

**Constitution Committee: Constitutional Implications of COVID-19,
*Call for Evidence***

A Response by

The Chartered Institute of Legal Executives (CILEx)

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1. Introduction

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
- 1.2. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it. At these unprecedented times, the impacts of COVID-19 have necessitated changes to the consumption of legal services and the manner in which the court estate is currently accessed. CILEx has thereby collated the below evidence from lawyers, to help aid the Constitution Committee's call for evidence in relation to the operation of the courts and tribunals at this time.
- 1.3. This response includes contributions from CILEx practitioners regarding their first-hand experiences of attending court and tribunal hearings during COVID-19; most notably, through the use of audio-visual hearing technology as opposed to physical attendance. CILEx liaised with practitioners through its Criminal, Family, Civil and Court User Specialist Reference Groups, as well as engaging with the wider membership, on various impacts that legal practitioners have faced in delivering legal services at this time. Through a series of surveys and internal calls for evidence, CILEx has collated the below feedback and evidence that directly relates to CILEx practitioner experiences of remote court and tribunal proceedings during the lockdown period. These are expanded in more detail below.

2. Summary of Findings

- 2.1.1. CILEx is pleased to see wider independent research conducted to assess opportunities and risks of virtual proceedings for current and future use and hopes that this research is used to underpin any future digitisation efforts. (Para 2.1.2)
- 2.1.2. CILEx practitioners have noted inconsistencies in the implementation of virtual proceedings which have been reported to: undermine public health guidelines; create further delays and confusion in accessing court services; and lead to a significant increase in adjournments, including in instances where it may not be in the best interests of justice to adjourn proceedings. (Para 2.1.3-2.1.6)
- 2.1.3. Wider practitioner concerns noted that there was a lack of judicial confidence in the use of new technologies which could be influencing judicial decision-making processes. (Para 2.1.6)
- 2.1.4. A similar lack of confidence amongst parties involved in virtual proceedings was also noted, particularly when navigating electronic evidence bundles and in cases involving multiple parties/attendees (Para 2.2.1-2.2.2). As such, greater technical support and training may be necessary in the interests of safeguarding fair and accessible court processes.
- 2.1.5. Concerns were raised relating to user exclusion of remote court services for vulnerable persons who lack the necessary technology to partake in these types of proceeding (Para 2.2.3). This includes the need for an appropriate 'safe space' for virtual proceedings where vulnerable clients are concerned. (Para 2.3.1). Additional public expenditure/resourcing may therefore be necessary to safeguard inclusion of all members of the public in accessing remote court services.
- 2.1.6. The acute impact of remote court services on Litigants in Person (LiPs) must also be acknowledged, as a lack of familiarity with court proceedings; reduced availability of court staff to provide pre- and post-hearing explanations, and poor technological interactions and accessibility, may hinder their ability to secure proper administration of justice. (Para 2.3.2)
- 2.1.7. In the absence of additional support for LiPs, there is a concern that this could drive greater reliance on untrained McKenzie Friends. In a virtual court proceeding, the ability to appropriately scrutinise the standard of help or support being provided to LiPs by such actors is much harder to ensure and is of particular concern in the interests of justice. (Para 2.3.3)

3 General Findings

3.1 Inconsistent Use of Remote Hearings

- 3.1.1 CILEx commends the hard work undertaken by HMCTS in implementing nationwide measures and providing guidance for the safe attendance of court users where physical attendance has been mandated throughout the lockdown period.
- 3.1.2 In respect of remote hearings, we have been pleased to see wider independent research and evaluation undertaken to assess the opportunities and risks that emergency use of audio-visual technologies have provided in ensuring that those seeking justice are still able to access court services to that end.¹ This research shall be critical in evaluating the suitability of remote hearings in resolving disputes as well as in helping to shape the future of court digitisation efforts.
- 3.1.3 However, concerns have been raised that inconsistent implementation and adoption of remote hearing technology across the court estate throughout the lockdown period has undermined wider efforts by Public Health England to ensure public safety and slow the spread of the coronavirus.²
- 3.1.4 This inconsistency has also led to further delay and confusion amongst legal practitioners,³ and most notably has led to a significant increase in adjournments on the basis that certain cases would require physical attendance for the proper administration of justice.
- 3.1.5 Whilst CILEx recognises the need for flexibility and case-by-case assessments in determining the suitability of remote hearings, there has been a distinct lack of clarity behind these decisions to adjourn.
- 3.1.5.1 Evidence obtained from CILEx practitioners note that judges have been adopting different approaches in conducting hearings from court to court, despite standardised guidance released by senior judicial figures such as the President of the Family Division.
- 3.1.6 A primary concern within these inconsistencies is the suggestion that decisions for remote versus physical hearing attendance may have been largely motivated by wider considerations relating to judicial confidence in new technologies⁴; as opposed to what would be necessary in the best interests of justice.

¹ Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: A Rapid Consultation*, (May 2020); Civil Justice Council, *The Impact of COVID-19 Measures on the Civil Justice System*, (May 2020); work directly undertaken by HMCTS to evaluate processes and impacts of audio-visual technology.

² One CILEx Specialist Adviser commented: *“there should be almost no occasion where a live attendance at court is required from a [duty] solicitor as consultation and court hearing advocacy can be conducted by remote means from home locations which would enable members to follow the stringent national government guidance to refrain from any unnecessary movement. Most courts can already facilitate remote hearings, but it is our understanding that many are still choosing not to and current guidance does not (either adequately or at all) enforce this, particularly in relation to the magistrates court.”*

³ Relevant member quote: *“Some courts have been more specific than others in what is happening – fee earners are spending valued time trying to work out what is happening with their court rather than it being in one place. We are relying on emails from others rather than official sources.”*

⁴ One Specialist Adviser informed CILEx, that drawing from personal observations, it is more common to see adjournments take place amongst District Judges than High Court/ Circuit Judges. It was suggested that this may well be due to the extra clerk support that High Court/Circuit Judges have access to; helping to set up remote hearings and provide additional tech-support.

3.1.6.1 In fact, decisions not to conduct a remote hearing have often resulted in adjournments of up to 3 months; an outcome that is not always in the best interests of the parties given the added stress and pressure this creates (exacerbating tensions caused by COVID-19 for many people in their daily lives).⁵ Indeed, with ongoing problems around court backlogs and delay, many litigants are in desperate need of a timely resolution.

3.2 Access to Justice Impacts

- 3.2.1 A lack of confidence in technology has also seen remote hearings create additional challenges for parties to the proceeding where technical support is not provided for by the courts. This is particularly noted in the case of family law proceedings where the ability to navigate sensitive electronic bundles and ensure that everybody involved in the proceeding can be seen (including CAFcASS advisers and social workers etc.) in real time, may require additional screens and support.
- 3.2.2 In such instances, family law practitioners and their clients have been left trying to resolve technology-related problems themselves (distracting their attention from the matter at hand), and creating wider concerns around the administration of justice.⁶
- 3.2.3 With particular regard to Public Family Law cases, additional barriers have further presented themselves where parties do not have the appropriate access to technology. As a result, some Local Authorities have faced extra costs in resourcing parties with the necessary equipment (such as smartphones) so that they may attend a court hearing.

3.3 Vulnerable Parties

- 3.3.1 Where proceedings involve particularly vulnerable parties, CILEx would like to draw attention to the overarching need to prevent further delay and enable proceedings to take place in a 'safe space.'
- 3.3.1.1 As a result of lockdown measures, and with remote hearings generally taking place from the homes of parties to a proceeding, CILEx practitioners have shared with us their concerns around wider privacy issues.
- 3.3.1.2 This is particularly noted in cases where there are familial disputes, and thereby the risk of being overheard by family members who may have a vested interest in case particulars or hearing outcomes, is exacerbated.⁷

⁵ Another CILEx Specialist Adviser shared experiences of: "A Judge in a local court [who] simply adjourned a 2 day fact finding hearing (where a father ha[d] not seen his children, aged 4, for a year, for 3 months despite detailed representations from our counsel saying why it could be dealt with remotely. [The Judge] simply adjourned it for 3 months, so instead of the hearing taking place in the last week of April it is now listed for the second week in September, a delay of over 4 months. That [same] Judge, who had previously reserved the case to himself, has [since] released himself from the case and sent the 2-day fact finding hearing to a different court."

⁶ Relevant member quote: "Parties dealing with a hearing remotely are not going to focus on issues and of course we still have the technical difficulties to sort... I feel that the parties who are probably not "tech savvy" will have some difficulty in coping with E bundles and examination by counsel via screens and seeking/giving instructions to their counsel at the same time."

⁷ Relevant member quote: "I have various hearings listed for April which would have been attended hearings... One is in the Magistrates before 3 Lay Justices and a court advisor. Cafcass is ordered to attend. The mother and father are to attend and have to make statements. Mother is my client and will be represented by counsel. The Father is a litigant in person. He does not accept the recommendation of the Cafcass officer so the case will mainly be about him questioning Cafcass on her report and my client's counsel examining him about his

- 3.3.2 Vulnerability amongst litigants can also extend to situations in which litigants are self-representing.⁸
- 3.3.2.1 Prior to the COVID-19 outbreak, the legal sector in both the family and civil law jurisdictions had seen dramatic increases in the number of litigants in person (LiPs) attending court. Throughout the COVID-19 outbreak, both family and civil law proceedings have continued to involve LiPs, and CILEx has been especially sensitive to the impacts that these parties have faced when interacting with remote hearings, and seeking to access legal aid and legal advice services.
- 3.3.2.2 As demonstrated by both rapid-fire reviews into the family and criminal justice system,⁹ LiPs have been particularly vulnerable when engaging in remote hearings due to: lack of understanding of/familiarity with court proceedings; reduced availability of court staff to provide pre- and post-hearing explanations, and poor technological interactions and accessibility.
- 3.3.3 Even prior to the hearing stage, there are concerns raised around accessibility of help and advice services in the absence of legal aid support for professional representation. Increased traffic to government and advice sector webpages have demonstrated increased public demand for legal advice and information during this time. Whether LiPs are provided with this much-needed support prior to or during their hearings is uncertain; and there is a risk that this demand could drive greater reliance on untrained McKenzie Friends. Indeed, confidentiality risks have already been raised by CILEx practitioners in respect of remote hearings, whereby unknown parties may be presenting help and advice off-screen during proceedings. As a result, the nature and standard of any advice given may not be subject to the necessary scrutiny or safeguards.

latest statement. The mother has health issues and the two children have asthma and the other has a learning disability and physical disability. They live with mother's elderly parents who also have health issues. They are all very anxious understandably about the catching Coronavirus... As it is in this case, I feel that the mother cannot possibly be expected to give evidence remotely when she is self-isolating with her family at home. She cannot confirm that the children and her parents would not overhear the proceedings and I doubt whether she can focus on the matter with the children in the house probably demanding her time and attention. I was also thinking that the whole thing is fraught with potential technical difficulties in setting up all the representation and in particular with a litigant in person father. All that would fall to me to organise."

⁸ Relevant member quote: "At trial – so many issues could arise – from witnesses being influenced or guided in their response by people off camera through to practical issues like the need to have inventive [ways] for counsel to communicate with instructing solicitor (when usually notes would be passed /help would usually be given to counsel)."

⁹ See footnote 1.

4. Specific Member Feedback

The below is a thematic analysis of all relevant practitioner feedback and evidence obtained from a series of surveys and internal calls for evidence run by CILEx amongst its members. The tables capture overarching themes presented in relation to practitioner experiences of virtual proceedings.

This includes both positive and negative views shared by CILEx practitioners on their experiences when attending a remote court or tribunal proceeding during COVID-19.¹⁰

4.1 Positive Member Feedback

General Theme	Geographical/ Court or Tribunal Specialisation	Members comment
General positives with audio/visual technology in virtual proceedings	Public Family Law (Local Authority)	<ul style="list-style-type: none"> Member expressed positive experiences of using Skype for Business when attending remote hearings
	Leeds Family Court/Wakefield Family Court	<ul style="list-style-type: none"> Member stated that the audio linkup technology used for hearings has been very successful
	North Cheshire Magistrates Court	<ul style="list-style-type: none"> Member has had positive experiences with audio-based hearings.
	Southampton (Court/Tribunal not stated)	<ul style="list-style-type: none"> Member indicated a positive experience of setting up and using Skype conference calls/telephone hearing.
Positive experiences with specific use of audio/visual technology	Not Disclosed	<ul style="list-style-type: none"> Member indicated that they have heard positive feedback regarding the use of audio/visual technology within detailed assessments and cost related applications
	Numerous Courts across England including Derby, Truro, Portsmouth and London	<ul style="list-style-type: none"> Member indicated that they have not had any issues with the new systems and have happily used them for their line of work which includes: return of goods, set aside Judgment, directions /allocation hearings and possession/landlord and tenant cases
	Civil Law Practitioner	<ul style="list-style-type: none"> Member reflected on the fact that COVID-19 has mobilised positive response measures to address the current situation, such as: The Agreed Procedural Template for Joint Settlement Meetings

¹⁰ Please note that some of the concerns expressed by members may have since been addressed; however, their comments have been included to provide a full retrospective analysis of practitioner feedback since the start of lockdown restrictions.

	Wakefield County Court/ Harrogate County Court	<ul style="list-style-type: none"> Member stated that one Judge has extended invites for parties involved to speak at certain times, rather than all those involved speaking over each other. This has created a much more positive effect when using remote audio/video technology.
Long term benefits of audio/visual technology	North Cheshire Magistrates Court	<ul style="list-style-type: none"> Member indicated that the inception of CVP into all court and tribunal buildings will inevitably change the way the justice system is run; from their perspective they see this as a positive action.
	Public Family Law (Local Authority)	<ul style="list-style-type: none"> Member recognised the longer-term positive impacts that remote hearings could have on court logistics when managing court listings and subsequent cost effectiveness for firms and local authorities
	North Cheshire Magistrates Court	<ul style="list-style-type: none"> Member cited work/life balance as a key benefit helped by remote hearings, as well as wider benefits to the environment in cutting down on transportation needs. However, they acknowledged that their experience may not be shared by all.

4.2 Negative Member Feedback

General Theme	Geographical/ Court or Tribunal Specialisation	Members comment
Interactions with purely audio hearings (no visual)	Magistrates Family Court (location not disclosed)	<ul style="list-style-type: none"> Member stated that it is difficult to conduct audio hearings as you are not able to see who is talking and furthermore, you cannot judge responses or submissions by those involved.
	Canterbury Crown Court/ Ipswich Crown Court	<ul style="list-style-type: none"> Member indicated that the Crown Court hearings they have attended have not utilised video technology and so they are unable to see the client, which they feel does not constitute good practice in terms of performing client care.
	First tier tribunals, mental health (location not disclosed)	<ul style="list-style-type: none"> Member indicated that the audio technology was not suitable for use and often meant that the practitioner was physically holding the receiver whilst attempting to document feedback.
Lack of standardisation across court estate in employing audio/visual technology	Family Law Practitioner	<ul style="list-style-type: none"> Member found that judges have adopted differing approaches in conducting hearings from court to court, despite standardised guidance having been released by the President of the Family Division.
	Bristol Magistrates Court/ Taunton Magistrates Court	<ul style="list-style-type: none"> Member indicated that different courts are using different technology platforms. Some work better than others and some do not work properly with certain devices (e.g.: iPads).

		<ul style="list-style-type: none"> Member suggested that all technology and access should be the same to streamline process.
Access to court documents and information electronically	Family Law Practitioner	<ul style="list-style-type: none"> One member noted that audio hearings have been delayed due to Judges not being fully prepared with the necessary documents, which have been sent in with an advance of 7 days Member further stated that they chase the courts on a weekly basis to ensure that they have received documents sent over to them
	Public Family Law (Local Authority)	<ul style="list-style-type: none"> Another Member also noted that hearings have been delayed due to Judges not having the necessary documents in front of them at the beginning of the hearing. The member suggested that this is most likely due to a high volume of work and administration for court staff, and did recognise that the issue is remedied in some courts, where practitioners have started to directly email documents to the Judge to ensure they are ready to start on time.
	Family Law Practitioner	<ul style="list-style-type: none"> Member indicated that courts have provided little advance notice of changes to hearing times, creating logistical issues for practitioners in organising workload.
Tech-confidence amongst judges acting as a barrier	Family Law Practitioner	<ul style="list-style-type: none"> Member stated that judges within the Family Courts have been recommencing Final Contested Hearings and adjourning them to 2-day hearings. The member noted that whilst technology confident judges were proceeding with remote hearings, less confident judges were asking for people to physically appear in court.
	Public Family Law (Local Authority)	<ul style="list-style-type: none"> Member noted an increase in hearings being adjourned for a further 3 months. This is thought to be due to lack of familiarity or confidence by judges in using audio/visual technology. Member anecdotally stated that from personal experience, this is more common with District Judges than High Court/ Circuit Judges. It is presumed this may be because of the extra clerk support that High Court/Circuit Judges have to take care of technology and remote hearing set-up.
Lack of contact with client before and after hearings due to remote set-up	Canterbury Crown Court/ Ipswich Crown Court	<ul style="list-style-type: none"> Member indicated that it is difficult to speak to clients that are in custody before or after the hearing.
	Not disclosed	<ul style="list-style-type: none"> Member commented on the inability for audio hearings to provide negotiation before-hand for Financial Dispute Resolution (FDR). This would have previously happened in a normal court setting. As a result, member noted anecdotal experience of judges providing varying opinions, which legal representatives must then discuss and negotiate over a call and then reproach the

		judge with their proposal: this has created a complete reversal of the traditional procedure.
Concern for client privacy/ confidentiality in remote hearings	Family Law Practitioner	<ul style="list-style-type: none"> Member indicated that during the COVID-19 outbreak there is a general concern around privacy for the parties involved as hearings which take place in self-isolation arrangements may involve other family members being present or within ear-shot, presenting the possibility of third parties to the proceedings overhearing the evidence/testimonials submitted. This can be a particular cause for concern in family law, where the third parties at risk of overhearing details are other family members.
	Not Disclosed	<ul style="list-style-type: none"> Member indicated a general concern for Litigants in Person (LiP's) when taking part in remote hearings. They feared that there was no secure way of verifying whether the LiP was receiving additional help or support in attending the hearing or submitting evidence off camera, when using remote hearing technology.
More tech support necessary to ensure proper administration of justice	First tier tribunals, mental health (location not disclosed)	<ul style="list-style-type: none"> Member summarised that individuals should not be forced to use audio/video technology unless the necessary support is in place first. Member stated that IT support is non-existent in remote hearings, meaning that the key focus for practitioners on representing clients ends up getting reprioritised elsewhere when having to address technical issues.
	Family Law Practitioner	<ul style="list-style-type: none"> Member felt that the E-bundle system was not easy to navigate for individuals that had never used it before. They were concerned that using E-bundles whilst monitoring multiple video screens could create an issue in terms of logistics and effective case management; particularly where there is a lack of technological competency for those involved.
	Public Family Law (Local Authority)	<ul style="list-style-type: none"> Member highlighted how a lack of access to remote technology for some individuals meant that there was a "significant amount" of delays to cases. The member added that traditional outlets for these individuals to access technology, I.E most libraries are currently inaccessible

For further details

Should you require any further information, please contact;

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