



## BRIEFING PAPER

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# Police, Crime, Sentencing and Courts Bill: Part 12, Procedures in Courts and Tribunals

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## Summary

This briefing paper is one of a collection of Commons Library briefing papers on the [Police, Crime, Sentencing and Courts Bill](#) (the Bill). It deals only with the provisions in Part 12 of the Bill which concern juries, the transmission and recording of court and tribunal proceedings, and live links in criminal courts. Briefing papers dealing with other parts of the Bill and general background are available on the [Commons Library website](#).

Part 12 of the [Police, Crime, Sentencing and Courts Bill 2019-21](#) (the Bill) would introduce several measures related to procedures in courts and tribunals.

### Juries

**Clause 164** would amend the law to permit British Sign Language interpreters in jury deliberation rooms, to enable profoundly deaf people who use sign language to serve as jurors. There is currently a common law rule against a '13<sup>th</sup> person' on a jury or in the deliberation room. This effectively prohibits deaf people reliant on sign language from serving as jurors as there is no way of legally accounting for the presence of an interpreter in the jury room.

The clause has been welcomed by the British Deaf Association, although the Government has acknowledged that it excludes other individuals with disabilities who, in order to serve effectively as a juror, would require the assistance of a third party. The Government has said it will keep this issue under review.

### Courts and tribunals

**Clauses 166 to 169** and **Schedule 19** would replace temporary provisions in the [Coronavirus Act 2020](#) relating to live video and audio court hearings in criminal courts, and the broadcast and recording of video and audio proceedings in courts and tribunals. New permanent (and in some cases expanded) provisions would be added to the *Courts Act 2003* and the *Criminal Justice Act 2003*.

The Government [said](#) the aim of the temporary measures in the 2020 Act was to ensure that courts could "continue to function and remain open to the public, without the need for participants to attend in person".

The 2020 Act is due to expire in March 2022, at which point these temporary provisions will cease to be available. Background on the 2020 Act is set out in [Library Briefing Paper 8865 Coronavirus Bill: implications for the courts and tribunals](#).

An overview of clauses 166 to 169 is set out in the [Government's fact sheet](#) on these provisions. Detailed guidance is set out in paragraphs 1172 to 1230 of the [Explanatory Notes](#).

The Government [says](#) these provisions will mean greater efficiency, flexibility and accessibility, and fewer delays. However, others – including the [Justice Committee](#) and legal charities – have raised concerns about the ability of (often vulnerable) lay people to engage with 'virtual justice' and to consult legal representatives in confidence.

# 1. Juries

**Clause 164** of the Bill would amend the law to permit British Sign Language interpreters in jury deliberation rooms, to enable profoundly deaf people who use sign language to serve as jurors.

**Clause 165** would make a minor technical amendment to section 16 of the *Juries Act 1974* regarding continuation of a criminal trial on the death or discharge of a juror. It is not discussed further in this paper.

## 1.1 Eligibility

The *Juries Act 1974* governs eligibility to serve on a jury. [Section 1](#) provides that “every person shall be qualified to serve as a juror” so long as:

- they are registered as a parliamentary or local government elector and are aged 18 or over but under 76;
- they have been ordinarily resident in the UK, the Channel Islands or the Isle of Man for any period of at least five years since attaining the age of 13; and
- they are not “disqualified” for jury service.

The list of matters that disqualify someone from jury service is set out in [Schedule 1](#) to the 1974 Act. Schedule 1 only lists matters relating to mental health and involvement in criminal proceedings (e.g. people who are on bail or who have served certain types of prison sentence).

It does not list any form of deafness as a factor that disqualifies a person from jury service, which means that deaf people are legally eligible to serve as jurors.

## 1.2 The jury summons and reasonable adjustments

Anyone who receives a jury summons from the Jury Central Summoning Bureau is asked whether they have a “disability or impairment, which will require adjustments or additional assistance to be made for you when carrying out jury service”.<sup>1</sup>

Potential jurors who answer yes are asked to give details of the arrangements or adjustments that they may require in order to perform jury service. Examples might include a sign language interpreter, access to a hearing loop, or computer-aided transcription services.<sup>2</sup>

The Jury Central Summoning Bureau will notify the court of any disability or needs that have been notified under Part 4.<sup>3</sup>

Under [section 9B of the 1974 Act](#), the court has the power to discharge a summons issued to a disabled person:

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<sup>1</sup> See [Part 4 of the Jury Summons Form](#)

<sup>2</sup> See “[Subtitles help deaf juror past ‘13th stranger’ court rules](#)”, *Guardian*, 28 August 2019 for some examples in practice

<sup>3</sup> See Note 5 of the [Guide to Jury Summons](#)

1) Where it appears to the appropriate officer, in the case of a person attending in pursuance of a summons under this Act, that on account of physical disability there is doubt as to his capacity to act effectively as a juror, the person may be brought before the judge.

(2) The judge shall determine whether or not the person should act as a juror; but he shall affirm the summons unless he is of the opinion that the person will not, on account of his disability, be capable of acting effectively as a juror, in which case he shall discharge the summons.

As such, although the 1974 Act does not prohibit deaf people from serving as jurors, it does give the courts the option to discharge their summons if there are doubts about their ability to act effectively as a juror. This is likely to be a particular problem for people requiring interpreters, given the common law '13<sup>th</sup> person rule' described in the next section.

### 1.3 The '13<sup>th</sup> person rule'

The 1974 Act makes no provision for the maximum number of jurors. Instead this is governed by the common law, under which it is a long-established principle that a jury consists of 12 persons.

There is statutory provision for a jury to consist of fewer people than this (e.g. [s16 of the 1974 Act](#), which permits a jury trial to continue with as few as nine jurors). However, there is no statutory provision to enable a jury to consist of more people than this, or for additional people to be present in the jury deliberation room (whether or not they have been sworn as jurors).

It is this common law rule prohibiting a '13<sup>th</sup> person' that effectively prevents deaf people who require interpreters from serving on juries, as there is no way of legally accounting for the presence of the interpreter in the jury room.<sup>4</sup>

### 1.4 The Bill

**Clause 164** would amend the common law '13<sup>th</sup> person rule' by adding new provisions to the 1974 Act to permit British Sign Language interpreters to assist deaf jurors, including in the course of their deliberations.

For the purpose of considering a deaf person's capacity to act as a juror under section 9B of the 1974 Act, the judge would be required to consider whether the assistance of a British Sign Language interpreter would enable that person to be capable of acting effectively as a juror. If so, the judge would be able to appoint one or more interpreters to provide that assistance, and affirm the summons.

The offences of researching a trial or sharing research that currently apply to jurors would be extended to interpreters. Interpreters would

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<sup>4</sup> See for example "[Deaf chief executive ruled out as juror](#)", *Guardian*, 10 November 1999 and "[Deaf woman told she couldn't be a juror because of her hearing impairment](#)", *iNews*, 15 January 2019

also be subject to a new offence of intentionally interfering in or influencing the deliberations of the jury.

Writing on the website of the British Deaf Association in March 2021, David Buxton (former Chief Executive of the Association) said that the change was “long, long, overdue but very welcome”.<sup>5</sup>

In its Equality Impact Statement on this clause the Government acknowledges that there may be other individuals who might require the assistance of a third party, who will not benefit from these changes:

We do not consider that this provision would result in anyone with a protected characteristic being put at a particular disadvantage because of their protected characteristic. Where third party assistance is currently required in the jury deliberation room, efforts will be made to arrange for other jurors to provide this, wherever possible. For example, blind and partially sighted jurors can be assisted by a fellow juror reading out documents. However, we recognise this proposal is limited to profoundly deaf jurors who require a BSL interpreter and does not extend to other individuals with disabilities who, in order to serve effectively as a juror, would require the assistance of a third party (other than a fellow juror) in the jury deliberation room. We intend to keep this issue under review.<sup>6</sup>

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<sup>5</sup> British Deaf Association, [Law change opens door to deaf jurors](#), 9 March 2021

<sup>6</sup> Home Office/Ministry of Justice, [Equality impact statement: courts](#), 9 March 2021

## 2. Transmission and recording of proceedings

**Clauses 166 to 169** and **Schedule 19** would replace temporary provisions in the [Coronavirus Act 2020](#) relating to live video and audio court hearings in criminal courts, and the broadcast and recording of video and audio proceedings in courts and tribunals. New permanent (and in some cases expanded) provisions would be added to the *Courts Act 2003* and the *Criminal Justice Act 2003*.

### 2.1 The Coronavirus Act 2020

The [Coronavirus Act 2020](#) included temporary provisions to expand the availability of video and audio link in criminal court proceedings, and to permit the broadcast and recording of a range of court and tribunal proceedings. The Government said the aim of these measures was to ensure that courts could “continue to function and remain open to the public, without the need for participants to attend in person”.<sup>7</sup>

The 2020 Act is due to expire in March 2022, at which point these temporary provisions will cease to be available.

Background is set out in [Library Briefing Paper 8865 Coronavirus Bill: implications for the courts and tribunals](#).

#### Criminal proceedings: ‘live links’

Prior to the 2020 Act, a range of existing legislation enabled ‘live links’ to be used at various stages of the criminal justice process. The standard definition of ‘live link’ for these purposes required the person to be able to see and hear, and to be seen and heard by, the court.<sup>8</sup>

The following pre-existing provisions were relevant for the purposes of the 2020 Act:

- [Section 51 of the Criminal Justice Act 2003](#), which enabled witnesses (other than the defendant) to give evidence via live link in certain criminal proceedings;
- [Sections 22 and 23 of the Criminal Appeals Act 1968](#), which enabled convicted individuals being held in custody to attend appeal proceedings via live link; and
- [Part 3A of the Crime and Disorder Act 1998](#), which enabled adult defendants in custody or at a police station to attend certain preliminary, sentencing and enforcement proceedings via live link.

The 2020 Act introduced a number of ‘temporary modifications’ to these provisions. The key modifications were as follows:

- Section 51 of the 2003 Act (which enabled witnesses other than defendants to give evidence via live link) was expanded to cover anyone involved in a criminal trial who is giving evidence or

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<sup>7</sup> Department of Health & Social Care, [Guidance: What the coronavirus bill will do](#), 17 March 2020

<sup>8</sup> [section 56 of the Criminal Justice Act 2003](#)

otherwise participating in an expanded range of criminal proceedings – there was a specific exception for jurors, who would continue to participate in person (see [Schedule 23 to the 2020 Act](#)).

- Sections 22 and 23 of the 1968 Act (relating to criminal appeals) was expanded to match the new wider scope of section 51 above (see [Schedule 23 to the 2020 Act](#)).
- Part 3A of the 1998 Act (relating to preliminary and sentencing hearings for adult defendants in custody or at a police station) was expanded beyond defendants to cover all participants in preliminary, sentencing and enforcement hearings (see [Schedule 24 to the 2020 Act](#)).
- ‘Live links’ for all of the above were expanded to include audio-only hearings as well as video hearings, and it would be possible for certain proceedings to take place wholly on the basis of audio or video links ([Schedule 23, para 7](#)).

The 2020 Act took the same general approach as the pre-existing legislation when it came to procedural safeguards. The courts are only able to make a live link direction under the new expanded provisions if they are satisfied it is in the interests of justice to do so, and if the parties have been given the opportunity to make representations.

A [new Schedule 3A](#) was added to the *Criminal Justice Act 2003*, which set out a range of restrictions and limitations on the use of audio and video links. For example, wholly audio proceedings are only permitted in a narrow range of preliminary, incidental or bail hearings, and there are restrictions on directing defendants to participate by audio link.

The Crown Prosecution Service has published detailed guidance on the operation of the temporary provisions in the criminal courts: see [Coronavirus Act 2020: Live Video and Audio Links](#).

## Remote observation and recording of court proceedings

The 2020 Act also added new temporary provisions to the *Courts Act 2003* and the *Tribunals, Courts and Enforcement Act 2007* to provide for the broadcast and recording of video and audio proceedings (section 55 and [Schedule 25](#)).

These provisions were intended to allow the public to observe virtual proceedings and to enable courts and tribunals to maintain appropriate records. Unlike the other provisions in the 2020 Act, the broadcast and recording provisions extended to the civil and family courts and reserved tribunals, as well as criminal courts.

The Act also created a number of offences to protect participants and prohibit recording or transmitting live-streamed proceedings, photography and sound recordings in the context of virtual hearings and live-links.

## 2.2 The Bill

**Clauses 166 to 169** and **Schedule 19** would repeal the temporary provisions made by the 2020 Act, and replace them with new permanent (and in some cases expanded) provisions.

An overview is set out in the [Government's fact sheet](#) on these provisions.<sup>9</sup> Detailed guidance is set out in paragraphs 1172 to 1230 of the [Explanatory Notes](#). Brief details of the key provisions are set out below.

### Observation and recording of proceedings

**Clause 166** would add a new section 85A to the *Courts Act 2003*. This would provide for remote observation and recording of specified proceedings (set out in regulations) by direction of the court. It would cover the following courts:

- the Court of Appeal
- the High Court
- the Crown Court
- the Court of Protection
- the county court
- the family court
- a magistrates' court
- a coroner's court

A direction would be permitted to authorise transmission to designated live-streaming premises, or to particular individuals who have first identified themselves to the court. The court would also be able to direct that a recording of the transmission be made, for the purposes of keeping a court record of the proceedings.

**Part 1 of Schedule 19** would make corresponding provision in relation to the First-Tier Tribunal and Upper Tribunal, employment tribunals and the Employment Appeal Tribunal, and the Competition Appeal Tribunal.

**Clause 167** would add a new section 85B to the 2003 Act, setting out an offence of recording or transmission in relation to remote proceedings. Paragraph 1195 of the Explanatory Notes gives "making an unauthorised recording of a witness giving evidence by live link" as an example of the type of conduct that would be covered.

**Part 2 of Schedule 19** would make corresponding provision for tribunals.

The Government's fact sheet on these provisions states:

The legislation will also seek to facilitate the principle of Open Justice by allowing for the remote observation of different types of hearings by members of the public. It will ensure that, regardless of the nature of the hearing, it is prohibited for

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<sup>9</sup> Home Office, [Police, Crime, Sentencing and Courts Bill 2021: audio and video live links factsheet](#), 10 March 2021

observers and participants to record or broadcast the proceedings, as is the case in physical public galleries. These powers will be enacted via Secondary Legislation with due consideration when it is practicable to do so for each type of court setting (wholly remote, hybrid, and whole in-person).

These provisions will be extended over time across the criminal, family, civil courts, coroner's courts, as well as to most major tribunals (Upper and First Tier Tribunals; Employment Tribunals and the Employment Appeal Tribunal; and the Competition Appeal Tribunal). This will make permanent and build upon legislation prohibiting the unauthorised recording or transmission of proceedings as laid out in the Coronavirus Act 2020 for the unified tribunals, and will bring the Employment and Competition tribunals in line with this legislation.<sup>10</sup>

## Live links in criminal proceedings

**Clause 168** would substitute a new section 51 for the existing section 51 in the *Criminal Justice Act 2003*. The new section 51 would set out an expanded framework for the use of live links in criminal proceedings. Related provisions in other legislation – including the *Criminal Appeals Act 1968* and the *Crime and Disorder Act 1998* – would be amended or repealed to reflect the provision of new section 51.

New subsection 51(1) would enable the court, by direction, to require or permit a person to take part in “eligible criminal proceedings” through a live audio link or a live video link.

One key difference to the 2020 Act is that new subsection 51(2) would permit live link directions to be given in respect of jurors. However, the direction would have to require “all members of the jury to take part through a live video link while present at the same place”. This would prevent directions being made in respect of individual jurors and would also prevent the use of audio links. The Government's fact sheet on these provisions states:

### **How would you ensure a fair trial once you enabled juries to participate via live link in the future?**

This would only be used in appropriate circumstances. A jury would still sit collectively in another room in the court or another building to attend a trial via video link and the judge would maintain full supervision of the jury. Jurors would not be able to take part individually by live link (for example, from home) under any circumstances.<sup>11</sup>

“Eligible criminal proceedings” would be defined in new subsection 51(3), and would include a wide range of proceedings such as preliminary hearings, summary trials and trials on indictment, criminal appeals to the Crown Court or Court of Appeal, and Attorney General references of unduly lenient sentences.

The court would only be permitted to give a direction if:

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

- it is satisfied that it is in the interests of justice for the person to whom the direction relates to take part in the proceedings via live link;
- the parties to the proceedings have been given the opportunity to make representations; and
- if required, the relevant youth offending team has been given the opportunity to make representations.

The court would also be required to consider any guidance given by the Lord Chief Justice, and all the circumstances of the case. These circumstances would include, in particular:

- the availability and views of the person concerned, and any need for them to attend in person;
- the suitability of the facilities at the place where that person would take part in the live link;
- whether that person would be able to participate in the proceedings effectively;
- in relation to witnesses, the importance of their evidence to the proceedings and whether any party might be inhibited from effectively testing that evidence; and
- the potential arrangements for members of the public to see or hear the live link proceedings.

**Part 3 of Schedule 19** would cover various supplementary procedural matters relating to live links and make associated amendments to other legislation.

The Government says these provisions will mean

the courts will be able to operate more efficiently in the future, with greater flexibility to make full use of improvements in technology in court processes and respond to unusual or changing circumstances like the pandemic. The courts will be more accessible and delays to justice will be minimised.<sup>12</sup>

## Reaction

Reaction has focused on the provisions relating to live links in criminal trials.

One area of concern is whether the technological infrastructure at criminal courts is sufficient to deal with increased virtual hearings. In its fact sheet on these provisions, the Government says:

### **5.5 How will you ensure the technology is of sufficient quality to ensure a fair trial?**

We believe the technology is of sufficient quality and have seen how valuable it can be during the pandemic, both in and outside of the criminal justice system. Audio and video live links provide an additional channel for conducting a hearing and should be as accessible as possible.

HMCTS rolled out the Cloud Video Platform technology which makes this possible at considerable pace during the Coronavirus

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<sup>12</sup> Ibid

pandemic, to enable justice to continue to be delivered in very challenging circumstances. We will build on this progress and sustain the reforms that have proved useful as we continue to develop the quality of the user experience through insight and feedback from stakeholders and the judiciary.<sup>13</sup>

However, there have previously been significant IT failures in courts causing disruption to proceedings. See for example:

- [“UK's courts system 'on its knees' following major IT failure, lawyers' association says”](#), Independent, 22 January 2019
- [HC Deb 23 January 2019 c247](#) (Urgent Question on Courts IT System)
- [“IT failure knocks out courts for second time in two months”](#), Law Gazette, 5 March 2019

The Justice Select Committee has examined the impact of the pandemic on the legal profession, and identified concerns about the impact of increased reliance on technology and virtual hearings. One concern related to legal professionals working from home:

Legal professionals have adapted impressively quickly to working from home and holding and attending hearings remotely, but this can be difficult. Lord Burnett of Maldon, the Lord Chief Justice, told us that “the quality of the kit matters a great deal. If you are doing this sort of encounter with a laptop, you are hunched over it, you are cramped and you do not have room for paper. If you are doing a full video hearing, you need two screens: one you can put papers on and the other so you can see people.”<sup>14</sup>

Another concern related to the ability of a defendant to give instructions to counsel in a confidential way:

On 24 March, Robert Buckland told us that there is

“an issue with regard to legal conferences and lawyer/client interviews... I know from my own experience that the conference with counsel or the client’s ability to give instructions in a confidential way is absolutely essential. It is a legal right, and it can and does lead to greater efficiencies in the system...”

This concern was repeated by John Bache, Chair of the Magistrates Association:

“One particular problem that concerns us is the ability of the defendant to get confidential advice from their advocate.”

The Committee also identified the ability of people with learning disabilities, autism spectrum disorders and mental health conditions to engage with virtual proceedings as an issue:

The Equality and Human Rights Commission has said that the use of video hearings can significantly hinder communication and understanding for people with learning disabilities, autism spectrum disorders and mental health conditions. In its interim report on inclusion the Commission says:

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<sup>13</sup> Ibid

<sup>14</sup> Justice Committee, [Coronavirus \(COVID-19\): the impact on the legal professions in England and Wales, Seventh Report of Session 2019–21](#), HC 520, para 6

“Almost all the criminal justice professionals in England and Wales who we interviewed felt that use of video hearings does not enable defendants or accused people to participate effectively, and reduces opportunities to identify if they have a cognitive impairment, mental health condition and / or neuro-diverse condition.”

Similar issues were raised with us by Transform Justice.

Organisations and individuals with experience of working with and advocating for court users who may be considered vulnerable are concerned that communication with clients during hearings “relied on lay parties having access to multiple devices and good standards of written comprehension.” We also received evidence about limited availability of video links for lawyers to communicate with clients in prison, since visits in person were cancelled.<sup>15</sup>

The Committee concluded that there had been

...positive developments in providing online solutions to providing court services, but pending full roll out of HMCTS’s cloud video platform, we recommend that the Ministry of Justice sets out the steps it is taking to ensure that lay parties to hearings have access to the technology they need so that they can communicate well, and confidentially, with their lawyers. We also recommend that the Ministry of Justice reviews how well remote hearings have worked for all participants in all jurisdictions before rolling them out further.<sup>16</sup>

Penelope Gibbs of the charity [Transform Justice](#), who has written extensively on issues relating to virtual hearings and access to justice,<sup>17</sup> has queried the evidence base for the proposals and suggested that “Effective participation is harmed not just by poor technology but by the nature of video communication itself”.<sup>18</sup>

The campaign group Appeal has raised similar concerns:

APPEAL is concerned that the impact of video links on the outcome of hearings has been poorly researched and could lead to more wrongful convictions. APPEAL is concerned about vulnerable individuals who are disproportionately over-represented in the criminal justice system. Video and audio hearings may mean that defendants with mental or physical health issues or those for whom English is not their first language may be deprived of the support they need during their court case, and it will be harder for them to be advised by and give instructions to their legal representatives.<sup>19</sup>

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<sup>15</sup> Ibid, paras 10-11

<sup>16</sup> Ibid, para 12

<sup>17</sup> See for example [Defendants on video – conveyor belt justice or a revolution in access?](#), October 2017

<sup>18</sup> Penelope Gibbs, [Twitter](#), 10 March 2021

<sup>19</sup> Appeal website, [Policing briefings and submissions](#) [last accessed 11 March 2021]

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