



Document title	<b>Covid-19 and Remote Hearings: Impact on the Family Court</b>
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## About the Magistrates Association

The Magistrates Association is an independent charity and the membership body for the magistracy. We work to promote the sound administration of the law, including by providing guidance, training and support for our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the courts and the broader justice system. With over 14,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

## Introduction

The Covid-19 pandemic has brought a number of significant challenges for the family justice system, which was struggling to meet demand prior to the current crisis. Huge efforts have been made by those across the sector to meet these, particularly through the use of technology and remote hearings. It now being clear that any recovery or return to 'normal' will likely be a long process, we have a number of concerns about how the family court is to meet these challenges whilst ensuring fair access to justice for parties and children. Our members have informed us of some important issues which need addressing, and these are detailed below.

## Key points to address:

- We are concerned about the impact of current family court pressures on the health and wellbeing of magistrates, legal advisers and court staff, which is being further exacerbated by inconsistent and insufficient technology and IT support.
- There is an urgent need for more administrative and IT support for the family court.
- A further concern is that remote and hybrid hearings can affect fair participation for some parties and that access to justice may be impeded by a lack of access to the right technology in terms of devices' capacity and quality of internet connection.
- Delays are being exacerbated by not receiving bundles in good time, and at times the court not receiving all contents of a bundle, leading to adjournments and protracting the process. This is further exacerbated when the next available listing date is not for several months.
- We are concerned about the impact on children and parents of delayed family court proceedings, as this may prolong ongoing conflict and in some cases put children and parents at risk of harm.

### **Remote hearings:**

- HMCTS' court reform programme has brought new technology and ways of working to the administration of justice. This technology has become even more relevant during the Covid-19 crisis, which has resulted in an increased reliance on technology and remote working. While the MA supports the use of technology to support a more efficient, effective and fair justice system, it is our view that any possible negative impacts must be carefully considered before new technology is introduced permanently.
- The MA has previously expressed concern that fully video hearings are rarely going to be appropriate for hearings in family court, apart from certain administrative hearings dealing with case management issues. We remain particularly concerned about cases involving litigants in person, whose ability to participate may be severely restricted if hearings are carried out remotely.
- The fact that particularly sensitive issues are being discussed in family court would usually necessitate face to face hearings. While we understand that remote hearings will need to continue while safety and social distancing measures are in place in order for cases to progress, we do not consider that this would be a satisfactory approach once restrictions are lifted and would not support increased use of remote hearings (with the possible exception of case management hearings where parties are represented) if and when face to face court hearings can resume fully.

### **Accessibility/suitability of hearings:**

- One concern relating to remote hearings during the Covid-19 pandemic is the appropriateness of accessing hearings from home, rather than using an accredited hearing centre. Relying on parties' own IT may put certain people at a disadvantage, if they do not have a laptop, or secure Wi-Fi that allows video meetings. It is notable that many lay parties only have a phone with which to join a call, giving them limited ability to follow proceedings. Telephone hearings are particularly difficult for litigants in person (LiPs) to follow, and inhibit the ability of some parties to make the points they need to. Video hearings on a phone give limited sight of the other parties. In both cases, parties often have no ability to simultaneously access any papers they need for the hearing.
- Another concern is practical in nature – if a party is at home with their children or other family members, it may not be possible for them to secure privacy for any hearing. This is particularly pertinent in relation to cases where there are allegations of domestic abuse, and there are concerns over the safety of one or more parties. The specific challenges involved in parties seeking emergency Non-Molestation Orders or Occupation Orders in areas where lockdown measures are in place, and alleged abusers may still be living with them, will need to be carefully managed. Our members report that some parties in domestic abuse cases feel safer with a video hearing, as they will not come into physical contact with the other party, but others find it intrudes in the “safe space” of their home, which they find emotionally difficult.
- Our members tell us anecdotally that there is also a problem with parties not treating proceedings as formal in nature, for example not being fully dressed or being in a public place. This may be because they identify the remote format with more social interactions, rather than the formal setting of a court hearing – which may affect how seriously proceedings are taken. However, this can be another factor leading to hearings being adjourned for reasons which would not be present in a physical courtroom.
- A further issue is that of remote video links from private locations where domestic abuse is a factor; the risk that a refuge location (or alternative accommodation which must not be traced by an alleged perpetrator) may be inadvertently revealed. In such cases, particularly if special

measures are requested, it may be beneficial to hold such initial remote hearings without visual display in the interests of safety. While some video applications allow the background to be blurred, it is usually the case that this only works on laptops. If parties are using a device other than a phone, it is usually a tablet, and these devices do not commonly have that facility.

- For cases involving children, we have concerns about the risks to children of being exposed to proceedings and adults' discussions of child arrangements if their parents or carers are taking part in remote hearings, considering that adults involved may not have access to a private location in which to attend from home. Our members inform us that children being present in such situations can add to existing delays due to the need for adjournments, which can have a further impact on the welfare of any children involved, particularly if this affects the contact they are able to have with parents or other family members from whom they are separated while court proceedings are ongoing.
- CAFCASS are seeing many children remotely, but will see them in person if necessary. Some of our members have identified concerns that relate to it being more challenging for CAFCASS to carry out the necessary investigations and therefore produce sufficiently detailed reports.
- Where phone conferencing is used (e.g. BT MeetMe), our members have informed us of situations where technical issues have meant that the litigants have been the only ones left on the conference call for a period of time, meaning that when professionals re-join the call, they have encountered parties being verbally abusive to one another. The controls for remote hearings must be robust enough to ensure they are fail safe, so as to avoid situations such as this which could adversely affect parties, in terms of their safety and the case they have before the court.
- Difficulties reaching parties have been reported, with some parents reluctant to answer the phone to an unknown number. This can add delay if parents cannot be reached at the relevant time, and members also note delays when parties often change their phone number, meaning legal advisers spend time trying to track people down so they can participate.

### **Fair participation:**

- We are concerned about the potential negative impact that use of video technology could have on ensuring fair and effective participation, which is a fundamental principle of justice and a human right set out in Article 6. All parties who are attending hearings will need to have the capacity to use digital processes, in terms of adequate hardware (such as a laptop with a camera functionality and secure Wi-Fi) and sufficient skills to participate remotely.
- In particular, individuals who are neuro-diverse, or have learning disabilities or mental health issues, may find it more challenging to communicate via video or audio link. It is also more difficult where there is a need for an interpreter, or intermediary, and particularly so for those who are hard of hearing. The Equality and Human Rights Commission concluded that video hearings are not suitable for people who need support with communication.
- We would also note the impact of Covid-19 on Article 8 rights, owing to the unavailability of options such as contact centres due to the pandemic. Where children are young this could have a significant and lasting impact on their relationships with parents or other family members.
- Our members inform us that it can be more difficult to identify unsuitable cases or vulnerabilities prior to a remote hearing, as well as being more difficult to pick up on non-verbal communication e.g. body language, in remote hearings. They also report that it can be

harder to manage the behaviour of a party in a remote hearing, particularly telephone hearings, if they become aggressive/abusive.

- It can be difficult for wingers to make a contribution in remote hearings, where litigants cannot see them (for instance, where video has been turned off to save bandwidth). There is a risk that this can be seen as not contributing and helping to ensure proper decision making, and communication between colleagues on the Bench must therefore be deliberate, with Presiding Justices needing to pause proceedings in order to consult with wingers – whereas in a physical court, non-verbal cues such as a nod or shake of the head would convey the same thing.
- Special measures and approaches to support participation are essential to ensure that vulnerable victims, witnesses and defendants are able to participate fairly. It is essential in ensuring effective participation that any reasonable adjustments are also available during remote hearings. But providing this support for remote hearings is more challenging, especially if intermediaries or interpreters are not co-located with the person they are supporting. Furthermore, depending on litigant capacity, any requirements for using interpreters or intermediaries can consume more CVP court time and add to the overall workload. This may mean that cases which should be heard at Tier 1 could be being re-allocated due to time capacity.
- The identification of any vulnerabilities, especially communication challenges, which will require additional support to allow participation, should be considered before any hearings. Guidance will need to be provided to courts, and staff, as to what support can be used to support participation for remote hearings. For example, if a party needs a translator, then it may be possible to use sequential, but not simultaneous translation.

#### **Access to legal representation and difficulties for litigants in person (LiPs):**

- It is important that parties understand the process, and accessing legal advice prior to any hearing will therefore be key as well as assisting parties in putting forward any views they may have on the appropriateness of utilising video link technology. If parties are not co-located with their legal representative, consideration must be given as to how the legal representative can take instructions before any hearing via a confidential discussion with their client. It is also a concern if a party cannot confer with their legal representative confidentially during a hearing.
- In relation to private family law cases, which often involve litigants in person, our members tell us it can be more challenging to chair a hearing where one party is represented and the other is not. We are concerned that if not represented, a party may feel pressurised to agree to something during a hearing, without time to consider the full implications. This problem is not limited to remote hearings, but may be more acute as a represented party will be helped by a professional more used to managing the technology. Remote hearings may also limit the opportunity for legal advisers to ensure that litigants in person are fully prepared before the start of a hearing.
- For litigants in person, a lack of understanding of the court process can involve proceedings taking longer, which can be exacerbated further when the process is conducted remotely, and could affect other proceedings which are listed. It can be difficult to simplify the terminology used in court, particularly if further information is needed. In the courtroom, magistrates would hand out templates, however, in remote hearings it is necessary to request the information and the format in which it is required. Many LiPs do not have the ability or means with which to access websites, or print material. This is more difficult still for those parents who have additional needs themselves.

- In contested and fact finding hearings where LiPs have been directed to file their cross examination questions with the legal adviser 48 hours prior to the hearing, members inform us that this is often not being done. In such cases, the Court then has to give a LiP adequate time on the day to draft their questions, which results in prolonged hearings and can run the risk of hearings going part heard. In contrast, at physical hearings LiPs must provide their cross examination questions to the legal adviser on the day – this demonstrates a challenging aspect of remote hearings for both the Court and for LiPs themselves in terms of due process of a fair and just hearing, even where case management has been robust at DRAs.

### **Guidance and training:**

- We welcomed the guidance produced by Mr Justice MacDonald on remote hearings in July 2020, and would emphasise the importance of such guidance being reviewed regularly, taking in to account any problems which are highlighted by those working in, or using, the family court.
- For magistrates currently unable to participate in court hearings, we find it concerning that HMCTS plans to retrain new magistrates with two years' or less experience, but this is not being offered to 'experienced' Presiding Justices, on account of their being experienced. We would emphasise the importance of continuous training for all family magistrates, particularly considering the speed at which recent changes have been happening, which everyone across the family justice system has had to keep up with.

### **Working from home:**

- Our members inform us that there is a lack of suitable equipment for family magistrates, which varies across areas but means magistrates are having to use their own personal equipment and devices to conduct court hearings. This is especially so for remote hearings, but even where it is possible to conduct hybrid hearings, there is little to no provision within the courtrooms, and magistrates are having to bring their own devices to court. This means that sensitive documents and court bundles are being provided by email and other software such as Caselines directly onto magistrates' own devices, and the security of access to those papers depends on their own security measures and IT knowledge. Not all magistrates have an appropriate device, and some have purchased new devices at their own expense (which excludes those whose own finances do not allow for that). These devices will not necessarily have all the appropriate security measures which HMCTS-provided equipment would have, which risks leaving some magistrates unable to participate despite their willingness to sit.
- There is a lack of provision within the Magistrates Expenses Rules for the extra costs incurred by magistrates through working from home, and as mentioned above, in some cases magistrates who are willing to sit on remote hearings are unable to do so because of a lack of suitable equipment or have had to purchase themselves at considerable expense (which we would note is not helpful in the context of efforts to have a diverse magistracy which is not skewed towards those with greater financial means). Increased or different expenses raised by members include Wi-Fi strengthening, buying suitable IT equipment and devices, and increased utility expenses e.g. heating at home.
- Members have told us that it is often necessary in practice for video hearings to have at least two platforms at home: one to display the video output, and another to display the bundle. While it is technically possible to switch between screens on one computer, this would make an already difficult process even more so. Magistrates often have to navigate electronic bundles simultaneously while speaking and observing reactions. Additionally, some are also using mobile phones to communicate with Bench colleagues, which can further complicate matters.

- Specific concerns have been raised by members about the use of the Cloud Video Platform when working from home, particularly for those without access to the latest devices. Those courts using Microsoft Teams rather than CVP report that this works much better – not least because lay parties seem to find it easier to use – and it appears to be less demanding on bandwidth than CVP. With CVP, poor connections and lack of adequate IT equipment can mean hearings have to be switched to telephone hearings, in order to avoid a hearing being part heard. This can disrupt what may already be a difficult and distressing process for parties, prolong proceedings, and ultimately increase existing delays.
- In rural areas with poor internet connections, remote hearings pose greater challenges for parties, judiciary and court staff alike. This is concerning and indicates inequitable access to justice for those who must access the family court; CVP has been noted as particularly problematic in such areas.

#### **Fully remote/hybrid remote hearings:**

- The hybrid solution appears to have limited effect, although members suggest that it is best used where a dispute resolution appointment can effectively case manage the hearing through to a final hearing. In some instances, this is most effective when magistrates are present in the court building and the parties join via BT Meet Me, so it is possible to narrow some issues and list for a final hearing while still giving parties the opportunity to speak.
- Contested hearings can be ineffective when conducted remotely owing to difficulties engaging with parties, questioning advocates sufficiently for represented parties, and scrutinising documents effectively, especially where one party is unrepresented.
- Members tell us that some final hearings have worked with the Cafcass officer dialling in and all other parties being in court, however this is still considered to be less effective than having all witnesses at court.
- Hybrid hearings have been mostly appropriate in public law cases where CAFCASS guardians can appear remotely, as well as any expert witnesses, and the respondents are in court, usually with their counsel, and the legal adviser present. While case management hearings can be listed remotely, interim care with removal hearings and final hearings are more appropriately listed face to face if possible, although not all court houses can accommodate them.
- It is becoming easier to hold hybrid hearings, but there are still significant technology challenges. There has been little attention to equipping courts properly to hold these hearings. Magistrates doing these are still having to take their own devices to court as it usually requires two devices – one for the video and one for the bundle. Some courts have managed to provide some old (second hand) laptops to use but they are very small and not usable for both the video and the bundle. This also leaves problems for the respondent parties being able to access a suitable device to see the video, and again this is usually a phone. Some magistrates have found themselves lending IT equipment such as tablets to respondents so that they can participate, which is inappropriate.
- Our members tell us that fully remote hearings in public law can work well for case management hearings in a practical sense, because the parties are always represented. It may however be more difficult for them to follow what is happening and to communicate with their representative.
- MA members' experience of private law hearings are that these are usually either fully remote or fully attended (typically reserved for domestic abuse fact finding hearings, which are very difficult to do fairly remotely, and contested final hearings). Very few are reported to be

hybrid hearings, although this has been possible where e.g. one party needed to be shielding/self-isolating.

### **Legal advisers, court staff and resourcing issues:**

- We are concerned about the lack of legal adviser availability across the system, which would be a problem for courts beginning to operate in alternative buildings, closed courts being temporarily reopened, or courts operating during out of hours.
- We are concerned about the significant shortage of legal advisors, who have had to work incredibly hard to keep the courts running, frequently working very late to get papers to benches for the following day's hearings. There is inadequate administrative support for the legal advisers, and significant problems with papers – from witness statements to police disclosure – 'going astray' when sent to the central court email boxes, which are not working well currently. This has been a significant problem since March 2020, and we have not yet seen improvements.
- Members inform us that legal advisers are working with outdated and slow laptops which are frequently breaking down, and not being repaired in a timely fashion – all of which impacts on the court. Some of the court recording equipment is also becoming prone to failure. There is, reportedly, virtually no on the ground IT support when problems do arise, meaning that this often falls to a minority of 'super user' staff, rather than IT professionals, to sort out these problems when they arise.
- There needs to be investment in IT and technology and IT and administrative support for the system to work well for all involved.
- We are concerned about the impact of this situation on magistrates, especially if it continues for a sustained period of time. In some regions which already had low numbers of family magistrates and Presiding Justices on their family panel, Presiding Justices in particular have been sitting more and more frequently. Some are shielding due to being particularly vulnerable to Covid-19, and some are not comfortable with conducting remote hearings if they are not confident with technology. The effect of this is that where sittings have to be conducted in person, this is falling to the same few individuals, meaning there is a risk that they will become too exhausted if they do not receive better support. One example given of an area in the Midlands illustrates this: out of two Presiding Justices, one has had to shield – but with two courts running two days a week, at least one court therefore often has to be filled by Presiding Justices in neighbouring areas (which may also face a similar situation).
- We note the President of the Family Division's comments on working hours in the recently updated 'The Road Ahead' document (published in January 2021). With reference to the President's comments at paragraphs 13-15 of this document, we wish to highlight that the current situation on the ground in terms of resourcing cannot meet the requirements recommended therein. We are concerned that this demonstrates a gap between the expectations for what can be achieved and the day to day reality in court, elements of which are detailed throughout this document.

### **Impact on health and wellbeing:**

- For those family magistrates who are able to attend court in person, we are concerned about the increased amount of travel they are required to do, which puts these individuals at risk of contracting the virus, and also risks further transmission of the virus between areas.
- Members have highlighted that the quality and preparation of the legal adviser in a remote or hybrid hearing is even more important than in a physical courtroom, as remote hearings require legal advisers to be more proactive in guiding the hearing in order to ensure procedural

fairness. We are concerned about the increased pressures legal advisers are under, which directly affects magistrates and can ultimately impact on court users and children in terms of the quality and timeliness of decisions made. We are concerned about the health impact on magistrates of conducting remote hearings over a prolonged period. Members inform us that it is much more difficult to act as Presiding Justice for a remote hearing, particularly without non-verbal communication with legal advisers and wingers. Members report that remote sittings can be more intensive and exhausting than in-person sittings, and we are concerned about the cumulative impact of doing this for several more months without adequate support – particularly for those who are taking on more sittings because of a shortage of magisterial colleagues in their area.

### **Innovations that seem to be working well:**

- Our members inform us that there have been some positive experiences with hybrid hearings, specifically where litigants, legal representatives, the Presiding Justice and Legal Advisor attend court in person, with other parties familiar with court (e.g. wingers, Cafcass, or social workers) attending remotely. This can reduce the number of people potentially exposed to the virus, while avoiding some of the challenges outlined elsewhere in this document. However, we should note that this does place an additional burden on the Presiding Justice and Legal Advisor, which can exacerbate the impact on them if they are already stretching themselves in order to meet demand.
- Case management hearings conducted remotely with local authorities are anecdotally reported to have resulted in more focussed and timely contributions.

### **Practice Direction 12J and special measures:**

- The ability of a court to provide for special measures currently varies according to area, with those able to accommodate attended hearings applying special measures where requested in the usual way. Where this is not possible, a combination of BTMeetMe, CVP and MS Teams are reported to be used. For remote and hybrid hearings where abuse is alleged and parties are attending remotely, the only available option for ensuring that parties do not have to see one another is for their camera(s) to be turned off. This can be difficult from the judiciary's perspective, as it is important to be able to see both parties – to control any abusive behaviour, and to check on the welfare of any vulnerable party. However, we would also note that some victims of abuse have reported finding a video hearing more stressful than being in court, with their abuser behind a screen. This is because the abuser's voice and picture is appearing in their home, which is meant to be a place of safety; members inform us that some parties find this can 'contaminate' their home.
- Without access to a mute facility, it is more challenging for Presiding Justices to maintain control over verbally abusive behaviour from parties, particularly as it is more difficult to pick up on the response of the party such abuse is directed towards – examples given by members include having to try to talk over one party whose behaviour in the hearing was unacceptable, and not being able to hear the distress of the alleged victim over this until they were 'sobbing,' at which point the hearing had to be stopped. Another was of one case where the respondent was texting abuse to the applicant while the applicant was giving evidence; this would not happen in a physical court but as each party was in their own home it could not be effectively controlled by the court. We would suggest that Presiding Justices as well as legal advisers should have access to the relevant controls so they can mute participants and stop or pause proceedings where necessary, without having to separately communicate this first to the legal adviser.

- Difficulties can arise where litigants in person do not follow court room protocols and behave abusively or without respect for the court, sometimes disconnecting their devices. This can mean legal advisers using valuable court time calling participants in attempts to get them to re-engage with proceedings, so that PD12J hearings take even longer to resolve.
- Members also inform us of concerns around who, other than those directly involved in a case, may be listening to evidence in remote hearings, or present in the room with a party – especially with litigants in person and witnesses giving evidence. Concerns have also been raised about proceedings being recorded by parties.

### **Bundle protocols:**

- Pre-Covid, in many areas HMCTS were reportedly reluctant to provide bundles electronically, citing home devices as a security issue. These concerns seem to have disappeared with the pandemic, although there may still be potential issues with the security of court documents in this respect. While it would be positive post-Covid to continue with easier access to bundles for the judiciary, we believe there should be assurances given around security and clear guidance on when it is and is not appropriate to use one's own device (and why). We fully understand the emergency situation brought by the pandemic has meant that everyone has had to do their best under very difficult circumstances, but a long term solution which guarantees better security is needed.
- We understand there is also significant variation across areas in terms of the court-provided IT available; some areas are still using paper bundles, but while laptops and iPads are available in some areas, this does not apply across the board and some court-provided devices are not capable of downloading bundles. Similar issues are reported with regard to eJudiciary accounts not having sufficient capacity to download bundles which exceed a certain size. Members' experiences vary across areas, but some are receiving large bundles which exceed 350 pages and therefore have to be split as admin staff struggle to condense bundles so they can be sent in one email. In some areas, admin staff are sending bundles through as emails with large numbers of attachments (one example given was of 78 attachments to one email) in order for papers to reach magistrates.
- Our members inform us that in many cases, particularly for private law matters, they are not receiving court bundles with enough time to read them prior to a hearing. With many hearings running over time, days run late while magistrates and legal advisers try to find missing documentation and read it. In some case, parties have also not seen the other's documents and must therefore be given time to read them.
- While a solution to this in an isolated case would be to adjourn a hearing until all documents have been read, the frequency with which this is happening makes this unsustainable – particularly as in many areas, the next available listing date is months away. Members have also pointed out that with many lists timetabled to a certain CVP, MS Teams or BTMeetMe time slot, adjourning to allow time to read bundles properly would mean parties miss their allocated hearing time. This is not only unfair to parents, but could be detrimental to the welfare of children at the heart of proceedings if decisions about their lives are further delayed and conflict between parents prolonged.
- Greater administrative support is much needed for the family courts, with staff trained to look through case bundles and provide magistrates and legal advisers with the relevant documentation in a timely manner.
- Problems with bundles increase for private law cases involving litigants in person. Members tell us that it is not uncommon for parties to send documents at the last minute, and/or to tell

the court they have sent in documentation which has not been seen by the court or the other party, meaning that time has to be spent finding missing paperwork sent to a central email account. In many cases, bundles are sent with documents as individual email attachments, meaning extra time is spent working through individual documents which as a paper bundle would have previously been organised ready for magistrates and legal advisers to read at the appropriate time. Again, this creates delays and prolongs proceedings.

- We would suggest that relevant documents, and at least safeguarding and/or Section 7 reports for private law cases, should be sent via eJudiciary 24 hours in advance of a hearing to allow time for these to be read and considered in full.

### **Recommendations for improvement:**

- Provision of proper administrative and IT support for the judiciary and legal advisers in family court, to ensure that electronic bundles are provided to the court in full, and in a timely manner.
- Provision of suitable IT equipment for family magistrates across areas, so that access to justice is not affected by a lack of access to the necessary facilities.
- For Presiding Justices to be provided with control of the mute facility and controls to pause proceedings and remove participants where necessary, in order to better control aggressive and abusive behaviour.
- For a standard script for remote hearings to be used, to set out expectations for all involved at the start of a hearing.
- Provision of a list of 'dos and don'ts' for all participants, for them to consider ahead of time and ensure suitable childcare arrangements can be made prior to a hearing.
- For bundles to be sent to magistrates 24 hours in advance of a hearing.
- For magistrates to have a briefing with legal advisers before a hearing so that they can be better prepared, particularly where court papers have been received at very short notice.
- To ask advocates and clients to be in the same location (socially distanced), as far as is possible.
- For magistrates' training to be made more consistent, with continuous training set as a definitive annual national timetable.
- For HMCTS to include in expenses the reimbursement of extra costs incurred by magistrates working from home in order to participate in remote court hearings.