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**Police Crime, Sentencing and Courts Bill**

**4th October 2021**

**Introduction**

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA’s role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 3,500 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

**The Police, Crime, Sentencing and Courts Bill**

1. The CBA is aware of and acknowledges the contribution of the Bar Council in its responses relating to remote juries: [https://www.barcouncil.org.uk/uploads/assets/be1af036-bfa8-443a-b0ee968987e4a3c6/35a10138-1d43-4bda-8cbb040dc3655fee/Bar-Council-Briefing-Police-Crime-Sentencing-and-Courts-Bill-Committee-Stage-May-2021.pdf](https://url.emailprotection.link/?b94XSpj7jhwZ6XjelgzclrmaddoI8sInSIIGGo5tXG1A-KnTlTDFXBUISR34mW9CEQ3fKQlgUCxh2nArC0G8FtRljxCA9dD5_xw3K5VgHCYsphvKhcZHgmtrBO-IShOcsHzlqHPhXBtyatzH-RtqD2fZDQvcfCVdBK4ieBZw4JAQ3E679Djjt49Gx9dUmsAHHf2jhxyI5YRzJO1iIcTw9i2QWwl0jIWI-Y-zvWPPZqs0xdOujH0iPi8PC8nt6_VFt)

<https://www.barcouncil.org.uk/uploads/assets/91e75e09-336b-4f00-ba16baf568b78457/Bar-Council-Briefing-PCSC-Remote-Juries.pdf>

We also adopt the submissions to the House of Lords of the Bingham Centre for the Rule of Law, and the joint submissions of Transform Justice, Fair Trials and Just for Kids Law.

1. The CBA has serious concerns over and above those expressed by other submissions and briefings and it is these concerns with which we deal.
2. As two preliminary points: (a) the CBA is supportive of open justice and the enhanced access by members to the public of livestreaming and broadcast of court proceedings; (b) the CBA is fully supportive of virtual pre-trial hearings, encourages their use and is surprised that some Resident Judges have directed that counsel attend as a default requirement when this can only be detrimental to case management and progression. The CBA and its members have highlighted the backlog of circa 57000 cases which has been built up pre- and post-pandemic and urge those judges to use virtual hearings in the interests of efficiency and effectiveness to be part of a number of measures required to clear the backlog. We would, however urge courts to take cognizance of any special needs of defendants so that there is no lack of understanding of proceedings or in the giving of instructions. There have been a number of instances where interpreters have not been booked and are not able to assist the court, leading to further adjournments and delays. Furthermore, the issue of prison visits/slots being available are also part of the picture in ensuring the smooth running of remote hearings.
3. The latest Barristers’ Working Lives Survey from the Bar Council, [https://www.barcouncil.org.uk/resource/barristers-working-lives-report-2021.html](https://url.emailprotection.link/?bfbHqkq5R3mekijytfPLiA281TSXE5BjTQlDdd9DJkE-kItSXAqd4UXdtTFSDvYlK6RCe5UB2OYSeORq7MBnZIBrpdlIfe9bOII1y7ZwT10NKtdXCPCrtfNWIUJlf68n_6C_5PgO_-a0OxAYpn3dSuN9GqBXthDhoLYpmB0N-cS4~) published 28th September 2021 makes for sobering reading: 82% of criminal barristers who had attended court in the 3 months up to April 2021 reported problems in the court system, with just over half of these saying the problems were significant rather than minor. The biggest problem was with technical problems with video platforms for court, with 78% experiencing this.
4. Our deep concerns relate to the impact of the measures authorising virtual trials on the criminal justice system. They will permit a shift to a completely virtual trial with everything occurring onscreen; the potential absence of the jury from the courtroom or even the court building; the possibility that defendants will not be permitted to attend the trial in person even when the defence advocate considers that to be strongly desirable, with the court not being required to give any reasons for such a drastic order; and the complete absence of any stipulation for exigent circumstances equivalent to a global health crisis to justify such a radical transformation in the traditional criminal trial.
5. The emergency measures will have been expanded and made permanent without any meaningful consultation or piloting with independent evaluation, which has previously been urged by the House of Commons Justice Committee and the House of Lords Constitution Committee in reviewing video technology during the pandemic. The Bill does not even seek to order the provisions in an organised or coherent manner, scattering them at various points throughout, so their full import is not easy to appreciate, nor has the Government in its briefing papers acknowledged the full extent of the measures.
6. *Compliance with the Human Rights Act 1998:* Worryingly, Ministers have placed reliance solely on *Marcello Viola* *v Italy* as justifying its certification of compliance with the Human Rights Act 1998, and ECHR Article 6 guaranteeing defendants a fair trial, when that case emphasised that it was a very narrow and restricted example of the circumstances where a virtual hearing may take place (an appeal where the defendant had been convicted of several Mafia-related murders and was considered a dangerous escape risk if taken to court from prison). The European Court of Human Rights(ECtHR) set out a number of requirements for effective participation by videoconference to satisfy the requirements for effective participation and a fair hearing under ECHR Article 6: (a) that a restriction on the defendant’s right to attend in person must be regulated by statute targeting specific circumstances; (b) that the statutory restriction sought to facilitate a legitimate aim; and (c) that it must be “strictly necessary” in a specific case. Moreover, the ECtHR, in *Viola* and in other judgments, has consistently drawn a distinction between the use of video link for defendants in appeals or administrative hearings, where it is more likely to be justifiable, and trials, where the ECtHR considers attendance in person to be far more crucial because the trial court must reach a verdict based on the evaluation of witnesses’ testimony. The Bill envisages wholly virtual trials in unspecified circumstances, with the only statutory safeguard being what an individual trial judge considers to be “in the interests of justice”. The CBA is concerned that this will not satisfy Article 6 requirements under the Human Rights Act 1998, under the very judgment on which the Government relies.
7. *Implications for effective participation by defendants:* Serious concern has been expressed across the voluntary criminal and equality sectors about the implications of the radical and permanent reforms for the ability of vulnerable defendants to participate fully and effectively in their trial. These relate not only to their testimony, but also to their ability to follow the proceedings when relayed in part or in whole through technology. The CBA shares these concerns, based on its wealth of daily experience in the criminal courts, both prosecuting and defending, including during the pandemic. Physical presence in the courtroom is usually of central importance when presenting clients’ evidence to juries, unless in the defence advocate’s assessment the client’s vulnerabilities or the risk of intimidation make an application for testimony by video link preferable. Because the video link sets up a physical barrier between advocate and the defendant, it becomes extremely difficult to monitor the client’s mental and physical wellbeing visually, and to maintain the necessary relationship of rapport, trust and confidence which can be hard-won. Having the client in another location for the entire trial will create impediments to genuine communication (especially ascertaining whether the client is really understanding the proceedings – many do not although they say they do, to hide their vulnerabilities – and that takes time) and the taking of swift instructions when that suddenly becomes necessary, as so often happens. That is why trial advocates keep turning round to clients in the dock to ensure a visual check or seek acknowledgement that the client understands and often give our clients notepads so that they can pass notes, or signal, to us whilst the case is being heard. Videoconferencing facilities in Crown Courts are prebooked in ten-minute slots, making a quick adjournment mid-trial to take speak to a client not feasible. Our experience in pretrial hearings has been that videoconference booths are often not soundproofed, and in prisons there are often third parties nearby, so the risk of being overheard is not theoretical; often barristers resort to whispers to communicate sensitive confidential advice to clients. Therefore, requiring the defendant to attend his trial only remotely, with his advocate in another location, is a real barrier to effective representation, as guaranteed by ECHR Article 6(3)(d). In short, it is essential that defence advocates are allowed to continue our age-old practice and professional obligation of advising our clients how best to present their case in court, and in what way they can give their best evidence.
8. Both the House of Commons Select Committee on Justice and the Equality and Human Rights Commission have advised the Government against the permanent expansion of live links in criminal proceedings without further interrogating its impact on disabled people, children in the youth justice system, and on access to justice more broadly. We share these concerns, not just for defendants but for other participants.
9. In a Report on the Bill on 9 September 2021, the House of Lords Constitution Committee, which of course includes eminent retired judges and lawyer peers, pointed out that the Government’s reliance upon the court’s discretion in evaluating the interests of justice in every case might not provide the necessary guarantee for a fair trial with effective participation by defendants, because the judge might not be fully aware of the defendant’s circumstances. The Constitution Committee recommended amendments to the Bill to require that before a court issued a live link direction (a) *the consent of the defendant would be required*; and (b) *individuals undergo physical and mental health assessments to determine whether they would be able to participate effectively in remote proceedings*. These recommendations have been supported by the Bingham Centre for the Rule of Law, JUSTICE, and other criminal justice organisations, and also strongly advocated by the CBA.
10. *Implications of wholly virtual trials for all participants:* Three empirical research studies commissioned by the President of the Family Division from the Nuffield Family Justice Observatory about virtual fact-finding and final hearings in the family jurisdiction during the pandemic make for extremely worrying reading for the criminal jurisdiction. Notably, trial judges, seasoned triers of fact, reported finding it extremely difficult to assess the credibility of parties and witnesses when appearing on a screen. It is to be noted that the family courts have considerably better-quality IT facilities than most crown courts. Research has shown that richness of communication depends upon instant feedback and the use of multiple cues such as facial expressions, voice inflections and gestures, but the Family Court experience demonstrates that even the most sophisticated technology available may not be able to capture the complexity of social interactions. Inevitably it is difficult for a witness, advocate or other participant to maintain (artificial) eye contact with the questioner or jury by looking directly at the camera, when the audience is located elsewhere on that or another screen. We have all experienced this in virtual meetings; the difficulties for advocate and witness will be even greater, under the stress of giving evidence. The technological demands on advocates in presenting their case and in leading and cross-examining witnesses, whilst managing the documents and recordings on the case management system, and paying heed to the jury and trial judge on at least two other computer screens, will be formidable. So too will be the demands on a juror who may not be accustomed to staring at a screen for several hours a day. We also note that statistically jurors will often have undisclosed disabilities including learning difficulties, and some might make engagement with a virtual trial exceptionally difficult whereas they might cope with in-court evidence. Already, jurors who need assistance in reading the oath, will have the usher simply read the oath and told to repeat it. The trial judge will observe the juror and any difficulty is identified. In a virtual trial, such observation, inquiry and action may not be possible.
11. The CBA submits that it will not be in the interests of justice, in the absence of exigent circumstances besetting the entire criminal justice system such as a pandemic. It will not be efficient, cost-effective, or fair.
12. The practitioner’s viewpoint has not even been sought to consider the very real issues which are thrown up by such drastic changes. As any advocate knows, it is the interplay of judge, jury, defendant, witness and advocate being present in court, which allows for a fair trial, and seen as such by all. The physical presence of all parties in the courtroom is necessary for the jury to understand and feel their duty to try the evidence on what is heard in the trial. It is not uncommon for issues to arise during the course of a trial when a juror is reminded of the oath they took at the start of a trial to try the case objectively and on the evidence heard in court. There is no substitute for the live interaction which takes place in the courtroom with its drama and emotion seen, heard and participated in by the jury and those present which manages to uphold our justice system.