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Remote trial and error: how COVID-19 changed public access to court proceedings

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Remote trial and error: how COVID-19 changed public access to court proceedings

Restrictions imposed during the COVID-19 pandemic in England and Wales accelerated the use of digital technology for remote hearings. Inevitably, a period of trial and error followed, with a hybrid and emergency set of rules for media and public access to hearings. This short article outlines some of the main changes to the conduct of court hearings in 2020-21, and the impact on open justice. We contend that this tumultuous period has highlighted the potential for improved accountability of the justice process, but also unresolved issues around the practical management of public access to courts.

Keywords: Open justice, digital courts, remote hearings, justice system accountability, COVID-19

Introduction

The principle of open justice – that justice should be administered so far as possible in public – is a fundamental part of the common law legal system and of the rule of law in a democratic society. It ensures scrutiny and accountability as well as promoting public awareness and understanding of the law. Access to observe and report on a public court hearing should not be limited otherwise than for legally justifiable reasons; for example, to protect national security, vulnerable parties or commercially sensitive information, or to prevent disruption of the proceedings. In practice, a patchwork of statutory provisions, practice directions and guidance have developed to enable or restrict public and media access to different court types. For instance, in the family courts, access is restricted to accredited members of the media and, most recently, to qualifying lawyers who wish to report hearings.¹

¹ ‘Legal Bloggers’ (*The Transparency Project*)

<<https://www.transparencyproject.org.uk/legalbloggers/>> accessed 17 August 2021

In the absence of any formal and official monitoring of public access to courts, the consistency of the application of these rules - and the frequency and nature of public and media attendance - is not reliably known. Obstacles to members of the media and public accessing courts and documents were, however, commonly reported via mass and social media prior to the pandemic period. As a result, in 2018 the Director of Communications of Her Majesty's Courts and Tribunals Service (HMCTS) initiated a working group of media representatives through which practical issues could be raised, and outcomes have included updating of rules on access to information on Single Justice Procedure cases and the issuing of guidance to staff. The group is constrained in several ways: it is not intended to develop policy, and it has not been open to non-journalists.²

In March 2020, the first national 'lockdown' forced HMCTS to restrict usual physical access to courtrooms. The government's Coronavirus Action Plan,³ published on 3 March 2020, claimed that 'HM Courts & Tribunal Service have well established plans to deliver key services to protect the public and maintain confidence in the justice

² 'New Media Guidance Issued to All Court Staff' (*Gov.uk*, 24 October 2018)

<<https://www.gov.uk/government/news/new-media-guidance-issued-to-all-court-staff>>

accessed 17 August 2021. Additional information about the working group has been relayed to the authors in correspondence and meetings with representatives of HMCTS.

³ 'Coronavirus Action Plan: A Guide to What You Can Expect across the UK' (*Gov.uk*, 3

March 2020) <[https://www.gov.uk/government/publications/coronavirus-action-](https://www.gov.uk/government/publications/coronavirus-action-plan/coronavirus-action-plan-a-guide-to-what-you-can-expect-across-the-uk)

[plan/coronavirus-action-plan-a-guide-to-what-you-can-expect-across-the-uk](https://www.gov.uk/government/publications/coronavirus-action-plan/coronavirus-action-plan-a-guide-to-what-you-can-expect-across-the-uk)> accessed 17

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system'. Just how well established remains open to doubt. However, there was soon to be a massive and revolutionary change in the way most courts conducted business – prompting comparisons with emergency measures during the Second World War.⁴ Jury trials were suspended from 23 March 2020. A small number of 'priority courts' remained open, for what were described as 'essential face-to-face hearings'.⁵ All other court business, if done at all, was thereafter done remotely. As time progressed, and rules permitted entry to court rooms, a form of hybrid (or 'blended') justice developed, with hearings continuing remotely as well as in physical courts; or with a mix of physical and virtual participation during a single hearing. Remote hearings are variously described as 'remote', 'digital', 'electronic' or 'virtual' courts and can be understood in three broad categories: video (partial or full); audio (partial or full); and 'paper' (submissions and responses sent by 'paper' – i.e. in writing rather than by way of oral argument).⁶

⁴ Coleman C, 'Coronavirus: Jury Trials Face "Biggest Change since WW2"' (*BBC News*, 30 April 2020) <<https://www.bbc.com/news/uk-52462678>> accessed 18 August 2021

⁵ 'Priority Courts to Make Sure Justice Is Served' (*Gov.uk*, 27 March 2020) <<https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served>> accessed 24 August 2021

⁶ Susskind, R. at Q20 in Parliament.uk, 'Corrected Oral Evidence: Constitutional Implications of Covid-19' (House of Lords 2020) <<https://committees.parliament.uk/oralevidence/462/html/>> accessed 17 August 2021

In this short analysis and commentary, we describe how the approach to remote hearings in England and Wales varied according to the type of court or case being heard, and identify some of the complaints about access to hearings made by journalists and other members of the public during this emergency period. Our discussion then turns to the unresolved issues for open justice in principle and practice, because of the shift to hybrid methods for conducting hearings. Although the problems were – and continue to be – numerous, some of these pre-dated the pandemic. We suggest, therefore, that the COVID-19 period should be used as a catalyst for improving and standardising access, in ways that best serve the interests of efficient, fair, and open justice; and there should be a resistance to reverting to the inadequate and inconsistent systems of the physical courts.

What did COVID-19 change?

Civil and family

In the civil and family courts, proceedings were conducted by Zoom, Skype for Business, Microsoft Teams and other platforms with judge, legal representatives, parties, and witnesses all participating remotely. The rapid development of online hearings was primarily managed by the judiciary and practitioners working together to find a solution, rather than being centrally planned and managed by HMCTS. This was all the more surprising in view of the extensive programme of modernisation, including the development of an online court, in which HMCTS had been engaged since 2016. The court estate was being rationalised, with many local courts being sold off, and all court documentation was in the process of being digitised. Against that background, the cessation of physical hearings during the coronavirus lockdown appeared to offer a perfect opportunity for the rapid roll-out of remote hearing technology. But the

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preferred platform being developed, known as Cloud Video Platform (CVP), was not yet ready. (It was since been rolled out fairly extensively, but that has taken more than a year to achieve and is still not complete.) Instead, there was what one judge described as a ‘smörgåsbord’ of different approaches adopted by judges or by law firms and advocates using their own app accounts. In April 2020 Mr Justice Macdonald, in what was by then already the third edition of guidance entitled *The Remote Access Family Court*, explained that:⁷

[I]t is simply not going to be possible at this point, pending the introduction of CVP, to arrive at a common agreement as to a single ‘off the shelf’ software platform to be used in the interim in all cases. In the circumstances, this paper proposes that ... the court and parties choose from a ‘Suite’ or ‘Smörgåsbord’ of IT platforms, subject always to the cardinal requirement that at the outset of each case the judge and parties consider and settle on the platform that is to be used in that case.

The civil courts provided an example of this free-for-all approach in what was reportedly the first fully virtual High Court trial, in *National Bank of Kazakhstan v Bank of New York Mellon* [2020] EWHC 916 (Comm) before Mr Justice Teare. The case was listed with links to several sessions on YouTube, which were for a short time available for ‘catchup’ viewing by anyone with a link. As is now common, both judge and counsel appeared on screen from their own living rooms or studies. The recording appeared to have been arranged by one or more of the solicitors’ firms in the case and was not published on the official YouTube channel used by the Judiciary for its

⁷ MacDonal J, ‘The Remote Access Family Court: Version 3’ (Family Division 2020)

<<https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-3-Final-03.04.20.pdf>> accessed 17 August 2021

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somewhat experimental live streaming of Court of Appeal cases dating back to before the pandemic. Although this unofficially posted video content was later removed, a daily transcript of the hearing remained on the solicitors' website.⁸

Although such publication was unusual, the recording of audio or video hearings by one of the practitioners in the case was not in itself uncommon. It was done to assist the court, and with a view to the recording being passed (in an appropriately secure fashion) to the court for retention and archiving. This meant that on top of the existing pressures of preparing a case the practitioner faced the burden of managing data and sometimes even resolving other parties' technical problems. Though symptomatic of the 'all hands on deck' approach that characterised the early days of the crisis, this additional responsibility was, commented barrister Lucy Reed, 'invidious'.⁹ Mr Justice MacDonald, in an earlier edition of the family court guidance quoted above, was also aware of the pitfalls: 'With judges conducting remote hearings on a variety of platforms, on occasion without the support of court staff due closure of the court, the risk of recordings being mislaid or corrupted is high'.¹⁰

⁸ 'Court Transcripts: Claim No FL-2018-000007' (*Stewarts Law*)

<<https://www.stewartslaw.com/fl-2018-000007/>> accessed 17 August 2021

⁹ Reed L, 'Invidious' (*Pink Tape*, 6 June 2020) <<http://www.pinktape.co.uk/rants/invidious/>>

accessed 17 August 2021

¹⁰ MacDonald J, 'The Remote Access Family Court: Version 1' (Family Division 2020)

<<https://www.judiciary.uk/wp-content/uploads/2020/03/The-Remote-Access-Family-Court.pdf>> accessed 17 August 2021

Technical hitches were not uncommon. But the limitations of equipment were likely to be all the more inhibiting in the case of lay participants, some of whom might only be able to join via a mobile phone with unreliable connections, and might also have to contend with the distraction of children or pets in their home. Even without such distractions, it was often difficult to replicate in a remote hearing the spatial formality of a court room hearing. In this regard, the perceptions of lay participants could be very different from those of professionals, who quickly adapted to the new reality, as legal blogger Celia Kitzinger notably captured in her report of a case in the Court of Protection. The barristers had said the hearing lacked nothing of importance despite its relative informality, but the lay participant felt ‘invisible’ and resented the casual attire and professional banter of the lawyers.¹¹ More starkly still, in one family law case in April 2020 the judge was asked by the (unrepresented) mother: ‘Are you going to take my child away from me on an iPad?’ The judge resolved to hold a physical hearing instead.¹² The problems were not all one way. Judges themselves reported lay participants not appreciating that ‘they were taking part in court proceedings with all the

¹¹ Kitzinger C, ‘Remote Justice: A Family Perspective’ (*The Transparency Project Blog*, 29 March 2020) <<https://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>> accessed 17 August 2021

¹² As recalled by Cyrus Larizadeh QC Gresham College, *The Family Court in Lockdown* (2020) <https://www.youtube.com/watch?v=IPFExoEL_20&t=2822s> accessed 17 August 2021

constraints on behaviour that implies. There have been instances of judges being shouted at by litigants'.¹³

Crime

After jury trials were suspended in March 2020, both the Lord Chancellor and the Lord Chief Justice were repeatedly asked to respond to speculation that Crown Court trials might safely be conducted with fewer or even no jurors, but no attempt was made to conduct full size jury trials remotely. However, a series of mock trials were conducted on that basis as part of an experiment organised by the law reform group JUSTICE, with assistance from Corker Binning solicitors and the tech company AVML. In each case, a defendant was tried for a relatively straightforward offence, such as assault, with witnesses examined by barristers before a judge and an array of jurors each in their own little box on the screen. The judge and barristers were qualified professionals and all the other participants were volunteers. The cases were live-streamed and could be watched by researchers and reporters. Though there were technical hitches (the most common being temporary loss of a juror), the experiment was a worthwhile proof of concept, even if more robust independent evaluation, with particular regard to the impact on

¹³ Judiciary.uk, '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' (9 April 2020) <<https://www.judiciary.uk/wp-content/uploads/2020/04/Message-to-CJJ-and-DJJ-9-April-2020.pdf>> accessed 24 August 2021

fairness and access to justice, would be needed for a genuine pilot of any proposed remote jury model.¹⁴

Meanwhile a Jury Trials Working Group chaired by Mr Justice Edis was already looking into how Crown Court trials might safely be resumed. From mid-May 2020 a small number of courts began to be used with video relays to a second or even third room in order to accommodate suitably distanced participants. In addition, locations were identified that could temporarily be converted to create what were eventually called Nightingale courts, copying the name of the widely publicised (but hardly used) extra hospital spaces hurriedly created in the early days of the pandemic. No attempt has been made in England and Wales to follow the ingenious idea, adopted in Scotland, of using empty cinemas to house a suitably socially-distanced jury, with a relay from the physical courtroom broadcast onto the cinema screen. Magistrates' courts have continued to sit throughout, the lack of jury and the use of video-links to prisons and police stations making social distancing within court buildings more manageable.

Coronavirus Act 2020

The use of remote hearings required a change in the law because they involved the 'broadcasting' of court proceedings via the internet in what would otherwise have been

¹⁴ Mulcahy L, Rowden E and Teeder W, 'Exploring the Case for Virtual Jury Trials during the COVID-19 Crisis: An Evaluation of a Pilot Study Conducted by JUSTICE' [2020] JUSTICE <<https://www.ssrn.com/abstract=3876199>> accessed 17 August 2021; Magrath P, 'Is Criminal Justice Under Lockdown Remotely Possible?' (*The Transparency Project Blog*, 11 May 2020) <<https://www.transparencyproject.org.uk/is-criminal-justice-under-lockdown-remotely-possible/>> accessed 17 August 2021

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a contravention of existing and long-standing prohibitions (against filming under the Criminal Justice Act 1925, s 41 and against audio recording under the Contempt of Court Act 1980, s 9). The changes were achieved under the Coronavirus Act 2020, which was passed at the end of March 2020. Sections 53 to 57 provided for temporary amendments to other legislation which were set out in Schedules 23 to 27. The key changes in respect of open justice were achieved by inserting extra sections into the Courts Act 2003. Section 85A was headed ‘Enabling the public to see and hear proceedings’ and provided for remote observation and recording of specified proceedings by direction of the court. Section 85B was concerned with ‘Offences of recording or transmission in relation to broadcasting’ and section 85C with ‘Offences of recording or transmitting participation through live link’.

The effect of these provisions was considered by the High Court in the case of *R (Good Law Project and others) v Secretary of State for Health and Social Care* [2021] EWHC 346 (Admin). Somewhat frustratingly from the open justice point of view, the court interpreted section 85A as allowing the court to authorise a hearing to be recorded for the court’s own records, or to be broadcast live to the public, but not for it to be both recorded and then broadcast it to the public —i.e. in the form of a catchup video, such as is already provided for under different legislation for the Supreme Court and Court of Appeal.¹⁵

¹⁵ Magrath P, ‘The PPE Procurement Case: Transparency Missed in Both Politics and Law’

(*The Transparency Project Blog*, 23 February 2021)

<<https://www.transparencyproject.org.uk/the-ppe-procurement-case-transparency-missed-in-both-politics-and-law/>> accessed 17 August 2021

Open justice

It was clear that a major aim of the legislation was to maintain the principle of open justice for remote hearings. Similar provisions were made in respect of magistrates' courts and of tribunals. Much of the detailed management of remote hearings was left to secondary legislation in the form of rules of court, and by judicial guidance. In March 2020, the Master of the Rolls and heads of division issued their Protocol:

[R]emote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing accredited journalists to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet. The principles of open justice remain paramount.¹⁶

In principle, therefore, remote hearings could also be joined by members of the public or interested observers, and reported on by the news and specialist media. But that depended on information being published in advance of the hearing, enabling those wishing to access the hearing to find out how to join. Although efforts to involve journalists were praised,¹⁷ concerns were raised via social media that access for the public was less consistently provided for. A problem encountered in the early days of the lockdown, was a lack of consistency in the way cases were listed with the necessary details to enable members of the public, or even the media, to log in to fully remote

¹⁶ 'Civil Justice: Covid-19: Remote Hearings' [2020] 1 WLR 1334: para 8

¹⁷ Tobbett C, 'Journalists Praise Courts for Remote Open Justice during Coronavirus Crisis' (*Press Gazette*, 26 March 2020) <<https://www.pressgazette.co.uk/journalists-praise-courts-for-open-justice-via-video-link-during-coronavirus-crisis/>> accessed 17 August 2021

hearings. One of the present authors, for example, was unable to access any information about proceedings at a local magistrates' court during the first lockdown period, unless she visited the court in person.¹⁸

Another problem, for members of the public, was a tendency to regard access for the media as a proxy for open justice. In this respect it was unfortunate that a temporary practice direction inserted into the Civil Procedure Rules, PD51Y, Para 3 stated: 'Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings'. We contend that this is not a valid assumption. Even if journalists covering the courts are assumed to be the 'eyes and ears of the public', as they are often described, such journalists only cover a tiny proportion of the hearings taking place each day. Further, the decline of court reporting, especially at a local level, is well documented.¹⁹ At a time when many journalists have been laid off or furloughed, this decline in court coverage is likely to be exacerbated.

Press reporting from the courts may enhance public scrutiny and accountability, but it is also (and often primarily) aimed at furthering circulation and profitability by finding 'good copy', that is a sensational or human interest story deemed newsworthy,²⁰

¹⁸ Townend J (@JTownend, 17 March 2020)

<<https://twitter.com/JTownend/status/1239899505853640707>> accessed 17 August 2021

¹⁹ Cairncross F, 'The Cairncross Review: A Sustainable Future for Journalism' (Department for Digital, Culture, Media & Sport 2019)

²⁰ See, for example, two recent articles on the nature of court reporting: Jones R, "'It's the Best Job on the Paper" – The Courts Beat During the Journalism Crisis' (2021) Journalism

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which may be at the cost of other important aspects of justice accountability. Media organisational interests and those of other observers do not always converge. Other observers include academic researchers, students, justice campaigners, charities representing a range of parties,²¹ family members of court participants, as well as curious members of the public, all of whom have legitimate aims in watching court proceedings in civil as well as criminal courts. But they appear to be excluded on the assumption that their interests are adequately met by enabling journalists to attend the proceedings on their behalf.²²

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Future legislation

The relevant provisions of the Coronavirus Act have been carried over into the Police Crime Sentencing and Courts Bill 2021, with a view to making the changes permanent. According to the explanatory notes, the intention is for the detailed working of the provisions to be managed, and updated, under secondary legislation. The bill also provides for jury trials to be held remotely (but only by live video link) and for further

Practice (online, 5 April); Chamberlain P and others, 'It Is Criminal: The State of Magistrates' Court Reporting in England and Wales:' (2019) 22 Journalism 2404

²¹ E.g. prisoners and people with convictions, migrants and refugees, and victims of crime.

²² We raised this issue in an open letter to HMCTS in summer 2020, which led to a response and constructive engagement, although no – as yet - significant change to procedure: 'Open Letter from NGOs and Academics on Open Justice in the Covid-19 Emergency' (*The Transparency Project Blog*, 29 May 2020) <<https://www.transparencyproject.org.uk/open-letter-from-ngos-and-academics-on-open-justice-in-the-covid-19-emergency/>> accessed 17

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use of live video links generally.²³ Additional changes, including provisions for an Online Procedure Rule committee and further use of remote hearings, e.g. for pre-trial hearings in criminal cases, are anticipated in the Judicial Review and Courts Bill 2021.²⁴

Some consultation has been conducted by the Ministry of Justice with media and public interest groups, and it is to be hoped that any rules, regulations or practice directions when drafted will permit more flexibility in the opportunities for access to hearings, however conducted. For example, since hearings are already recorded for the purpose of keeping a public record and providing transcripts when needed, they could also be archived for public access. Moreover, where video technology is involved in the hearing, the recording could include video as well as audio. This would compensate for the obstacles to physical access where local courts have either been closed or hearings listed at antisocial hours to accommodate additional cases (under what is currently known as ‘Covid operating hours’).²⁵

²³ ‘Police, Crime, Sentencing and Courts Bill Publications’

<<https://bills.parliament.uk/bills/2839/publications>> accessed 17 August 2021

²⁴ ‘Judicial Review and Courts Bill’ <<https://bills.parliament.uk/bills/3035>> accessed 17 August 2021

²⁵ ‘Consultation on “COVID Operating Hours” in Crown Courts’ (*Gov.uk*, 21 July 2021)

<<https://www.gov.uk/government/consultations/consultation-on-covid-operating-hours-in-crown-courts>> accessed 24 August 2021

Questions arising

Are there new or different restrictions on access to court hearings?

Before the pandemic, court staff had been issued with revised and updated guidance on how to manage media access to the courts and requests for documents for reporting purposes.²⁶ This was predicated on the assumption that hearings were in a physical court and that journalists, who might sit in a particular part of the courtroom (i.e. the press bench) might be entitled to different levels of access to hearings or documents than other members of the public. But it also made clear that observers sitting in the public seating were allowed to take notes (addressing a common complaint).

The guidance has since been updated to accommodate remote hearings and the risk of contempt of court.²⁷ But there is a perception that the management by court staff of digital access to remote hearings has begun to affect their management of access to newly resumed physical court hearings now that lockdown restrictions are being lifted. For example, the media specialist barrister Kirsén Sjøvoll reported via Twitter that she had seen ‘several people turned away because of “Covid restrictions” and no attempt made to offer alternative access to watching proceedings’ ... One was told hearings were “basically in private now”. In her view, ‘[t]his is very concerning from an open

²⁶ Magrath P, ‘Guidance Issued to Court Staff on Supporting Media Access’ (*The Transparency Project Blog*, 28 October 2018) <<https://www.transparencyproject.org.uk/guidance-issued-to-court-staff-on-supporting-media-access/>> accessed 17 August 2021

²⁷ ‘Guidance to Staff on Supporting Media Access to Courts and Tribunals’ (*Gov.uk*, 24 October 2018, updated 25 June 2021) <<https://www.gov.uk/government/publications/guidance-to-staff-on-supporting-media-access-to-courts-and-tribunals>> accessed 17 August 2021

Accepted version, 6.9.2021. Forthcoming publication in the Journal of Media Law.

justice perspective (...).²⁸ The London Evening Standard's court reporter and other court reporters have recounted numerous difficulties in accessing virtual and physical courts during the pandemic period.²⁹ These examples, to which we could add more, raise a question about whether the obstacles for remote access – because of limited or no access to listings or remote hearing details – are being replicated in the physical environment.

Additionally, early anecdotal evidence suggests that the stated purpose for attending court is becoming more relevant in both virtual and physical environments, with certain types of information being restricted to 'accredited' journalists (e.g. full court listings information) and non-journalists encountering problems in securing access to court hearings and court documents. Limiting certain types of access to 'trusted' actors in the immediate emergency period of court closure is perhaps understandable, but in the longer term represents a significant change in approach that has not been subject to public and parliamentary scrutiny. If observing and reporting becomes a special privilege for certain types of professionals (e.g. journalists), this is not open justice in the sense we outlined at the beginning of this article. Discrimination by

²⁸ Kirsten Sjøvoll (@KirstenSjovoll, 7 June 2021)

<<https://twitter.com/KirstenSjovoll/status/1401883446784499713>> accessed 17 August 2021

²⁹ See, for example, Kirk T, 'Coronavirus Lockdown Laws: Justice Wasn't Being Seen, so Was It Being Done?' (*kirkkorner: Notes from the Old Bailey press bench*, 4 May 2020)

<<https://kirkkorner.wordpress.com/2020/05/04/coronavirus-lockdown-laws-justice-wasnt-being-seen-so-was-it-being-done/>> accessed 4 May 2020

observer type or purpose has the potential to reduce justice accountability – or the possibility of justice accountability; it further narrows public accessibility of cases to the narrow and partial sub-set of information that is reported by news organisations.

A good example of the unintended consequences of the transition to remote hearings by default has been captured in Celia Kitzinger’s account of her experience of attending Court of Protection hearings for the purpose of her blog on the Open Justice Court of Protection Project. She catalogues incidents in which she has been told by court staff that all remote hearings are private, and of being asked to explain why she wants to join them, but by patiently persisting and if necessary asking to be referred to the judge, she eventually gained access to all the hearings she wanted. She concludes:

In my experience, then, the problem of gaining access is not primarily down to the Court being closed, secretive, shady, or determined to conduct its business behind closed doors. There is no conspiracy to exclude us. Problems of access are rather the unintended consequence of rapid change, insufficient support for court staff who are doing their best under difficult circumstances– plus the sheer unfamiliarity of receiving these requests from a member of the public.³⁰

Are there reasons for excluding someone from a physical hearing that might not apply to a remote one, and vice versa?

In the case of a remote hearing, the limit on numbers may be dictated by the technology available, and the need to provide access links in advance requires prior notification by observers. In case of physical hearings, there might be some justification for limiting access on grounds of lack of space to accommodate sufficient social distancing for

³⁰ Kitzinger C, ‘How to Observe Remote Hearings in the Court of Protection’ (*The*

Transparency Project Blog, 7 June 2020) <<https://www.transparencyproject.org.uk/how-to-observe-remote-hearings-in-the-court-of-protection/>> accessed 17 August 2021

Accepted version, 6.9.2021. Forthcoming publication in the Journal of Media Law.

health protection reasons. But is also the question whether, during a lockdown, it is appropriate for a person who is not directly involved in a case, to be physically in attendance. This in turn raises the question whether an observer, by putting into practice the concept of open justice, thereby becomes a participant in the trial process. When the Lord Chief Justice announced in May 2020 that jury trials, which had been suspended from 23 March 2020, would resume ‘under special arrangements to maintain the safety of all participants and the jury in line with Public Health England and Public Health Wales guidelines’³¹ it was not clear under either the Coronavirus Regulations or the accompanying guidance whether it would be a ‘reasonable excuse’ for a member of the public to leave their home to attend court as an observer. However, in a podcast discussion, the human rights barrister Adam Wagner has suggested that public observers could be characterised as ‘participants’ in the administration of justice given that their presence (or ability by some other means to observe) was necessary to give effect to the concept of open justice as traditionally understood and as protected under Article 6 of the Human Rights Convention.³²

³¹ Judiciary.uk, ‘Jury Trials to Resume This Month’ (11 May 2020)

<<https://www.judiciary.uk/announcements/jury-trials-to-resume-this-month/>> accessed 17 August 2021

³² ‘‘Better Human Podcast - 20 - The Untold Story of the Covid-19 Digital Courts Revolution’

<<https://podcasts.google.com/feed/aHR0cHM6Ly9hbmNob3IuZm0vcy9INTI3YmVjL3BvZGNhc3QvcnNz/episode/OTBhODA0NTQtNzcxMi00OWQxLWE5MDktOGEwYTEzZDFkYTRi>> accessed 17 August 2021 (from 16 minutes)

What safeguards are there to protect court hearing recordings?

A fear of how digital recordings of remote hearings may be distributed and used by third parties may explain judges and court administrators' nervousness in permitting any member of the public access to remote hearings. Though non-official recordings are prohibited, it is likely that judges are concerned by the ease with which non-permitted recordings could be made and digitally disseminated, especially by those unfamiliar with contempt restrictions, or reckless as to legal consequences. Even the BBC has fallen foul of restrictions, with one of its regional news programmes being found in contempt of court for mistakenly broadcasting an extract of a hearing.³³ While there have been high profile contempt prosecutions – such as Stephen Yaxley Lennon for live-streaming contemptuous material filmed outside court – regular breaches of reporting restrictions on social media indicate limited public understanding in this area; indeed the Attorney General's Office has launched a new campaign to draw attention to this area of law.³⁴

In this short article we do not offer fully developed recommendations for improvements to the system, but we urge the judiciary, Ministry of Justice and courts service to undertake proper evaluation of public participation in court proceedings, and

³³ Hyde J, 'BBC Fined £28,000 for Broadcasting Footage of Remote Hearing' (*Law Society Gazette*, 3 February 2021) <<https://www.lawgazette.co.uk/law/bbc-fined-28000-for-broadcasting-footage-of-remote-hearing/5107273.article>> accessed 17 August 2021

³⁴ 'Attorney General Launches New Campaign to Combat Contempt of Court Online' (*Gov.uk*, 28 June 2021) <<https://www.gov.uk/government/news/attorney-general-launches-new-campaign-to-combat-contempt-of-court-online>> accessed 17 August 2021

to look to better education and flagging of court rules and reporting restrictions, rather than to close public access to proceedings as a knee-jerk response. One option may be to send all registered observers details of the relevant restrictions. Although physical court attendance would not historically require self-identification or registration to attend court, and this could be understood as potentially detrimental to freedom of expression in some contexts, this may be a proportionate and fair response to the problem of regulating the use of court hearing recordings.

What do we know about the methods and outcomes of remote hearings?

We have characterised the judicial and government's administrative approach to remote courts as 'trial and error'. This is true to the extent that from 2020-21 there was rapid experimentation with different technological platforms, with practitioners and administrators fast learning what worked better and adapting their practice accordingly.

However, there is little evidence - in the public domain at least – that systematic research has been undertaken on the nature and, most importantly, impact on proceedings and outcomes. As Professor Hazel Genn suggested, in oral evidence to the House of Lords select committee on the constitution:

I am not currently convinced that we are collecting the data we need to be able to answer the questions about who is using the [civil justice] system, the outcomes they get and their perceptions of the fairness of the procedure by which they have been dealt with, nor that, if we were to be collecting that data, particularly on demographics, we would have clues about who we are missing — some of the hardest to help groups who are not engaging with the system.³⁵

³⁵ At Q20 in Parliament.uk, 'Corrected Oral Evidence: Constitutional Implications of Covid-19'

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Important data on civil courts and tribunals has been captured by the Legal Education Foundation in two reports considering the experiences of court users,³⁶ and on the family courts by the Nuffield Foundation,³⁷ but a more complete picture has not to date been presented by the MOJ, HMCTS and judiciary. Further, we have not seen evidence of any equivalent research in the criminal context.

Although HMCTS does routinely publish quarterly statistics on the operation of the courts, this is largely concerned with the types of cases being heard, how long they are taking and the types of orders made and number of judgments given. Some weekly management information was published in February 2021 about the workload in the courts during 2020,³⁸ but this did not include the method by which hearings were being

³⁶ Byrom N and Beardon S, 'Understanding the Impact of COVID-19 on Tribunals: The Experience of Tribunal Judges' (The Legal Education Foundation 2021) <<https://research.thelegaleducationfoundation.org/wp-content/uploads/2021/05/FINAL-Tribunal-Judges-Survey-Report-02-June-2021-.pdf>> accessed 8 June 2021; Byrom N, Beardon S and Kendrick A, 'The Impact of COVID-19 Measures on the Civil Justice System' (Civil Justice Council / Legal Education Foundation 2020) <<https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>> accessed 15 June 2020

³⁷ Ryan M and others, 'Remote Hearings in the Family Court Post-Pandemic' (Nuffield Family Justice Observatory 2021) <<https://www.nuffieldfjo.org.uk/resource/remote-hearings-post-pandemic>> accessed 18 August 2021

³⁸ 'HMCTS Weekly Management Information during Coronavirus - March 2020 to January 2021' (*Gov.uk*, 11 February 2021) <<https://www.gov.uk/government/statistical-data->

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conducted. In response to a Freedom of Information Act request made in July 2020 by one of the authors of this article, the Disclosure Team at the MoJ explained that ‘currently the data requested is not considered to be robust or accurate enough to release into the public domain as a FOIA response’. But they said some data would be published later in the year. In fact it was not until June 2021 that the MOJ did eventually release some statistics about the number of hearings conducted remotely – whether by audio, video or on paper, as compared with physical in-person hearings – over the course of the preceding 12 months.³⁹

These figures showed that at the beginning of the lockdown, in late April 2020, only 10 per cent of hearings in all jurisdictions (i.e., including civil, crime, family and tribunal) had been conducted in person, while 33 per cent were conducted by video, 45 per cent by audio, and the remaining 12 per cent on paper. Over the course of the next 12 months, particularly after the Crown Courts began to open up again following the Edis working group report,⁴⁰ the number of physical hearings began to rise again, and

[sets/hmcts-weekly-management-information-during-coronavirus-march-2020-to-january-2021-2020](https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-use-of-remote-audio-and-video-technologies-may-2020-to-april-2021)> accessed 17 August 2021

³⁹ ‘HMCTS Weekly Use of Remote Audio and Video Technologies May 2020 to April 2021’ (Gov.uk, 13 May 2021) <<https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-use-of-remote-audio-and-video-technologies-may-2020-to-april-2021>> accessed 18 August 2021

⁴⁰ Judiciary.uk, ‘Message from the Chair of the Jury Trials Working Group on Resumption of Jury Trials’ (22 May 2021) <<https://www.judiciary.uk/announcements/message-from-the->

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by the end of 2020 made up around 45 per cent of all hearings, while video and audio hearings dropped back, though the imposition of a further lockdown in early January prompted a renewed increase in the proportion of hearings conducted by video or audio.⁴¹

This data is published with various caveats regarding its reliability, but does at least offer a picture of the extent to which the conduct of business transitioned rapidly to remote hearings. What it cannot tell us is what sort of people were engaging with the justice process and what their experience of it was. For that we are largely dependent on anecdotal evidence, such as that provided by legal bloggers, media reporters, and representatives of public interest groups, many of whom have given evidence to inquiries by parliamentary committees. In short, we suggest it has been a process of ad hoc, rather than systematic trial and error.

Furthermore, it has been a closed process. We mean this in two senses: first because of the difficulties reported in accessing remote – and even physical – hearings during the tumultuous COVID-19 period. Second, because of what we do not know about the administration of justice since March 2020. Although data is notoriously

[chair-of-the-jury-trials-working-group-on-resumption-of-jury-trials/>](#) accessed 24 August 2021

⁴¹ Magrath P, 'Day to Day Data on Remote Hearings in the Family Courts' (*The Transparency Project Blog*, 4 June 2021) <<https://www.transparencyproject.org.uk/day-to-day-data-on-remote-hearings-in-the-family-courts/>> accessed 18 August 2021

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patchy in the justice context⁴² and we have limited reliable baseline data with which to compare the administration of justice during the pandemic, the emergency measures and changed methods make it ever more urgent to begin collecting a wider range of data as advocated by Byrom in 2019.⁴³ Data on hearing methodology and court user experience and outcomes would help us more accurately analyse the impact of hybrid justice on different aspects of the justice system, including but not limited to, the extent to which the public and members of the media have been able to observe justice during the COVID-19 period.

Conclusion

In this piece we have described some of the changes that have taken place in courts since the implementation of COVID-19 restrictions in England and Wales in late March 2020, and outlined the main issues for public observers, including but not limited to journalists, during this period, meaning that many hearings have been unobserved during this period, even when repeated attempts were made. We have also raised concerns about the limited data collected on court hearings and outcomes, which is likely to hinder data-informed evaluations that would otherwise help improve the future

⁴² See, for example, Townend J, 'Closed Data: Defamation and Privacy Disputes in England and Wales' (2013) 5 Journal of Media Law 31

⁴³ Byrom N, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (The Legal Education Foundation 2019)

<<https://research.thelegaleducationfoundation.org/blog/digital-justice-hmcts-data-strategy-and-delivering-access-to-justice>> accessed 23 July 2020

design of the justice process. Nonetheless, we also see this period as presenting an opportunity for better transparency through a technology-enhanced justice system.

We agree with Richard Susskind that technology presents an opportunity for better ‘information transparency’ of court proceedings (the ability to capture, store and analyse data about proceedings) and physical courts may offer greater ‘real time transparency’ (the ability to see what is going on at the time).⁴⁴ However, as discussed in our work elsewhere, there are difficult discussions to be had around the management of privacy protection and digital dissemination of justice system data, owing to the reduction of informational friction, or ‘practical obscurity’ of courts data in digital environments.⁴⁵ It is time to confront these tensions and design digital justice and access mechanisms that protect a range of competing interests as fairly and consistently as possible. An optimistic reading of this period sees the emergency measures instigated by COVID-19 as an opportunity for improvement and enhanced justice system accountability, rather than as a grave threat to traditional approaches to the administration of justice.

Acknowledgments: The authors wish to express thanks to all those who have so assiduously documented online their experiences and views on observing and reporting the courts since

⁴⁴ Susskind R, *Online Courts and the Future of Justice* (Oxford University Press 2019), Ch 19.

⁴⁵ Townend J and Wiener C, “‘Justice System Data’: A Comparative Study” (The Legal Education Foundation 2021) <<https://research.thelegaleducationfoundation.org/research-learning/funded-research/justice-system-data-a-comparative-study>> accessed 18 August 2021

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March 2020, offering valuable insights into the functioning of the system. These include: Celia Kitinger, Lucy Reed, Tristan Kirk, Mark Hanna, Josh Mellor and Sian Harrison.

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