



JUSTICE

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Police and Justice Bill

**JUSTICE and Liberty amendments to
proposed new clauses for Committee
stage in the House of Lords**

July 2006

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

About JUSTICE

JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

Further details of JUSTICE's work are available at www.justice.org.uk

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Summary

1. JUSTICE and Liberty recognise the benefits that video link technology can provide to the criminal courts, and are aware of the delays that are sometimes caused by waiting for defendants in custody to arrive at court.
2. While the holding of preliminary and/or sentencing hearings by video link may be sensible and expedient in some cases, it may disadvantage the defendant - and the court – in others. We therefore believe that a defendant should not be sentenced nor give oral evidence, nor attend an appeal, via video link without his consent, and that he should be legally advised before consent is given.
3. One of the disadvantages of live links is that they can make it difficult for the defendant to communicate confidentially with his lawyer. We therefore propose amending the definition of 'live link' to ensure that facilities are available for such communication to take place.
4. We welcome the proposal that vulnerable defendants should be able to give their evidence via video link. However, we believe that all children should be eligible for this provision, provided that they pass the interests of justice test.

After Clause 46

Attendance by accused at certain preliminary or sentencing hearings

Leave out lines 25 to 28¹ and insert –

“‘live link’ means an arrangement by which –

- (a) a person (when not in the place where the hearing is being held) is able to see and hear, and to be seen and heard by, the court during a hearing (and for this purpose any impairment of eyesight or hearing is to be disregarded);**
- (b) the person is able privately to seek and obtain advice from and privately to give instructions to his legal representatives in the court; and**
- (c) the person’s legal representatives in the court are able privately to seek and obtain instructions from and privately to give advice to the person.”**

Effect

This amendment would ensure that in addition to being able to communicate with the court during the hearing, the person could seek and obtain legal advice from his legal representatives, so that he and they are not disadvantaged in giving and receiving advice and instructions by reason of the live link.

Briefing

2. The ability to give instructions and receive legal advice in confidence is an essential part of the guarantee of a fair trial. It is of particular importance that live link hearings do not compromise the ability to do so. It is of even more importance if, as envisaged in the proposed new clauses to the Police and Justice Bill, first appearances in the magistrates’ court, and sentencing, can take place via live link. This will mean that in some cases the only meeting between the defendant and his legal representative will be at court via the link.

¹ The proposed definition of ‘live link’ in subsection 57A(3) of the Crime and Disorder Act 1998.

Leave out lines 78 and 79² and insert –

“(b) after receiving legal advice about his continuing to attend through the live link the accused consents to do so”

Leave out line 85³ and insert –

“(a) after receiving legal advice about giving oral evidence through the live link during the continued hearing the accused consents to do so”

Leave out line 105⁴ and insert –

“(a) after receiving legal advice regarding the direction the offender consents to it”

Leave out line 117⁵ and insert –

“(a) after receiving legal advice about giving oral evidence in this way he consents to do so”

Effect

These amendments provide that the court should not proceed via live link without the defendant’s informed consent (following legal advice).

Briefing

1. The presence of the defendant in the court, at pre-trial and sentencing hearings, is an important safeguard for several human rights protected under the European Convention, including those under Articles 5 (liberty), 6 (fair trial), 3 (protection from torture and inhuman and degrading treatment or punishment) and even Article 2 (right to life). One of the great protections

² The proposed subsection 57B(6)(b) of the Crime and Disorder Act 1998.

³ The proposed subsection 57B(7)(a) of the Crime and Disorder Act 1998.

⁴ The proposed subsection 57C(4)(a) of the Crime and Disorder Act 1998.

⁵ The proposed subsection 57C(6)(a) of the Crime and Disorder Act 1998.

provided by *habeas corpus* is that it allows the court to ensure that a person is released when appropriate, and also allows the court and the public to see if they have been mistreated or are at risk. The scars of self-harm or abuse may be much more evident to the eye in person than on a video link.

2. It is also, we believe, easier for the court and/or the defendant's legal representative(s) to pick up traits suggestive of, for example, mental illness in a face-to-face encounter. This is particularly important where there may be no other opportunity for the court or the lawyer to assess the person (for example, on a first appearance followed by a guilty plea in the magistrates' court).
3. Furthermore, in bail and sentencing hearings we believe that the defendant may be disadvantaged in some cases from an appearance in custody – since this may create an inertia against release on the part of the court (particularly in the case of a relatively inexperienced lay bench).
4. An appearance in court is a particularly important safeguard against both abuse in prisons (the defendant can come to court and in an environment away from the prison, complain to his legal representative or the court about what has occurred) and, in particular, police misconduct. The proposal that a person could plead guilty and be sentenced by the magistrates from police custody creates a risk that the person may be, by inducements or oppression, persuaded to admit the offence and plead guilty at the police station. Further, it may influence police and CPS in making charging decisions to charge a person and put them before the video link court rather than using alternative disposals such as cautions and restorative solutions.
5. For all these reasons, we believe that a defendant should only be sentenced, or give evidence, via live link with his consent, and that the potential disadvantages of so doing should be explained to the defendant by his legal representative(s) before he gives that consent.

Evidence of vulnerable accused

Line 143, leave out “18” and insert “17”.

Line 144, leave out “conditions are” and insert “condition is”

Leave out lines 145 to 147.

Effect

These amendments would ensure that all children under 17 are eligible for the live link direction.

Briefing

1. Under the Youth Justice and Criminal Evidence Act 1999 (YJCEA), witnesses under the age of 17 are eligible for special measures on account of their age alone. The Act recognises that their youth may make it necessary to make a special measures direction in order to maximise the quality of their evidence. However, illogically the new proposed clause does not extend this provision for all child defendants, but inserts an extra criterion that their level of intellectual ability or social functioning must compromise their ability to participate effectively in the proceedings.
2. We believe that in order to ensure fairness and equality of arms the criteria for ordering special measures for all witnesses – including the defendant – should be the same. Therefore, we have changed the age in lines 144 and 151 from 18 to 17, because 17 is the age under which children are eligible for special measures as witnesses on grounds of age under s16 YJCEA.
3. We also propose that the additional requirement re. intellectual ability or social functioning be removed for children under 17. In addition to the unfairness of this requirement, it may also cause the court to be forced to make difficult determinations in all youth cases as to the child defendant’s level of intellectual ability or social functioning. This may require expert evidence in some cases – leading to lengthy and costly proceedings.

4. Where the child's level of intellectual ability or social functioning is very compromised – for example, in the case of a child with a mental age of say, 6 – we question whether the child should be on trial at all. A video link may help a child to be less intimidated by the process of giving evidence, but it will not solve the difficulties that the child has in participating in the trial effectively by understanding the proceedings and their gravity, making the decisions necessary in the case and giving instructions to his or her legal representatives. There will be some children – and some adults – for whom this is and remains impossible.

Appeals under Part 1 of the Criminal Appeal Act 1968

Leave out lines 219 to 222⁶ and insert –

- “(a) “live link” means an arrangement by which –**
- (i) the appellant is able to see and hear, and to be seen and heard by, the Court of Appeal (and for this purpose any impairment of eyesight or hearing is to be disregarded);**
 - (ii) the appellant is able privately to seek and obtain advice from and privately to give instructions to his legal representatives in the Court of Appeal; and**
 - (iii) the appellant’s legal representatives in the Court of Appeal are able privately to seek and obtain instructions from and privately to give advice to the appellant.”**

Effect

This amendment would ensure that in addition to being able to communicate with the Court of Appeal during the hearing, the person could seek and obtain legal advice from his legal representatives, so that he and they are not disadvantaged in giving and receiving advice and instructions by reason of the live link.

Briefing

1. As in relation to trial courts, we believe that it is an essential part of the guarantee of a fair hearing that a person can communicate in confidence with his legal representatives at the Court of Appeal.

⁶ Proposed subsection 22(5)(b) of the Criminal Appeal Act 1968

Leave out lines 223 to 229⁷ and insert -

- “(6) The Court of Appeal must not give a live link direction unless –**
- (a) after receiving legal advice regarding the direction the appellant has given his consent to it; and**
 - (b) the Court of Appeal is satisfied, after giving the parties to the appeal the opportunity to make representations about the giving of such a direction, that it is not contrary to the interests of justice to give the direction.**
- (7) The Court of Appeal may rescind a live link direction at any time before or during any hearing to which it applies (whether of its own motion or on the application of a party).”**

Effect

This amendment would ensure that a live link direction is not made in appeal proceedings in the Court of Appeal without the appellant's informed consent.

Briefing

1. As in relation to proceedings in the Crown Court and the magistrates' courts, we believe that it is an important safeguard for the defendant's rights that he should have the right to attend his appeal if he so wishes. Since it may be to his disadvantage to conduct the hearing by video link, before giving his consent he should be legally advised.

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Jago Russell, Liberty

⁷ Proposed subsection 22(6) of the Criminal Appeal Act 1968.