



What we know about the impact of remote hearings on access to justice: a rapid evidence review

Briefing paper

This briefing paper highlights the main findings of a rapid evidence review undertaken during April 2020 by Dr Natalie Byrom, Director of Research and Learning, Legal Education Foundation.

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The coronavirus pandemic has required the justice system in England and Wales to pivot rapidly to remote working. In the family justice system this has translated into the widespread expansion of hearings conducted by telephone and video link. The use of court-based hearings is only contemplated in exceptional circumstances where the interests of justice and fairness require one, and where it is safe to do so (Macdonald 2020, para 3.3). This places significant discretion and responsibility in the hands of individual judges, who are tasked with determining whether particular arrangements are in the interests of justice during a period of intense uncertainty.

This briefing presents the results of a rapid evidence review, and explores whether any practical lessons can be drawn from existing research on the impact of remote hearings, with particular reference to the experience of vulnerable groups:

- What can the existing evidence tell us about the kinds of vulnerability that might be compounded by the use of remote hearings?
- What effective safeguards can be recommended to ensure that access to justice is maintained?

This paper accompanies a report that follows a two-week consultation on the use of remote hearings in the family justice system, commissioned by President of the Family Division. Both rapid studies were undertaken with a view to potentially helping to inform further guidance on the use of remote hearings through the crisis.

Figure 1: Summary of evidence included

	First author	Year	Location	Study design	Sample size	Area of law	Type of hearing
1	Antrobus, E.	2016	Australia	Vignette/mock trial	102 mock jurors	Criminal	Partly-video, testing impact of mode of child witness testimony on assumptions of credibility
2	Bowen, A.	2004	United States	Literature review	N/A	Criminal,	Partly-video
3	Diamond, S.S.	2010	United States	Quantitative: Time series study, empirical analysis of case files	645,117 bond decisions	Criminal, bail hearing	Partly-video, defendants in detention
4	Eagly, I	2015	United States	Quantitative: Observational, empirical analysis of case files	153,835 proceedings studied	Immigration removal proceedings	Partly-video, appellants in detention
5	Ellison, L.	2014	England and Wales	Vignette study	160 mock jurors	Criminal	Partly-video, testing the impact of special measures on mock juror deliberation
6	Equality and Human Rights Commission	2020	England, Wales and Scotland	Mixed methods- interviews and survey	285 participants	Criminal	Partly-video, defendants in detention
7	Fielding, N.	2020	England and Wales	Mixed methods	600 hearings observed	Criminal	Partly-video, defendants in police custody
8	Goodman, G.	1998	United States	Vignette/mock trial	1,201 mock jurors	Criminal	Partly video-testing impact of different modes of witness testimony on mock jury decision-making
9	Haas, A.	2006	United States	Literature review	N/A	Immigration	Partly-video, appellants in detention
10	Hynes, B.	2019	Global	Literature review	N/A	Immigration	Partly-video
11	Lindsay, R.	1995	Canada	Vignette study	385	Criminal	Partly-video, testing impact of different modes of witness testimony on mock jury decision-making
12	Munro, V.	2018	Global	Evidence Review	N/A	Criminal	Partly-video, impact on juror decision making of pre-recorded evidence and live link testimony
13	Raine, J.	2016	England and Wales	Mixed-methods Self-completion online survey	213 respondents	Traffic Penalty Tribunal	Fully-audio
14	Rossner, M.	2018	England and Wales	Qualitative- process evaluation	8 hearings	First Tier Tribunal Tax	Fully-video
15	Rowden, E.	2013	Australia	Synthesis of findings from a mixed-methods study	N/S	N/S	Partly-video
16	Tait, D.	2015	Australia	Mixed-methods vignette, pilot study	445 volunteer model jury members	Criminal	Partly-video
17	Terry, M.	2010	England and Wales	Mixed methods- interviews, observations, survey plus analysis of administrative data	1,593 cases in administrative dataset	Criminal	Partly-video, defendant detained in police station
18	Thorley, S.	2019	USA	Quantitative, replication study, observational, empirical analysis of case files	109,926 proceedings studied	Immigration removal proceedings	Partly-video, appellants in detention
19	Wallace, A.	2017	Australia	Qualitative, interviews	56 interviews with stakeholders	Criminal	Partly-video
20	Wallace, A.	2018	Australia	Qualitative, case study	3 courts	Criminal	Partly-video
21	Walsh, F.	2008	USA	Quantitative, secondary analysis of statistics	c.500,000 records of hearings	Asylum removal hearings	Partly- video, appellants in detention

Key research findings

The majority of the 21 studies included in this review are small-scale and qualitative in nature (see Figure 1) and feature parties in detained settings. The absence of detailed descriptions of the technology used, alongside differences in setting, legal frameworks, party location and methods, makes it difficult to draw firm conclusions. However, reviewing the published research on the use of partly-video hearings in criminal and immigration bail hearings reveals some consistent themes.

Successive studies raise concerns regarding the impact of remote hearings on the ability of parties to participate effectively in proceedings. The reasons for this are poorly understood—but potential explanations are set out in this section.

1. Parties do not fully appreciate the seriousness or finality of proceedings when conducted remotely and therefore do not avail themselves of the procedural safeguards available to them—including legal advice.

Successive studies indicated that, in cases where hearings are conducted remotely by video link, parties are less likely to seek legal advice and representation because they do not understand the significance of the process.

Research into the impact of the introduction of remote hearings in immigration detention settings in the United States demonstrated that remote hearings impacted negatively on the level of litigant engagement in the process. Litigants perceived the process as less legitimate and therefore did not take full advantage of the procedural safeguards available to them (Eagly 2015). These findings were confirmed by a replication study published in 2019. Research published by the Ministry of Justice in 2010 into a pilot virtual court process that allowed defendants charged with an offence to appear in the magistrates' court for their first hearing via a secure video link identified that: 'the rate of defence representation was lower in virtual courts compared to the

What do we mean by 'remote hearings'?

This briefing uses the following definitions and terms:

- audio hearings – conducted by telephone or via audio-only systems
 - partly-audio – a physical hearing in which some participants might be connected via audio
 - fully-audio – when there is no physical hearing and all participants are connected by audio
- video hearings – conducted using Skype, Zoom, Kinly or the Cloud Video Platform
 - partly-video – a physical hearing where some participants might be connected by video link
 - fully-video – when there is no physical hearing and all participants are connected by video link.

expectations of the pilot in the original model and the comparator area', in spite of the fact that free legal advice was offered to all participants in the pilot'. A recent study of the 'video-enabled justice' pilot conducted by the University of Surrey also found that defendants who appeared by video were less likely to have legal representation (Fielding, Braun and Hieke 2020).

Successive studies in the US context suggest that failure to seek legal advice may be linked to a defendant's diminished ability to present their case effectively (Eagly 2015; Terry, Johnson, and Thompson 2010; Diamond et al. 2010), and consequently have a negative impact on outcomes (Walsh and Walsh 2008; Poulin 2004; Haas 2006; Harvard Law School 2009). An Australian study into the use of partly-remote hearings suggests that the use of video links: 'alters the representation of the judge as a the embodiment of law, weakening symbolic and cultural dimensions and undermining the gravity and decorum of court proceedings' (Wallace, Anleu and Mack 2018). In the context of all forms of remote hearings in family law, it may be considered particularly important to develop safeguards to ensure that all parties understand the significance and implications of the hearing they are taking part in.

2. Partly-video hearings impair a defendant's ability to communicate with their legal representatives when they are finding proceedings difficult to follow.

Existing research into the use of partly-video hearings in the criminal justice context has identified concerns regarding the impact of remote hearings on the ability of legal representatives to communicate with their clients privately and effectively (Terry, Johnson, and Thompson 2010; House of Commons Justice Committee 2019, p. 24). This has a negative impact on participation as defendants are unable to raise concerns when they are finding proceedings difficult to understand.

In its interim report, 'Inclusive justice: a system designed for all', the Equality and Human Rights Commission (EHRC) highlighted the potentially discriminatory impact of video links in remand review hearings, suggesting that the use of partly-remote hearings undermines access to justice for disabled defendants (EHRC 2020). Defence solicitors interviewed in the conduct of this research highlighted the issues created by the separation between the defendant and their solicitor and/or the court on the ability of defendants to effectively participate in their hearings.

The above concerns are echoed in research conducted in the United States, which raises concerns regarding the impact of partly-video hearings on defendant counsel communications during hearings conducted in the criminal context (Colbert, Paternoster, and Bushway 2001; Poulin 2004).

In the context of fully remote hearings contemplated in the family justice system as a result of COVID-19, it is notable that all of the methods described for enabling remotely located clients to communicate with their representatives during the course of a hearing (WhatsApp, text message, email) rely on literacy (Macdonald 2020). This is particularly concerning as Revolving Doors Agency, in providing evidence to the Justice Select Committee inquiry into the ongoing programme of court reform, pointed out that 15% of the population in the UK are

functionally illiterate (House of Commons Justice Committee 2019, pp. 14).

In order to ensure effective participation, thought may need to be given to whether it is possible to effectively represent parties remotely, or whether representatives should make arrangements for clients to join the hearing alongside them at their place of work, assuming it is possible to do so in a socially distanced manner.

The impact of all categories of remote hearing on the efficacy of intermediaries as an adjustment to facilitate effective participation—particularly where the intermediary is joining the hearing separately from the party they are supporting—is not well understood. It is therefore not known whether remote intermediaries can operate as an effective safeguard in this context.

3. Technical issues with technology can make it more difficult for parties to follow proceedings.

Unsurprisingly, a common theme across the studies that examined the impact of partly-video hearings on access to justice, is that deficiencies in the performance of the technology risk undermining effective participation.

The EHRC report (2020) implicated the poor performance of technology in its findings on the discriminatory impact of remote hearings in the criminal justice context.

Research that aimed to develop design and operational guidelines for remote participation in court proceedings in the Australian context concluded that: 'improved technology and environment in the remote space indicates an improved interaction with those in the court room' (Rowden et al. 2013, p.9). The same study indicated that the size of the participant on the screen in partly-video hearings should be 'life size' (p.16).

Unfortunately, there is little evidence pointing to minimum technical and performance requirements for technology to ensure effective participation. What quality of software and hardware is necessary to ensure effective participation? If the broadband drops out once, does this

undermine effective participation? In party-to-party disputes, if one side has access to sophisticated technology and high quality broadband, but the other does not, does this create issues in relation to the relative equality of parties before the court?

The absence of empirical evidence renders it difficult to recommend effective safeguards in the context of the rapid transition to fully remote hearings.

4. Partly video hearings may impact negatively on perceptions of party and witness credibility.

The evidence regarding the impact of partly-remote hearings on assessments of witness and party credibility is inconsistent and conflicting. Some studies exploring the impact of remote testimony in criminal trials suggest that child witnesses are viewed as 'less believable' when they provide testimony over video link, in spite of the fact that they are more relaxed and their accounts more accurate when they appear remotely (Goodman et al. 1998; Lindsay et al. 1995; O'Grady 1996). Explanations for this include:

- the inability of jurors to see the child's demeanour fully via video link
- jurors' perceptions of the credibility of child witnesses who appear via video link are mediated by their beliefs about the reasons why children are participating remotely (Antrobus, McKimmie, and Newcombe 2016).

Studies exploring the impact of special measures for witnesses available in criminal trials, including appearance by video link, have similarly suggested that: 'the mediating effect of the live link may create a distance between the victim and the jury which will make it less likely that her account will elicit sympathy and be believed' (Payne 2009 and Phelps, Turtle and Sattar 2004 cited in Ellison and Munro 2014).

Conversely, other studies that have adopted a vignette design to explore the impact of different modes of witness testimony on juror perceptions of credibility have concluded that there is no clear evidence of consistent impact arising from divergent

presentation modes (Ellison and Munro 2014; Munro 2018).

A recent review of research in the context of partly-video hearings in the immigration and asylum context argues that cultural norms regarding body language and trustworthiness may be interrupted when hearings are conducted remotely. The review states that: 'In a Western cultural context, eye contact is a key means by which trust between individuals is secured. However, for a judge in a hearing using video-conferencing to sense that eye contact with the applicant is being maintained, the applicant must speak directly into the camera, obstructing their view of the screen where they can see the judge. This is unintuitive and presents a trade-off of senses for the applicant. Lord Wilson, in a judgment of the UK Supreme Court, has observed that "[t]here is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as satisfactory as live evidence given in person from the witness box"' (Hynes, Gill, and Tomlinson, 2019).

A study conducted in Australia on the impact of partly-video hearings on judicial engagement suggests that the use of partly-video hearings has a dehumanising effect on participants (Rowden 2013). The impact of the transition to fully video hearings on perceptions of credibility has not been studied, making it difficult to suggest appropriate accommodations to address this issue.

5. The use of remote hearings makes it more difficult for the court to identify vulnerability and put in place reasonable adjustments to ensure effective participation.

Successive research raises concerns that the use of remote hearings, particularly partly-video hearings, makes it more difficult for the court and legal representatives to identify when a party is vulnerable and put in place reasonable adjustments to secure their effective participation.

What do we mean by ‘access to justice’ and ‘vulnerable parties’ in family justice?

Common law in England and Wales establishes a definition of access to justice that can be summarised as consisting of four parts: access to the formal legal system; access to a fair and effective hearing; access to a decision; and access to an outcome. The legal basis for this definition is set out in Byrom (2019a; 2019b).

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. It has been recognised that oral hearings might be required ‘when facts which appear to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally if it is to be accepted’ (R (Howard League for Penal Reform and The Prisoner’s Advice Service) v Lord Chancellor [2017] EWCA Civ 244 (41)). 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 amount of time (Choudhry and Herring 2017). Article 6(1) applies both to civil rights and criminal cases: through a series of judgments, the European Court of Human Rights has interpreted civil rights and obligations as including areas such as family law. In *Airey v Ireland* (App No 6289/73) (1979–80) 2 EHRR 305 per para 24 it was held that judging whether a hearing is effective includes consideration of whether an individual is able to present their case properly and satisfactorily (Miles 2011). Courts in countries that have signed the European Convention on Human Rights are allowed to apply their own procedural rules so long as the outcome is a fair trial. In addition, the United Nations Convention on the Rights of the Child 1989, **Article 9**[2] provides that in any proceedings concerning the separation of a child from her parents: ‘all interested parties shall be given the opportunity to participate in their proceedings’.

The **Family Procedure Rules 2010**, which govern the conduct of hearings in the family courts in England and Wales, have the overriding objective of: ‘enabling the court to deal with cases justly, having regard to any welfare issues involved’ (FPR 2010). The Rules

state (per 1.1(2)) that dealing with a case justly includes ‘(a.) ensuring that it is dealt with expeditiously and fairly, (b.) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues and (c.) ensuring that parties are on an equal footing.’ The FPR 2010 afford judges a considerable degree of flexibility in determining the arrangements that are appropriate to ensure that cases are dealt with justly and fairly, and that parties are able to fully participate. In 2017, a new Part 3A of the FPR 2010 came into force, supplemented by a new Practice Direction 3AA (UK government 2017). Practice Direction 3AA sets out the procedure and practice to be followed to achieve a fair hearing: ‘by providing for appropriate measures to be put in place to ensure that the participation of parties and the quality of the evidence of the parties and other witnesses is not diminished by reason of their vulnerability.’ In determining whether a practice direction should be made to facilitate effective participation, Rule 3A.7 states that the court should have regard in particular to:

- the impact of any actual or perceived intimidation (by any other party, witness, family member or associates)
- whether the party or witness suffers from a mental disorder or has a significant impairment of intelligence or social functioning, has a physical disability or physical disorder or is undergoing medical treatment
- the issues arising in the proceedings including any concerns arising in relation to abuse
- whether a matter is contentious
- the age, maturity and understanding of the party or witness
- the social and cultural background and ethnic origins of the party or witness
- the domestic circumstances and religious beliefs of the party or witness
- any characteristic of the party or witness which is relevant to the participation direction which may be made
- whether any measure is available to the court and the costs of such measures.

Further guidance on vulnerability is given at paragraph 3.1 of the Practice Direction. The Practice Direction also states that the court should also consider the ability of the party or witness to: (a) understand the proceedings and their role in them, (b) put their views to the court, (c) instruct their representative before, during and after the hearing, and (d) to attend the hearing without significant distress. Additional guidance issued on the conduct of remote hearings should seek to address whether the conduct of a remote hearing is likely to compound or alleviate the vulnerabilities of parties or witnesses.

Studies exploring the impact of remote hearings on the efficacy of court interpreting have been similarly critical, raising concerns about the safety of proceeding with hearings in this manner when parties have English as an additional language. Extending the use of remote ground rules hearings in the family law context, with a view to adjourning cases where participants have English as an additional language, are neurodiverse, have a learning disability or are experiencing mental ill health, or have issues with drug and alcohol abuse, which might impair their ability to participate effectively in remote hearings could be an effective way to manage the risks posed by the shift to audio, partly-video and fully video hearings.

Evidence gaps

It is important to acknowledge the significant limitations of the existing evidence base.

1. Absence of recent studies exploring the impact of the use of partly or fully-audio hearings.

Research conducted in support of this briefing revealed very little evidence relating to the impact of fully or partly-audio hearings on access to justice for vulnerable groups. This may be because fully or partly-audio hearings tend to be used for routine procedural matters where parties are legally represented. However, the absence of robust data on the use and prevalence of audio hearings in the justice system in England and Wales makes it difficult to speculate why this has not been identified as a topic of interest for researchers.

One study of the Traffic Penalty Tribunal observed that the parties were most likely to understand the process when a telephone hearing was conducted, in preference to a face-to-face hearing or hearing on the papers (Raine, Snow, and Dunstan 2016). The benefit was held to accrue from not having to travel to unfamiliar surroundings to participate, and being able to engage in a two-way dialogue about the process (p. 36). However, 55% of the sample of those who participated in a telephone hearing felt them to be somewhat or very unfair, with only

35% finding them fair or reasonably fair (p. 25).

2. Absence of studies on partly-video hearings in family justice.

The majority of the existing studies relate to the deployment of video links (partly-video hearings) in criminal proceedings and immigration (party to state disputes). Within the existing literature, the bulk of research examines the use of video-links when one party is in detention. There is little data on the use of partly-video hearings in party-to-party disputes (such as private family law).

3. Lack of consistent recording of the intervention to facilitate comparison across different settings.

The absence of common definitions and detailed descriptions of the types of remote hearing studied makes it difficult to draw conclusions across different settings. In addition, variations in study design and cultural and legal system context undermine the ability to draw consistent conclusions. As in many areas of justice system research, the literature is dominated by small scale qualitative studies. The relative absence of robust experimental and quasi-experimental studies renders it difficult to draw firm conclusions regarding cause and effect between intervention and outcome. The absence of replication makes it difficult to confirm the veracity of conclusions drawn. One notable exception is the work Eagly (2015) whose conclusions regarding the impact of partly-video hearings on outcomes in immigration removal proceedings were confirmed in a replication study published in 2019 (Thorley and Mitts 2019). The absence of a counterfactual in many studies also raises questions regarding whether or not the impact on participation is due to the medium selected for the hearing.

4. Complete absence of empirical research on the use of fully-video hearings in live cases.

This review found no empirical research on fully-video hearings for live cases, other than a small-scale process evaluation of a

pilot in the First Tier Tribunal Tax Chamber, which only captured data on eight cases. HMCTS conducted the first ever pilot in England and Wales for fully-video hearings. It demonstrated, amongst other findings, that the technology utilised required further development: three out of the eight cases could not proceed because of technical issues.

The only other empirical research on fully-video hearings has been conducted in an experimental setting (Tait et al., 2015).

Recommendations

- Extend the use of remote ground rules hearings in the family law context with a view to adjourning cases or ordering a physical hearing where participants are identified as vulnerable according to the criteria set out in Practice Direction 3AA. Special attention should be given to cases where one or more parties :
 - are children or young adults
 - have English as an additional language
 - are neurodiverse
 - have a learning disability or are experiencing mental ill health
 - have issues with drug and alcohol abuse that might impair their ability to participate effectively
 - experience fear or distress in relation to the case.
- Build in additional safeguards and checks to ensure all parties understand the seriousness of hearings conducted remotely and have the opportunity to seek legal advice and representation.
- Where parties have legal representation, thought should be given to whether it is possible to provide effective representation remotely. Representatives should consider making arrangements to enable their clients to join the hearing alongside them at their place of work, assuming it is possible to facilitate this in a socially distanced manner.
- Consider establishing a minimum threshold for the degree of technology performance required to facilitate a fair

and effective hearing, to ensure consistency and equality before the law.

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About the Nuffield Family Justice Observatory

The Nuffield Family Justice Observatory (Nuffield FJO) aims to support the best possible decisions for children by improving the use of data and research evidence in the family justice system in England and Wales. Covering both public and private law, the Nuffield FJO will provide accessible analysis and research for professionals working in the family courts.

The Nuffield FJO has been established by the Nuffield Foundation, an independent charitable trust with a mission to advance social well-being. The Foundation funds research that informs social policy, primarily in Education, Welfare, and Justice. It also funds student programmes for young people to develop skills and confidence in quantitative and scientific methods. The Nuffield Foundation is the founder and co-funder of the Ada Lovelace Institute and the Nuffield Council on Bioethics.

The views expressed in this paper are those of the author and not necessarily those of the Foundation.

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