

**Transform
Justice**

**Defendants on video – conveyor belt
justice or a revolution in access?**

By Penelope Gibbs
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About Transform Justice

Transform Justice is a national charity campaigning for a fairer, more humane, more open and effective justice system. Penelope Gibbs set up the charity in 2012 to help create a better justice system in the UK. Transform Justice promotes change through generating research and evidence to show how the system could be improved, and by persuading practitioners and politicians to make those changes.

About Penelope Gibbs

Penelope Gibbs is the author of this report. She worked as a radio producer at the BBC before being inspired to move into the voluntary sector. She set up the Voluntary Action Media Unit at TimeBank before she joined the Prison Reform Trust to run the Out of Trouble campaign to reduce child and youth imprisonment in the UK. Under her watch, the number of children in prison in the UK fell by a third. Penelope has also sat as a magistrate. She has been director of Transform Justice since its foundation and is a Research Associate with the Centre for Criminology at the University of Oxford.

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Foreword

Mike Hough, Visiting Professor, Birkbeck, University of London

Embracing technology is the progressive thing to do. We all know that – it has enriched our lives immeasurably. Sometimes, however, it is really important to pause for thought, and ask whether a seemingly obvious opportunity for a technological solution is actually one that is worth grasping. That is the message from this timely report. It offers a totally convincing argument that the use of video and similar technologies for virtual court hearings may carry risks and costs that outweigh the likely benefits.

Court hearings are complex events. It requires a great deal of coordination and cost to assemble all the participants. Surely there are benefits to be had by allowing some – or all – of them to take part in hearings virtually? Certainly there are potential savings, but there are also some obvious, and some less than obvious, costs. The obvious ones are financial. Whilst it is easy and cheap to take part in a short Skype meeting, the virtual reality that is afforded to participants is far from real. It is very much more expensive to provide equipment that meets realistic criteria for court business. There are issues of visual and acoustic clarity. Virtual participants need to see and hear what is going on, and need to be seen and heard just as clearly. Systems need to be 100% reliable and available – which can prove expensive. These practical considerations may be surmountable, of course. ‘Teething problems’ can be solved, and costs of technology will fall over time – but these arguments do not remove the need for careful and thorough calculation of cost-effectiveness.

The non-financial costs of virtual hearings are potentially more troubling. In the first place, many defendants are vulnerable participants, and appearances in court are arguably very stressful ‘vulnerable moments’ for the majority, sometimes having life-changing consequences. It is over-optimistic to expect them to participate as fully

in a virtual hearing as they can in open court, and to ensure that they are properly given voice. More generally, virtual technology inevitably degrades the quality of human interaction. Nuances may be undetected, misunderstandings may go unnoticed more easily. Empathy may be lost. Defence counsel may find it harder to support their clients effectively, and there are some indications that the technology may actually affect court outcomes. In other words, there is no guarantee at present that virtual hearings will not damage the quality of justice.

Finally there are more diffuse – but equally important – concerns about the impact of this technology on the legitimacy of the criminal courts. We know that courts draw their legitimacy from many sources. Treating people fairly, giving them respect, listening to their side of the story, explaining the processes carefully, are all important preconditions. But there is also an element of theatre to court business. One might question whether the full pomp and ritual of wigs and gowns are essential to the authority of the court, but it would be naïve to ignore the fact that a hearing is an occasion, not simply a transaction. And it seems very likely that the quality of the occasion is thinned by the technologies of virtual reality.

Some will be tempted to dismiss this report as sentimental Neo-Luddism. That would be wrong, as its arguments are balanced and thoughtful, and deserve close consideration. For most citizens, court appearances constitute rare and important moments of interaction with the power of the state. It could prove a costly mistake to penny-pinch when orchestrating these moments.

Executive summary

Videolink is the new normal. Judges have been told to always do it (criminal lawyer).

Psychologically, it is easier to do something negative to someone when they are not physically present. When I prosecute a bail matter, I prefer the defendant to be on the [video] link. When I defended, I always sought to have the defendant present in court, so the judge or magistrates would have to refuse bail "to their face" (prosecutor).

In my experience prison to court video links have enabled defendants to participate in the same way as if they were in court. They have not been disadvantaged, nor advantaged. It results in fewer delays due to... vans being caught in traffic or incorrect prisoner transport paperwork (magistrate).

The use of video hearings for defendants and prisoners has increased gradually but steadily over the last ten years with little scrutiny or consultation. The development of video hearings has profound implications for the way the court, and justice itself, is perceived, and for the relationship between a lawyer and their client.

Video hearings from prison and police station to court, and from prison to parole board are seen as quicker, cheaper and more convenient – by the senior judiciary, Her Majesty's Courts and Tribunals Service (HMCTS) and the Ministry of Justice (MoJ), but many practitioners and magistrates feel that the disadvantages of virtual justice outweigh the advantages. And it is not at all clear what are the outcomes in terms of justice, for witnesses or defendants. There is no data on the number of video court hearings held, or for what purpose. There is no research on the effect of appearing on video on a defendants' ability to participate, on their relationship with their lawyer or probation officer, and on perceptions of a jury or judge. Given

that judges' decisions can be affected by issues such as whether they have had lunch or not¹, it seems likely that they are influenced by whether the defendant is present physically in court or not. This is supported by the only research from the last ten years on the outcomes of defendants appearing on video in England and Wales. This found that defendants who appeared on video from police stations were more likely to get prison sentences and less likely to get community sentences.²

Dr Jessica Jacobson has argued that all defendants are to some extent vulnerable, because the court process is alien and intimidating. The testimony gathered by Transform Justice for this report suggests that appearing on video can increase defendants' feelings of isolation and stress. Alarm bells are ringing particularly loud about the use of video for people with mental health problems, learning disabilities, and autism. It can be hard to recognise when a defendant has a disability or support needs when they appear in court in person, and it is harder still when they appear on video.

This report suggests ways to improve the way video hearings work. But to make the system fit for purpose would cost millions – millions the MoJ does not have. And the outcomes in terms of justice (sentencing and remand decisions) may always be more punitive for those appearing on video. So is it worth it? If cost saving is the over-riding objective of the move to video hearings, the jury is still out on whether they save money now. It may well be more expensive to create a virtual court that works properly, than to use existing physical courts.

What does virtual justice do for trust and confidence in the justice system? The principles of procedural justice suggest that the way defendants and witnesses are treated has a profound effect on whether they perceive the system and the outcome of their case to

be fair. Our qualitative research suggests that video hearings reduce defendants' understanding of, and respect for, the process. When separated by a screen, defendants are more likely to shout or walk out of a hearing. Video hearings also exclude family and supporters (of defendants and witnesses) from the court. Of course they *can* turn up. But what is the point if some or all the participants are on a screen? As David Lammy recently pointed out in his review of the treatment of BAME communities in the criminal justice system, trust in our justice system, particularly amongst those from ethnic minorities, is already fragile. We can't afford to undermine that trust further. This report suggests that virtual justice may not be more efficient, may not deliver the cost-savings it is meant to do, and may compromise human rights and confidence in our justice system.

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Sources of information

Transform Justice has previously produced a number of blogs and a briefing (on the Prisons and Courts Bill) on the subject of virtual justice.³ This report draws on those, and on international academic articles and research. There is no national MoJ published data on video hearings, though Tom Hawker (PhD student at the University of Cambridge) obtained some information from an FOI request and a download of court lists.

There is no MoJ research on virtual hearings from police stations since 2010, and on virtual hearings from prison since 2000. There is no Parole Board research on video parole hearings.

For this report, Transform Justice has gathered additional qualitative data through three sources

1. A surveymonkey survey which was circulated via twitter and e-bulletins of organisations such as the Criminal Bar Association and CILEx. Respondents could skip some of the questions, but on average 180 people responded to each question.⁴ All had some experience of defendants' video hearings, whether as magistrates, probation officers, lawyers, intermediaries or other. Dr Tim Bateman of the University of Bedford helped design this survey.
2. Eight in depth telephone interviews with some of the survey respondents. These were conducted by Mia Harris, a PhD student with the University of Oxford Centre for Criminology.
3. A round table discussion with a range of participants, including lawyers, magistrates, academics, HMCTS, an intermediary and liaison and diversion practitioners, on 5th July 2017, transcribed by Leanne Robinson.

The Standing Committee for Youth Justice helped to analyse the survey data on child defendants.

The participants in this qualitative research were contacted via Transform Justice's networks. They all have experience of the criminal justice system, have freely given their views and the balance of views has been reflected in this report. All the quotes used (unless otherwise referenced) are from the survey, the phone interviews or the roundtable discussion.

There is a dearth of research. We would welcome more research on any aspect, particularly on outcomes, on participation by defendants with particular needs, and on the effect of virtual justice on confidence in the system.

Transform Justice gathered valuable information on the experience of conducting parole hearings on video. There are interesting parallels between parole and court video hearings, but also significant differences. So parole issues are covered in the Transform Justice blog rather than in this report.

Terms which are frequently used:

- live link is a live video link
- PVL is a prison to video link
- Virtual court is court where some or all the parties are appearing by video link. Usually used in relation to police station to court video links

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Background: the defendants who appear on video and why?

Nearly every criminal court facilitates video appearances by defendants from prison, and most prisons have video links to courts. There are video links from some police stations and NHS psychiatric facilities to courts, and some lawyers have taken part in court hearings from home using a tablet.

In 1992 the first prison-court video link was established between Norwich Prison and Great Yarmouth Magistrates' Court. Video links were originally used for case management and remand hearings. The first UK research on prison-court links was published in 1999 and 2000 by Joyce Plotnikoff and Dr Richard Woolfson. This research⁵ was positive overall, and was used to support an expansion in their use – to more prisons and courts and to a greater range of hearings. The rationale for using prison to court video hearings was to save money, and make the process more convenient for the defendant. The prisoner who appears on video link is spared a long journey to court in a very uncomfortable van, and a potential prison move. Money is saved on the transport of prisoners from prison to court and on court custody staff, while prisons pay for video equipment and for staff to supervise prisoners attending video hearings.

The first police station to court video links were tried in 2009. A room in a police station was equipped with video monitors, and the means to connect the room to a local court. These "virtual" courts were used for defendants who had been detained by the police (either arrested on warrant or charged and denied bail by the police), who would otherwise be transported in a van to the court. The first courts to take part in the pilot programmes were in Kent and London, and an evaluation of the pilot was published in 2010⁶. This showed the virtual courts to be more expensive than traditional courts. Defendants appearing on video were less likely to take up (non means tested) legal advice, and more likely to get a prison sentence –

possibly because they were unrepresented. It is hard to understand why this MoJ research did not lead to some soul searching, but the research has not been cited in any official publication subsequently, and such police station to court links have increased. There are now a number of police forces offering "virtual courts". In some areas (Kent, Norfolk and Suffolk) nearly all detained defendants appear on video. Defendants on these links plead, have bail considered and, if they have pleaded guilty, are usually sentenced there and then.

Transforming our justice system: government proposals for expanding virtual justice

It is time for innovation in our system. The resolution of cases has historically revolved around advocacy before a judge in a physical courtroom...As the courts and tribunals are modernised we will need fewer buildings, used more efficiently with courtrooms which are more adaptable. In many cases, attending hearings in person will only be needed where there is no other alternative; parties will be able to engage virtually or online rather than have to take time to attend hearings in person⁷ (Lord Chancellor, Lord Chief Justice, Senior President of Tribunals 2016).

The government and the senior judiciary are committed to expanding virtual justice.

Lord Leveson promoted video hearings in his 2015 review of efficiency in criminal proceedings.⁸ He acknowledged that “there has been no time or little opportunity for evidence gathering” and that “there is no quantitative analysis of the effect of the changes which are proposed. Within the constraints of the Review, it has not been possible to calculate how much will be saved by any participant in the criminal justice system by any single change, or combination of changes, to the way in which criminal cases are conducted”. Nevertheless he proceeded to recommend a big expansion of video and telephone hearings to incorporate all stages of the criminal justice process, apart from trials and sentencing.

His key proposals were included in a white paper,⁹ which in turn informed the Prisons and Courts Bill introduced in February 2017. This advocated a radical expansion of virtual hearings – more radical than suggested by Lord Leveson. The Bill proposed eliminating almost all barriers to the appearance of parties, including judges, on either a video screen or a phone i.e. it would have paved the way for trial by Skype or conference call with no parties being in a physical court room. The only hearings excluded from the proposals were Crown Court trials.

The bill was a casualty of the calling of the election in April 2017. The Queen’s speech two months later heralded a new bill – the Courts Bill – but it is not yet clear when this might be introduced, nor what court reform proposals it will contain.

Many of the court reform proposals in the Prisons and Courts bill had not been subject to public consultation. But the Magistrates’ Association, the Bar Council, the Law Society, Justice, Transform Justice and the Prison Reform Trust, among others, voiced disquiet about aspects of the proposals, particularly their potential impact on vulnerable defendants.

It is not clear whether the government needs primary legislation to expand virtual justice. In recent years court reform has been supported by changes in guidance – criminal practice directions and criminal procedure rules. Such changes do not have to be consulted on, or actively approved by parliament.

The most recent amendments to the criminal practice directions¹⁰ allow any criminal justice process to be held on video/telephone apart from taking evidence from the defendant during a trial (though even this can be taken on video in certain circumstances) and the directions permit defendants to appear on Skype or FaceTime in any open hearing. The Lord Chief Justice dismissed concerns about potential for links to be hacked or monitored by pointing out that the hearings should be open to the public anyway (3N.4).

To use or not to use? Who decides whether the live link should be used

The starting point is that all prisoners will appear on a video link from prison unless there is an extremely good reason why that is inappropriate (legal adviser).

It is unclear how exactly decisions are made to use a live link. In both prison and in the police station, the defendant has no choice either way, though can express a preference through their lawyer. The ultimate decision on whether a live link should be used is for the court, namely the judge or bench. And they are supposed to make that decision in “the interests of justice”. The government in its briefing accompanying the Prisons and Courts Bill assured that “the court will always decide whether it is appropriate to conduct a hearing in a certain way”.¹¹

The reality of most video link bookings is that the judge/bench may not even be consulted, and an “interests of justice” test is seldom actively applied. In the case of some police station-court links, all the defendants are automatically booked to appear on video from the police station. No one consults that day’s bench in advance as to whether the defendants should appear on video or be brought to court – virtual is the default. I have never seen a bench deem a video hearing unsuitable unless a lawyer or other practitioner has intervened during the hearing itself and persuaded them that the case be adjourned. There is no procedure for a lawyer to make a representation about the suitability of video before a defendant appears on video from the police station.

In long running cases, judges have more flexibility – theoretically – to choose whether a defendant should appear on video. But the most recent Criminal Procedure Rules suggest judges should always opt for video hearings, except when the defendant is actually on trial, and judges feel under pressure to follow the senior judiciary’s instructions and mood music. There is anecdotal evidence that resident judges in Crown Courts have been told to encourage all the

judges in their court to use video links whenever technically available. Presumably, listings officers have the same instructions.

However the use of video is not popular with many judges and magistrates. In a recent survey of judicial attitudes¹² commissioned by the judiciary, over a third of district judges and 16% of circuit judges said they were concerned by a reduction in face-to-face hearings. More than half of respondents to this survey also said the quality of IT equipment, including live links, was poor.

Judges’ unease about the reduction in face-to-face hearings is likely based on their experience of video links. Unfortunately neither they, nor anyone else, have the information they need to make the “interests of justice” test a real one.

Equipment failures and stopwatch justice: the practical problems

There was a long delay to get the system functional. There was a delay between video and audio so the defendant was struggling to follow what was happening. The system seemed so temperamental it would have been quicker to transport him from the prison to the court (police officer).

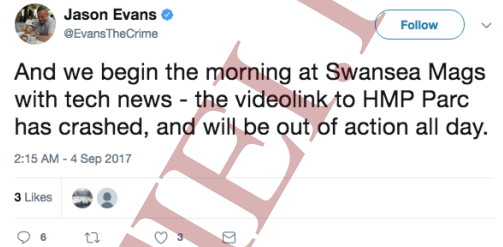
Often the audio quality is poor- there have been times when part way through a case the Def has indicated he can't hear what is happening. People often don't speak up if they can't hear/see what is going on. In the court we sometimes can't hear all of what is being said by the Def (legal adviser).

Unsurprisingly communicating by video hampers understanding. Delays in the sound cause people to simplify their points of view and misunderstandings can happen easily (court clerk).

There are many concerns about the design, capability and reliability of current video technology:

1. Live link does not always work causing considerable delay. Respondents said this happened quite often.
2. Live link works visually but sound is not available, or poor. A lawyer, Ant Waller recently wrote on FaceBook of a defendant who was faced with a number of charges: "issues in Brighton with the video-link. The defendant can hear us, but we cannot hear the defendant. We are about to embark on a PTPH [plea and trial preparation hearing]. The solution ...is for the defendant to be given a piece of paper with "not guilty" written on it and hold it up as each count is read out. If he wants to plead guilty he will cover up the word "not!"¹³ Tristan Kirk, the Evening Standard Court reporter, tweeted this August of a hearing in which, twelve minutes in, "defendant on videolink says he can just hear typing and distant voice of judge. Cue a few minutes of "Can you hear me now?" There was only one working microphone in the court so the judge and all the barristers ended up huddled around the same microphone. Even at the end the defendant said he only followed it "vaguely".¹⁴
3. "[The defendant] is usually on the wall of the court fifteen feet away, the actual screens that you're looking at. So you're looking at a screen fifteen feet away, where they're in a room, sitting fifteen feet away from their actual camera... it's not like you have a good close up vision of them" (criminal barrister). Sightlines are poor for defendants on video. They can usually only see one person in the court at a time, so cannot see all the participants, nor gauge their body language. Equally the court's view of the defendant is often mediocre – they can appear quite small on screen and the camera is sometimes angled such that it looks down on the defendant, rather than looking face on
4. "It works fine so long as there is ample pre court conference time between the prisoner and their lawyer... it is negative when the court sitting hours conflict with prison routine so they cut you off mid link!" Legal Adviser. The rigid time-slots available for video hearings mean there are frequently delays, overruns and non-appearances. Prisons sometimes do not allocate staff to get prisoners from their cells for the right time slot. A lawyer told us that she had twice recently waited for a client to appear on video-link, only to be told they had refused to leave their cell to take part in the hearing. She later discovered that her clients had been sitting in their cells, ready to take part. Delays also happen in police station to court links. Where a defendant is in a police station and time runs out for them to appear on the live link to court that day, their case is held over to another day, involving another night in custody in the

police station (in legal limbo since the defendants are no longer in police custody). This would never happen in a court where all defendants in court cells have to be dealt with by the end of the day.



A broken relationship? The effect of video hearings on lawyer and client

I have had communication break down entirely with defendants who become agitated – it's a lot easier for them to become frustrated and take out their anger with a "face on a screen" than a human being in the room with them (criminal lawyer).

It makes it easier AND more difficult. It's harder to fully and effectively advise (which is a real problem, since that's my job). But on a selfish level, it does mean I know exactly what time my client will "be there" and what time we will be heard etc. However, despite the obvious advantage to us barristers, I am... entirely against the use of video links in all but the most basic of hearings (criminal lawyer).

A startling finding of the MoJ research on virtual courts from police stations¹⁵ was the high proportion of defendants who opted to manage without a lawyer. For the pilot, a special scheme was set up whereby all defendants had access to free legal advice, regardless of income. Even so, 46% of defendants who appeared on video were unrepresented. This is higher than the proportion appearing unrepresented in actual courts at the time – estimated at 32% in this study.

It is not clear why a significant minority of defendants eschewed legal advice, but it may be that they felt the process would be quicker if they did not wait for a lawyer. Given that many of these hearings resulted in a prison sentence or remand, it is worrying that self-representation was so much higher in the police station. Research by Transform Justice¹⁶ suggests that defendants who appear unrepresented have little idea of their legal rights, nor of the criminal justice process. This prejudices justice outcomes.

We do not know what proportion of defendants currently appear on video from the police station or prison unrepresented, but proportions are likely to be high, particularly from police stations. Respondents to our survey suggested that

unrepresented defendants were one of the groups most disadvantaged by virtual hearings. But there is no guidance to suggest that unrepresented defendants should be transferred to a physical court.

Most defendants appearing on video are still represented by lawyers. The views of lawyers on virtual hearings are mostly negative, and have been expressed as such in all research, including that commissioned by MoJ in 1999, 2000 and 2010. But there are a few lawyer proponents. Some praise the convenience of video hearings since they avoid long journeys to visit clients in prison, and lengthy consultations. Lawyers are sometimes able to appear themselves by video link from their office or their nearest court (rather than the court in which the bench is sitting), thus radically reducing their travel time.

Lawyers also accept that some hearings are fairly administrative and, as such, may be suitable for video. Lawyers are used to remand hearings being on video (if the defendant appears at all), but most are uneasy about their ability to properly defend if they do not meet their client in person. Advocates are also concerned that their client may be disadvantaged if they appear on video.

Lawyers consult with clients on video when they are at the police station awaiting their first "virtual" appearance, and when their client is in prison and has a video hearing – which may be for case-management, remand or sentencing. Lawyers are theoretically allowed to go to the police station or prison for the video hearing, consult with their client there, and sit with them during the hearing, also appearing on video to the court. But for practical and ethical reasons, most prefer to attend court in person and liaise with clients over the video. (They often need to deal with more than one client or case in the same court in one day). They also feel better

able to defend their client if they appear in court in person – ironically for the same reasons (clarity of communication, ability to read body language) why they feel their clients' interests are prejudiced by appearing on video. Law Society guidance suggests lawyers should appear in person in court.

Rapport

On those occasions when the video link works, we have very limited time. We often use a lot of it shouting for the custody staff at the other end to hear us on the video screen in the video room, and then come in and speak to us. When the defendant is produced on the other end, he seems remote, and I often find I can't be sure if he understands my empathy/sympathy/other emotions which are essential to cultivating a working relationship in this very difficult circumstance....We have stilted conversations which are often interrupted by delay in transmission or poor connection. The worst part is that, when in court, or when discussing matters with the prosecutor or probation, you have no opportunity to speak to the defendant and explain what developments have taken place or what he would like you to do next. I find video links an insult to the justice system (criminal lawyer).

Defendants are often in a state of high stress when they first meet their defence lawyer. Those who have been charged and detained by the police overnight are particularly stressed. They may have some distrust of lawyers in general. So lawyers who are in court and need to speak on video to a client they have never met before have a difficult time establishing any kind of relationship. Maintaining any lawyer-client relationship is also more difficult on video. Without a trusting relationship and good communication, advocates cannot defend their clients properly.

Time slots

You are only allowed a 15 minute pre-hearing conference which is not enough time for you to advise a client on the evidence against them, what the law is, what defences are available, and what the likely sentence will be. Often you resort to bullet points and end up rushing the client to make a decision. Similarly, with sentence hearings you barely have enough time to discuss the PSR... and discuss mitigation. If you have a client who is telling you about personal matters such as addiction, childhood abuse etc, you find yourself rushing them in order to cover everything you need to cover (criminal lawyer).

The ability of the lawyer to develop and nurture a relationship with their client is hampered by the time-slots available for consultations over the video. Police stations and prisons only have a finite number of rooms/booths available for lawyer-video consultations. Rooms, equipment and custody staff are prioritised for the actual court hearings. Lawyers are allocated 15 minute time slots for each consultation. The slot often starts at least five minutes late because the defendant/prisoner is not there at the start time and there is little, if any, flexibility to extend the slot given the pressures on the use of the video slots. The brevity and inflexibility of the time slots make consultations with those with disabilities, trauma, poor literacy, limited English and/or hearing impairments particularly challenging. In a court building, no lawyer is restricted to a 15 minute slot to consult their client face-to-face. They may not need 15 minutes, but they can take an hour if they want to, and the judge or bench will usually accommodate that.

The rigidity of time slots can also cause delay. Lawyers told us that if the initial 15 minute morning slot was not long enough, they were not allowed to extend their slot, so were sometimes forced to book another 15 minute slot later in the morning. Thus the

hearing itself would have to be delayed from morning to afternoon, simply because a 15 minute consultation slot could not be extended.

Documents

Lawyers frequently need to show their client either online or printed documents, and get documents signed. This is nigh on impossible on video link, particularly when the documents the lawyer wants to show are only in digital case files, as is increasingly the case. Defendants often need to see the evidence against them in order to decide on plea. So lawyers end up trying to put their own tablet/computer screen up to the video screen in a booth. This does not work well, and defendants end up having to make decisions without seeing the relevant files.

Confidentiality

It is a principle of our system, and a right, that client-lawyer consultation should be confidential. But lawyers and others have told us that consultations on video are frequently overheard by others because the booths/rooms in which they are held are not properly soundproofed, and because either or both sides sometimes need to shout to be heard, due to the poor sound quality of the line. This is the case in police stations, courts and prisons.

PhD researcher Tom Hawker was recently waiting outside a court room alongside other parties. A defence lawyer and her client were shouting to each other over a video link in a nearby room, in order to be heard, meaning everyone nearby heard everything.

In the original 1999 Plotnikoff/Woolfson research on prison-court video links, the majority of lawyers

in the magistrates' and crown courts expressed concerns about the confidentiality of the video and phone consultations they had held, whether because they suspected their conversations of being actively monitored or overheard. These concerns have not been allayed. And the links currently used are in theory secure, but cyber security is a growing challenge.

The frequent lack of confidentiality of video consultations is another barrier to trust in lawyer-client relationships and threatens to undermine the legitimacy of the process for all parties.

The court hearing itself

If he has a problem during the hearing, or needs to speak to me, he needs to have the cojones to interrupt the court in full flow. Detached and on a screen, he is more likely to be reluctant to do so. This is *his* case, remember...(criminal lawyer).

Defendants often forget to ask something in the private consultation. If they are present in court then that isn't a problem, if they are on the link it is a real problem. To discuss further, the court has to be cleared or the defendant taken back onto the private link, which isn't always possible for the prison staff or the court (criminal lawyer).

A defendant who has been detained previously is usually placed in court in a secure dock. But the judge or bench has discretion to allow any defendant to sit in the well of the court. Sitting near their lawyer they can whisper corrections or important bits of information. If necessary, the defence advocate can ask the court to adjourn for five minutes to allow for private consultation. Communication between advocate and client is difficult from the dock, but the defendant can still use body language or knock on

the screen to indicate to the judge or court staff that they want to intervene or talk to their lawyer. When a defendant is on video, it is extremely difficult for them to communicate with their lawyer, openly or privately. This is probably why some defendants start shouting. If the lawyer does need to have a private conversation with their client during a video hearing, they have to ask for a brief adjournment, get a video consultation booked in a separate room, hold the consultation and return to the court where the video link has to be set up again. This makes a video hearing potentially much longer than one held in the court where the defendant can simply whisper the point to their advocate.

Post court consultation

In a traditional court setting, a lawyer usually has the opportunity to talk to their client face to face after the hearing. This enables the lawyer to make sure the client has understood the court's decision and to discuss next steps. Lawyers say that it is often impossible to have a post court "meeting" with the client when they have appeared on video due to the logistical difficulties (the client may have already been escorted away by the prison officer) and because time in the video consultation rooms is in high demand.



Sidelined by the process? The impact of video hearings on probation

There has been a gradual erosion of personal contact between probation officers and their clients. This cannot be a good thing. In the past, an offender manager would attend a hearing in person. Then video links were introduced. As some prisons or probation offices do not have such facilities, telephone participation has crept in. Is it right that an offender manager charged with oversight of a case has not ever met his/her client face-to-face? Good relationships are very important in the supervision process and that is aided by direct contact (Parole Board member).

Inspectors were concerned...at the over-reliance on telephone contact in supervising individuals. Without meaningful contact, people are less likely to develop the will to change their attitudes and behaviour¹⁷ (Dame Glenys Stacey).

Court probation officers perform an important role in court, particularly in ordering and writing pre-sentence reports. The impact of virtual hearings on their role is unresearched, but those who responded to our survey were concerned. Probation officers often interview clients in prison or in the police virtual custody suite using the video link. If a client has appeared virtually from the police station, and the court asks for a pre-sentence report to be done that day, the probation officer will need to book a video slot, interview someone they have never met before about the motivation for their offending, and produce a report putting forward options (eg potential conditions that could be attached to a community order) and recommending a sentence.

Unsurprisingly, probation officers find this hard.

The Director of Transform Justice watched a day of virtual court hearings from police stations in Kent. The probation officer sat in court, but appeared side-lined. Many defendants were sentenced,

including to custody, without a pre-sentence report. It was not clear why these were not ordered - maybe the demands of the fixed video slots made the bench reluctant to slow things down by ordering reports?

The quality of sentencing is to some extent dependent on the expert input of probation. We have only indications that video hearings may be inhibiting probation officers in using their skills, or dissuading judges from ordering pre-sentence reports, but this is an area which urgently needs further research.

Sweatbox or screen: what do defendants and prisoners want?

Sometimes you feel that you are not part of it and it would be better to go [to court]. Other times it is a load of hassle and you think 'what's the point of going to court to wait around all day?' It just depends on how things are going with your case but I think we should have some choice (defendant).¹⁸

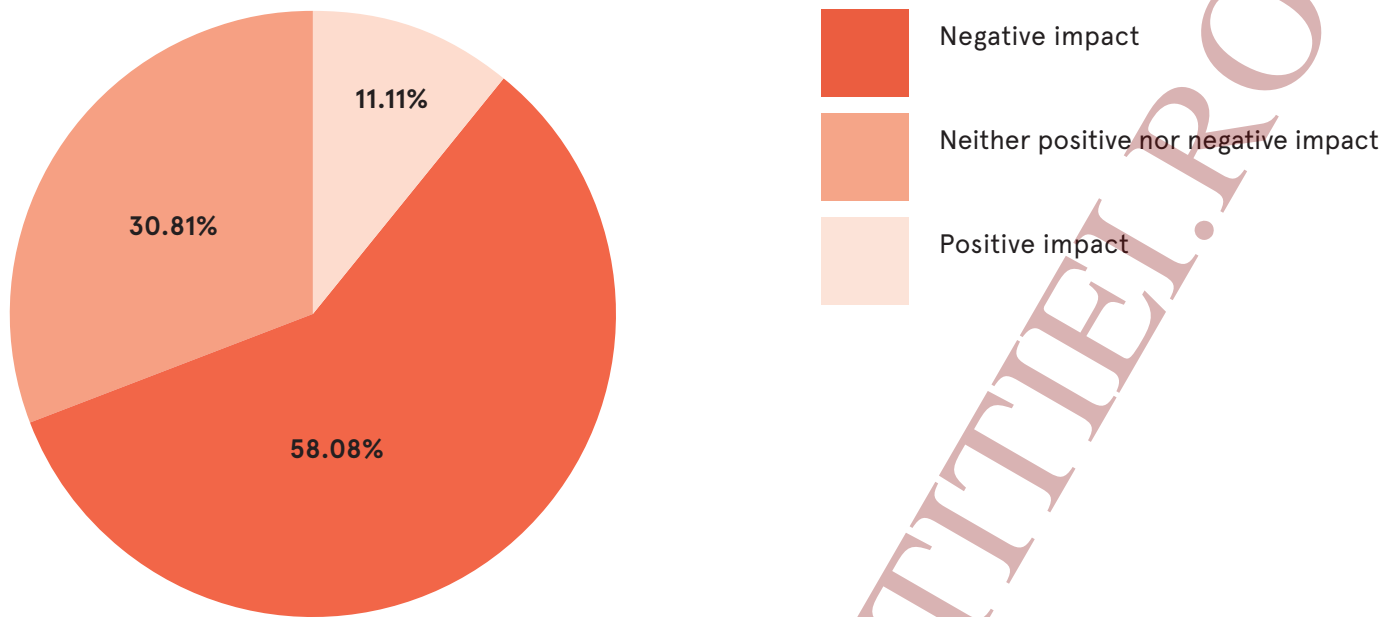
Many lawyers and prisoners themselves point out that it is much more convenient for someone already in prison to take part in a short hearing by video. If prisoners go to court they have to get up in the middle of the night, be processed out of their prison, spend hours in a very uncomfortable van (nicknamed "sweatbox" since hot with very small windows), wait in court cells and then travel back arriving very late and having missed supper – all often for an appearance in open court of less than half an hour. Sometimes prisoners are moved to a new prison at the end of the court day, not necessarily because of the court outcome, but because of the complications of prison space logistics. So it is clear why prisoners may prefer video hearings.

It is not at all clear that defendants detained in police stations prefer to be dealt with on video. The journey times to court are usually much shorter, and the prospects of leaving court at liberty much greater – two thirds of those detained by the police are released by the court. No research has ever been done with defendants on the subject, but the evaluation of the virtual court suggests defendants were reluctant to appear on video. When given the choice, the majority of defendants refused to appear on video from the police station. Despite the reluctance of defendants to appear on video from the police station, the law was changed in 2009 (mid-pilot) to deny detained defendants any choice.

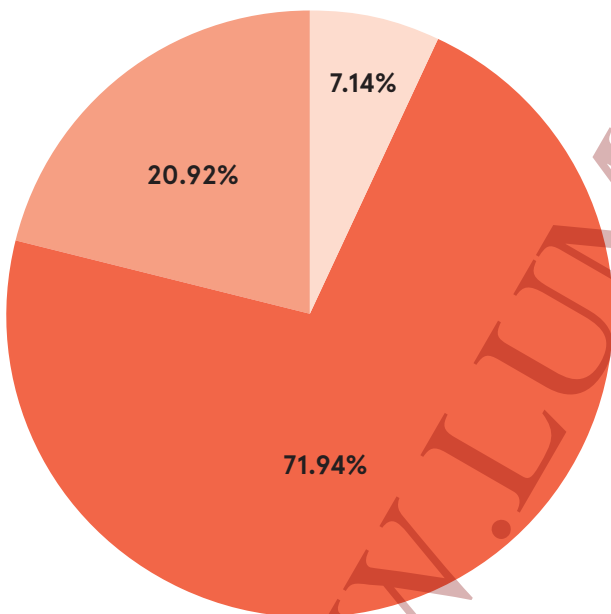
Most defendants interviewed in the Plotnikoff/Woolfson research felt that holding pre-trial hearings on video was fair, but a significant minority (20-25%) did not.



What is the positive/negative impact of video hearings on defendants' ability to participate?



What is the positive/negative impact of video hearings on defendants' ability to communicate with practitioners and judges?*



*Specifically lawyer/interpreter/intermediary/health professional/probation/family member/the judge or bench
Source: SurveyMonkey http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Data_All_170927-1.pdf

Silenced and excluded? The impact of video hearings on defendants' behaviour in court hearings

Many, or even most, defendants seem to feel disconnected from the court process when appearing via video-link. It's almost as if they are being processed by a machine as opposed to humans. There is a great tendency for less respect to be given to the court. Many is the time that defendants show disrespect by calling the bench "mate" or worse (criminal lawyer).

Attitude and communication is different (I have had far more instances of 'whatever' to replies, and 'f... off' as a parting comment). Defendants can stand up and even walk out, as immediate sanctions are not possible (magistrate).

They appear disengaged and remote. They often give a nonchalant/poor account of themselves and we are left to infer that they couldn't care less/that they are disrespectful of the court (magistrate).

A number of psychological studies have established the importance of body language and tone of voice in communication. A seminal study from 1970 found that all types of non-verbal cues combined – especially body posture – had 4.3 times the effect of verbal cues.¹⁹ What we don't know is how much video hearings affect that non-verbal communication.

No-one has done any observational or psychological research in the UK on whether appearing remotely affects the behaviour of defendants and their ability to understand, communicate and participate. But there is research from other countries and disciplines. Indeed Lord Justice Leveson in his review footnoted a publication which suggests that those involved in video conferencing need to concentrate much harder: "Faced with a higher cognitive load, users of video conferencing may economize when evaluating the information presented by the speaker. They may economize by using heuristics, such as how likeable they perceive the speaker to be, rather

than the quality of the arguments presented by the speaker when judging whether or not they will adopt or use the information presented by the speaker."²⁰ Even in the business context: "Face-to-face meetings are still largely preferred in situations requiring persuasion, such as negotiations and marketing demonstrations."²¹

The early Plotnikoff/Woolfson research assessed the views of defendants, judges and others of defendants' ability to follow proceedings when the defendant is on video. Of those who felt the link made a difference, only justices' clerks felt the video link aided participation. Magistrates, prosecutors and lawyers either did not know the effect, or felt the link had a negative effect both on participation and magistrates' ability to maintain eye contact. In contrast, the vast majority of defendants interviewed for this study thought that people in court were looking at them when they were being spoken to on video.

A study of prisoners appearing by video link in Australia tells a different story. Carolyn McKay of the University of Sydney interviewed prisoners about the experience of taking part in court hearings by video link.²² Her findings are not positive: "If every engagement with architecture is a multi-sensory experience, then the prison video studio reinforces expulsion from the human world, exacerbates prisoners' sensorial impoverishment, and diminishes opportunities for expressive participation in legal procedure." Video equipment in New South Wales is better than in England and Wales – in that most prisoners view a screen split four ways, so they can see four different parts of the court. Even so, those in prison felt that they could not see people in the court properly – one could not see her family while "several prisoners mentioned that they could not even recognize their legal representative, did not know when they were "live", or when they were being

addressed by anyone in the remote court". Those in prison also found it harder to follow what was going on and intervene. One interviewee said: "I've noticed with myself I'm a bit more focussed when I'm in the courtroom 'cause...I like speaking to people face-to-face, you know, if I had to explain myself to the judge or something like that, I'd like to do it face-to-face. And my lawyer – if she's doing a shit job – I can tell her."

Those who responded to the Transform Justice survey felt that video in the main negatively affected defendant's behaviour. Service breakdown and the overall poor quality of the audio and the picture were a barrier. But most lawyers were also concerned that the defendant could not see everyone in the court, and thus gauge their mood and body language, and the general atmosphere. This affected their ability to understand what was going on and to communicate.

Many felt that holding hearings on video diminished defendants' respect for, and appreciation of, the seriousness of proceedings. Defendants were isolated – there was usually no-one in the room with them who could advise or comfort them. The only staff present were escorts to and from cells who simply sat in the video room. This isolation led defendants to impetuous actions – sometimes shouting, swearing, abruptly leaving the "virtual court room". Equally many defendants appeared to "zone out" on video. Research suggests that defendants physically in the court room often disengage from proceedings since they cannot understand the legal language and feel they have no role.²⁵ Being on video appears to exacerbate this problem, partly because it is so difficult for defendants to intervene in proceedings remotely.

A barrister interviewed for this research related an incident which illustrates how the voice of the defendant is literally silenced in virtual courts.

The camera and audio feed are controlled by the legal adviser in the court:

I've seen this on more than one occasion when the legal adviser just mutes the defendant... there's a mute button... When [the defendant is] trying to talk in the court room, even if the judge isn't there, and the legal adviser just gets fed up hearing them because it's a very grating sound, because obviously, he's shouting at... he doesn't know how well it's heard, so it's very grating, and they just mute them.

If defendants are to have trust in the criminal justice system, they need to be able to contribute to proceedings. That defendants' voices can be, and are, muted speaks volumes about how using a virtual court can facilitate the dehumanisation of defendants and undermine the right to participation.

The right to be or not to be on video

Article 6 of the ECHR guarantees the right to a fair trial. It requires that, in the determination of a criminal charge, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." "Effective participation" presupposes that the accused has a broad understanding of the nature of the trial process, and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court.²⁴ The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.

Defendants usually appear in person during their trial, but the right of a defendant to effectively participate applies to every hearing. It is clear that video could be an impediment to general understanding and active engagement. But no-one from England and Wales²⁵ has ever legally challenged a decision to have a defendant/prisoner appear in court on video either through challenging the denial of consent to defendants, or whether video is in the interests of justice in the case of vulnerable defendants, or the absence of reasonable adjustments.

Disconnected: Do video hearings make all defendants more vulnerable?

Mental health is not a criteria used to assess use of video link – it is availability of the link in court diary/prison and type of hearing (legal adviser).

In my experience no adjustments are made. The person appears and if they raise an issue they are seen to be a person who is attempting to disrupt proceedings. The result being the termination of the video link and the case going forward without them (probation officer).

Some judges are sympathetic when you let them know you have a vulnerable client and will order them to be produced. But others will just say its court policy to have a video link hearing and that's the end of the matter (criminal lawyer).

No-one knows how many defendants who have vulnerabilities and/or who are disabled (under Equality Act criteria) appear on video links, nor what kind of physical and mental health difficulties they have. We know that a high proportion of defendants and prisoners have such disabilities.²⁶

There is no guidance on what criteria should be used to assess whether live link is suitable for someone who has a disability or support needs, nor what reasonable adjustments should be made to the video service to facilitate their participation or, in fact, whether they should be produced in court.

It is clear from our survey and from participants to the roundtable that people with disabilities and/or vulnerabilities are regularly appearing on live links and that practitioners are concerned that appearing by live link can further disadvantage such defendants.

The first challenge is to know whether the defendant does have a disability or vulnerability. All prisoners should at some point have had an assessment, which should pick up some vulnerabilities (there is still no

routine assessment for learning difficulty or autism) and may be given to the court and their lawyer. But, even if that happens, the assessment won't necessarily identify what support that defendant needs in court. What do lawyers do? In an ongoing case, the defence lawyer can ask for someone in prison to be produced in court at a future hearing, if they feel that their disability will make a live link appearance difficult. Its not clear how often this happens, or how judges generally react to such requests, though some judges appear to be more sympathetic than others.

The difficulty in the case of the police station-court video appearances is that some of the defendants are unknown to the authorities. They may have known or unknown disabilities, but without someone at the police station to assess the defendant, it's hit and miss whether information about any disability is conveyed to the court. Where the police station has a liaison and diversion service, this is likely to happen, but many do not. It is even more difficult to work out whether someone has a hidden disability (or a disability they are hiding), if they appear on video link on their first, and sometimes last, appearance. Even when defendants are known to have mental health problems or learning difficulties, the default seems still be to deal with them on video. The Director of Transform Justice observed a magistrates' court where several virtual cases involving defendants with mental health problems were dealt with on the day. The only case which was adjourned was that of a 16 year old boy with ADHD whose lawyer said he had not even been able to take instructions.²⁷

Under equality legislation, reasonable adjustments should be made to any service used by disabled people. Those adjustments should depend on the needs of the disabled person, the service and the capacity of those running the service to make adjustments. But, in the case of video links, the

issue is not usually even considered because those involved are not clear what a reasonable adjustment to a video link hearing might be, in theory or in practice. 47% of respondents in our survey said reasonable adjustments to video hearings were made rarely or never, and the comments indicate that the issue is often ignored:

I have never had the court or prison staff ask about making or instigate the making of reasonable adjustments (criminal lawyer).

I have never seen any adjustments in place since links came into use (magistrate).

I have never heard reasonable adjustments being taken into account (probation officer).

The only "adjustments" that I have been aware of is where the participants in the hearing sit (YOT officer).

When they are minded to consider adjustments, judges and lawyers "guess" what changes might benefit defendants. The most common is to recommend that the defendant be brought to court, another to provide the defendant with an intermediary to help them understand proceedings and communicate clearly.

Intermediaries are confident that video is not necessarily a barrier to participation if they sit next to the defendant in the video room. But intermediaries are seldom granted to defendants. They are occasionally granted to vulnerable defendants when giving evidence (which they seldom do on video) and, very rarely, for the duration of the trial. And the cost of sending an intermediary to sit with a defendant while they take part in a hearing from prison is likely to be far higher than if both came to court.

Well meaning staff, lawyers and judges try other "common-sense" adjustments where they are aware of a disability:

I have had defendants with a low IQ or anxiety and we have repeated everything slowly.

Volume increased for those with hearing difficulties, camera moved for those in wheelchairs.

The judge will often make particular effort in communicating with the defendant and checking their understanding, but there is little else that anyone can do. It is normally just not possible to have extra time, for example (all comments from legal advisers).

Without research on the incidence of defendants with disabilities appearing on video links, on the impact of video on their behaviour and ability to participate, and on the effect of potential adjustments, even those who are aware of the potential injustice are working in the dark. But hunch, instinct, goodwill and ignorance do not equal compliance with the Equality Act.


In their equalities impact statement for the Prisons and Court Bill²⁸ the government denied that expansion of virtual and audio hearings would discriminate against disabled people:

We will mitigate against any risk of discrimination arising from the extended use of live links and virtual hearings by establishing safeguards to ensure that these channels are only used under appropriate circumstances, and that the defendant is afforded a fair hearing. The court will always decide whether it is appropriate to conduct a hearing in a certain way, and the parties (including youth offending teams in youth cases) will also be able to make representations. In making its decision, the court should consider whether any parties or witnesses have a disability (e.g. visually or hearing impaired) or

are vulnerable, and would benefit from face to face contact in order to effectively participate in the case. As set out in paragraph 11 below, users may be able to benefit from HMCTS Assisted Digital provision when accessing virtual or video-enabled hearings.²⁹

The assisted digital programme proposed a range of services such as telephone help to support those who might have difficulties using future digital services such as the online court.

It is clear from our research that the court currently often does not have the opportunity or knowledge (either of the defendant or of the impact of virtual hearings on participation) to make an informed judgment as to the appropriateness of a video hearing, and sometimes dismisses the representations made. It is also unclear how a defendant faced with a video hearing would benefit from assisted digital services – how could someone in a prison ring up the helpline, or someone detained by the police go online to have a webchat? And is it really worth offering assisted digital services (designed for online applications) to someone who could get face-to-face help if produced in court?

 **Oliver Gardner**
@oliversgardner [Follow](#)

Just watched as court sent unrep'd def to prison. He didnt say a word through hearing save his name & DOB. Turns out he was deaf.

7:00 AM - 3 Jan 2014

46 Retweets 3 Likes


7 46 3

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Replying to @jenniferkelly
[@jenniferkelly](#) only found out when he went down & then guard called to say he didnt know what happened. Everyone just thought he was quiet

8:19 AM - 3 Jan 2014

5 Retweets

 **Oliver Gardner**
@oliversgardner [Follow](#)

Replying to @saidiebee
[@saidiebee](#) he appeared by video from pol stn & it was only coz he told cop he didnt understand that cop then called court explain he is deaf

1:13 AM - 4 Jan 2014

Disassociation?

Autism and video links

Dr Marie Tidball has done in-depth research into defendants with autism and their experience of the criminal justice process.³⁰ She has concerns about the suitability of video hearings based on her observations of a remand hearing and a case management hearing since “the process had the effect of atrophying their ability to participate”.

“People on the autism spectrum often... can’t take one set of experiences and transfer the learning from that experience to another scenario. So when doing a video link, giving evidence via a video link, or having part of the court procedure via video link, it was clear that they didn’t associate that as being part of their case. They weren’t in that space of the courtroom, so they didn’t have the communicative aspect of that space to understand the significance of what was happening and what was being said to them.” Neither of the defendants had an appropriate adult or intermediary with them. The mother of one of the defendants was watching her son Robert on the screen: “Look at him, he’s not listening. I know he doesn’t know what’s going on”. Another defendant, Samuel commented that his court hearing at ten minutes seemed a lot shorter than he expected - “It didn’t feel like they’d been through a proper court case.”

Dr Tidball concludes that “remote court appearances via video link likely create additional barriers to the defendant with autism being able to relate the alleged wrongdoing of their criminal actions and to the administration of justice in the processing of their case. Importantly, this is also likely to reduce the expressive effect of the sanctioning of the wrongful conduct”.

Safer behind a screen: can video links be beneficial to vulnerable defendants?

Video links for witnesses are usually seen as aiding participation through reducing the stress of appearing in a (formal) trial court face to face with the defendant. Witnesses who meet vulnerability criteria should be offered the opportunity of appearing on video when giving live evidence in their trial. Some vulnerable witnesses, such as children in abuse cases, are able to have their evidence and cross examination pre-recorded on video in advance of the trial.

Vulnerable defendants also have the right to ask to give evidence on video if they meet the legal criteria - they "must suffer from a mental disorder (as per the Mental Health Act 1983), or a significant impairment of intelligence and social function...This must result in their inability to participate effectively as a witness... the use of the live link needs to be considered to enable more effective participation."³¹

Dr Samantha Fairclough cites examples where a defendant may find giving live evidence in court difficult: "vulnerable defendants could, for example, be suffering from attention deficit hyperactivity disorder (ADHD) and thus be easily distracted by the multiple stimuli within a crowded court. Alternatively, they might have an anxiety disorder which is intensified by the requirement to give evidence in a courtroom filled largely with strangers." However she found awareness and usage of the provision to be very limited, having been used only three times by the 18 lawyers and judges she interviewed - presumably because most practitioners feel that giving evidence on live link disadvantages defendants:

Respondents worried that the use of the live link by a defendant would be viewed suspiciously by the jury. In addition, the findings from the interviews support existing research which denotes that there is a belief within the profession that 'best evidence' is that which is obtained live in court before the jury. The use of the live link by vulnerable defendants was

viewed as reducing the impact of their testimony on the jury, and thus their chances of acquittal.

These are powerful reasons for opposing video. But our survey suggests the main reason why lawyers do not ask for vulnerable defendants to give trial evidence on video is their strong perception (based on experience) that most clients who have mental health issues, learning difficulties and other vulnerabilities find it more difficult to understand what is going on in their case and more stressful to give evidence, if they appear on video, rather than in the court itself.

The folly of youth?

Children and young people on video

We are now entering an era of telepresence— I joke not...Relationships are established through FaceTime and other similar types of videolinking. The assumptions we make as "grown-ups"—as one might say—about how we establish trust and communicate comfortably with others cannot necessarily be carried forward to people who have grown up in the internet era, for whom the conduct of a meeting and interaction via video may be more comfortable and comforting and give rise to a greater experience of trust than it would for our generation (Professor Richard Susskind).³²

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

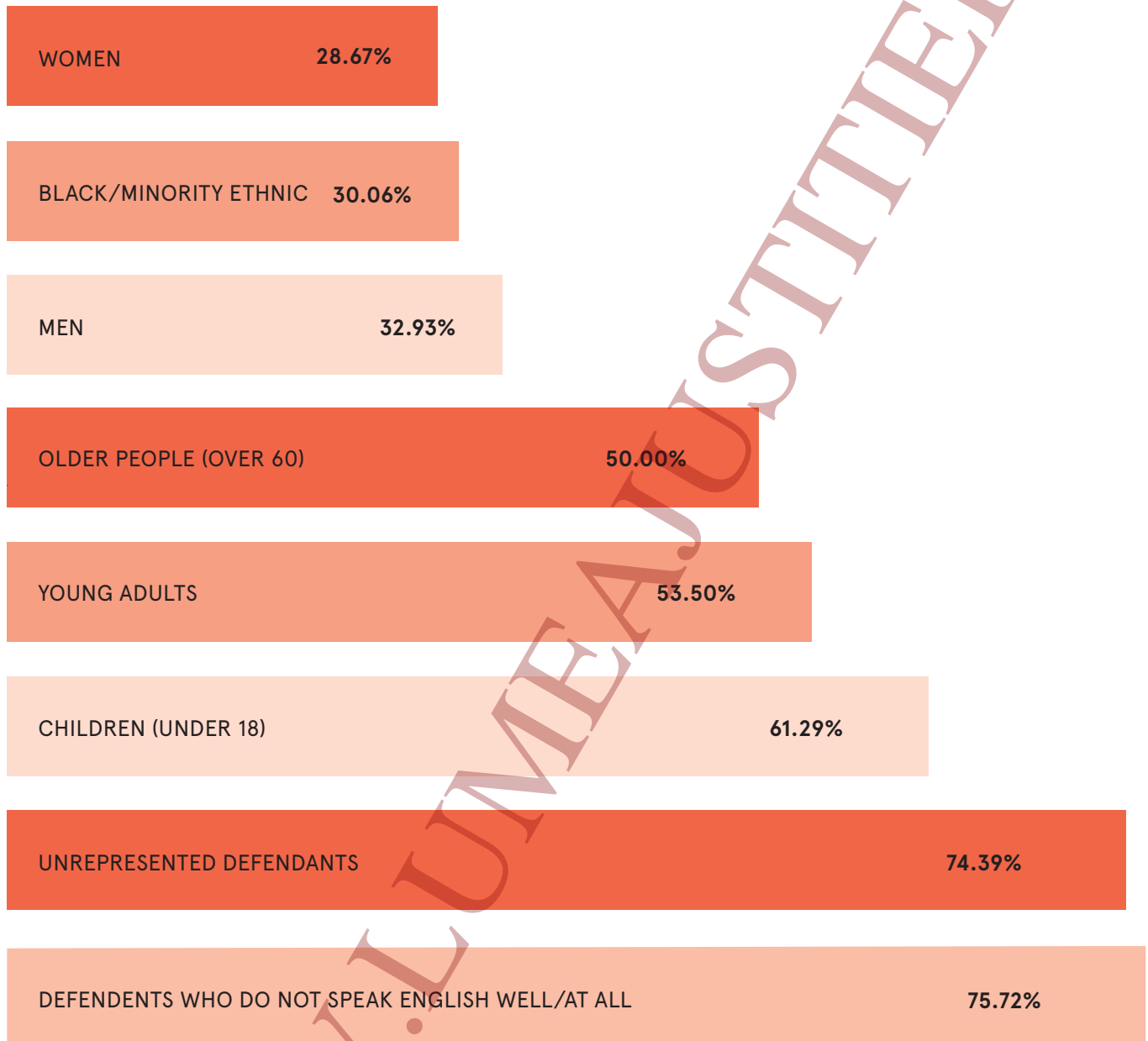
You can only see their face and there is little interaction. In my experience unless you have time with the young person to prepare, it is very hard to tell the difference between surly teenage behaviour, a total lack of confidence and/or significant learning difficulties and a lack of understanding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

Part of the justification for virtual hearings is that it enables the court service to "keep up with the times" and with modern technology. Children and young people are familiar with social media and most use it daily. However, most respondents felt that this did not make virtual hearings more suitable for young people - they use virtual communication in informal, social situations with friends or peers, not in formal settings with figures of authority. Appearing virtually in court may prevent them understanding the seriousness of proceedings. Though other groups were seen as more disadvantaged by virtual hearings, the majority of survey respondents felt video link had a negative effect on participation - 61% felt video had a negative effect on children and 53% on young adults. Only 8% of respondents felt that video links had a positive impact on young adults' participation.

Young adults aged 18-24 are treated the same as any other adults when it comes to virtual hearings i.e. they are equally likely to appear on video. Originally, child defendants never appeared on video into court-rooms, whether from YOIs or police stations. This arrangement broke down when YOIs began to build video facilities, and local courts unilaterally started putting children on video links from police stations. No data is available on how many child defendants and prisoners have participated in hearings on video links but those who responded to the survey suggest the practice is quite widespread, even for sentencing. A recent Criminal Practice Direction³³ explained the circumstances in which video links should be used for child defendants. "In the youth court or when a youth is appearing in the magistrates' court or the Crown Court, it will usually be appropriate for the youth to be produced in person at court." The guidance seems to preclude the use of video links for child defendants from the police station - which are nonetheless still being used.

The testimony of those who have responded to Transform Justice suggests that the use of video links for child defendants should be urgently reviewed. Existing research suggests children do not usually have any idea what is going on when they are in court.³⁴ This disengagement seems to be exacerbated by video linking. We need to know how and why links are being used, and what the effects are. If a child is faced with a long journey for a short but important hearing, maybe the court should go to them, rather than them to the court? This would involve setting up a "pop-up" court in the prison - a possibility given that youth courts are normally closed. Most Parole Board hearings (which are quasi-judicial) are held in prisons.

Video link has a particularly negative impact on which groups?



Source: 186 respondents to surveymonkey survey answered question on negative/positive impact of video on the ability of particular groups to participate
http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Data_All_170927-1.pdf

Lost in translation: how video hearings disadvantage other groups

The sound quality was so bad that in the subsequent transcript of the trial proceedings the word “inaudible” appeared on numerous occasions. I also noted that there were documents that I had in my possession that would have aided my case but could not hand over to the Lord and Lady Justices (unrepresented defendant who appeared on video).

It is mind-boggling that anyone can believe that 15 minutes is enough to do anything more than introduce yourself when everything you or your client are saying is having to be interpreted by a third party. It is entirely ridiculous (criminal lawyer).

Personal touch is lost so is the trust (interpreter).

Just over three quarters of the respondents to our survey felt that video hearings particularly disadvantage those with poor or no English, and just under three quarters felt video negatively affected the participation of unrepresented defendants.

Initially, hearings where interpretation was needed were never held on video, but they are now common. Even though it appears only common-sense that there may be problems, there appears no guidance on the criteria to be used in judging whether an interpreted hearing should be held on video or not. Where hearings are on video, interpreters sometimes go to the location of the defendant (prison or police station), but mostly they come to the court and interpret from what they see on screen.

Dr Yvonne Fowler has analysed the difference between interpreted court hearings on video and in person.³⁵ She is concerned by the disparity:

In video link courts, mismatches of sound and image due to court clerks’ failure to adequately track current speakers, poor image and sound quality and the fact that non-English-speaking defendants in

pre-and post-court consultations can see and hear interpreters but not their defence advocates are just some of the additional layers of disadvantage and confusion already suffered by non-English-speaking defendants. These factors make it less likely that justice will be done.

Most of the interpreters she interviewed felt that the video impeded the ability of the interpreter to provide a good service “there was no interaction between myself and the defendant and I couldn’t tell... how... well he was following the procedure”,

“I believe in personal contact, I think it matters to see with your own eyes directly, what sort of people ask you questions, what sort of people you are facing... I think I would prefer to go to court live.”

Dr Fowler also observed video hearings such as this:

Defendant B, a Russian, entered the [prison] court. There was a cursory virtual tour of the actual court (“magistrates”, “legal adviser”, “solicitor”, “interpreter”, “crown prosecutor” was all that the court clerk said). As the camera jerked backwards and forwards from speaker to speaker there was a blur of images. All court actors greeted him verbally but made no visual acknowledgement [eye contact] during the virtual tour: this included the interpreter... There were mismatches of speaker and image throughout the hearing. There was also considerable feedback that sounded like electronic interference from a mobile phone.

On-screen imprisonment: the rise and rise of sentencing on video

I have experience of a defendant asking to be sentenced over the video link, and the judge declining. Following the defendant's attendance at court the judge said that, had he sentenced on the previous occasion, he would have imposed a 10 year sentence. However, after having a chance to see the defendant, and his clear intellectual deficits, the judge sentenced the defendant to 8 years imprisonment (criminal lawyer).

Young people I have worked with have found the video link impersonal and have complained about the lack of time spent with their legal advocate. I have had one young person sentenced whilst in custody, with no prior warning, via video link. This was a wholly negative experience and done because the judge believed that adjourning again for an already requested psychiatric report was not acceptable (YOT officer).

When virtual hearings were first brought in, sentencing hearings were not included. Legislation to allow sentencing on video was introduced in 2007 without any piloting or research being done on the effect on all parties.

Tom Hawker has studied communication in sentencing remarks for his PhD. He analysed the publicly available daily court lists for 74 Crown Courts on a Friday, and found that "45 (8.5%) of the 533 defendants listed to be sentenced were to appear via PVL".³⁶ The practice is spreading.

At the roundtable event, Mr Hawker discussed his interviews with 20 Crown Court judges. "15 of 17 judges who had passed sentences via PVL thought that less engagement was possible with defendants they sentenced over the link. 8 judges also expressed concerns that defendants' effective access to counsel before, during and after sentencing hearings was reduced over PVL... 8 judges perceived a loss of

gravitas when sentencing via PVL, and felt that this sense of gravitas was very important to the act of sentencing."

Sentencing by video has the potential to undermine both the judges' authority and effectiveness. "The judge sees his position as being heavily related to controlling who says what and when - and that sense of gravitas leads through to retaining control over that. So if that breaks down, if you have defendants over link who are shouting things out or saying things which would perhaps be better off in these private conferences with their lawyers, then that's problematic. But also, in terms of control of behaviour as well. The perception of a number of judges is that behaviour over the link is not so good, and the defendants do not take it as seriously. That then feeds through into perceptions of other court users, because you're sat there in court, you're watching a defendant who's decided they're just going to walk out of the hearing, and that doesn't necessarily communicate the kinds of things you'd want victims and members of the public to be seeing" (Tom Hawker at roundtable).

Those who have been sentenced face to face often do not understand their sentence and/or question its fairness. This research suggests that such experiences may be considerably more frequent for defendants who are sentenced on video. Some of the defendants observed by Tom Hawker were sentenced to long prison sentences - the range was from 4 months to over 6 years. The average time taken for mitigation was just eight minutes. No other country sentences people to lengthy prison sentences over video links. Given the disquiet of judges about the practice, it would be worth reviewing.

Gone and forgotten? The experience of family, victims and witnesses

Defendants are more and more often sentenced on video. We don't know what impact this has on victims attending court, nor on their perception of the legitimacy of the process and of the fairness of the sentence. One incident observed by Tom Hawker indicates how video hearings can undermine confidence. A prisoner was on a video link from prison awaiting his sentencing hearing. All he could see on his screen was the judge's empty chair. He started rapping to pass the time. "Clearly no one had told him what was going on, and the victims' family were in court, they were pointing, they were gasping, their opinion of his behaviour really spoke to their view of him not taking them seriously as victims. Whilst that may not have been the case, it is obviously not fair to put someone in a situation where they are not aware of who can see them." There may however be other circumstances where the victims and witnesses are glad to have the perpetrator of the crime at a distance from them – on a screen.

Family members, friends and support workers in the courtroom can provide support and comfort to a defendant, even if the defendant is in the dock. Often a defendant on video cannot see the public gallery on their screen and those in the public gallery do not have a good view of the screen. Dr Marie Tidball found that family members played an important part in helping practitioners understand the needs of defendants with autism. Cases made progress when family members, experts and the defendant were all present in a physical courtroom or, more importantly, in the corridors outside.

Family support is important for all defendants, particularly for children. Judges should not legally hear cases of under 16 year olds if their parent or carer is not present in court and parents and carers are strongly encouraged to attend court for every hearing involving an under eighteen year old. This poses logistical problems – if a child is appearing

from a police station, should the parent be at court, or with them in the "courtroom" at the police station? In reality, judges presiding over cases where a child defendant/prisoner appears on video, appear to dispense with the presence of carers. A YOT officer interviewed for this project said she had tried and failed to get parents to attend court to observe their children appearing on video from prison. These parents simply did not think it worthwhile to attend to see a face on a screen.

There is a risk that virtual justice isolates even those who are released from police custody. If someone is released from court (as most who are detained are), they can leave the dock and immediately get support from any family and friends who are in court. When someone is released from a courtroom in a police station, they leave alone.

The billion dollar question – do virtual hearings affect outcomes?

There's something about having a physical presence in the dock that makes me feel that there is a chance of bail. When appearing via video link it's like a foregone conclusion that bail won't be granted (YOT officer).

I think seeing people via a video link implies (immediately) they must be dangerous/guilty. Perception is everything. Most people look 'shifty' on screens (accredited legal representative).

Unfortunately there is no information since 2010 for police station-court links, or at all for prison-court links, on what difference it makes to justice outcomes if the defendant appears virtually. No data is or has been collected either on what hearings are virtual, nor the outcome of those hearings. The only data we have is from a government press release: “in 2016 to 2017, [HMCTS] enabled 137,495 cases to be heard via video link, a 10 per cent increase from 2015 to 2016”.³⁸

We need comparative data on guilty pleas, bail and remand decisions, convictions, and severity of sentencing. We have some indications from government research, but these are not current.

The early evaluations of prison to court video hearings (published 1999) suggest no difference to outcomes of bail hearings, but the numbers were so small that the authors suggested it would be “unwise to read too much into them”. The evaluation of police station to court virtual hearings did collect outcome information. This evaluation (published 2010) found that those who appeared on video were more likely to plead guilty, more likely if sentenced to get a prison sentence, and less likely to get a community sentence. The researchers did not cost out the extra financial resources demanded by such outcomes, since they were unsure whether the outcomes were due to the video appearance, or the

defendant’s lack of representation (which seemed linked to their appearing from the police station).

Australian researchers simulated a trial with the defendant alternatively in an open dock, in the well of the court, or on video. The video equipment was state of the art and the virtual court-room rearranged to suit; participants were presented on full-size screens with high quality lighting and directional sound. The defendant was most likely to be acquitted (by the mock jury) when sitting in the well of the court or on the state of the art video screen, and least likely to be acquitted when they were in the dock. “The conclusions hold only with top-end video and audio equipment, not the current video technologies used in [Australian] courts”.³⁹

Most of those who responded to our survey were unsure whether appearing on video made a difference to outcomes (guilty pleas, remand decisions, sentences) or felt video did not make any difference to outcomes. Of those who felt it did make a difference, lawyers were most likely to suggest that an appearance on video may influence whether their client is granted bail. 28% thought that a video appearance would make remand more likely, compared to 8% who felt it would make bail more likely.

We have no research as to whether defendants think the outcome of their hearing may be affected by being on video rather than in a court. They, like everyone else, have no access to hard data. But the defendants with autism observed by Dr Marie Tidball did perceive a difference: “the sense from them was that it was a foregone conclusion, because if they weren’t produced from prison (in one case it was for bail and the other case it was part of the case management hearing) the ultimate outcome of their case was already decided because they were being kept in prison and it was being done over video link”.

The known unknowns: who pays for virtual hearings?

The costs of virtual hearings are opaque, since they are spread across different organisations and agencies, and some appear to be hidden. The evaluation of virtual police station to court hearings captured the costs in 2010. The evaluators worked out that the pilot virtual court cost much more than the traditional court (even excluding the increased costs of sentences) and that, even if cuts were made, it would only be marginally cheaper than the traditional model.

Since the pilot, no virtual hearings costs have been transparent. The prison service needs to equip rooms, manage timetabling and operation of links, and provide staff to supervise prisoners on links. But this cost to the prison service is not published. HMPPS (part of the MoJ) is, over time, likely to make savings, as they pay a contractor to provide transport from prisons and police stations to courts.

HMCTS (the courts service) is likely to save costs on court custody, since all defendants appearing on video would normally be held in court cells and guarded by security staff there and in the dock. It is not clear to what extent these savings are cashable. And HMCTS must also organise the video slots for lawyers, probation officers and courts, and pay for the equipment and lines used in the court.

The net financial losers from the virtual court programme are the Home Office and the police. Police forces which operate virtual courts pay for the use of a custody suite for virtual hearings, and for other rooms for video consultations for lawyers and probation officers. They pay for installation and running of all the video equipment, for the staff to manage the booking slots and the equipment, and to supervise the defendants in the police station. They also pay all the costs of police station custody for defendants who would otherwise be put in a van to court. The only cost saving for police is being able to

enable their officers to give evidence from the police station video suite, but many officers still prefer to go to court since they believe their evidence has more impact face-to-face. And there is no reason why police should not be able to give evidence by video without also operating a virtual court.

Each police force makes their own decision as to whether to invest in police-court video links and there is nothing in the public domain to really explain why some police forces have decided to subsidise the MoJ. Nor do forces understand what they are actually spending on virtual courts. Transform Justice asked all police forces in England and Wales for the costs of setting up and running virtual courts. None could provide the costs of the video suite, the staff to supervise virtual courts, and the extra custody costs.

The Home Office has also subsidised MoJ by investing in some regional virtual court programmes. Police forces have successfully bid to to the Police Transformation Fund to establish virtual courts. Most recently, Sussex, Surrey, the Metropolitan Police and Kent have been awarded £11 million for video enabled justice (VEJ), which “will introduce an industrialised VEJ programme to deliver swift, fair and efficient justice”.

The bid document³⁹ talks of significant efficiency savings but the costings are not in the public domain. The financial advantage to the police (saving travel time to court) seems marginal compared on the ongoing costs they may need to shoulder when the transformation fund has been spent.

It remains to be seen how the MoJ will finance an expansion of video courts. They have over £1 billion from the Treasury for a court modernisation programme, and have closed many courts as a cost-saving measure. But will the police and the Home Office continue to subsidise?

Trial by conference call?

Court hearings with no court

Respondents to our survey were mostly sceptical about government proposals to make more hearings all virtual (with every party on video and no one in a courtroom) or with all parties on the telephone, as in a telephone conference call. 68% of respondents disapproved of all-video hearings and 76% disapproved of having hearings conducted wholly or partly on the telephone.

Objections were on practical and “interests of justice” grounds:

I believe there are risks to having all parties appearing by video for a hearing. It can be challenging sometimes with just one party (the defendant) but with many people I would worry that the view of the court (ie sitting in the chair I can see and observe all participants’ interactions with the hearing) would be degraded (magistrate).

Even if the v-link systems were technically 100% efficient - which is NOT the case - v-links are not the way forward for all court participants. Individuals 'in person' are likely to lose out, as are members of the public who suffer with learning difficulties. Solicitors don't like v-links, prosecutors & defending solicitors need 1-2-1 access to defendants/witnesses as body language counts for a great deal in trials. Legal advisers, magistrates & judges need to be trained in how to make best use of v-link situations rather than see them as an opportunity to rush through a case to the next matter (usher).

We need properly funded courts, legal aid and CPS [the Crown Prosecution Service]. Court is a formal institution and it has serious implications for people's future well being. It should not be a fob off via the telephone (police officer).

Conclusion

The only true fans of video hearings for defendants appear to be a minority of senior judges, of lawyers and of police and crime commissioners. They feel that virtual justice saves time and money. Many prisoners also like video hearings for practical reasons – they avoid disruption, long hours travelling and the risk of having to move prison.

Most lawyers have always been opposed to virtual justice on principle and for practical reasons. They worry that their clients cannot communicate their best evidence on a video screen, and thus that justice outcomes may be prejudiced. They also relate numerous technical problems which cause delay to them and their clients.

The hidden story of virtual justice is of the harm the disconnect does to the relationship between lawyer and client. The rigid timetable leads to “stopwatch” justice, in which lawyers try to beat the clock to get instructions from their clients, many of whom have challenges understanding the basics of the criminal justice process.

The defendants who appear on video are all, to a lesser or greater extent, vulnerable. They appear alone save a custody officer, isolated from the court, their lawyer, court staff and family, with their ability to communicate hampered by poor technology. No wonder they often appear disengaged or frustrated. Virtual justice further renders people vulnerable by providing no adjustment for those with mental disabilities. In some specific circumstances the ability to give evidence on video may be beneficial to those who have mental health issues, particularly social anxiety, but practitioners felt that virtual justice mostly exacerbated existing difficulties in assessing disability and vulnerability and in facilitating the participation of disabled people. Those with English as a second language and unrepresented defendants were also felt to be at a significant disadvantage.

Video justice does defendants a disservice – it facilitates and encourages inappropriate or disengaged behaviour, the impact of which the defendant cannot see, and deprives defendants of the choice to appear on video or not. Defendants are often said to prefer the convenience of the prison-video link, but they are also deprived of the information they would need – on differential outcomes – to take an informed view.

The unanswerable question is whether virtual justice does make any difference to justice outcomes. Bar the 2010 study on virtual courts we have no research in England and Wales which assesses the impact on court decisions. With no data collection since video hearings were launched on the number and type of defendant who appears on video, we are all working in the dark. But the MoJ study, and the weight of anecdotal evidence suggest video hearings are prejudicial. Given this, it seems foolhardy to press ahead with a major expansion of virtual justice – an expansion which can be implemented, with or without new legislation.

We also have no idea of the impact of virtual justice on respect for justice itself. Confidence in the justice system is already fragile (as David Lammy MP has recently emphasised in relation to ethnic minority communities) and this report suggests that defendants are “disconnected” from the court process and from their lawyers through appearing on video. Judges are concerned that sentencing over video undermines its importance and their own ability to engage with the defendant. So are we undermining trust in the system itself by reducing a sentencing hearing to a five minute video conference call? We should find out before spending the precious resources of the MoJ on expensive new hardware. Digital technology has its place in the justice system, but is it currently the servant of justice or its master?

Recommendations

- 1 Implement a moratorium on the expansion of virtual justice (video and telephone) for defendants until we have more research on its impact, particularly on juries, judges and defendants themselves
- 2 Re-assess the suitability of video hearings, as currently held and delivered, for those with mental health problems and intellectual disabilities, for those with English as a second language (particularly those needing interpretation), for those who are unrepresented, and for children
- 3 Ensure all those who may appear on video from police stations are screened and, where necessary, assessed by appropriately qualified health practitioners, preferably by liaison and diversion services
- 4 Develop guidance for judges, magistrates and legal advisers on how to decide if video hearings should be used for vulnerable defendants and what reasonable adjustments could be made if video is used, including the use of intermediaries. Establish clear accountability for the decisions made
- 5 Improve the quality of the video service, both visual and aural, and its reliability
- 6 Improve the facilities for (including soundproofing) and flexibility of time available for lawyer-client consultation on video before and after hearings
- 7 Reduce the high number of defendants detained by the police, given that most are released by the court.
- 8 Increase take up of legal advice for those appearing from the police station
- 9 Review the use of video links for sentencing and consider mandating sentencing face to face bar exceptional circumstances
- 10 Consult victims and witnesses as to whether they prefer the defendant or perpetrator to be in court or on video and use that information to inform the decision
- 11 Improve the comfort, reliability and speed of transport to the court from prison and police stations
- 12 If a defendant is deemed unsuitable to travel to the court, consider taking the court to the defendant or prisoner via a "pop-up" court – similarly to the Parole Board
- 13 Pilot and evaluate the impact of telephone and completely virtual hearings on all aspects of justice
- 14 Analyse and publish the true costs (including any costs of more punitive outcomes) and financial benefits of prison to court, and police station to court virtual hearings
- 15 Assess the impact of virtual justice on trust in and respect for the justice system

End notes

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- 22 Video Links from Prison: Court "Appearance" within Carceral Space, Carolyn McKay, *Law, Culture and the Humanities* 2015
- 23 Inside Crown Court, personal experiences and questions of legitimacy by Jessica Jacobson, Gillian Hunter and Amy Kirby
- 24 The Interpretation and Application of the Right to Effective Participation – Dr Abenaa Osuwu-Bempah
- 25 ECtHR heard a case where one of the issues was whether the applicant's participation by videoconference at his appeal was compatible with Article 6 (Marcello Viola v Italy ECtHR 5 October 2006, no. 45106/04). The ECtHR found no violation of Art 6, but this was premised on all parties being able to see and hear each other, on the absence of any contemporaneous complaints of technical problems to the original court, and on the maintenance of confidential lawyer-client communication (paras 73-5). The last point has since been re-emphasised in *Zagaria v Italy* ECtHR 27 November 2007, no 58295/00. Here Z appeared in court via videolink, and his phone line to his lawyer was tapped. Both of these cases were mafia cases, thus it was argued to the ECtHR that the use of videolinks was undertaken for a legitimate aim at the outset, re avoiding escape and intimidation etc.
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