

# Howard League for Penal Reform



**What if the dock was abolished in criminal courts?**

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What if...? Series of challenging pamphlets



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## **What if the dock was abolished in criminal courts?**

A pamphlet for the Howard League for Penal Reform by Linda Mulcahy, Meredith Rossner and Emma Rowden

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## Foreword

The Howard League for Penal Reform and the Mannheim Centre at the London School of Economics have been working in partnership on the *What if?* pamphlet series with the aim of challenging conventional thinking on penal and criminal justice issues. We have worked with established thinkers, academics and practitioners to develop innovative, and perhaps controversial, ideas that can work as a stimulus to new policy initiatives and ultimately achieve change. In this edition Linda Mulcahy, Meredith Rossner and Emma Rowden propose that the widespread use of the dock in English and Welsh courtrooms is anachronistic and that its continued use interferes with a defendant's right to a fair trial and dignified treatment.

This pamphlet draws on both new research findings about the modern history of the dock and empirical research to develop the arguments that defendants in English and Welsh courts should not be routinely placed in docks. Doing so situates them at the margins of the court whether they are being tried for serious offences such as rape and murder or minor offences such as petty theft or driving offences. They are, in effect, being unnecessarily incarcerated in the courtroom when the statistics show that only a very small number (tens of people) of the thousands of people tried each year try to escape the courtroom. This suggests the use of the dock is not proportionate to the potential harm and rests more on costs and economic considerations rather than a defendant's access to dignity and a fair trial. The discussion makes clear that placing defendants in docks, whether 'secure' or 'standard', can prejudice juries against them. The authors argue that this provides important social science evidence that the human rights of the defendant are currently being abused and fair trials compromised on a routine basis.

As this pamphlet demonstrates, the Howard League has long championed discussion about the place of the dock in the courtroom questioning its efficacy. This could be the time to revisit the place of the dock in the courtroom: to think again about what the courtroom represents; what it needs to achieve and how; and its design and geography in an era of courtroom closures and an active desire to utilise technology across criminal justice. The abolition of the dock could be regarded as a symbolic and substantive change in the way justice is seen to be delivered and ultimately is delivered.

The ideas contained in this pamphlet were introduced by Professor Linda Mulcahy and Dr Meredith Rossner at a public seminar attended by senior practitioners and academics from across the criminal justice system. Chris Henley, the vice chair of the Criminal Bar Association; Abigail Bright, a barrister at Doughty Street Chambers and Paula Backen an intermediary with vulnerable witnesses were on the panel as discussants and their prepared responses were discussed. We would like to thank everyone attending the seminar for their contributions.

This pamphlet marks the last in this *What if?* series. We would like to thank everyone who has 'tested' their ideas and put forward a different, perhaps unpopular approach to a difficult and entrenched issue for criminal justice policy and practice. We hope that this *What if?* series has challenged and allowed those who have participated in the seminars and read the pamphlets to take a fresh look at specific issues, but also challenge themselves to think again about how we 'do' justice.

Anita Dockley, Research Director, Howard League for Penal Reform

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### *What is the problem that needs to be addressed?*

The dock is a place in the criminal courtroom which is set aside for defendants and marks them out from other participants in the trial. It is also occupied by the security personnel who guard defendants and the interpreters and intermediaries<sup>1</sup> who may be assigned to assist them. This distinct enclosure is usually placed to the side of the courtroom in Magistrates' courts and at the very back of the room in Crown courts. In recent decades it has developed from a construction which was often delineated by no more than a simple wooden bar at waist height to a sophisticated structure. Standard docks, which appear in most courtrooms, are constructed of an enclosure made of wooden base and glass screen to a height of five feet. Secure docks, which feature in at least one courtroom in every criminal justice centre are akin to a separate room within the courtroom (see Figure one). Despite their widespread use in England and Wales, docks are unheard of in many other jurisdictions where it is considered unnecessary or inappropriate.



Figure One: Views from within the Secure Dock at the Warwickshire Justice Centre (source: BBC News, 2010).

Concerns about the presence and form of the dock have been repeatedly raised and supported by a range of experts. The Law Society initiated a campaign for the abolition of the dock in 1966. Its call for reform of the practice of having a dock in courtrooms was heralded as 'long overdue' by the *Justice of the Peace and the Local Government Review* (1966) and 'imaginative and practical' by the *Law Society Gazette* (1966).<sup>2</sup> A second campaign was launched by the Howard League for Penal Reform in 1976 when it published the report of a working party chaired by Lady James of Rusholme.<sup>3</sup> This criticised the ingrained timidity of contemporary policies surrounding the dock and argued that there should be a general assumption that the dock should not be used unless the defendant was known to be violent or there was a clear risk of an attempt at escape. The proposals were supported by the Law Society, Magistrates' Association and Justices' Clerks Society (*The Magistrate*, 1966, 1967, 1973, 1974a, 1976, 1977). The Howard League was later to publish a press release in 1993 detailing a letter it had written to the government calling for the abolition of the dock in the majority of courts and the introduction of a practice whereby defendants could sit next to their

counsel (Howard League, 1993). A third campaign which called for the abolition of the dock was launched by JUSTICE as recently as 2015 and reflects a growing momentum for change from practitioners, pressure groups and senior members of the judiciary (Blackstock, 2015; Stone and Blackstock, 2017; Easton, 2014; Scott, 2015).<sup>4</sup> Most recently, the former Lord Chief Justice, Lord Thomas, argued that docks should be abolished in Magistrates' courts (see further Gibb, 2015, Bentham, 2015). Despite this, the most recent version of court design guidance issued by Her Majesty's Courts and Tribunals Service (2019) continues to require the presence of the kind of dock shown in Figure one in courtrooms where adults are tried. This paper calls for urgent debate amongst policy makers about whether the incarceration of the defendant in the courtroom is appropriate in a modern justice system which is underpinned by a commitment to human rights.

This paper draws on new research findings about the modern history of the dock and its impact on how people perceive the defendant. It explores: the reasons why docks have been considered necessary in criminal proceedings; the ways in which they have become increasingly contained; their impact on perceptions of the defendant and the presumption of innocence; the extent to which the modern dock can be considered a violation of defendants' human rights and the ways in which modern technology is capable of exacerbating the problems caused by the dock. Most importantly, it explores whether decisions about the presence and design of the dock have come about as a result of an inappropriate trade-off between the competing needs of security and due process.

## What principles should govern the design of courtrooms?

It is increasingly recognised that courtroom design has a significant impact on the ability of people to participate in trials.<sup>5</sup> Courtroom design is frequently called upon to symbolise goals of transparency, majesty, openness, security, fairness and authority. These aspirations are particularly important in an era in which there has been much debate about the democratic deficit and the need for the exercise of state power in the criminal courts to be seen as legitimate in the eyes of citizens. The facilitation of effective participation in trials, the enjoyment of the rights to counsel and the presumption of innocence are critical for the thousands of defendants tried in criminal courts in England and Wales each year for whom liberty, reputation and assets are at stake.<sup>6</sup> However, some of these goals can be hard to reconcile. The rights of defendants have to be balanced with the needs of witnesses and the public who should be free to attend trials without fear of intimidation or violence. The tension between security and due process is one which has been at the heart of debate about the presence of the dock.

The everyday workings of criminal courts pose serious challenges for those responsible for providing a safe environment. Escapes from the courtroom represent the majority of break outs from custody, posing a risk to the public and damaging public confidence in the criminal justice system (*National Security Framework Guidance*, 2015). Some defendants have a history of violence. Others may be suffering from mental illness which makes them liable to unpredictable or aggressive behaviour.<sup>7</sup> Judges are a typical target for a defendant's anger. Panic buttons for judges and the monitoring of courtroom behaviours by security staff via closed circuit television inside and outside courts is now the norm. Defendants may also need protection from members of the public whilst appearing in court. These factors suggest there is a strong case for some segregation of different categories of people in the trial.

While the above examples clearly call for vigilance when segregating people in the courtroom, violent occurrences involving defendants are the exception rather than the rule. The vast majority of defendants who come before the courts appear without incident. While security

problems do arise, it is difficult to obtain consistent publicly accessible statistics against which to contextualise current policies. In 2002, however, it was noted internally at the Ministry of Justice that in the previous financial year, of the 67 escape attempts in Magistrates' courts only 27 were 'dock jumpers'. In the same year there were only three escapes from Crown courts in total (Mulcahy and Rowden, 2020). This raises important questions about the extent to which it is necessary, or even economical, to install elaborate and expensive docks in all criminal courts. It is also important to consider the impact that the presence of the dock has on the rights of the defendants and peoples' impression of them. It is a fundamental mark of democracies that they recognise equality before the law and the rights of the accused. These include the requirement that all defendants are treated as innocent until proven guilty, that the accused has access to counsel, and that defendants are able to participate in their own trial. In line with these expectations we anticipate that defendants will be positioned so that they are able to see and hear the witnesses who give evidence against them, have easy access to the lawyers whom they have instructed and an opportunity to scrutinise written evidence.<sup>8</sup> In common with victims and witnesses, we expect that care is taken over defendants well-being and psychological comfort so that meaningful participation in proceedings is facilitated. These expectations are recognised in current security guidance (*National Security Framework Guidance*, 2015).

In the following sections we consider the extent to which an appropriate balance has been struck between security concerns and the needs and rights of the defendant. This involves an exploration of how new research on how docks have evolved in the modern era and the impact their presence has on the dynamics of the contemporary trial.

### ***A Brief History of the Dock***

Oxford English Dictionary traces usage of the word 'dock' in the context of legal proceedings back to 1586, but until the nineteenth century the term was used to denote the 'bail-dock'. This was a holding area where groups of prisoners awaiting trials stood together when criminal trials took much less time than they do today. The genesis of a separate enclosure for defendant(s) in a particular trial is discernible from the seventeenth century onwards, though it was not until the eighteenth century that it became common for bail docks to acquire a small protruding section at the front at which those involved in the case being tried could stand. As the length of trials increased, those awaiting trial began to be kept waiting outside of the courtroom and by the 1840s most docks in Assize and Quarter Sessions courts had their own private tunnels and staircase connecting the dock to cells below. This meant that defendants could be brought into the court when their trial commenced. Docks became larger and increasingly elaborate in many courts in the nineteenth century, and in some they took the form of citadel-like structures which dominated the courtroom (Graham, 2003; Mulcahy 2011, 2013).

### ***The evolution and increasing fortification of the dock***

There has never been a formal legal requirement that docks be included in courtrooms (Law Society, 1966) and the increasing fortification of the dock is a relatively recent occurrence in the English criminal justice system that goes back several hundred years. The evolution of a separate and very modest enclosure for the defendant dates back to the sixteenth century but despite its increasing popularity in some nineteenth century courts, docks were still not a universal feature of all English courtrooms by the 1970s.<sup>9</sup> When the government first started to produce centralised guidance on the design of courtrooms in the 1970s their form and position varied considerably across the country. While some senior courts built in the Victorian era had elaborate docks in the centre of courtrooms, in most Magistrates'



courts the dock was often nothing more secure than an iron rail (Kirk, 2012) or a simple raised platform surrounded by a railing (Hampton, 1982). Moreover, numerous trials for both petty and serious offences in provincial towns and cities continued to be conducted in multi-purpose shire and town halls where there were no enclosed areas for defendants (Law Society, 1966; Rosen, 1966; Home Office, 1966-68; Howard League, 1976).

A particularly intolerant attitude towards the defendant became evident from the mid-1980s (Mulcahy and Rowden, 2020). By the early 1990s, glass screens on top of the waist height wooden sides of the dock were adopted for all docks. During this period, the floor area within the dock was extended and different floor heights were included to create what became known as the 'moat' shown in Figure Two. This meant that defendants trying to escape were forced to step into a low well inside the dock before they could attempt to lever themselves out.<sup>10</sup> Concerns expressed by some civil servants that these changes were unnecessary, expensive and served to isolate defendants were swept aside in the face of support for the changes by the Home Office and prison governors. The Howard League was later to label the introduction of the moat a retrograde step that was contrary to natural justice (Howard League, 1993). It is during this same period that the dock began to shift from its central position in the courtroom, which had been common in nineteenth century courts, to the margins of the courtroom (Mulcahy and Rowden, 2020).

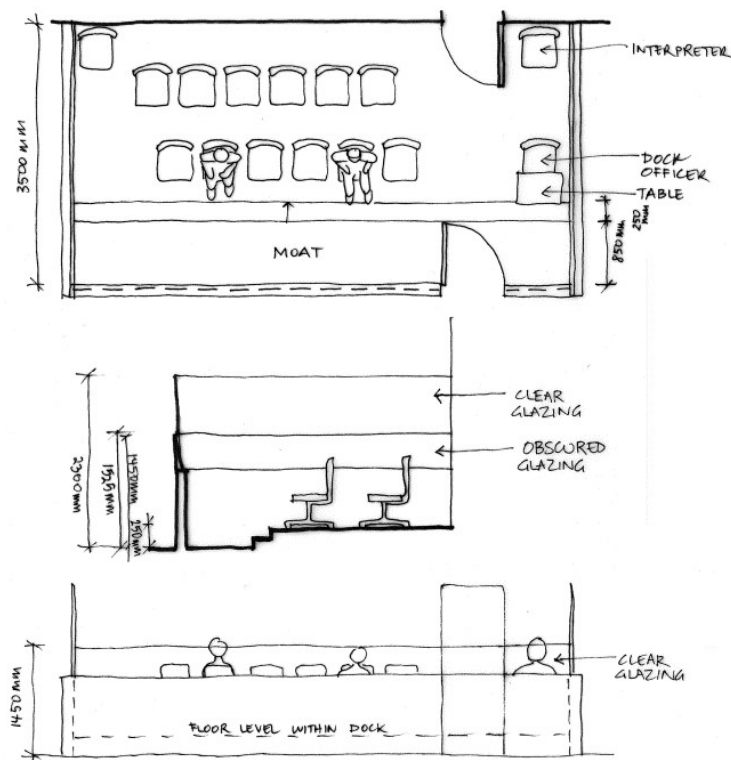


Figure Two: Detailed design of the standard dock from the late 1980s (source: Mulcahy and Rowden, 2020)

The physical marginalisation of the defendant escalated to new heights when 'standard' docks with simple rails began to be distinguished from 'secure' docks in Crown courts in the early 2000s. The secure dock, or what some now call a 'glass cage',<sup>11</sup> differs from the standard dock in a number of ways. The external walls of the secure dock comprise a solid wooden base about one metre from floor level and a transparent screen on top of this that stretches all the way to the ceiling. These changes came into being without any consultation with lay

users of the courts, including the defendants most affected or organisations that might act as their proxy such as the Howard League for Penal Reform or JUSTICE. Moreover, while copies of recent centralised design guides were once lodged in the British Library, the 2019 *Court and Tribunal Design Guide* (HMCTS, 2019) has now redacted the sections on docks from the shortened public version of the guide. Despite criticisms that the glass can disrupt clear sight lines and can make it more difficult to hear proceedings, secure docks have since been installed in courtrooms across the country (Mulcahy and Rowden, 2020).<sup>12</sup>

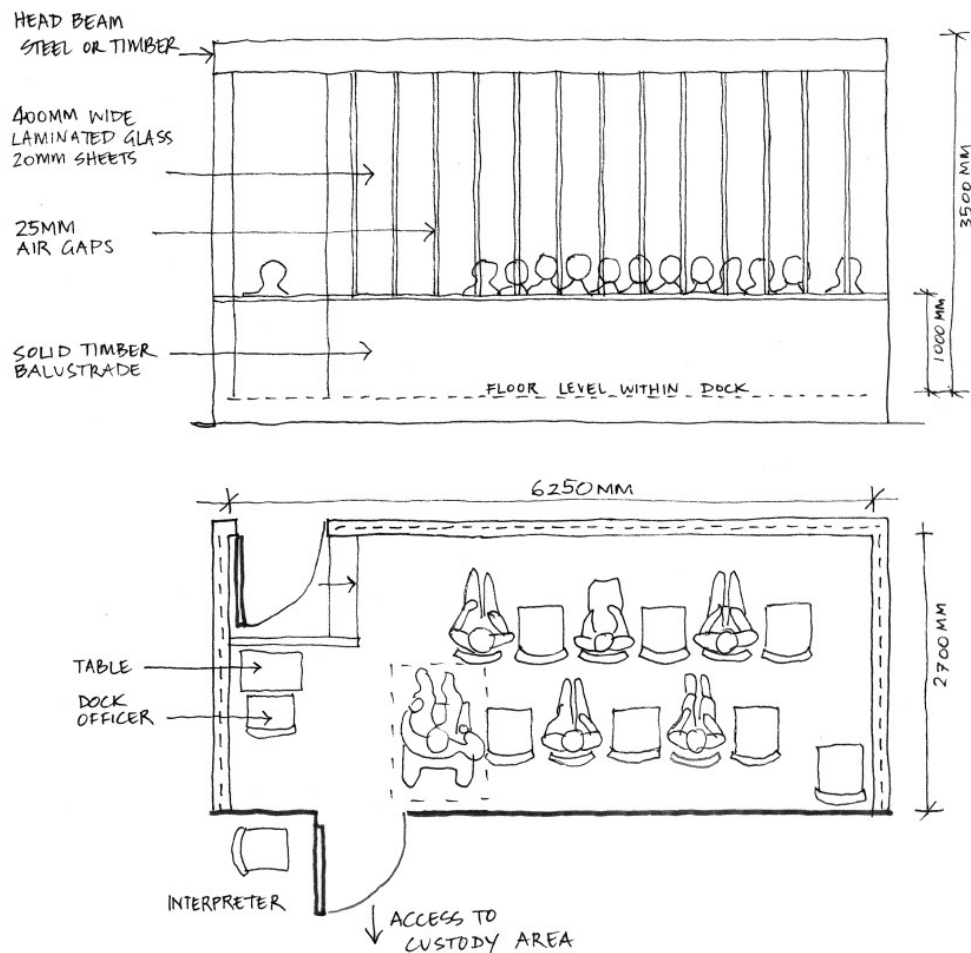


Figure Three: Secure dock (source: Mulcahy and Rowden, 2020)

As Figure Three indicates, the glass pane at the front of the secure dock is made up of a series of glass strips each measuring 400mm across with 'air gaps' of 25mm separating each panel. Documents that defendants and their counsel want to share, including instructions the client may want to give to their lawyer, have to be passed through these narrow slits in full view of everyone. Figure One provides an indication of the view of the courtroom from a secure dock which is one of the most recent secure docks to be installed in the Warwickshire Justice Centre completed in 2010. This captures the sense of isolation defendants must feel in this glass cell within the courtroom.

Centralised guidance on docks issued in 2010 asks dock designers to ensure that security glazing creates minimum visual impact and prevent impeded sight lines. However, the additional requirement that its design should avoid a likeness to "a cage-like oppressive environment" might be read as an admission that it is likely to have this effect no matter the skill of the designer (Mulcahy and Rowden, 2020). Given the potential for prejudice, it is

unsurprising that judges have felt the need to instruct jurors not to draw any conclusions from the defendant's placement in a secure dock.

In addition to the increasing fortification of the dock, defendants have also been gradually stripped of facilities that help them follow and participate in their own trial. Centralised guidance on court design produced in the 1970s and 1980s required a shelf for documents and note-taking to be installed in the dock for use by the defendant. By 1985 the writing table had been reduced to the arm of the defendant's chair, and by 1993 the requirement to provide a place for the defendant to put papers on or write had been abandoned altogether. Mulcahy and Rowden (2020) note that this was justified on two grounds by those responsible for producing the *Court Standards and Design Guide*. The first is the risk that a writing surface might enable escape or be used as a weapon, suggesting that security is more important than participation. The second is that, according to the civil servants involved in discussion about design, defendants have no desire or need to read papers relating to their case.

During the same period, there have been other changes relating to comfort and amenities in the dock that impact on defendants' ability to present themselves in the best light. The defendant's chair began to be secured to the floor of the dock in 1985. While this decision was purportedly taken to reduce the risk that chairs might be used as weapons, it also impacts on a defendant's mobility and comfort. Facilities for the welfare and comfort of the defendant outside of the courtroom have also been reduced over time. Equipment for cooking and preparing food on site for prisoners has been gradually phased out. Rooms in which defendants can speak in private to their lawyers or family have also been abandoned. Defendants on remand are increasingly placed in prisons far from the court, meaning that they sometimes begin their journey to the court in the early hours of the morning and are left waiting in minimalist cells, often without natural light, for long periods of time. These conditions are far from ideal for those who want to adequately prepare for their appearance in court.

### Security or resources?

It is tempting to conclude that these developments are best understood as a reaction to security concerns and the heightened sensitivity towards surveillance and control in an increasingly risk-averse society. This shift towards cultures of control is clearly an important context in which to understand how it becomes legitimate to prioritise security concerns over the right to effective participation (Garland, 2012). However, Mulcahy and Rowden's (2020) study of government archives on court design points to other causes which reflect more mundane considerations about which branch of government is responsible for security in the courtroom. In the 1970s the police service routinely made available police officers in the courthouse, and the Home Office directly employed prison officers to attend to defendants in custody. By the late 1980s two major government policies had significant ramifications for the care and custody of prisoners and defendants. The first of these was the contracting out of security services. The second was the widespread cuts to the funding of public services during the Thatcher administrations (1979–90). Following a visit to the US by the prison minister, Lord Caithness, the Criminal Justice Act 1991 included a provision to allow the contracting-out of both court and escort duties and the management of prisons (Faulkner, 2014). This paved the way for a major shift in the provision, training and management of staff involved in escorting and guarding the defendant in the courtroom. From this point on, Prison Custody Officers throughout the court estate were employed by private contractors, rather than HM Prison Service.

At the same time as these legislative changes, the Home Office began to reduce the number of its staff providing security in the courtroom. By the early 2000s, police officers were only providing security in the courtroom on an informal and *ad hoc* basis.<sup>13</sup> This suggests that the increasing fortification of the dock was motivated as much by reduced staffing levels as it was by a perceived risk of violence or escape (Mulcahy and Rowden, 2020). Put simply, the increasing fortification of the dock from the 1980s onwards reduced the financial burden of providing security in the courtroom by providing for the physical incarceration of the defendant in the dock.

### ***The growth of legal challenges to the dock***

Recent years have witnessed mounting concerns about the presence of the dock in English criminal trials and the secure dock in particular. Many of the arguments about the impact of the dock expressed by critics in campaigns conducted in the 1960s and 1970s remain equally applicable today and have even been exacerbated in light of the increasing fortification of the dock since the 1980s.<sup>14</sup> The criticisms raised go straight to the heart of arguments about design, due process and democracy. For many critics, the presence of the dock at the back or side of the courtroom cannot fail to create a strong sense of isolation from proceedings which inhibits defendant's ability to participate in the trial. The fact that the secure dock now takes the form of an enclosed wooden and glass box within the courtroom means that there is a danger that defendants appear 'in court' without a strong sense of having entered it. The dock provides a window on proceedings whilst removing the defendant from them (Mulcahy, 2013). This sense of segregation and distance is exacerbated when defendants appear in court from custody and enter the dock via a self-contained prison unit housed in the basement of the courthouse. Rather than facilitating the defendant's participation in the trial as mandated by the European Convention on Human Rights, the use of the dock appears to signal the expectation that the defendant remains silent and passive (Mulcahy 2013; Mulcahy and Rowden, 2020).

A key difference from early campaigns in the 1960s and 1970s is that recent years have seen a growth in legal challenges to the presence of the dock in the courtroom. Claimants objecting to the use of enclosures have argued that their containment has violated their rights under the European Convention on Human Rights to dignity (Article 3)<sup>15</sup> and a fair trial (Article 6).<sup>16</sup> After an initial reluctance to implicate design practice in the abuse of these principles<sup>17</sup> the European Court of Human Rights has now begun to pay more attention to the issue.<sup>18</sup> In *V v United Kingdom* [1999] the European Court drew attention to the need to conduct hearings in such a way as to reduce feelings of intimidation and inhibition and found that the style of dock used in that case had contributed to the undermining of the defendant's right to a fair trial.

A series of cases from other legal jurisdictions have also shed light on what the European Court of Human Rights considers acceptable. In *Mariya Alekhina and Others v Russia* [2018], the defendants were held in a fully-enclosed glass dock referred to as an 'aquarium,' not unlike the secure docks used in this country. In the course of finding Russia in violation of Article 3 it was argued that the use of the dock was not warranted by any specific security risks or courtroom order issues but had merely been used as a matter of routine. The conditions were viewed as having adversely affected the fairness of the proceedings and those overseeing the trial were criticised for not having recognised the impact of the courtroom arrangements on the applicants' defence rights in a trial that lasted for over a month. Elsewhere, Judge Nicolaou and Judge Keller in *Svinarenko & Slyadnev* [2014], noted glass enclosures or 'organic glass screens' are capable of raising Article 6 issues.



### Access to counsel

The dock makes it difficult for defendants to consult with their legal representatives during trials, especially as counsel usually sits with their back to their client. In their report on the dock, JUSTICE have expressed concern about this practice and argued that effective participation must go beyond allowing the defendant to speak from the witness box when called to do so (Blackstock, 2015). This is especially so in adversarial trials where the tradition of orality prevails, and defendants need to converse with their counsel as the case unfolds. According to JUSTICE:

The defendant in the secure dock can only communicate by passing notes via security officers in the dock, knocking on the glass, or gesticulating in an attempt to grasp the attention of their lawyer. It is often the judge who notices that the defendant wants to communicate with their lawyers and must draw attention to it. The difficulty in communicating has arguably been exacerbated in recent years as legal aid cuts have meant that solicitors or solicitors' clerks are in Crown courts less often and so many defendants no longer have a go-between to pass notes to counsel from the dock (Blackstock, 2015, p.13).<sup>19</sup>

Or as one practitioner has argued:

Sometimes the design of the dock may allow him to pass a discrete note to his solicitor (assuming that the solicitor has a representative present in court, itself a highly implausible assumption these days). Otherwise, when his brief fluffs a crucial question the unfortunate defendant has to choose between sitting on his hands and hoping for the best or burying his head in his hands and fearing the worst. As he can't catch the eye of his advocate his only other option is to create such a fuss that the Judge interrupts the trial to announce, in tones of ill-concealed exasperation, "your client wants to tell you something." It is a grotesque and ridiculous arrangement ... Nor, in principle, should it make much difference that modern English docks are built from the latest materials rather than the old-fashioned Soviet era iron bars used in Armenia. A gilded cage is still a cage (Scott, 2015, p.100).

These concerns are now receiving recognition in human rights jurisprudence across jurisdictions. In *Belousov v Russia* [2016] the European Court of Human Rights court ruled that an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; without which legal assistance would lose much of its usefulness.<sup>20</sup> More recently, in *Mariya Alekhina and Others v Russia* [2018], it was decided that the fact that the defendants were separated from the rest of the courtroom by glass restricted their involvement in the hearing,<sup>21</sup> and made it impossible for the defendants in the trial to have confidential exchanges with their legal counsel.<sup>22</sup>

### Empirical research on the presumption of innocence

The use of the dock has prompted concerns about the extent to which the presumption of innocence is respected in contemporary courthouse design. Segregation and enclosure of the defendant clearly run the risk of creating an impression that the defendant needs to be separated from others because they are dangerous. For some commentators, anyone sitting in the dock surrounded by security guards is bound to look guilty (Rosen, 1966; Kirk, 2012; Howard League, 1976; Law Society, 1966; Morton, 2005). Others have argued that the use of the dock does not just make people look guilty; it makes them *feel* guilty (Gifford, 1986) with the result that it can impact negatively on their levels of confidence. Some have argued that it also means that punishment does not have to wait until conviction (Wright, 1996).



There is also important empirical evidence which now demonstrates that docks, both standard and secure, have a prejudicial impact on jurors' perceptions of the defendant (Rossner et al., 2017). In an Australian study, 404 participants were invited to serve as mock-jurors in a simulated trial in a real courtroom with professional actors playing all the relevant roles. They were randomly assigned to one of three different courtroom designs. In the first the defendant sat with counsel at the bar table. In the second, the defendant sat in an open 'standard' dock. In the third, the defendant sat behind glass in a secure dock. In the course of the simulated trials in this study, the research team ensured that a number of factors were held constant. These included the appearance and demeanour of the accused, the evidence and mode of presentation, judicial instructions, and style of legal presentation. The only element of the trial that varied was the location of the accused. Significantly, jurors who saw the defendant in the dock, be it standard or secure, were 1.8 times more likely to view him as guilty than jurors who saw the accused at the bar table.<sup>23</sup> Expressed in percentage terms, those who saw the accused in a dock had a guilt level 14 percentage points higher (47 per cent) than those who saw the defendant at the bar table (33 per cent). Chart One details these findings.

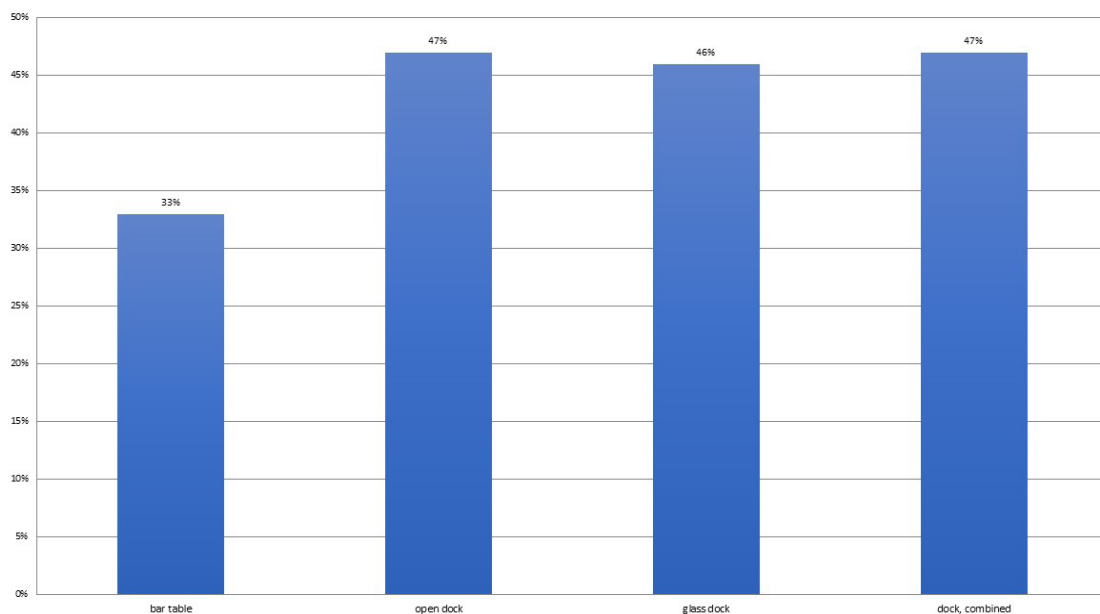


Chart One: Per cent of defendants found guilty by a mock jury by location of accused (n = 404). Source: Rossner *et al.* 2017

This research indicates that the dock is likely to have a negative impact on juror assessments. It would seem that it is not just the glass fortified dock that violates the presumption of innocence and the right to a fair trial but *all* forms of enclosure (Rossner *et al.*, 2017). Consistent with other social-psychological research on stereotypes and juror prejudice, these findings suggest that jurors may use the location of the accused in either a standard or secure dock as a cue to help them assess guilt.<sup>24</sup>

The new empirical research discussed in this section adds considerable weight to earlier campaigns. The archival research conducted by Mulcahy and Rowden (2020) has revealed inconsistent and unclear reasoning for the widespread use and increased fortification of the dock. The legal challenges to the European Court of Human Rights have laid bare serious worries about the defendant's right to a fair trial and to dignified treatment. Finally, the experimental work by Rossner et al. (2017) is the first of its kind to empirically demonstrate the prejudicial impact of confining the accused before a jury. This evidence

places the UK government at risk of legal challenges should further test cases on the matter be mounted.

### *How do other jurisdictions manage defendants?*

Other jurisdictions appear to manage perfectly well without docks just as the English and Welsh justice systems have in the past. It has been argued that the dock is seldom, if ever, used in Holland, Denmark, Sweden, South Africa and Ireland (Tait, 2011; Blackstock, 2015) and is not used in English military or youth courts. A survey of US Attorney-Generals conducted by the Howard League for Penal Reform (1976) found that docks were not used in federal courts, were unknown in 42 of the 50 States and used only sporadically in the remaining state courts. A follow up study conducted by Mulcahy (2013) found that the position has not changed since the 1970s despite increasing fears about homeland security in the aftermath of 9/11. Indeed, more than one respondent to the survey admitted that they had to look the word 'dock' up before replying to the survey. Others described the dock as 'extreme', 'odd' and 'an anachronism' which did not sit well with civil liberties granted to Americans. Paradoxically, these are civil liberties that draw on the English common law.

Rather than isolating defendants from their counsel, it is standard practice in American courts for them to sit shoulder to shoulder with their legal representative. In addition to reinforcing the presumption of innocence and conferring the defendant with dignity, this practice has the practical benefit of allowing the defendant to have discreet conversations with their counsel. In the small number of cases, where a significant security risk is present, defendants can be placed in leg irons hidden from the jury by a cloth or barrier covering the front of counsels' table. Significantly, while defendants in English and Welsh courts are routinely placed in the dock, any restraint of the defendant in American courts requires the permission of the judge. A survey of American practices undertaken by Mulcahy (2013) found that lawyers in the US are trained to make their client as indistinguishable from others at the bar table as possible. American observers of the English trial might conclude that when defendants sit with their counsel during the trial, they are able to consult with counsel much more effectively. This seems particularly important given that many defendants in England and Wales only meet their barrister for the first time on the day of the trial.

Elsewhere the risk of escape or the outbreak of violence between the defendant and supporters of the alleged victim is managed by separating the public from proceedings by glass walls. This is a technique that was used in the International Tribunal for the Former Yugoslavia. A well-designed version of this system can also be seen in Figure Four which shows a court in Denmark.



Figure 4. The public gallery of the court in Frederiksborg, Denmark

Source: Meredith Rossner

Other jurisdictions where docks are present have allowed for more flexible practices relating to the placing of the defendant in the courtroom. In the Australian Central Territory Supreme Court in Canberra trial courts have three areas where the defendants might be placed depending on the security risks involved. The first of these is akin to the secure dock and is used in a minority of cases. A second open dock sits immediately in front of the secure dock and is concealed with a screen when the open dock is in use. The third area which consists of a simple row of chairs in the body of the court is used when there is a minimal security risk. The security services for the court assess the nature of the risk involved in a particular case and put a recommendation to the judge as to how the defendant should be managed on the assumption that the defendant should be allowed as much liberty in the court as seems reasonable. Some English courts have a similar commitment to less oppressive docks. One example of this is the Magistrates' Court in Sheffield which has seats in front of the dock to allow defendants to sit in open court.<sup>25</sup> This could reflect the fact that these courts were designed in 1978 when practices were more flexible and the secure dock was unknown. It may also signify the fact that some justices continue to be happy to allow the defendant into the main body of the court when they are on bail and not considered a risk to anyone else.

New technologies now being widely introduced in English courts bring with them the potential for defendants to sit in any number of spaces outside the court from which they 'appear' on video link. This has the potential to free defendants from the sort of constraints discussed above. However, it also has the potential to exacerbate the problems identified. Prisoners who are perceived to pose special risks are increasingly being treated as priority candidates for the use of Prison-Court video links or approved restraints (National Offender Management Service, 2015) which means that they appear in court from prison facilities. McKay's (2018a, 2018b) research suggests that when defendants appear on video link from prisons and police stations the custody dock is once again inextricably linked with spaces of prosecution and punishment (see also Rowden et al 2010, Mulcahy 2011). Video link also exacerbates the current sense of isolation by causing problems with the replication of eye-contact, understanding nonverbal cues, picking up on architectural and social behavioural cues, or the soundtrack of the prison being audible over the link. A particular problem is that

adequate access to counsel during court proceedings has not been resolved, with meetings before and after court sessions also becoming more complicated to arrange, rather than if the defendant were to appear in person in court (Rowden 2011, McKay 2018b). There continues to be a danger that defendants appearing by video link in court may find themselves in a virtual secure dock “doubly trapped: framed within the screen and judged in the context of their confinement” (Rowden 2011, p.316).

## **Recommendations**

This report has considered key debates over the use of the dock in criminal proceedings, arguments over why it has been considered necessary, and empirical and legal findings about how it may interfere with a defendant's right to a fair trial and dignified treatment. In the course of discussion, it has become clear that:

- The official expectation is that defendants in English and Welsh courts should be routinely placed in docks at the margins of the court whether they are being tried for serious offences such as rape and murder or minor offences such as petty theft or driving offences. **We argue that this leads to a situation in which the many are being unnecessarily incarcerated in the courtroom as a result of the alleged behaviour of a small minority;**
- The use of docks means that defendants have restricted access to their lawyers during their trial and that this offends the right to counsel which forms a key element of the fair trial. **We urge legal representatives to be proactive in challenging the use of the dock in the cases they appear in and asking judges to use their inherent jurisdiction over the court to allow defendants to sit close by to their representatives;**
- There is very little statistical evidence available in the public domain demonstrating a security risk which justifies the routine placing of all defendants in docks provided for that purpose. **We argue that this means that current practice is not evidence based or proportionate;**
- New research suggests that policy has been driven by concerns about costs rather than a focus on how fair trials are facilitated. **We argue that economic considerations should not routinely take precedence over the right of the defendant to dignity and a fair trial in this way;**
- The European Court of Human Rights has demonstrated an increasing concern about the presence of enclosures in criminal courts. **We argue that insufficient attention is being paid to contemporary jurisprudence by those responsible for the design of courtrooms;**
- New research shows that placing defendants in docks, whether 'secure' or 'standard' can prejudice juries against them. **We argue that this provides important social science evidence that the human rights of the defendant are currently being abused and fair trials compromised on a routine basis;**
- Other jurisdictions manage security in the courtroom without using docks. **We argue that this provides a compelling case for policy makers in England and Wales to seriously and urgently consider more imaginative ways of managing risk in the courtroom.**

The discussion of these issues makes clear the difficulty of balancing out the often-conflicting goals of order and participation or freedom and security. With the publication of this report, we hope that the conditions in which defendants are contained in the courtroom are placed, once again, at the heart of debate about the future of the courtroom. Renewed interest in court design with the current policy programme of court closures, technology upgrades and widespread reform of the court estate being pursued by the Ministry of Justice, have created yet another opportunity for policy makers to go back to first principles and make the bold humane move to finally rid English and Welsh courtrooms of the anachronistic dock.



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<sup>1</sup> Intermediaries are independent communication specialists who assist children and vulnerable adults at trial to improve the quality of their evidence.

<sup>2</sup> The campaign failed to effect change in the face of strong resistance to the proposal from prison governors.

<sup>3</sup> The Law Society campaign of 1966 and Howard League campaigns were not entirely independent of each other. Lionel Rosen, the author of the Law Society memorandum, also served on the Howard League's working party and by the time the second campaign was launched Lord Gardiner had also become the President of the Howard League (Mulcahy, 2013). See also Howard League (1993).

<sup>4</sup> More recently, JUSTICE (2016) has called for much more flexible attitudes towards court design and an increase in the number of informal courts. This has implications for the number of courts we might expect to have docks. HMCTS (2019) appear to have taken some of their recommendation on board in their new design guide.

<sup>5</sup> There is an emerging literature on the strong links between design and due process. See further Mulcahy (2007, 2008, 2011, 2013); Mulcahy and Rowden (2020); Rowden (2011, 2013a, 2013b, 2018); Rowden and Jones (2018); Tait (2011, 2009); Rossner et al (2017); Resnik and Curtis (2011); Blackstock (2015).

<sup>6</sup> Further discussion on the debate about participation in the trial see Owusu-Bempah (2016).

<sup>7</sup> Security policy also focuses on the risks involved in prisoners attending civil coroners and family courts or immigration tribunals which are not designed to include secure custody areas (National Security Framework Guidance, 2015).

<sup>8</sup> In some instances, where the witness is considered vulnerable, they might give testimony behind a curtain in the court with the result that the defendant may not be able to see them.

<sup>9</sup> For histories of the dock see further Rogers (1997), Graham (2003), Tait (2011), Rowden (2013a).

<sup>10</sup> Other security features trialled during this mock-up court experiment included a 'rolling bar' positioned on the top of the dock's front balustrade. Never considered to be a particularly successful design feature, the rolling bar was dismissed after it was demonstrated that it might actually help a defendant build momentum and aide their escape from the dock (see further The National Archives of the UK, LCO 71/6; Mulcahy and Rowden, 2020).

<sup>11</sup> See further Carrick (2014). Tait (2011) reminds us that glass took on a new meaning for justice when Adolf Eichmann was placed in a bullet proof dock during his trial in Israel in 1961.

<sup>12</sup> On this point see further the facts of the case in *Stanford v United Kingdom* App. No. 16757/90 [1994].

<sup>13</sup> Police attendance at court was something that the government of the time tried to reduce through its 'Police Bureaucracy Taskforce'.

<sup>14</sup> For a broader discussion of the presence of the dock in criminal proceedings see Miller (2011); Shepard (2005). Proposals for change are also being supported by senior lawyers, see for instance Bentham (2015) and Gibb (2015). Campaigns against the use of the dock are not restricted to the 20th and 21st centuries, see arguments made by parliamentarians and members of the judiciary in Australia in the 19th century summarised in Rowden (2013a).

<sup>15</sup> Article 3 provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Treatment is considered to be 'degrading' within the meaning of Article 3 when it humiliates or debases an

individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. *Svinarenko and another v Russia* (App. Nos. 32541/08 and 43441/08) - [2014] ECHR 32541/08

<sup>16</sup> Article 6 protects the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, adequate time and facilities to prepare a defence, the right to counsel, the right to confrontation and to the free assistance of an interpreter.

<sup>17</sup> In 1985 in *Auguste v. France* the Commission argued that glass docks did not violate the presumption of innocence. In *Stanford v United Kingdom* [1994], the court found that poor acoustics in an English courtroom could give rise to a claim under Article 6, but that only minimal loss of sound was caused by the presence of the glass screens routinely used in English docks. The court agreed that while the defendant has a formal right to be present, hear, follow and participate in proceedings these expectations could be satisfied as long as their lawyer could hear and see everything, they needed to conduct a good defence.

<sup>18</sup> See further *Lutsenko v Ukraine* (No. 2) (App. No. 29334/11) - [2015] ECHR 29334/11; *Svinarenko and another v Russia* (App. Nos. 32541/08 and 43441/08) - [2014] ECHR 32541/08; *Ashot Harutyunyan v Armenia* (App. No. 34334/04) - [2010] ECHR 34334/04; *Ramishvili and Kokhreidze v Georgia* (App no 1704/06) - [2009] ECHR 1704/06; *Khodorkovskiy v Russia* [2011] ECHR 5829/04. The cage in *Ashot* measured three metres square and the defendant was kept in there for up to four hours at a time. For a discussion of the history of the cage in Russia see *Svinarenko and another v Russia* (App. Nos. 32541/08 and 43441/08) - [2014] ECHR 32541/08 para 88-92 and 122-123. There are also cases where claims about being contained in a cage have not been upheld. See *Titarenko v Ukraine* (App. No. 31720/02) [2012] ECHR 31720/02.

<sup>19</sup> This problem may be even more intense in Magistrates' courts where the defendant has no legal aid and no one representing them.

<sup>20</sup> *Belousov v Russia* [2016] ECHR 2653/13 and 60980/14.

<sup>21</sup> *Mariya Alekhina and Others v Russia* [2018] ECHR 38004/12. The Court noted that the glass cabins were intended as an improvement on the metal cage arrangement otherwise used in the Russian courts as a matter of routine.

<sup>22</sup> It is worth noting that while JUSTICE and others have argued that the barrier created by the dock can lead to poor communication with counsel, in an earlier study for the Royal Commission of Criminal Justice, Zander and Henderson (1993) reported that defendants thought that sitting close to the barrister would have enabled them to help the barrister put the case across in 60 per cent of cases. In almost exactly half that proportion of cases (29 per cent) the defence solicitor agreed.

<sup>23</sup> This result was discovered using a logistic regression analysis, with punitiveness as a covariate.

<sup>24</sup> While the current study is the only one to directly examine how the location of the accused in a dock impacts jurors' perception, there is a large body of research on how other peripheral cues, such as gender, race, dress, or demeanour impacts credibility assessment. For a summary, see Devine (2012).

<sup>25</sup> On a visit to Sheffield Magistrates Court in 2015 one of the authors spent an afternoon in this courthouse where several defendants were allowed to occupy the seats in front of the dock.



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The Howard League for Penal Reform is a national charity working for less crime, safer communities and fewer people in prison. We campaign on a wide range of issues including short term prison sentences, real work in prison, community sentences and youth justice. We work with parliament and the media, with criminal justice professionals, students and members of the public, influencing debate and forcing through meaningful change to create safer communities.

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The Mannheim Centre for Criminology was set up in 1990 at the London School of Economics. It was named in honour of Hermann Mannheim who after emigrating from Nazi Germany in 1934 did much to establish the discipline of criminology in Britain. It is a multi-disciplinary centre incorporating staff from across the LSE. The Centre provides a forum for LSE criminology including undergraduate and postgraduate courses, funded research, and a large number of conferences, seminars and other public events including this series.

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