



# The implications of video link hearings on the effective participation of child defendants and how best to manage them

Anya Lewis and Danielle Manson

Garden Court Chambers

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GARDEN COURT CHAMBERS



@gardencourtlaw

# Introduction



# Video link hearings pre-COVID 19: the beginning

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- Launched in 1999 following successful pilots in Manchester, Swindon and Bristol;
- Hailed by Jack Straw, Home Secretary at the time, as a “turning point” in the modernisation of justice;
- $\frac{3}{4}$  of defendants taking part in pilot backed the scheme – 83% of defence lawyers “felt that the link was unfair in some respects”;
- Recommended as a way of cutting costs and improving security;
- Originally intended to be used for case management and remand hearings only.



# Video link hearings pre-COVID 19: statutory powers

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- Crime and Disorder Act 1998

s57 (now repealed, live links at preliminary hearings)

amended in 2007

s57A (introduction)

s57B (live links at preliminary hearings; accused in custody)

s57C (live links at preliminary hearings; accused at police station)

s57D (continued use of live link for sentence hearings following preliminary hearings)

s57E (live link at sentence hearings)

s57F (live link at certain enforcement hearings)

s57G (practical implications)

**Temporarily amended by Coronavirus Act 2020**



# Video link hearings pre-COVID 19: statutory powers

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- Youth Justice and Criminal Evidence Act 1999

s24 (special measures for vulnerable and intimidated witnesses)

s33A (special measures for vulnerable defendants – in force 2007)

- Criminal Justice Act 2003

s51 (live links for witnesses other than the defendant – in force 2007)

**Temporarily amended by Coronavirus Act 2020**

- Criminal Justice Act 1988

s32 (live television link witnesses other than the accused outside the UK)

- Police and Criminal Evidence Act 1984

s46ZA, s46A and s47 (live link bail – in force 2007)

s45ZA, s45ZB and s45 (use of live links in relation to decisions re detention – in force 2017)



# Video link hearings pre-COVID 19: Criminal Procedure Rules

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- 3.2 (2) Active case manages includes... (h) making use of technology
- **3.2 (4) Where appropriate live links are available**, making use of technology for the purposes of this rule includes directing the use of such facilities, whether an application for such a direction is made or not—
  - (a) for the conduct of a pre-trial hearing, including a pre-trial case management hearing;
  - (b) for the defendant’s attendance at such a hearing—
    - (i) where the defendant is in custody, or where the defendant is not in custody and wants to attend by live link, but
    - (ii) only if the court is satisfied that the defendant can participate effectively by such means**, having regard to all the circumstances including whether the defendant is represented or not; and for receiving evidence under one of the powers to which the rules in Part 18 apply (Measures to assist a witness or defendant to give evidence).



# Video link hearings pre-COVID 19: Criminal Procedure Rules

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- 3.2 (4) continued
  - (c) for receiving evidence under one of the powers to which the rules in Part 18 apply (Measures to assist a witness or defendant to give evidence).
- 3.2 (5) similar provisions in relation to telephone hearings.

## Temporarily amended

- **3.9 (3) In order to prepare for the trial, the court must take every reasonable step-(b) to facilitate the participation of any person, including the defendant.**



# Video link hearings pre-COVID 19: Practice Directions

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- Criminal Practice Direction 1 General Matters 3N: Use of live link and telephone facilities as inserted by Lord Thomas CJs amendment to the 2015 CPD in 2015 and subsequently amended by Lord Burnett CJ in 2018
  - 3N.1 Where it is lawful and in the interests of justice to do so, courts should exercise their statutory and other powers to conduct hearings by live link or telephone...
  - 3N.2 It is the duty of the court to make use of technology actively to manage the case. . .
  - 3N.3 It is the duty of the parties to alert the court to any reason why live links or telephone should not be used. . .
  - 3N.5 **There may be circumstances in which the court should not require the use of live link or telephone facilities. . .**
  - 3N.6 **Such circumstances will include any case in which the defendant's effective participation cannot be achieved by his or her attendance by such means....**



# Video link hearings pre-COVID 19: Practice Directions

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## Youth defendants

**3N.13** 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. This is to ensure that the court can engage properly with the youth and that the necessary level of engagement can be facilitated with the youth offending team worker, defence representative and/or appropriate adult. The court should deal with any application for use of a live-link on a case-by-case basis, after consultation with the parties and the youth offending team. Such hearings that may be appropriate, include, onward remand hearings at which there is no bail application or case management hearings, particularly if the youth is already serving a custodial sentence.



# Video link hearings pre-COVID 19: Practice Directions

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**3N.14** It rarely will be appropriate for a youth to be sentenced over a live link. However. . .  
There may be circumstances in which it may be appropriate to sentence....:-

- (a) if the youth is already serving a custodial sentence and the sentence to be imposed by the court is bound to be a further custodial sentence. . .
- (b) if the youth is already serving a custodial sentence and the court is minded to impose a non-custodial sentence which will have no material impact on the sentence served;
- (c) the youth is being detained in a secure establishment at such a distance from the court that the travelling time from one to the other will be significant so as to materially affect the welfare of the youth;
- (d) the youth's condition – whether mental or otherwise – is so disturbed that his or her production would be a significant detriment to his or her welfare.

# Video link hearings pre-COVID 19: Practice Directions

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**3N.15 Arrangements must be made in advance of any live link hearing to enable the youth offending worker to be at the secure establishment where the youth is in custody. In the event that such arrangements are not practicable, the youth offending worker must have sufficient access to the youth via the live link booth before and after the hearing.**

- In addition guidance from the Youth Justice Board and the Magistrates Association all recommend that children should usually be produced in person at court. In 2016 the YJB issued a position statement on young people appearing in court via video link:

***“it is important to note that a “digital by default” approach to court hearings is not appropriate for children and young people...The YJB is concerned that there is a risk that young people will neither understand the gravity of their situation, not take the judicial system seriously if all of their interaction with courts and legal representatives is via video or telephone...”***



# Video link hearings pre-COVID 19: prevalence in youth court

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- All Young Offender Institutions now have prison video link facilities;
- Statutory provisions apply to children as they do to adults;
- No data available on the number of virtual hearings involving children;
- Transform Justice Survey (October 2017) report their use as prevalent.



# Video link hearings pre-COVID 19: Court Reform Programme

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- 2016 launch of HMCTS reform. Joint statement from The Lord Chancellor, LCJ and Senior President of Tribunals:-

*“The revolution in **technology** will characterise tomorrow’s justice system. We will provide online access by developing a single online system for starting and managing cases across the criminal, civil, family and tribunal jurisdiction....Some cases will be handled entirely online. In the criminal courts, we are already seeing judges and magistrates working online rather than in the courtrooms. . . **In future, we intend to extend these benefits further by introducing a structured process of online pleading, and by holding “virtual hearings” enabling lawyers, parties and witnesses to participate in traditional hearings by telephone and video conferencing...”***

*“...we will... invest in smarter, more streamlined processes to deliver better justice for all. . . We want to ensure that the majority of Crown Court trials are heard on the day on which they are listed. The entire criminal justice system is being digitised...  
In most circumstances, preliminary hearings will not need to be face to face in court, saving time and money, with less need for defendants to be transported back and forth from prison to court. . .”*



# Video link hearings pre-COVID 19: Court Reform Programme

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- The Prisons and Courts Bill introduced February 2017, but abandoned due to general election, proposed a considerable expansion of the use of virtual and telephone hearings for defendants, witnesses and the public. It proposed:-
  - Almost any party to any court hearing allowed to take part by telephone or video link with some hearings being wholly virtual/telephone;
  - Remand hearings, pre-trial and enforcement issues, disputes re bail conditions and witnesses including defendants evidence in trials all conducted in part of wholly by telephone or video, if the judges and parties wish;
  - Summary only trials wholly by video link where the offence non-imprisonable;
  - Sentencing where all parties are on video links.

# Implications of video link hearings on effective participation of children: children who offend: BSB Review 2017

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- Characteristics of children who offend:-
  - Six in ten children in the youth justice system have a communication disability (Bryan et al, 2007, cited in RCSLT, 2009);
  - More than half of children in custody come from deprived households; (Jacobson et al, 2010: 52);
  - 76% of children in custody have an absent father and 33% have an absent mother (ibid);
  - A third of young boys and just over 60% of young girls in custody (aged 15-18) have spent time in local authority care (Kennedy, 2013: 10);
  - One-third of children in custody have identified special educational needs (Gyateng et al, 2013: 39);



# Implications of video link hearings on effective participation of children: children who offend: BSB Review 2017

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- Approximately 30% children who have 'persistent offending histories' in custody have IQs of less than 70, signifying a learning disability (Rayner et al, 2008, cited in Hughes et al, 2012: 26);
- Between 65% and 75% of children in custody have suffered a traumatic brain injury (various authors, cited in Hughes et al, 2012: 35-37); and
- 31% of a sample of 13 to 18-year-old offenders in custody and the community were found to have mental health problems, compared to 10% of the wider population (Jacobson et al, 2010: 68).



# Implications of video link hearings on effective participation of children: Carlile 2014 and Taylor 2016

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- An Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court, chaired by Lord Carlile, published in 2014, highlighted that:-

***"...young people's lack of understanding of proceedings or language, owing to the prevalence of neuro-developmental disorders and other problems that hinder participation and the lack of any systematic court processes to identify these. Additional factors that impeded child defendant's understanding include their young age and development immaturity and the fact that the cohort of children in the youth court have had fewer education opportunities."***

- A Review of the Youth Justice System in England and Wales by Charlie Taylor published in December 2016 found:-

***"Despite [the adaptations for children] and the best efforts of magistrates and judges, it is clear that the courts are simply not set up to ensure the full participation of children in criminal proceedings. Children are subject to what are essentially modified versions of the same processes and procedures that apply to adult defendants. Too often children are alienated by the frequent use of opaque legal argument and arcane terminology. . . On many occasions children leave court confused by the outcome and need to have their sentence explained to them by a YOT worker. All these problems are exacerbated when cases are heard in the Crown Court or the adult magistrates' court where fewer adjustments can be made for children."***



# Implications of video link hearings on effective participation of children: research: Plotnikoff and Woolfson

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- Plotnikoff and Woolfson published reports in April 1999 commissioned by the Prison service evaluating the pilot projects:-

Pilots did not include children;

Evaluation demonstrated that provided appropriate procedures are in place to safeguard the rights of defendants, video links can successfully be incorporated into the criminal justice process;

Among all classes of participant including defendants 80 percent felt the link was fair. 83 % of defence lawyers felt it was unfair in some respects.

Similar findings in a further report into a Manchester Pilot in March 2020.



# Implications of video link hearings on effective participation of children: research: MoJ 2010

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- MoJ in 2010 evaluation of virtual court pilot in Kent and London. **The pilot did not involve children.** Evaluation found that the Virtual Court pilot added cost to the delivery of criminal justice in the pilot and:-

The physical separation of defendants (and sometimes their solicitors) and the courtroom raised some concerns among practitioners;

The fixed 15-minutes time slots resulted in time pressure judged by some magistrates and District Judges as risking delivering “hasty justice”;

Some magistrates and DJs thought that the court had more difficulty in imposing its authority “remotely”, and perceived that the defendants took the process less seriously than they would if they appeared in person;

**The rate of guilty pleas and custodial sentences were higher in the pilot;**

**The rate of defence representation was lower in Virtual Courts.**

In terms of implications the report said this:-

*“The impact of the pilot on judicial processes and outcomes is complex. The evidence points to a series of factors that may be regarded as giving cause for concern, but the frequency with which they occur is very difficult to judge. If the Virtual Court concept is rolled out in future, it is recommended that these issues are further explored.”*



# Implications of video link hearings on effective participation of children: research: SCYJ / Transform Justice Survey

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- Standing Committee for Youth Justice produced a report, “They just don’t understand what’s happening or why”: A report on child defendants and video links in April 2018 which looked at the responses specific to children in the qualitative data gathered by Transform Justice through surveymonkey. It found widespread agreement that the use of video links has a negative impact on children’s ability to participate in court proceedings because of the lack of communication and therefore understanding that video links afford a child:-
  - Practical difficulties with technology interfere with the ability of the court to communicate fully and effectively with a child defendant:- connectivity issues; time constraints; low quality audio and visual;
  - Practical problems intrinsic to appearing on video link. Organic conversations not enabled. No opportunity to ask a question or for clarification without interrupting the entire court:

*“Participation in hearings is more than “just” communicating. Being physically present when talked to or about makes it easier for the young person to ask questions if he/she does not understand or to challenge what others are saying about them” (YOT worker);*



# Implications of video link hearings on effective participation of children: research: SCYJ / Transform Justice Survey

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- Relationship with lawyer, including insufficient conference time, cited as a key issue. Lack of trust. Impact on BAME children:

*“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” (YOT worker);*

Lammy Review 2017:-

*BAME proportion of young people offending and re-offending rose from 11% in 2006 to 19% in 2016;*

*BAME proportion of youth prisoners rose from 25% to 41%;*

*Loss of trust in lawyers by BAME defendants;*

*One of key recommendations – HO, MOJ, LAA, Law Society and Bar Council should experiment with different approaches to explaining legal rights and options;*



# Implications of video link hearings on effective participation of children: research: SCYJ / Transform Justice Survey

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- Time with YOT. 80% of YOT workers stated that video links made carrying out their duties more difficult:

*“If somebody appears via video link for either a standard hearing or a sentencing even, it’s just a case of we’re in the court room, but, they might be told that we’re there, but they can’t see us, they don’t have any interaction with us at all. So really, for all intents and purposes we don’t have any role at all” (YOT worker)*

*“There’s no means of us doing a post-court report because neither the court nor the establishment provide us with any opportunity to speak post-court with the young person. Because the video links are very, very strictly diarised...So there’s no kind of room to have a conversation...because obviously they’re serving quite a lot of courts. So, I’ve just not found any way around that” (YOT worker)*

*“Much more difficult as we cannot complete the required post-court report and fulfil our statutory responsibilities” (YOT worker);*



# Implications of video link hearings on effective participation of children: research: SCYJ / Transform Justice Survey

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- Impact on support from family and carers:

*"[The child] might be told that [family] are there, but they wouldn't have any chance to interact, and they wouldn't see them. So quite often we have parents saying 'oh I'm not going to bother coming then today; they won't know I'm there anyway" (YOT worker);*

- Failure to properly and suitably engage with the process:

*"Children do not appreciate they are in a court not on a computer game" (Magistrate 2):*

- Exacerbating communication and understanding difficulties for defendants who have vulnerabilities; often difficult to discern the physical or mental difficulties over video link:

*"Almost impossible. 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 worker)'*





# Implications of video link hearings on effective participation of children: research: SCYJ / Transform Justice Survey

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Responses to question does the use of video link impact on court hearing outcomes?

- Some thought child more likely to plead guilty;
- Majority felt child more likely to be refused bail;
- Some thought sentences over video link more severe.

Conclusions of the SCYJ report:-

- Virtual hearings compromise children's right to a fair trial, erode the support currently afforded to children in court, and prevent statutory duties from being met;
- Such hearings may negatively affect outcomes;
- They threaten the development of reforms to youth justice.

Recommendations of the SCYJ report:-

- Urgent review of the use of video links with children and the collation and monitoring of data;
- Halting the expansion of video link hearings;
- Video link hearings should only be used in exceptional cases with appropriate adjustments.



# Implications of video link hearings on effective participation of children: Youth Proceedings Advocacy Review: BSB 2015

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The Youth Proceedings Advocacy Review: Final Report (Institute for Criminal Police Research for BSB and CILEx Regulation) November 2015:-

- Formality of court proceedings and language is a significant barrier to young defendants' and witnesses' understanding and engagement with the process;
- Compliance masking understanding difficulties:-

*"I didn't really understand what they were saying...they used big words and stuff" [Casper, aged 17]*

*" You don't really understand what they're saying but they're saying something about you and then say they've made a decision" [Jabir, aged 17]*

*"Some of the words being used it was like way over my head. They were talking proper, like. ...ridiculous. I had no clue, me, I just stood there and stayed white and nearly cried" [Riley, aged 16]*

*"All the people that were talking, I couldn't understand ... They asked me if I understood – I just said yeah. ... I just wanted to get it over with, and that. I didn't want them to think I was being rude or something" [Tyler, aged 17]*

# Implications of video link hearings on effective participation of children: University of Surrey research now published

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- Video Enabled Justice Programme: University of Surrey Independent Evaluation was published on 4<sup>th</sup> May 2020:-
  - Did not involve children;
  - It's findings echo the findings of the 2010 Kent and London pilot evaluation and the Transforming Justice survey of 2017;
  - The use of custodial sentences was more likely to be recorded in video court hearings;
  - Defendants less likely to have legal representation;
  - Problems with lack of confidentiality of lawyer-client consultations;
  - Some evidence that defendants may be less engaged in video court hearing when the outcome is delivered. Defendants more likely to be passive/expressionless and less likely to be satisfied with the hearing outcome;
  - Video appears seem to lead to more "inappropriate" and frustrated behaviour from defendants
  - <http://spccweb.thco.co.uk/our-priorities/access-to-justice/video-enabled-justice-vej/video-enabled-justice-programme-university-of-surrey-independent-evaluation/>



# Implications of video link hearings on effective participation of children: research Equality and Human Rights Commission

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- Equality and Human Rights Commission very recently published “Inclusive justice: a system designed for all. Interim evidence report. Video hearings and their impact on effective participation”:-
  - HMCTS reliance on defendants’ self-identification of impairments affecting participation is likely to lead to many people’s additional needs not being identified;
  - Video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as learning disability, autism spectrum disorders and mental health conditions;
  - Recommended the MoJ should commission independent research on video hearings with a primary focus on justice outcomes;
  - Government response in early March 2020 was that it does not propose to slow the growth in use of video links whilst it is being evaluated.



# The Coronavirus Act 2020: Legislative Changes

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- Makes temporary modifications to the following pieces of legislation:
  - The Crime and Disorder Act 1998
  - The Criminal Justice Act 2003
  - The Courts Act 2003
  - The Mental Health Act 1983
- Changes came into force on **25th March 2020**
- Subject to 'sunset clause' (due to expire after 2 years)
- The purpose of the amendments is to extend powers in relation to the use of live audio and live video links as part of criminal proceedings



# The power to make a direction

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- Opens up the circumstances in which a live link direction can be made
- Permits certain hearings to be conducted wholly by live audio or live video link
- Defendants on bail are now eligible to participate by live link
- More scenarios in which a witness can give evidence by live link



# Definitions

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- ‘Preliminary Hearing’ and ‘Sentencing Hearing’ are defined in section 57A of the Crime Disorder Act 1998
- ‘Eligible Criminal Proceedings’ are defined in section 51(2) of the Criminal Justice Act 2003
- ‘Live Audio Link’, ‘Live Video Link’, a ‘hearing conducted wholly as an audio hearing’ and a ‘hearing conducted wholly as a video hearing’ are defined in both section of the 57A Crime Disorder Act 1998 and section 56 of the Criminal Justice Act 2003



# THE COURTS POWER TO MAKE A LIVE LINK DIRECTION PURSUANT TO THE CORONAVIRUS ACT 2020

THE CRIME DISORDER ACT 1998

PRELIMINARY HEARINGS

SENTENCING HEARINGS

Sections 57A - G Crime Disorder Act 1998 and the new Schedule 3A (to the Crime Disorder Act 1998)

THE CRIMINAL JUSTICE ACT 2003

ELIGIBLE CRIMINAL PROCEEDINGS

- Summary trials
- Criminal appeals to the Crown Court
- Trials on indictment
- Any other trial in the Crown Court

Sections 51 - 56 Criminal Justice Act 2003 and the new Schedule 3A (to the Criminal Justice Act 2003)

In deciding whether to give a direction the court must consider the circumstances of the case including:

In the case of a direction relating to a witness:

- The importance of the witness's evidence
- Whether a direction might inhibit any party from effectively testing the witness's evidence

In the case of a direction relating to any other participant:

- The availability of the person
- The need for the person to attend in person
- The views of the person
- The suitability of the facilities at the place where the person would take part in the hearing
- Whether the person will be able to take part effectively

A direction may not be given unless the court is satisfied that it is in the interest of justice for the person concerned to participate through a live video or a live audio link



# LIMITATIONS ON THE COURTS POWER TO MAKE A LIVE LINK DIRECTION

## PRELIMINARY HEARINGS

- D cannot give evidence by live audio link
- A person other than D may participate for the purpose of giving evidence by live audio link if:
  - Suitable arrangements cannot be made for the person to give evidence by video link **and**

## SENTENCING HEARINGS (AND ACCEPTANCE OF A GUILTY PLEA)

- D cannot participate by live audio link
- A person other than D may participate by live audio link if:
  - The persons participation is only for the purpose of giving evidence **and**
  - Suitable arrangements cannot be made for the person to give evidence by video link **and**
  - The parties agree

## ELIGIBLE CRIMINAL PROCEEDINGS

- A direction cannot be given in relation to any member of a jury
- D cannot give evidence by live audio link

Proceedings can only be conducted **wholly** by live audio link, if the hearing in question meets one of the conditions outlined in subsection 1(2) – 1(7) of the new Schedule 3A (to the Criminal Justice Act 2003).

Proceedings can only be conducted **wholly** by live video link, if the hearing in question meets one of the conditions outlined in subsection 2(1) – 2(9) of the new Schedule 3A (to the Criminal Justice Act 2003).

# Hearings conducted wholly as audio or wholly as video proceedings

## The New Schedule 3A (to the Criminal Justice Act 2003)

### *Conduct of proceedings wholly as audio proceedings*

- 1
- (1) Eligible criminal proceedings may be conducted wholly as audio proceedings only if the proceedings meet one of the following conditions.
  - (2) *Condition A*: the proceedings are preliminary or incidental to a criminal appeal to the Crown Court.
  - (3) *Condition B*: the proceedings are preliminary or incidental to an appeal to the criminal division of the Court of Appeal.
  - (4) *Condition C*: the proceedings are preliminary or incidental to a reference to the Court of Appeal by the Attorney General under Part 4 of the Criminal Justice Act 1988.
  - (5) *Condition D*: the proceedings are preliminary or incidental to the hearing of a reference under section 9 or 11 of the Criminal Appeal Act 1995.
  - (6) *Condition E*: the proceedings are a hearing following conviction held for the purpose of making a decision about whether to impose or vary conditions of bail in respect of the person convicted.
  - (7) *Condition F*:—
    - (a) the proceedings are a hearing following conviction held for the purpose of deciding whether to grant or continue bail in respect of the person convicted, and
    - (b) either—
      - (i) section 4 of the Bail Act 1976 does not apply to the person, or
      - (ii) the making of the decision is not disputed (including where the court is minded to refuse or revoke bail of its own motion).
  - (8) But proceedings which meet any of those conditions may not be conducted wholly as audio proceedings if the court is minded to deal with a person for contempt of court (including enquiring into conduct and imposing punishment) at the proceedings.

### *Conduct of proceedings wholly as video proceedings*

- 2
- (1) Eligible criminal proceedings may be conducted wholly as video proceedings only if the proceedings meet one of the following conditions.
  - (2) *Condition A*: the proceedings are—
    - (a) an appeal to the Crown Court which is an appeal only against sentence,
    - (b) an appeal to the Crown Court arising out of a summary trial—
      - (i) which is an appeal arising out of a summary trial which was itself conducted wholly as video proceedings, and
      - (ii) which the parties agree may be conducted wholly as video proceedings, or
    - (c) preliminary or incidental to any criminal appeal to the Crown Court.
  - (3) *Condition B*: the proceedings are preliminary or incidental to an appeal to the criminal division of the Court of Appeal.
  - (4) *Condition C*: the proceedings are preliminary or incidental to a reference to the Court of Appeal by the Attorney General under Part 4 of the Criminal Justice Act 1988.
  - (5) *Condition D*: the proceedings are preliminary or incidental to the hearing of a reference under section 9 or 11 of the Criminal Appeal Act 1995.
  - (6) *Condition E*: the proceedings are preliminary or incidental to a hearing before the Court of Appeal under section 80 of this Act.
  - (7) *Condition F*: the proceedings are a hearing following conviction held for the purpose of making a decision about bail in respect of the person convicted.
  - (8) *Condition G*:—
    - (a) the proceedings are a summary trial in a magistrates' court,
    - (b) a written procedure notice has been served on the defendant but the offence is not being tried in accordance with section 16A of the Magistrates' Courts Act 1980, and
    - (c) the parties agree to the proceedings being conducted wholly as video proceedings.
  - (9) *Condition H*: the proceedings are a hearing under section 142(1) or (2) of the Magistrates' Courts Act 1980 or under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000.

# CPR 3.2(4)

## Removal of the ‘effective participation’ requirement

### The Criminal Procedure Rules

October 2015

as amended April 2016, October 2016, October 2017, November 2017, April 2018,  
October 2018, October 2019 & April 2020  
as temporarily amended April 2020

### The duty of the court

3.2.—(1) The court must further the overriding objective by actively managing the case.

(2) Active case management includes—

- (a) the early identification of the real issues;
- (b) the early identification of the needs of witnesses;
- (c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
- (d) monitoring the progress of the case and compliance with directions;
- (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
- (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
- (g) encouraging the participants to co-operate in the progression of the case; and
- (h) making use of technology.

(3) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.

(4) Where appropriate live links are available, making use of technology for the purposes of this rule includes giving a live link direction—

- (a) for the conduct of any hearing by live link under a power to which the rules in Part 18 apply (Measures to help a person give evidence or otherwise participate); and
- (b) whether an application for such a direction is made or not.

(4) Where appropriate live links are available, making use of technology for the purposes of this rule includes directing the use of such facilities, whether an application for such a direction is made or not—

- (a) for the conduct of a pre-trial hearing, including a pre-trial case management hearing;
- (b) for the defendant’s attendance at such a hearing—
  - (i) where the defendant is in custody, or where the defendant is not in custody and wants to attend by live link, but
  - (ii) only if the court is satisfied that the defendant can participate effectively by such means, having regard to all the circumstances including whether the defendant is represented or not; and
- (c) for receiving evidence under one of the powers to which the rules in Part 18 apply (Measures to assist a witness or defendant to give evidence).



# Safeguards?

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- The parties (plus any relevant YOT) must be given the opportunity to make representations before a direction is given
- A hearing may be held to determine whether or not to give a live link direction
- If the court decides not to give a live link direction in relation to a sentencing hearing or in eligible criminal proceedings (further to an application being made), it must state in open court the reasons for not doing so
- There are some restrictions on use of audio link:
  - The circumstances in which a defendant can use a live audio link;
  - The prohibitions on those who are **not** giving evidence using a live audio link;
  - The requirement that the parties agree.
- Summary proceedings conducted wholly by video link (condition G) also require the parties to agree



# General Concerns: Video and Audio link

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- There is currently limited research available on the impact a live link direction has on the effective participation of the parties
- There are very real concerns about the quality of evidence given by a witness over a live link during a trial
- Live links for preliminary and sentencing hearings are also problematic in terms of engagement
- Plans for summary trials to be conducted wholly by live video link
- Provisions to remain after emergency legislation has expired
- Even now, the HMCTS data being collated does not capture the detail we need to review and assess moving forward



# Falling short? NSPCC report (February 2019)

## 5.8 Perceptions of effective participation: young prosecution and defence witnesses and young defendants

'In order to prepare for the trial, the court must take every reasonable step ... to facilitate the participation of any person, including the defendant' (Criminal Procedure Rule 3.9(3)(b))

'The child-centred approach is supported by ... the Equality Act 2010, which puts a responsibility on public authorities to have due regard to the need to eliminate discrimination and promote equality of opportunity. This applies to the process of identification of need and risk faced by the individual child and the process of assessment. No child or group of children must be treated any less favourably than others in being able to access effective services which meet their particular needs' (HM Government 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children' July 2018, para 14, page 11)

'We confirm, if confirmation is needed, that the principles in *Lubemba* apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness' (Lord Chief Justice, *R v Grant-Murray and anor* [2017] EWCA Crim 1228, para 226).<sup>245</sup>

Judges, Crown Advocates and other lawyers had differing perspectives as to whether young defendants were enabled to participate as effectively as young prosecution witnesses in the criminal justice process:

**Table 4: Are you satisfied that young defendants are enabled to participate as effectively as young prosecution witnesses?**

|                                    | Yes      | No       | Total |
|------------------------------------|----------|----------|-------|
| Judges                             | 23 (58%) | 17 (43%) | 40    |
| Barristers and solicitor advocates | 8 (30%)  | 19 (70%) | 27    |
| Crown Advocates                    | 18 (90%) | 2 (10%)  | 20    |



# Implications of COVID-19 for trials in the Youth Court

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- **Wholly remote Youth Court trials**
  - Children will not be able to communicate or participate effectively
  - Success is contingent on the patience of the Judge or Bench
  - Difficulty building rapport over the link
  - Unlikely that disclosure issues could be resolved
  - Connectivity difficulties impact quality of evidence
  - Child's perception of the proceedings
  - Court's perception of the child
  
- **Youth Court trials that comply with social distancing guidance**
  - Child's position within the courtroom
  - Ability to communicate
  - Ability of advocate to read body language



# The Reality on the Ground

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- Youth Court trials are not taking place remotely at present
- Unclear whether the power to hold a summary trial wholly by live video link extends to proceedings in the Youth Court
- Any proposal to commence trials in the Youth Court remotely ought to be opposed
- First Appearances and Sentencing Hearings continue to be listed (both in the Youth and Crown Court) which remains a cause for concern





# Remedies

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- Make objections known
- Consider *carefully* whether to consent to evidence being given by live audio link
- Do not consent to proceedings being conducted wholly by video link
- Have regard to the Child Protocol in Criminal Cases



# Child Protocol in Criminal Cases

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- Essential court hearings involving children should proceed safely which may require live link hearings during COVID-19, The principles for live link hearings involving child defendants, as set out in the Consolidated Criminal Practice Directions paragraphs 3N.13-15, should be adhered to wherever possible.
- There are a number of safeguards to consider if, exceptionally, a hearing involving a child defendant takes place over live link:-

(A) The judge or magistrate should state openly in the presence of the child:

*“We note that there is evidence that children sentenced over video link are more likely to receive custodial sentences or be refused bail.*

*We note that there are currently disproportionately high number of BAME (black, Asian and minority ethnic) children in custody and that this includes gypsy, traveller and Roma children. As a result, we have reviewed our decision to ensure no prejudice or bias has affected our ruling.”*



# Child Protocol in Criminal Cases

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(B) There should be a member of the youth offending team present during the hearing and the child should be aware of this, even if they are unable to see them. There should be an opportunity for the YOT officer to speak with the child both before and after the hearing, with sufficient time for effective communication.

(C) Arrangements must be in place for the legal representative to communicate with the child both before and after the hearing, with sufficient time to do so effectively (the usual 15-minute time slot is likely to be inadequate).

(D) A parent, guardian or other supporting adult should be present and able to participate in the remote hearing to support the child including in the pre- and post-consultation with the legal representative (where technology allows).

(E) It can be challenging for participants to follow what is happening during a remote hearing. Every effort should be made to facilitate the child's involvement in the hearing. Hearings must proceed slowly with appropriate pauses and breaks to enable the child to communicate with their legal representative if the need arises.



# Child Protocol in Criminal Cases

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(F) An enhanced level of care should be taken to ensure that the language used during the hearing promotes the child's understanding, allowing them to participate meaningfully in the hearing. This is in addition to the usual steps taken to simplify language during criminal proceedings involving children.



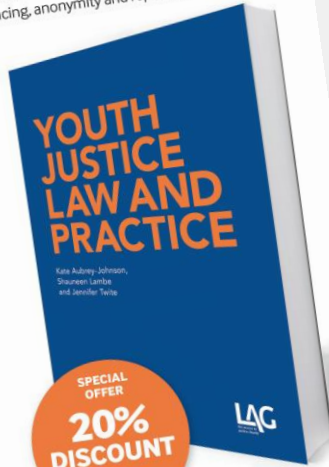
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020 7993 7600

info@gclaw.co.uk

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