

Inclusive justice: a system designed for all

—
Interim evidence report

Video hearings and their impact on
effective participation



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Foreword

We have recently concluded an inquiry looking at access to justice for disabled people in the criminal justice system.

In response to the COVID-19 pandemic, the Ministry of Justice has announced a significant expansion in the use of phone and video hearings, including in the criminal courts, but not for jury trials. This is to reduce the number of face-to-face hearings across courts and tribunals.

We are publishing the interim findings from our inquiry to inform decision-making and mitigate risks to disabled people.

The decision as to how a hearing is conducted is made by the judge, magistrates or panel. We would encourage the judiciary to consider this interim report when making decisions about whether or not telephone or video hearings are appropriate.

Her Majesty's Courts and Tribunals Service (HMCTS) have encouraged court users to tell the court or tribunal if there are any circumstances that may affect or impair their ability to participate effectively in an audio or video hearing, and have confirmed that reasonable adjustments will be made in their [guidance published on 18 March 2020](#).

This guidance has been issued recognising that phone and video hearings may not be suitable for everyone. It states that reasonable adjustments can be made, but does not give specific information about what adjustments are available. The guidance relies on defendants' self-identification of impairments. Our inquiry found that this is inherently problematic and is likely to lead to many people's additional needs not being identified.

We undertook our inquiry due to widespread concern that disabled defendants or accused people can face significant barriers to justice in criminal proceedings. We found that video hearings can significantly impede communication and understanding for disabled people with certain impairments, such as a learning disability, autism spectrum disorders and mental health conditions. People with these conditions are significantly over represented in the criminal justice system.

We identified a number of other barriers, including the absence of processes to identify, record and share information about impairments. We are also concerned about the availability of adjustments to ensure that disabled people accused of crime can understand and effectively participate in legal proceedings against them.

We recognise that criminal justice agencies currently face unprecedented challenges and the overriding concern is to protect public health. Yet, we are concerned about the impact that the expansion of video and phone hearings will have on justice for some disabled people.

The current health crisis should not also become a crisis of justice. We are publishing our findings to inform decision-making in this extraordinary time and make recommendations to mitigate the risks we identify.



About this inquiry

Our inquiry looked at how effectively cognitive impairments, mental health conditions and/or neuro-diverse conditions are being identified among defendants in the criminal justice system. It examined whether the appropriate adjustments are being made to ensure that individuals with such conditions can effectively participate. This included looking at the impact of video hearings on participation for defendants.

The inquiry drew on a wide range of evidence sources including interviews with judiciary, front line professionals and defendants.

Effective communication underlies the entire legal process:
ensuring that everyone involved understands and is understood.
Otherwise the legal process will be impeded or derailed.

(Equal Treatment Bench Book 2018, Guidance for Judges and
Magistrates for England and Wales)

We conducted this inquiry under section 16 of the Equality Act 2006. Inquiries are a way for us to find out more about an issue of equality, diversity or human rights. Based on our findings we can make recommendations for change and improvement in policy, practice or legislation. We examined whether:

- the right to a fair trial (Article 6 of the European Convention on Human Rights) was being realised
- reasonable adjustments were being made, as required by the Equality Act 2010, and
- public authorities were considering their policies and services and making decisions in line with the public sector equality duty (PSED).

In the last decade, a key part of the court modernisation programme in England and Wales has been significant investment in digital systems. This includes the use of video links primarily for pre-trial and remand hearings.

How we collected evidence

The inquiry report draws on a wide range of evidence sources.

- Our staff conducted 100 in-depth qualitative interviews with criminal justice professionals in England (69), Scotland (24) and Wales (7).

- We engaged directly with a range of government departments and arms-length bodies.
- We commissioned the following research projects:
 - 39 qualitative interviews with ex-defendants in England and Wales.
 - Online surveys with 200 criminal justice professionals and 46 defendants, accused people and supporters in England, Scotland and Wales.
 - A mapping of the extent of court modernisation and digitisation across the criminal justice systems in England, Scotland and Wales.
 - Desk-based research to provide examples of how various legal systems outside Great Britain have attempted to improve effective participation of defendants with cognitive impairments, mental health conditions and/or neuro-diverse conditions.

The inquiry draws on published research, official statistics and policy documents. An External Reference Group (ERG), with members representing legal professionals, disabled people's organisations and an advocacy and human rights organisation provided valuable expertise and advice about the inquiry.

The focus of this inquiry

Our inquiry focused on defendants and accused people with a cognitive impairment, mental health condition and/or neuro-diverse condition. This may affect people in different ways, including:

- memory loss or difficulty retaining information
- having a short attention span
- being reluctant to speak up
- having extreme anxiety, and
- an inability to control impulses or thoughts.

These effects can be exacerbated when an individual is a defendant in criminal proceedings. There is little government data about the prevalence of this group within the criminal justice system, but the evidence suggests it is significant¹.

¹ For example, it is estimated that 40% of people detained in police custody have a mental health issue. NICE (2017), [Mental health of adults in contact with the criminal justice system](#)

It is a long-standing common law principle that defendants must be able to understand and be involved in the criminal proceedings that they are a part of. This is also a right under the Human Rights Act 1998. Defendants need to understand what they are being charged with, what evidence there is for this, and be able to give their account and effective instructions to their legal team. We call this 'effective participation'.



Use of video-link technology

As part of our inquiry, we looked at the extent of video-link technology across the criminal justice systems in England and Wales.

We found that most criminal courts in England and Wales had some form of video-link technology (207 out of 234 venues) in spring 2019.

In a sample of courts contacted, most (31 out of 37) reported that they could connect by video-link to a local police station.

We contacted 104 prisons (out of 114²) in England and all three prisons in Wales. All establishments that we contacted have the technology and its use is widespread.

Our analysis of Crown Courts with listings available on a sample of dates³ showed that most (62 out of 72) had at least one defendant listed to appear by video.

Our interviews with criminal justice professionals confirmed that video-links are often used for remand and interim hearings (between prisons and courts).⁴ They are also regularly used for consultations between prisoners on remand and their defence solicitors or advocates.

² House of Commons. 'The prison estate' House of Commons Briefing paper. November 2019.

³ Court listings were analysed on 10 April, 17 April, 24 April and 1 May 2019.

⁴ Interim hearings are hearings that take place at any stage of proceedings, other than the trial itself. The bulk of our inquiry evidence focused on remand review hearings, links from prison to court, where the defendant has already been remanded in custody. We received very little evidence on police remand hearings, links from the police custody suite to the magistrates' court for first appearances.

Our evidence

Impact on identifying impairments

We found that opportunities to identify impairments and make adjustments are lost or reduced when a defendant appears in court by video-link rather than in person.

For defendants whose first meeting is over video, professionals from a range of sectors felt that this significantly undermined the ability of advocates to identify impairments.

Criminal justice professionals suggested that the ‘human element’ is missing from these interactions and that trust and rapport are harder to build up. They underlined that both people and behaviours can be easily misunderstood over remote technology.

A number of interviewees said that these barriers are compounded by the short timeslots available for video consultations. Before hearings, standard slots for meetings are up to 15 minutes and often shorter, even if the quality of the link is poor. This may be the first opportunity that a defence solicitor or advocate has to meet their client.

I think it is less easy for the court to identify if somebody is confused, or unable to pay attention, or whatever else it may be, because you are a little remote figure on a TV screen. Yes, I think you are less well able to represent yourself, as it were, or for the court to easily identify that you are not necessarily able to follow what is going on. You are just less present, I think.

(Liaison and Diversion, England)

The time slots that are given to the defence solicitors or representatives are only quite limited, perhaps maybe fifteen minutes. If that individual has a particular vulnerability or need and they struggle to understand concepts, trying to ram that all home in fifteen minutes and make an informed decision is going to be far from ideal. The fact is it's just not going to work.

(Prosecutor, England)

Impact on participation

We found that there has been very limited assessment of the potential impact of using video hearings in cases with disabled defendants. A number of interviewees said the use of video hearings should be paused until further evidence has been gathered about their use and suitability for these defendants.

Interviewees raised numerous concerns about video-links with poor sound and image quality. They said that links may not work at all, or they may be intermittent.

It was suggested that the technology in magistrates' courts can be particularly bad. This can mean that hearings or consultations (between defendants and defence solicitors or advocates) can't go ahead, or are delayed.

When consultations are delayed, timeslots can run out. This means that defence solicitors or advocates may not have enough time to repeat or simplify information for disabled defendants, or to ensure that defendants have understood the information.

The research conducted with defendants included several individuals who had used video-links. There were mixed views about the experience and the issue of 'poor connection' was raised by several participants.

Defence solicitors and advocates highlighted the separation between the defendant and their solicitor and/or court. They outlined that defendants may not have a full view of the court, or know who is present in the room at the other site.

Concerns were raised about privacy and legal privilege with video-links in courts, as they are not always soundproof. It was also noted that being alone for a video hearing, without support, can be difficult for some people.

While some positive impacts of video hearings were noted for defendants, they were seldom related to participation. For example, professionals and defendants noted that remand hearings by video can be less disruptive and prisoners don't have to spend all day travelling in uncomfortable conditions or waiting in court.

It wasn't what I would call a real court because I was sat in a room all on my own with a screen but I couldn't hear what was being said ... I found it very difficult and I was unable to take part in it.

(Defendant, England/Wales)

My overall view would be that it is better for them to be brought to court, for all sorts of reasons, because – amongst other things – they can see the solicitor, the solicitor can make a judgement on the day, the barrister can make a judgement on the day, and then the trial process can be adapted in a particular way. Doing it remotely, as far as getting the defendant's participation and understanding is concerned, I would have thought is acutely compromised.

(Judiciary, England)

Required adjustments

Most of our evidence focused on the barriers that video hearings can present to defendants with a cognitive impairment, mental health condition and/or neuro-diverse condition. We found that for many people with these impairments, a video hearing would not be suitable.

Many interviewees underlined that, due to concerns about participation, it is not usually appropriate for defendants with impairments to attend hearings by video-link. They strongly urged that disabled defendants should be able to attend remand or interim hearings in person, where relevant, by way of an adjustment.

Professionals in England said that they were sometimes successful in requesting in-person appearances, rather than video-links.

We received some evidence that suggested video hearings could be an adjustment. For example, those who experience high levels of stress or anxiety when attending court hearings in person might find a video hearing to be a helpful adjustment, but would need support in the room where they are.

Only one defendant from the sample we interviewed was given the choice as to whether they would attend a hearing by video-link or in person.

In my view, anybody who's got language issues, mental health problems, or autism, ADHD, or any other learning-based difficulty, they shouldn't be appearing by video link. It's difficult enough working with somebody who has those problems to make sure that you're doing your job properly and making reasonable adjustments to do it in person, so it should be avoided at all costs, other than for the most simple things.

(Legal professional, England)

I have not seen any real thought given where people appear from the police station to the court as to whether or not that person is suitable to go over the link or not. It's more a case of they've got the orders to do all first appearances by video link and that's what we're going to do. There's no real consideration being given to children or people who may have learning difficulties or mental health problems.

(Legal professional, England)



Evaluating the impact of video technology

Following concerns raised about the impact on access to justice of video-link technology in courts, in [their November 2019 report](#), the Justice Select Committee for the UK Parliament recommend that the Ministry of Justice should commission independent research on video hearings and video-links with a primary focus on justice outcomes. It recommended that this research should be completed before HMCTS makes use of video technology more widespread in courts and tribunals.

The Government stated in its response in early March 2020 that it does not propose to slow the growth in use of video while it is evaluated. Shortly after, on 18 March 2020, following the outbreak of COVID-19, HMCTS confirmed it is taking urgent steps to increase the capacity to hold telephone and video-enabled hearings.

Although such measures would ordinarily involve extensive testing, training and slow rollout, these measures are being put in place urgently in light of the current, unprecedented, public health emergency, as detailed in [the Government's update](#). Use of video hearings has been increased even though the up to date video technology has not yet been installed.

The impact of remote hearings on participation has not been evaluated and therefore the implications are not fully understood. Recording some video hearings would provide an opportunity to evaluate this. We hope that the publication of the evidence gathered from our inquiry contributes to an understanding of the impact.

Recommendations

The UK Government should:

1. Use the emerging evidence from the pilots for video enabled justice to inform how the rapid expansion of remote hearings is implemented.
2. Ensure that defendants have accessible information that explains their right to raise issues that they may have with participation, and accessible mechanisms that enable them to do so.
3. Ensure that all frontline professionals, including judges, police and health workers, give greater consideration to identifying people for whom video hearings would be unsuitable.
4. Support Liaison and Diversion services to make recommendations on adjustments, including postponing non-urgent cases.
5. Consider the use of registered intermediaries to provide remote communications support to defendants in video hearings.
6. Consider using audio and video recordings of hearings as part of the evidence base to evaluate remote hearings.



Contacts

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