



POLICE, CRIME, SENTENCING AND COURTS BILL

VIDEO AND AUDIO LINKS IN CRIMINAL PROCEEDINGS

FAIR TRIALS, TRANSFORM JUSTICE & JUST FOR KIDS LAW BRIEFING FOR 2ND READING IN THE HOUSE OF LORDS

September 2021

PART 12: USE OF VIDEO AND AUDIO LINKS IN CRIMINAL PROCEEDINGS

The plans 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.

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 vulnerable defendants. There is evidence, including from the Government's own research, suggesting that remote hearings disproportionately result in custodial sentences.³ Despite this overwhelming evidence, the Government attempted to assert during Committee stage in the House of Commons that, "*No one has suggested that, during the pandemic, any particular defendant or witness has been especially badly served*".⁴ Yet 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.

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 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))

- 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.⁵ 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.⁶
- 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.*”⁷ 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 room. Technical problems also impede enjoyment of the accused’s rights.⁸ 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

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

⁶ ECtHR, *Marcello Viola v. Italy (No.2)*, App. No. 45106/04, Judgment of 5 October 2006, para. 67

⁷ ECtHR, *Sakhnovskiy v. Russia*, App. No. 21272/03, Judgment of 2 November 2010, para. 98

⁸ 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.

confirms, remote proceedings pose significant risks to the fairness of hearings/proceedings and trials.

2. VULNERABLE DEFENDANTS: THE NEED FOR SCREENING BEFORE A VIDEO OR AUDIO LINK HEARING

- 2.1 **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.⁹ 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.”*¹⁰
- 2.2 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”*,¹¹ significantly restricting vulnerable people’s access to justice.
- 2.3 A recent Criminal Justice Joint Inspectorate (HM Inspectorates of Prisons, Probation, Constabulary and Fire & Rescue) report ‘Neurodiversity in the Criminal Justice System: A review

⁹ 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

¹⁰ 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>

¹¹ 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

of evidence’ (Neurodiversity Report)¹² 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,¹³ 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.

2.4 Elements of police custody processes (for example, booking in and searches) and the custody environment 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.¹⁴

2.5 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 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”.

¹² Criminal Justice Joint Inspectorate, Neurodiversity in the Criminal Justice System: A review of evidence’, July 2021. <https://www.justiceinspectors.gov.uk/cji/wp-content/uploads/sites/2/2021/07/Neurodiversity-evidence-review-web-2021.pdf>

¹³ <https://www.appropriateadult.org.uk/downloads/research?download=63:there-to-help-3-2020>

¹⁴ *Ibid*

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”*.¹⁵

- 2.6 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”.

- 2.7 **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.

- 2.8 However, Government Minister Chris Philp MP 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”*.¹⁶

- 2.9 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

¹⁵ *Ibid*

¹⁶ 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))

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.¹⁷

- 2.10 In July 2021, the Lord Chancellor and Secretary of State for Justice, Rt Hon Robert Buckland QC MP, stated that neurodiversity had “*long been an interest*” and affirmed that the Government was “*going to do something about it*”.¹⁸ Referring to the Neurodiversity Report, the Justice Secretary said that it “*showed very clearly [...] that **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***”.
- 2.11 The Lord Chancellor 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*”.
- 2.12 We agree with this and hope that action is taken in this Bill to address this, including amending the Bill to include health needs screening for video and audio link hearings.

3. THE IMPACT OF VIDEO AND AUDIO LINKS ON ACCESS TO LEGAL ADVICE AND EFFECTIVE LEGAL REPRESENTATION

- 3.1 **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.¹⁹ Some of these difficulties are attributable to the poor quality or unreliability of the technology used to facilitate client-lawyer consultations.

¹⁷ *Ibid*

¹⁸ Speech by Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice, Centre for Social Justice, 22 July 2021 https://www.youtube.com/watch?v=7c_nReQ6eis

¹⁹ 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

- 3.2 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*”.
- 3.3 **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.
- 3.4 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”.*²⁰

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

- 4.1 **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.
- 4.2 Moreover, those sentenced in the more traditional court setting were more likely to receive fines or other community sentences:

²⁰ 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”.*²¹

The proportion of unrepresented defendants receiving custodial sentences was also higher than the rate for represented defendants.²²

- 4.3 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.²³
- 4.4 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.

5. SAFEGUARDS REQUIRED TO PROTECT THE RIGHT TO A FAIR TRIAL

A health needs screening before video and audio link hearings

- 5.1 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.
- 5.2 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 they should be set out on the face of the legislation.

Allow defendants to decide whether to appear remotely

- 5.3 **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.

²¹ 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>>

²² *Ibid*

²³ 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>>

- 5.4 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”*.²⁴
- 5.5 **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.²⁵
- 5.6 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.²⁶

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

- 5.7 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. 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.
- 5.8 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,”*²⁷ does not provide sufficient safeguards for vulnerable defendants.
- 5.9 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”*:²⁸

²⁴ 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))

²⁵ Walnut Omnibus, a nationally representative omnibus survey of 2009 adults across GB between 17th – 18th February 2021.

²⁶ Judicial Attitudes Survey, 25 February 2021 <https://www.judiciary.uk/announcements/judicial-attitudes-survey/>

²⁷ Section 169(4) and (6)

²⁸ 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))

*“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”.*²⁹

5.10 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.

Children to appear in person

5.11 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.³⁰ Children should be excluded from consideration for video or audio link; the Bill should ensure that all children appear in person to reduce the risk that their rights are compromised.

5.12 **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 not in line with the UN Convention on the Rights of the Child, ratified by the UK in 1991, which gives children clear participation rights. Paragraphs 57 to 64 of the UN Committee on the Rights of the Child’s General Comment number 12 sets out the fundamental right of the child to be heard in the context of criminal justice proceedings.³¹

5.13 Most concerningly, Alliance for Youth Justice’s research indicated children on video link are less likely to appreciate the seriousness of the situation or present themselves well and may

²⁹ *Ibid*

³⁰ <https://www.ayj.org.uk/news-content/they-just-dont-understand-whats-happened-or-why-an-ayj-report-on-child-defendants-and-video-links>

³¹ 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

prejudice their outcomes. This is borne out in earlier research by Transform Justice³² 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).

5.14 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

³² <https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

he could find some privacy. An adjournment would have been more suitable. This particular child also had learning difficulties, making it even more worrying that he was unable to fully engage or understand what was going on.”

- 5.15 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.

Impact assessment on video and audio link hearings

- 5.16 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, we have no evidence on video and audio criminal hearings in the pandemic. No data has been systematically collected *and published* in the public domain.

- 5.17 At committee stage, 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.

- 5.18 In 2021, 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”.*³³

5.19 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.

³³ 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>