

Written evidence from Nuffield Family Justice Observatory

Openness and transparency in the Family Courts in England and Wales during Covid-19

The Nuffield Family Justice Observatory is an organisation set up by the Nuffield Foundation to put data and evidence at the heart of the family justice system. We are responding to this call for evidence in light of the work that we have undertaken during the Covid-19 pandemic to understand the impact on the family court.

Background

Proceedings in Family Courts are not open to the public and there are limited arrangements for reporters and bloggers to report on individual cases. There has for some time been concern about a lack of transparency in relation to family justice and the Committee will no doubt be aware of the recent report on Transparency in which the President of the Family Division sets out his proposals for improving transparency following a [full review](#) of this issue. The NFJO agrees with the President that openness and transparency in the Family Courts is not just about reporting and access by the public. In the report the President stated:

In the last three years Family justice has been extremely well served by the work of the National Family Justice Observatory (a dedicated research body that is generously funded by the Nuffield Foundation). The work done by the FJO has been a real game-changer which has shed light on the working of the Family Court. It was invaluable during the onset of Covid 19 to have access to research that held a mirror up, in real time, to the impact that our new ways of remote working were having on all involved. (para 59)

In April 2020, the President of the Family Division asked the NFJO to undertake a rapid consultation to explore the impact of remote hearings on the family courts. Following the continued need for social distancing, the Nuffield Family Justice Observatory undertook a further rapid consultation in September 2020 to find out how remote hearings were operating. A third consultation was undertaken in June 2021, when social distancing measures started to be eased, to seek feedback as to which forms of remote working should endure beyond the pandemic.

This paper draws together the insights from these three consultations. Full details of the consultations can be found [here](#).

The consultations revealed a disconnect between the way that lay parties and professionals experienced remote hearings and exposed the extent to which lay parties often struggled to fully participate. Concerns about whether justice could be achieved in such circumstances was expressed by litigants and professionals alike. The consultations highlighted the need to maintain sight of the litigants' experience of participating in proceedings, whether these are held remotely or in person.

Family court hearings are routinely held in private. Despite the stated wish of the President of the Family Division to increase transparency, the family courts continue to be a long way from 'open justice'. In light of this, it is vital that that litigants' experiences of family court proceedings are actively sought out by the justice system and that these insights inform future reforms.

How the consultations were conducted

Each consultation was conducted over a two to three-week period. The first consultation was undertaken from 14 to 28 April 2020, the second from 10 to 30 September 2020 and the third from 10 to 27 June 2021.

Who responded

All three consultations sought feedback from parents, other family members, and all professionals in the family justice system including judges, magistrates, barristers, solicitors, Children and Family Court Advisory and Support Service (Cafcass) advisers, court staff and social workers.

Those who had experience of a remote hearing in public or private law family proceedings were invited to respond. This included experience of any type of remote hearings (including administrative hearings, interim hearings and final hearings).

932 participants (professionals and parents) responded to the first consultation, 1,306 responded to the second consultation and 3,219 responded to the third consultation. Some responses collated information from groups of individuals, but this was counted as a single response, so the actual number of individuals who provided feedback was higher than recorded. There was a similar pattern in the type of respondents to the consultations, with judges, barristers, solicitors and magistrates making up at least two-thirds of the respondents in each consultation (see Table below).

	Consultation 1 n=932	Consultation 2 n=1306	Consultation 3 n=3219
Judges	15%	15%	10%
Magistrates	8%	17%	13%
Legal Advisers to magistrates	4%	5%	3%
Barristers	26%	15%	25%
Solicitors	15%	13%	27%
Social Workers	5%	7%	4%
Cafcass staff	18%	10%	6%
Parents	3%	9%	5%
Other (e.g., working for Family Drug and Alcohol Courts, intermediaries, voluntary organisations)	6%	8%	6%

Responses were received from all regions of England and Wales and there was a reasonable geographical spread.

Findings

Overall views of remote hearings

The respondents to the first consultation were evenly balanced in terms of their overall positive and negative reactions to remote hearings. This reflected the fact that many respondents felt that remote hearings were justified in some cases in the circumstances of the pandemic, and, for some types of hearing, were even preferable, but they had serious concerns in relation to other types of cases, particularly those where the issue was complex and/or contested and evidence was required or those where final orders were being made, especially where vulnerable parties were involved. It was clear from the responses that there

was a wide variation in practice and no consistency in decisions about which cases should be adjourned.

By September 2020, when remote hearings had been operating for six months, most professionals who responded to the second consultation felt that things were working more smoothly, either all of the time or some of the time. Professionals continued to report that there were also some benefits to working remotely, for professionals and parties, particularly in relation to a reduction in time spent travelling or in waiting at court for a case to be called on.

However, responses to the second consultation also revealed a clear disconnect between the experience of professionals and that of parents and other family members in relation to remote hearings. While many professionals were positive about remote hearings, the majority of parents and family members had concerns about the way their case had been dealt with and just under half said they had not understood what had happened during the hearing. Many professionals, although positive about remote hearings for some types of hearing or case, remained very concerned about the experience of vulnerable lay parties and litigants in person.

By June 2021 we were able to elicit detailed feedback about the suitability of remote hearings being conducted in specific types of cases or circumstances. The majority of professional respondents saw a continuing role for certain types of remote hearing, although many felt that the decision should be made on a case-by-case basis. The main considerations respondents identified as relevant to such a decision were the vulnerability of lay parties and their wishes and views, the complexity of the case, and whether there was access to suitable technology for all those taking part.

Overall, there was support for remote ‘administrative’ hearings (subject to certain caveats) such as case management hearings, first hearing dispute resolution appointments¹ and also for initial and/or ex parte applications for non-molestation/occupation orders². There was much less support for remote fact-finding hearings, hearings involving contested applications for interim care or contact orders, or final hearings.

There were parents who reported that they had preferred the remote hearing from having to attend court and others who were pleased that at least their hearing had taken place. .

In the main however it was clear that parties to cases were far less positive about remote hearings than professionals. A clear majority of parents (83%) who responded to the third consultation had concerns about the way that their case had been dealt with. Many other parents, relatives and lay parties raised concerns specifically about their experience of remote hearings. The majority of these comments were about the fairness and the smooth working of remote hearings, or concerns about technology or delays in proceedings.

Concerns about fairness

¹ These are first hearings in proceedings, (CMH public law, FHDRA private law) setting timetables and giving directions about the filing of evidence

² Initial hearings in private law proceedings in cases of domestic abuse where the victim is seeking protection are frequently heard ex-parte with an early return date.

Significant concerns were raised by all respondents (not just parents) to all three consultations about the fairness of remote hearings in certain cases and circumstances. There were also some worrying descriptions of the way some cases had been conducted.

The concerns included the difficulties in reading reactions and communicating in a humane and sensitive way when there was no face-to-face contact. Many professional respondents referred to the importance of being able to show empathy when involved in family justice cases, particularly in public law cases where children may be removed from their parents.

The court process is more important than simply being an administrative adjudication. It's a very human set of interactions. My role as a judge is absolutely dependent on the humane administration of a very, very complex interactive process (Judge).

There were also concerns that parents were having to take part in remote hearings alone and from their homes, without any legal or other emotional support.

In addition, respondents noted that it could be very difficult for parents to ensure privacy and confidentiality when they were calling from home. In the earlier phase of social distancing, when schools were closed, it was not uncommon for parents to be at home with the children who were the subject of the proceedings:

The mother, who was at risk of having her four children removed, gave evidence by telephone from her garden shed as there was nowhere else private she could go as she was self-isolating due to COVID-19 and the children were in the house, being cared for by their grandmother. (judge)

The concerns about parents being alone and unsupported during remote hearings where important decisions were being made were particularly strong when the case involved an application to remove a newborn baby from the mother.

Another issue identified by both parents and professionals was the problem of communication between lay parties and their legal representatives before hearings and during hearings. Pre-hearing communication, instead of being in person, was mainly by phone or email which adversely affected the taking of instructions and drafting of statements. During hearings it was difficult for many parents to communicate with their legal representatives in private because they did not have access to more than one device to enable them to send private messages and because judges or magistrates did not always allow for breaks or adjournments so that lawyers could communicate with their clients. Particular concerns were commonly raised in relation to parties with a disability or cognitive impairment or where an intermediary or interpreter was required.

There was widespread concern for litigants in person in private law matters. Many examples were given of support being provided to litigants in person by judges, magistrates, and legal advisers but it was acknowledged that this was often insufficient.

I have major concerns about the fairness of proceedings with both Litigants in Person and some represented parties (e.g., parents with learning type difficulties in care cases) in remote hearings. Removing children and making major decisions, e.g., on contact, can have long term (even lifelong) consequences. Notwithstanding

everyone's best efforts remote parties cannot sometimes be adequately engaged and whilst Judges and professionals can 'get on with it' and make it work I have real misgivings about how fair it is and how fair it is felt and seen to be (Judge).

While concerns were expressed most strongly by parents and relatives who have experienced remote hearings, it was clear that judges, lawyers and social workers had concerns too. Although six months into the pandemic most family justice professionals felt that fairness and justice had been achieved in the cases they were involved with most or all of the time, it was clear from responses that professionals also had concerns about whether proceedings were perceived as fair by parties in all cases. Professionals shared concerns about the difficulties of being sufficiently empathetic, supportive, and attuned to lay parties when conducting hearings remotely. By June 2021 63% of professionals who responded to the consultation felt that further arrangements needed to be in place to make remote hearings fair and work smoothly.

Let's not kid ourselves - none of us would have thought these methods of working achieved fairness and justice six months ago (Judge).

I think they have been fair and just in terms of legal outcome but I am not sure the perception has always been of fairness and justice being done (Judge).

Impact on the authority of the court

Many respondents raised concerns about the impact that working remotely was having on the formality and authority of the court. Family justice professionals expressed concern that the relative informality of telephone and video hearings meant that lay parties were not taking the court as seriously as they would if the hearing were taking place in person.

Professionals reported changes in lay party behaviour due to hearings being held online.

Lay parties often don't treat the court process with the usual respect when connecting from home. I have undertaken cases where a lay party is in bed, or in pyjamas or trying to do household tasks while participating (Barrister).

Parents also expressed concern about professionals appearing overly relaxed in situations where important decisions are being made about their future.

Problems with technology and administration of hearings

Many of the concerns relating to fairness and upholding the gravitas of the court were caused, or exacerbated, by problems of managing telephone and video technology, or difficulties with the administration of remote hearings.

The responses to the three consultations suggested that the technology to support remote hearings did improve over time. Nevertheless, many respondents continued to report difficulties. Respondents' concerns about video technology normally related to the quality of connection and access to appropriate hardware (screens and loudspeakers). These difficulties affected professionals as well as parents, but the majority of concerns related to the difficulties parents experienced in fully participating in hearings. The pandemic highlighted issues of digital poverty as it became clear that many parents in public law care proceedings did not have access to laptops, Wi-Fi, or smart phones. Where there was no access to Wi-Fi

they often had very limited access to data, making it difficult for them to take part in online hearings.

Many of my clients may not have Wi-Fi, no credit on their phones, phones that are infrequently charged and no access to laptops nor iPads. They live in social deprivation, and their housing may be shared or not sufficiently private for a hearing to be conducted (Barrister).

The vast majority of parents received no help in accessing the technology to take part in the hearing. Professionals expressed concern about the lack of clarity around responsibility for supporting lay parties with access to technology and/or private space from which to join hearings remotely. As a result, it was clear that practice across England and Wales was very varied in terms of the support available.

It was also clear from responses to the consultations that the family court system in England and Wales lacked consistent high-quality IT equipment and connectivity. Common problems arising from this identified by respondents included difficulty in hearing people, difficulty seeing people, and difficulty identifying who is speaking.

Concerns were also raised about the extent of professionals' technological capabilities, a lack of opportunities for training and limited IT support available to judges and magistrates. The limited IT support available meant that judges, magistrates and legal advisers were spending considerable amounts of time trying to deal with problems that arose, which impacted on delays in the system. It also resulted in technical issues during hearings which impacted on the ability of lay parties to follow and understand what was happening.

Both consultations revealed wide variations in practice across different courts and geographic areas in terms of how hearings are organised. This included the information sent to lay parties and professionals about how the hearing would work, the timing of sending out notifications of a hearing, the timing of the decision about what technology would be used for the hearing and arrangements for enabling professionals and lay parties to contact the court if there were any connectivity problems.

Recommendations made by respondents

Each consultation asked respondents for recommendations about how to improve the fairness and smooth running of remote hearings. The responses were remarkably similar across all three consultations.

Many requested measures that would make hearings run better, such as guidance for lay parties about the court process and the format of the hearings, better support to access the relevant technology and clarity about who was responsible for providing assistance to lay parties and parents. Some of the recommendations for improved practice were remarkably modest: such as being sent the links of hearings the day before, having an usher to manage attendance, and ensuring all bundles of evidence have been sent out in advance. Some of the request for improvements in the way hearing were run were relevant to any hearing, not just those run remotely:- making sure everyone has joined the hearing, making sure to identify all the different people involved, checking everyone can hear and/or see, checking whether people need a break to communicate.

There were also many requests for improvements in technology, such as ways to assist with communication between lay parties and their legal representatives during a hearing and improved technology to assist with interpreters and intermediaries. Judges and magistrates also requested better technical support, as well as improvements to the technology itself (better hardware, better sound, better connectivity).