advice:

“In late July 2021, one of our youth justice lawyers attended court to represent a 14-year-old charged with possession with intent to supply class A drugs. A number of technical issues then occurred which made what should have been a relatively short hearing protracted and distressing for the child involved. Initially, the court shared an incorrect video link to the child and legal representative. It took about an hour to resolve this issue. All those affected became increasingly frustrated during this period (including the YOT, prosecutor, magistrates, and, crucially, the child defendant himself). Once a valid link was finally distributed there were issues with the audio connection, which meant that the child could hear those in the Court room but they could not hear him. Nevertheless, the court was keen to progress the case and wanted pleas to be entered. The legal representative had to call the child defendant via phone, put him on loud speaker, following which the court clerk read the charges to him and he entered pleas. Luckily, the legal representative had arranged to speak to the child via Teams before the hearing and did not have to rely on the court video link system for that consultation, which would clearly have caused yet further delays and challenges. The legal representative herself was troubled by this experience stating: “Not only did it feel improper to have a vulnerable child enter pleas in such manner, but he became incredibly frustrated by the end of it and was visibly distressed and finding it very difficult to engage with the process. He had missed out on time with his mother which he had been hoping to have that day and had to attend the hearing from a car, as this was the only place he could find some privacy. An adjournment would have been more suitable. This

³⁶ <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

particular child also had learning difficulties, making it even more worrying that he was unable to fully engage or understand what was going on.”

- 6.4 Given that children’s effective participation is already at risk in face-to-face court hearings, and given the only available evidence on virtual justice raises critical concerns, it is not appropriate for legislation to be introduced promoting the use of live link for defendants under 18. As Baroness Sater said during second reading in the House of Lords *“There is little reference in the Bill to the youth court, or to provision for the welfare of the child with regard to the expansion of video-linking”*, and asked that the Government consider *“the default position for children should always be that they never appear via video link for non-administrative hearings”*.³⁷
- 6.5 While the Government recognises that *“children have specific needs”* and *“the courts have a statutory duty to have regard to the welfare of children”* the Bill does not go far enough to safeguard children’s fair trial rights.³⁸ **Children should be excluded from consideration for video or audio link and the Bill should ensure that all children appear in person to reduce the risk that their rights are compromised.**

7. THE NEED FOR AN IMPACT ASSESSMENT OF THE USE OF VIDEO AND AUDIO LINKS IN CRIMINAL PROCEEDINGS

- 7.1 The Government has claimed that video and audio links in the pandemic have been a huge success. But beyond the occasional announcement on the number of links used, there is no evidence on the use and impact of video and audio criminal proceedings during the pandemic. No data has been systematically collected and published in the public domain. The former judge, Nicola Padfield has said that

“To me, it is both obvious and vital that there is much more serious discussion about the disadvantages of digital justice before we rush headlong into what appears to be a superficially attractive mode of trial.”

- 7.2 As Lord Thomas of Gresford said at second reading *“before making these temporary provisions permanent, surely it would now be right to assess to what extent they impinged upon a fair*

³⁷ Baroness Sater, PCSC Bill Second Reading House of Lords, Tuesday 14 September 2021, Hansard <https://hansard.parliament.uk/lords/2021-09-14/debates/4D726E25-3924-4BB5-B399-4C839D773815/PoliceCrimeSentencingAndCourtsBill>

³⁸The Minister of State, Home Office, (Baroness Williams of Trafford), PCSC Bill Second Reading House of Lords, Tuesday 14 September 2021, Hansard <https://hansard.parliament.uk/lords/2021-09-14/debates/4D726E25-3924-4BB5-B399-4C839D773815/PoliceCrimeSentencingAndCourtsBill>

trial”³⁹ adding “A full evaluation of the impact of the coronavirus-type virtual proceedings and its effect upon the right to a fair trial is needed”. Earlier this year, Baroness Drake similarly stressed the importance of addressing the impacts of the reliance on remote technology in Court:

*“Court funding fell by 21% over the preceding decade, the courts modernisation programme struggled to deliver, and legal aid cuts increased litigants in person. Therefore, when Covid-19 suddenly rendered courts reliant on remote technology, those very vulnerabilities exacerbated the devastating impact of the pandemic, and the need for more investment in the justice system was laid bare. The Lord Chief Justice described the rapid adoption of new technology during the pandemic as “the biggest pilot project that the justice system has ever seen” and said that the shift to remote hearings provided an opportunity to “take the best of this new way of working to improve access to justice”, but the information to support improvements to the courts service was “just not available”. The pandemic shone a light on the absence of quality data. An opportunity to capture users’ experience in that “biggest pilot project” has been lost—yet without adequate data, the fundamental questions about the operation of our justice system remain unanswered”.*⁴⁰

7.3 At committee stage in the House of Commons, an amendment Fair Trials and Transform Justice supported was tabled to compel the Government to seek a full independent impact assessment of the effects of clause 169 before the expansion of audio and video links could take place. The aim of the impact assessment is to show what impact the roll-out of live links would have on sentencing and remand decisions, the effective participation of defendants, the experience of victims and witnesses, and the cost to the wider justice system, including costs borne by the police and prison systems.

7.4 **The Government must carry out a full and meaningful impact assessment into the implementation and effect of video and audio link hearings during the pandemic.**

8. FURTHER SAFEGUARDS REQUIRED TO PROTECT THE RIGHT TO A FAIR TRIAL

³⁹ Lord Thomas of Gresford, PCSC Bill Second Reading House of Lords, Tuesday 14 September 2021, Hansard <https://hansard.parliament.uk/lords/2021-09-14/debates/4D726E25-3924-4BB5-B399-4C839D773815/PoliceCrimeSentencingAndCourtsBill>

⁴⁰ Baroness Drake, Queen’s Speech debate, Tuesday 18 May 2021, Hansard Volume 812 <https://hansard.parliament.uk/Lords/2021-05-18/debates/33A25936-7C04-40A5-8CAD-EB920FB58292/Queen%E2%80%99Speech>

Allow defendants to decide whether to appear remotely

- 8.1 **All defendants, including those remanded by the police, who wish to appear in person rather than on video or audio link, should be allowed to do so.** They must be given the opportunity to request that they appear in person and this should be facilitated, and they should not appear by video or audio link unless they have given informed consent.
- 8.2 However, the Government’s view is that appearing remotely is non-compulsory and at the court’s discretion. While the Government acknowledges that *“some participants, including defendants, may want to exercise their own choice and say to the court [...] that they want to participate remotely”* it suggests that remote hearings are *“ultimately a matter for the judge presiding over any given hearing”*.⁴¹
- 8.3 **People are generally in favour of appearing in-person and are unhappy about the prospect of virtual hearings.** A recent survey commissioned by Transform Justice found that when asked for their preference should they be accused of a crime, two third of respondents said they would prefer to appear in court in person, rather than on video or on the phone.⁴²
- 8.4 A survey of judicial attitudes commissioned by the judiciary suggests most judges are unhappy about virtual hearings. Some 75% were concerned by the reduction in face-to-face hearings, 75% by the digital reform programme, and 81% by court closures.⁴³

Extend the ‘interests of justice test’ in the Bill to properly account for defendants’ interests

- 8.5 The ‘interests of justice’ test set out in Clause 169(4) of the Bill, which gives parties to the proceedings the ability to make representations, considers the views of the defendant as just one of the factors to be taken into account. During second reading at the House of Lords, the Government reiterated that the *“use of live links will continue to be subject to judicial discretion, and they will be used only where the court is satisfied that it is in the interests of justice”*.⁴⁴ This means that the defendant’s views are not determinative, or even recognised as being a primary factor for deciding whether or not court proceedings should take place remotely.

⁴¹ Chris Philp, PCSC Bill Committee Stage 16th Sitting, Thursday 17 June 2021, Hansard [https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill\(SixteenthSitting\)](https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill(SixteenthSitting))

⁴² Walnut Omnibus, a nationally representative omnibus survey of 2009 adults across GB between 17th – 18th February 2021.

⁴³ Judicial Attitudes Survey, 25 February 2021 <https://www.judiciary.uk/announcements/judicial-attitudes-survey/>

⁴⁴ The Minister of State, Home Office, (Baroness Williams of Trafford), PCSC Bill Second Reading House of Lords, Tuesday 14 September 2021, Hansard <https://hansard.parliament.uk/lords/2021-09-14/debates/4D726E25-3924-4BB5-B399-4C839D773815/PoliceCrimeSentencingAndCourtsBill>

8.6 In addition, the vague requirement in the Bill to take into account “*all of the circumstances of the case*” including “*whether that person would be able to take part in the proceedings effectively*,”⁴⁵ does not provide sufficient safeguards for vulnerable defendants.

8.7 The Government’s stance is that the judicial discretion in Clause 169 is enough of a safeguard and that a judge “*must decide whether it is in the interests of justice for a live link to be used*” which involves considering “*all the circumstances*”:⁴⁶

*“Those circumstances expressly include “the views” of the person who might be invited to attend by live link, so if someone has a particular problem or objection, they may table it and say to the judge why they think it is not right for them to appear remotely, if they are invited to do so. Equally, of course, they might say to a judge, “I would rather participate remotely”, for some reason of logistics or something else”.*⁴⁷

8.8 However, if there is no screening judges cannot properly exercise discretion; judges need up to date health screening information on the health and mental health needs of the defendant in order to exercise their discretion. As currently drafted, the Bill does not guarantee that unrepresented, vulnerable, or young defendants can participate effectively in the process. Nor does the Bill account for studies which show that video links can give a prejudicial view of a defendant, which disproportionately leads to high custodial sentences and guilty pleas. These factors must all be explicitly taken into account, not left to judicial discretion.

⁴⁵ Section 169(4) and (6)

⁴⁶ Chris Philp, PCSC Bill Committee Stage 16th Sitting, Thursday 17 June 2021, Hansard [https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill\(SixteenthSitting\)](https://hansard.parliament.uk/commons/2021-06-17/debates/8594adca-36bb-431c-a588-ef4ad272b78b/PoliceCrimeSentencingAndCourtsBill(SixteenthSitting))

⁴⁷ *Ibid*

ANNEX: AMENDMENTS TO CLAUSE 169

1. Defendant's consent to appearing remotely (Part 12, Clause 169)

Amendment

Clause 169, page 192, line 9, sub-clause 4 insert new sub-section (d):

“(d) the defendant has previously been given the opportunity to state whether they would prefer to appear in person and they have consented to appearing via live audio link or live video link.”

Effect

This amendment would give defendants the opportunity and ability to choose to appear in person rather than via audio or video link.

Explanation

Effective participation in court proceedings can be impeded if the defendant appears on video or audio link. Remote hearings can interfere with defendants' right to participate effectively at their own hearings and to review and challenge information and evidence relevant to the proceedings. All defendants, including those remanded by the police, who wish to appear in person rather than on video or audio link, should be allowed to do so. They must be given the opportunity to request that they appear in person and this should be facilitated. They should not appear by video or audio link unless they have consented to this.

2. Use of video and audio links in criminal proceedings: Health needs screening (Part 12, Clause 169)

Amendment

Clause 169, page 192, line 24, sub-clause 6(e), after “the direction,” insert:

“and in making such an assessment, the court has been provided with a physical and mental health screening of the person to whom the direction relates with a recommendation as to whether or not proceeding via a live audio link or live video link will impede their ability to understand or effectively participate in proceedings.”

Effect

This amendment would require that all defendants who might appear on a video or audio link from a location outside court should be subject to a health needs screening, and that screening information be made available to the judge responsible for listing, before listing is finalised.

Explanation

Vulnerable defendants are especially susceptible to unfair trials where trial proceedings are conducted remotely. Multiple studies have shown that remote justice proceedings are an inadequate substitute for in-person hearings, with vulnerable defendants especially at risk of unfair trials. While police custody and courts do have access to some health practitioners, through Liaison and Diversion (L&D) services, health practitioners only screen those referred to them which evidence suggests is a minority of those with disabilities. There is currently no reliable system to identify those who have mental health/neuro-diverse and cognitive impairment disabilities, particularly considering that these are often hidden and/or the defendant may be reluctant to disclose.

3. Use of video and audio links in criminal proceedings: Extend ‘interests of justice test’ (Part 12, Clause 169)

Amendment

Clause 169, page 192, line 24, sub-clause 6(e), after “the direction,” insert:

“including the following factors:

- (i) the existence of impairments or other factors that could negatively affect the defendant’s ability to participate effectively in court proceedings;
- (ii) the nature of the hearing, including the complexity of the case and the matter being dealt with; and
- (iii) the likely impact of the hearing on the rights of the defendant, particularly if it puts the defendant at risk of deprivation of liberty;”

Effect

This amendment would require the court to consider a range of crucial factors to ensure an individual’s (including but not limited to defendants) effective participation in the proceedings, including impairments or other factors, the nature of the hearing and the complexity of the case, and the risk to the defendant’s liberty.

Explanation

There is no requirement or mechanism within the Bill for the court to review the needs of vulnerable defendants, and how their ability to participate in remote justice proceedings might be impacted. Remote hearings can interfere with defendants' right to access effective legal assistance, to participate effectively at their own hearings, and to review and challenge information and evidence relevant to the proceedings. Evidence also suggests that remote hearings disproportionately result in custodial sentences. These factors must all be explicitly taken into account.

4. Appearance of children in court (Part 12, Clause 169)

Amendment

Clause 169, page 192, line 8, sub-clause 4(c) remove:

(c) if so required by section [52\(9\)](#), the relevant youth offending team has been given the opportunity to make representations.

and replace with:

“(c) the person to whom the direction is made has attained the age of 18 years”

Effect

This amendment would require children to be automatically produced in person at court.

Explanation

A child's effective participation in criminal justice proceedings is already at risk in face-to-face court hearings. Children have problems understanding what is happening and participating effectively, and many children in court have existing communication difficulties. Research indicates this will worsen with the use of audio and video link hearings. This amendment excludes children from consideration for video or audio links, ensuring all children appear in person and reducing the risk that their rights will be compromised.

5. Require an impact assessment on the use of video and audio links in criminal proceedings (Part 12, Clause 169)

Amendment

Clause 176, page 196, line 19, delete sub-clause (5)(u), and add subsection:

“(7) Section 169 (and Part 3 of Schedule 19) shall not come into force until an independent review of the impact of the expansion of audio and video links in criminal proceedings has been conducted. This

review must provide robust evidence of the impact of live audio and video links on sentencing and remand decisions, the effective participation of defendants, the experience of victims and witnesses and the cost to the wider justice system, including costs borne by the police and prison systems.”

Effect

This amendment would require an independent review to be conducted of the impact of video and audio links on effective participation, access to justice, fair trial rights, key justice outcomes such as on remand and sentencing decisions, and confidence in the justice system, before they are implemented in criminal justice proceedings.

Explanation

We have no evidence about the impact and effectiveness of these momentous changes to criminal proceedings. No impact evaluation has been undertaken or commissioned by the Government *during the pandemic* on the effect of these exceptional measures it now seeks to make permanent, including observational and ethnographic research, disaggregated data gathering, or research on the impact on remand, sentencing, and legal representation. The Government did not mention audio and video live link measures in its White Paper. There is evidence that video and audio links lead to lower levels of legal representation, more punitive outcomes, and less effective participation in the process, particularly for vulnerable people. There is no evidence that video and audio hearings will create cost efficiencies in the justice system. There should be no extension of video and audio links in criminal proceedings until a full evaluation is completed and published.