

Report and recommendations

# The impact of COVID-19 measures on the civil justice system

**Dr Natalie Byrom**  
**Sarah Beardon**  
**Dr Abby Kendrick**  
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## 1. Executive Summary

### A. Background

- 1.1 The measures put in place to tackle the spread of COVID-19 have resulted in significant and rapid changes in the operation of the civil justice system: new guidance authorising the use of remote hearings has been published, priorities for listing have been created and practice directions authorising the extension of time limits and suspending possession hearings have been issued.
- 1.2 Successive announcements by the senior judiciary have emphasised their commitment to continuing the work of the courts “wherever possible”.<sup>1</sup> The rapid expansion of the use of remote hearings has been central to facilitating the continued operation of the justice system<sup>2</sup>—few if any civil hearings are now being conducted face-to-face.<sup>3</sup> Guidance from the senior judiciary has emphasised flexibility in the approach adopted to remote hearings. This has led to a proliferation of practice across the civil justice system—published accounts indicate that the move to remote hearings has been swifter and easier in the senior and commercial courts where resources are greater and levels of legal representation are higher<sup>4</sup> and more problematic in the county court.
- 1.3 Against this backdrop, the Civil Justice Council, at the request of its Chairman the Master of the Rolls, Sir Terence Etherton, agreed to undertake a rapid review examining the impact of the changes mandated by COVID-19 on the operation of the civil justice system. In announcing the rapid review, the Master of the Rolls stated, “*It is essential that we understand quickly how court users are being affected by the widespread changes adopted by the civil justice system in response to COVID-19. This review is a chance for users to give feedback on how the changes are impacting them and to suggest areas of improvement. The evidence collected by this review will be invaluable in shaping the way forward for the civil justice system, both immediately and in the longer term.*”<sup>5</sup>

### B. About the rapid review

- 1.4 The rapid review was launched on 1 May 2020 and concluded on the 15 May 2020. The aim of the review was three-fold:
  - 1.4.1 To understand the impact of the arrangements necessitated by COVID-19 on court users.
  - 1.4.2 To make practical recommendations to address any issues over the short to medium term.
  - 1.4.3 To inform thinking about a longer-term review.

<sup>1</sup> The Lord Burnett of Maldon, Sir Terence Etherton, & Sir Andrew McFarlane. (2020, March 19)). *Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division.*

<sup>2</sup> Tomlinson, J., Hynes, J., Marshall, E., & Maxwell, J. (2020). *Judicial Review in the Administrative Court during the COVID-19 Pandemic.* <https://publiclawproject.org.uk/wp-content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>

<sup>3</sup> Johnson, N., Pertoldi, A., Mendoza, R., & McIntosh, M. (2020, March 26)). COVID-19: The evolving picture for remote hearings in the English courts. *Herbert Smith Freehills.* <https://hsfnotes.com/litigation/2020/03/26/covid-19-the-evolving-picture-for-remote-hearings-in-the-english-courts/>

<sup>4</sup> de la Mare QC, T. (2020, March 30). Coronavirus and Public Civil Hearings. *Blackstone Chambers.* <https://coronavirus.blackstonechambers.com/coronavirus-and-public-civil-hearings/>

<sup>5</sup> <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/>

- 1.5 The response to the review was exceptional: - 1077 people responded to an online survey and 116 people attended a remote consultation meeting. 65 submissions were sent to the consultation inbox— of these, 46 were collective responses made on behalf of organisations<sup>6</sup>. The overwhelming majority of responses to the review were from professional court users. Of the 1077 survey responses and 65 submissions there were 17 survey responses and submissions by lay courts users including 3 from represented users and 14 from litigants in person. This lower response level is inevitable given the short consultation period and methods used to conduct the review - it underscores the vital importance of collecting better data to understand the experience of non-professional court users.
- 1.6 Respondents overwhelmingly recognised the necessity of measures that have been put in place to ensure that cases continue to be heard during this period and were keen to offer practical suggestions to ameliorate the issues that have inevitably arisen as a consequence of the crisis. Many responses began by praising the judiciary for the steps they have taken to ensure that the justice system continues to operate. The response to the review demonstrates the keen interest and willingness of professional court users to offer their time and expertise to support the judiciary and HMCTS in maintaining access to justice.
- 1.7 Data on the experience of court users under COVID-19 measures was collected through a number of mechanisms.
- 1.7.1 A literature review was carried out to frame the findings.
- 1.7.2 Desk-based analysis of one week of court listings data from CourtServe was analysed (11 May 2020–15 May 2020) to try to understand the national picture with regard to the civil hearings taking place in the County Court. This work was led by an experienced County Court Judge.
- 1.7.3 A public consultation meeting was conducted remotely, hosted by Tortoise Media.
- 1.7.4 An online survey was developed to gather detailed information on the experience of court users who had participated in a remote hearing between 19<sup>th</sup> March 2020 and 15<sup>th</sup> May 2020.
- 1.7.5 Stakeholders were also able to submit individual and collective responses to a consultation email address, hosted by The Legal Education Foundation. Where collective responses were submitted, participants were asked to state how many people’s views were represented in their response.
- 1.8 While every effort was made to adopt objective, robust methods, the speed of the review, participant recruitment method and absence of data to enable the construction of a sample frame means that **findings should not be generalised to the wider population of court users**. Details on the methodology deployed and the limitations of the findings presented in this report are set out below at Chapter 3.

<sup>6</sup> In order to weight these responses appropriately in the analysis we asked respondents to specify how many individuals were represented by their response— in total submissions to the inbox represented the views of 34,855 individuals (see Appendix A). Due to their length, appendices are presented in a separate document: Byrom, N. Beardon, S. and Kendrick, A. (2020) “The impact of COVID -19 measures on the civil justice system: Appendices”

### **C. Findings: Understanding the context for remote hearings under COVID-19**

- 1.9 A combination of factors brought about by COVID-19 have fundamentally altered the work conducted across the civil justice system. Consultation respondents cited reasons including: (i.) policy decisions (such as the stay on possession hearings); (ii.) pressures on County Court time created by the need to conduct hearings in relation to family law matters; and (iii.) priorities issued for listing. Changes in claimant behaviour were also felt to have had an impact on the types of cases proceeding. Consultation respondents reported that the net impact was to artificially suppress the numbers of litigants in person and vulnerable people participating in hearings during this period, - with implications for findings regarding the success or otherwise of remote hearings.
- 1.10 Respondents reported that measures mandated by the pandemic had reduced the availability and accessibility of legal advice, with the impact of reductions in advice disproportionately affecting those on low incomes. A number of respondents raised concerns that the economic climate created by the pandemic had caused legal need to rise, with implications for pressure on the civil justice system in the short to medium term. Even if these concerns fail to materialise, respondents reported that the backlog generated by the current stay in possession proceedings would pose an enormous challenge for the civil justice system. The urgency of establishing a working group to devise solutions for managing this backlog representing all stakeholders involved and including lawyers with experience of working at the housing court duty scheme, was repeatedly emphasised.
- 1.11 The high rate of adjournments brought about by the pandemic was raised repeatedly as a concern by professional court users. Responses from the Bar provided data to illustrate the impact of adjournments on the profession, with responses from several Circuit Leaders characterising the threat posed by the loss of income engendered by the crisis as “existential”. The impact of adjournments was felt to be borne disproportionately by members of the junior bar. Other respondents highlighted the impact of home working arrangements on professionals with caring responsibilities, - stating that the impact on women and carers should be monitored.
- 1.12 A number of respondents highlighted the timing of the pandemic in the context of the ongoing court reform programme. Respondents felt that under-investment in facilities, technology and staff at the County Court level, and the lack of availability of bespoke platforms for video hearings had compounded the difficulties experienced by court users.

### **D. Findings: Remote hearings under COVID-19—The experience of lawyers**

- 1.13 The majority of respondents to the survey were lawyers: - of the 1077 people who responded to the survey, 871 were lawyers. The survey asked respondents a number of questions about the most recent remote hearing they had participated in. Data was collected on 480 hearings in total.

- 1.14 The majority of hearings reported on in this study took place between 1 May and 7 May 2020, with parties receiving notice that their hearing would take place one day to one week in advance. The biggest proportion of hearings described took place in London (46.5%). Only 58.8% of the hearings described in the study took place in the County Court -hearings in the senior courts are over-represented in this sample.
- 1.15 Most of the hearings related to higher value claims (47.3% of hearings described concerned cases with a monetary value of £50,000 or above). Nearly 40% of hearings related to personal injury claims, and 15.9% related to commercial cases. Only 2.9% of hearings relating to housing matters and 1.2% of hearings in this study related to debt. Of the hearings reported, 53.9% were interlocutory and 31.69% were trials. The vast majority of hearings described were short: - 83.3% of the hearings described lasted between 0 and 3 hours. The majority of hearings described were audio hearings, with participants using a telephone to join: only 27% of hearings in this sample were fully video hearings. Within this, the most commonly-used platform for participating in a fully video hearing was Skype (69%).
- 1.16 The majority of hearings reported in this sample did not involve litigants in person- only 10.9% (53 hearings in total). The majority of hearings involving a litigant in person in this sample were fully-audio interlocutory hearings or trials. Within the hearings described in this study, hearings involving litigants in person tended to be in relation to cases with a value of less than £10,000- over half (56.6%) of all hearings involving a litigant in person had a value of less than £10,000.
- 1.17 Almost half of all hearings experienced technical difficulties: - in 44.7% of hearings, respondents reported that there were problems with the technology used. More technical difficulties were experienced during fully video hearings than fully audio hearings: - 50.8% of respondents who had participated in video hearings reported experiencing minor problems during the hearing, and 12.9% reported experiencing significant difficulties during the hearing.
- 1.18 When asked about the technical support that had been provided for their remote hearing, 30.4% of respondents reported that no-one had provided technical support. Many respondents reported that technical support had not been used or needed. 18.1% of respondents reported that the judge's clerk<sup>7</sup> had provided the technical support for their hearing, and 24.1% of respondents stated that "someone else" had delivered this function. HMCTS provided the technical assistance in 19.5% of hearings within this study.

#### **D1. Findings: Remote hearings during COVID-19—Satisfaction with hearings**

- 1.19 Broadly speaking, the lawyers who completed this survey were satisfied with their experience of remote hearings: - 71.5% of respondents described their experience as positive or very positive. The drivers of satisfaction with remote hearings included: agreeing with the outcome of the hearing; not

<sup>7</sup> Clerks are only available in the High Court and above

<sup>8</sup> Holding constant all other factors



experiencing technical difficulties; participating in a fully video hearing (compared to an audio hearing<sup>9</sup>); having greater experience of remote hearings; participating in a hearing at the start of the crisis and participating in a hearing that did not involve a litigant in person. Costs hearings were more likely to be experienced positively than interlocutory hearings, and enforcement hearings, appeals and trials were less likely to be experienced positively than interlocutory hearings. **These findings suggest tentative support for reserving remote hearings for matters where the outcome is likely to be less contested, where the hearing is interlocutory in nature and for hearings where both parties are represented.** Further research with a representative sample of court users is needed to verify these findings.

- 1.20 In spite of this, when asked to compare audio and video hearings to hearings in person, the majority of respondents felt that remote hearings were worse than hearings in person overall and less effective in terms of facilitating participation – a critical component of procedural justice. Respondents also found remote hearings to be more tiring to participate in than physical hearings, particularly those that proceeded by video. Findings also suggest that remote hearings may not necessarily be cheaper to participate in, which may be counter to assumptions about relative costs being lower. Immediate, practical recommendations for improving the experience of remote hearings are presented alongside the findings at Chapter 5.

#### E. Findings: Understanding remote hearings under COVID-19—The experience of lay users

- 1.21 This review was necessarily rapid: the speed of the exercise forced the research team to deploy methods for data collection that are ill-suited to capturing the experience of lay users and litigants in person. Only 11 complete responses from lay users and litigants in person were submitted to the online survey. This mirrors the experience of similar exercises: - the rapid review of remote hearings in the Family Justice System only received responses from four lay users, and recent Civil Justice Council inquiries into the experience of vulnerable users and the use of Anti-Social Behaviour Injunctions have been undermined by their inability to access data on the experience of vulnerable groups and parties. One lay user responded to the consultation to state that they felt that the length of this consultation exercise rendered it inaccessible to disabled court users—this is a cause of deep regret and concern. The literature review conducted in support of this consultation similarly returned little detailed information on the experience of lay court users and litigants in person.<sup>10</sup> There is an

<sup>9</sup> The following categories of hearing are referred to throughout the report. Fully audio hearings:- hearings where all parties appear by telephone; partly audio hearings:- hearings where some of the parties appear by telephone; fully video hearings:- hearings where all parties appear by video and partly video hearings:- hearings where some of the parties appear by video.

<sup>10</sup> With the notable exceptions of Exall, G. (2020a2020b, March 27). Innovative approach when proposed appellant unable to attend court. *Civil Litigation Brief*. <https://www.civillitigationbrief.com/2020/03/27/innovative-approach-when-proposed-appellant-unable-to-attend-court/> and Tomlinson, J., Hynes, J., Marshall, E., & Maxwell, J. (2020). *Judicial Review in the Administrative Court during the COVID-19 Pandemic*. <https://publiclawproject.org.uk/wp-content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>

urgent need to capture the types of management information that facilitate the conduct of research into the experience of lay users and litigants in person: this data is described at Chapter 9 below.

- 1.22 Collective responses submitted to the rapid review by organisations and individuals with experience of working with and advocating for court users who may be considered vulnerable raised a number of important concerns about the impact of the rapid shift to remote hearings. Respondents reported concerns including:
- 1.22.1 That the lack of communication from court staff prior to hearings and decline in the amount of administrative support available at court during COVID-19 was impacting disproportionately on lay parties and litigants in person, causing anxiety and distress.
  - 1.22.2 That many lay clients and litigants in person would be unable to access the technology and resources needed to effectively participate in remote hearings.
  - 1.22.3 That the requirement to create and submit e-bundles would create particular challenges for many litigants in person.
  - 1.22.4 That the practices adopted by lawyers to communicate with their clients during hearings relied on lay parties having access to multiple devices and good standards of written comprehension, creating barriers to effective participation.
  - 1.22.5 That a combination of restricted access to legal advice due to COVID-19 and difficulties with navigating unfamiliar technology alongside unfamiliar legal processes compounded pre-existing practical and emotional barriers to effective participation.
- 1.23 The number of lawyers in the survey reporting difficulties experienced by lay parties and litigants in person is notable given the profile of hearings described in this study: as stated above, the majority of hearings described in this study related to higher value cases. Due to changes in the types of cases being progressed under COVID-19,<sup>11</sup> hearings reported were less likely to involve vulnerable parties. The problems experienced by lay users and litigants in person reported in this study are likely to be amplified if remote hearings are expanded at scale to deal with matters more likely to involve vulnerable parties and litigants in person (such as housing and debt).

#### **F. Findings: Remote hearings under COVID-19—The impact on open justice**

- 1.24 Journalists and court reporters who responded to the survey reported that they have largely been able to attend hearings where they have wished to do so— - no respondents reported that their access had been refused. Where respondents reported that they have been unable to attend hearings, this was attributed to the failure of the court to respond to requests in a timely fashion, or difficulties in identifying the correct person to contact to request attendance. Some respondents reported that

<sup>11</sup> See Chapter 4:- the stay on possession proceedings and altered behaviour of debt companies during the early stages of the crisis.csir

the ability to attend hearings remotely had a positive impact on the number of hearings they were able to cover.

- 1.25 However, the findings from the consultation revealed a divide in practice and experience between the upper and lower courts. Analysis of publicly-available court lists published over one week (11 May–15 May) revealed that only a minority of County Court hearing centres (14/68) published notices with details on how to attend hearings alongside listings information. These notices varied considerably in terms of content.
- 1.26 In addition, respondents reported that whilst arrangements for accredited media access to court hearings are working reasonably well, access for members of the public, legal bloggers and representatives of NGOs is more problematic. Respondents raised concerns that media access was being treated as synonymous with or equivalent to open justice: *“A major problem appears to be an assumption, enshrined in para 3 of CPR PD51Y, that providing access for media coverage is somehow equivalent to open justice. Para 3 states: ‘Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings.’ For a number of reasons that is simply not the case.”* (Individual respondent, law reporter). Concerns were also raised by respondents regarding the impact of COVID-19 arrangements on the number of hearings being held in private, and the absence of good data to monitor this.
- 1.27 One issue raised by all respondents related to the difficulties involved in accessing documents relating to cases that were considered vital to facilitate accurate reporting. Existing deficiencies in the current arrangements for accessing primary legal information (listings, judgments, transcripts and case documents where authorised by the court) were reported to be amplified by the current crisis.

### **G. Recommendations for recovery and managing the backlog of cases**

- 1.28 A number of respondents made recommendations to support the continued operation of the civil justice system in the short to medium term. Responses from large commercial firms advocated for the expanded use of remote hearings in commercial litigation, with limited exceptions relating to cases where foreign language interpretation is required. There was clear willingness and enthusiasm from commercial firms to reimagine what a “Rolls-Royce” service looks like in commercial litigation, with predicted benefits for the economy and the environment.
- 1.29 In other areas of law, respondents recommended maximising the use of remote hearings in preliminary matters, interlocutory hearings and trials without evidence, particularly where both sides were represented. The majority of costs disputes were also felt to be suitable for remote determination. Respondents also emphasised the important role of continuing to list trials in encouraging parties to settle.
- 1.30 Practical suggestions to improve the conduct of hearings included improving the equipment provided to judges and developing the functionality of platforms used to conduct remote hearings

to enable better document sharing. The importance of improving systems and support for preparing and filing e-bundles and providing access to listings and case information was also emphasised. In terms of policy recommendations, some respondents advocated for reconsideration of the types of legal problems that should be dealt with by the civil justice system: - recommendations included considering whether claims brought in relation to private parking could be dealt with via alternative arrangements.

- 1.31 A number of respondents made suggestions regarding the provision required to resume in-person hearings, and practical adjustments to court buildings that might be made to address the backlog. Particular concerns were raised about dealing with the backlog of cases in relation to housing possession: these concerns, and suggestions to address them are described in detail in Chapter 8. Given the issues at stake, and the need for a consistent approach, it is recommended that the CJC urgently convene a working party representing all stakeholders to devise an approach. The importance of including lawyers involved in the delivery of housing court duty desk schemes was underscored by respondents.

#### **H. Information, evaluation and priorities for research**

- 1.32 Many respondents highlighted the urgent need to improve the quality and quantity of data and information available about the operation of the civil justice system. Recommendations were made in relation to both the management information collected and published by HMCTS and primary legal information (listings, case documents and judgments). Many respondents emphasised the urgent need for thorough evaluation of remote hearings. The review itself highlighted a number of key data gaps—these are summarised at Chapter 9.
- 1.33 Urgent priorities for evaluation included:
- 1.33.1 Research to understand the experience of non-professional users in the context of remote hearings.
  - 1.33.2 Longitudinal research to understand the experience of all court users over time.
  - 1.33.3 Research to robustly evaluate the impact of remote hearings on outcomes.
  - 1.33.4 Cost-benefit analysis to explore the impact of remote hearings on the costs of accessing the justice system.
  - 1.33.5 Research to understand the impact of remote hearings on judicial wellbeing, experience of hearings and training needs
  - 1.33.6 Data collection and research to monitor the impact of remote hearings on open justice.

## 2 Introduction

### A. Background

- 2.1 The measures put in place to tackle the spread of COVID-19 have resulted in significant and rapid changes in the operation of the civil justice system: new guidance authorising the use of remote hearings has been published, priorities for listing have been created and practice directions authorising the extension of time limits and suspending possession hearings have been issued.
- 2.2 Successive announcements by the senior judiciary have emphasised their commitment to continuing the work of the courts “wherever possible”.<sup>12</sup> The rapid expansion of the use of remote hearings has been central to facilitating the continued operation of the justice system<sup>13</sup>—few if any civil hearings are now being conducted face-to-face.<sup>14</sup> The protocol for remote hearings published by the Master of the Rolls, the President of the Queen’s Bench Division, the Chancellor of the High Court, the Senior Presiding Judge and the Deputy Head of Civil Justice provided broad guidance to support the conduct of remote hearings whilst deliberately promoting flexibility in their implementation. Judges have been required to consider the suitability of remote hearings on a case-by-case basis and asked to proceed where a fair resolution can be achieved.<sup>15</sup> This has led to a proliferation of practice across the civil justice system—published accounts indicate that the move to remote hearings has been swifter and easier in the senior and commercial courts where resources are greater and levels of legal representation are higher<sup>16</sup> and more problematic in the County Court. The Lord Chief Justice, Lord Burnett of Maldon, has indicated that longer hearings and those involving high levels of emotion may be more difficult to conduct remotely, and counselled that careful consideration should be given to the deployment of remote hearings in cases involving litigants in person or parties who are not native English speakers.<sup>17</sup>

<sup>12</sup> The Lord Burnett of Maldon, Sir Terence Etherton, & Sir Andrew McFarlane. (2020, March 19). *Message for Circuit and District Judges sitting in Civil and Family from the Lord Chief Justice, Master of the Rolls and President of the Family Division.*

<sup>13</sup> Tomlinson, J., Hynes, J., Marshall, E., & Maxwell, J. (2020). *Judicial Review in the Administrative Court during the COVID-19 Pandemic.* <https://publiclawproject.org.uk/wp-content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>

<sup>14</sup> Johnson, N., Pertoldi, A., Mendoza, R., & McIntosh, M. (2020, March 26). COVID-19: The evolving picture for remote hearings in the English courts. *Herbert Smith Freehills.* <https://hsfnotes.com/litigation/2020/03/26/covid-19-the-evolving-picture-for-remote-hearings-in-the-english-courts/>

<sup>15</sup> Exall, G. (2020b2020g, April 21). Extension of time granted and hearing put back because of covid-19 problems: the relevant principles considered. *Civil Litigation Brief.* <https://www.civillitigationbrief.com/2020/04/21/extension-of-time-granted-and-hearing-put-back-because-of-covid-19-problems-the-relevant-principles-considered/>

<sup>16</sup> de la Mare QC, T. (2020, March 30). Coronavirus and Public Civil Hearings. *Blackstone Chambers.*

<https://coronavirus.blackstonechambers.com/coronavirus-and-public-civil-hearings/>

<sup>17</sup> *Supra* note 1.

2.3 Against this backdrop, the Civil Justice Council, (an advisory public body with responsibility for keeping the Civil Justice system under review and considering how to make it more accessible, fair and efficient<sup>18</sup>), at the request of its Chairman, the Master of the Rolls, Sir Terence Etherton, agreed to undertake a rapid review examining the impact of the changes mandated by COVID-19 on the operation of the civil justice system.

## B. About the review

2.4 The rapid review was launched on 1 May 2020 and concluded on 15 May 2020. The aim of the review was three-fold:

- i.) To understand the impact of the arrangements necessitated by COVID-19 on court users.
- ii.) To make practical recommendations to address any issues over the short to medium term.
- iii.) To inform thinking about a longer-term review.

2.5 Court users were provided with a variety of options for responding to the review. A remote consultation meeting was convened, an online survey for court users who had participated in a remote hearing since 19 March 2020 was created, and a consultation inbox was set up to facilitate the submission of collective responses to the review. **Due to the extreme pressure on judges and court staff brought about by the crisis, the Master of the Rolls requested that judges and court staff not be asked to take part in the survey: their feedback will be gathered through other means.**

2.6 The response to the review was exceptional: - 1077 people responded to the online survey and 116 people attended the remote consultation meeting. 65 submissions were sent to the consultation inbox—of these, 46 were collective responses made on behalf of organisations.<sup>19</sup> Respondents overwhelmingly recognised the necessity of measures that have been put in place to ensure that cases continue to be heard during this period and are keen to offer practical suggestions to ameliorate the issues that have inevitably arisen as a consequence of the crisis. The response to the review demonstrates the keen interest and willingness of court users to offer their time and expertise to support the judiciary and HMCTS in maintaining access to justice.

2.7 Despite the short duration of the review, this rapid exercise has generated an extremely rich dataset that is impossible to comprehensively analyse in one week; as such, the findings presented in this

<sup>18</sup> Civil Procedure Act 1997, s.6(3).

<sup>19</sup> In order to weight these responses appropriately in the analysis we asked respondents to specify how many individuals were represented by their response. In total, submissions to the inbox represented the views of 34,855 individuals (see Appendix A). Due to their length, appendices are presented in a separate document: Byrom, N. Beardon, S. and Kendrick, A. (2020) “The impact of COVID -19 measures on the civil justice system: Appendices”

report should be considered preliminary—there is significant scope for further analysis which should be undertaken in the immediate term.

- 2.8 The remainder of the report is structured as follows. Chapter 3 below describes the methodology and approach and sets out the limitations of the findings. Chapter 4 sets out the context for the findings on the experience of remote hearings, Chapter 5 describes the experience of lawyers who have participated in remote hearings since 19 March and Chapter 6 presents the experience of lay users. Chapter 7 presents findings regarding the impact of remote hearings on open justice. Chapter 8 presents suggestions for managing recovery, and Chapter 9 concludes the report with urgent priorities for research and data collection.

### 3 Methodology and approach

#### A. Overview- how was data collected?

- 3.1 Data on the experience of court users under COVID-19 measures was collected through a number of mechanisms:
- 3.1.1 A literature review was carried out to frame the findings.
- 3.1.2 Desk-based analysis of one week of court listings data from CourtServe was analysed (11 May 2020–15 May 2020) to try to understand the national picture with regard to the civil hearings taking place in the County Court. This work was led by an experienced Circuit Court Judge.
- 3.1.3 A public consultation meeting was conducted remotely, hosted by Tortoise Media.
- 3.1.4 An online survey was developed to gather detailed information on the experience of court users who had participated in a remote hearing between 19<sup>th</sup> March 2020 and May 15<sup>th</sup> 2020.
- 3.1.5 Stakeholders were also able to submit long-form and collective responses to a consultation email address, hosted by The Legal Education Foundation.

#### B. Understanding the context and framing the findings

- 3.2 A literature review was conducted to gather published accounts of the changes that have occurred in the civil courts as a result of the Covid-19 pandemic and gain insight into the impacts these have had for legal professionals, litigants and the civil justice system as a whole. The aims of the literature review were to:
- identify the extent of available literature
  - describe the conduct of remote hearings in the civil courts
  - investigate the experiences of court users
  - identify evidence gaps in relation to the impacts of the changes.
- 3.3 The literature review sought published accounts of hearings occurring in the civil courts in England and Wales for the period since the social distancing measures were announced (16 March 2020). Evidence was sought specifically on the conduct of remote hearings and accounts or experiences of those participating. The focus was on understanding substantive impacts of the changes, therefore literature presenting guidance or commentary only was excluded. A wide-ranging web search was conducted using search engines, databases and social media to identify relevant publications. Websites of legal organisations and networks were also searched and a request for literature submissions was included in the public consultation.



Table 1: Selection criteria for literature

Criteria	Inclusion criteria	Exclusion criteria
<b>Geography</b>	England and Wales	Scotland, Northern Ireland and international
<b>Time period</b>	16 March 2020–date of search (27 April 2020)	Accounts of remote hearings occurring outside COVID-19 era
<b>Jurisdiction</b>	Civil courts	Other jurisdictions (family courts, criminal courts, military courts and tribunals)
<b>Information reported</b>	Descriptions of remote hearings Reported experiences of court users	Guidance, procedures/protocols

3.4 The content of the included publications was analysed thematically. Each publication was read in detail and the text coded according to the information presented. The findings are presented at Appendix B<sup>20</sup>.

3.5 In order to try understand the contemporary national picture with regard to remote hearings in the County Court, data from court listings published by CourtServe over one week was collected. The types of hearings taking place, the technology deployed and arrangements for Open Justice were recorded: a detailed note on the methodology used is presented at Appendix C<sup>21</sup>.

### C. Understanding attitudes to current arrangements

#### C1. Survey

3.6 An online survey was created and disseminated through a range of online channels and platforms, including Twitter and the Civil Justice Council mailing lists. Lay users, litigants in person, McKenzie friends, lay advocates, members of the media, researchers and members of the public who had participated in a court hearing in a civil case since 19 March 2020 were all eligible to complete the survey. 1077 responses were submitted in total. A copy of the survey questions is provided at Appendix G alongside a note about the routing applied.

3.7 The survey contained a suite of questions asking about the experience of their most recent hearing, in order to understand the drivers of satisfaction within remote hearings. Some of the data captured was recoded to facilitate analysis. The date the hearing took place was recoded as variable T1—time since Practice Direction 51Y was published and the location of the court was recoded as “Region”. The most extensive recoding was undertaken in relation to the case type: respondents were asked to describe in their own words the hearing that they had most recently taken part in.

<sup>20</sup> Due to their length, appendices are presented in a separate document: Byrom, N. Beardon, S. and Kendrick, A. (2020) “The impact of COVID -19 measures on the civil justice system: Appendices” .

<sup>21</sup> At time of publication this data was still being validated for accuracy- it has therefore not been relied upon in the analysis presented in this report.

This description was recoded with the support of an experienced High Court judge. The categories used, and an explanation of how these were deployed, is provided at Appendix D.

- 3.8 As stated above, regression analysis was conducted to understand the drivers of satisfaction with remote hearings. A detailed summary of this analysis and output tables from the models tested is presented at Appendix E

## **C2. Consultation event**

- 3.9 A remote consultation meeting was hosted by Tortoise Media: 116 people attended in total. A summary of the discussion, produced by Tortoise Media is provided at Appendix F

## **C3. Consultation inbox**

- 3.10 In total, 69 responses were received. Of these, 49 were responding as organisations and 19 were responding as individuals. Two follow-up interviews were conducted on the basis of responses to the inbox: one with a legal professional and one with a litigant in person.

- 3.11 The respondents were affiliated with the following types of organisations:

- Law firms (n=17). The firms largely specialised in business and private law, including commercial and corporate, tort, property and insurance.
- Barristers' chambers (n=13). The chambers were interdisciplinary but included two that focussed on human rights and civil liberties.
- Professional associations (n=14). Associations representing the interests of barristers, solicitors and other users of the civil justice system.
- Charities (n=8). Charities focussing on issues including homelessness, social welfare, access to justice, torture and human trafficking, corruption and law reporting.
- Universities (n=6). Academic departments and institutes for legal studies.
- Media (n=5). Press organisations involved in court reporting.
- Public bodies (n=2). Departmental and non-departmental public bodies with a focus on equality and access to justice.
- None (n=2). One independent legal practitioner and one litigant in person.
- Law Centre (n=1). Social welfare legal work.

- 3.12 Where collective responses were submitted, respondents were re-contacted to ascertain the number of individuals whose views were represented in their response. This number is reported in the findings, in order that the reader may give appropriate weight to the views expressed. A full list of those who responded to the consultation is provided at Appendix A

#### D. The limitations of the findings

- 3.13 Responses to the survey were gathered via a snowball method—a non-probability sampling technique. **The findings from this study cannot be generalised to the wider population of court users.**
- 3.14 The sample of respondents was heavily skewed towards professional court users: - the majority of people who responded to the review were legal professionals—871 of the 1077 respondents who participated in the survey described themselves as lawyers (81% of the total sample). Of the complete responses to the survey, (651) 86.2% came from lawyers. Only 11 complete responses to the survey were submitted by lay users of the civil courts.
- 3.15 The findings regarding the drivers of positive perceptions of remote hearings reported at Chapter 5 section R below are preliminary in the sense that they have not been subjected to further post-estimation diagnostic tests.<sup>22</sup> While such tests would not necessarily change the sign or significance of the coefficients, they would shed greater light on the extent to which we can be confident that the relationships we observe are not spurious. There are likely many empirical issues that require further investigation. However, given limited time and resources, it has not been possible to carry out those investigations presently. Interpretations of the findings should therefore be conditioned with respect to the possible empirical limitations, as well as be limited to the sample under discussion.
- 3.16 The cross-sectional nature of the data means that any unobserved individual-specific characteristics are not captured in the models. This could be particularly problematic if these characteristics are indeed important predictors of overall impression/recommendation. An individual's expectations, and realised (dis)confirmation of them, is just one example. There may also be significant selection issues. For example, it might be the case that those opting into the survey are already pre-disposed to think optimistically/pessimistically about remote hearings. There is also a possibility that those individual respondents who have participated in cases of a particular type are substantively different (in terms of their knowledge, experience, culture, etc.) to those who have participated in other types of cases. If these characteristics also predict overall impression/recommendation, the model is endogenous.
- 3.17 The results on “agreement with the outcome” as a driver of positive perceptions of remote hearings would also require further investigation to be meaningful in practice. We would need to know whether there is an over and above agreement effect on overall impression for remote hearings, compared to other types of hearings. Hypothetically, it could be the case that if an unfavourable outcome (in terms of agreement with the outcome by the parties) is likely, attempts might be made to delay a remote hearing for a hearing in person. This again would pose empirical issues of selection.

<sup>22</sup> For example, test of specification error, goodness-of-fit, multicollinearity, and heteroskedasticity— - a problem to which robust standard errors are not a solution.

If, however, the agreement effect holds across different types of hearing, it would merely be needed as a control.

- 3.18 More generally, the ordered probit and probit models require more observations than Ordinary Least Squares regression because they use maximum likelihood estimation techniques. It is also important to keep in mind that when the outcome is rare, even if the overall dataset is large, it can be difficult to estimate a probit model. It is evident from cross-tabulations between categorical predictors and the outcome variables that there are many small cells in our dataset (including for example, litigants in person). This is problematic because if a cell has very few cases (a small cell), the model may become unstable. Indeed, for some categories in our case variable, there are a number of empty cells, which likely explains at least in part why no significant result is observed: the empty cell causes the estimation procedure to fail.

## 4 Findings: Understanding the context for remote hearings under COVID-19

### A. Overview

- 4.1 In order to make sense of the findings regarding perceptions and experience of remote hearings under COVID-19 it is vital to understand the context in which these hearings took place. The literature and responses to the consultation provided detailed information on the wider impacts of COVID 19 on the civil justice system, the key issues raised and their implications for the conduct of and attitudes towards remote hearings are described below.

### B. The impact of COVID-19 on the types of cases proceeding

- 4.2 Respondents to the consultation inbox reported that the types of cases proceeding through the civil justice system has been fundamentally altered by COVID-19, as a consequence of three factors. First, policy decisions taken by the government (such as the legislative stay on possession hearings) and the Master of the Rolls' Practice Direction that complemented that policy had resulted in very few if any housing cases being heard. Secondly, the rapid expansion in the number of family hearings taking place in the County Courts was felt to be contributing to reductions in the civil work undertaken at the county and district courts (Irwin Mitchell, n=n/s). Thirdly, the priorities for listing that had been put in place were felt to have altered the composition of hearings that were taking place: respondents reported that restrictive and inconsistent interpretation of listings guidance had further reduced the number of hearings taking place at the county and district court level (PIBA, n=1500).
- 4.3 In addition, respondents reported that changes in claimant behaviour brought about by the wider context of COVID-19 had altered the types of cases that were proceeding. A submission on behalf of consumer forum Legal Beagles reported that debt companies in particular had altered their behaviour significantly in response to the crisis. Research conducted by consumer forum Legal Beagles has been reported to show that the main debt companies are not currently issuing new claims and are instead focusing on repayment by existing debtors. With regards to new claims, many are now stayed, with no new claims issued since 12 March 2020. The net implication of changes in relation to both housing and debt was reported to have reduced the number of cases proceeding through the system involving litigants in person and those individuals described under existing law and practice directions as vulnerable. The absence of accurate, routine data collection on the cases being heard across the civil justice system and the characteristics of those who bring them makes it impossible to confirm these observations. If verified however, these findings would indicate that the proportion of vulnerable people and litigants in person participating in remote hearings may be artificially repressed by COVID-19 measures, with implications for findings regarding the efficacy of remote hearings.

### C. Reductions in ability to access legal advice—particularly for those who are vulnerable

- 4.4 A number of respondents to the consultation reported on the reduced availability of access to free legal advice for individuals as a consequence of the crisis, and the detrimental impact of this on access to justice for vulnerable groups (Citizens Advice Woking, n=3; Shelter, n=n/s; Brighton Housing Trust, n=21; Pro-Bono Community n=1; Official Solicitor, n=n/s; The Law Society, n=n/s; Southwark Law Centre, n=9). The suspension of “support through court” schemes was referenced as being particularly challenging for vulnerable clients. The Housing Law Practitioners Association shared findings from their survey which provided evidence of the difficulties facing legal aid funded advice providers in transitioning to providing advice remotely, whilst submissions from Shelter and an academic at LSE highlighted the issues inherent in attempting to provide advice by telephone to vulnerable clients. A submission from the Equality and Human Rights Commission (n=n/s) summarised these issues accordingly:

*“Telephone advice may also be available, but our Inquiry into civil legal aid for discrimination cases showed that many people, particularly disabled people, faced real difficulties in accessing this. The Legal Aid sector is also facing difficulties. Those who cannot afford to pay for it require free legal representation to assert their rights... We welcome the initial Government support measures for the Legal Aid sector but this must be kept under review as the crisis unfolds to ensure the survival of the legal aid sector.”*

The response submitted by The Law Society (n=N/S) reinforced these concerns, stating: *“There is a risk that, as the pandemic continues, there may be more Litigants in Person using the courts in some areas of law”*. This wider context may be considered to heighten concerns about the ability of remote hearings to provide effective participation and deliver access to justice.”

### D. Growth in levels of wider legal need

- 4.5 A number of responses raised concerns that the economic implications of COVID-19 would result in an escalation in population levels of legal need, creating increased pressure on the civil justice system in the short to medium term. Early evidence of this is provided by findings of a representative tracker survey conducted as part of a wider project monitoring public attitudes to compliance with COVID-19 related lockdown restrictions. An interim report from this study stated that 15% of respondents nationally have experienced issues with money as a consequence of COVID-19, 10% have experienced issues with employment and 3% with housing and accommodation.<sup>23</sup>
- 4.6 Even if fears regarding increasing levels of legal need fail to materialise, respondents raised concerns that the backlog of possession hearings generated by the stay on eviction proceedings would elevate pressure on the civil justice system. Many respondents specialising in both housing law and the

<sup>23</sup> Halliday, S., Meers, J. and Tomlinson, J. (2020). “) “Public attitudes on compliance with COVID-19 lockdown restrictions.” Available” available at: <https://ukconstitutionallaw.org/2020/05/08/simon-halliday-jed-meers-and-joe-tomlinson-public-attitudes-on-compliance-with-covid-19-lockdown-restrictions/>

experience of vulnerable people expressed the view that remote hearings were unsuitable for possession cases (Shelter, n=n/s; Garden Court Chambers, n=130). Respondents were emphatic that urgent work was needed to identify approaches to managing this before mid-June, and that any working group established must include representatives with recent experience of the housing desk duty scheme (Shelter, n=n/s; Southwark Law Centre, n=9; Citizens Advice Woking, n=3; Brighton Housing Trust, n=21; Garden Court Chambers, n=130).

#### **E. Reductions in the volume of cases being heard and the impact on the profession**

- 4.7 The majority of submissions to the consultation from the Bar referenced the high number of adjournments that have taken place and the dramatic impact that this has had on their practice (Western Circuit, n=1,100; 5 Pump Court, n=52; Wales and Chester Circuit, n=n/s; South Eastern Circuit, n=n/s; Northern Circuit, n=1000; Personal Injuries Bar Association, n=1500). A number of Circuit associations had attempted to collect data on cases that are currently being listed to demonstrate this, in response to the absence of data produced by HMCTS.
- 4.8 Some respondents felt the guidance was not being applied properly in practice, in particular that hearings were being adjourned without good reason or proper consideration of remote alternatives. The guidance had therefore been of limited use to some respondents because for the most part their hearings were no longer going ahead. Respondents argued that guidance provided to date had been too flexible and made it too easy for cases to be adjourned (5 Pump Court, n=52; Wales and Chester Circuit, n=n/s)—most respondents from the Bar argued for the rapid expansion of the use of remote hearings, “to prevent many civil barristers being lost to the profession” (Wales and Chester Circuit, n=n/s). Respondents reported drops in the number of cases heard from this time last year of up to 75% (Wales and Chester Circuit, n=n/s). Speaking on behalf of their members, the Personal Injury Bar Association stated that “*the appropriate use of remote hearings is also critical to the livelihood of our members. The reduction in Court hearings since lockdown began has had a very profound impact... All our members are self-employed. No work means no pay*” (Personal Injury Bar Association, n=1500).
- 4.9 Many respondents highlighted the disproportionate impact of adjournments on the junior bar, stating that the present situation poses an “existential threat” (South Eastern Circuit, n=n/s) to those under ten years’ call. Respondents argued that there is an urgent need to make much greater use of remote video technology, to reduce the incidence of adjournments.

#### **F. Home-schooling and impact on those professionals with caring responsibilities**

- 4.10 The literature review and consultation responses highlighted the impact of wider COVID-19 measures (particularly school closures) on the ability of professionals to conduct remote hearings. A number of responses highlighted the impact on the junior bar who may not always have access to appropriate work - spaces to conduct hearings from their own homes. The literature review identified

numerous references to the ways in which joining hearings from the home environment could introduce distractions for the court and advocate alike, including reporting experiences of loud noises, family and pet cameo appearances and managing distracting backgrounds. The response received from Garden Court Chambers (n=130) highlighted the disproportionate impact on barristers with caring responsibilities for children and suggested that the impact of measures on women and carers be monitored.

#### **G. Timing of the crisis in the context of the wider court reform programme**

- 4.11 The majority of responses referenced the role of COVID-19 in exacerbating pre-existing issues with the technology, staffing, and infrastructure available at the County Court level (Personal Injuries Bar Association, n=1500). A response submitted by the Association of Consumer Support Organisations stated, *“The COVID-19 pandemic has revealed the court system was poorly prepared for the need to conduct large scale remote hearings. However, given the lack of investment in the courts and tribunals service over the last ten years this is not altogether surprising”* (ACSO, n=45). Other respondents commented on the difficult timing of the crisis, part-way through the £1 billion programme of reform led by HMCTS, which aims to prepare the court system for digital ways of working. Disparities in availability of more bespoke platforms (such as Kinly) to support the conduct of remote hearings were raised as an additional challenge for the civil justice system during this period.



## 5 Findings: Remote hearings under COVID-19—The experience of lawyers

### A. Overview

5.1 This chapter presents findings on the experience of lawyers who have participated in remote hearings since 19 March 2020.<sup>24</sup> Findings relate to all stages of the process, from hearing notification to outcome. Broadly speaking, the lawyers who completed this survey were satisfied with their experience of remote hearings: 71.5% of respondents described their experience as positive or very positive. The drivers of satisfaction with remote hearings are presented below at section R. In spite of this, when asked to compare audio and video hearings to hearings in person, the majority of respondents felt that remote hearings were worse than hearings in person overall and less effective in terms of facilitating participation. Respondents also found remote hearings to be more tiring to participate in than physical hearings, particularly those that proceeded by video. Findings suggest that remote hearings may not necessarily be cheaper to participate in, which may be counter to assumptions about relative costs being lower. Immediate suggestions provided by respondents for improving the arrangements for remote hearings are also presented.

### B. Before the hearing: Notice periods

5.2 Respondents to the survey were asked about the amount of notice they had been given that their hearing was going to take place remotely. Of the 724 people who responded to this question, just under half (332) responded that they had been given one day to one week’s notice that their hearing would take place remotely.

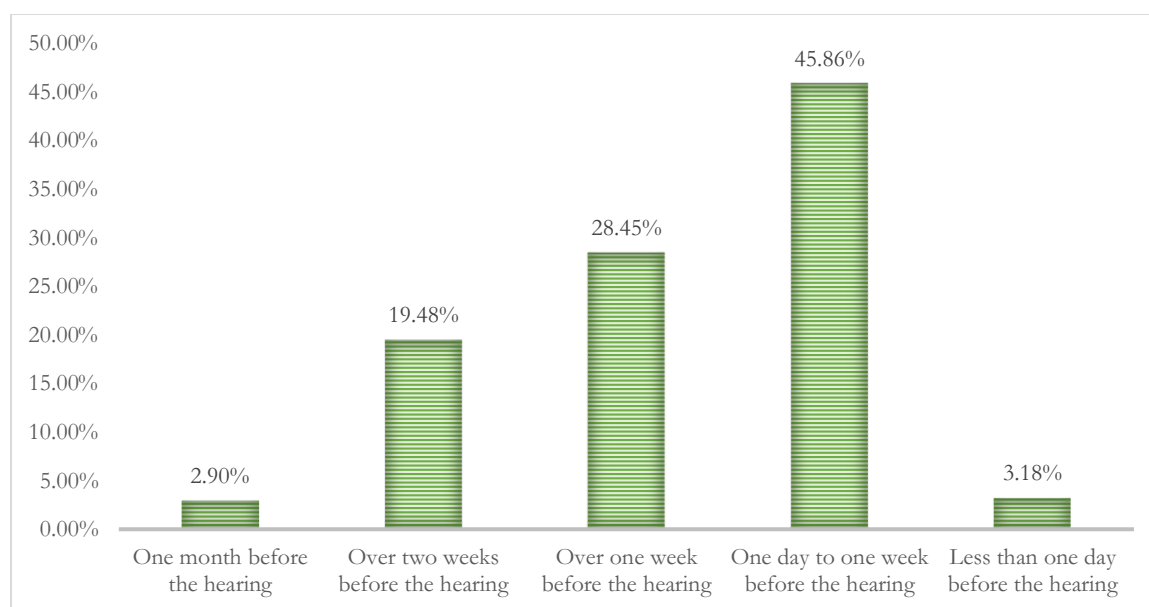


Figure 1: Average notice given prior to hearing (n=724)

5.3 Most respondents were satisfied with the amount of notice they were provided with, stating that this gave them adequate time to prepare, in light of the circumstances. Respondents in general felt

<sup>24</sup> When Practice Direction 51Y was published.

that they would have benefitted from the provision of more detailed information about the conduct of the hearing. In the immediate term, participants suggested that the Notice of Hearing should be adapted to include the following information:

- details about the mode of hearing
- dial in details
- timetable for the hearing
- information about how to ensure that clients can participate
- advice on the preparation of e-bundles
- whether the hearing will be conducted in private or in public.

5.4 Respondents who reported dissatisfaction with the notice they had been given were those who had received little notice that the hearing would take place—of those who were dissatisfied with the amount of notice, the majority reported receiving on average less than one day’s notice. Inadequate notice was reported to put undue pressure on preparation time, and, in the case of trials, undermine the ability of counsel to prepare the case properly. Last minute cancellation of hearings was a cause of particular frustration, due to wasted preparation time and inability to reclaim costs:

*“If courts leave it to the last minute to announce what is happening, I won't be instructed until the last minute. This adds unnecessary time pressure and is not satisfactory for the client.”* (Survey respondent)

*“My solicitors had to work very hard to contact the client, and contact my clerk, to make sure that everybody was ready for the hearing and more importantly was free to attend. There was no need for this particular hearing to have such short notice.”* (Survey respondent)

5.5 A number of respondents to the survey reported difficulties with contacting the court to access information about whether their case was going ahead, inadequate support with preparing for their hearing and lack of advice on the preparation of e-bundles. Some respondents felt that the general guidance provided was an inadequate substitute for practical support in advance of the hearing<sup>25</sup>—comments included:

*“Guidance is helpful but cannot replace the one to one support to ensure, for example, that witnesses are comfortable with the technology and have support during the hearing.”* (Survey respondent)

5.6 Responses to the consultation inbox reported concerns that the court infrastructure was insufficiently developed and resourced to support the transition to remote hearings at scale,<sup>26</sup> with comments including: *“We do not believe that the court infrastructure is sufficiently developed to hold many remote hearings”* (Southwark Law Centre, n=9); and *“The process is only as good as the administration”* (5 Pump

<sup>25</sup> This finding is reflected in an earlier study by Rossner et al. (2018) on fully remote hearings which reported that participants particularly valued the one-to-one support they were provided with for testing the technology and process orientation prior to the hearing.

<sup>26</sup> Response from Southwark Law Centre (n=9), Garden Court Chambers (n=130) and 5 Pump Court (n=52).

Court, n=50). Persistent concerns were raised regarding the arrangements for e-bundles. Respondents reported bundles regularly going missing, judges not receiving files on time, people having different copies of the e-bundle or being unable to locate them altogether, resulting in delays. Facilities for filing documents were also felt to be inadequate at the County Court level (Wales and Chester Circuit, n=n/s; DWF Law, n=929): respondents reported that courts were currently requiring submission by email, placing limits on the size of files that can be sent.

**C. Before the hearing: Guidance**

5.7 Respondents to the survey were asked to indicate the extent to which they agreed with the statement that the guidance on remote hearings issued by the Judiciary and HMCTS was useful. Of the 721 people who answered this question, the majority agreed that the guidance published by the Judiciary and HMCTS had been useful: interestingly respondents found it difficult to distinguish between guidance provided by the Judiciary and guidance provided by HMCTS.

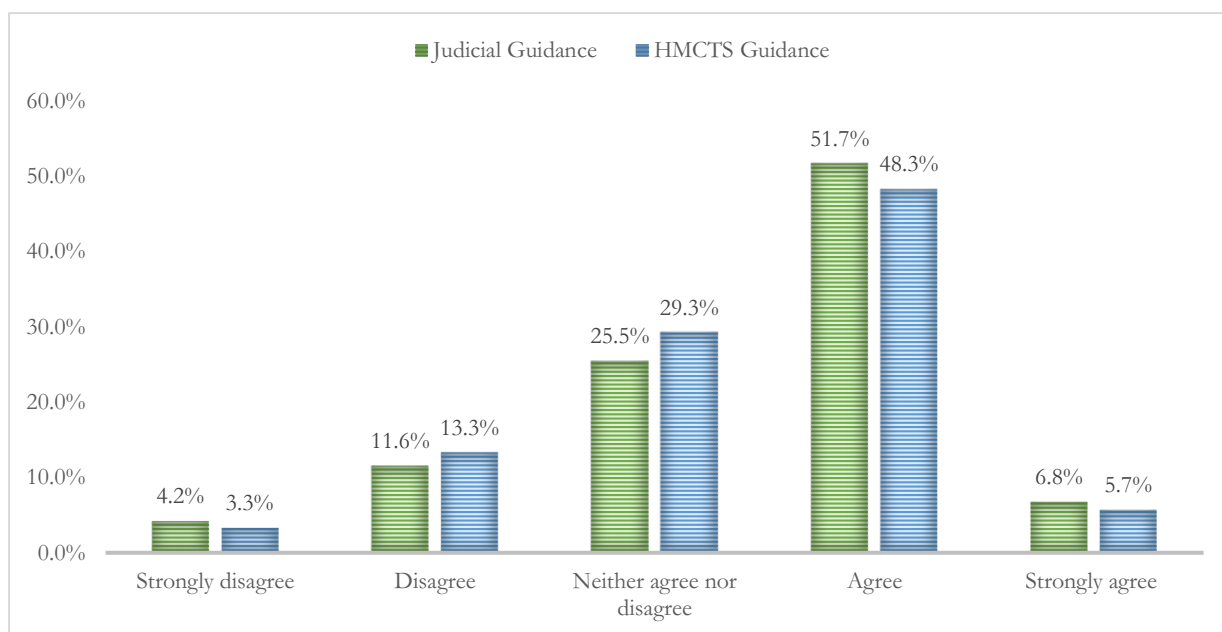


Figure 2: Response to question: “In your view, the guidance that has been provided by the Judiciary has been useful” (n=721)

5.8 Where concerns were raised about the guidance provided, these primarily related to a lack of consistency in the guidance between different courts. Respondents felt that guidance was lacking in some areas (for example in relation to the County Court), and too specific in others (such as the High Court):

*“There is a lack of consistency between the approach of individual court centres and between the Queen’s Bench Division Masters. Whilst we understand the difficulties faced by individual judges when addressing different individual challenges around technology and facilities, and with Courts which are open, staffed or closed, there does not appear to be an attempt to co-ordinate an approach (as demonstrated by the North-Eastern Circuit Pilot Protocol which has now been published). This causes Court users difficulty in complying with the requirements of the local courts. Many of these initiatives may appear perfectly sensible when viewed through the prism of a lawyer habitually working with the same court, day-in and day-out. However, the reality of the modern day legal services*

*market is that individual fee earners (increasingly Claimant and Defendant alike) will have a caseload that is not geographically centred around an individual court or limited to a single QBD Master. Attempting to keep track of a myriad of separate initiatives and how they apply to individual cases is a daunting and difficult process.”* (DAC Beachcroft, n=n/s)

Respondents requested greater granularity and consistency in the guidance produced. Where lawyers reported that they had received individualised guidance from the judge in relation to how their case would be conducted, they overwhelmingly found this to be both clear and helpful.

- 5.9 A persistent concern related to the variation in quality and clarity of guidance across the regional circuits. Respondents reported that different approaches to remote hearings were being taken by different courts who were applying differing criteria for adjourning cases and different methods for conducting remote hearings. The proliferation of guidance and practice was felt to be overwhelming and confusing—respondents requested centralised consistent guidance for ease of reference.
- 5.10 Multiple respondents called for greater adherence with the guidance in practice and more active judicial case management: *“Firmer guidance from the judiciary as to which cases should go ahead remotely is needed, rather than leaving parties to agree on the appropriate forum”* (Wales and Chester Circuit, n=n/s); *“There has been too much discretion given to local designated civil judges and district judges. Each court takes a different approach on the conduct of remote hearings and whether they should take place or not”* (Survey respondent); *“Current guidance is too flexible and makes it too easy for cases to be adjourned”* (5 Pump Court, n=52); and *“...we fear that the guidance being issued by the senior judiciary is being misapplied and that far too many adjournments are taking place”* (South Eastern Circuit, N=n/s).
- 5.11 A number of respondents identified gaps in the guidance that is currently provided, and indicated that they would welcome these gaps being addressed as a matter of urgency. Particular concerns were raised in relation to e-bundles. Respondents reported that different courts have developed different requirements for e-bundles and that many lawyers in areas of law currently or formerly funded by legal aid do not have the software to produce hyperlinked electronic bundles (HLPAs, n=N/S, Brighton Housing Trust, n=21). Respondents requested guidance setting out:
- Definitive criteria for adjournments/the types of cases that will and will not be heard.
  - Which platforms are suitable for the conduct of remote hearings of different types.
  - How to access and use the platforms and technology specified.
  - How to create an effective electronic bundle—many respondents advocated for the creation of a common protocol.
  - How to ensure that lay clients are able to participate and the steps that lawyers should take to support this.
  - Detailed guidance on how to identify and make adjustments for vulnerable witnesses and parties, litigants in person, and those with limited access to the resources necessary to participate in a remote hearing.

- Mandatory rules on breaks for communication between counsel and to provide relief from screen time.

#### **D. The experience of remote hearings: Characteristics of hearings reported**

- 5.12 As described above at Chapter 3, the survey asked respondents to answer a series of detailed questions about the most recent remote hearing they had participated in, and their perceptions of the hearing. Once the data had been cleaned and non-civil hearings had been excluded from the sample, it was revealed that data had been captured on 486 remote hearings.
- 5.13 Sections E-Q below describe the key features of the hearings respondents described. The majority of hearings reported on took place between 1 May and 7 May 2020 with parties receiving notice that their hearing would take place one day to one week in advance. The biggest proportion of hearings described took place in London (46.5%). Most of the hearings related to higher value claims (47.33% of hearings described concerned cases with a monetary value of £50,000 or above). Of the hearings reported, 53.9% were interlocutory and 31.69% were trials. The vast majority of hearings described were short: - 83.3% of the hearings described lasted between 0 and 3 hours. The majority of hearings described were audio—hearings with participants using a telephone to join—only 27% of hearings in this sample were fully video hearings. Within this the most commonly-used platform for participating in a fully video hearing was Skype (69%). Nearly 40% of hearings related to personal injury claims, 15.9% of hearings related to commercial cases.
- 5.14 The majority of hearings reported in this sample did not involve litigants in person—only 10.9% (53 hearings in total). The majority of hearings involving a litigant in person in this sample were fully-audio interlocutory hearings or trials. Within the hearings described in this study, - hearings involving litigants in person tended to be in relation to cases with a value of less than £10,000- (56.6%) of hearings involving litigants in person had a value of less than £10,000.
- 5.15 Almost half of all hearings experienced technical difficulties: - in 44.7% of hearings respondents reported that there were problems with the technology used. More technical difficulties were experienced during fully video hearings than fully audio hearings: - 50.8% of respondents who had participated in video hearings reported experiencing minor problems during the hearing, and 12.9% reported experiencing significant difficulties during the hearing.
- 5.16 When asked about the technical support that had been provided for their remote hearing, 30.4% of respondents reported that no-one had provided technical support. Many respondents reported that technical support had not been used or needed. 18.1% of respondents reported that the judge's clerk<sup>27</sup> had provided the technical support for their hearing, and 24.1% of respondents stated that “someone else” had delivered this function. HMCTS provided the technical assistance in 19.5% of

<sup>27</sup> Judge's clerks are only available in the High Court and above

the hearings reported. Higher proportions of hearings in the County Court proceeded without technical support (36% of hearings in the County Court did not have technical support)

**E. Characteristics of hearings reported: When did the hearings described take place?**

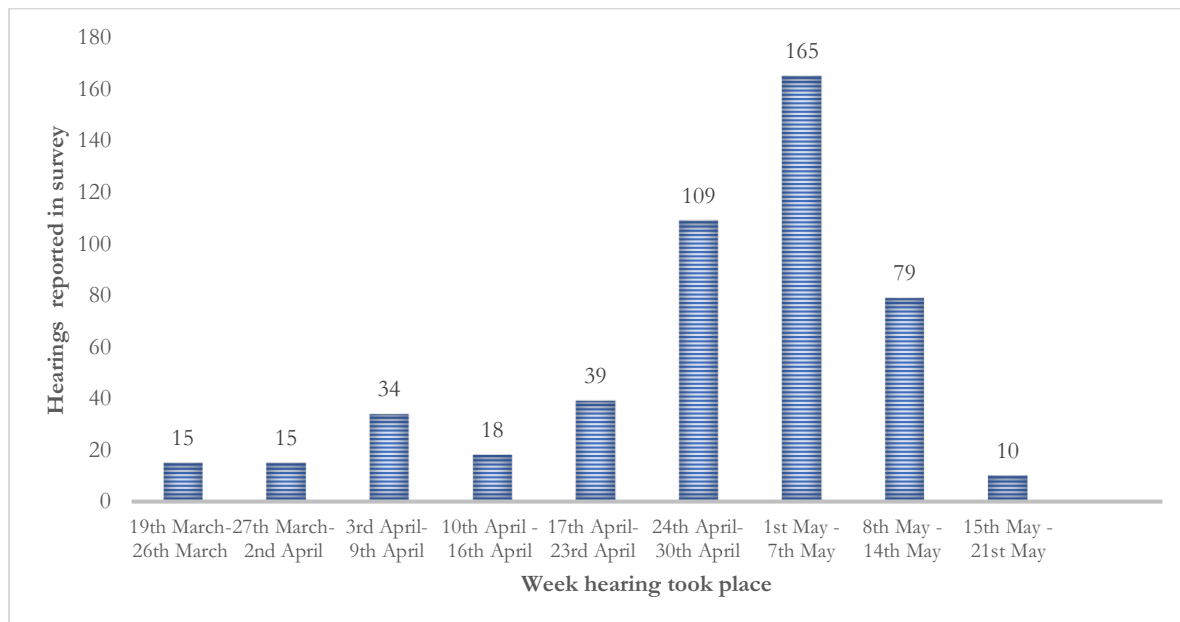


Figure 3: When did the hearings described in this report take place? (n=484)

5.17 The majority of hearings reported in this survey took place between 24 April and 7 May: 56% of the hearings described took place during this period. This means that the majority of hearings described took place when practice had had time to stabilise (i.e. participants were largely *not* reporting on hearings that took place immediately after the practice direction was introduced).

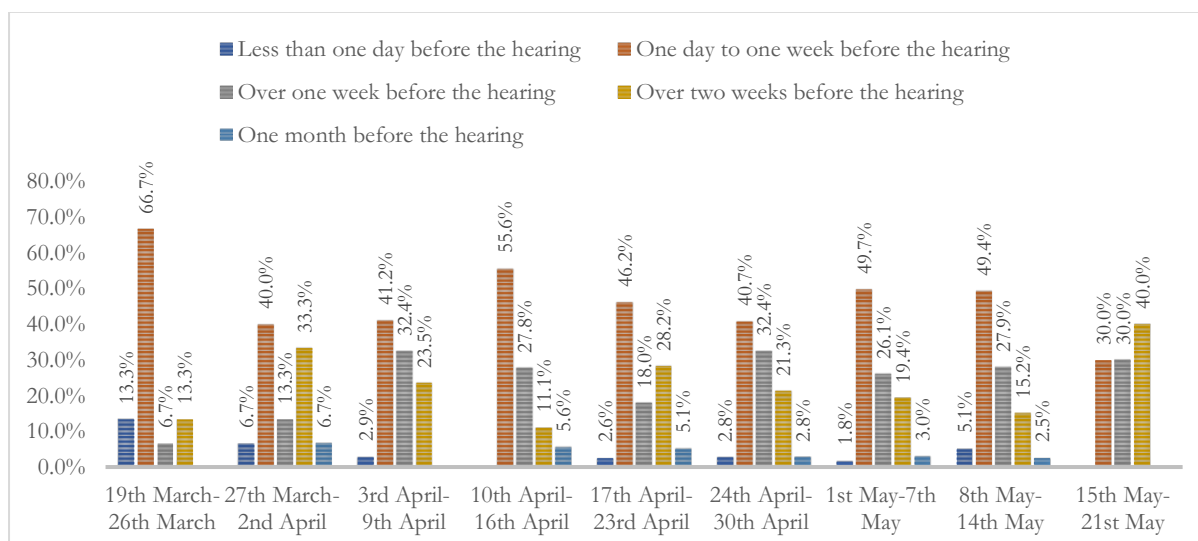


Figure 4: Notice of hearing by week that hearing took place (n=484)

5.18 The majority of respondents who reported on a hearing that took place in the first week after Practice Direction 51Y was issued told us that they received less than one week’s notice that their hearing would take place. In contrast, the majority of respondents who provided details on a hearing that

took place between 17 April and 30 April reported that they had received more than one week's notice that their hearing would take place, suggesting that court practice regarding the notification of parties began to stabilise three weeks after Practice Direction 51Y was issued. However, notice periods of one day to one week were still fairly common eight weeks into the crisis, causing problems for some respondents (see section B above).

**F. Characteristics of hearings reported: Geographical distribution of hearings**

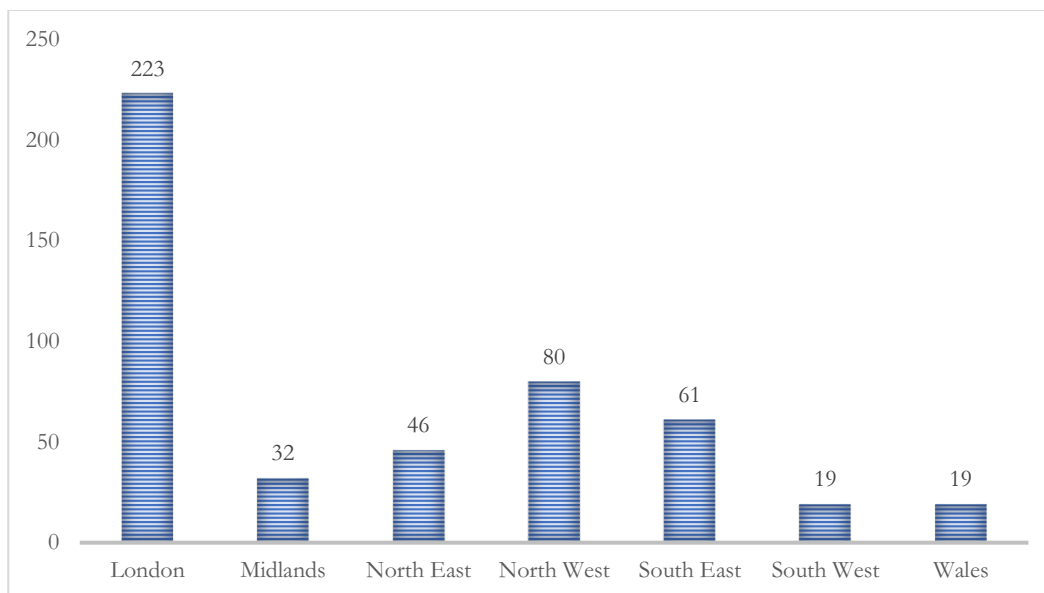


Figure 5: Where did the hearings reported take place? n=480

5.19 The largest proportion of hearings (46.5%) described by respondents took place in London.

**G. Characteristics of hearings reported: Value of claim and level of court**

5.20 The majority of remote hearings reported concerned claims with a monetary value of over £50,000. Only 35.4% of hearings captured in the survey concerned cases worth less than £25,000.



Figure 6: Claim value (£) n=480

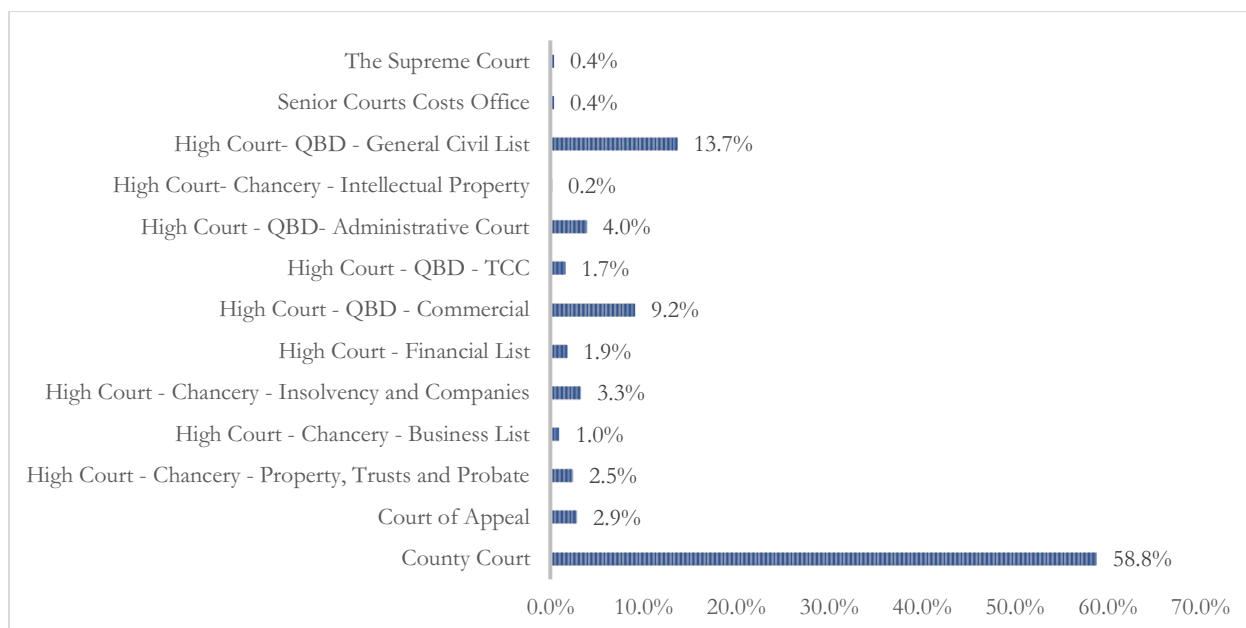


Figure 7: Percentage of hearings by court (n=481)

5.21 Over half of the hearings described in this study took place in the County Court – 58.8% of the hearings included took place here. 28.5% took place in the High Court Queens Bench Division, and 8.9% in the High Court Chancery Division. As such, hearings in the Senior Courts are over-represented in this sample.

#### H. Characteristics of hearings reported: Hearing type

5.22 Respondents were asked to describe in their own words the type of hearing that they had most recently taken part in. As described above at Chapter 3, these descriptions were recoded with the support of an experienced Circuit judge, to arrive at the figures presented below.

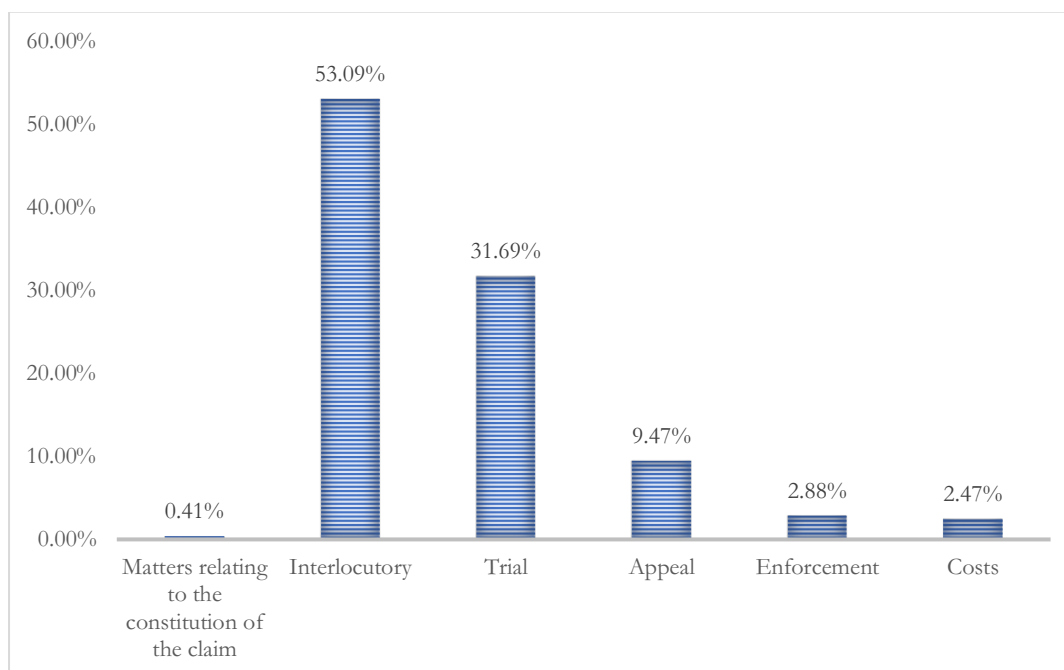


Figure 8: Types of hearing in sample (n=486)



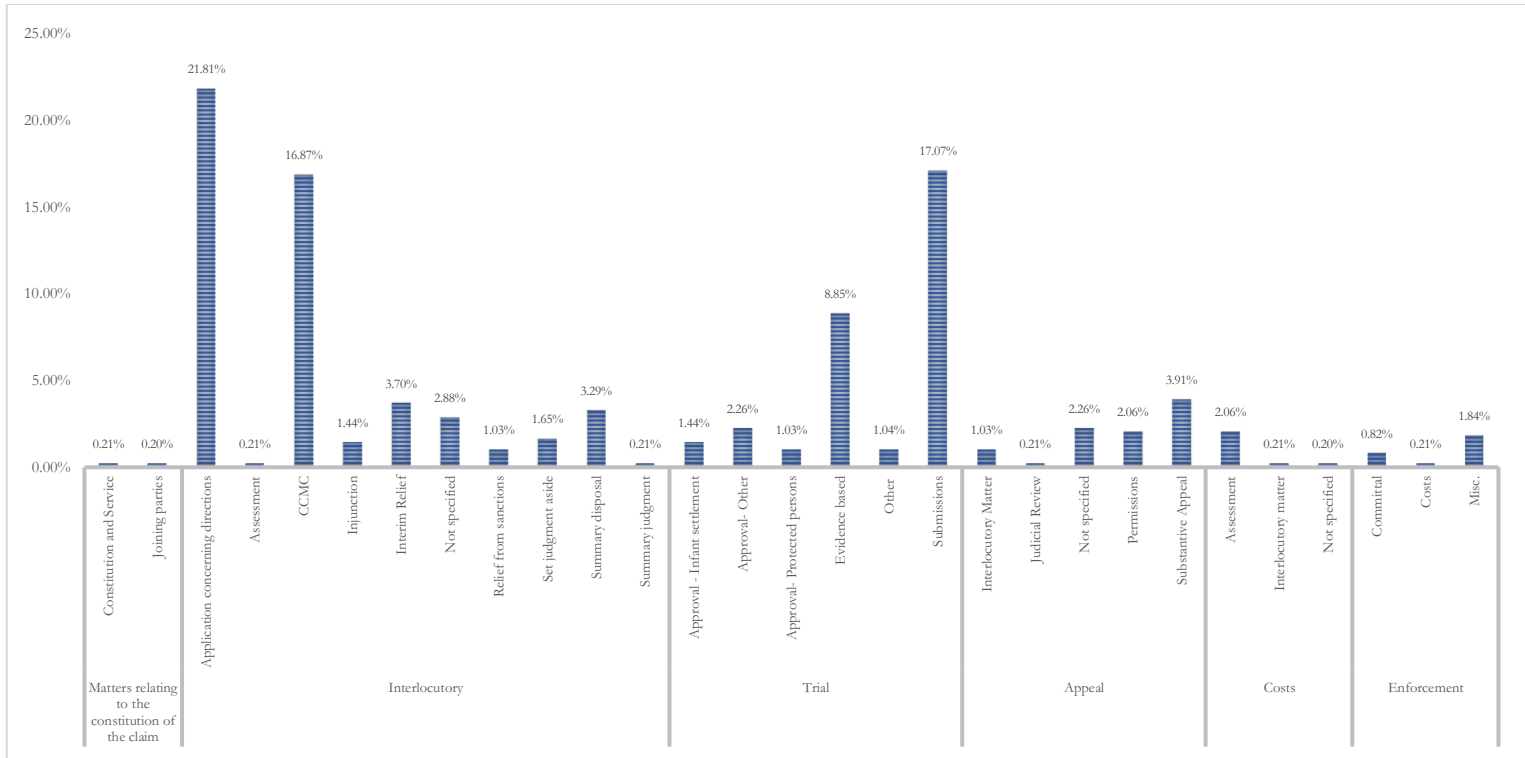


Figure 9: Percentage of hearings in sample by detailed bearing type (n=486)

5.23 As these figures demonstrate, the majority of hearings reported on in this sample were interlocutory hearings (53.09%). The next largest percentage of hearings were trials (31.69%). Within these categories, the majority of interlocutory hearings reported on were applications concerning directions (21.8%) and Costs and Case Management Hearings (16.87%). The majority of trials reported on were trials by submissions (17.1%) and trials- evidence based (8.85%).

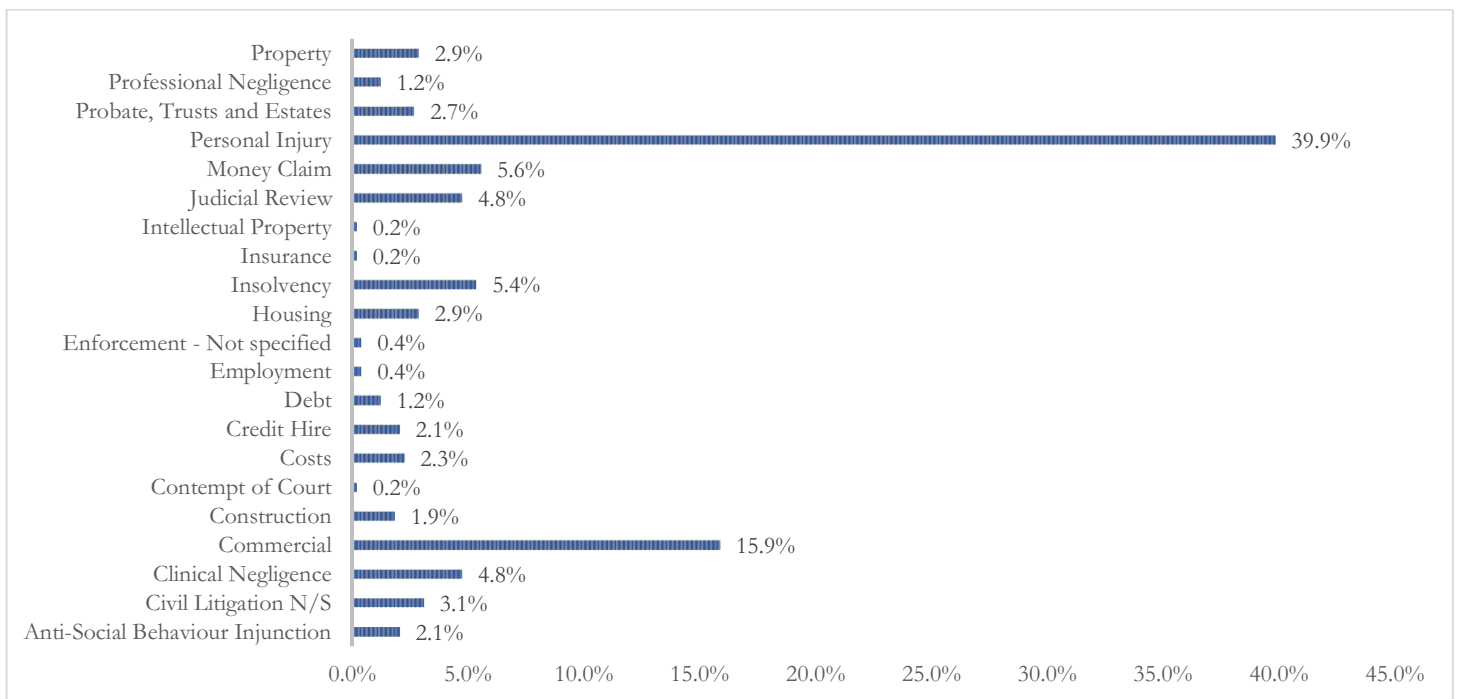


Figure 10: Hearings by area of law

**I. Characteristics of hearings reported: Mode of hearing and technology used**

5.24 The majority of hearings described by respondents were fully audio hearings with all parties joining by telephone.

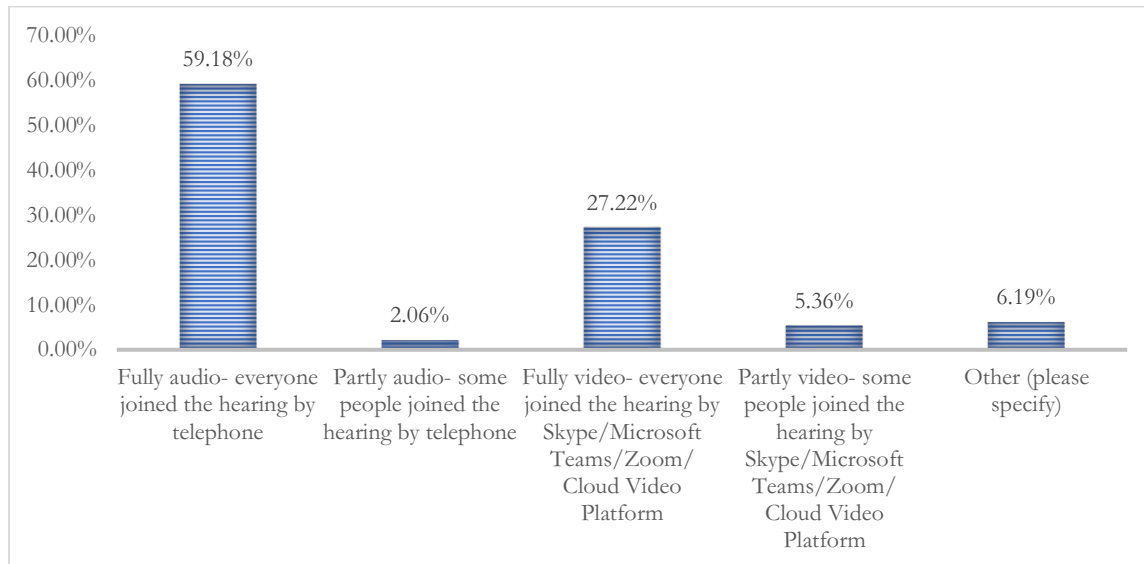


Figure 11: Mode of hearing (n=486)

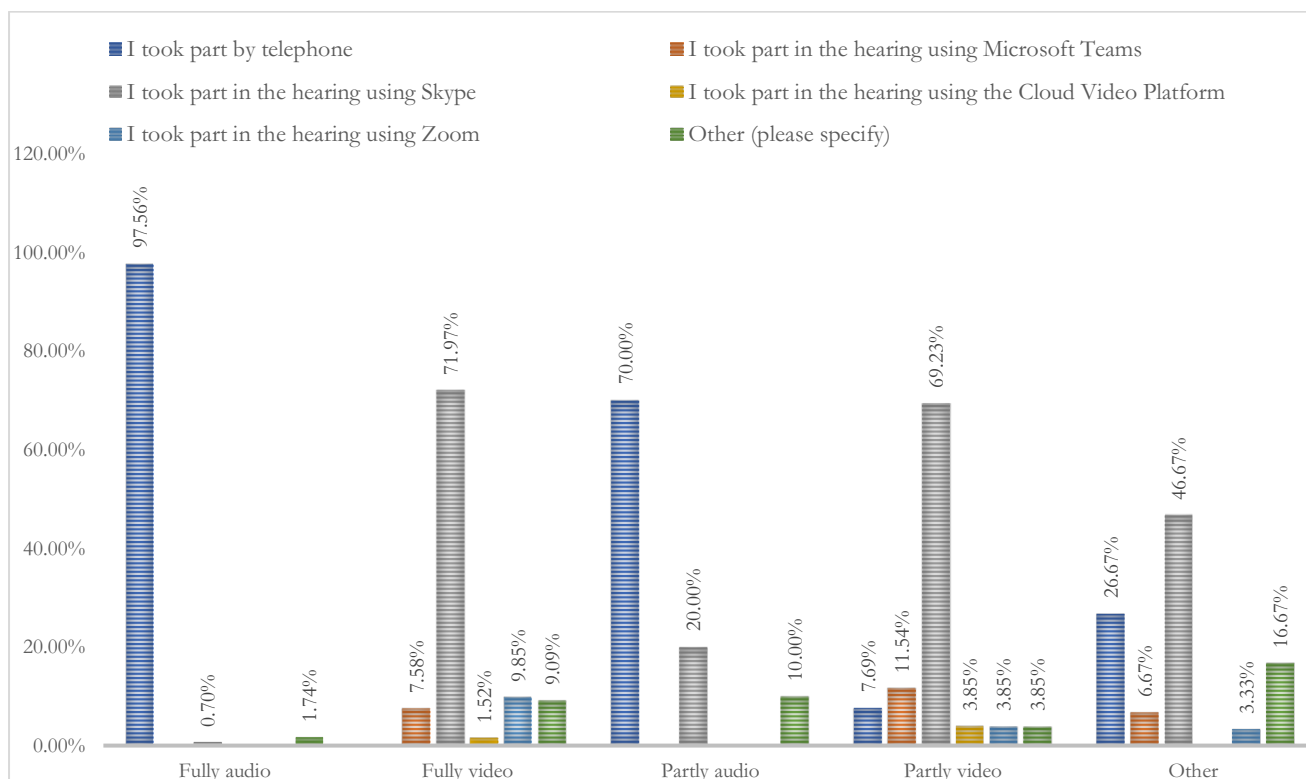


Figure 12: Mode of hearing by technology used to join (n=486)

5.25 Within this sample, the majority of people joined fully video and partly video hearings using Skype, with a minority using Zoom. Very few respondents reported using Cloud Video Platform (n=3),

mirroring what we know about the state of national roll-out at the time the study took place. No-one reported using their mobile phone to join a fully video hearing.

**J. Characteristics of hearings reported: Litigants in person**

5.26 The majority of hearings reported in this sample related to cases where both parties were represented: only 10.9% of hearings (n=53 hearings) involved a litigant in person. Within this sample, the majority of hearings involving litigants in person were interlocutory hearings and trials (84.9% of the total hearings involving litigants in person were coded as interlocutory or trial).

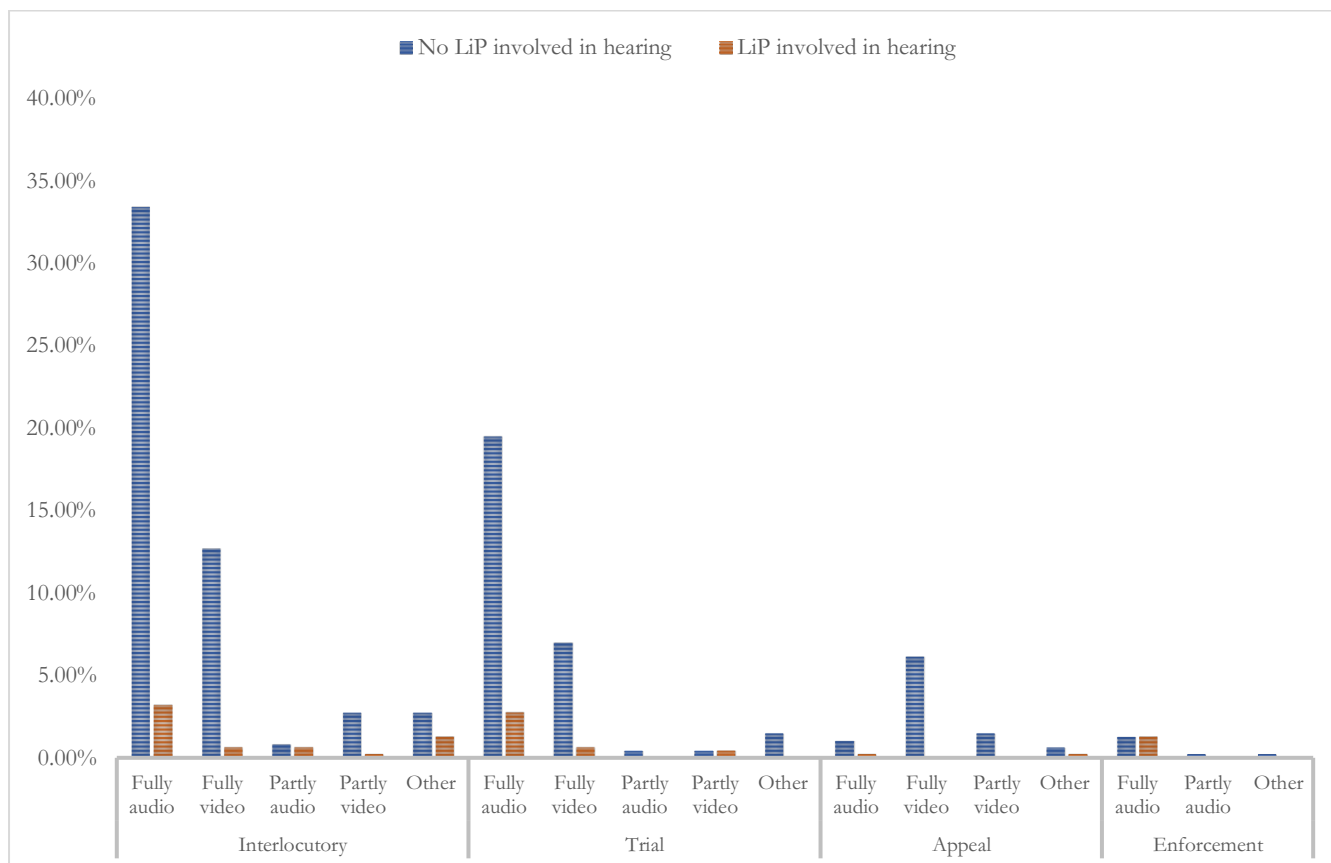


Figure 13: Hearings involving LiPs by mode of hearing (n=472)

5.27 Figure 13 above shows the hearings involving litigants in person broken down by mode of hearing: the majority of hearings reported as involving a litigant in person were fully audio hearings. 56.6% of hearings in this sample involving litigants in person were reported as having a monetary value of less than £10,000. Where litigants in person were involved in hearings concerning high value claims over £50,001 (n=17), 29.7% were commercial claims, 23.5% concerned the administration of estates and 17.7% concerned insolvency.

Value of claim	Administration of estates	Clinical negligence	Commercial	Insolvency	Money Claim	Personal Injury	TOLATA	Grand Total
£1,000,000 and above	0	0	1	0	0	1	0	2
£250,000-£1,000,000	2	1	4	3	1	0	0	11
£50,001-£250,000	2	0	0	0	0	1	1	4
<b>Grand Total</b>	<b>4</b>	<b>1</b>	<b>5</b>	<b>3</b>	<b>1</b>	<b>2</b>	<b>1</b>	<b>17</b>

Figure 14: Subject matter of high value cases involving litigants in person (n=17)

**K. Characteristics of hearings reported: Issues with technology**

5.28 Nearly half of the hearings described in the survey experienced technical difficulties—, - in 44.7% of hearings, respondents reported that there were problems with the technology used. More technical difficulties were experienced during fully video hearings than fully audio hearings:- 50.8% of respondents who had participated in video hearings reported experiencing minor problems during the hearing, and 12.9% reported experiencing significant difficulties during the hearing. Overall, minor problems were most prevalent in partly video hearings (61.5%) although the numbers of people who participated in partly video hearings in this sample were small (n=26). Significant problems were most prevalent in partly audio hearings, although again, the number of partly audio hearings was very small (n=10).

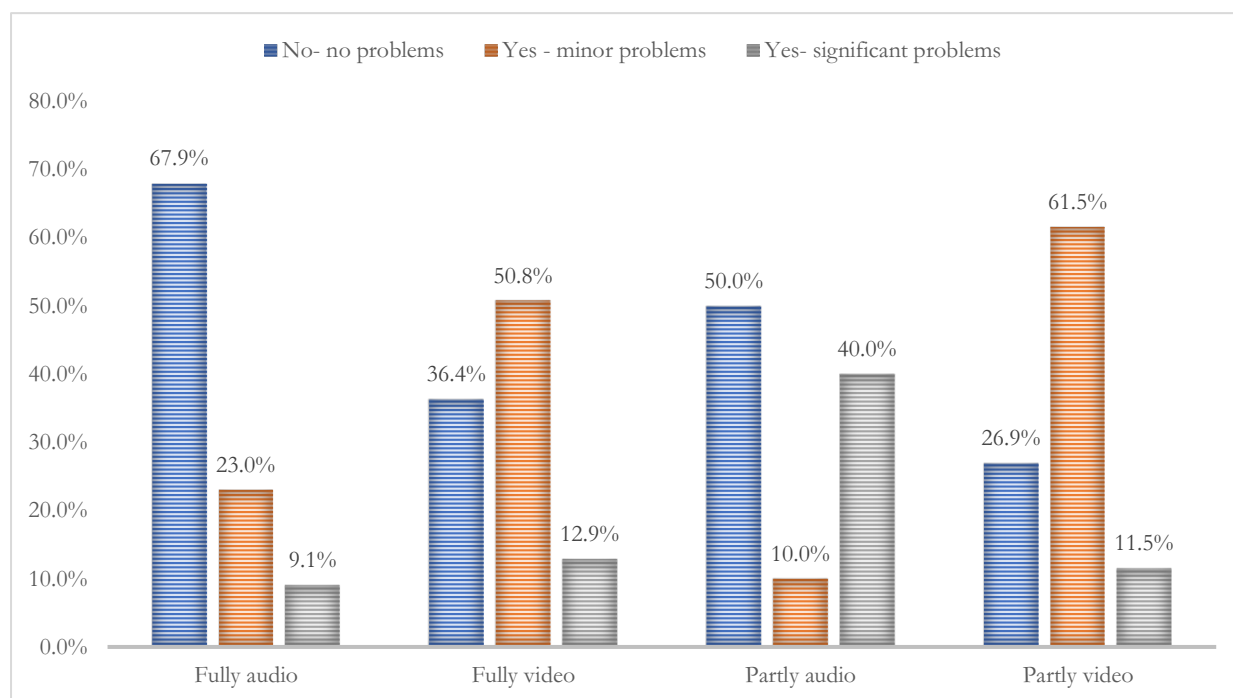


Figure 15: Experience of technical problems by mode of hearing (n=455).

5.29 Figure 16 below demonstrates that, in the sample of cases included in this study, the experience of technical difficulties increases with hearing duration up to one day, then begins to fall slightly for hearings lasting for more than one day.

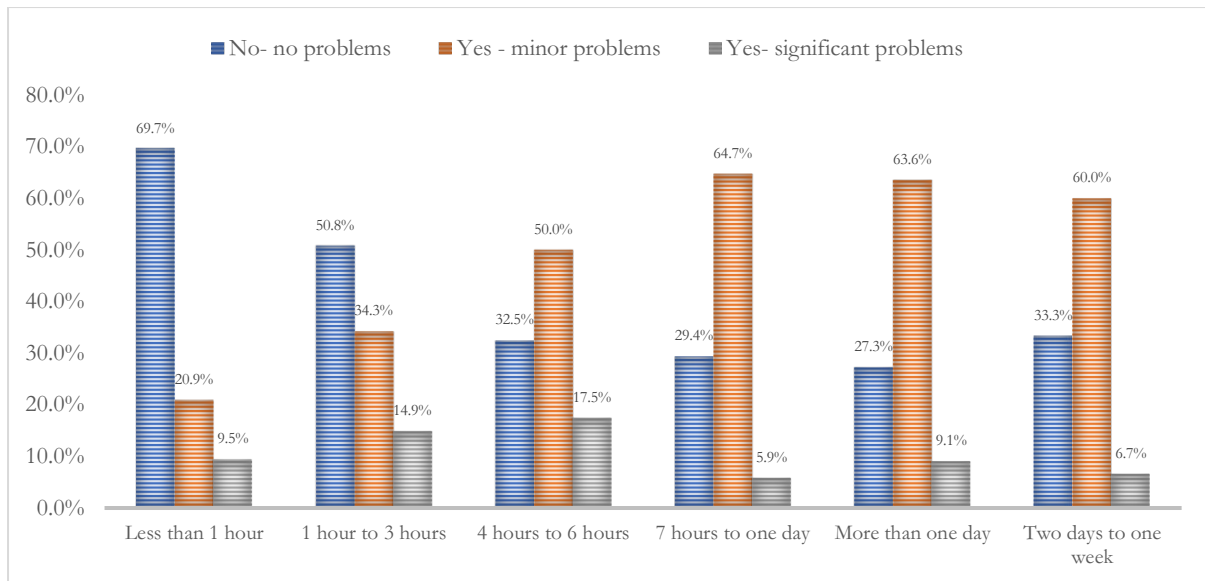


Figure 16: Experience of technical difficulties by hearing duration (n=485)

5.30 Respondents also reported on the number of hearings they had participated in since 19 March 2020, which enabled the construction of a proxy for experience. In general terms, lawyers with greater experience of remote hearings reported fewer technical issues in their most recent hearing, as Figure 17 below demonstrates.

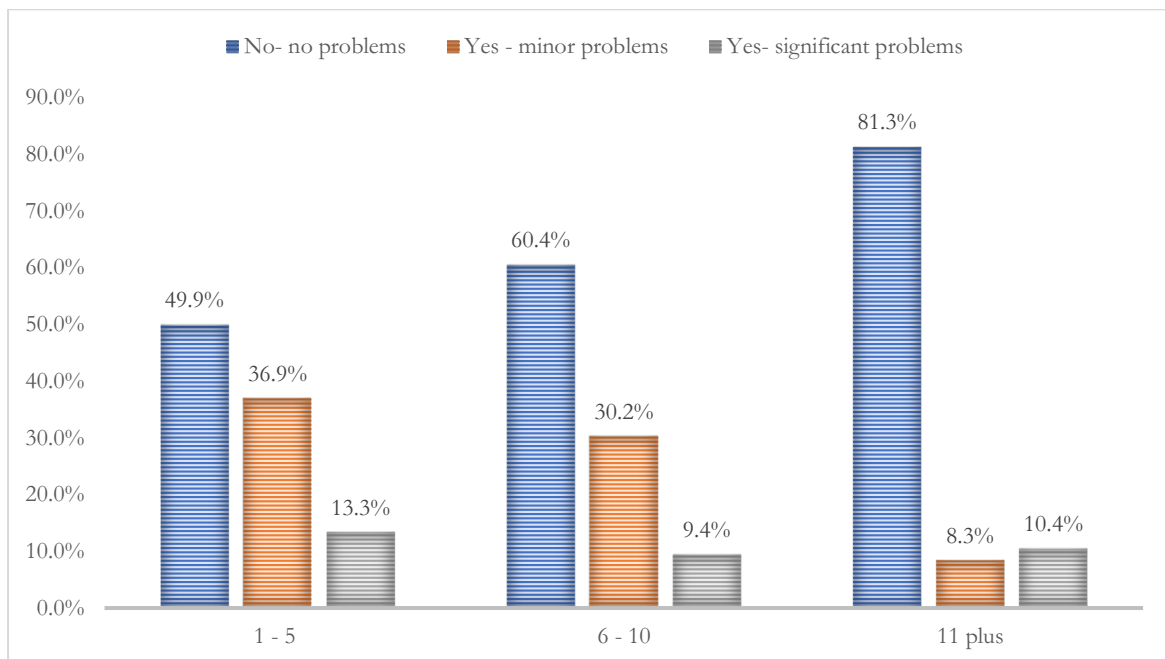


Figure 17: Experience of technical problems by number of remote hearings participated in

5.31 Problems with call connection and audio were the most commonly- reported technical issues. Poor connection (of both phone and internet lines) had caused parties to drop out of the hearings and to lose video or sound during the call. Sometimes these interruptions were only brief and caused no major issues, but in other cases they were persistent and caused significant communication

problems and delays. To overcome these issues parties had occasionally joined the hearing using different channels, with some dialling in via telephone and others using the video platform.

- 5.32 Reported audio problems included issues with telephone lines, microphones and muting, time lags, echoes and audio feedback. These had made it difficult to understand what was being said during the hearing, and had occasionally led to hearings being adjourned. There had been issues with participants speaking over each other or not being able to interject, made worse by parties not being able to see each other. This made it more difficult to have a free-flowing conversation and undermined the ability to advocate effectively: *“There was a delay on the line which meant that making submissions and responding to judicial interventions was difficult. Ultimately the case was very straightforward so it did not cause substantial issues but if the issues were more complex I would be concerned about this type of hearing proceeding by telephone.”* (Survey respondent).
- 5.33 Difficulties joining the call at the outset were also frequently reported: for example due to links failing; login problems; joining details not coming through; multiple invitations for the same hearing being sent; firewall issues; issues with certain platforms or devices. These had caused lengthy delays at the start, as well as parties being completely absent during the hearing.
- 5.34 Other technical problems included:
- ensuring litigants in person were able to join the call
  - difficulties maintaining video connection
  - difficulties receiving and using bundles electronically
  - compatibility issues (e.g. Skype for Business not working on Mac computers)
  - computers crashing.
- 5.35 In many cases, the technical issues lay with the technology available to the judiciary—one respondent commented: *“The judge’s connection was very poor, despite having a dongle (I think) supplied by HMCTS and he was unable to participate by video. The attending lawyers spent longer waiting for him to connect than we did on the substantive part of the hearing.”* (Survey respondent). Some respondents reported significant technical issues that had led to adjournments, but not before substantial court time had been wasted, for example: *“Witness unable to login and then access video on second day led to delay of 1 hr 45 minutes.”* (Survey respondent) and *“Opposing counsel could not be heard for first 90 minutes leading to an adjournment. It appeared he and his solicitor had not conducted test calls in advance”* (Survey respondent).

**L. Characteristics of hearings included: Who provided technical support?**

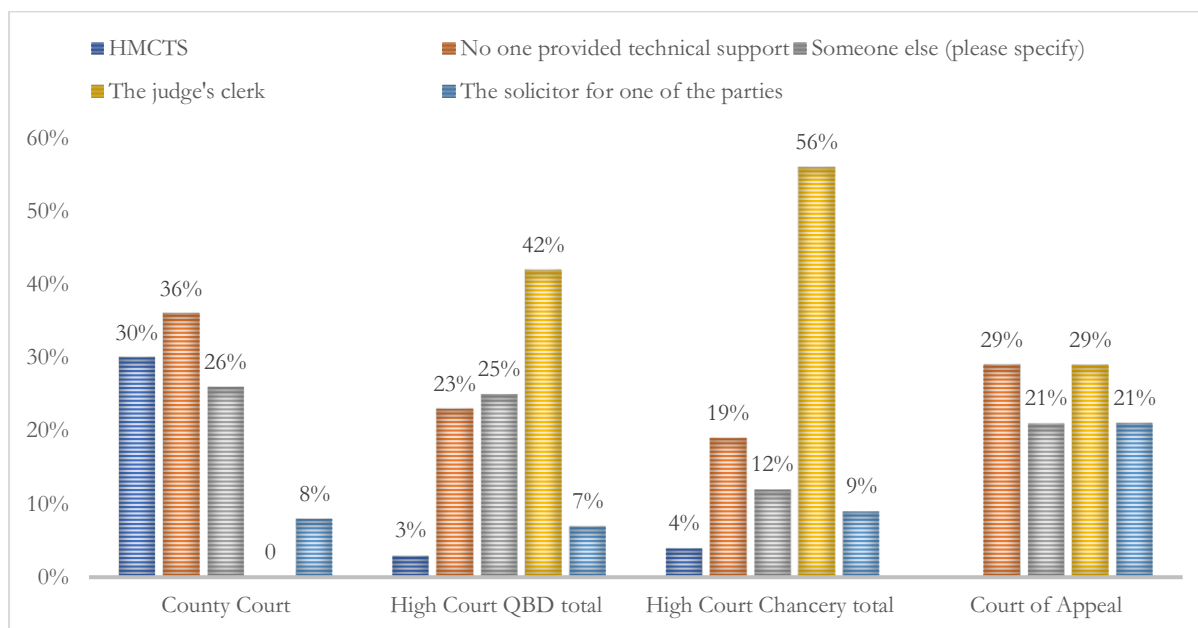


Figure 18: Technical support provided for remote hearings by level of court (n=481)

5.36 When asked about the technical support that had been provided for their remote hearing, 30.4% of respondents reported that no-one had provided technical support. Many respondents reported that technical support had not been used or needed. 18.1% of respondents reported that the judge’s clerk had provided the technical support for their hearing, and 24.1% of respondents stated that “someone else” had delivered this function. Where respondents indicated that someone else had provided support, they were asked to specify who had provided this. The most commonly-reported sources of technical assistance within this category were conference call provider companies, internal IT departments within the respondent’s own firm or chambers, or the judge who was hearing the case. The solicitor for one of the parties provided technical support in 7.9% of the hearings reported in this study, and HMCTS provided the technical assistance in the remaining 8.04%. In the case of fully video hearings, the most common source of technical support was the judge’s clerk, who provided this assistance in 50% of the video hearings included in this study.19.5%.

5.37 Where respondents expressed satisfaction with the support provided, this related to being given clear instructions, having helpful staff on hand and being able to resolve issues quickly as they arose. Where respondents reported negative experiences, these tended to relate to:

- not having any technical support readily available
- not being able to get through to the court when issues arose
- internal IT support not being able to fix problems remotely
- test-runs taking place too late to resolve issues
- reliance on judges’ clerks who do not have relevant technical expertise
- using outdated technology (Skype for Business was frequently cited as causing particular problems)

- disorganised processes for connecting to the call
- difficulties connecting journalists to the call.

5.38 Many respondents shared suggestions for how technical issues could be better addressed in the immediate term. Suggestions provided are summarised at Figure 19 below.

<b>Preparation</b>	<ul style="list-style-type: none"> <li>i.) Conduct dry runs to test the technology in advance of the hearing</li> <li>ii.) Provide sufficient notice of format so all participants can ensure suitable technology is in place</li> <li>iii.) Allocate more time before the start of each hearing to deal with connectivity issues</li> <li>iv.) Provide direct contact details of parties and judge in advance of hearing</li> <li>v.) Have a backup line of communication</li> <li>vi.) Vet the quality of e-bundles</li> <li>vii.) Give longer notice of which judge is going to hear the case and enable hard copy bundles to be delivered</li> <li>viii.) Allow parties to say whether they easily use the chosen platform or not</li> </ul>
<b>Guidance</b>	<ul style="list-style-type: none"> <li>i.) Clearer guidance on e-bundles and filing</li> <li>ii.) Guidance drawing attention to technical incompatibility issues or prior software requirements</li> <li>iii.) Clearly specify who is responsible for setting up any remote hearing</li> <li>iv.) Provide more detailed guidance regarding how to connect to hearings and how to resolve common connection issues</li> </ul>
<b>Technology</b>	<ul style="list-style-type: none"> <li>i.) Use more up-to-date platforms (many petitions for Zoom or Teams rather than Skype for Business)</li> <li>ii.) Use platforms compatible with both PCs and Macs</li> <li>iii.) Invest in remote access areas for clients with no access to technology and broadband</li> <li>iv.) Provide standardised AV package for judges, including high quality webcam, microphone and second screen</li> <li>v.) Ensure that all judges are equipped with a reliable internet connection</li> <li>vi.) Ensure all parties have more than one screen to participate in hearing and view documents</li> </ul>
<b>Conduct of hearing</b>	<ul style="list-style-type: none"> <li>i.) Set ground rules at the start of the hearing</li> <li>ii.) Slow the pace of the hearing and allow parties to re-start submissions where connection is lost</li> <li>iii.) Develop consistent standards of etiquette to ensure parties do not speak over one another (and a standardised approach to muting participants)</li> </ul>
<b>Assistance</b>	<ul style="list-style-type: none"> <li>i.) Provide a dedicated direct helpline for court users</li> <li>ii.) Provide contact number for a court officer</li> </ul>

Figure 19: Summary of suggestions for improving the support provided for remote hearings



**M. Characteristics of hearings included: Fear, distress and frustration**

5.39 Respondents to the survey were asked whether any of the parties involved in their hearing expressed fear or distress before, during or after the hearing took place. 84.6% of respondents (n=411) reported that the parties did not express fear or distress at any point, and 6.9% respondents (n=34) said they didn't know. 5.6% of respondents (n=27) stated that one of the parties had expressed fear or distress before the hearing; 1.4% (n=7) said that one of the parties expressed fear or distress during the hearing and the same proportion 1.4% (n=7) reported that one of the participants had expressed fear or distress after the hearing.

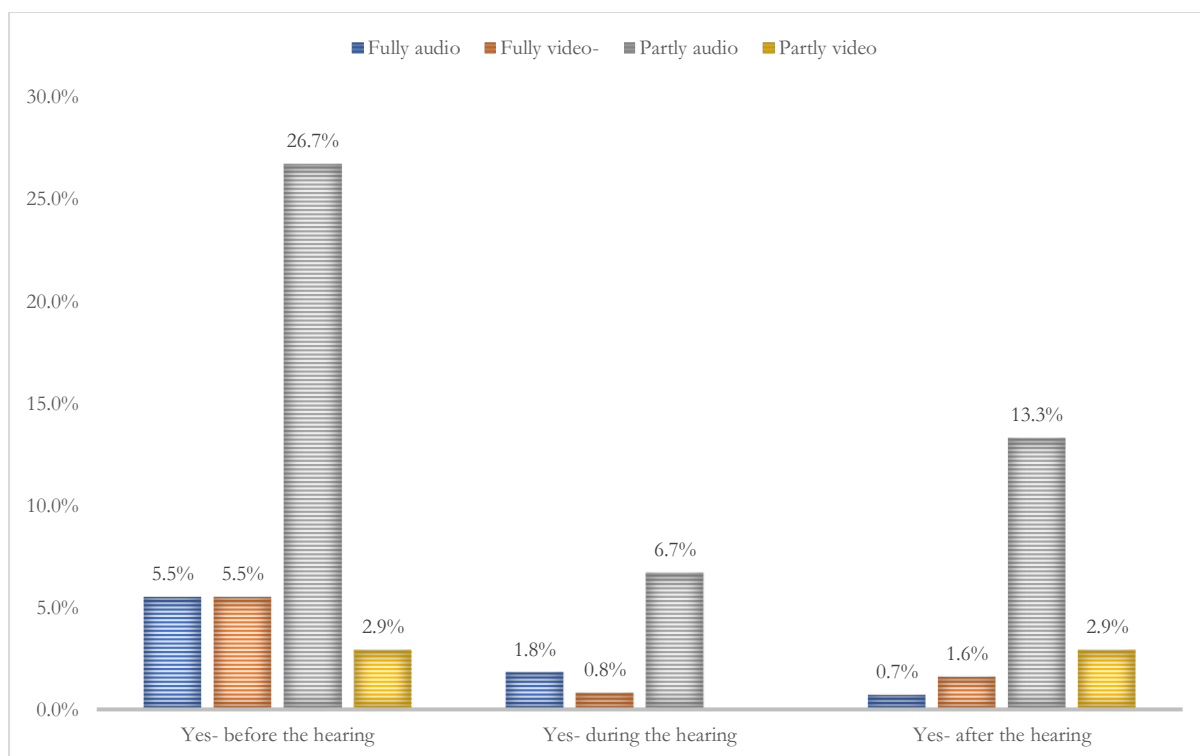


Figure 20: Percentage of respondents reporting that a party expressed fear or distress by mode of hearing

5.40 Figure 20 above shows that partly audio hearings within the sample were those where the highest proportion of parties expressed fear or distress, although the numbers involved are extremely small (only 15 partly audio hearings were reported in total). After this, those hearings with the highest proportion of parties expressing fear or distress were fully audio hearings. It is notable that the only housing and Anti-Social Behaviour Injunction hearings reported in the sample proceeded by audio or partly audio hearing types of hearings where parties are more likely to be distressed and vulnerable.

5.41 Respondents were also asked whether any of the parties involved in the hearing they were describing expressed frustration during the hearing. No frustration was expressed in the vast majority of hearings reported: 86.3% of the hearings proceeded without any of the parties expressing frustration (n=417).

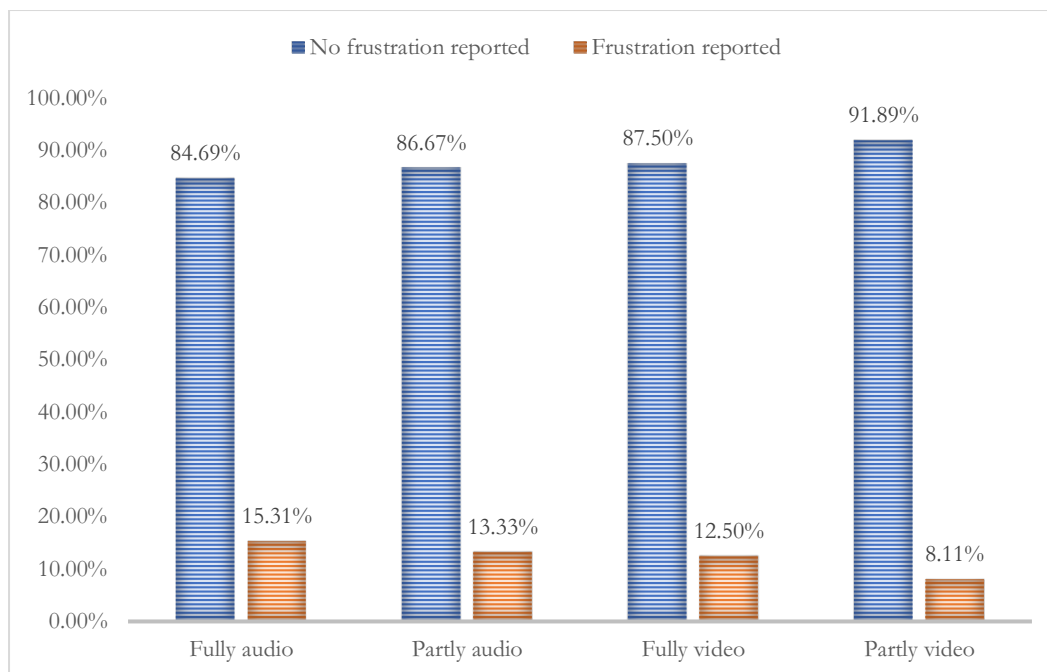


Figure 21: Percentage of hearings where one of more parties expressed frustration by mode of hearing n=483

- 5.42 Figure 21 demonstrates that a slightly higher percentage of respondents reported that one or more of the parties expressed frustration during fully audio hearings than other modes of hearing, although the differences between mode, and absolute numbers reported are small: 45 respondents reported that parties expressed frustration in fully audio hearings, and 17 in fully video hearings.
- 5.43 Where frustration was expressed, problems with the creation of and access to the documents related to the hearing were a commonly-reported cause. Problems reported with documents included missing bundles, judges not receiving files, people having different files or not being able to locate them. Respondents reported that electronic documents could be difficult to use in practice, due to being provided in several different parts or not being hyperlinked appropriately for easy navigation. A separate screen was not always available to view various documents at the same time. Some clients were frustrated with the length of electronic documents or did not understand them. Explaining documents remotely was not easy, especially when clients had to view them on their phones at the same time as talking to the legal advisor.
- 5.44 Another common theme was audio problems. Judges and counsel could sometimes not be heard properly, or there was poor signal and interference on the line. There could be difficulties with parties interrupting each other or judges not being able to interject.
- 5.45 Connecting to the conference at the outset had caused issues in some cases, including being unable to get through to the court or the judge. Internet connectivity problems had caused interruptions during some hearings. These delays added to the length of hearings or prevented issues being dealt with properly.

5.46 Communication had been difficult in some cases due to the remote nature of the hearing. This included communication among legal teams (for example taking instructions or providing clarification) and between lawyers and lay clients, where the mode of hearing prevented lawyers from explaining or discussing what was happening. It was reported that some lay clients could not follow or understand the proceedings and had become upset or overwhelmed; this included where clients were not fluent English speakers.

**N. Characteristics of hearings included: Parties interrupting each other**

5.47 Respondents reported issues with parties interrupting each other in 44% of hearings (n=473) with moderate to serious issues experienced in 6.6% of cases. Issues were most commonly experienced in fully audio hearings. In general terms, as the complexity of the hearing rose, so did the experience of issues with parties interrupting each other during fully audio hearings. Issues were experienced with parties interrupting each other in fully audio hearings in 40.8% of interlocutory hearings (n=63); 38.5% of trials (n=40); 57.15% of appeals (n=4); 62.5% of costs hearings (n=5) and 58.3% of enforcement proceedings (n=7) although the absolute numbers involved are small. The biggest increase in the experience of issues during fully video hearings occurred between the interlocutory and trial categories of hearing—the experience of problems with parties interrupting each other rose by 12% between these two categories.

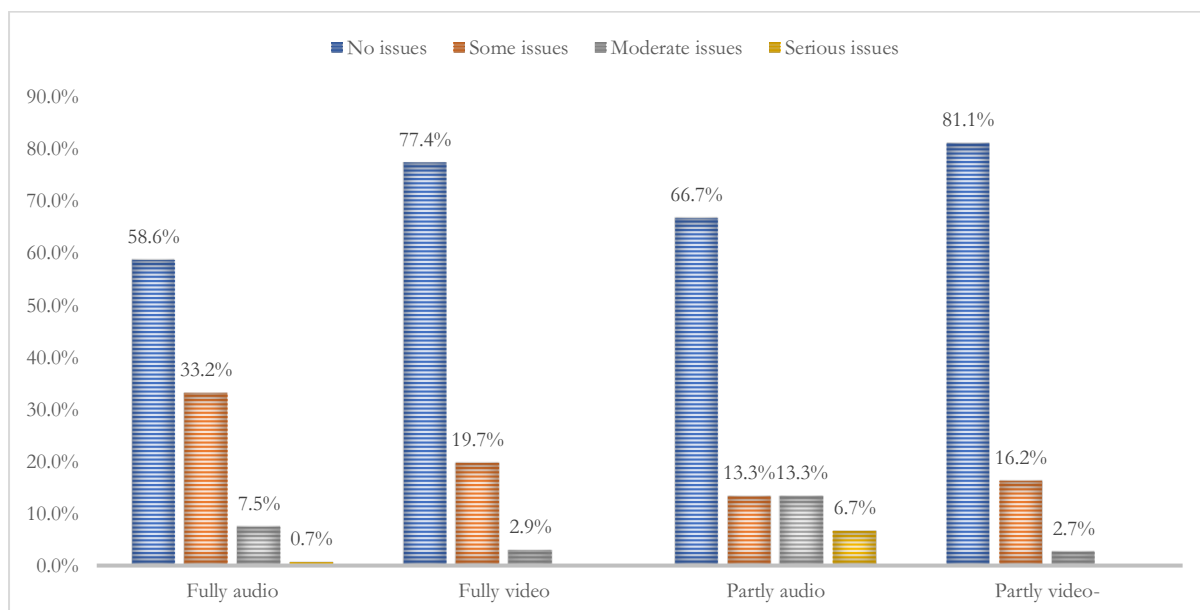


Figure 22: Parties interrupting each other by mode of hearing (n=484)

5.48 Many parties described the issues experienced with parties talking over each other in audio hearings as inevitable—the most common difficulty was not having visual cues so that parties could gauge who should speak when. Respondents stated, “It is sometimes difficult to tell when someone has stopped speaking because you don’t get the visual signals” (Survey respondent).

5.49 Issues with over-speaking were far less common in video hearings, although they were reported as occurring due to time lag, connection problems and difficulty reading body language. Several responses highlighted particular difficulties with lay parties and litigants in person interrupting.

5.50 The role of the judge was important in managing interruptions. Respondents stated that judges need to give clear indications of who should speak when, ensure turns were taken and invite comments from all parties. Good etiquette and familiarity with the process on the part of the participants was associated with hearings going smoothly. Comments included:

*“Generally we take the lead from the judge but when there is scope for discussion, it is hard on telephone hearings to know who the judge wants to speak next or who he/she is expecting to hear from if he/she does not make that clear verbally.”* (Survey respondent)

*“No issues, due to good judicial management mainly. Also the fact that my opponent and I had done this before, but mainly it was due to the Judge.”* (Survey respondent)

**O. Characteristics of hearings included: Problems communicating during the hearing**

5.51 Within this sample of hearings, the majority of respondents reported no difficulties communicating with either their client or other lawyers during the hearing. 87.8% of respondents reported no problems communicating with their client (n=426) and 84.7% reported no problems communicating with other lawyers.

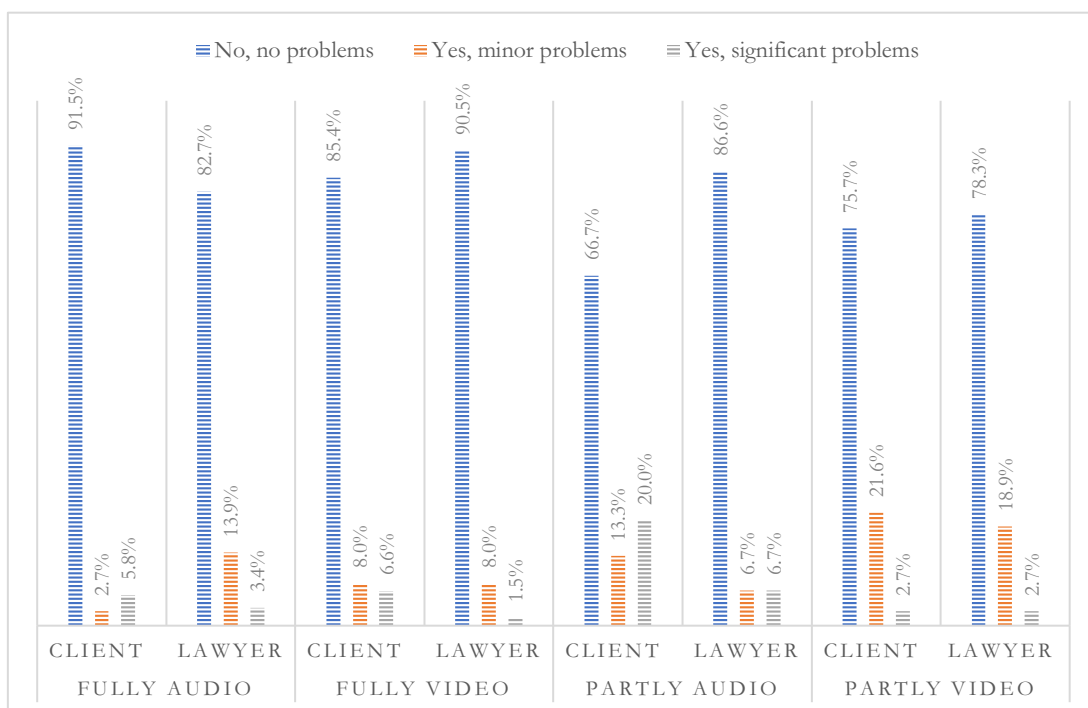


Figure 23: Issues communicating with clients and other lawyers during remote hearings (n=485)

5.52 Within this sample, a higher proportion of respondents reported experiencing significant problems communicating with their client in fully audio and partly audio hearings (25.8%) than in fully video

and partly video hearings (9.3%). In some cases it had been impossible to communicate with clients during the hearing. This was more commonly reported in fully audio hearings but had occurred in video hearings too. Reasons were not always provided for this, but included:

- needing to connect to the hearing via phone, therefore could not use it to communicate with client;
- clients only having telephones as a means to connect with the hearing
- clients not being able to participate in the hearing
- having no private connection so that communications could be heard by the whole court
- issues with the technology (such as phones connected to desktop computers interrupting video hearings)
- having insufficient time during the hearing to communicate.

5.53 Another commonly-reported problem which impacted on the ability of respondents to communicate with their clients was the impact of technology on the speed with which messages could be relayed. This was reported in both audio and video hearings. Examples included:

- not being able to type fast enough
- messages crossing
- delays receiving messages
- difficulties in ascertaining whether messages had been relayed.

5.54 Significant multi-tasking was required to communicate with clients during remote hearings and this had presented considerable challenges for both audio and video hearings. Communication with clients had to happen privately and simultaneously as the hearing took place. Respondents described difficulties concentrating on the hearing and making submissions, whilst also dealing with emails or texts. Notifications had to be muted to avoid disrupting the hearing, which could cause messages to be missed. Sometimes separate devices were needed to view documents and messages, and it was difficult to keep an eye on everything at once. In some cases the hearing had to be paused to allow communication to happen. Responses included:

*“It was sometimes hard to notice that I had an email because my phone was on silent and my computer was showing the video and bundle screens.”* (Survey respondent)

*“Communicating with the client whilst on an open call is essentially impossible with any clarity or speed. Email is too slow and is distracting and text generally is too slow.”* (Survey respondent)

*“It is difficult as advocate to take instructions from a client during a remote hearing. I was using my laptop to stream the video connection and my i-Pad to look at documents which were in electronic form (as well as looking at a hard-copy of the trial bundle). It is not realistic to take detailed instructions from a third device while speaking.”* (Survey respondent)

5.55 The main issue raised by respondents in the context of the impact of remote hearings on the ability to communicate with other lawyers was the lack of opportunity for private discussion, which was reported in both audio and video hearings. The usual opportunities for liaison with opponents were

absent, such as before the hearing and during the morning and afternoon breaks. Respondents felt that providing some means of replicating this would be helpful; suggestions included being provided with contact details of parties, having separate chat channels within the remote platform, being placed together in waiting rooms (for video hearings), and having longer breaks to allow for private discussions. It was also suggested that the overall pace of remote hearings could be reduced, to enable messages between lawyers to be sent and received. Comments raised by respondents included:

*“It would have been useful (as it usually is) to communicate with my opponent prior to the hearing. I did not have my opponent’s telephone number.”* (Survey respondent)

*“One of the losses of AV hearings are the pre- and post-hearing minutes and the times in the adjournments for sensible liaison.”* (Survey respondent)

*“Communications over email and Whats.App are not instantaneous - which makes it harder to pass messages to lead counsel during a hearing. This needs to be accommodated for by judges in the overall pace of the hearing.”* (Survey respondent)

5.56 Respondents were asked to comment on the extent to which they felt the judge had understood the arguments they had made during the remote hearing they described. Respondents were asked to record the extent to which they agreed with the statement: “I felt the judge understood my arguments”. Overall, 86.2% of respondents agreed or strongly agreed with the statement (n=480).

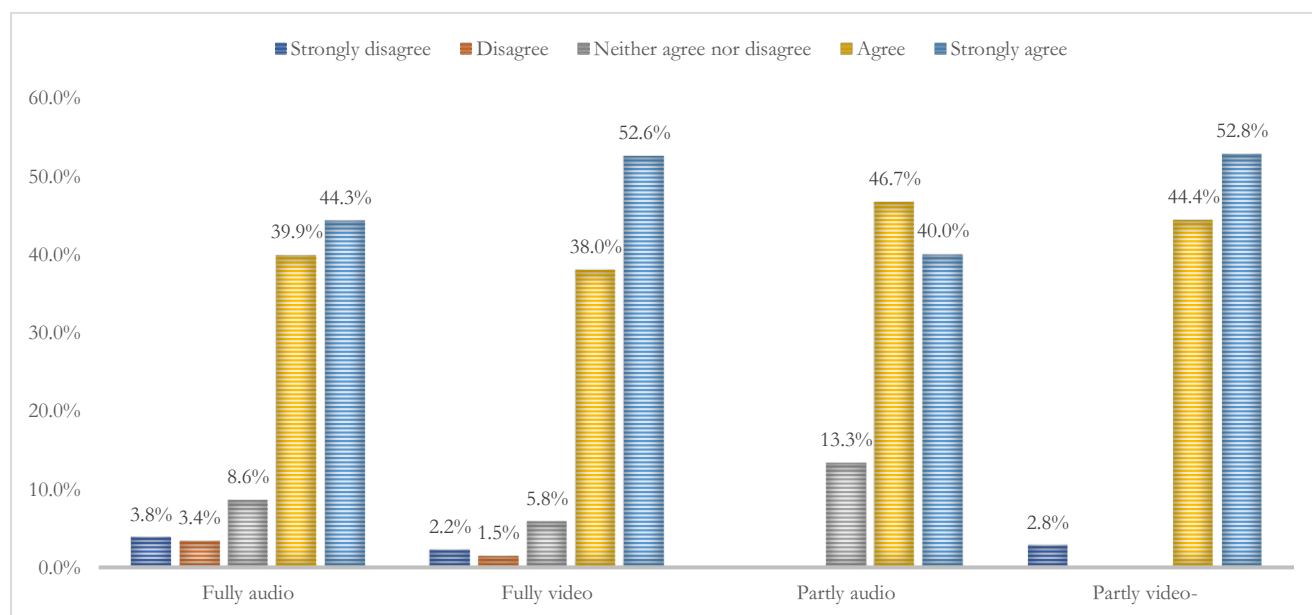


Figure 24: Agreement with statement- "I felt the judge understood my arguments"

5.57 A number of factors had given respondents confidence in the judge’s understanding of the points they had made during the hearing. These included:

- **Detailed preparation of skeleton arguments and bundle documents:** Respondents reported that these had been submitted, received, read in advance and understood by the judge.

- **The ability to see the judge’s reaction:** The ability to see the judge’s reaction was felt to be important in building confidence that he/she had understood the points made.
- **Evidence of judicial engagement:** The judge had listened carefully to both parties, engaged with submissions, asked searching questions and taken on board the arguments.
- **Competence and demeanour:** Respondents were confident that the judge had understood their arguments where they conveyed their experience with the area of law, applied the law correctly, ensured issues were dealt with properly and took a measured and professional approach.
- **Straightforward hearings:** Many respondents reported that the hearings they had participated in were routine, uncontentious, highly structured, and involved no complex arguments or issues of law (for example, Stage 3 assessments). The hearing was short, did not involve lay clients, required no questioning of witnesses and parties were represented by qualified advocates.

5.58 The majority of respondents felt that the mode of the hearing had not affected the quality of submissions, the way arguments were understood or the quality of the decision-making process itself. Comments included:

*“I felt the judge was as engaged with my submissions as they would have been had we been in person.”* (Survey respondent)

*“Adequate time was allowed for submissions and any further comment, judge gave a fully-reasoned ex tempore judgment.”* (Survey respondent)

5.59 However, some respondents indicated that they did not feel confident the judge had understood the arguments they had made. In some cases, this lack of confidence was attributed to written submissions being received late or not at all, and accounts were given of judges missing bundles or struggling to navigate them electronically. Other concerns included that insufficient time had been provided to hear the arguments or that submissions had not been heard at all. There were also comments about the impact of the mode of hearing on the ability to present arguments effectively; all of these comments related to fully audio hearings. Respondents had felt they were less able to influence the judge over the audio. They had found it difficult to read the judge and gauge which points had been understood, affecting the quality of their advocacy. Others were uncertain whether their arguments had been understood and felt that remote hearings led to increased reliance on written submissions and the instincts of the judge.

*“I have found it significantly more difficult to ‘read’ the judge and understand which points they require more/fewer submissions on. I worry that this has a significantly detrimental effect on the presentation of a case. It makes the advocate more likely to miss a cue and either under/over address the judge on a point.”* (Survey respondent)

*“Nowhere near the force to my arguments that one would expect in person. Judge much more easily able to dismiss points and much more difficult to sway by advocacy. Much worse ability to do any back and forth exchanges with a view to persuading the judge.”* (Survey respondent)

**P. Characteristics of hearings included: Agreement with outcome**

5.60 Respondents were asked to indicate whether they agreed with the outcome in their case—the majority of lawyers who participated in this survey agreed with the outcome the judge had reached in respect of their hearing, 86.4% (n=434). Respondents were also asked whether their client had agreed with the outcome in their hearing: 83.3% of respondents indicated that their client had agreed with the outcome (n=419).

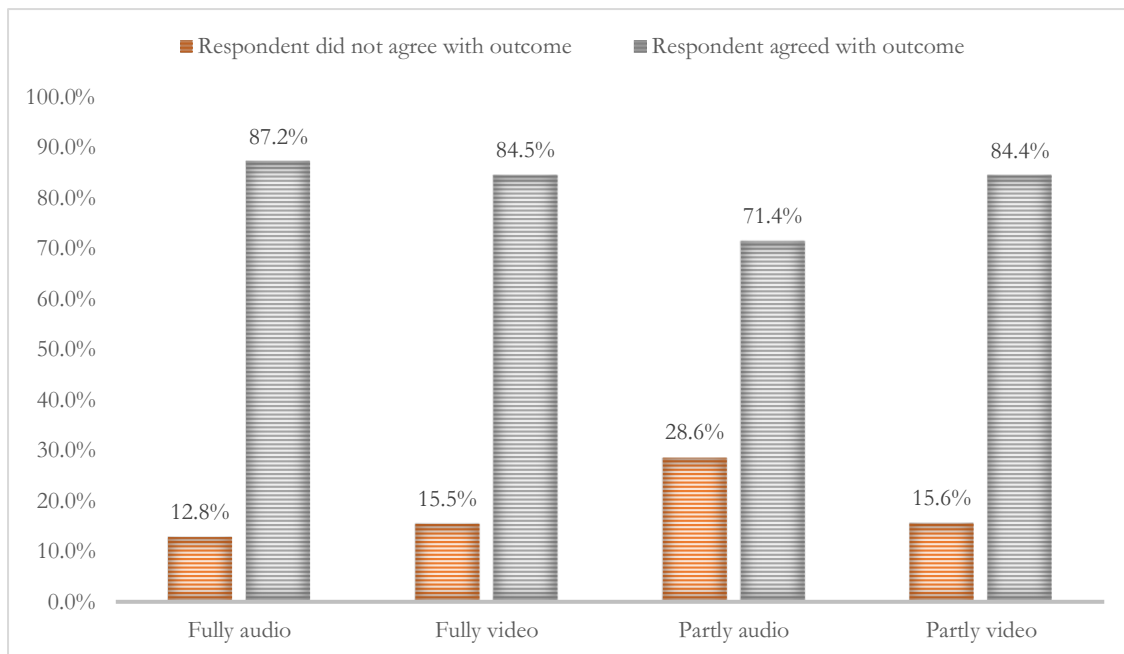


Figure 25: Lawyer agreement with hearing outcome (n=434)

5.61 The highest proportion of lawyers disagreed with the outcome where the hearing they had participated in was a partly audio hearing, although the absolute numbers are small (n=15). Respondents were then asked whether their client agreed with the outcome of the hearing: again, the majority of respondents reported that their client agreed with the outcome—83.3% stated that their client agreed (n=419).



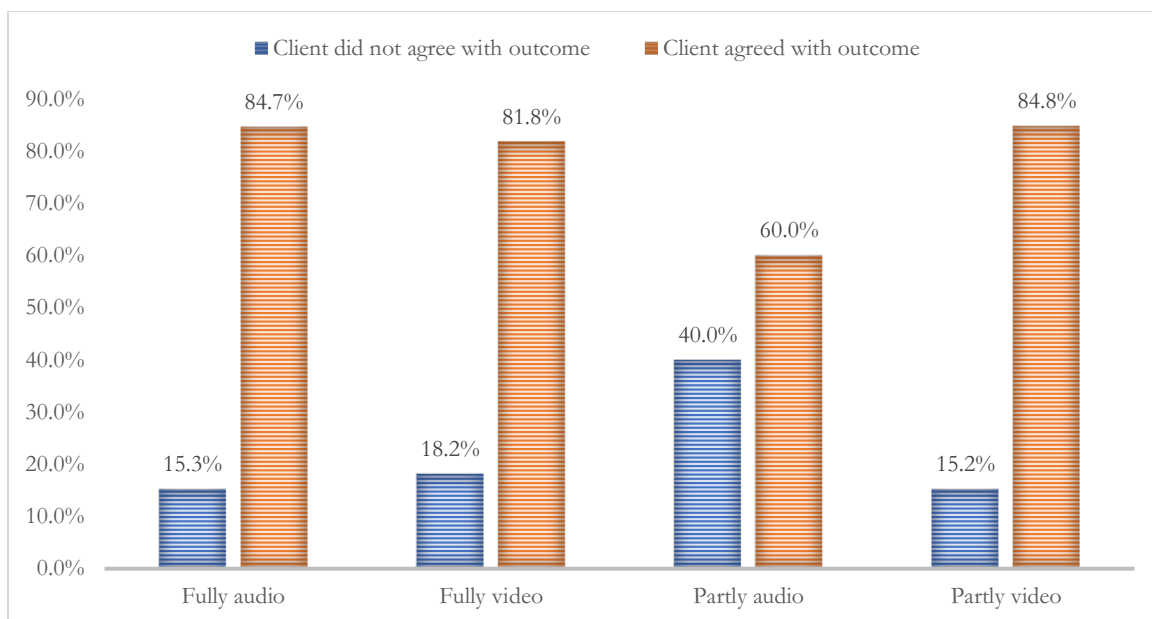


Figure 26: Client agreement with outcome by mode of bearing

5.62 As can be seen from Figure 26 above, the highest proportion of clients who were reported to have disagreed with the outcome of their case took part in a partly audio hearing (although as above, the absolute numbers are small (n=15). The second-highest proportion of clients who were reported to have disagreed with the outcome of their case were those who took part in a fully video hearing: 18.2% of clients who participated in fully video hearings were reported to have disagreed with the outcome.

**Q. Characteristics of hearings included: - Satisfaction with hearings**

5.63 Respondents were asked two questions to gauge their overall satisfaction with the hearing they had described. Respondents were asked to state whether their overall perception of the hearing was very positive, positive, neither positive or negative, negative or very negative. Respondents were also asked whether they would recommend taking part in a remote hearing to their colleagues and clients.

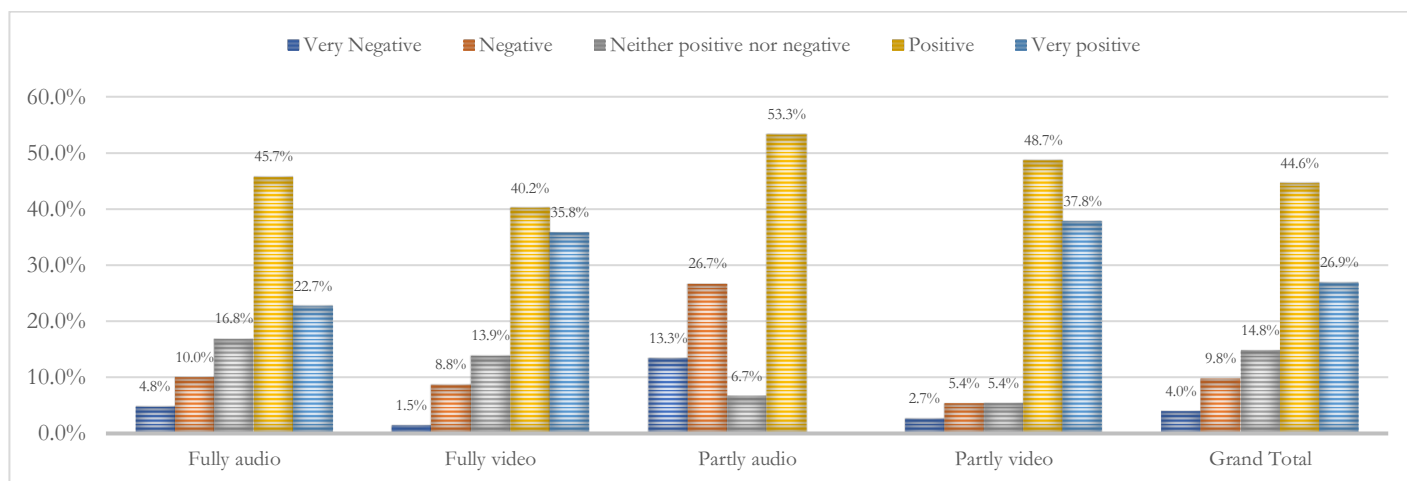


Figure 27: Overall perception of bearing by mode of bearing (n=480)

5.64 As Figure 27 above demonstrates, the majority of respondents were partly or very satisfied with the hearings they had described: 71.5% of respondents (n=303) described their perception of the hearing as positive or very positive. 86.9% of respondents to the survey (n=412) reported that they would recommend participating in a remote hearing to their colleagues and clients.

5.65 Levels of satisfaction with remote hearings vary significantly by level of court- the higher proportions of respondents reported positive or very positive perceptions of remote hearings in the Senior Courts (see Figure 28 below). 17% of respondents in the County Court reported negative or very negative perceptions of their hearing, compared to 9% in the High Court Chancery Division and 9% in the High Court Queens Bench Division. Section R below investigates the drivers of positive perceptions of hearings within this sample.

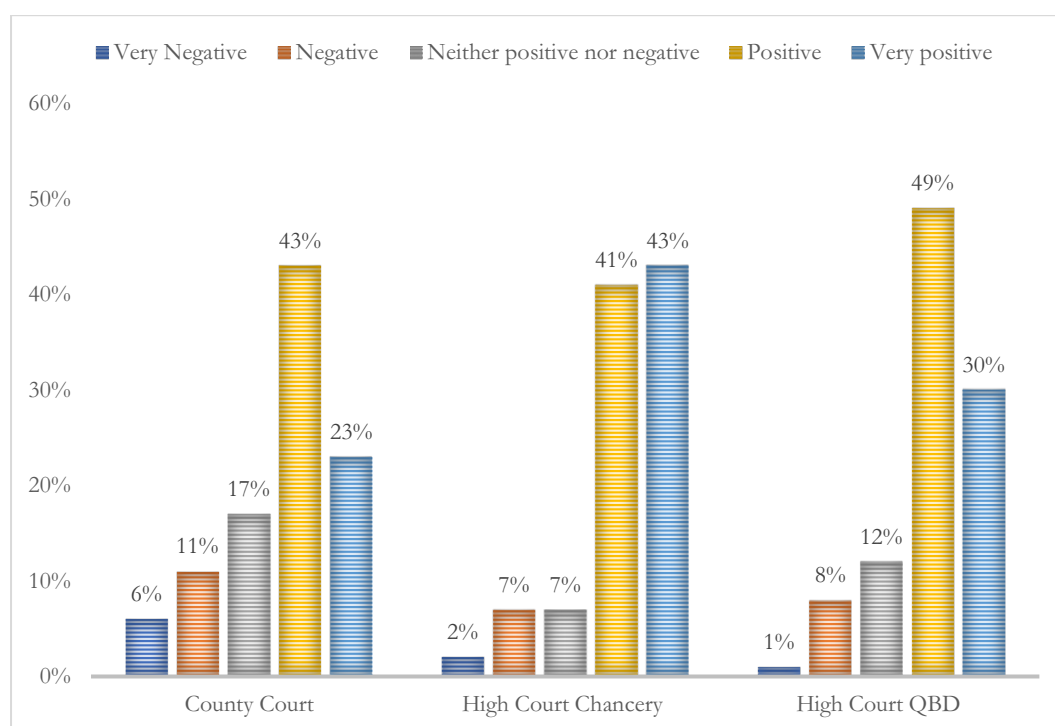


Figure 28: Perceptions of hearings by court

**R. Understanding the factors that drive positive perceptions of remote hearings**

5.66 Positive perceptions of court hearings are important, because they are closely related to trust and confidence in the justice system.<sup>28</sup> In order to ensure that trust in the justice system is maintained through COVID-19, it is important to understand the factors that drive positive perceptions of remote hearings (and therefore those which are most important to get right). In order to understand which factors were most important in driving positive perceptions of remote hearings amongst this sample of court users, regression analysis was conducted. Ordered probit and probit models were applied to the data and used to examine the impact of a range of factors on overall impressions of

<sup>28</sup> See for example, Tyler, T. (2001) “Public Trust and Confidence in Legal Authorities: What do majority and minority group members want from the law and legal institutions? Behavioural Sciences and the Law: 19:215-235.

hearings, and whether the respondent would recommend participating in remote hearings to colleagues and their clients, as shown in Figure 26 below.

<p><b>MODEL 1:</b> Overall impression of hearing = <math>f(\text{case type} + \text{severity} + \text{duration} + \text{technical problems} + \text{litigant in person} + \text{experience with remote hearings} + \text{days since rollout of remote hearings} + \text{agreement with outcome} + \text{type of technology used} + \text{region})</math></p>
<p><b>MODEL 2:</b> Overall impression = <math>f(\text{case type} + \text{technical problems} + \text{litigant in person} + \text{experience with remote hearings} + \text{days since rollout of remote hearings} + \text{agreement with outcome} + \text{type of technology used} + \text{region})</math></p>
<p><b>MODEL 3:</b> Recommend = <math>f(\text{case type} + \text{severity} + \text{duration} + \text{technical problems} + \text{litigant in person} + \text{experience with remote hearings} + \text{days since rollout of remote hearings} + \text{agreement with outcome} + \text{type of technology used} + \text{region})</math></p>
<p><b>MODEL 4:</b> Recommend = <math>f(\text{case type} + \text{technical problems} + \text{litigant in person} + \text{experience with remote hearings} + \text{days since rollout of remote hearings} + \text{agreement with outcome} + \text{type of technology used} + \text{region})</math></p>

Figure 29: Models applied to data to assess drivers of positive perceptions of remote hearings

A detailed explanation of the models applied to the data and findings from the regression analysis is included at Appendix E.

- 5.67 Within this sample of cases, it was found that the experience of technical problems makes it more likely that the overall impression of the hearing will be lower. Those who experienced technical problems in their most recent hearing were 29.7% less likely to have a very positive overall impression of the hearing in comparison to those who experienced no technical problems. They were also 11.3% and 3.7% more likely to hold a negative or very negative impression of the hearing.
- 5.68 Agreeing with the outcome of the hearing makes it more likely that the overall impression of the hearing will be higher. Respondents who agree with the outcome are 30.9% more likely to have a very positive overall impression of the hearing, and 10-13% more likely to recommend remote hearings than those who disagree with the outcome. Further research is required to understand the implications of this finding for future practice, however, it could be the case that hearings where the outcome is more likely to be contested or contentious are less suited to conduct by remote hearing. Where it is likely that there will be significant disagreement with the outcome on the part of one or more of the parties, consideration could be given to whether the hearing should be adjourned until such point that it can be held in person.
- 5.69 Having a hearing by video makes it more likely that that the overall impression of the hearing will be higher, compared with audio hearings. Those whose hearings were held by video were around 24% more likely to report having a very positive overall impression of the hearing, and 11% more likely to recommend remote hearings than those whose hearings were held by audio, holding all other factors constant.

- 5.70 Within this group of respondents, the more experience the individual has with remote hearings, the more likely it is that their impression of the hearing will be higher, compared to having less experience. If this finding holds true more broadly it is potentially important, because the majority of lay court users are unlikely to be able to build experience by participating in multiple remote hearings.
- 5.71 Interestingly, the more recently their remote hearing was conducted, the less likely respondents were to report an overall positive impression. This reasons for this require further investigation: one hypothesis could be that people's expectations of remote hearings are higher now than they were at the beginning of the crisis, when participants were likely to be more forgiving of technical and other issues.
- 5.72 Where a litigant in person was involved in the hearing, respondents were more likely to report having a lower impression of the hearing overall.<sup>29</sup>
- 5.73 Costs hearings are more likely than interlocutory hearings to be included in the overall higher impression categories (positive, very positive). Enforcement hearings, appeals and trials are more likely to be in the overall lower impression categories (negative, very negative) compared to interlocutory hearings. This may indicate which hearings are most suitable to be conducted remotely.

#### **S. Comparing remote hearings to physical hearings: Better or worse?**

- 5.74 Respondents were asked a series of questions comparing their experience of remote hearings under COVID-19 to physical hearings. In spite of the broadly positive experiences of remote hearings reported above, the majority of respondents reported that hearings in person were better and more effective than video or audio hearings. In addition, many respondents reported that audio and video hearings were more tiring than physical hearings. The impact of remote hearings on the expense associated with participating in hearings were less emphatic than might be expected: only 35.8% of respondents felt that remote hearings were less expensive than physical hearings.

<sup>29</sup> Although this finding did not reach statistical significance.

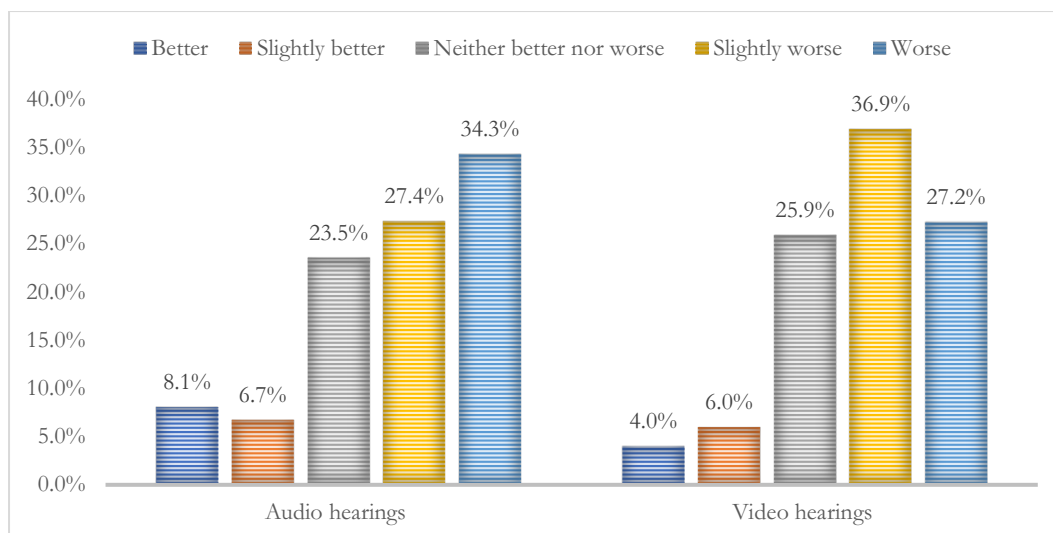


Figure 30: Are remote hearings better or worse than physical hearings? (n=446 for audio hearings, n=301 for video hearings)<sup>30</sup>

5.75 Respondents were asked to state whether, in their experience, audio and video hearings were better or worse than physical hearings. As Figure 30 above shows, 61.7% of respondents felt that audio hearings were slightly worse or worse than physical hearings, and 63.9% felt that video hearings were slightly worse or worse than physical hearings.

5.76 The minority of respondents who felt that audio hearings were slightly better or better than physical hearings reported that, for routine procedural hearings, audio hearings were a more sensible option than physical hearings as there were no tangible benefits to proceeding in person. Straightforward hearings not involving live witness evidence, such as interlocutory hearings and even fast-track trials were felt to be highly suited to determination by audio. In addition, respondents felt that audio hearings were more efficient, due to reduced travel and waiting time, and offered tangible benefits for work/life balance and the environment. The potential benefits to the environment conferred by the widespread adoption of remote hearings was emphasised in a collective submission to the consultation by large law firm Mishcon de Reya (n=900). Similarly, the minority of respondents who felt that video hearings were better or slightly better than hearings in person felt that video hearings were most appropriately used for procedural hearings. Respondents reported that video hearings facilitated efficient use of time and reduced the time and costs associated with the platform. Those who felt video hearings were better than in-person hearings reported experience of video hearings where the platform provided high quality audio and video, the potential for recording the hearing and the ability to easily share documents.

5.77 The majority of respondents who felt that audio hearings were worse than physical hearings most often cited the difficulties audio hearings pose in relation to effective communication. Respondents reported that not being able to see the judge and other participants made it harder to engage and

<sup>30</sup> Respondents who had not participated in a telephone or video hearing were asked to select “Not applicable- I have not participated in a telephone or video hearing” which accounts for the difference in number of respondents reported.

communicate well. It was difficult to gauge people's reactions, making it harder to know how to present a case and when to speak. Difficulties in exchanging documents and taking instructions from clients were also commonly cited. The majority of respondents felt that trials involving witnesses and where cross examination is involved were unsuitable for audio hearings. In addition, long and complex cases, highly contested hearings and those involving litigants in person and vulnerable parties were felt to be unsuitable for determination via audio.

- 5.78 As Figure 30 above shows, the majority of respondents felt that video hearings were worse than hearings conducted in person. The principal explanation given for this response was the impact that video hearings have on the ability to communicate with clients and other legal teams. Respondents felt that dialogue was less fluent when hearings proceeded by video, and that it was less easy to gauge reactions and respond appropriately. The prevalence of technical issues was commonly cited as a reason for thinking that video hearings were worse than hearings in person: many respondents stated that the information technology provided for video hearings was counter-intuitive and prone to failure. Frustration with connection problems, delays and time lags was also commonly expressed.
- 5.79 Many respondents expressed the view that video hearings were a reasonable alternative to hearings in person in the context of COVID-19, despite being not as good as hearings in person. Respondents felt that video hearings were preferable to audio hearings due to the visual element and improved engagement with other participants. As with audio hearings, video hearings were thought to work well for non-contentious or procedural issues, but not for contested applications, complex issues or trials involving witnesses.

#### **T. Remote hearings: Participation and efficacy**

- 5.80 The definition of access to justice set out under common law in England and Wales can be summarised as comprising four elements: i.) access to the formal legal system, ii.) access to a fair and effective hearing, iii.) access to a decision on the merits of the case and iv.) access to a remedy.<sup>31</sup> The existing case law on access to justice gives primacy to the notion of an individual being able to put his or her case effectively. When the issues involved in a case are too factually or legally complex for an individual to present their case effectively the courts have recognised a requirement for representation and legal aid (see for example, *R(Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710). The right to a fair and effective hearing is also enshrined in Article 6 of the European Convention on Human Rights [ECHR]. Article 6 provides that individuals have the right to be heard by an independent, impartial tribunal in public and within a reasonable

<sup>31</sup> The legal basis for this definition is set out in two publications: i.) Byrom N (2019a) "Developing the Detail: Evaluating the Impact of Court Reform in England and Wales." Available at: <https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Developing-the-Detail-Evaluating-the-Impact-of-Court-Reform-in-England-and-Wales-on-Access-to-Justice-FINAL.pdf> and ii.) "Digital Justice: HMCTS data strategy and delivering access to justice, Report and recommendations." Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/835778/DigitalJusticeFINAL.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF)

amount of time.<sup>32</sup> Article 6(1) applies both to cases involving civil rights and obligations and to criminal cases. Accordingly, whether remote hearings can enable parties to participate and put their case effectively goes to the heart of whether they are capable of upholding access to justice.

5.81 Participants were asked whether, in their experience, audio and video hearings are effective or ineffective in terms of allowing both parties to participate and put their case. As Figure 31 below demonstrates, the majority of respondents felt that audio hearings were mostly effective or effective in allowing both parties to participate and put their case (61.3%). 28.6% of respondents thought that audio hearings were slightly ineffective or ineffective. A slightly higher proportion of respondents felt that video hearings were mostly effective or effective in allowing both parties to participate and put their case (68.37%).

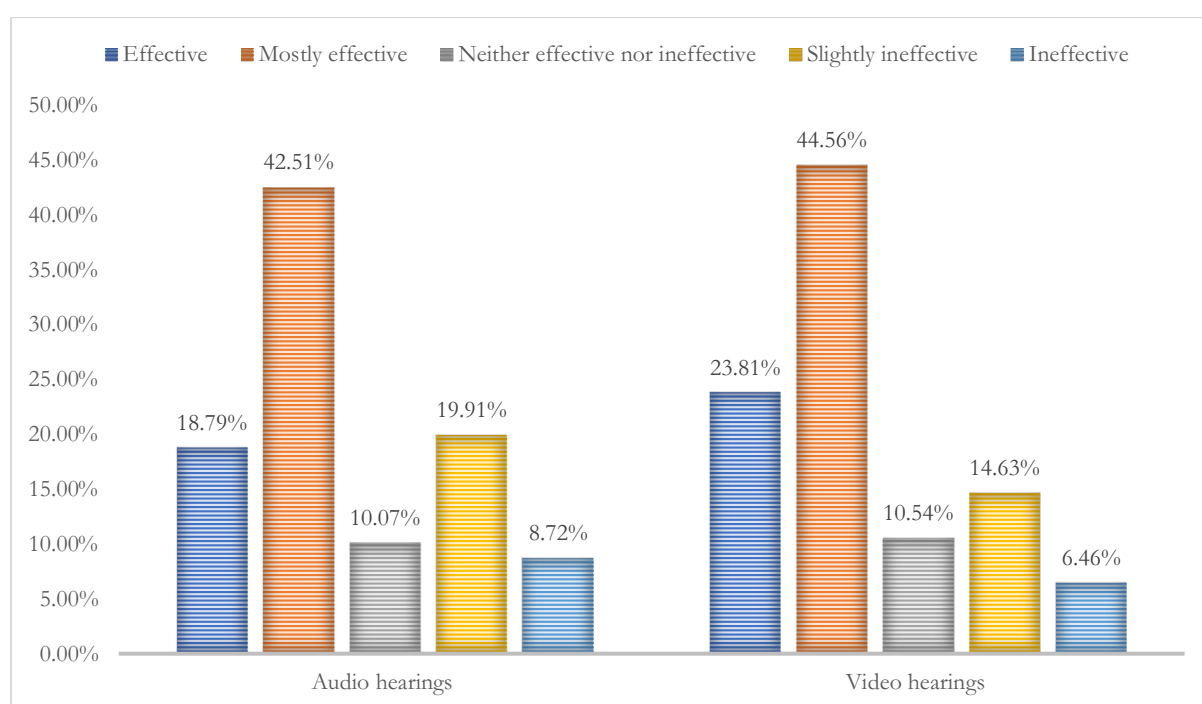


Figure 31: Are audio and video hearings effective or ineffective in allowing both parties to participate and put their case? (n=445 for audio hearings, n=295 for video hearings)

5.82 Respondents felt that audio hearings were effective at facilitating participation for many types of non-contentious, non-complex hearings and routine procedural matters. This was particularly the case where the hearings did not ordinarily require the attendance of the parties. Interestingly, respondents based their assessment of the efficacy of audio hearings on the outcomes that they had secured, stating that audio hearings were effective because the outcomes received did not differ in their view from the outcome they would have received in person. Where respondents reported that audio hearings were mostly effective or effective, they explained their response with reference to the quality of communication they had experienced with the judge and other parties. For example, respondents felt audio hearings had been effective when the parties had been able to put their cases

<sup>32</sup> Choudhry, S. and Herring, J. (2017) "A human right to legal aid? The implications of changes to the legal aid scheme for victims of domestic abuse" *Journal of Social Welfare and Family Law*, 39:2, 152-167.

to the judge in the usual way, had sufficient time to convey their arguments and felt that they had been listened to and understood.

- 5.83 Respondents were more qualified in their assessment of the efficacy of video hearings. Many respondents reported that video hearings had worked effectively, subject to a variety of caveats. Straightforward issues and submissions-based advocacy had worked very well via video, but contested trials were thought to present more problems. The success of video hearings also depended on the technical skills of the parties and the technology itself working smoothly. As with audio hearings, respondents assessed the efficacy of video hearings with reference to their experience of the process and outcomes they felt they would have been subject to in a physical hearing. Respondents reported that parties had been able to put their case and participate as they would do in person. Respondents felt that hearings had been conducted fairly and properly and that both decisions and the reason for them had been well reasoned. The quality of communication was also important: respondents felt that video hearings were effective where all participants could be heard well and had sufficient opportunity to speak. The visual element was described as important in avoiding interruptions and parties talking over each other, and facilitating smooth dialogue. Being able to respond to visual cues from the judge's demeanour was also felt to be helpful in enabling parties to advocated effectively.
- 5.84 Where respondents felt that audio hearings were slightly ineffective or ineffective, this tended to be in relation to more complex hearings involving detailed argument, witness evidence and litigants in person. Respondents stated that without visual cues it was more difficult to have a fluent discussion, gauge participants' reactions and put across arguments. Audio hearings were felt to depend on the papers to a greater extent and reduce the effectiveness and impact of oral advocacy. Respondents who felt that video hearings were slightly ineffective or ineffective explained their answer in terms of the impact of video on interactions between court users. Respondents stated that in video hearings, nuanced interactions are lost. Video hearings were reported as unsuitable for trials where communication with witnesses is important.

#### **U. Remote hearings and fatigue**

- 5.85 Respondents were asked to comment on whether remote hearings were more or less tiring to participate in than physical hearings. The majority of respondents felt that video hearings were more tiring to participate in than physical hearings: 55.3% of respondents (n=295) reported this. 44.0% of respondents felt that audio hearings were more tiring than physical hearings, and a higher proportion of respondents felt that audio hearings were similarly tiring to physical hearings. (30.79% of respondents reported that they neither agreed nor disagreed with the statement "audio hearings are more tiring than physical hearings" compared with 23.05% of respondents when asked the same question about video hearings).



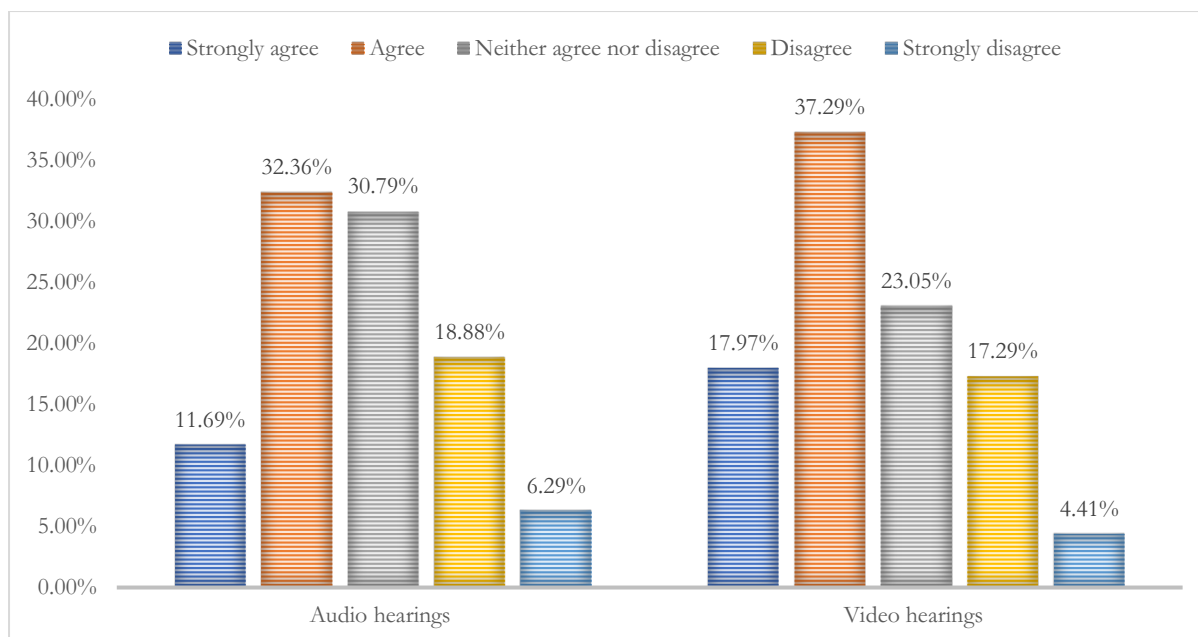


Figure 32: Comparing remote hearings to physical hearings, to what extent do you agree with the statement: "remote hearings are more tiring than physical hearings"? (n=445 for audio hearings, n=295 for video hearings)

- 5.86 Where respondents felt that video hearings were more tiring than physical hearings, they attributed this to the impact of the technology used to participate. Respondents stated that working in front of screens for long periods was inherently tiring. Some respondents reported developing eye strain and headaches, especially for long hearings. The technology being unfamiliar and unreliable raised stress levels. Other issues contributing to tiredness included being sedentary and lacking access to natural light. Respondents also reported that the level of concentration required was greater for video hearings than in person. The intensity of being on video meant it was not possible to switch off for a moment, and greater focus was needed to ensure nothing was missed and dialogue ran smoothly.
- 5.87 For both telephone and video hearings, respondents reported that greater effort was needed to listen intently and understand the proceedings due to communication being more difficult than in person. Juggling communication channels on different devices added an extra level of effort to manage documents whilst communicating with clients and teams. Many respondents suggested incorporating regular short breaks into remote hearings to address these issues.
- 5.88 Some respondents disagreed or strongly disagreed that remote hearings were more tiring than physical hearings. Reasons given included that not having to commute made the experience of participating in hearings less tiring, helping respondents to reserve their energy and avoid early starts. Some respondents also told us that working from home was a more comfortable and relaxed environment than attending court. Other respondents stated that remote hearings enabled them to work more efficiently.

## V. Remote hearings and expense

5.89 Respondents were asked to comment on whether remote hearings were more or less expensive to participate in than physical hearings. The findings were more equivocal than might be expected, with 39.8% (n=483) stating that participating in remote hearings was neither more nor less expensive, slightly more expensive, or more expensive than participating in physical hearings.

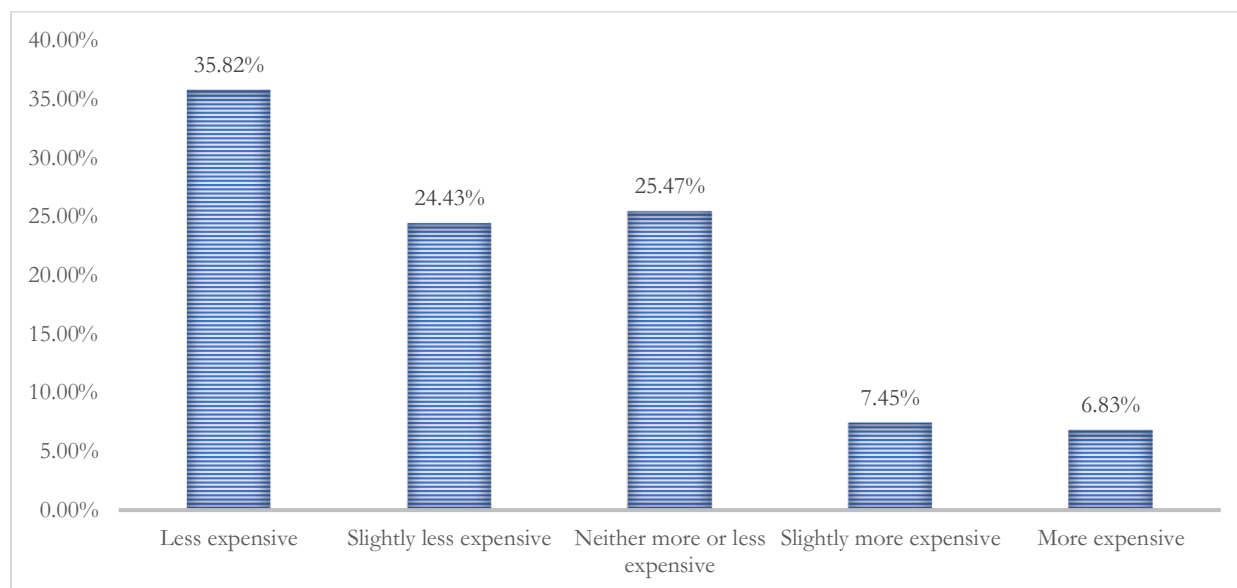


Figure 33: In your experience, are remote hearings more or less expensive to participate in than physical hearings? (n=483)

5.90 Where respondents stated that remote hearings were less expensive to participate in, they most commonly attributed this to reduced travel, including reductions brought about by the absence of a requirement to pay for transport, accommodation and sustenance. Time savings were also felt to contribute to making remote hearings less expensive to take part in. In addition, respondents felt that remote hearings enabled them to use their time more productively, as they were not required to wait around in court buildings. In addition, the use of electronic documents was felt to radically reduce costs, eliminating money spent on printing and postage.

5.91 Where respondents reported that participating in remote hearings was comparably expensive or more expensive, they attributed this to the increased amount of time they were required to spend on preparation prior to remote hearings taking place. The main factor increasing preparation time was the extra work involved in preparing electronic bundles and documents. Other factors included adapting to requests from judges, arranging the logistics of the remote hearing itself, testing equipment and processes, liaising with colleagues and opponents, preparing lay persons for the hearing and additional post-hearing work:

*“Although we have not carried out a detailed costs comparison for the purpose of this response, many of our lawyers have felt that the remote hearings they have been involved in were either slightly less expensive than traditional hearings, or comparable on cost. This may, however, reflect the fact that most of the hearings we have been involved in have not been trials. The position may well be different for trials, where we are likely to find ourselves needing (in*

*more cases than previously) sophisticated tools for electronic bundling, collaboration and case presentation, such as Opus 2; additional hardware, such as extra devices/screens; and potentially even support with the management of the remote hearing from a provider such as Opus 2 or Sparq.” (Pinsent Masons, n=n/s)*

- 5.92 In addition, the relative length of hearings contributed to perceptions that remote hearings were more expensive to participate in. Hearings themselves took longer to conduct, due to additional time setting up the calls, technical problems, difficulties communicating and taking instructions, and slower evidence taking. Inefficient working was also cited as a contributing factor: a number of respondents stated that efficiencies and procedures are not yet in place to support fully remote working and fully remote hearings, with many court users doing things for the first time. Respondents stated that it took longer to coordinate teams remotely, relay crucial information and cited challenges with staying on top of changing guidance. Other respondents reported that they had been required to buy additional IT equipment to participate in remote hearings and pay additional supplier fees for conference calling facilities. It was acknowledged that some of the current inefficiencies would improve over time as the processes become more familiar and embedded and initial set-up costs are offset.

## 6 Findings: Remote hearings under COVID-19—The experience of lay users

### A. Overview

- 6.1 This review was necessarily rapid: - the speed of the exercise forced the research team to deploy methods for data collection that are ill-suited to capturing the experience of lay users and litigants in person— - only 11 complete responses from lay users and litigants in person were submitted to the online survey. This mirrors the experience of similar exercises: - the rapid review of remote hearings in the Family Justice System only received responses from four lay users, and recent Civil Justice Council inquiries into the experience of vulnerable users and the use of Anti-Social Behaviour Injunctions have been undermined by their inability to access data on the experience of vulnerable groups and parties. One lay user responded to the consultation to state that they felt that the length of this consultation exercise rendered it inaccessible to disabled court users—this is a cause of deep regret and concern. The literature review conducted in support of this consultation similarly returned little detailed information on the experience of lay court users and parties.<sup>33</sup> There is an urgent need to capture the types of management information that facilitate the conduct of research into the experience of lay users: this data is described at Chapter 9 below.
- 6.2 Collective responses submitted to the rapid review by organisations and individuals with experience of working with and advocating for court users who may be considered vulnerable raised a number of important concerns about the impact of the rapid shift to remote hearings on lay users. Evidence that the experience of lay users and litigants in person does not always mirror that reported by professional court users in Chapter 5 above can be found in the responses provided by lawyers to the survey. This is notable given the profile of hearings described by lawyers in this study: as stated above at 5.13, the majority of hearings described by respondents concerned higher value cases, and due to changes in the types of cases being progressed under COVID-19,<sup>34</sup> hearings reported were less likely to involve vulnerable parties. The problems experienced by lay users reported in this study are likely to be amplified if remote hearings are expanded at scale to deal with matters more likely to involve vulnerable parties and litigants in person (such as housing and debt). The following chapter summarises the key findings and concerns and explains why the need to gather better data to understand the experience of lay users is so urgent.

<sup>33</sup> With the notable exceptions of Exall, G. (2020b, March 27). Innovative approach when proposed appellant unable to attend court. *Civil Litigation Brief*. <https://www.civillitigationbrief.com/2020/03/27/innovative-approach-when-proposed-appellant-unable-to-attend-court/> and Tomlinson, J., Hynes, J., Marshall, E., & Maxwell, J. (2020). *Judicial Review in the Administrative Court during the COVID-19 Pandemic*. <https://publiclawproject.org.uk/wp-content/uploads/2020/04/200420-JR-during-COVID-19-Research-paper-for-publication-final.pdf>

<sup>34</sup> See Chapter 4X above:- the stay on possession proceedings and altered behaviour of debt companies during the early stages of the crisis.

**B. Understanding remote hearings under COVID-19: The experience of lay users**

- 6.3 Only eleven lay users submitted complete responses to the survey, and four litigants in person emailed long form responses to the consultation inbox. All of the respondents to the survey described themselves as “White British” and reported that they could speak English very well. Two of the respondents stated that they had mental health conditions that limited their ability to participate in day to day activities, and one respondent reported that they had a significant hearing impairment. The majority (n=9) reported that they had been notified that their hearing would take place remotely less than one week before the scheduled date. The majority of hearings described (n=7) were fully audio hearings: only one respondent had participated in a fully video hearing and three respondents had participated in a partly video hearing. All video hearings were conducted using Skype for Business. The majority (n=10) joined their hearing from their home; one respondent reported joining the hearing from their car. Six respondents told us that they used a mobile phone to connect to the hearing, one respondent used a landline, one respondent used a desktop computer and three joined using their laptop. The majority (n=8) found it easy to join the hearing although one respondent reported that their hearing was delayed by one hour. None of the hearings lasted more than 7 hours. The majority of respondents (n=7) were unrepresented and over half of respondents (n=6) reported experiencing technical issues during the hearing. Four of the eleven respondents strongly disagreed that their hearing had been fair, and three of the eleven respondents disagreed or strongly disagreed that they were able to express their views. Just under half of the respondents (n=5) agreed that the judge listened carefully to them when they spoke, four of the eleven respondents reported that the judge treated them with respect. Of the eleven respondents, seven reported that the hearing had been a stressful experience.
- 6.4 Given the low response rate from lay users, the findings reported below are predominantly based on the accounts of lay and litigant in person experiences described by lawyers. Findings are augmented by collective responses submitted to the consultation inbox.

**C. Understanding remote hearings under COVID-19: The experience of parties prior to the hearing**

- 6.5 A number of responses to the survey submitted by lawyers reported that parties to the hearing had been reluctant to proceed remotely. Reasons given for this included that the party had a disability that made it difficult for them to participate in a hearing by telephone or video, parties feeling that they needed additional support to participate in a hearing held remotely and parties being unable to comply with directions regarding the mode of hearing (for example, parties being unable to download Skype) .
- 6.6 In addition, a number of respondents reported that clients wished to adjourn their hearing until such time as it could be heard in person due to the perceived “impersonal” nature of remote hearings.

One respondent stated, *“My client felt let down by the court that she should have her case dealt with by telephone. It was perceived as cheap justice and not value for money”* (Survey respondent, lawyer). Some collective responses to the consultation inbox echoed this concern, stating that *“A remote hearing may lead litigants to feel robbed of their day in court. There might never be a feeling that procedures were conducted fairly and openly”* (Brighton Housing Trust, n=21).

- 6.7 Respondents to the survey raised concerns about the levels of communication and support provided by the court in advance of the hearing. Respondents highlighted lack of communication from the court regarding whether hearings would take place, causing distress to parties: one respondent described a situation where a party had been forced to take part in a telephone hearing from their car having driven to attend a court hearing in person only to find that it had been listed to take place remotely. Respondents implicated the lack of timely communication acknowledging the receipt of documents in causing additional stress to those involved in the hearing. One respondent stated, *“I had prepared and served bundles twice - the first time served by email, and the second on paper as the judge at a previous hearing said he hadn’t seen the emailed ones - although receipt was acknowledged by the court”* (Survey respondent, lay user). There was a general consensus from respondents who had participated in hearings in the County Court regarding the urgent need to improve the administrative support provided to judges in order to facilitate effective remote hearings. One respondent typified these concerns stating:

*“I think the real issue which needs to be tackled in the court system is that serious lack of administrative staff to assist the judges. I was very lucky in this hearing that I had the court clerk to speak to immediately prior to the hearing and that they were able to connect the parties remotely and answer any queries if need be. In many hearings, it will be the judge alone who has to make decisions, weigh up the sides of both parties control both parties and also operate the telephone equipment. This is a very difficult thing to do when you are dealing with multiple cases in one day. There needs to be a serious increase in the amount of staff who can assist judges but also staff who are able to list cases and deal with any urgent queries.”* (Survey respondent, lawyer)

- 6.8 This account was endorsed by a collective submission from the Personal Injuries Bar Association (n=1500) which stated:

*“PIBA notes the significant problems caused by staff absences as a result of COV19. Years of underfunding have meant that the County Courts in particular were already operating with limited staff, resources, technology and equipment. Unlike the Queen’s Bench Masters running specialist asbestos, clinical negligence and personal injury lists – where direct and effective communication by email with counsel and solicitors was already common – no such facility exists across the board for District Judges or County Court Judges. Communication with those courts often fell into an administrative black hole. COV19 has highlighted and exacerbated all of these problems.”*

- 6.9 The availability of interpreters for parties with English as a foreign language was also raised as an issue. One respondent stated, *“The Claimant needed to hear the judgment (because it was her case). She needed a translator. It is rude not allowing individuals involved in litigation to not have any idea of the outcome of it. She was*

*forced to do the trial at the height of the corona outbreak and then not allowed to know the outcome of it in her own language. For all I know she still has no idea what happened.”* (Survey respondent, lawyer)

#### **D. Understanding remote hearings under COVID-19: Issues with technology reported by lawyers**

6.10 Respondents to the survey raised concerns about the impact of technical issues on parties. Where technical issues affecting parties were reported, these were often attributed to the inadequacy of the technology available to parties themselves. Collective responses to the consultation inbox emphasised this point: - a response from the charity Shelter stated, *“there is an assumption that clients have access to the internet and telephone. Not all of them can afford access”* (Shelter, n=n/s). Respondents stated that even where adequate hardware was possessed by parties, variabilities in Wi-Fi coverage and speed nationally and issues with access to data present a significant barrier to participation in remote hearings. A response submitted by the Official Solicitor stated that many of the parties she represents have no or inadequate access to email, making it difficult for parties to receive documents. This issue has been exacerbated by the erratic nature of the postal service. The Official Solicitor further stated that in her experience, many vulnerable parties do not have iPads, laptops or similar electronic devices and therefore no access to Zoom or Skype. These concerns were echoed in submissions provided by Citizens Advice Woking (n= 3) and Brighton Housing Trust (n=21). It is notable that many respondents to the survey emphasised the need to be able to access two screens to be able to participate effectively in remote hearings (see above per 5.37 and Figure 17), resources that are unavailable to many lay users.

#### **E. Understanding remote hearings under COVID-19: Fair and effective hearings-communication between representatives and parties**

6.11 As stated above, the existing case law on access to justice in England and Wales gives primacy to the notion of an individual being able to put his or her case effectively. The right to a fair and effective hearing is also enshrined in Article 6(1) of the ECHR. Respondents to the consultation emphasised that effective participation is core to the overriding objective set out in the Civil Procedure Rules which makes it clear that dealing with cases “fairly and justly” means “ensuring that parties are able to participate fully in the proceedings”.<sup>35</sup> Respondents to the consultation were keen to emphasise that the requirement for effective participation has not been negated by the transition to remote hearings. Under Article 6(1) of the ECHR it is established that participation entails that each party must have the opportunity to be heard herself: “either in person or through her own legal representative with whom she can freely communicate”.<sup>36</sup> Understanding the impact of remote hearings on the ability of representatives to communicate freely with their clients is therefore critical

<sup>35</sup> The Civil Procedure Rules 1998 – See McKeever, G. (2020) “Comparing courts and tribunals through the lens of legal participation” Civil Justice Quarterly Vol 39 I(3) pp. 217pp217-236.

<sup>36</sup> Settem, O (2016) “Applications of the ‘Fair Hearing’ Norm in ECHR Article 6(1) to Civil Proceedings: With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency” Springer, Switzerland pp111

to understanding whether or not remote hearings under COVID-19 are capable of upholding access to justice.

- 6.12 As reported in section 5.50 above, 12.2% of lawyer respondents to the survey (n=426) reported experiencing issues communicating with their client during the hearing. 41 lawyers reported that their client expressed fear or distress before, during or after the hearing—of these, 41.5% reported minor or significant difficulties communicating with their client during the hearing. Some respondents reported that issues communicating with their client had caused extreme distress. For example, in a possession hearing motivated by an allegation of anti-social behaviour levelled at the client's disabled child, one respondent reported, *"I spoke to the client after. He was in tears because of things said by the claimants' lawyer. We had arranged for him to give me instructions mid-hearing by text but he couldn't tell me this until afterwards because he could only get into the hearing using the same phone"* (Survey respondent, lawyer). Another reported, *"Without going into too much detail, my client was very distressed about the hearing and that he could not interact with me directly at the hearing. He felt the same afterwards"* (Survey respondent, lawyer).
- 6.13 Collective responses to the consultation inbox raised concerns that the practices adopted by lawyers to communicate with clients during remote hearings require clients to have both multiple devices and good written comprehension skills. As such, it was argued that remote hearings risked undermining effective participation for clients without access to these resources. The response from Garden Court Chambers (n=130) is illustrative of the issue: *"Some well-resourced parties contributing to this consultation may consider that witnesses and lay clients have sufficient access to remote hearings by using sophisticated IT and have a chain of communication open to them which allows them to communicate with a legal team in real time, by means of the written word, that is however very different from the circumstances in which many of our clients operate."*
- 6.14 Whilst respondents acknowledged that physical court hearings could pose barriers to effective participation, particularly for litigants in person (McKeever n=1, Shelter n=n/s) many expressed concerns that the overlaying of existing complex processes with technology would exacerbate, rather than ameliorate issues for lay users. Some survey responses indicated that these concerns may be manifesting in practice—respondents' comments included: *"I think the poor sound quality made understanding much harder...In practice he was left alone with no one to talk to while three lawyers did all the discussion"* (Survey respondent, lawyer); and, *"My client, who I felt would have been able to engage sufficiently were I with him in person, had difficulties joining, and then appeared distracted and not engaged to a level that I do not feel he would have were he in court"*(Survey respondent, lawyer). These comments were reinforced by a collective response submitted on behalf of the Western Circuit (n=1,100) which stated, *"when they are used, remote hearings are working reasonably well although there is real concern as to whether the lay person is able to engage properly with the process."*



- 6.15 Particular concerns were raised regarding the experience of parties who are regarded as vulnerable under existing law and practice directions. Survey respondents reported that their clients had a range of characteristics that affected their ability to participate in remote hearings. The most commonly-reported barriers to participation were disabilities, both mental and physical. This included clients who had severe mental health conditions and those who lacked capacity. In some cases the client was not participating in the hearing due to their condition, but was represented by a litigation friend. Other clients were children or elderly people, in some cases represented by family members. In some cases, respondents reported that their clients were unable to join due to the nature of the hearing—one respondent reported, *“My client has a disability and was unable to join the hearing to listen to it as he found the joining instructions too complicated”* (Survey respondent, lawyer). Another reported, *“My client was unable to attend the hearing due to his disabilities – particular issues around hearing impairments and the need for adjustments”* (Survey respondent, lawyer). A response to the consultation submitted by the Equality and Human Rights Commission argued forcefully for the need to identify and monitor the access to justice impacts of remote hearings for individuals with protected characteristics. The Equality and Human Rights Commission stated that this monitoring should begin now, *“in the event that the technology is permanently implemented.”*

#### **F. Understanding remote hearings under COVID-19: The experience of litigants in person as reported by lawyers**

- 6.16 Many of the lawyers who responded to the survey qualified their positive assessment of remote hearings with reference to their impact on litigants in person. Comments included:

*“This is based purely on my experience as a legal representative. I do not know how a litigant in person would manage”.* (Survey respondent, lawyer)

*“It was acceptable for legally represented parties but not for litigants in person.”* (Survey respondent, lawyer)

*“The hearing went well because of the skills and experience of Judge and 3 Counsel and would have been very different with a litigant in person.”* (Survey respondent, lawyer)

*“For this type of application, it could be said that a telephone hearing was cheaper and perhaps faster than a hearing in person; with submissions only by experienced professionals. My general experience suggests that it would be very different with a litigant in person, a vulnerable party or any hearing involving live evidence of any kind.”* (Survey respondent, lawyer)

- 6.17 Concerns about the impact of remote participation on litigants in person were reflected in the data gathered from lawyers about their experience of hearings: - of those hearings where it was reported that parties expressed fear or distress during the hearing (n=7), the majority involved a litigant in person. Of those hearings where respondents reported moderate or serious issues with parties interrupting each other, 29.2% involved litigants in person (n=25). As in physical hearings, the task of managing this fell to the judge. Where hearings involving litigants in person proceeded effectively, lawyers reported increased active management on the part of the judge. In describing their remote hearing, one participant stated, *“Very positive from the point of view of justice being done, court very attentive to*

*litigants needs, particularly those of the litigant in person*” (Survey respondent, lawyer). Some collective responses to the consultation inbox also reported instances where judges had communicated directly with unrepresented parties to ensure that documents were received. One respondent stated that *“it should be noted that historically direct communication between the parties and the judge has been frowned upon and perhaps this is something that should become more commonplace given the constraints upon court staff”*. Further research is required to understand the impact of the shift to remote hearings on the ability of judges to engage with litigants in person, and the impact of this on court time and judicial wellbeing.

- 6.18 Some responses suggested that reductions in the availability of court staff had impacted disproportionately on litigants in person and their understanding of the process and procedures around remote hearings. Collective responses reported difficulties in contacting courts by phone during the crisis (Southwark Law Centre, n=9, Shelter, n=n/s) and overstretched court administration (South Eastern Circuit n=n/s).
- 6.19 Many respondents felt that issues with technology described above at para 6.10 were magnified for litigants in person. Respondents reported issues with both technology and access to stable internet connections. One respondent commented, *“This technology is not designed for litigants in person. The litigant kept interrupting and it was difficult for the judge to speak over him due to the technological barriers. There were also dogs barking throughout that made it difficult to hear.”* Further issues were reported around compiling and accessing e-bundles (DWF Law, (n=929); Blackstone Chambers, (n=n/s); Southwark Law Centre, (n=9); Wales and Chester Circuit (n=n/s))—one respondent described the following scenario:

*“Major issues with litigant in person (LIP) accessing the electronic authorities bundle. Initially when being referred to cases, I was checking to see the LIP had the correct reference and he kept confirming he had. The hearing had been going for about 15 mins -20mins when the judge asked the LIP to look at something. The LIP then confessed he had been lying in order to progress the hearing and in fact didn't have the bundle open in front of him at all. He also said he was on his mobile phone so couldn't access his email. There was then a delay when he was advised to find a tablet/computer/ alternative device and a further delay whilst the process of using tabs/index in a pdf bundle was explained to him. Having had this experience, I would recommend the other side's solicitors (if one party is represented) running a technical check/trial with a litigant in person using e-bundles prior to the hearing.”*

Given the vital role of electronic bundles in facilitating the conduct of effective remote hearings (see above) and the impact on court time when they are not available, urgent action to address this issue was strongly recommended by respondents.

- 6.20 A combination of restricted access to legal advice due to COVID-19, and the remote nature of hearings plus the difficulties of navigating unfamiliar technology alongside unfamiliar legal processes was felt to compound pre-existing practical and emotional barriers to effective participation by

litigants in person.<sup>37</sup> Respondents reported, “*Litigants in person don’t understand the process - less so than when they attend court. There is a clear lack of understanding of what is taking place*” (Survey respondent, lawyer); and “*Without exception, telephone hearings have been far from ideal...Defendants have been, for the most part, litigants in person - they do not understand the process at the best of times - telephone hearings exacerbate the problem*” (Survey respondent, lawyer). Contested applications were felt to be particularly problematic. Respondents also highlighted the impact of the current pandemic on the emotional state of all court actors, - particularly the parties. One litigant in person reported the following experience at their court hearing:

*“I’ve never felt so stressed in my life, we had already been put in a situation with the COVID as it was I was losing my job then I had a court case via a phone call which I found humiliating... because I wasn’t really given a chance to explain, I didn’t understand the words as I’m not that clever, there was a pause where I was then told that that was my time to speak, I tried to explain, then someone else spoke and they spoke to each other, I was so confused, so I asked if they could explain in a simple way of speech, then I heard one say how I’d ‘ignored’ all correspondence, so I said I didn’t ignore anything, to which I was told...quite sternly!! DO NOT INTERRUPT ME!! I felt stupid and very upset, so I listened very quietly to the end, the hearing was then closed, I got off the phone very, very distressed.”* (Survey respondent, litigant in person)

6.21 The mode of hearing was also felt to undermine litigant in person perceptions of the significance of the hearing, and consequently the potential impact of non-attendance. One respondent commented:

*“I believe the consequences of failing to attend a remote hearing should be made clearer for inexperienced Court users. It should also be better explained that there are no alternatives to remote hearings due to the current pandemic. A litigant in person refused to attend a hearing I was present as I believe she did not fully understand the consequences and instead thought the hearing would be adjourned until she could attend in person.”* (Survey respondent, lawyer)

Some respondents also felt that the mode of hearing impacted on the behaviour of litigants in person during the hearing—joining from their own homes and absent the formality of the courtroom, litigants in person were felt to become more disinhibited. One respondent whose experience exemplifies this concern reported the following: “*I have carried out one hearing with two 61 and 65-year-old unrepresented defendants. There were some difficulties because they felt empowered to behave less appropriately in their home setting*” (Survey respondent, lawyer).

6.22 Some respondents from the legal profession raised concerns about litigants in person seeking adjournments in cases that would be suitable for remote determination on the basis of unrealistic expectations of the experience they would receive in a physical court setting. One respondent, reflecting on their experience of a remote hearing involving two unrepresented parties stated, “*The*

<sup>37</sup> See McKeever, G. et al. (2018) “Litigants in person in Northern Ireland: barriers to legal participation” Ulster University, Belfast p. 2. Available at:

[https://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0004/309892/179367\\_NIHRC-Litigants-in-Person\\_EXECUTIVE-SUMMARY\\_\\_6\\_LOW.pdf](https://www.ulster.ac.uk/__data/assets/pdf_file/0004/309892/179367_NIHRC-Litigants-in-Person_EXECUTIVE-SUMMARY__6_LOW.pdf)

Supra note 19

*hearing probably took 50% longer because it was remote. We reached a satisfactory result in the end, but I anticipate that their view of justice was diminished”* (Survey respondent, lawyer). For cases where the hearing has been subject to long delays, or parties are particularly emotionally invested in the outcome, remote hearings may be considered an inferior alternative to an in-person hearing. One litigant in person who had requested an adjournment in preference to participating in a telephone hearing stated the following:

*“I feel we are owed our day in Court and as much as the thought of having to do it makes me feel sick because I will be the one who has to cross examine and will be cross examined...I feel that I am ready for the day and that we have the upper hand and he has to be shown to be what he is and I do want that to happen. He needs to see it and be taught that lesson.”* (Interview, litigant in person)

- 6.23 The findings reported at Chapter 5 indicate that, for lawyers, assessments of the efficacy of remote hearings are formed on the basis of the ability of remote hearings to deliver parity of outcome with in-person hearings. Many litigants in person and other non-regular court users lack the experience and/or legal knowledge to accurately assess the extent to which any outcome they receive from a remote hearing differs from the outcome they would have secured in person. Inaccurate assessment of the extent to which outcomes received from remote hearings differ from those secured through in-person processes may contribute to unfairly negative assessments of remote hearings. Transparent, accessible data on the outcomes secured through both physical and remote court processes could help to mitigate this. Further research is needed to understand the drivers of positive perceptions of remote hearings amongst litigants in person and lay court users.

## 7 Findings: Remote hearings under COVID 19: The impact on open justice

### A. Overview

- 7.1 The principle of open justice is a fundamental feature of the legal system in England and Wales: protection of this principle is enshrined in common law, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and various international human rights instruments.<sup>38</sup> The leading expression of this principle, per Lord Halsbury in *Scott v Scott* [1913] AC 417 established a stringent test for departure from this principle, stating that in camera hearings should only be held when they are “strictly necessary” and that the threshold for “strictly necessary” is “that by nothing short of the exclusion of the public can justice be done”. The International Covenant on Civil and Political Rights to which the UK is a signatory, states that “even in cases where the public is excluded from the trial, the judgment must, with certain strictly defined exceptions, be made public.”<sup>39</sup>
- 7.2 The rapid transition to remote hearings in the context of COVID-19 presents a number of legal and logistical challenges in relation to open justice. The publication of Practice Direction 51Y<sup>40</sup> aimed to address these issues through a.) providing that the court may direct that proceedings must take place in private where it is not practicable for the hearing to be broadcast in a court building, and where proceeding in private is necessary to secure the proper administration of justice; b.) explaining that hearings will be public where a media representative is able to access proceedings remotely and c.) stating that hearings held in private must be recorded, where this is feasible, in a manner directed by the court, and providing access on application to these recordings within a court building, where the court consents.
- 7.3 17 complete responses to the survey were submitted by journalists and court reporters; two were submitted by researchers and two by members of the public. In addition, four collective responses were submitted on behalf of Thomson Reuters, the News Media Association, the Press Association and Guardian News Media. Responses were also submitted by individuals working at the Incorporated Council of Law Reporting for England and Wales, and the Royal Courts of Justice. One collective response was submitted by the NGO Spotlight on Corruption.

<sup>38</sup> For a comprehensive overview of the principle and relevant legal frameworks see Bosland and Townend (2018) “Open Justice, transparency and the media: representing the public interest in the physical and virtual courtroom” Communications Law Vol. 23, No. 4, 2018 and Ana Harvey, *Public Hearings in Investor-State Treaty Arbitration: Revisiting the Principle* (February 2020, Doctoral thesis, University of Luxembourg) <<https://orbilu.uni.lu/handle/10993/42628>>. On file with author.

<sup>39</sup> Ana Harvey, *Public Hearings in Investor-State Treaty Arbitration: Revisiting the Principle* (February 2020, Doctoral thesis, University of Luxembourg) <<https://orbilu.uni.lu/handle/10993/42628>>. On file with author. p. 86.Pp86

<sup>40</sup> <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

## B. Findings: The impact of COVID-19 on open justice across the civil justice system

- 7.4 The findings from the consultation revealed a divide in practice and experience between the senior courts (the Court of Appeal and High Court) and the County Court. Analysis of publicly-available court lists published over one week (11 May to 15 May 2020) revealed that only a minority of County Court (14/68) published notices with details on how to attend hearings alongside listings information. These notices varied considerably in terms of content, although around half were produced with the same software (“Diary Print”). In addition, respondents reported that whilst arrangements for accredited media access to court hearings are working reasonably well, access for members of the public, legal bloggers and representatives of NGOs is more problematic. Respondents raised concerns that media access was being treated as synonymous with or equivalent to open justice: *“A major problem appears to be an assumption, enshrined in para 3 of CPR PD51Y, that providing access for media coverage is somehow equivalent to open justice. Para 3 states: “Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings.” For a number of reasons that is simply not the case.”* (Individual respondent, law reporter). Concerns were also raised by respondents regarding the impact of COVID-19 arrangements on the number of hearings being held in private, and the absence of good data to monitor this.

## C. Findings: What is working well about COVID-19 arrangements regarding open justice

- 7.5 Journalists and court reporters who responded to the survey reported that they have largely been able to attend hearings where they have wished to do so—no respondents reported that their access had been refused. Where respondents reported that they have been unable to attend hearings, this was attributed to the failure of the court to respond to requests in a timely fashion, or difficulties in identifying the correct person to contact to request attendance:

*“Save for one occasion when a remote hearing was being conducted in private, I have not been expressly denied access to any hearings - and I was later informed by the judge's clerk that there would be a public extempore ruling following the private hearing later that day. However, on a number of occasions, requests have been unanswered requiring me to chase a reply, which - in a few cases - I have simply not had the time to do. My experience of requesting access to join hearings by contacting generic listing office email addresses (which are available on public court lists) has been mixed, and in most cases - particularly 'essential', high-profile cases - I have directly contacted judges' clerks, which I have found to be a much more reliable way of ensuring attendance at remote hearings.”* (Survey respondent, court reporter)

- 7.6 Respondents were also keen to praise the practice adopted by the Supreme Court, the Privy Council and in some Court of Appeal cases, - where some remote hearings have been live streamed (as was the case prior to COVID-19 for physical court hearings) and documentation has been provided to observers in advance to enable them to understand and make sense of proceedings.

- 7.7 Some respondents reported that remote observation has increased the number of hearings it is possible to attend, improving their ability to cover a range of cases. One respondent to the survey stated:

*“One unexpected advantage of remote hearings is that reporters can simultaneously cover more than one hearing if they are conducted over different platforms. Using Skype is also convenient as a reporter can move between multiple Skype hearings, which are automatically placed on hold when left and can be returned to without much difficulty.”* (Survey respondent, court reporter)

Another respondent with experience of covering regional hearings stated that *“These remote hearings make it much easier for us to cover those cases that would otherwise have to be missed.”* (Survey respondent, media). Some respondents felt that mechanisms for facilitating remote viewing of court hearings had the potential to increase the openness of the justice system.

- 7.8 The majority of respondents to the survey found their interactions with court staff to be helpful where they were able to contact them. Judges were also praised for adapting their communication style and pace to enable accurate reporting of proceedings, and for taking consideration of the need to enable access for the media:

*“Lawyers and judge have also generally been conscious of the difficulties everyone is facing and have asked for things to be repeated or taken more slowly to ensure everyone can follow the proceedings, although that is understandably focused on the parties and the judge being able to follow proceedings rather than reporters.”* (Survey respondent, court reporter)

*“Everyone - court staff, judges, lawyers - has worked incredibly hard to get the remote justice show on the road, under incredibly difficult circumstances... Judges’ clerks have been helpful and courteous in dealing with a hugely increased workload due to media requests. Judges have been careful to acknowledge the difficulties of remote hearings, and most have enabled reporters to raise matters if they have arisen (for example, regarding reporting restrictions).”* (Survey respondent, court reporter)

*“The consideration of the importance of the press who attend such hearings as the eyes and ears of the public is welcome.”* (Survey respondent, media)

- 7.9 The facilities in the senior courts were particularly singled out for praise in terms of the high levels of technical performance: *“The remote hearings have gone fairly smoothly so far, only a few hiccups with other people (solicitors etc) being unable to join the meeting (largely, I think, because of unfamiliarity with the system). I have had no issue joining or hearing the meetings.”* (Survey respondent, court reporter). Respondents to the survey and consultation inbox were particularly satisfied with their positive experience of video hearings when viewed in comparison with telephone hearings: *“Generally speaking, video hearings are much better than telephone hearings”* (Survey respondent, court reporter). Some respondents felt that watching video hearings via a live stream or video conferencing platform improved the ability of

reporters to identify who was speaking at any given time, improved sightlines and made it easier to take notes than when reporting on in person hearings (Individual respondent, court reporter, n=1).

#### D. Findings: What could work better? Suggestions for improvement

7.10 A number of respondents to both the consultation inbox and the survey described issues with the variation in practice across courts as an impediment to open justice. Where problems have arisen, these have been attributed to the way in which guidance is being interpreted or adhered to by different court centres, rather than technical issues. (Press Association, n=4). This issue was felt to be particularly acute at the County Court level (Court reporter response to inbox, n=1). Respondents argued for the urgent need to develop a consistent, standardised approach to facilitate anyone who is entitled to attend or listen in to a hearing (including members of the public) to find out how to do so. A number of respondents requested the creation of designated media contacts (News Media Association, n=n/s). Some issues were raised in relation to the ability to observe the minority of hearings that were proceeding in person (News Media Association, n=n/s, Press Association, n=4, Guardian News Media, n=n/s).

7.11 Non-responsiveness on the part of court staff was also implicated as an issue by multiple respondents. Some respondents reported that joining details had been provided late, or requests to attend hearings left unanswered:

*“Sometimes details are not provided, or provided late. There have been instances of clerks saying they need to ask the judge if we can join. also, sometimes, despite details being sent, the invitation has not arrived for some reason.”*

(Survey respondent, court reporter)

*“There is variation in how quickly and fully Clerks respond (or if they do at all!)”* (Survey respondent, court reporter)

*“As mentioned previously, there have been some requests which have gone unanswered. There have been even more examples of cases where we have had to contact the judicial communications office to request access, when a request has gone unanswered, and that has resolved the issue.”* (Survey respondent, court reporter)

Respondents also reported the absence of mechanisms to contact court clerks in individual hearings as a barrier to the timely rectification of problems once hearings had been joined (Press Association, n=4).

7.12 A number of respondents to the survey and consultation inbox implicated issues with the level of detail provided in court listings as a barrier to identifying and observing relevant cases. The timeliness of listings publication was also raised as an issue—respondents were concerned that lists were not published sufficiently in advance to facilitate joining:

*“Court lists, particularly in the Administrative Court, provide very little information as to what a case is about and whether it is newsworthy. When working out of the RCJ, each reporter can check anywhere up to a dozen cases on a*



*given day - though a large number of them may not be newsworthy, or may be too early in the litigation to report on. The current practical inability to check on a large number of cases has meant reporters - who now have to email listings offices and/or judges' clerks simply to be able to attend hearings - have to be even more selective in prioritising hearings which are more likely to be immediately newsworthy, at the risk of missing an important case or cases because we have not got the time to request access to the hearings and/or check on them. It is also significantly more difficult to work out whether a hearing is newsworthy, which previously could be done by simply asking counsel outside court - now, this often only becomes obvious at the start of the hearing when (or if) counsel opens the facts of the case and, at that point, it may be too late to attempt to dial in to another hearing..” (Survey respondent, media)*

This concern was felt to be particularly acute in a context where reporters are unable to attend court in person to have informal conversations with clerks and lawyers.

- 7.13 The absence of a consistent approach to providing information about whether hearings are to be held in private (in courts other than the Royal Courts of Justice and Rolls Building), was experienced as problematic by respondents. A number of respondents advocated for improved facilities for gaining access to information about hearings, such as whether applications for reporting restrictions have been made, and any reporting restrictions that might be in place (News Media Association, n=n/s).

- 7.14 Respondents raised significant concerns regarding the challenges facing members of the public and public interest organisations who wished to observe hearings. One respondent to the survey who described themselves as a researcher stated that they had been misinformed about whether or not they could join a hearing:

*I've been excluded from attending hearings to which I requested access...because they said "In Private" on the lists and I wasn't aware at the time that I could ask permission to observe (and to write about) hearings held "in private" (I've subsequently learnt that I can and have observed 2 that were listed as being held "in private" after the judge varied the Transparency Orders). (Survey respondent, researcher)*

A response to the consultation submitted on behalf of an NGO advocated forcefully for the need to give serious consideration to the amendment of court listings to make it clear that hearings can be observed by members of the public and public interest organisations. Support for this proposition was also found in the review of the existing literature.

- 7.15 While the majority of respondents expressed qualified satisfaction with the technology used to observe hearings, citing good levels of technical performance, respondents to the survey raised a number of particular concerns in relation to telephone hearings and Skype for Business. Comments included:

*“Telephone hearings are, in my experience, probably the worst of the options, not least because the arrival and departure of all participants is (quite loudly) announced by the conference call software, meaning reporters have to try and time leaving the hearing so as not to disrupt submissions.” (Survey respondent, court reporter)*

*“The one hearing I tried, I missed most of the hearing due to technical difficulties.”* (Survey respondent, court reporter)

*“I did try to join the hearing using Skype for Business, downloaded and installed the necessary software but when I tried to join the hearing it did not work. I then used the telephone link which worked straightaway and continued throughout the hearing. I was able to hear, but could not see the judges or counsel.”* (Survey respondent, court reporter)

Sound quality was also identified as an issue. In relation to video hearings, concerns were raised about the stability of the platforms used and the ability of the technology to deliver an uninterrupted experience for cases where attendance by observers was large.

7.16 One issue raised by all respondents to the consultation inbox related to the difficulties involved in accessing documents relating to cases, that were considered vital to facilitate accurate reporting. Existing deficiencies in the current arrangements for accessing primary legal information (listings, judgments, case documents where authorised by the court) were amplified by the current crisis. Particular issues were raised in relation to:

- The complicated logistics involved in accessing court documents, and the desirability of developing consistent arrangements.
- The accessibility of skeleton documents; the absence of which was felt to impede understanding of the issues at stake in any given case. Concerns were expressed as to why the good practice adopted in the Court of Appeal and above had not been replicated for the lower courts.
- Issues with accessing transcripts of hearings and especially transcripts of judgments that are handed down orally. Respondents called for serious consideration to be given to providing these for free from early March 2020 until early July 2020, with an option to review the practice at this stage.
- Persistent issues with securing timely access to judgments—suggestions made included emailing judgments to the High Court press association email list, to enable journalists and reported to access them early in the day, as per arrangements when hearings proceed in person.

7.17 Finally, respondents raised concerns regarding the absence of routine data collection to monitor the number of hearings taking place in private during COVID-19. It was felt that data should be captured on this as a matter of urgency.

## 8 Recommendations for recovery and managing the backlog

### A. Overview

- 8.1 A number of respondents made recommendations to support the continued operation of the civil justice system in the short to medium term. Suggestions included expanding the use of remote hearings in large commercial cases and maximising their use in interlocutory hearings and trials without evidence in other areas of law. Respondents emphasised the important role of continuing to list trials in encouraging parties to settle. The majority of costs disputes were also felt to be suitable for remote determination. Practical suggestions to improve the conduct of hearings included improving the equipment provided to judges and developing the functionality of platforms used to conduct remote hearings to enable better document sharing. The importance of improving systems and support for preparing and filing e-bundles, and providing access to listings and case information was also referenced. In terms of policy recommendations, some respondents advocated for decisions to be taken about the types of legal problems that should be dealt with by the civil justice system—respondents recommended considering whether claims brought in relation to private parking could be dealt with via different arrangements.
- 8.2 A number of respondents made suggestions regarding the provision required to resume in-person hearings, and adjustments that might be made to address the backlog. Particular concerns were raised about dealing with the backlog of cases in relation to housing possession: these concerns, and suggestions to address them are described in detail below. Given the issues at stake, and the need for a consistent approach, it is recommended that the CJC urgently convene a working party representing all interests, to devise an approach. The importance of including lawyers involved in the delivery of housing duty desk schemes was underscored by respondents.

### B. Expand the use of remote hearings for large commercial disputes

- 8.3 A number of responses from large commercial law firms (including Mishcon De Reya, n=900; Hogan Lovells, n=140; Reed Smith, n=52 and Freshfields, n=6) advocated for the expanded use of remote hearings in commercial litigation, with limited exceptions relating to cases where foreign language interpretation is required:

*“We consider that, in principle, remote hearings are likely to be suitable for all types of major commercial litigation during COVID-19 restrictions, although it will always be necessary to consider the circumstances of each case (including the needs of the hearing participants). Remote trials which involve a significant amount of fact and expert witness evidence, and in particular, the use of foreign language interpretation present particular challenges (we understand that there are currently limitations on using simultaneous interpretation with video-conferencing platforms, for example) and need to be considered and managed carefully, again depending on the circumstances of the case.” (Hogan Lovells, n=140)*

- 8.4 One detailed response from Mischon de Reya (n=900) highlighted the important role that the widespread adoption of remote hearings could play in reducing carbon emissions; others emphasised that the expansion of remote hearings could contribute to enhancing the existing attractiveness of the civil justice system in England and Wales as a forum for the conduct of commercial disputes:

*“From a preliminary review, it appears there is significant scope for the administration of civil justice in England and Wales to play a part in reducing the contribution to climate change. The measures adopted by the Court system during the COVID-19 crisis – and in particular the prevalence of remote hearings – have brought into focus some of the opportunities for lasting change to reduce carbon emissions. Where these emissions result from avoidable vehicle emissions in towns and cities in particular, the contribution to air pollution could also be reduced.”* (Mischon de Reya, n=900)

*“In our experience, the use of remote hearings during the lockdown has greatly enhanced the perception of the English justice system, by adopting a “business as usual” and flexible approach in order to enable hearings to take place when they would otherwise not have been able to happen at all.”* (City of London Law Society, n=17,000)

- 8.5 The following responses from Reed Smith (n=52) and the City of London Law Society (n=17,000) encapsulate the willingness and enthusiasm expressed by large commercial firms in relation to the opportunity to reimagine what a ‘Rolls-Royce’ service looks like in the commercial courts:

*“Remote hearings work...The Lord Chief Justice’s comment that “there will be no going back to where we were” neatly encapsulates the feelings of the commercial lawyers at Reed Smith about remote hearings.”* (Reed Smith, n=52)

*“The greater use of technology could be used as a foundation to modernise court procedure further, for example in relation to video conferencing and electronic bundles for the court. The mechanics of how to conduct a remote hearing and the use of the technology have been left to individual judges and the parties to work out on a case by case basis. That has probably been necessary to accommodate the range of parties’ circumstances and the needs of individual cases. However, as the courts build experience of remote hearings, it would be very useful for parties and lawyers if a more comprehensive framework (perhaps a future practice direction) were to be developed for remote hearings”* (City of London Law Society, n=17,000)

### **C. Expand the use of remote hearings for interlocutory hearings and trials without evidence in personal injury and civil money claims**

- 8.6 There was broad consensus from respondents about the types of hearings in personal injury and civil money claims that were suitable for remote conduct, especially if video could be used. A number of respondents stated that interlocutory and procedural hearings where both parties are represented, and some trials involving submissions rather than live evidence were suitable for determination remotely (Western Circuit, n=1,100; Wales and Chester Circuit, n=n/s; Northern Circuit, n=1000;

DAC Beachcroft, n=2500; Irwin Mitchell, n=n/s; Berryman Lace Mawer, n=10; City of London Law Society, n=17,000). The following comments typify the views expressed by these respondents:

*“There is merit in continuing to list interlocutory and other hearings remotely, taking into account the significant saving in costs through avoiding travel which is possible through the use of remote hearings.”* (DAC Beachcroft, n=2,500)

*“The default position should be that the following hearings are conducted by video: Stage 3 hearings, Small Claims, Fast Track Trials, Interim hearings: CMCs and CCMCs and other hearings, particularly where there is no live evidence and parties are represented”* (Western Circuit, n=1,100)

- 8.7 Respondents were less positive about the use of remote hearings in longer cases, and cautioned against their use in hearings involving litigants in person (Law Society, n=n/s; Garden Court Chambers, n=130; Official Solicitor, n=n/s; Wales and Chester Circuit, n=n/s; Berryman Lace Mawer, n=10 and Irwin Mitchell n=n/s). Some respondents felt that there was a risk of moving beyond public acceptability with the use of remote hearings, with the potential to undermine trust in the justice system:

*“...perceptions may change/have changed with the increased use of technology to communicate socially etc now – may have become more the norm and more acceptable. Some claimants, particularly LiPs do want their ‘day in court’.”* (Berryman Lace Mawer, n=10)

In addition, multiple respondents noted that technology was not a panacea for procedural complexity, and that concerns about the use of technology compounded, rather than ameliorated issues that predated the crisis.

*“Most claimants (about which we can speak with more authority) are not experienced in legal claims. It is apparent that concerns which were common place beforehand, about finding a court, the format of proceedings or speaking in front of the court room are being replaced by concerns about having the right technology set up and knowing how to use it or whether or not it will work as intended. As the courts may become more used to using technology, claimants will not at the same speed which needs to be understood.”* (Irwin Mitchell, n=n/s)

*“Our position is that there should be a return to in-person, face-to-face court hearings as soon as circumstances allow – they are the most effective form of open, accessible and fair justice. Save in respect of limited categories of procedural and case management hearings, we would oppose remote hearings continuing once the pandemic emergency has ceased.”* (Garden Court Chambers, n=130)

- 8.8 Many respondents were emphatic about the need to continue to list trials in order to encourage settlement and reduce pressure on the civil justice system. The following comment typifies this view:

*“Another important function of a listed hearing is that it focuses the minds of the parties involved and their representatives. Having a trial in the near future is often the impetus required for a matter to be compromised. It is*

*therefore important that the courts continue to list all sorts of hearings both to maintain progress but also to drive settlements.” (Irwin Mitchell, n=n/s)*

#### **D. Improve the equipment and support provided to judges**

- 8.9 A number of respondents expressed the view that improving the equipment provided to judges and ensuring that they were able to access stable Wi-Fi would dramatically improve both the ability to conduct and the experience of remote hearings. The following exemplifies the views expressed by a number of collective responses to the consultation (Wales and Chester Circuit, n=n/s; DWF Law, n=929; Southwark Law Centre, n=9; City of London Law Society, n=17,000)

*“Courts need massively to increase the number of video hearings in preference to adjournments or telephone hearings and judges need to be given the technical and administrative support to achieve this. If that does not happen, the backlog will become completely unmanageable.” (Western Circuit, n=1,100)*

*“We should be grateful if all judges were strongly encouraged to hold hearings by video conference, and if the Ministry of Justice and Court Service were to ensure that the judiciary and court staff have the necessary support in terms of computer hardware and software, and training, to be able to do so. This should mean that hearings will not be adjourned, unless there is some other compelling reason to do so (as would be the case in the normal course of events).” (City of London Law Society, n=17,000)*

#### **E. Invest in better infrastructure to support the preparation and submission of e-bundles, and the sharing of documents during hearings**

- 8.10 Multiple respondents referenced the vital need to improve arrangements for preparing and submitting e-bundles—a number of issues were attributed to a reliance of courts on receiving e-bundles by email (with consequent restrictions on file size). Further emphasis was given to the need to improve the ability to view and share documents with parties and witnesses during hearings (Western Circuit, n=1,100; DWF Law, n=929) with respondents expressing hopes that the Cloud Video Platform would offer this functionality.

#### **F. Consider removing certain types of claim from the purview of the civil justice system**

- 8.11 Responses from consumer forum Legal Beagles and DWF Law (n=929) suggested that consideration could be given to removing private parking disputes from the purview of the civil justice system and transferring the resolution of these disputes to other forums.

#### **G. Urgently investigate options that would facilitate the conduct of socially distanced in-person hearings**

- 8.12 The majority of respondents emphasised the importance of urgently investigating alternative venues which might be used to conduct in-person hearings whilst abiding by guidance on social distancing

(Official Solicitor, n=n/s; Western Circuit, n=1,100; Wales and Chester Circuit, n=n/s; South Eastern Circuit; n=n/s; Kings Chambers n=117)

*“The Lord Chancellor has spoken publicly about the need to explore the use of spaces outside the traditional court estate for criminal trials where defendants are on bail. There is absolutely no reason why such safe spaces and similar technology should not relieve pressure on the county courts.”* (Official Solicitor, n=n/s)

*“With social distancing, the volume of work will remain well below normal levels owing to the size of the public areas and courtrooms in County Courts across the Circuit. Urgent consideration needs to be given to the use of other larger venues to hold Civil hearings. The Government needs to invest time, effort and resources in equipping these buildings as soon as possible.”* (Wales and Chester Circuit, n=n/s)

- 8.13 Respondents who specialise in housing law (Shelter, n=n/s; Law Centres Network, n=n/s; South Eastern Circuit, n=n/s) raised concerns about the safety of working conditions in the County Courts, and referenced inadequate provision in terms of sanitation facilities and ventilation.
- 8.14 In order to service these new, socially-distanced court buildings, many respondents suggested the urgency of expanding the use of part-time and fee-paid judges, such as Deputy District Judges, in order to manage the backlog (5 Pump Court, n=52; Western Circuit, n=1,100).

#### H. Housing- Managing the resumption of possession hearings

- 8.15 Respondents noted the suitability of remote hearings for case management hearings in cases where both sides are represented, and Homelessness appeals on a point of law under s.204 Housing Act 1996, provided that the appellant is able to attend remotely and hear proceedings (Shelter, n=n/s). However, there was broad consensus amongst respondents with expertise in housing law that injunction hearings or indeed any hearing in which there are factual issues and/or a need for in-person evidence where the attendance of the defendant is necessary, are generally not suitable for remote hearing. Respondents acknowledged that there will be exceptions, where defendants cannot, or prefer not to, travel to the court and have had the opportunity to get advice and/or representation beforehand. Possession hearings were felt to raise numerous difficulties, and respondents argued strongly that these were unsuitable for remote determination.
- 8.16 Many respondents with expertise in housing law, particularly those with experience of working on the housing court duty desk, emphasised the inherent unsuitability of remote hearings as a mechanism for dealing with possession cases. One primary reason for this related to the over-representation of vulnerable defendants in this area of law (Law Centres Network, n=n/s; Housing Law Practitioners Association n=44; Shelter, n=n/s; Garden Court Chambers, n=130)

*“The majority of our clients have a mental health diagnosis, ranging from anxiety and depression, to autism and schizophrenia. It is near impossible to do case management directions without their support workers/ social workers all engaging with them face to face and bringing them to appointments, staying in contact with them and keeping*

*them up to date. Some clients require an intense amount of support to achieve basic tasks, and the absence of the support makes it very difficult for them to function.” (Shelter, n=n/s)*

*“A significant proportion of member’s clients are also vulnerable as a result of physical and/or mental health problems, as a result of which they find it difficult properly to understand information.” (Housing Law Practitioners Association, n=44)*

*“My client with ADHD and autism was unable to receive advice over the telephone. He needed me to adapt how the information was being given to him, and I couldn’t see him to know which bits to adapt and how to break it up best for him. I gave it to him in small chunks and got him to explain it back to me. I managed sufficiently to get instructions for the most pressing point, but he struggled immensely. The impact of the conversation was that his mental health then plummeted following the call, and his family called back later worried about him. He hadn’t understood what was happening.” (Shelter Norfolk, n=1)*

- 8.17 The vulnerability of many defendants in possession proceedings was felt to underscore the need to consider the public health impact of proceeding remotely where the consequence was likely to be reduced engagement with the process and consequently increased rates of eviction:

*There is a serious risk that possession orders will be made which would not have been made at a physical hearing because the defendant has been unable to explain his/ her circumstances fully, either to a duty adviser or to the court. (Shelter, n=n/s)*

- 8.18 Respondents also emphasised that many defendants in possession proceedings are unlikely to be able to access the technology needed to participate in remote hearings, or provide instructions to solicitors where they were represented (Law Centres Network, n=n/s; Housing Law Practitioners Association n=44; Shelter, n=n/s; Garden Court Chambers, n=130):

*“20% of our existing clients are able to communicate via email. The remainder do not have Zoom/Skype, and telephone contact is being maintained. This is not sufficient to take detailed instructions as required for possession cases because clients can’t show documents to us, and we cannot pick up on all the non-verbal cues that are necessary when interviewing clients on sensitive topics regarding health/ victims of anti-social behaviour, domestic abuse, etc.” (Shelter, n=n/s)*

*“A significant proportion of member’s clients do not have the technology to assist with properly providing instructions remotely (because they do not have computers or smartphones, or because they have restricted data allowances), lack the aptitude to use technology and/ or are unable to give instructions for other reasons (e.g. childcare obligations or a lack of private space to discuss confidential matters).” (Housing Law Practitioners Association, n=44)*



*“There are grave risks to trying to do the Duty Advice Scheme over telephone. It is bad enough as it is trying to get to the bottom of the story with clients quickly enough when you can see the paper.”* (Law Centres Network n=n/s)

- 8.19 Issues were also raised regarding the availability of legal advice—many respondents noted that not-for-profit and legal aid funded agencies had experienced particular difficulties in transitioning to remote provision (Housing Law Practitioners Association, n=44). As a consequence of the combination of these factors, respondents expressed the view that possession hearings, if conducted remotely, would threaten effective participation and undermine trust in the justice system.
- 8.20 Respondents provided a number of suggestions to enable hearings to resume. Some respondents suggested that the pre-action protocol could be strengthened, to require landlords and lenders to demonstrate that they have taken proactive steps to secure legal advice for tenants and generalist advice to assist with the resolution of any underlying issues with accessing welfare benefits. It was felt that this could be particularly effective where social landlords were involved (Law Centres Network, n=n/s; Individual respondent, n=1). If such a pre-action protocol was created, this would require an expansion in the availability of legal advice to meet demand. This advice could be funded by the Ministry for Housing, Communities and Local Government, in recognition of the impact of their policy in creating the “bubble” of possession cases that the court service is required to deal with.
- 8.21 Respondents also suggested the temporary relaxation of Housing Act 1988 Ground 8, which offers mandatory grounds for possession in the event of tenants accruing two-months’ notice (if paying monthly) to reflect the circumstances created by the pandemic and protect public health.
- 8.22 Respondents felt that the complexity and importance of these issues, and the need to develop a consistent mechanism for managing possession hearings across England and Wales, argues in favour of the urgent creation of a Civil Justice Council expert working group representing all stakeholders. The inclusion of individuals with practical experience of the Housing Possession Court Duty Scheme was felt to be vital.

## 9 Information, evaluation and priorities for research

### A. Overview

9.1 Many respondents highlighted the urgent need to improve the quality and quantity of data and information available regarding the operation of the civil justice system. Recommendations were made in relation to both the management information produced by HMCTS and primary legal information (listings, case documents and judgments). Many respondents emphasised the urgent need for evaluation. The review itself highlighted a number of key data gaps—these are summarised below.

### B. Improvements to the management information collected by HMCTS

9.2 Many respondents highlighted the inaccuracy of the basic information provided by HMCTS on the operation of the civil justice system under COVID-19. This response from the Western Circuit (n=1,000) summarises the prevailing view:

*“We urgently need data from HMCTS which will allow us to compare the volume of civil work last Spring with this Spring – to assess the impact. HMCTS has been asked for this data repeatedly by Circuit leaders and others.”*  
(Western Circuit, n=1,000)

9.3 The difficulties involved in establishing an accurate understanding of the work undertaken within the civil justice system were highlighted by the exercise led by HHJ Chris Lethem. At an early stage in the study, the authors attempted to access basic data on the number of remote hearings that had taken place in the Civil Justice System since 19 March 2020, broken down by mode of hearing (video/audio/in person), technology used, and type of hearing (interlocutory/trial/appeal/enforcement/costs etc.). **This basic information was unavailable.** In order to gather this data, HHJ Chris Lethem and a member of the research team spent over five hours each day analysing the published listings data for the County Court during one week in May (see Appendix C for the approach taken to this). The response from the South Eastern Circuit contained information gathered on the South Eastern Circuit via a similar exercise that had been conducted each day since 19 March 2020. This data should be available to leadership judges, HMCTS and other stakeholders on a routine basis<sup>41</sup>.

<sup>41</sup> The author has written elsewhere and in detail about the changes that should be made to improve the data that is collected on the operation of the court system. Byrom, N (2019b2019) “Digital Justice: HMCTS data strategy and delivering access to justice; Report and recommendations”  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/835778/DigitalJusticeFINAL.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF)

A response to these recommendations (submitted in October 2019) is still outstanding. These recommendations, if adopted, would address the majority of the points made in this chapter.

9.4 At a basic level, HMCTS management information systems should be adapted to capture the following information:

- What hearings are taking place e.g. matters relating to constitution of claim, interlocutory, trial, appeal, costs, enforcement.
- What types of cases are proceeding e.g. personal injury, commercial, etc.
- What mode is being used e.g. paper, fully audio, partly audio, fully video, partly video, in person.
- Where are hearings taking place (geographic location).
- What technology is being used (telephone, Skype for Business, Microsoft Teams, Kinly, Cloud Video Platform etc).
- Is the case proceeding in private or in public?
- Technical issues experienced (none/moderate/serious).
- Outcome of hearing e.g. adjournment/settled prior to hearing etc.

9.5 A number of respondents identified the need to collect better data on the users of the civil justice System:

*“HMCTS should take urgent steps to capture data on the experiences of court users and outcomes of cases across court and tribunals, disaggregated by case type and protected characteristic, and use this to inform any required changes to the use of video and telephone hearings.”* (Equality and Human Rights Commission, n=n/s)

*“There has been no collection on whether court users have a protected characteristic (disability, age, sex, etc). This in my view is a major flaw, as the impact of Covid and Covid measures on those with certain protected characteristics is much greater than on those without them. Such consultations are pointless if the data on the impact of Covid on the most marginalised and disadvantaged types of court users in the civil justice system, such as disabled court users and especially disabled litigants in person, is not collected.”* (Individual respondent, litigant in person)

9.6 In light of the issues experienced in this review (and other similar exercises) regarding the ability to understand the experience of non-professional court users, it is vital that urgent steps are taken to collect the following basic information on users of the court system. This should be collected immediately and on a routine basis:

- age (date of birth)
- postcode
- English as a foreign language?
- protected characteristics data
- represented vs litigant in person.

### C. Primary legal information

- 9.7 Respondents consistently raised issues with access to and the consistency of primary legal information, such as listings (see Chapter 7 above). Respondents recommended a standardised format for listings, and the inclusion of more detailed information on the cases that are being heard (ICLR, n=n/s; Spotlight on Corruption, n=3; The Law Society, n=n/s).
- 9.8 As described above at section 7.16, respondents emphasises the urgent need to reform arrangements for providing timely access to case documents (including skeleton arguments) when authorised by the court, and judgments in a consistent format (News Media Association, n=n/s; Press Association, n=4; Guardian News Media, n=n/s; ICLR, n=n/s; Spotlight on Corruption n=3).

### D. Priorities for evaluation

- 9.9 A number of urgent priorities for evaluation were recommended by respondents and highlighted by the conduct of this review. These are summarised below.

#### D1. Non-professional court users

- 9.10 The most pressing priority relates to the need to understand the experience of non-professional court users, particularly those who are considered vulnerable under existing law and practice directions, those with protected characteristics and those who are litigants in person. Given that the two reviews of the impact on remote hearings under COVID-19 (the review of remote hearings in the Family Justice system led by the Family Justice Observatory, and this review) have been dominated by the experience of professional court users, it is vital that immediate attention and resource is dedicated to understanding the experience of non-professional court users.
- 9.11 Improving the quality of management information collected by HMCTS is urgently needed in order to make this possible. The courts and tribunals service in Northern Ireland collects routine data on the number of litigants in person in proceedings—. HMCTS should liaise with the Northern Ireland Courts and Tribunals Service to understand how this is approached.<sup>42</sup> Without the collection of information on users of the court system who have participated in hearings during this period, it is impossible to identify a sample frame for research.
- 9.12 In the immediate term, hearing notices should be adapted to facilitate the recontacting of parties for the purposes of research. The methodology applied to conduct the Survey of Employment Tribunal Applicants should be investigated and deployed. Standardised measures of legal

<sup>42</sup> See McKeever, G. et al. (2018) “Litigants in person in Northern Ireland: barriers to legal participation” Ulster University, Belfast p. 2. Available at: [https://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0004/309892/179367\\_NIHRC-Litigants-in-Person\\_EXECUTIVE-SUMMARY\\_\\_6\\_LOW.pdf](https://www.ulster.ac.uk/__data/assets/pdf_file/0004/309892/179367_NIHRC-Litigants-in-Person_EXECUTIVE-SUMMARY__6_LOW.pdf)

confidence and perceptions of procedural justice should be included. Data on hearing outcomes should be collected.

#### **D2. Priorities for evaluation: Understanding the experience of court users over time**

- 9.13 The empirical problems identified in relation to the regression analysis conducted as part of this rapid review could be surmounted by the collection of longitudinal data. Individual-specific characteristics could be isolated via panel data methods, where the impression of hearings is observed for the same individual across multiple hearings over time. Above all, future research must consider the significant selection issues at stake: samples must be random for meaningful generalisations to be made.
- 9.14 Respondents raised concerns about the impact of remote hearings on professional court users with caring responsibilities and those without access to private space at home. The impact on the junior bar, women and individuals with caring responsibilities should be monitored.

#### **D3. Priorities for evaluation: Understanding the impact of remote hearings on outcomes**

- 9.15 Respondents argued that the impact of remote hearings on outcomes should be urgently investigated in light of findings from recent research published by the EHRC and University of Surrey.<sup>43</sup> This research was conducted in the context of hybrid hearings with one party appearing from a detained setting. If findings from this are replicated in the context of remote hearings conducted in civil justice, this would be a cause of extreme concern. Quasi-experimental and experimental research methods should be applied to isolate the over and above effects of hearing mode on outcome.

#### **D4. Priorities for evaluation: Understanding the cost of remote hearings**

- 9.16 The finding presented in this review regarding the impact of remote hearings on cost requires further investigation in the context of the ongoing programme of HMCTS court modernisation. Some of the access to justice benefits predicted are based on assumptions that proceeding with hearings remotely will reduce the expense for court users. If this is not borne out, the widespread expansion of remote hearings may not deliver the access to justice benefits predicted.
- 9.17 In addition, the impact of remote hearings on judicial time and court system resource should be studied. If observations in this report regarding the relative time taken to conduct remote hearings are borne out on a wider basis, this could impact on assessments of their wider cost efficacy.

<sup>43</sup> For a recent review of the existing evidence on remote hearings, see Byrom, N. (2020) "What we know about the impact of remote hearings on access to justice: a rapid evidence review." Available at: <https://www.nuffieldfjo.org.uk/resource/impact-remote-hearings-access-to-justice>

**D5. Priorities for evaluation: Understanding the impact of remote hearings on judicial wellbeing, experience and training needs**

- 9.18 Findings relating to the fatigue created by proceeding with hearings remotely for professional users require investigation. The impact of remote hearings on judicial health and wellbeing should be studied, and recommendations in relation to breaks, optimal technological and working set-up and maximum hearing duration developed in accordance with this evidence.
- 9.19 D6 Further work should be undertaken to understand the impact of remote hearings on judges experience of hearings, and to identify training needs.

**D6. Priorities for evaluation: The impact of remote hearings on open justice**

- 9.20 Respondents raised concerns about the impact of remote hearings on the number of hearings conducted in private. Data should be collected on the number of applications made for privacy orders, and the number of hearings conducted in private. Data should also be collected on the proportion of hearings attended by the public, media and researchers.

**D7. Priorities for evaluation: The impact of remote hearings on carbon emissions**

- 9.21 The impact of remote hearings on carbon emissions should be studied, particularly in relation to large international commercial disputes where parties are currently required to travel internationally to attend in-person hearings.

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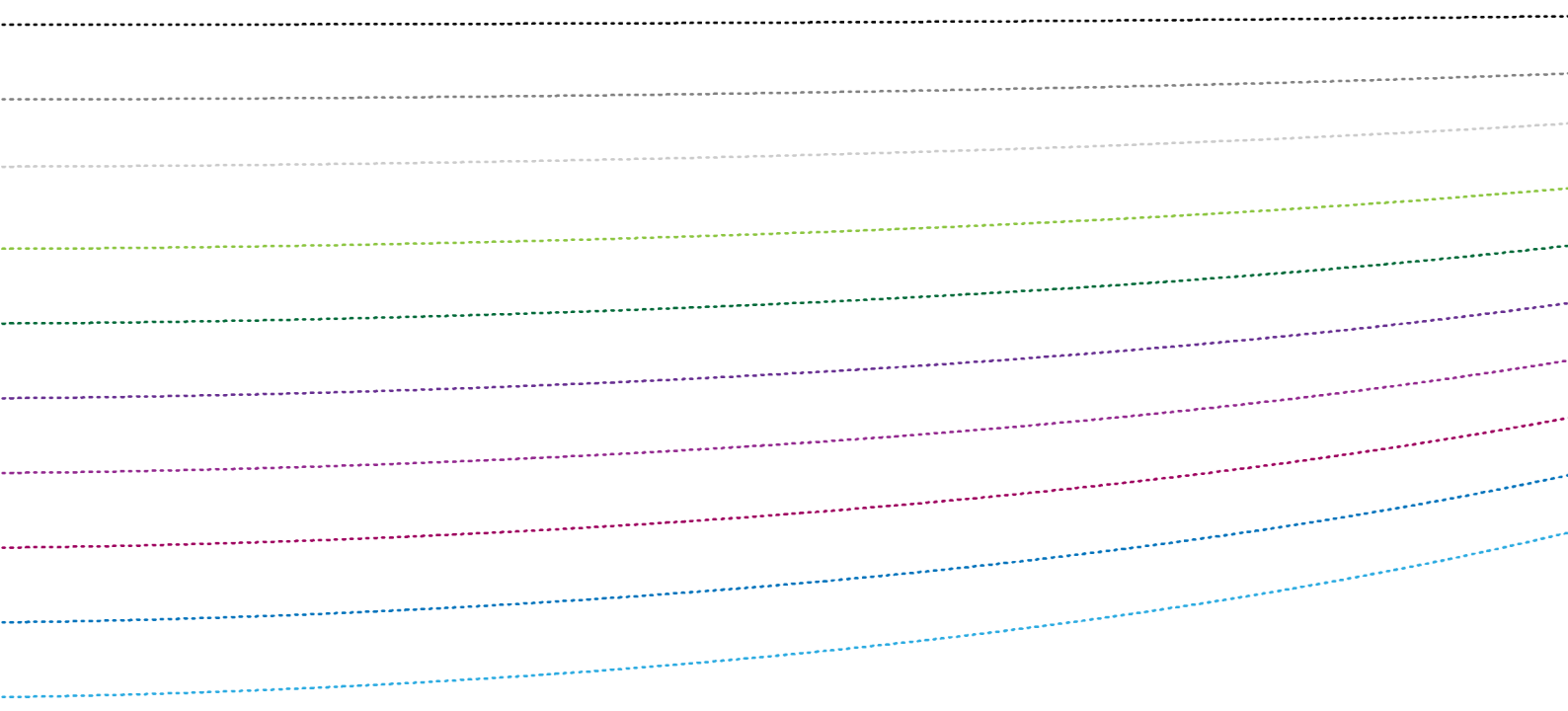
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