



*“Providing Access to Justice & Equality”*

## **House of Lords Constitution Committee – call for evidence**

### **Constitutional implications of COVID-19: Courts**

Norfolk Community Law Service is a charity working to identify unmet legal need in Norfolk and to work with partner agencies to provide free services to meet that need. We aim to provide access to justice and equality and particularly target our services at disadvantaged and vulnerable groups e.g. migrant workers, other BAME groups, people with long term illnesses, physical disabilities or mental health issues, people with learning difficulties, offenders and ex-offenders.

Norfolk is a largely rural county, and outside of the city of Norwich large areas are known to suffer from ‘advice deserts’. Court and Tribunal services are provided in Norwich, Kings Lynn and Great Yarmouth. Technology has a place in reaching clients in more remote areas, and NCLS has been quick to adapt and continue providing all our services via telephone and video during the pandemic, when there has been a record need for advice. However remote services are not fully effective; face to face advice has always been at the core of what we do, and will continue to be so.

During the COVID-19 pandemic Norfolk Community Law Service (NCLS) has participated in remote hearings by representing Appellants at Social Security Appeal Tribunals and providing McKenzie Friends in the Family Court for litigants in person in private law cases (chiefly child arrangements and domestic abuse injunctions).

As a medium sized charity with no long term or statutory funding, composing a response to this consultation has cost implications, but we felt it important to convey the experience of our clients. Please find below our comments, followed by the results of our client feedback survey, which we have been conducting since April when remote hearings were introduced in Norfolk.

#### **1. How effective are virtual court and tribunal proceedings?**

As a means to continued access to justice whilst face to face hearings cannot take place due to the Covid 19 pandemic, NCLS has found remote hearings to be broadly acceptable for our clients as a means to avoiding an indefinite delay with their case or appeal, but we have also identified some grave concerns.

##### Benefits

The use of phone hearings by HMCTS for social security appeals during the Covid 19 pandemic has meant that for some Appellants access to justice has not been delayed, appeals have been allowed, and benefits reinstated. This is of vital importance given that many social security Appellants have low incomes, chronic health problems, and have encountered a wide range of practical day to day difficulties during Covid 19 through shielding, vulnerable status, and linked issues.

Likewise, parties involved in family cases have in some cases been able to progress matters despite the pandemic, although the fact that contested cases are being adjourned for ever longer periods is of great concern, especially where children are unable to see one parent pending the outcome of their court case.

Litigants in Person tend to find appearing at court and tribunal hearings stressful and some report that remote hearings are less daunting and easier to cope with.

Remote hearings can also be more efficient, avoiding the time and costs of travel to court and waiting for hearings to proceed.

### Disadvantages/challenges

#### Administrative

There are ongoing administrative delays presumably due to altered staffing levels at HMCTS during the Covid 19 pandemic which has meant further evidence is not circulated in a timely manner if at all, there is a wait period longer than usual to get through by phone, and when we do get through the clerks cannot always answer the question, or give incorrect information.

McKenzie Friend requests and representatives' telephone numbers are not always forwarded to the relevant court officer in time for the hearing.

There is a mis-match between national advice on HMCTS website (eg how to submit urgent C100 applications) and local practice.

Sometimes Litigants in Person are sent communications intended for lawyers, leaving them bewildered and ill-informed about what is required of them before their hearing.

#### Technical

There have been logistical problems with joining parties to calls. Some clients have not included telephone numbers on their court forms, don't reply to the HMCTS letters asking for phone numbers, or have phones that don't accept calls from unknown numbers. This has on occasion resulted in a judge under time pressure encouraging all participants to be brief, leading to potential unfairness in decision making as the Appellant and others may not feel able to give all relevant evidence.

Lack of a reliable mobile signal and other issues can cause difficulties with sound quality.

Data breaches have occurred eg where a representative's private telephone number was divulged by HMCTS to a client, or where a McKenzie Friend was joined by the court to the wrong hearing.

The lack of a suitable channel for a client to consult with their representative is a major drawback of remote hearings. WhatsApp or a separate telephone call can be used but this relies on parties having multiple devices and/or the skills for digital multi-tasking.

#### Geographical

Social Security Tribunals hearing appeals by phone are not necessarily from the hearing venue local to the Appellant, so do not have the local knowledge that can be particularly useful in fact finding oral hearings - especially for the most vulnerable claimants who can't communicate their difficulties or underestimate them, and indeed for cases where the credibility of an Appellant might be in doubt and local knowledge can be informative for fact finding. This increases the risk of misunderstanding and unfairness.

#### Communication

Most remote hearings/tribunals for our clients have taken place via telephone rather than video. The lack of visual cues in a phone hearing can be problematic in that a judge can be unaware of a party who is distressed, uncomprehending, etc.

Participants in telephone hearings report difficulty in identifying who is speaking from their voice alone.

#### Engagement

The reduction in /loss of face to face advice services due to Covid is impacting on many and especially on the most vulnerable Appellant's ability to engage with the support they need and with the hearings themselves. Many benefits claimants are less skilled and less familiar with modern technologies and are not accustomed to formal meetings by telephone or video, whereas they are often very familiar with face to face meetings; e.g. at benefits office, with health practitioners and at DWP assessments. A

virtual hearing puts the claimant at a disadvantage, real and perceived, and further adds to the sense of injustice if the benefits appeal is lost. One client commented, 'Because I couldn't be seen during my telephone hearing, I just didn't feel heard'.

In the early days of lockdown clients who are single parents faced major difficulties with childcare and were often unable to find a private, uninterrupted space in which to participate in a remote hearing.

### Accessibility

Not all Appellants can engage with phone hearings, some don't even have phones, so for them there seems to be little scope for access to justice during Covid 19. Video hearings will be no more accessible for those Appellants who are not digitally able. Phone hearings are not practical for some disabilities, nor will video appeals be. An indefinite delay due to Covid will impose financial, and emotional pressures and impact on health.

## **2. Impact of virtual proceedings**

### Impact on litigants

It is vital that parties have access to an appropriate physical space (private and sound-proof, free from distraction and interruption, with consideration given to their personal safety), as well as the necessary technology in order to participate in virtual proceedings. It cannot be assumed that everyone will have this available at home, and courts must ensure that these facilities can be made available to parties when needed, either on the court estate or elsewhere.

### Support for litigants

NCLS is concerned that litigants/appellants without representatives will feel even more stressed about phone hearings than they would an oral hearing as there are even less advice services and info resources for this new format.

The HMCTS guidance is quite long and formal, leading NCLS to create our own plain-English guide for clients. The Transparency Project has more recently created a user-friendly guide to remote family court hearings.

We usually have volunteers on hand to connect with unrepresented parties who have not sought advice when they arrive for their first hearing. This method of reaching vulnerable litigants in person is not available in the virtual arena so it is vital that HMCTS highlights the importance of advice in its correspondence and signposts litigants to local, available sources of legal advice and representation.

Across the country legal charities such as ours play a vital role in supporting Litigants in Person, and certainly in Norfolk this service is greatly appreciated by the court. However this crucial support is constantly under threat with no statutory, long term funding for the legal advice sector.

## **3. Implications of virtual proceedings**

### Access to justice

Digital exclusion is a major concern, particularly for video hearings which require hardware and skills not universally available.

### Participation and fairness

Participants report a wide variety of difficulties with remote proceedings – see comments above and feedback below – which in turn impair their ability to participate effectively.

Clients can suffer a damaging lack of confidence when faced with the unfamiliar concept of a remote court hearing combined with technological hurdles. We have had a client whose pre-booked interpreter was not joined to the hearing and who felt unable to interrupt proceedings to mention this, so 'participated' in an entire hearing without understanding what was going on; another client was

promised that her abusive ex-husband would speak to the judge separately, and was traumatised to hear his voice when he was joined to the remote link. She found it difficult to speak and represent herself effectively in the hearing thereafter.

Telephone hearings also increase the risk of unconscious bias against parties based on their vocal characteristics; for example, an ESA claimant might sound intelligent and articulate and capable of work.

### Styles of proceeding

Social security tribunals are inquisitorial, the remote format should not alter that if done properly.

As noted elsewhere, remote platforms are not deemed suitable for holding contested hearings, leading to substantial delay. A solution for making decisions in such cases must be urgently sought.

## **4. Outcomes of cases**

For social security appeals - too early to tell, in our experience the majority of appeals are being allowed but there needs to be a formal assessment of the HMCTS outcome stats. They are already produced so it can be done quite easily provided the hearing type is being recorded.

In family cases the chief impact is delay, since contested cases are not deemed suitable for remote hearings. This is having a knock-on and potentially lasting effect on the relationship between children and their non-resident parents – for these families justice delayed is justice denied.

The inequality of arms in cases where one party is represented and the other is not can be exacerbated by virtual proceedings for all the reasons already mentioned, leading to potentially unjust outcomes.

## **5. Further research**

360 degree feedback should be sought from judges, panels, representatives, clerks, as well as a review of stats.

We present below a small sample of unofficial feedback from Litigants in Person but some extensive and robust research should be conducted with this group to gain their views, especially given that the majority of litigants in private family law cases are unrepresented.

Given that women, people with disabilities and from black Asian and minority ethnic communities are disproportionately and negatively impacted by Covid 19- both in terms of health and socially, a comprehensive Equalities Impact Assessment must be undertaken to inform future policy and practice and necessary legal changes.

## **6. Are the IT systems in the courts fit for purpose to support virtual proceedings?**

Currently, no, but we are aware that HMCTS is working on this.

Rather than waiting to be called by HMCTS, it would be more efficient for participants to dial into a password protected meeting service. A dial in service would have the advantage that the panel could dial out leaving others a few minutes for a confidential discussion.

## **7. Are certain types of case more/less suitable for virtual proceedings? If so, which ones?**

For social security, technical appeals with full sets of evidence might suit but only with agreement of the parties, it should not be a default hearing type. Likewise it might work for interlocutory work where directions are required before a full hearing can take place. NCLS does not feel them very suitable for Sickness or disability appeals. Whilst Appellants undoubtedly find face to face oral hearings stressful, especially without the support of a Representative, the concern is that telephone hearings are not

suitable for the most vulnerable Appellants, who are not articulate or have communication disabilities that a face to face panel can pick up on more easily than a phone panel.

In the Family Court, virtual hearings might be used (subject to agreement by all parties) to save time for straightforward directions hearings, but in the majority of cases face-to-face will be preferable for the litigant in person.

## **8. Should virtual court proceedings continue after the end of social distancing?**

NCLS would not support the replacement of face to face hearing with phone hearings as a means of saving costs as part of the ongoing court reforms. Phone hearings may be adequate in an emergency such as Covid 19, or perhaps for limited preliminary or interlocutory matters but they are not good enough to be the primary means of hearing.

For social security appeals face to face hearings at venues local to the Appellant are the better format by far. Our local centre could certainly be adapted for socially distant Tribunals.

We are also mindful of the fact that there are already vulnerable witness practice directions which give flexibility in the format for Appellants to support them to engage, those will remain important and mean we can request phone or video hearings for those who need it even when we revert to face to face as the default hearing type. In that respect those remote formats may have a role in extending access to justice but only as extras not as default formats to save costs.

## **9. What legal changes are needed to facilitate virtual proceeding in future? To what extent would the proposals included in the Courts and Tribunals (Online Proceedings) Bill 2017-19 meet those requirements?**

No comment

## **10. What changes should be made to HM Courts and Tribunal Service's courts modernisation programme as a result of the operation of virtual proceedings during the pandemic?**

It is our impression that some court personnel are eager adopters of new technology; they are making the most of the possibilities it offers and swiftly became familiar with how to operate it. Conversely, others are still struggling to master the technology. The smoothness with which a remote hearing operates is therefore somewhat 'luck of the draw' depending on who is in charge, and reasonably straightforward requests (eg to add an additional party to a telephone hearing for mentoring or shadowing purposes) have been denied in some cases as presenting too much of a technical hurdle.

The learning curve has of necessity been very steep since March, but in future, training of all system users should be a high priority to ensure that everyone is entirely comfortable using it and can offer a consistent level of service.

## **Client feedback results:**

### **Norfolk Community Law Service – Remote Hearing Feedback Norwich Family Court, 6<sup>th</sup> April – 15<sup>th</sup> July 2020**

Over this period Norfolk Community Law Service surveyed 30 clients who had remote hearings scheduled.

Of those, 2 waited by the phone for their hearing but received no call from the court.

The following figures are feedback received on the 28 hearings which went ahead.

#### **Notice of hearing**

Most clients (55%) received a week's notice of their hearing, with 15% finding out the day before and 7% stating that they received no notice at all. 80% were satisfied with the notice given.

#### **Quality of call**

Only one hearing took place by Skype, the vast majority being by telephone. Most clients (81%) found it straightforward to connect to the remote hearing. 84% felt the remote technology worked

very well or quite well, with 16% saying it did not work well.

### **Participation**

When asked 'Was it clear to you what was happening during the hearing?' 48% said it was always clear, 37% said mostly clear, 11% didn't understand much and one party understood nothing (the interpreter she had requested was not joined to the call).

When asked 'Did you get an opportunity to say everything that you wished to say?' 69% responded yes and 31% no.

### **Qualitative comments**

37% of clients felt the remote hearing went smoothly whilst 63% said they experienced a problem. The most frequently cited problem was the court failing to join McKenzie Friend to the hearing following a written request (this happened in 21% of hearings; most of these were in July).

Other commonly identified issues included:

- not being able to distinguish who is speaking
- participants accidentally talking over each other
- hearing not commencing on time
- poor audio quality
- clients not feeling they had been listened to
- found it hard to follow what was happening
- difficulty arranging childcare or ensuring children are unaware of proceedings when participating from home
- feeling rushed
- needed a 'summing up' at the end

One victim of abuse spoke of her distress at hearing the alleged perpetrator on the phone and felt they had intruded into her home setting; she had no recovery time after the hearing before going to attend to her children.

Positive comments referred to the remote hearings being

- more efficient
- no need to take a day off work, or to travel to court
- less formal

One party was grateful not to have to face the alleged perpetrator of domestic abuse in person.

## **Norfolk Community Law Service – Remote Hearing Feedback Norwich Social Security Appeal Tribunals, 1<sup>st</sup> April – 10<sup>th</sup> August 2020**

Over this period Norfolk Community Law Service surveyed 19 clients who had remote tribunals scheduled. These clients gave feedback as follows:

### **Notice of hearing**

Most clients (70%) received notice of their hearing a week or more in advance, with 12% finding out the day before and 12% stating that they received no notice at all. 89% were satisfied with the notice given. 59% were offered an alternative to a remote hearing if required.

### **Quality of call**

Only one hearing took place by Skype, the vast majority being by telephone. 65% of clients found it easy to connect to the remote hearing with 23% finding it 'OK' and 12% finding it difficult. 94% felt the remote technology worked very well or quite well.

### **Participation**

When asked 'Was it clear to you what was happening during the hearing?' 59% said it was always clear and 35% said mostly clear.

When asked 'Did you get an opportunity to say everything that you wished to say?' 94% responded yes.

**Qualitative comments**

76% of clients felt the remote hearing went smoothly whilst 24% said they experienced a problem. The most frequently cited problems were lack of notice and poor sound quality.

Other issues identified included:

- participants interrupting each other
- hearing not commencing on time
- submissions not being available
- client dislikes using telephone

One client had known issues with using the telephone but felt she had no option but to participate as no alternative was offered.

Positive comments referred to the remote hearings being less stressful and preferable to face-to-face hearings.

Jane Basham  
Chief Executive Officer  
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Norfolk Community Law Service Limited  
St Clements House, 2-16 Colegate, Norwich, NR3 1BQ

Tel 01603 496623  
Fax 01603 618320  
Email [info@ncls.co.uk](mailto:info@ncls.co.uk)  
Website [www.ncls.co.uk](http://www.ncls.co.uk)

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